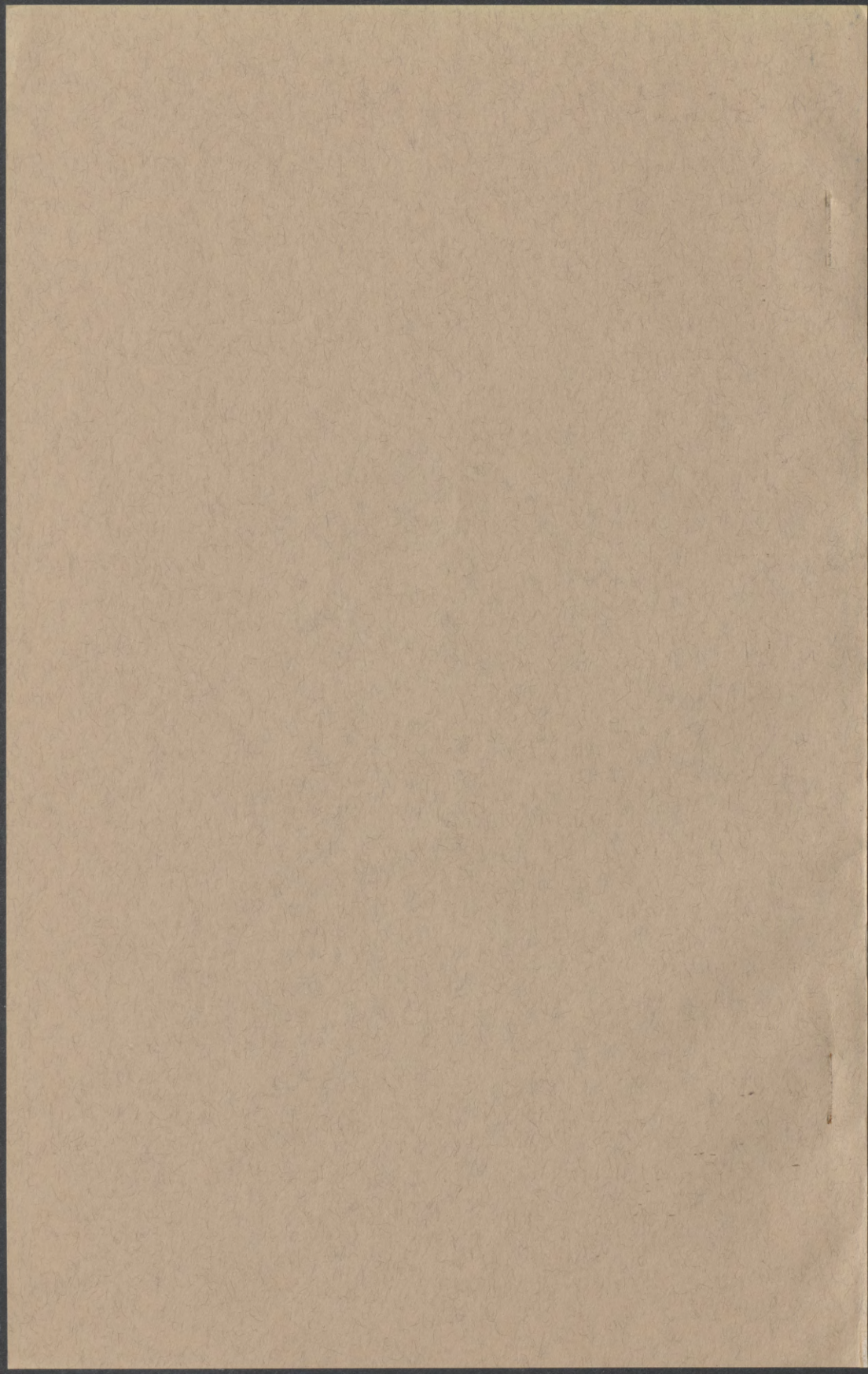




REGULATORY REFORM AND CONGRESSIONAL REVIEW OF AGENCY RULES

HEARINGS
BEFORE THE
SUBCOMMITTEE ON RULES OF THE HOUSE
OF THE
COMMITTEE ON RULES
HOUSE OF REPRESENTATIVES
NINETY-SIXTH CONGRESS
FIRST SESSION
ON
H.R. 1776, "The Administrative Rule Making
Reform Act," and Related Measures
TO PERMIT CONGRESS TO VETO RULES AND REGULATIONS
ISSUED BY INDEPENDENT REGULATORY AGENCIES AND
EXECUTIVE BRANCH DEPARTMENTS

SALISBURY, MD., OCTOBER 15, 1979

Part 3 of 3 parts

Printed for the use of the Committee on Rules



U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1980

COMMITTEE ON RULES

RICHARD BOLLING, Missouri, *Chairman*

CLAUDE PEPPER, Florida

MORGAN F. MURPHY, Illinois

GILLIS W. LONG, Louisiana

JOHN JOSEPH MOAKLEY, Massachusetts

SHIRLEY CHISHOLM, New York

CHRISTOPHER J. DODD, Connecticut

LEO C. ZEFERETTI, New York

BUTLER DERRICK, South Carolina

ANTHONY C. BEILENSON, California

MARTIN FROST, Texas

JAMES H. QUILLEN, Tennessee

JOHN B. ANDERSON, Illinois

DELBERT L. LATTA, Ohio

TRENT LOTT, Mississippi

ROBERT E. BAUMAN, Maryland

ALBERT A. SAYERS, Jr., *Staff Director*

WILLIAM D. CROSBY, Jr., *Minority Counsel*

SUBCOMMITTEE ON RULES OF THE HOUSE

JOHN JOSEPH MOAKLEY, Massachusetts, *Chairman*

CHRISTOPHER J. DODD, Connecticut

ANTHONY C. BEILENSON, California

MARTIN FROST, Texas

JOHN B. ANDERSON, Illinois

ROBERT E. BAUMAN, Maryland

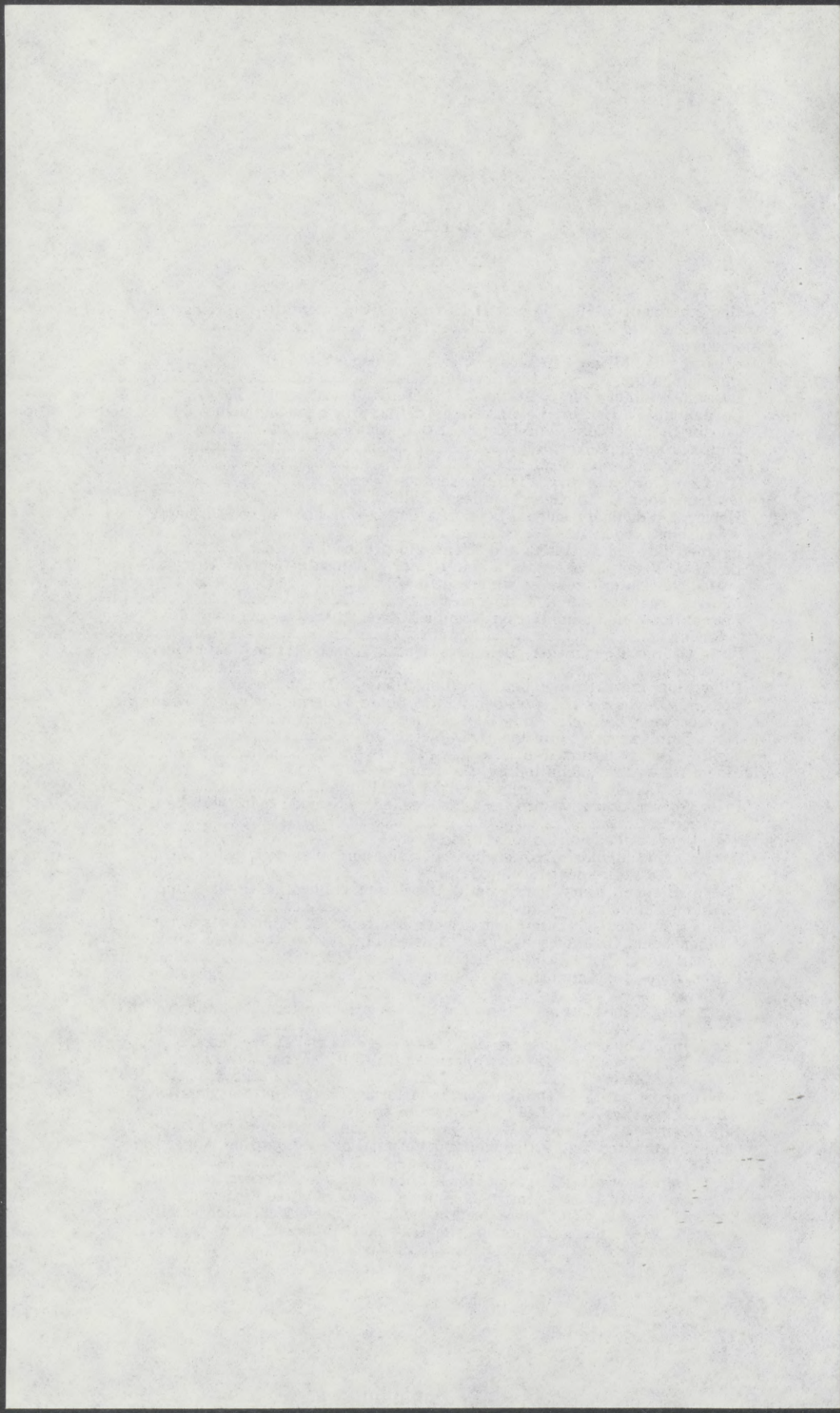
JOHN J. DOOLING, *Counsel*

DONALD WOLFENBERGER, *Minority Counsel*

JOHN F. SCRUGGS, *Associate Staff*

CONTENTS

Opening statement of Hon. Robert E. Bauman, a Representative in Congress from the State of Maryland	Page 1
Statement of—	
Abercrombie, Michael, Texaco wholesaler, Salisbury, Md	266
Bloxham, Mike, Maryland National Bank	304
Bostian, William J., E. S. Atkins & Co. (prepared statement p. 297)	294
Cavanaugh, Patrick, Jr., Cavanaugh Ford, Inc. (prepared statement p. 104) ..	100
Chasin, Stephen, Maryland Hospital Association	33
Endres, Ken, Hess Apparel	306
Fehrer, Mrs. Joseph W	289
Gladden, Gordon, Avery W. Hall Insurance Agency	30
Graham, John L., III, George, Miles & Buhr	93
Hobbs, J. Edwin, president, Delmarva Power & Light Co. of Maryland, Salisbury, Md	139
Kremer, Edward J., Hanna and Kremer Insurance Co	75
Layfield, Virginia, associate administrator, Peninsula General Hospital Medical Center (prepared statement p. 66)	57
Mohler, Hugh, president, Peninsula Bank	88
Peters, Donovan, Committee on Administrative, Executive, and Legislative Review	146
Pitts, George T., manager, Delmarva Water Transportation Committee, Inc	15
Riley, Hon. Lewis R., member, Maryland House of Delegates	5
Rodgers, David F., vice president, First Shore Federal Savings & Loan Association, Salisbury, Md	105
Stein, Sam, executive director, H. D. Metals, Inc	98
Twilley, Bill, Salisbury, Md	9
Additional statements submitted for the record by—	
Littleton, Donald D., Wicomico County Farm Bureau	97
Prior, Robert, executive director, Chesapeake Bay Seafood Industries Association	92
Additional material submitted for the record by—	
Abercrombie, Michael, Texaco wholesaler: summary plan description of the Employee Retirement Income Security Act	277
Chasin, Stephen, Maryland Hospital Association: publication titled "Duplication of Regulation Study"	34
Kremer, Edward J., Hanna and Kremer Insurance Co.: Comments of the Independent Insurance Agents of America, Inc. before the Agricultural Credit Rural Electrification Subcommittee, on Oct. 9, 1979	80
Peters, Donovan, Committee on Administrative, Executive, and Legislative Review:	
A copy of the statutes of the Joint Standing Committee on Administrative, Executive, and Legislative Review	154
A report by the Senate Service Task Force on Critical Problems, New York State Senate, "Administrative Rules . . . What is the Legislature's Role?"	178
A report entitled "Opinions of the Attorney General of Maryland on Legislative Veto of Proposed Administrative Regulations"	206
Pitts, George T., Delmarva Water Transportation Committee, Inc.: statement presented before the Wetland Permit Review Board on Aug. 21, 1978	17
Riley, Hon. Lewis R., Maryland House of Delegates: article describing the Committee on Administrative, Executive, and Legislative Review	8
Rodgers, David F., First Shore Federal Savings & Loan Association: publication titled "Case Studies on the Cost of Compliance with Federal Regulations"	110



REGULATORY REFORM AND CONGRESSIONAL REVIEW OF AGENCY RULES

MONDAY, OCTOBER 15, 1979

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON RULES OF THE HOUSE,
COMMITTEE ON RULES,
Salisbury, Md.

The subcommittee met at 9:30 a.m., in the Chamber of Commerce Building, Salisbury, Md., Hon. Robert E. Bauman presiding.
Present: Representative Bauman.

Mr. BAUMAN. I call to order the Subcommittee on Rules of the House. Today we are holding a field hearing here in Salisbury to hear testimony from a number of witnesses on H.R. 1776, "The Administrative Rulemaking Reform Act" and related bills. I should say a word of thanks to Tony Middleton and the Salisbury Chamber of Commerce for arranging the room as well as contacting a number of witnesses.

It appears from the list we have that it will be a very representative sampling of people from the lower shore and the Salisbury area. We hope to gain some insight from the testimony and we do thank you.

Let me introduce to you the members of the Rules Committee staff who are with us and also those from the subcommittee staff—John J. Dooling, who is the chief counsel of the Subcommittee on Rules, Don Wolfensberger, minority counsel, Miss Cullen and Mr. Scruggs.

I have a brief statement that I would like to read before we begin.

OPENING STATEMENT OF HON. ROBERT E. BAUMAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MARYLAND

Mr. BAUMAN. I am pleased to convene the second in a series of field hearings to be conducted by the Subcommittee on Rules of the House. The jurisdiction of this subcommittee is somewhat unique in that it focuses on matters which affect the internal operations of the House of Representatives. With this in mind, the Committee on Rules has directed us to conduct extensive hearings on a number of bills which contain provisions for congressional review of agency rules and regulations. If enacted, such legislation would have a significant impact not only upon the internal operations of the House and Senate, but upon the entire regulatory process of Government as well.

H.R. 1776, "The Administrative Rulemaking Reform Act," introduced by Congressman Levitas of Georgia and cosponsored by over

200 other Members of Congress, myself included, would permit Congress to veto rules and regulations issued by independent regulatory agencies as well as executive branch departments. This bill and similar pieces of legislation introduced in the 96th Congress are responses to widespread public frustration with regulations and a growing disillusionment with Government in general.

Rules and regulations promulgated by the monstrous bureaucracy in Washington now number in the tens of thousands, most of which have the force and effect of law. They are all-pervasive and involve all segments of our society. The rule and regulation tentacles of the bureaucratic octopus allocate our gasoline supplies, provide guidelines for the conduct of our family-owned businesses, and regulate the very food that we put on our tables. Needless to say, compliance with all of these rules and regulations increases the cost of doing business, and thereby fuels inflation.

According to some estimates, the overall cost of Government regulations may come to more than \$102 billion this fiscal year. Of that, nearly \$5 billion is a direct expense incurred by Federal agencies. The other \$98 billion is the cost of compliance for the private sector.

The impact of Federal regulation on the economy paints an even more disturbing picture. The Director of the Council on Wage and Price Stability calculates that regulation contributes as much as three-quarters of a percentage point annually to the increase in the consumer price index. This at a time of double-digit inflation.

These enormous costs of Federal regulations translate into a disproportionately large burden for small businesses. Large firms have accountants, lawyers, and funds to deal with the problems associated with Federal regulations. To them, compliance is a nuisance and an unproductive expense. But for small businesses, the costs of compliance can be a matter of life and death for the firm. The economic health of these small businesses is of tremendous importance to the Nation's economic well-being. Small businesses employ more than 40 million persons and produce some 43 percent of our gross national product. The time has come to put a stop to the gluttonous bureaucracy's eating of our tax dollars by developing regulations which devour the profits of the American small businessman and increase the cost of necessities to the consumer.

The unelected regulators, politically accountable to no one, are passing laws at a ratio of 18 to every 1 passed by Congress. The legislation being considered by this subcommittee attempts to put a leash on this unrestrained and illegitimate power being exercised by the bureaucrats. Hopefully, it will be a step toward returning control of the Government to the American people and out of the hands of faceless regulators.

Although instances of overregulation are endless, the prime example of an agency gone mad is the Federal Trade Commission. The FTC has gone on a lunatic binge of regulating everything from funeral homes to car dealers. The FTC has even gone so far as to require the Brown & Williamson Tobacco Co. to submit documents concerning its advertising practices over the past 14 years, at a cost to the company of \$800,000. The only explanation anyone has been able to get from the FTC staff for this action is that it was simply

to satisfy their curiosity. It would definitely be appropriate for curiosity to have killed the cat in this instance. I'm sure the witnesses we will be hearing from today will have similar horror stories to tell.

Even so, it is important that my colleagues and I not look at legislative veto with tunnel vision and not act rashly. Before making the difficult legislative decision before us, we must carefully explore the excesses and failures of our regulatory programs, determine where our traditional methods of controlling the bureaucracy have failed, consider all of the ramifications of the remedies proposed and then act decisively to pass the most appropriate legislation to accomplish the task of reform. As Jefferson so aptly stated, "The patch must be commensurate with the hole."

I am particularly delighted with the variety of witnesses that are here today to testify. Too often we in Washington get a distorted view of the day-to-day problems encountered by the public in dealing with Government. In committee hearings, we continuously hear from the lawyers, lobbyists, and interest groups. But this legislation is much too important for us to consider with their limited input. Rules and regulations affect you—my constituents—and it is from you that I am seeking the most effective remedy.

I am pleased Congress has come to Salisbury on the lower Eastern Shore. I am not sure how historic that is. The last time a subcommittee formally commissioned a meeting here in the First District, was, through my experience, only once, and that was in the area of fish and wildlife several years ago.

More importantly, we are pleased that the State legislature has a similar sort of review, through the Committee on Administrative, Executive, and Legislative Review. This is the second of the field hearings to be scheduled. One was held in August in Dallas, Tex., and I believe another is scheduled for South Carolina next month. There may be more.

Let me explain to you why the Subcommittee on Rules of the House is meeting in Salisbury, Md. The Committee on Rules has directed us to conduct extensive hearings on provisions for review of rules and regulations enacted by Federal agencies. The bill that we are considering, if it became law, would definitely impact, not only on the way the House operates, but it would have the same impact, perhaps even greater, on the Federal regulatory process of Government.

The bill, H.R. 1776, introduced by Congressman Levitas, and cosponsored now by 226 Members of the House, myself included, would permit Congress to veto rules and regulations promulgated by regulatory agencies and the executive branch. This, and similar legislation, is in response to the public's frustration of being impacted by Government rules and regulations. In fact, Mr. Wolfensberger read us his summary of what we found in Dallas. Just to give you an example of the testimony during the Dallas hearing, though I was not able to attend, the bottom line was a chamber of horrors of problems resulting in excessively severe Federal regulations, including the resultant stifling of innovation and productivity, and the increased cost of operations. In some cases it involved the inability to continue to do a business, many having to shut down because of the impact of Federal regulations. So this is one of the

reasons that we have decided to go to the people and find out precisely how they have been impacted. We have done some estimating on the impact of these regulations and one source says the overall cost of Government regulations may come to more than \$102 billion in this fiscal year.

It is estimated that a very small fraction, about \$5 billion, is a direct expense incurred by Federal agencies that promulgate the regulations, but \$98 billion is the cost of compliance put upon the private sector and the individuals who have to live with these regulations and most of that cost, of course, is passed along directly to the consumer. It has even been suggested that roughly three-fourths of 1 percent is added to the Consumer Price Index by Federal regulations.

My experience has been, dealing with firms in my own district, and I think it has been proven nationwide, that while the big business firms have lawyers and funds to deal with this, the most worrisome and the most damaging impact is on the smaller business groups that obviously do not have the capability to respond to Federal regulations in many instances.

Small businesses throughout the United States now employ about 40 million people and produce 43 percent of our gross national product. That is not an insignificant amount.

The ratio of regulations being produced in Washington, as compared to laws passed by the Congress, are 18 to 1. In other words, for every law passed by Congress, 18 sets of regulations by the Federal agencies are put on the books where people must live under their control and power.

I would cite just two examples from my own experience in the Congress of the way such regulations impact on the State of Maryland. One is the set of regulations issued several years ago by the Federal Food and Drug Administration or the FDA by which they sought to regulate the health and trading practices of the seafood industry in such a way that they would have put every waterman in this Chesapeake Bay out of business in a matter of weeks. They would have had to install mechanisms upon their boats that do not exist and could not be manufactured, little shower baths for oysters so that every oyster could have been bathed and cleansed of the mud before it was taken into the packing plant.

Of course, the Federal regulatory powers did not know oysters retain their freshness because of the mud on them until they actually go to the plant and are cleaned and shucked. The regulation would have required a label on every oyster, every individual oyster to allow the Federal Government to know if someone had gotten sick from eating an oyster in Chicago there in the Light-house Bar or wherever. The Government would have known exactly where that oyster came from. Of course, compliance with the regulation was impossible. It took an act of Congress, an amendment that I sponsored, related to the seafood bill that repealed these regulations which were finally withdrawn.

We have an example in the crab shell process. There is the possibility of closure of a plant in Christi, Md., because they cannot meet the clean air standards of the Federal Government. So we do

see the impact here in our own district. I welcome the chance to get out among the people of this district, as do our committee staff, to compile a record of testimony that will be presented to the Committee on Rules before we finally mark up legislation to try to address these problems. I think we get a fresher view of the problem from the citizens who elected us than we do from the lobbyists and the so-called professionals in Washington. That is why we are very pleased to hold this hearing today.

Our first witness needs some introduction to our staff, but not to the people of the lower shore. Delegate Lewis R. Riley is not only a member of the house of delegates representing three shore counties, but also served with great distinction at this very table for three terms as a member of the Wicomico County Council. He was also head of the Maryland Association of Counties, so his experience with Federal powers has been extensive.

Mr. Riley, state your name for the record and your title so the reporter will be able to get that down. Also we are going to ask our witnesses to spend about 15 minutes roughly, on their testimony and then we will ask questions.

STATEMENT OF HON. LEWIS R. RILEY, MEMBER, MARYLAND HOUSE OF DELEGATES

Mr. RILEY. Lewis R. Riley, a member of the Maryland House of Delegates from the 36th District. I also represent the agricultural community as a farmer in the agricultural business. First of all, I want to welcome you to our area. We appreciate the fact that you have decided to choose this area to hold this hearing. We do have some information that will be helpful to Congress in correcting many of the faults you have outlined in your presentation.

I do have a brief testimony and I have five copies if anyone would like to have those for the record.

I would say that I hope the number H.R. 1776 may have some relationship to another document started here in the year 1776.

Mr. BAUMAN. There must have been some forethought in choosing that number.

Mr. RILEY. If this document will be as effective as that one I can assure you we will be on the right track.

I welcome the opportunity to offer my comments on the so-called legislative veto bill.

I cannot offer a great voice of experience as a State representative, as I am a freshman delegate, serving my first year in the Maryland Legislature. However, I am a local farmer and agricultural businessman and have served 12 years in county government where grassroots experience often serves as a basis for rational thought.

I am delighted that we have Members of Congress willing to work to seek to improve the Federal regulatory process. Improvement is greatly desired.

As I study the Administrative Rule Making Reform Act, H.R. 1776, I find what I consider to be a number of encouraging proposals that would enable business, Government, and private citizens an opportunity to offer their respective views as to its effectiveness.

I refer to the rulemaking sheet sent to me earlier. There are a number of proposals in there that I like. Presently, regulations are

often enacted with little or no consideration to its effect on business or the economy.

Often it appears the bureaucracy feels it has an inherent right to go beyond the intent of our legislators, be it local, State, or Federal with the resulting effect of the creation of unnecessary regulations that are not in accord with the original intent of the legislation.

Often we adopt laws that will give a department the right to promulgate rules and regulations and we hear this statement so many times that we as lawmakers take a back seat and let the rules go ahead. Most times these rules and regulations are almost unbearable to live with.

I firmly believe this adds tremendously to the cost of living of our total society, as costs are always passed on, the end result being a real serious inflationary problem.

We often hear the statement that it is passed on to the consumer. The consumer is the ultimate end in our society.

I am sure that during today's hearing, you will hear more detailed testimony from interested business people who will bear this out.

Previously I went over the list of those coming in today to explain their situations, and I am sure some of them are prominent business people who will bear this out. I am sure you are in for some good information from them, and I will not try to detail the individual complaints because they know much better than I.

The State of Maryland has a standing committee known as the AELR Committee—Administrative, Executive, and Legislative Review Committee—which serves well in this area.

This committee is comprised of five house members and five senate members appointed by the president of the senate and the speaker of the house for terms of 1 year.

This committee may inquire into the failure of an officer or an employee of either the legislative, executive, or judicial branch of the State government to comply with the statutory or constitutional law of our State.

Its primary duty is to review the rules and regulations as adopted by State agencies for the protection of the legislative intent. In my opinion, it works well.

Included in my testimony is the background data and responsibilities of this committee as presented in the Maryland manual for your study.

Also I believe you will be hearing testimony from a staff person later today. I am certain he will be capable of giving you a more in-depth view of this group.

As a State legislator, I can relate to two specific issues that this committee acted on that were of importance to our business economy since adjournment last April.

One was the Governor's proposal of thermostat settings, energy policies, et cetera, his total plan to combat the energy shortage.

The Governor's executive order was sent to the AELR Committee and it was reviewed very closely. There they decided there were a number of things the people could not live with and it was vetoed.

This committee served well in vetoing portions of this proposal that they felt inappropriate or unenforceable, et cetera.

I think this is one of the areas that we have to look at—unenforceable.

The net result being a workable program being adopted.

Another matter of great interest to this area was the approval of an executive order temporarily lifting weight on trucks, an issue not resolved by the legislature, but certainly a necessary move for transportation during the energy shortage.

The AELR committee served well in representing all points of view in the absence of legislative session.

We had a situation where our economy drastically suffered this summer because Maryland and Pennsylvania are two of the few States with lower truck limits. You can see what we are doing in the higher northeast in the field of transportation. We had a situation on the Eastern Shore where we had problems with the regulations involved in getting our river dredged. We had problems with the railroads, and our trucking industry was the only one we had that we could economically depend upon. Well, the energy shortage hit, and being a farmer, it was very difficult for me being in an area where we grow a lot of produce in the summer months. The produce business is a little lopsided.

The AELR Committee worked with the Governor in seeing that these regulations were moved aside by executive order, and they were temporarily banned. It really helped agriculture and the economy for this period of time.

Also this committee sits as a legislative advisory board for the code of Maryland Regulations (COMAR). In my opinion, this is an area where they are most effective, serving as watchdog for the legislative body in seeing that legislative intent is carried out. In turn, this serves as a protection to our citizens.

I am hopeful my remarks will be of assistance to you in your final decision on this matter. I urge you to adopt legislation of this nature. I sincerely feel it will be of great benefit to our free enterprise system.

Let me emphasize this, because as I said earlier, we often adopt a law in the general assembly or in the Congress which says various departments may adopt rules and regulations. AELR serves as a watchdog to see that the regulations are enforced, can be lived with, and are not discriminatory against business or any segment of our society.

I can tell you in my short span at the Maryland Legislature that AELR works well and I believe something along the Federal level like this is drastically needed.

That concludes my testimony and I would be happy to answer any questions you have. On the back of the testimony you have a copy of the Legislative Review Committee view.

Mr. DAUMAN. That will be made a part of the record at this point.

[The document referred to follows:]

COMMITTEE ON ADMINISTRATIVE, EXECUTIVE, AND LEGISLATIVE REVIEW

Chairperson, Carter M. Hickman

Vice-Chairperson, Norman R. Stone, Jr.

Members from the Senate: Jerome F. Connell, Sr., Thomas V. Mike Miller, Jr., Charles H. Smelser, Robert E. Stroble.

Members from the House of Delegates: Catherine I. Riley, Steven V. Sklar, William R. McCaffrey, Elizabeth S. Smith.

The Committee on Administrative, Executive and Legislative Review (AELR Committee) was originally created as a joint standing committee known as the Committee on Legislative Review by Chapter 96, Acts of 1964. It was renamed the Committee on Administrative, Executive and Legislative Review by Chapters 400 and 699, Acts of 1972, and had its membership increased to five Senators and five members of the House of Delegates, all of whom are appointed by the President of the Senate and the Speaker of the House of Delegates at the conclusion of each regular session. Members serve for one year. The chairperson and vice-chairperson alternate each year between the two Houses. Representation of each political party is approximately in the same proportion as their membership in each House.

The Committee may inquire into the failure of an officer or employee of either the Legislative, Executive, or Judicial branches of the State government to comply with the statutory or constitutional law of the State. However, the Committee primarily reviews the rules and regulations that are adopted by any State agency as to intrusion on the Legislative prerogative and as to the issue of procedural due process. Further, the Committee sits as a legislative advisory board for the Code of Maryland Regulations and COMAR publications of the Division of State Documents of the Office of the Secretary of State.

By Chapter I of the Acts of the Second Special Session of 1973, the Committee is required to receive emergency energy Executive Orders promulgated by the Governor. This legislative authority has been updated annually.

Chapter 776, Acts of 1973, removed the Committee as an adjunct of the Legislative Council. The Committee by law reports annually to the Council (now the Legislative Policy Committee) and the General Assembly.

The AELR Committee was added to the list of agencies that receive copies of all the rules of each State agency by Chapter 777, Acts of 1973. Chapter 778, Acts of 1973, provided that certain rules, regulations, or standards may be invalid unless submitted to the Committee (Code 1957, Art. 40, sec. 40A).

Mr. BAUMAN. I think I was serving as a member of the Maryland State Senate when the committee was created but I left in 1973.

Am I correct in my estimation that the committee has the power to actually veto only emergency measures rather than all regulations? Our research indicated it was restrictive.

Mr. RILEY. I do not think so. A staff person will give you a clearer understanding of that. Actually, as you are aware, in Maryland in the Maryland Register which comes out monthly and bi-monthly the department has established the areas or regulations the AELR committee has jurisdiction over. The normal regulations that may be issued by some departments may not be within that jurisdiction, but do not hold me to this. I would really like you to ask the staff person here this afternoon who is coming in from that committee.

Mr. BAUMAN. And you also say they now have the requirement that agencies of the State must get the approval of the committee before they issue regulations or at least consult with them?

Mr. RILEY. Do not misunderstand me. They cannot veto a regulation that is mandated by law.

One of their intentions is to see that the intent of the legislation as passed by the general assembly is carried out.

The veto power used frequently in vetoing an executive order proclamation and this type of thing comes from the legislature itself. If it is mandated into law, that is the specific proposal is

mandated into law, all they can do legally is see that the intent of that law is carried out. What I am saying is that there are many laws that are drafted rather vaguely that say in such and such a part an agency may promulgate rules and regulations. This is where I think an executive committee of this nature can come in and review these regulations and see that they are serving the intent of the law because often they are not. It takes over after the elected official leaves town and that is where the trouble comes in.

Mr. BAUMAN. One of the questions in previous testimony before the committee involved the disagreement that may exist between special committees and the Congress reviewing all regulations. The committee of original jurisdiction that passes bills out such as, the Interstate and Foreign Commerce Committee would not really want a new committee to review their regulations. They would rather retain their power.

Have you found in the Maryland General Assembly, that the specific committees such as Appropriations, judicial procedures, et cetera, have had contention with the AELR Committee?

Mr. RILEY. No; I had not in my short time and experience. I think simply it is because you have a broad-based representation; you have three members from each body and usually one of those members will have some contact back with the origin of that legislation, that is, whichever committee it may have originated in.

I have not seen any great amount of friction. That is not to say this may not exist, but I think having this broad-based representation gives a fair amount of communication and reasoning.

Mr. BAUMAN. We want to thank you very much for your testimony this morning.

Mr. RILEY. Thank you for hearing me out.

As I say, the staff person I am sure can give you much more detail on how the operation works.

We are very proud in the State of Maryland. While your proposal may be somewhat different, we would like to be the ones to set the pace for the rest of the country.

Mr. BAUMAN. You do that in many ways.

Thank you, very much.

Mr. RILEY. Thank you.

Mr. BAUMAN. We will now hear from Bill Twilley, a farmer from Wicomico County.

STATEMENT OF BILL TWILLEY, SALISBURY, MD.

Mr. TWILLEY. It is encouraging to see the House Rules Committee holding this field hearing to hear testimony regarding regulations. I am Bill Twilley, plain dirt farmer, from Wicomico County, and I say thanks for letting me have my say about regulations and regulators.

Perhaps I should start by saying that I have served as county ASCS chairman for several years. I willingly tried to help administer these programs, thinking there was help for the family farmer. Approximately 83 percent of the USDA budget goes for consumer activities. If only they could realize that preserving, not abolishing, the American family farmer, would be the best possible way to help the consumer.

Here in Wicomico, Worcester, and Somerset Counties, ditching is one of the farmers' greatest needs. Just last week a local farmer told me, even if we have no more rain this year, a large portion of his soybean crop will not be harvested due to the poor field drainage. In all of ASCS we now find that ditching is a low priority. In the ACP program, any approved practice must be conservation oriented and not production oriented. In Washington, I discussed this with Ray Fitzgerald, head of ASCS, and told him why not plant all of America in grass, thereby satisfying the conservation issue. But what about those people who like to eat cucumbers, strawberries, and potatoes? When Bob Bergland first was appointed Secretary of Agriculture, he said he had great faith in ASCS because it was run by farmers. Ever since he made that statement, I've tried to make it come true, but I've yet to find any place except here at the county level where they want any input from the farmer. There is no need to mandate soil conservation from Washington, for soil is the very soul of a farmer, the element with which he feeds himself and the world. The farmer foolish enough to ruin the soil beneath his feet, has already gone bankrupt with today's very thin profit-margin farming.

One wonders what USDA goals really are. Going into the 1978 crop year, everyone knew corn was the one crop we have too much of. As farmers came into the ASCS office to sign up for set-aside acres, they found they could have more set-aside acres if they planted their full limit of corn. The end result was that many farmers planted more corn than they had originally planned.

Another area of great concern to the U.S. farmer is Carole Tucker Foreman, Bob Bergland's assistant and head of consumer affairs. Within the last 2 years she tried to wreck the pork industry, saying nitrates widely used in the curing of pork were a possible health hazard. Never mind that without nitrate curing you have the very deadly botulism. Also, never mind that there is naturally occurring in lettuce, more nitrosamines than in nitrate-cured pork. I've yet to see the USDA publication picturing lettuce as a health hazard. There are more nitrosamines in a can of beer than in a pound of nitrate-cured bacon. Don't we have a lot more people who can drink more than one can of beer at a sitting than can eat more than a pound of bacon at a sitting?

What I would like to say is that we ought to take a good hard look at the way we cure pork after we get rid of the beer.

Restricted use and banned chemicals are another area of concern. Many have been pulled off the market, many are threatened, and new chemicals are not coming to label because of harassment by the regulators. At the same time, these banned chemicals are still being manufactured, transported, and being used in Mexico and other countries. Mexican meat and vegetables end up in our supermarkets laden with these chemicals. When we ask about this double standard, we find the law is being interpreted in such a way that it is illegal for the U.S. farmer to use these chemicals on his crops, but it is quite legal for the American housewife to feed them to her family.

One encounter I had with regulators involved a gravel pit operated as a sideline of my farming operation. Approximately 10 years ago I bought a farm that had an abandoned gravel pit. This area

was wasteland and an eyesore to the community. At my expense—no help from local, State, or Federal—I bulldozed, hauled trash, established a drainage plan and started to dig gravel to a uniform depth of 16 feet. The gravel was stockpiled to be hauled to neighborhood farmers for driveways and building foundations, and so forth. In the process I was creating a pond to be used as a recreation area, complete with boating, fishing, bathing, picnicing. All of it was progressing well until the Department of Natural Resources of Maryland slapped a cease and desist order on me. Their representative inspected the area with me. I asked if I was polluting the water, he said, "No." I asked if I was polluting the air, he said, "No." He did say I was guilty of breaking the mining law. With their interpretation of the law, I was placed in the same category as a western Maryland strip mining operation. My efforts in completing my pond and making something useful of a waste area have been stopped.

The movement of fertilized ingredients, diesel fuel, and many other products by boat into Salisbury is of vital concern to the agricultural community as well as to most everyone. Yet, we see the urgently needed dredging of the Wicomico River held up for years for fear of spoiling the habitat of a few mosquitos. God in his infinite wisdom gave man, who has a brain, dominion over the lower animals. If the regulators put the welfare of a few lower animals above man's needs, can it be that they want to reverse God's plan? Just think, snail darter and you will know that the ecological plan has swung too far.

Although they have never visited my farm, OSHA regulators could wreck havoc with a farming operation. One OSHA manual made the profound statement that "manure is slippery." Another spelled out to the farmer the meaning of wholesome food. Most everyone would agree that after several years of harassment by OSHA officials, there has been no improvement in the workplace.

Mining of coal, seemingly does not directly concern us; however, the availability of coal as a cheap energy source does very much affect us. The clean air act of July 1975 eliminated the burning of 45 percent of the coal in this country because of sulfur content. That is enough to drive us to dependency on the Arab oil merchant. In addition, we have a regulation demanding strip-mined land to be put back to its original contour. Never mind that it would be far cheaper and better to restore the land to resemble the flat, easy-to-till land like on the Eastern Shore.

What have we accomplished with pollution control equipment on the internal combustion engine? The engine Henry Ford installed in the first Model A Ford in 1928 has the same basic crankshaft, piston rings, intake and exhaust valves and so forth as today's 1980 model. From 1928 thru 1960, that design was refined until an average sedan gave 20 to 25 mpg. Beginning in the 1960's until we hit bottom in 1973-74, we managed to get that mileage down to 9 to 10 mpg. This lower mileage was coupled with higher maintenance costs, bigger engines, sluggish performance, and a demand for unleaded gasoline. Did we get clean air or did we get dependent on the Arab oil merchant?

For the past year, I've become very involved in the production of fuel grade alcohol as an octane booster and extender of gasoline.

Here we are faced with the regulations from Alcohol, Tobacco and Firearms. Beverage grade or drinking alcohol is made in stainless steel equipment and water is not recycled. In producing fuel grade alcohol, we plan to use black iron equipment and recycle water from the distillation column to the next batch. By the very nature of the operation, our alcohol will not be drinkable. However, under present interpretation of the law, we will be scrutinized the same as beverage alcohol producers. Fuel grade alcohol should be exempted from the law regulating beverage alcohol.

As hard as needless regulations are on all business, remember they hit farmers the hardest. Other businesses cuss the regulators, spend the money to comply, then pass the cost on to the consumer. The farmer is faced with ever-increasing costs, but cannot pass them on because the price he receives is not under his control. Time does not allow me to fully explore this issue, but for sure the farmer does not set the price of his production.

According to past history, democracies do not last over 200 years. So, what is to be America's demise? Are we to be ruined by the regulators, who have nothing invested in America's business, and who only seek to promulgate their particular regulation, the public be damned?

Sometime, somehow, we must reach the point where every regulation has to be weighed in the balance—cost to everyone versus benefit to everyone.

Thank you, Mr. Chairman.

Are there any questions?

Mr. BAUMAN. No; I would say you have given us a very comprehensive and categorical list of regulatory power in the manner in which it touches your life.

Obviously, you have done some research on this.

Let me ask you a few specific questions. In the case of the Department of Agriculture, on the set-asides they are at the discretion of the Department, that is the secretary, are they not?

Mr. TWILLEY. Yes.

Mr. BAUMAN. And what you are saying is that the power to make the decisions within the framework that the Congress allowed resulted in the planting of a crop that was not needed?

Mr. TWILLEY. It was in greater supply and they say that is the problem they addressed, which was the cutting back of production. The way they constructed the program resulted in more production. I could give you an example of this. They say one thing but the program does the opposite.

Mr. BAUMAN. I have discussed this with Mr. Fitzgerald and others.

Was there any rationale given for this decision?

Mr. TWILLEY. You get the most assinine kind of thing you have ever heard of in your life.

Mr. BAUMAN. Would you say that the ASCS people at the local level pretty much shared your view?

Mr. TWILLEY. At the local level you can get a little cooperation. Woodson, who is the county CEB is most helpful. He will tell you what the program is. If it is black, he calls it black, and if it is white, he calls it white, but when you get above that, at the State and Federal level they keep saying they want goods from the farm.

Here on the Eastern Shore the biggest conservation we have is for ditching and the minute you open your mouth about ditching they say you cannot talk about that primary thing.

Mr. BAUMAN. Another question. I'm not exactly sure when but I recall reading about it in the past few months. Has not a group of farmers who had banded together for a ditching project been subjected to Federal orders to fill in the ditch or something because of the drainage?

Mr. TWILLEY. Well, I do not know about farm drainage but I know where some digging has been done over at Ocean City and they have to pump it back out and fill it back in.

Mr. BAUMAN. Because they proceeded without Federal permission?

Mr. TWILLEY. I thought they had Federal permission, but, you know, you have to get it from everybody there.

There is one thing I did not address here. When I was asking the farmers about what the worst problem was, they said that when we ask a question about what we have to do to comply it takes 2 years to get an answer. Meanwhile, what is he supposed to do?

Mr. BAUMAN. In other words, when the regulators do not tell you precisely what to do, they tell you what not to do.

Mr. TWILLEY. Just like a lagoon from a hog operation, they will not give you any plan. They say this is it. You build it and we will see if we like it. They do not have the plan that they say is right. They say build it and we will see if we like it. A plan cannot operate that way.

Mr. BAUMAN. In the case of the use of nitrates for the preservation of cured meat, if I am not mistaken, the Congress passed an act to suspend that regulation temporarily. That was because there was not readily available an alternate method to preserve the meat.

Mr. TWILLEY. I sure hope so.

Mr. BAUMAN. Let me ask you about your gravel operation in Maryland. You come under the Maryland strip-mining law?

Mr. TWILLEY. That was actually in Maryland. I was just pointing that out because I do not think the law written by Maryland, you know, was that discriminatory. The way it was—it was the way the regulators interpreted that law that put me out of business.

Mr. BAUMAN. So you had to actually desist?

Mr. TWILLEY. Yes.

Mr. BAUMAN. Now, there is a Federal strip-mining law that has been suspended. The regulatory power has been suspended to some degree, I think by an action of the Senate last week and the House is about to face a battle over this.

Have you experienced any interference at all from the Federal level?

Mr. TWILLEY. No, I have not. But let me tell you about one regulation in Maryland on the strip-mining thing.

One of the first things I would have to do is I would have to have a topographical map of whatever area I intended to dig, whether that is 2 acres or 10 or not, but whatever. I give them a plan and say I intend to dig over the next 20 years I would have to have a topographical surveyor and an engineer in which he gives the position of every square foot of that. It I attempted to do this it

would cost me \$5,000. The next thing I intend to do is to dig it with a drag line to a depth of 16 feet.

What possible good is that topographical map?

Mr. BAUMAN. There is no requirement that you return it to the same configuration in any way?

Mr. TWILLEY. No; that is why it was so easy with my operation. I will have pretty blue water if the county will not pollute it with their sewage, one can bathe in it, fish in it, swim in it. There will be no reclamation. But they keep wanting to collect my money because of all these different Federal regulations to reclaim to whatever use. I told them there is no reclamation. Mine will be a beautiful blue lake.

Mr. BAUMAN. Is there not a Federal law that, in fact, authorizes the use of funds for the building of such lakes?

In the Interior Department, I believe. I am not sure it is still available but it used to pay farmers to build such lakes.

Mr. TWILLEY. There has been a program. I do not know if it is still active or not.

Mr. BAUMAN. So one agency would be paying you to build ponds and another agency will prevent you from doing it.

Mr. TWILLEY. They will prevent me from doing it. In the case of the average farmer, Bob, I feel we will survive with no help from the Government if they will just not be a hinderance.

Mr. BAUMAN. Let me ask you lastly about your gasohol operation. Have you actually built a still to produce the product?

Mr. TWILLEY. I have talked with many groups here on the shore that propose to build. We have not laid the first bricks yet. I have used the alcohol at various ratios for the gasohol referred to, that is at 90/10, but I am right now burning in my pickup a mixture of 80/20 to find out exactly, you know, what can be burned. What I am really pushing is that we burn straight alcohol. It has many advantages. There is no problem with the air. There is a need to get away from the Arab merchants and if we can burn straight alcohol then we are energy efficient and the farmer can make it.

Mr. BAUMAN. Do you know of any farmers who have dealt directly with the Alcohol, Tobacco, and Firearms Agency?

Mr. TWILLEY. Yes; I think the consensus of opinion is that at the ATF, the people are fairly cooperative, but yet the law says they must scrutinize it. What we are saying is that by the very nature of the process we are making a nondrinkable product. One gentleman in Michigan told me that he told ATF that if everything else fails, all you have to do is put one lead bar in the tank and no one will drink it and if they do, they will be terribly sorry. We are not making drinking alcohol. We are making fuel alcohol.

Mr. BAUMAN. I would say, just for the record, that our office has assisted an operation in St. Mary's County and found it very difficult to get ATF to respond very quickly. They were not familiar at first with the gasohol and once they became familiar with it, they were reluctant to authorize production because of the possible human consumption problem. I think we did get one approved after 8 months of wrangling with them.

Mr. TWILLEY. One question I have on my mind, Bob. The Federal Government, or Bob Bergland keeps saying it would be all right for the farmers or other people to make alcohol but you must not use

grain; you must use a waste product. You must not think of using grain, but yet, in the case of drinking alcohol what makes it? Nobody ever says it is immoral to use a grain and make drinking alcohol so one wonders, you see, for every bushel of my corn they used to make alcohol at 190 proof, the Federal tax comes out to be \$20 a gallon. So that means for every bushel of my corn that makes drinking alcohol that is a \$50 revenue. But that \$50 revenue, does that make it morally right? They never say it is morally wrong to make drinking alcohol but do not think of making fuel alcohol. Why?

Mr. BAUMAN. Being in Congress I find it hard to pass on moral questions. That is not within the ability of the Congress, generally. Any questions?

Thank you very much, Bill. I think you have given us a very good set of proposals.

Mr. TWILLEY. Thank you.

Mr. BAUMAN. Our next witness is Mr. George Pitts, Delmarva Water Transport Committee.

STATEMENT OF GEORGE T. PITTS, MANAGER, DELMARVA WATER TRANSPORTATION COMMITTEE, INC.

Mr. PITTS. First of all, for the record, my name is George T. Pitts. I am the manager of the Delmarva Water Transport Committee, Inc. (DWTC) and am appearing on behalf of that organization. The purpose of this organization is to develop and encourage waterborne commerce. The membership consists of maritime carriers, petroleum products distributors, city and county governments, dredgers, banks, public utility companies, and other businesses that utilize waterborne transportation.

My testimony today will cover two major areas of concern; environmental controls as they affect dredging operations and this was already covered by our previous speaker, and dredge spoil site construction costs required to be paid by non-Federal interests for the disposal of dredge material for Federal dredge maintenance projects.

Mr. BAUMAN. George, are you accompanied by Mr. Reagan this morning?

Mr. PITTS. Yes.

Mr. BAUMAN. Would you like to join us up here, Mr. Reagan?

For the record, this is Mr. Bob Reagan, the new president of the Delmarva Water Transport Committee.

Mr. REAGAN. Good morning.

Mr. PITTS. In the first area of concern the implementation of environmental controls and determination of restrictions as far as dredging is concerned, results in: delays or cancellation of dredging projects; restraint of dredging operations to periods of adverse weather and seasonal limitations and consequent increase of dredging operations costs; restriction of dredge disposal areas to upland locations; and you are welcome to visualize the effect of this in an area like the Delmarva Peninsula which is 60 to 80 percent in some areas all wetlands; disparity of criteria between State and Federal agencies; and this is an indication of where the State approves the use of borderline or swamp area and the Federal agency disapproves; variation of disposal criteria between our

States in use of other than uplands for dredge disposal areas; and for example, some of our States are Southern States which allow you to use side casting dredging in order to clear your river channels. The city of Savannah, for example, is built on dredged materials. There is a difference of criteria between the States. And in the absence of standards to evaluate the cost of anticipated environmental loss as balanced against socioeconomic loss. For example, using a small stretch of swamp, you take away the feed area for the ducks and geese throughout this area. How much is this in terms of loss in relation to the economic impact on the economic base of the area concerned by the delay or the cancellation of the dredging project. Last but not least is the excessively long time frames to obtain final environmental agency clearances.

I have selected the local example that comes to mind, involving postponement of dredging, expenditure of funds, and effort related to both public and citizen actions in the 3 years of reviews, hearings, and exchanges in the action involved for acquisition of dredge disposal area for the Tony Tank-Sharp's Point portion of the Wicomico River, here in Salisbury, Md.

I have added to my testimony further detailed information outlined in a wetland permit review and a public hearing in August 1978.

Mr. BAUMAN. We will make that a part of the record at this point.

[The document referred to follows:]

Statement of

GEORGE T. PITTS

on behalf of
THE DELMARVA WATER TRANSPORT COMMITTEE, INC.

before the

WETLAND PERMIT REVIEW BOARD OF

STATE OF MARYLAND DEPARTMENT OF NATURAL RESOURCES

WATER RESOURCES ADMINISTRATION

on the

USE OF WETLAND DEPRESSION INCLUDED IN PROPOSED DREDGE SPOIL SITE (N2-N3)

August 21, 1978

My name is George T. Pitts. I am the manager of the Delmarva Water Transport Committee, Inc. (DWTC) and am appearing on behalf of that organization. The purpose of this organization is to develop and encourage waterborne commerce. The membership consists of maritime carriers, oil suppliers, city and county governments, dredgers, and other businesses that utilize waterborne transportation.

At present the only portion of the Wicomico River that is pending completion of federal maintenance dredging scheduled for 1978 is the section in the vicinity of Tony Tank on the upper river southwest of Salisbury, Maryland. This is due to a wetland restriction that limits the use of the proposed spoil site N2-N3 to approximately 8 acres and is insufficient to support the project. Release of the drainage area within the proposed spoil site would increase the area available for filling to 23 acres. Cancellation or delay of this project will result in a plug at the vertex of the storage and distribution complex of thirteen terminals. Nine of these are petroleum distribution points, two are aggregate, slag, and gravel building and construction suppliers, and two are fertilizer, seed, feed, and grain suppliers. All are essential commodities for the sustenance of the Delmarva Peninsula industry, agriculture, and community support.

Approximately one million tons of cargo carried by 3500 inbound and outbound vessels flows through Salisbury annually. Of this total about 75 percent are petroleum products. The current shoaling to 9' MLW at this point in the river reduces tanker and tanker barge loads to 85 percent of their capacities. As this shoaling continues to reduce the channel depth, the size of barges and load levels will have to be further decreased. Annually 750,000 gallons of petroleum is delivered to one terminal. Thus there is a 15 percent

load loss of 112,500 gallons for one terminal. Based on delivery to all Salisbury terminals annually, there is a load loss of approximately one million gallons. This results in an additional cost of \$945,000 per year.

It is estimated that the purchase of suitable upland that meets environmental criteria in this area would cost \$4,000 an acre. Therefore, a 30 acre spoil site would cost \$120,000 if the property owners and their adjacent neighbors were willing to sell it for this purpose. In addition, utilization of land for this purpose every eight to ten years is not economic use of cultivated, commercial or development land.

Based on the socioeconomic impact on the distribution center at Salisbury and communities in this area and the availability of no other suitable spoil site, it is critically essential that a permit be granted to fill the drainage area designated as wetland within the property listed as parcels 54 and 519 Camden District 13 Map 47 Wicomico County. Release of this area would make the entire proposed spoil site N2-N3 available for disposal of the dredging spoil from the federal project to increase the channel depth to 14' at MLW in the vicinity of Tony Tank and preclude cancellation of this project so critical to waterborne commerce, distributors, and consumers in this area.

Businesses affected by dredging:

AMERADA HESS
Route #5
Marine Road
Salisbury, MD 21801

AMOCO OIL COMPANY
P. O. Box 1681
Parsons Road
Salisbury, MD 21801

ARCO
424 Mill Street
Salisbury, MD 21801

ARUNDEL PRODUCTS, INC.
Fitzwater Drive
Salisbury, MD 21801

CATO, INC.
P. O. Box 1030
Marine Road
Salisbury, MD 21801

DELMARVA OIL COMPANY
Fitzwater Street Extended
Salisbury, MD 21801

EASTERN MARINE BUILDERS SUPPLY
Sharps Point Road
Salisbury, MD 21801

EXXON COMPANY
Marine Road
Salisbury, MD 21801

FARMERS & PLANTERS COMPANY
202 Mill Street
Salisbury, MD 21801

GULF OIL COMPANY
P. O. Box 830
Marine Road
Salisbury, MD 21801

POCAHONTAS, INC.
404 Mill Street
Salisbury, MD 21801

GEORGE L. RALPH, INC.
P. O. Box 1936
315 Lake Street
Salisbury, MD 21801

W. B. TILGHMAN COMPANY
650 Fitzwater Street
Salisbury, MD 21801



DELMARVA WATER TRANSPORT COMMITTEE, INC.

August 10, 1978

OFFICERS

LEONARD W. DAYTON
President

ROBERT W. COOK
Executive Vice President

ROBERT W. ALLEN, JR.
Vice President
Nanticoke River Project

FRANK E. WILLIAMSON
Vice President
Nanticoke River Project

TERRY F. BLADES
Vice President
Pocomoke River Project

ROBERT H. COWENS
Vice President
Somerset County Project

CHARLES A. MCCLLENHAN
Vice President
Crisfield Deep Water Port

MAYOR ALBERT B. ATKINSON
Vice President
Cambridge Port Project

S. NORMAN HOLLAND, JR.
Vice President
Wicomico River Project

WILLIAM C. ROCHA, JR.
Vice President
Transportation

ARTHUR T. MONIGLE
Secretary

ROBERT J. RAGAN
Treasurer

MICHAEL G. ABERCROMBIE
Immediate Past President

PUBLIC HEARING
MONDAY, AUGUST 21, 1978, 2:00 P.M.
THE CITY-COUNTY OFFICE BUILDING, ROOM 106
SALISBURY, MARYLAND

The State of Maryland Department of Natural Resources, Water Resources Administration will conduct a Public Hearing in Salisbury, Maryland on Monday, August 21, 1978 at 2:00 p.m. in the City-County Office Building, Room 106. The purpose of the hearing is to determine the propriety, need, and justification of permitting the use of a wetland area in the vicinity of Pine Bluff to support the urgently needed federal maintenance dredging of the upper Wicomico River near Salisbury. This is apparently the only available dredge spoil site in this vicinity.

If this disposal site is not approved, the federal dredging project to increase the presently shoaled depth of 9 feet MLW to 14 feet MLW will be cancelled. To provide the 23 acre area necessary to accommodate the dredge material, a drainage depression in the proposed site must be filled. See sketch enclosed. This drainway is classified as wetland and any alteration or filling of this depression will require a special permit.

In order to urge the State Board of Public Works and the Secretary of Natural Resources to act favorably on this permit, it is essential that the economic impact of any delay or cancellation of this dredging project be emphasized by those persons adversely affected by limited and unsafe river conditions.

Your active interest and participation in this hearing is necessary to assure that the impact on business and local governments is effectively presented. We urge that you testify, and it is recommended that ten copies of your testimony be available to present at the hearing.

Public Hearing
Page Two
August 10, 1978

The maintenance of this channel to meet your water-borne delivery needs economically, efficiently and safely is essential to our present economic well-being and safety and the future development of our region. We look forward to your support and participation at this hearing. Call 742-5162 if you have any questions.

Sincerely

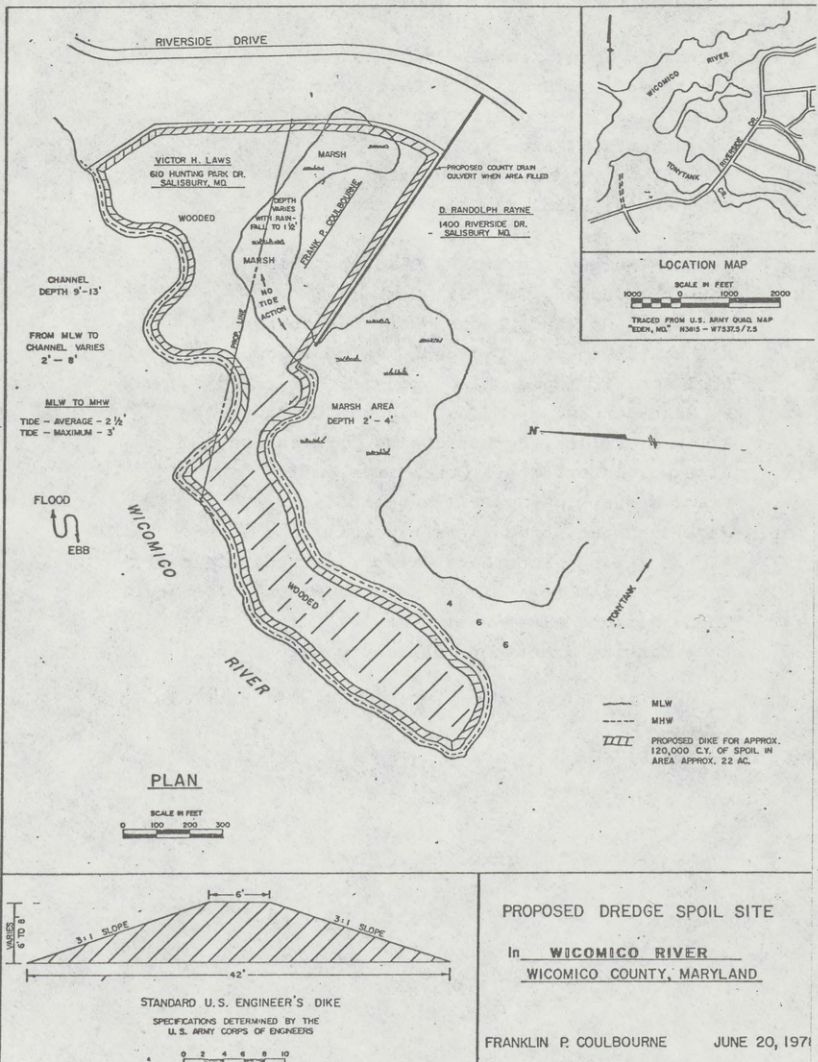
George T. Pitts
George T. Pitts *Q*
Manager, DWTC

GTP:bjp

Enclosures (2)

cc: Senator Charles McC. Mathias, Jr.
Senator Paul S. Sarbanes
Congressman Robert E. Bauman
Senator E. Homer White, Jr.
Delegate Joseph J. Long
Mr. Leonard W. Dayton, President, DWTC
Mr. John W. T. Webb, Chairman, GSC
Mr. Robert W. Cook, Executive Director, GSC
Mr. Franklin P. Coulbourne
Mr. Victor H. Laws
Mr. Melvin Toadvine, Managing Editor, Daily Times
Mr. Alan Landay, WBOC T.V.
Ms. Mary Corddry, Baltimore Sun
Mr. Frank Megargee, Baltimore Sun

(4)



DISTRIBUTION:

Gertha C. Cook, Arundel Products
Robert Grim, Amerada Hess Corporation
C. L. Heath, Amoco Oil Company
Edwin Hertzog, Arco
Michael Abercrombie, Cato Oil
Don Dennis, Delmarva Oil Company
W. E. Simpkins, Exxon Company
Bernard Murphy, Farmers & Planters Company
Robert J. Ragan, Gulf Oil Company
Norman S. Holland, Pocohontas, Incorporated
Arthur T. Monigle, George L. Ralph & Company
Paul Cox, Triangle Oil Company
F. Nash Strudwick, W. B. Tilghman Company
Allen B. Keller, Harbor Towing Corporation
Al Mann, Interstate & Ocean Transport
Frank Steuart, Steuart Transportation
Jack Buchanan, Steuart Transportation
Albert Bailey, President, Wicomico County Council
Matthew Creamer, Admin. Director, Wicomico County Council
The Honorable Elmer Ruark, Mayor, City of Salisbury
Paul Martin, President, Salisbury City Council

Mr. PITTS. In summary, this spoil site acquisition and selection action involved the use of a 2.5-acre drainage depression within a 26-acre area offered as the only disposal area available and at that time acceptable to the U.S. Army Engineer Corps. All but the 2.5-acre depression in the center was cleared for use by all agencies. The entire area to include the 2.5-acres was cleared for use by the Maryland Department of Natural Resources. Without this depression the total capacity was insufficient and, if used, would require the uneconomical construction of two dike areas. The initial official review of this area was completed in January 1976 in the official environmental statement. Commencing from this time frame through June 1979 the use of this disposal area was finally abandoned due to the costly stipulation from the Federal Environmental Protection Agency that the 2.5 acre depression, classified as wetland, could be used provided that 5.2 acres of wetland would be created to replace the 2.5 acres of wetland proposed to be used, for dredge disposal.

Due to the reduced channel depth, barges have reduced capacity loans 15 percent in order to negotiate the shallowed channel. In addition, the dredging costs have been increased due to the accumulation of a larger column of dredge material to remove and the influence of inflation.

As of right now, by use of extensive pipelines to other disposal sites remote from the dredge location the project should be underway downstream between November 1979 and March 1980—a 3- to 4-year ponderous effort by all.

It is recommended that conservation and preservation restrictions be implemented to attain more flexible and less restrictive controls by:

Release of wetlands with low ecology value for use as spoil sites where upland areas are unavailable due to industrial, agricultural, or residential areas. We hope we can get them implemented to obtain more recommended and less restrictive controls and to include in the evaluation of land use for dredge disposal areas an ecological/economic cost ratio of anticipated environmental loss balanced against economic loss in the community concerned; achieve a consistency of criteria by more standardization between the States and Federal environmental agencies.

Establish a clearinghouse system with go or no go decision authority within each U.S. Army Engineer district to expedite coordination and resolution of preservation and conservation limitations to reduce time-consuming administrative and attendant actions.

And, to push along the time-consuming procedure that must be gone through or to get the environmental people, the archeologists, the historians and the many people who are interested in preserving our land, establish a clearinghouse situation with a go or no go decision authority within each Army Engineer district to expedite the coordination and resolution and preservation and conservation limitations, to reduce the time-consuming administrative and attendant actions just to get a piece of communication back and so forth with a 30-day leadtime that each agency has given as a waste of time in addition to the normal bureaucracy and procedures that will occur.

Before I go to the secondary concern, are there any questions?

Mr. BAUMAN. I think it is just as well to ask them. I have some questions.

What is the total length, roughly, of the Wicomico River?

Mr. PITTS. Approximately 20 to 25 miles.

Mr. BAUMAN. And the stretch you are discussing here is what?

Mr. PITTS. Right now, 1½ miles.

Mr. BAUMAN. And as I understand it, the entire project of dredging costs how many millions of dollars?

Mr. PITTS. This project?

Mr. BAUMAN. The total cost of the dredging.

Mr. PITTS. I do not know. It is close to \$2.5 million.

Mr. BAUMAN. So it came down to a mile and a half stretch and at that point the Federal agencies, because of the disposal site, refused to permit the further dredging?

Mr. PITTS. That is right.

Mr. BAUMAN. Do you remember what authority it was that they cited for this power or what agency it was that was involved?

Mr. PITTS. The two sister agencies, the Environmental Protection Agency and the Fish and Wildlife Agency.

Mr. BAUMAN. Is there not also a Marine Fisheries establishment?

Mr. PITTS. The National Marine Fisheries. They were not as insistent.

Mr. BAUMAN. But all three agencies were involved? Was the corps the umbrella agency?

Mr. PITTS. The coordinating agency, yes.

Mr. BAUMAN. One of the stipulations was that in order to use their wetlands, you had to approximately double the wetlands and build it yourself at your cost?

Mr. PITTS. Yes.

Mr. BAUMAN. The final resolution was to get another area?

Mr. PITTS. Yes; you can well visualize the cost. It turned out, based on the present estimates, by installing 3 miles of pipeline and using two disposal areas for this further down the stream, we will be able to accomplish this cheaper and less costly than going to this 5.2 acres. Plus the problem of finding the area where you can recreate this wetland.

Mr. BAUMAN. In your negotiations with the various Federal agencies, did you ever come to a point where they cited their authority, what it was in the law that allowed them to make this decision regarding this 2½ acres of wetlands?

Mr. PITTS. Just the fact that they classified it as a wetland to my knowledge. To our agencies at this level they never cited a particular law or statute.

Mr. BAUMAN. My impression is, being in the Government and having dealt with them, is that they have the discretion under their regulations to define the areas. In this case, the State of Maryland with a rather restricted wetlands law was willing to have them used but the Federal agencies refused.

Mr. PITTS. The Maryland Department of Natural Resources as you know, Mr. Bauman, made an exception which is in their regulations and the Federal agencies have the power to do the same thing, but they chose not to.

Mr. BAUMAN. During this time, there was a reduced capacity to bring in large loads of oil and everything else, you say 15 percent reduced capacity. Does it continue right through today?

Mr. PITTS. Yes, it does.

Mr. BAUMAN. Would that have added to the cost of the consumers in the area that used the product when two or three trips might be required to bring in the product that only one trip would have allowed, had the dredging been completed?

Mr. PITTS. I would like to have Bob Reagan comment on that if you feel it is appropriate.

Mr. REAGAN. I would like to touch base on a few other points just very quickly.

In essence, the answer to your question, Mr. Bauman, it would. It is very difficult to come down with a kind of dollar and cents kind of an answer and say if the dredging had been permitted, the price of gasoline would be thus and so, but definitely as far as the economic growth of the area is concerned all costs of petroleum products in the area are affected. It is very difficult to pin down how much exactly but getting back to George's statement itself, conceptually we have a very difficult time in dealing with the Federal agencies. The Federal Government can be a little foggy in its actions and on a local level what we find we are dealing with is about four different agencies, each of which does not have a direct communication with the other over a project and as the local entity we are trying to bring each one of those agencies together. And it is very difficult.

On our project, George just outlined we had just about had that wrapped up when the Environmental Protection Agency stepped in and what I thought was quite arbitrary, turned it down. We had several meetings with them. They showed some signs of reconsidering. But it is very hard to get these agencies down to an area like Salisbury to look at 2 acres. They have a very large responsibility nationwide. So George suggested the clearinghouse type of thing and what we are really looking for is some way, a contact we could deal with who would bring these groups together for us and get the thing on the road.

Mr. Bauman, it seems to take years to do a very small project and it should go straight forward.

The corps, if I understand it correctly, has the authority to move ahead on such issues but they acquiesce and do not get themselves involved in environmental issues. They could have moved ahead with this project several years ago but because there was some doubt in the minds of other agencies they sit back and they do not move on it.

We would just like to see some way of dealing with them where they are a little more flexible, perhaps some group that they could form as a task force to deal with bringing themselves together.

Mr. BAUMAN. One of the proposals that has been made to the Congress is to require a cost benefit study to accompany any proposed regulations. As part of the agencies' duties, they would have to say if we make this decision under this and if we implement these regulations, here is what it will cost in a given operation. Do you think something like that is worthwhile?

Mr. REAGAN. They are faced with that right now in OSHA. They have gotten to the point now where regulations can be arbitrary. We do not like to think they are but it is very difficult to address each individual situation and while I do not necessarily say I would like to see it in the Environmental Protection Agency and for them to have to justify their position with a cost benefit statement, we have to justify the use of an area with such a statement, but still, all in all, if they had just been a little more flexible, more understanding with some latitude, but they seemed to be very straight and narrow and difficult to deal with.

Whether that is the answer, I do not know, but I do not want to see them backed off from what they are trying to accomplish, because I agree with that, overall.

Mr. BAUMAN. As long as we are on this point of an agency making the final decision, I would like to point out that the Congress is now considering an agency for so-called fast track consideration of energy proposals and it is having a very rocky time in the House of Representatives.

Do you think it would be better to have some sort of tapecutting, redtape-cutting agency, or just go back and restrict the powers of each agency? It seems to me we would just have another agency.

Mr. REAGAN. Yes; you hate to create another agency or bureaucracy, and I do not really want to see the powers restricted. I do not think that is the answer. Perhaps I would like to see the corps address themselves a little more to their role in this, which, as I say, they have the authority to proceed with these programs if they feel they are necessary.

If the corps became the redtape-cutting agency or the coordinating agency right now. Instead they just sort of step back and say, well, we will do it if you can get the other agencies to agree. One person to deal with is what we are after and I do not like to see the creation of more bureaucracy.

Mr. PITTS. In defense of the Corps of Engineers, and to their defense, the district certainly does everything within their power to coordinate this effort. But, when they get two Federal agencies voting against the project, the corps system as such, as you know, Mr. Bauman, must go to their district, and the district must go to the Chief of Engineers and the Environmental Agency at the Federal level looks at the district and then says we will take it all the way to the Cabinet level. We are talking about a 1-year delay.

Mr. BAUMAN. I understand. In the case of Miller Island in Baltimore, I think it has been about 5 or 6 years.

Mr. PITTS. If we could somehow, in this clearinghouse system, have a little more decentralization of authority perhaps this would be better than superimposing another superagency on the top side.

The Chief of Engineers just organized a new section known as the Water Resources Center at Fort Belvoir.

Now, perhaps this will serve as a more expedited agency to work with where they have a section that devotes themselves to dredging and a section that devotes themselves to dams, et cetera, et cetera, in the legislative decision area.

Mr. BAUMAN. George, did you want to address your second point regarding cost of dredge disposal?

Mr. PITTS. Yes; in the second area of concern, to refresh your memory, construction costs for the preparation of dredge disposal areas are now borne by the non-Federal interests. This is the result of the Secretary of the Army and the Chief U.S. Army Corps of Engineers directives that require such payments be made for dredge projects programed after June 1960. These spoil site construction costs are a monetary burden beyond the funds available to the counties on the Delmarva Peninsula and the cancellation of pending projects because of insufficient funds to participate in this share-cost requirement could result in unsafe navigation conditions and a deterrent to and decrease of waterborne commerce and in turn affect the economic base of the communities concerned.

The oil distribution center here in Salisbury dried up because we could no longer get up and down the Wicomico River. You can imagine the local economic impact plus the impact of all of the lower shore that receives their fuel and petroleum products from their Salisbury center.

As an example of some specific costs involved: Wicomico County—\$105,000 for 1 project; Accomac County—\$206,000 for 1979-80 projects, of 19 projects, 2 have been canceled. Worcester County—1 project canceled.

Based on the monetary impact on the non-Federal interests and resultant affect of insufficient fund sources on river and harbor navigation, waterborne commerce and economy of the areas concerned, action should be pursued to: Implement legislative action to relieve the non-Federal interests from payment for construction of dikes for dredge material disposal areas in support of Federal maintenance dredging projects pending legislation a suspension of this requirement.

Now, while this implementation of legislative action is going on, we should obtain a suspension of this requirement and as a minimum interim measure pending completion of legislative and suspension action, reduce the non-Federal interest construction costs share to 25 percent as cited in Public Law 91-611 dated December 31, 1979, wherein it cites the non-Federal interests will pay a minimum of 25 percent.

The district plan was to advise them, when they come down with the normal letter, that says, such and such spoil is accepted, and the dredge project in fact will be issued, your share of the cost is so and so.

Mr. BAUMAN. So you would go all the way through the process of getting the permits to use the site, and suddenly the corps would inform you, due to their interpretation of the regulations, that your cost will be \$105,000 more than you thought it would be.

Mr. PITTS. Not in this case, no, because a year ago we learned from Accomack County that this was in effect.

Mr. BAUMAN. If you had not stumbled onto that knowledge, you would not have known?

Mr. PITTS. We would not have known it. So we have had this officially for the district for 1 year.

Mr. BAUMAN. And they cite a law that allows them to make this?

Mr. PITTS. Yes. That is right. They cited a directive from the Chief of Engineers, who in turn received it from a Secretary of the Army to have the non-Federal interests pay this cost.

In my research today, the only item I can find is the public law that I cited in my testimony here. I would like to point out that there is a variation in the application, for example, the State of Delaware is very lucky to have the dredging done to a level of 6 feet without having to pay for the construction costs of their spoil sites.

They come under the Philadelphia district, as you know, and the stand is at the original authorization for the Systelian River project was 1956, so the Federal Government is backing up the cost of the spoil site construction. You can imagine the reaction of the rest of the counties on the peninsula when they discovered this. We researched this with the other districts, and they concur with the Philadelphia district decision, and it is unfortunate that no one else in the other counties have grounds for having the spoil site construction charged to the Federal Government.

Mr. BAUMAN. So it is discretionary with the Corps of Engineers?

Mr. PITTS. If they can determine from the document, the original document, for example, this 1956 document, does not have anything in it that requires the joint participation of the non-Federal agency, and it is discretionary with the district if this is omitted from the authorization. It sounds like hanky panky to me, but the district we do the greatest business with in Baltimore has assured us that if they could find a way to do it for us, they would.

We do not have any cases that can be defended from this point of view, and also the district in Norfolk as far as Accomack and North Hampton Counties concerned, at the time of discussion, which was our annual meeting last month, had no cases, where they could defend providing the capitalized Federal funds to put the spoil site construction.

Mr. REAGAN. I would like to add a quick comment, that in most cases the regulations, it is the perspective that adds a great deal to it.

You have the Hart-Miller Island on one end of the scale. I do not think the availability of Federal funds is going to affect the project one way or the other, Baltimore Harbor will be done, whether they use their own funds or Federal funds, but when you get down to the opposite end of the spectrum, you are dealing with small ports where you have people depending on fishing for their livelihood, and a great many small channels to get in and out of their villages, this type of project will be hurt by this, because the local government cannot come up with the kinds of funds the Federal Government will require to construct their spoil sites, so they will go by the wayside, and that is what we are trying to project, is the lower end of the spectrum as opposed to the Delaware River Basin projects.

There should be some interpretation whether it is the level of project scale, be it a level covered by Federal funds, or how this is done, I really have no idea, but we were to protect the small end of the scale, and that is what we are dealing with primarily here, most of our projects are for small communities.

Mr. BAUMAN. From the viewpoint of the committee's interest in regulatory power, I think it is interesting that this particular financial problem grew out of the reinterpretation of the statutes by regulatory agencies, and with very little notice apparently.

I thank both of you for your appearance here today.

Any questions?

Mr. WOLFENSBERGER. Just one question.

How do you think congressional review will work?

Federal regulations and possible veto might help to end the type of problem you cited.

I notice you indicated part of the problem is delay, and that one of the biggest delays is on the part of the Federal regulatory process. Some people say by allowing Congress to sit on a regulation for 90 days, and then vetoing it, it may be a year or two before regulations are promulgated, and that this might inject more delay.

Do you think Congress should have this time for review, to force an agency to come up with a new regulation?

Mr. REAGAN. I don't know. Again, you are getting into an area that is out of our local concerns. It is how you can more effectively deal with our problems, and it probably would add another level of delay to the time frame you are talking about. It is just a shame we cannot get something in there to make Federal agencies a little more sensitive to local problems, and a little less bureaucratic. I do not know how to get that in there.

Mr. WOLFENSBERGER. There should be better communication is one thing you are saying, there is not enough accountability, and somehow or another this should be improved?

Mr. PITTS. The public law does have a phrase in it, whereby the Chief of U.S. Engineer Corps has the latitude to vary from this 25 percent cited.

Miss CULLEN. Do you think initially when Congress is writing a law, they should be more specific, or more fuzzy so there is latitude?

Mr. PITTS. Well, there is a House regulation pending in the Rules Committee, I believe, Mr. Bauman, the old number of it was 4111, which asks the Engineer Corps to study just this aspect of what share of the non-Federal interests should pay.

I do not know the status of this, except your legal person advised me last week it is still in committee.

Mr. BAUMAN. My own guess would be, in response to your inability to say whether Congress might slow it down, I suspect it might slow it down. On the other hand, the pressure of knowing Congress can veto regulations, might have a salutary effect on the agencies.

It is a fact that the agency must take into account the effect of the people affected by it, whereas now they ask for comments and do what they like. This I understand to a great extent is done in input before the regulations are promulgated. That might remove the problem of having a veto and make them more responsive.

Well, I thank both of you for appearing today.

Mr. PITTS. Thank you.

Mr. BAUMAN. Our next witness is Mr. Gordon Gladden of Avery W. Hall Insurance Agency.

Please proceed Mr. Gladden.

STATEMENT OF GORDON GLADDEN, AVERY W. HALL
INSURANCE AGENCY

Mr. GLADDEN. Thank you, Mr. Chairman. I am Gordon Gladden, and I work for Avery W. Hall Insurance Agency. I am representing myself here today.

I am sure many pieces of regulations are being interpreted by the Federal departments differently than what Congress had intended the bill to be when it was passed.

I think we have just heard some of that discussion just a couple of minutes ago.

For example, I cannot believe Congress intended to give the EPA all the clout and power it has, for example, the dredging of our rivers recently, or over the selection of spoil sites.

I have a feeling that it is probably true, and it is with this in mind that I as an insurance agent would like to discuss some things today. For example, there is presently before the Congress a bill which the Federal Benefits Review Board would be given jurisdiction to enforce.

It is a bill that the U.S. Senate bill 420 introduced by Senator Harrison Williams, a Democrat from New Jersey, and Senator Jacob Javits, a Republican from New York, has been referred to the Senate Committee on Labor and Human Resources, it would effect Workmen's Compensation Insurance, it would require that States comply with the number of Federal minimum standards. It is interpreted or it is undisputed by the sponsors of the legislation that the Federal Standards for Workmen's Compensation would be extensive, and I believe the bill represents a significant intrusion and interference in State Regulations for Workmen's Compensation.

I believe that the Federal Regulations are unnecessary, and State regulations are protecting the interests of the insured public. I believe that the Federal regulations are unnecessary, and the increased costs providing Federal mandated benefits will also be borne by the consumer, that Federal programs fail to discriminate between the various needs of the various States.

The Government that is closest to the people does a much better job in recognizing and fulfilling the needs of the people.

The Federal Minimal Standards, that is, in Workmen's Compensation represents a giant leap for the Federal Government to control the insurance industry.

The Federal Government track record, in matters of this sort, is not very good.

For that reason I have written Senator Sarbanes and Senator Mathias and Congressman Bauman and asked them to help us influence the defeat of this bill.

On another effort of Federal intrusion into the insurance area, Senator Mathias has proposed Senate bill 506, and this would give the Federal Government regulations for controlling insurance, he says it does not, but we feel it does.

We have written to the Senator about this, and he says it does not, but when you deal with insurance, we feel that some of our Federal departments will interpret anything that says anything about insurance, in that they have control over it.

There has been another recent bill to do with the farmers. This bill would subsidize insurance premiums for crop losses. The most recent bill I speak of is House bill 4119 and Senate bill 725. We feel that the insurance industry is now a competitive industry, that is where they should be, the industry arises and gives proper protection for the dollar that is at risk, so we do not feel that the Federal Government should be involved in subsidizing in these programs, and we have told our Senators and Congressmen that we would like that bill defeated.

I tell you that there are insurance commissioners in each and every State in the United States, and that these insurance commissioners are regulating insurance, and should be left to themselves to do this.

If the Federal Government cannot regulate insurance, as good as or better than the State Government is doing at this time, then they should leave it alone.

I think that the matter needs to be done at a State level, because I think they can respond more directly to the public.

I do feel that sunset legislation would be overwhelming to the Federal Government, but I feel that Congress should have the authority to deal with and veto Federal regulations.

If some form of veto power is not given to the Congress, our Federal agencies will be running the country, and therefore I do support the House bill H.R. 1776, and I think it could have an awful lot of support on the local level.

Thank you.

Mr. BAUMAN. You've described a number of instances of proposed extension of Federal control into the insurance industry, which of course runs counter to the trend that is embodied in H.R. 1776, you would like to see not only less control but more responsible control, if there has to be any, is that correct?

Can you give us examples in your own experience of increased costs, or added coverage that result from Federal regulations required of the businesses that come to you for insurance. For instance, they have Federal Flood Insurance, the proposal for crop insurance, but things such as the OSHA regulations, do you find that your clients have to increase their coverage, or that it in any way affects their activities?

Mr. GLADDEN. Of course, we support OSHA, because I think as an industry, we do need protection for the worker, and I think OSHA in principle is necessary.

However, I think with the reporting forms, it seems to me it could be done a lot easier than the way we have, than the way the Federal Government has set it up.

I think that the States can control the OSHA requirements, and I think in the most part, the Federal Government has given the States some control over that, so I think it is now done with OSHA, but I think that is probably a step in the right direction, because safety in the long run affects insurance premiums on the downward trends.

I think the OSHA concept is good. In one of the places that we see an overcharge for insurance premiums is in Federal programs, where we are offering a 100 percent loan. That agency will require insurance for 100 percent of the total value of the property, which

includes land, and even if we had a loss, a total loss, we always have land value there, that insurance policy will not pay.

For example, if we had \$100,000 business that had a business loan, and say 20 percent of the assets were in the land, the Federal Government would require you to insure for \$100,000, even though maybe the building was only worth \$80,000 and the land was worth \$20,000, we still have to insure for \$100,000, because the loan is in that amount.

I think that is an overcharge for the consumer, he has to pay 20 percent more insurance than he really should pay, but this is one of the areas that could stand some scrutiny.

Mr. BAUMAN. What agency is requiring this type of insurance?

Mr. GLADDEN. Anybody that we will have a mortgage with, Farmer's Home Administration, HUD, all of these agencies will require 100 percent insurance for the loan, even though the policy would never pay for that much.

Mr. BAUMAN. And to your knowledge is that done as a result of this interpretation of the law?

Mr. GLADDEN. Yes; I would think so, because I do not imagine that the law would say 100 percent insurance would be necessary, but then the Government says you need 100 percent insurance, total insurance for the total amount of the loan.

The insurance policy would never pay that much.

Mr. BAUMAN. This is not the practice in private lending?

Mr. GLADDEN. No; the bank would look at that, and then the appraiser would say this land is worth \$20,000, the building is worth \$80,000, we want insurance on the building, so you give us an \$80,000 insurance policy.

Mr. BAUMAN. Over the 20-year life of the mortgage, this could result in considerable cost?

Mr. GLADDEN. Yes.

Mr. BAUMAN. Are there any other instances you can cite?

I know you did not come cataloged with all of this.

Mr. GLADDEN. One of the areas the industry is most interested in is keeping the banks out of the insurance industry. Ed Kremer is going to speak to this today.

Mr. BAUMAN. I believe he will.

Mr. GLADDEN. He is an expert on that subject, and I would rather he discussed that with you.

Mr. WOLFENBERGER. What about ERISA?

Mr. GLADDEN. I am not very involved in the life and retirement benefits. I would better not say anything about that.

Mr. BAUMAN. Any other questions?

Thank you very much for appearing here. I appreciate it.

Mr. GLADDEN. Thank you.

Mr. BAUMAN. I do not see our next scheduled witness, but I do see representatives of the Peninsula General Hospital Medical Center, so perhaps we could have them testify first. Mrs. Virginia Layfield, will you come forward?

This is Mrs. Layfield, accompanied by Mr. Dick Allen, who is the chairman of the board of the Peninsula General Hospital, and Mr. Stephen Chasin, and Mr. William Duval, a member of the bar.

Mrs. LAYFIELD. Thank you, Mr. Chairman. Steve will precede me, and he will speak for the Maryland Hospital Association, and I will pick it up from there.

Mr. BAUMAN. So our first witness will be Mr. Stephen Chasin, representing the Maryland Hospital Association.

We will enter as part of the record a copy entitled, "Duplication of Regulation Study," published by the Maryland Hospital Association at the conclusion of your remarks [see p. 35].

It appears we arrive at a fortuitous time. You seem to be very well prepared.

STATEMENT OF STEPHEN CHASIN, MARYLAND HOSPITAL ASSOCIATION

Mr. CHASIN. I would like to thank you for the opportunity to testify.

My name is Stephen H. Chasin and I am representing the Maryland Hospital Association (MHA). MHA is a nonprofit, private, voluntary association of 62 Maryland hospitals. We offer the following comments on regulatory overlap without waiving any rights of member institutions to object or add to our comments.

I will be brief and to the point.

In early December 1978, the Maryland Hospital Association released a study quantifying the regulatory overlay affecting Maryland hospitals. It should be stressed that MHA is not against regulation per se. Rather, we would urge that a rational system of regulation be developed to lessen any duplication. Once released, MHA's duplication of regulation study received a great deal of press coverage from a number of newspapers all over the State.

The study was conducted by surveying five member hospitals. The hospitals involved represent a cross section of Maryland hospitals in terms of size, location, teaching affiliation, and religious affiliation. The hospitals were: John Hopkins University Hospital, Baltimore; Maryland General Hospital, Baltimore; Sacred Heart Hospital, Cumberland; The Memorial Hospital at Easton, Md.; and Greater Baltimore Medical Center, Towson.

The study was divided into 10 major areas of investigation. Each of these were further divided into subgroups. In total, 113 subgroups were surveyed.

We found that a total of 108 different agencies regulate Maryland hospitals. This total can be broken down into: 40 Federal agencies; 61 State agencies; 3 city/county agencies; and, 4 quasi-public/voluntary agencies.

The study's most important finding was that the majority of the regulation deals with nonpatient care issues. For example, in the area of professional standards 15 Federal agencies are busy regulating hospitals. These are: Office of Equal Employment Opportunity; Office of Professional Standards Review Organization; Office of Nursing Affairs; Food and Drug Administration; Bureau of Quality Assurance; Division of Long-term Care; Administration on Aging; Office of Child Development; Bureau of Health Insurance; Rehabilitation Services Administration; Social Services Administration; Bureau of Retirement and Survivors Insurance; Atomic Energy Commission; and Bureau of Disability Insurance.

Finally, 17 Federal agencies regulate standards of performance: National Labor Relations Board; Department of Labor; Department of Justice; Equal Employment Opportunity Commission; Bureau of Retirement Survivors Insurance; Social Services Administration; Rehabilitation Services Administration; Bureau of Health Assurance; Office of Child Development; Administration on Aging; Office of Child Health Affairs; National Institute on Health; Bureau of Quality Assurance; Long-Term Care Division; Food and Drug Administration; Office of Nursing Home Affairs; and Office of Professional Standards Review Organization.

One example of conflict of regulations is the hot water temperature in patients' rooms. The Maryland Division of Licensure and Certification and the Baltimore City Health Department require that hot water temperature be between 110 to 125° F. HEW, however, says that hot water temperatures cannot exceed 100° F.

Basically, we found there were 108 different agencies regulating Maryland hospitals. This can be broken up into 40 Federal agencies, 61 State agencies, and 3 city/county agencies, and 4 quasi-public or voluntary agencies.

A most important finding of the study was that most regulations did not deal with patient care.

For example, in the area of professional standards, which was not dealing with patient care, we found 15 Federal agencies.

I will confine all of my remarks just to Federal agencies cited in the report, you can see the numbers of States in the other areas.

The second example is in the area of policies, procedures, and organizations, we found 14 Federal agencies.

Finally, we found in the area of standards of performance 17 Federal agencies.

One example of the overlap we found is mentioned in the study, to reiterate here, the Maryland Division of Licensure and Certification requires that hot water in patients' rooms be between 100 and 125° F.; however, HEW feels that hot water in a patient's room should not go above 110° F.

As miniscule as this may sound, that is an example of some of the complex issues.

I think to convey the magnitude of the regulations, I would like to turn to the chart, essentially work on the chart backward.

The blue lines right here are the State regulatory areas. There are in fact 61 blue boxes representing the State agencies. This is one layer here.

Over that we will now add the Federal layer of regulations, as you can see in the lines, it is overlapped between the Federal regulations themselves, as well as the Federal and State.

On top of that we will add green and black lines which show quasi-public and city areas.

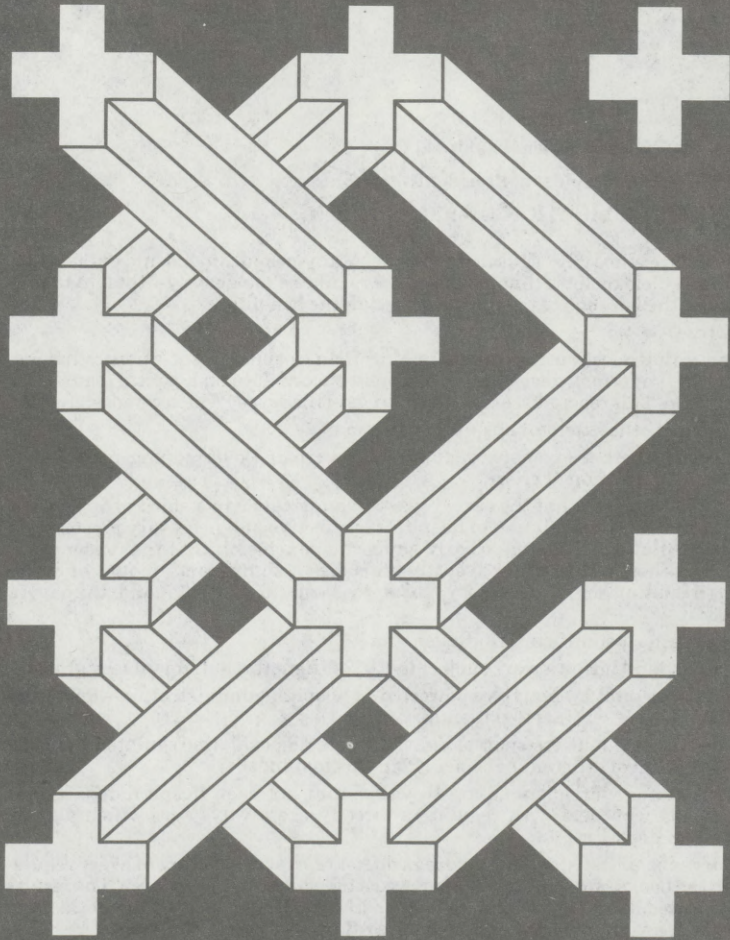
I think that the chart graphically captures what a hospital has to deal with.

Now, I will be glad to answer questions, either on the study or anything else.

[Testimony resumes on p. 56.]

[The publication submitted by Mr. Chasin "Duplication of Regulation Study" follows:]

DUPLICATION OF REGULATION STUDY





December 1978

TO: MHA Member Hospitals
 FROM: Dick Davidson, President *DD*
 SUBJECT: DUPLICATION OF REGULATION

Hospitals are a heavily regulated industry. Many people, inside and outside the health care field, believe that hospitals are regulated *too* heavily—that, in many instances, the burdens of regulation outweigh the benefits.

Is this true?

To answer that question, the staff of the Maryland Hospital Association, by means of a survey, undertook development of a solid base of data on hospital regulation in Maryland. This report discusses the findings of the survey which was designed to:

- identify the extent of hospital regulation;
- learn whether extensive regulation has created overlapping jurisdiction and duplication of effort.

It should be stressed that the survey was not undertaken in a spirit of opposition to regulation; some regulation of hospitals is effective and necessary for society's protection. But, the findings clearly support a conclusion that the present system—or, rather, the lack of a system—embodies a significant amount of duplication, resulting in unnecessary costs to hospital patients and taxpayers in general.

Among the most significant findings:

- Maryland hospitals are subject to 1,078 different regulatory oversights;
- most regulatory activity is directed at hospital administration—not at the delivery of services to patients;
- even basic matters such as that of waste disposal are regulated by large numbers of different agencies (12 in this instance);
- regulatory jurisdictions are so vague that not even hospital department heads who deal with regulators directly are always sure which agency regulates what.

The survey is a first step. The findings do not represent scrutiny of every regulation on the books, nor quantify the exact cost of regulation in each area. The results are presented in order to stimulate further study of the problems of hospital regulation with a view toward creating a more rational system.

MHA appreciates the assistance of the five Maryland hospitals that participated in the survey: Maryland General, Memorial at Easton, Greater Baltimore Medical Center, Sacred Heart, and Johns Hopkins. Thanks, also, to the Hospital Association of New York State for the survey outline and information on federal regulations.

TABLE OF CONTENTS

Part I: The Problem of Hospital Regulation p.3

A. The Background of Hospital Regulation p.3

B. Are Hospitals Over-Regulated? p.4

Part II: The Findings of the Survey p.5

A. Methodology p.5

B. General Findings p.5

C. Examples of Over-Regulation p.7

Part III: Conclusions and Recommendations p.8

Appendices

Appendix I: Inventory of Regulation p.10

Appendix II: List of Regulatory Bodies p.20

DUPLICATION OF REGULATION STUDY

PART I: THE PROBLEM OF HOSPITAL REGULATION

The past decade has seen a phenomenal growth in government regulation in all areas and at all levels. In recent efforts to quantify this growth, two separate sources (Professor Murray L. Weidenbaum of Washington University in St. Louis and an economic research team at the Chase Manhattan Bank) pegged the annual cost of federal regulatory activities alone at an astounding \$100 billion. Of this total, by far the greater part—more than \$4 of every \$5—represents the cost of compliance. That is, it represents the expense to those being regulated—and, through them, to the consumer.

Hospitals have borne their full share of rising costs due to regulatory growth. Testifying before a Senate Subcommittee on September 20, 1978, American Hospital Association President Alex McMahon said that the cost to hospitals in 1977 in complying with just eight federal regulations was about \$865 million, and "that cost is likely to reach \$1 billion by 1979".

This report does not question government's right to regulate hospitals; health has always been a public concern and properly subject to some control. What it *does* question is whether the recent upsurge in regulatory activity has reached the point where it is no longer cost effective or fully productive.

In particular, a new and intriguing question is being asked: Is it possible that, taken individually, most regulatory programs appear beneficial—but, taken in the aggregate and measured by systemic impact, the overall regulatory structure is less beneficial?

THE BACKGROUND OF HOSPITAL REGULATION

Regulation of the health care industry was for a long time largely voluntary. The American Medical Society began to set standards for medical schools in 1911, following publication of the Flexner Report, which found that many medical schools were providing inferior education. Voluntary regulation took a major step forward in 1952 when a group of health organizations* formed the Joint Commission on Accreditation of Hospitals (JCAH). This body has grown in importance so that today almost every American hospital, including all Maryland hospitals, seeks JCAH approval.

Prior to 1946, governmental regulation of hospitals was nearly limited to such matters as building code compliance and fire safety requirements. In that year the Hill-Burton Act was passed, authorizing construction and equipment grants to public and nonprofit hospitals. In order to receive this funding hospitals had to meet certain standards and criteria and guarantee a certain amount of free service to patients unable to pay. The Hill-Burton program, however, did not regulate the operation of hospitals or concern itself with the quality of patient care in the modern sense.

The 1960s saw the growth of the idea that quality health care was a *right* which the government ought to ensure. The Medicare and Medicaid legislation of the late 1960s was enacted in response to this new demand and brought about extensive, detailed regulation which has made federal and state government a continuing presence in hospitals.

Today, regulations touch all aspects of a hospital's operation. The JCAH accreditation survey examines virtually every detail, from the boiler room to the utilization review committee, and the oversight by the Medicare and Medicaid programs is just as comprehensive. The Professional Standards Review Organi-

*The American Hospital Association, American Medical Association, American College of Physicians, American College of Surgeons and the Canadian Hospital Association.

zations (PSROs) examine the care physicians provide. Planning groups like the Health Systems Agencies look at hospitals' proposals to provide new services or invest in new facilities and equipment.

On the state level, the Health Services Cost Review Commission regulates hospital rates and impacts on all areas of hospital finance. The Maryland Department of Health and Mental Hygiene regulates areas which range from possible patient discrimination to food storage conditions. Hospitals must comply with a variety of local health regulations as well.

The agencies mentioned above regulate the health care industry only. *In addition*, hospitals are subject to the regulations which apply to all industries. The Maryland Occupational Health and Safety Administration, the Employment Security Administration, the Bureau of Air Quality and dozens of other agencies all promulgate rules or guidelines requiring hospitals' compliance.

The same regulators who visit Bethlehem Steel also visit hospitals, and so do large numbers of specialized regulators of a kind that Bethlehem Steel never sees. This double system of regulation creates a double burden for hospitals.

ARE HOSPITALS OVER-REGULATED?

There is a persistent feeling that regulation, which is designed to solve problems, has grown to the point where it has become a major problem in itself. Regulatory authority is said to be fragmented among too many federal and state agencies, jurisdictions are said to overlap, and reporting requirements are perceived as a costly and onerous burden.

It would be surprising if there were not some truth to these accusations. The growth in the number and scope of hospital regulatory agencies has been extraordinarily rapid; is it any wonder that not all of that growth has been fully integrated yet? It is not reasonable to expect that a complex and comprehensive regulatory system should have evolved in a perfectly synchronized and coordinated manner.

It is reasonable, however, to expect that the regulatory system should be synchronized at some point—and the findings of this study indicate that the process should not be delayed any further. It is time to evaluate existing programs, and to bring some order and coherence to them, before embarking on any new regulatory projects.

For purposes of discussion, the problem of excessive hospital regulation can be divided into two related parts:

1. *The problem of regulatory coordination.*

The most frequent complaint against regulatory agencies is that they are isolated from each other. Each agency promulgates its regulations without regard to what other agencies are doing in the same regulatory area—so that regulations duplicate each other or contain conflicting requirements. New regulations also tend to be incremental; they simply add another regulatory layer to existing programs.

2. *The problem of regulatory cost.*

In a major study covering fiscal 1976, the South Carolina Hospital Association found that the *direct* cost of regulation in only three areas—Utilization Review, Personnel Management and Reimbursement Mechanics—added between \$1.10 and \$2.59 each day to each patient's bill at sample hospitals; and, of course, there are many other areas subject to regulatory costs. A 1978 study by the Hospital Association of New York State revealed that regulation may add as much as \$38.85 per patient day in New York State.

The search for solutions to these problems has highlighted the need for a broader base of factual information. It is not enough to *claim* duplications, excessive reporting requirements and unnecessary costs; the claims must be documented. This report is a first step in that direction.

MHA does not wish to give the impression that this report is in any way a complete analysis of the problem of regulatory duplication. It is a *preliminary* study only, intended to achieve four limited objectives:

- to document the existence of a significant number of overlapping regulations;
- to indicate the need for better coordination of the many agencies regulating hospitals;
- to identify priority areas for additional study; and,
- to support a request for a legislative and administrative moratorium on new hospital regulation while remedies to the problem of duplication are sought.

PART II: THE FINDINGS OF THE SURVEY

METHODOLOGY

Five hospitals participated in this study of regulatory duplication. They represent a cross-section of Maryland hospitals: one is a university hospital; one an inner-city teaching institution; one a medium-sized suburban institution; one a medium-sized Eastern Shore facility; and one a rural Western Maryland hospital.

Each hospital was given a list of areas subject to regulation. Ten general areas were identified: Administrative Services, Ancillary Services, Educational Services, Facility Services, Financial and Information Services, Medical Services-Delivery, Medical Services-Special Programs, Medical Services-Organization, Personnel Services, and Support Services. These general areas contain a total of 113 sub-areas covering specific subjects; for example, the general area of Educational Services contains the sub-areas of curriculum, faculty, housing, student financial aid, student health services, and supervision of residents. All of the sub-areas are listed in the tables of Appendix I.

The participating hospitals were asked to indicate which agencies regulated each sub-area. The information came from the department head directly responsible for each sub-area, as the person most likely to provide a reliable, accurate, and complete list.

The totals are shown in detail in Appendix I. When an area is subject to control by an unusually large number of regulatory agencies, the assumption is made that some duplication of regulation exists.

The actual duplication is probably understated because of the verification process. Two or more hospitals had to indicate that an agency regulated an area in order for the answer to be accepted as correct. When only one hospital mentioned an agency, MHA staff sought further verification and clarification. Answers that could not be verified were excluded from the final tally.

GENERAL FINDINGS

The answers that were excluded from the tally are as revealing as the answers that remain. A total of 183 answers were dropped for lack of verification. This would seem to indicate serious confusion over who regulates what, even in the minds of the department heads who deal most directly with regulators. It would also seem to indicate that many regulatory agencies lack a clear understanding of the limits of their own authority, and tend to impinge on areas which are marginal to their primary purposes.

The verified answers to the survey show that 108 regulatory bodies are in-

volved in controlling the affairs of Maryland hospitals. The chart below indicates the source of these agencies' authority:

CHART A
Source of Regulatory Authority

	NUMBER	PERCENT
STATE	61	56
FEDERAL	40	37
CITY/COUNTY	3	3
VOLUNTARY & QUASI PUBLIC	4	4

Coincidentally, these 108 agencies regulate 113 different sub-areas of interest or subject matter—a seeming one-on-one relationship. This is misleading, however, as it does not take into account the fact that some regulatory agencies exercise oversight in a large number of sub-areas. Counting each agency's oversight of each sub-area separately gives a truer picture: *The 113 sub-areas are regulated 1,078 different times, or, to state it another way, the average sub-area is controlled by 10 regulatory bodies.* Some sub-areas, of course, are controlled by many more than 10—as high as 35, in one case.

Such multiple regulation would be easier to accept if it were designed to assure patient safety and monitor the quality of patient health care. This is not the case. An analysis of the general subject areas and individual matters within those areas indicates that *the greatest regulatory concern is directed at administrative services.* Below is a chart showing the general areas of regulation and the number of agencies involved with each.

CHART B

<i>Major Area of Regulation</i>	<i>Number of Agencies</i>
Administrative Services	57
Medical Services—Delivery	35
Facility Services	30
Support Services	29
Personnel	28
Financial Services	25
Ancillary Services	21
Medical Services—Organization	18
Medical Services—Special Programs	18
Educational Services	8

Within these general areas, the following sub-areas are most heavily regulated:

CHART C

<i>Individual Issues</i>	<i>Number of Regulatory Bodies</i>
Standards of Performance (Administrative Services)	35
Certification (Administrative Services)	33
Permits (Administrative Services)	29
Medical Records (Medical Services Delivery)	18
Records (Personnel Services)	18
Accounting and Recording (Financial and Information Services)	17
Utilization Review Plan (Medical Services Delivery)	15
Wages (Personnel Services)	16

Some of the more surprising areas of multiple regulation include:

- 12 bodies regulate waste disposal;
- 12 bodies regulate patients' rights;
- 12 bodies regulate admitting procedures;
- 7 bodies regulate transportation; and,
- 5 bodies regulate security.

EXAMPLES OF OVER-REGULATION

Although this is only a preliminary study, it seemed advisable to further document the problem of over-regulation by specific examples. Subject areas were chosen at random and studied for evidence of regulatory duplication, conflicting regulations and unnecessary costs.

REGULATORY DUPLICATION

The sub-area of patients' rights is one of 12 within the general area of Administrative Services. It covers such matters as the rights of patients to non-discriminatory treatment, for information, and to confidentiality. A total of 12 regulatory agencies monitor this sub-area:

1. Medicaid
2. Maryland Division of Licensure and Certification
3. Maryland Human Relations Commission
4. Maryland Hill-Burton Agency
5. Maryland Office of Consumer Affairs
6. Maryland Office of Civil Rights
7. Maryland Title VI Compliance Office
8. U.S. Bureau of Quality Assurance
9. U.S. Medical Service Administration
10. U.S. Bureau of Supplemental Security Income
11. U.S. Department of Labor
12. Professional Standards Review Organizations

These agencies hold hospitals accountable for protecting patients' rights. Some focus their efforts primarily on certain aspects of the subject (e.g. disclosure of billing information to patients)—*but all 12 monitor compliance with anti-discrimination laws*. They ensure compliance by requiring hospitals to:

- submit written reports;
- open their patient records for inspection; and,
- develop written policies on non-discrimination.

Some of the 12 agencies use only one of these methods of regulatory oversight. Some use all three. Hospitals must repeat the same information again and again and again—a clear case of regulatory duplication.

CONFLICTING REGULATIONS

Regulatory agencies not only duplicate their efforts, they also subject hospitals to conflicting and confusing requirements. The following examples have been taken from only one general area (Facilities Services), and have been chosen because they can be readily understood by laymen.

1. *The Life Safety Code*. The Maryland Occupational Safety and Health Administration (MOSHA) uses the 1967 Life Safety Code edition. The Division of Licensure and Certification uses the 1978 Life Safety Code in Baltimore City, and the 1970 Life Safety Code in the counties.

2. *Waste Disposal*. The Maryland Water Resources Administration requires hospital waste to be autoclaved before shipping for disposal. The Division

of Licensure and Certification requires waste to be placed in leakproof containers and *not* autoclaved before shipment. It is impossible for hospitals to comply with these conflicting requirements.

3. *Hot Water Temperature.* The Division of Licensure and Certification and the Baltimore City Health Department require that hot water temperatures in patients' rooms be between 110°-125°F. HEW says that hot water temperatures in patients' rooms cannot exceed 110°F.

UNNECESSARY COSTS

Documentation of unnecessary costs due to regulatory duplication is a time-consuming process and is beyond the scope of this survey. Nevertheless, it seemed worthwhile to research one example:

The Professional Standards Review Organizations and the Health Services Cost Review Commission require hospitals to submit discharge data abstract information on patients. The abstract contains approximately 20 elements of data summarizing the patient's medical record and is submitted to the regulatory agencies 90 days after the close of the calendar quarter in which the patient was hospitalized.

Each abstract takes approximately 15 minutes to complete. For a 300-bed hospital, the direct cost of producing this information is \$32,631 a year. The approximate total cost of preparing this information in Maryland is \$1,312,500 a year.

The Medicaid program is now proposing that almost exactly the same information should be provided with the patient's bill. This would require a near total duplication of the efforts required to produce and record the data, at little or no additional benefit to the patient or the hospital.

PART III: CONCLUSIONS AND RECOMMENDATIONS

The provision of health care services by hospitals and their medical staffs is a public trust. Due to this fact, rational hospital regulation is in the public interest; health care is too vital a concern for hospitals to operate without appropriate mechanisms for public accountability. Hospital regulation by a variety of agencies is also desirable, for vesting all regulatory authority in a single agency would create a regulatory monolith with a clear potential for abuse.

The findings of this study, however, support the conclusion that regulation has proliferated to the point where it generates duplication, conflict and unnecessary cost. It is time to coordinate and streamline regulatory functions. Toward that aim, this report presents the following recommendations:

Maryland Hospitals should review those areas where substantial duplication exists to determine the practicality of consolidation. Because these survey findings are a guide to the areas which should be studied in depth, such a study can be undertaken without major expenditures of time and money.

The Maryland General Assembly should not expand the number of regulatory agencies nor the scope of regulations without a thorough examination. The General Assembly can take steps to remedy the problems of regulatory duplication by (1) looking closely at existing regulations before adding new ones; (2) coordinating, with existing regulations, those new regulations that are felt to be necessary; and, (3) considering carefully the recommendations of the thorough study referred to above.

While a well coordinated system of regulation can take many forms and include many separate agencies, it should meet certain criteria. This report suggests that a rational regulatory process for hospitals should:

- be administered systematically rather than in a fragmented and duplicative fashion;
- provide significant benefits to patients;
- include input from affected parties;
- yield clear and understandable written regulations
- provide funds to support implementation of government mandated requirements;
- offer due process mechanisms for those affected;
- include a mechanism to insure public accountability of regulatory bodies; and,
- require a concurrent statement on the costs to the health care delivery system resulting from the proposed regulation, and a judgment as to cost effectiveness.

APPENDIX I: INVENTORY OF REGULATION

ADMINISTRATIVE SERVICES

	NUMBER						PERCENT OF TOTAL						
	Federal	State	Cumulative	City/County	Quasi Public	Voluntary	Federal	State	Cumulative	City/County	Quasi Public	Voluntary	
Patient Rights	5	7	12			12	67	33	100%				
Civil Rights	10	6	16			16	63	37	100%				
Community Relations	11	8	19	3	1	1	24	46	33	79%	13	4	4
Effectiveness of Performance	7	13	20	3	1		24	29	54	83%	13	4	
Permits	12	12	24	4	1		29	41	41	82%	14	4	
Establishment	4	9	13	4	1		18	22	50	72%	22	6	
Certification	10	18	28	4	1		33	30	55	85%	12	3	
Smoking	2	6	8	2			10	20	60	80%	20		
Disaster Plans	2	5	7				7	29	71	100%			
Admitting Procedures	5	6	11		1		12	42	50	92%		8	
Professional Standards	15	11	26	1			27	56	41	97%	3		
Standards of Performance	17	14	31	3	1		35	48	40	88%	9	3	
Policies, Procedures & Organization	14	13	27	3			30	47	43	90%	10		
Governance	6	3	9	3			12	50	25	75%	25		

APPENDIX I: INVENTORY OF REGULATION

ANCILLARY SERVICES

	NUMBER			Cumulative Subtotal	TOTAL	PERCENT OF TOTAL			Cumulative Subtotal	TOTAL	PERCENT OF TOTAL		
	Federal	State	City/County			Federal	State	City/County			Federal	State	City/County
Radiation Protection	3	8	11		11	27	73	100%					
Radioactive Substances	3	8	11		11	27	73	100%					
Sale of Drugs	3	5	8		8	37	63	100%					
Packaging	4	5	9		9	44	56	100%					
Labeling	5	5	10		10	50	50	100%					
Narcotics Control	3	5	8		8	37	63	100%					
Drugs & Medication Control	5	6	11		11	45	55	100%					
Alcohol Control	2	1	3		3	67	33	100%					

APPENDIX I: INVENTORY OF REGULATION

EDUCATIONAL SERVICES

	NUMBER	Federal	State	Cumulative Subtotal	City/County	Quasi Public	Voluntary	TOTAL	PERCENT OF TOTAL	Federal	State	Cumulative Subtotal	City/County	Quasi Public	Voluntary
Supervision of Residents	1	4	5				5	20	80	100%					
Student Health Services			3	3			3		100	100%					
Student Financial Aid	2	3	5				5	40	60	100%					
Housing	1	2	3				3	33	67	100%					
Faculty	2	5	7				7	29	71	100%					
Curriculum	2	5	7				7	29	71	100%					
Research						1	1							100	
Staffing						1	1							100	
Accreditation		1	1				1		100	100%					

**APPENDIX I: INVENTORY OF REGULATION
FACILITY SERVICES**

	NUMBER					TOTAL	PERCENT OF TOTAL				Cumulative Subtotal	City/County	Quasi Public	Voluntary
	Federal	State					Federal	State						
Public Safety	3	5	8	2		10	30	50	80%	20				
Water	1	6	7	1		8	13	75	88%	12				
Energy Conservation		3	3			3		100	100%					
Light/Heat/Power	1	8	9	1		10	10	80	90%	10				
Pest Control	3	3	6	1		7	43	43	86%	14				
Sterility	4	3	7	1		8	50	38	88%	12				
Waste Disposal	4	6	10	2		12	33	50	83%	17				
Sanitation	3	5	8	2		10	30	50	80%	20				
Environment	4	8	12	2		14	29	57	86%	14				
Operation	6	7	13			13	46	54	100%					
Emergency Power		4	4			4		100	100%					
Fire Control		4	4	1		5		80	80%	20				
Equipment	4	5	9			9	44	56	100%					
Material Shortage	5	4	9			9	56	44	100%					
Parking	1	3	4	1		5	20	60	80%	20				
Construction	8	10	18			18	44	56	100%					

APPENDIX I: INVENTORY OF REGULATION

FINANCIAL AND INFORMATION SERVICES

	NUMBER			Cumulative Subtotal			TOTAL			PERCENT OF TOTAL			Cumulative Subtotal		
	Federal	State		City/County	Quasi Public	Voluntary	Federal	State		Federal	State		City/County	Quasi Public	Voluntary
Beneficiary Benefits	10	2	12			12	83	17	100%						
Reimbursement	10	2	12	1		13	77	15	92%				8		
Free Care	3	3	6	1		7	43	43	86%				14		
Taxes	2	2	4	1		5	40	40	80%				20		
Grants	3	3	6			6	50	50	100%						
Contributions	3	2	5			5	60	40	100%						
Cost Control	2	2	4			4	50	50	100%						
Budgeting	4	3	7	1		8	50	38	88%				12		
Financial & Statistical Reporting	10	3	13	1		14	71	22	93%				7		
Accounting & Recording	13	3	16	1		17	76	18	94%				6		

APPENDIX I: INVENTORY OF REGULATION
MEDICAL SERVICES—DELIVERY

	NUMBER					PERCENT OF TOTAL				
	Federal	State	Cumulative Subtotal	City/County	Quasi Public	Federal	State	Cumulative Subtotal	City/County	Quasi Public
Patient Safety	7	6	13	1	14	50	43	93%	7	
Medical Records	13	4	17	1	18	72	22	94%	6	
Services Delivered	8	6	14	1	16	50	38	88%	6	6
Length of Stay	9	2	11		11	82	18	100%		
Quality of Care	7	2	9		9	78	22	100%		
Utilization Review Plan	10	4	14	1	15	67	27	94%	6	
Communicable Disease Control	3	3	6	1	7	43	43	86%	14	
Infection Control	3	3	6	1	7	43	43	86%	14	
Drug Profiles	3	3	6		6	50	50	100%		
Accessibility	3	3	6	1	7	43	43	86%	14	
New Services	3	4	7	1	9	33	45	78%	11	11
Levels of Care	10	5	15	1	17	59	29	88%	6	6
Breadth of Service	6	3	9	1	11	55	27	82%	9	9

APPENDIX I: INVENTORY OF REGULATION

MEDICAL SERVICES—SPECIAL PROGRAMS

	NUMBER					PERCENT OF TOTAL				
	Federal	State	Cumulative Subtotal	City/County	Quasi Public	Federal	State	Cumulative Subtotal	City/County	Quasi Public
Drug Abuse	3	2	5		5	60	40	100%		
Child Abuse	3	2	5	1	6	50	33	83%	17	
Adoption		1	1		1	100	100%			
Birth Certificates		2	2		2	100	100%			
Death Certificates		4	4		4	100	100%			
Crime Victims		4	4		4	100	100%			
Ambulance		1	1		1	100	100%			
Renal Dialysis		3	3		3	100	100%			
Renal Transplants		3	3		3	100	100%			
Termination of Pregnancy		1	1		1	100	100%			

APPENDIX I: INVENTORY OF REGULATION

MEDICAL SERVICES ORGANIZATION

	NUMBER		FEDERAL		CUMULATIVE SUBTOTAL	CITY / COUNTY	QUASI PUBLIC	VOLUNTARY	TOTAL	PERCENT OF TOTAL			CUMULATIVE SUBTOTAL	CITY / COUNTY	QUASI PUBLIC	VOLUNTARY
										FEDERAL	STATE					
Research	4	4					4		100	100%						
Health Standards	5	8	13		1	14	36	57	93%				7			
Staffing	3	5	8		1	9	33	56	89%				11			
Physical & Mental Status of Medical Staff	2	4	6			6	33	67	100%							
Attending Staff Privileges		3	3			3	100	100%								
Board Certification		1	1			1	100	100%								
Registration	3	8	11			11	27	73	100%							
Licensure	4	6	10		1	11	36	55	91%				9			
Accreditation	4	2	6			6	67	33	100%							

APPENDIX I: INVENTORY OF REGULATION

PERSONNEL SERVICES

	NUMBER		Cumulative Subtotal			TOTAL		PERCENT OF TOTAL			Cumulative Subtotal		
	Federal	State	City / County	Quasi Public	Voluntary	Federal	State	Federal	State		City / County	Quasi Public	Voluntary
Volunteers	4	4			4	100	100%						
Supervision	11	5	16		16	69	31	100%					
Training	13	1	14		14	93	7	100%					
Fair Labor Practices	5	2	7		7	71	29	100%					
Dress Code & Uniforms	2	3	5		5	40	60	100%					
Discrimination	6	3	9		9	67	33	100%					
Hiring	7	4	11		11	64	36	100%					
Safety	3	3	6		6	50	50	100%					
Employee Health Services	2	2	4		4	50	50	100%					
Records	10	8	18		18	56	44	100%					
Disability Insurance	2	2			2	100		100%					
Workmen's Compensation	3	4	7		7	43	57	100%					
Unemployment Insurance	3	3	6		6	50	50	100%					
Payroll Taxes	3	4	7		7	43	57	100%					
Fringes	7	2	9		9	78	22	100%					
Wages	9	6	15		15	60	40	100%					

**APPENDIX I: INVENTORY OF REGULATION
SUPPORT SERVICES**

	NUMBER				PERCENT OF TOTAL		
	Federal	State	Cumulative Subtotal		Federal	State	Cumulative Subtotal
			City/County	Quasi Public			City/County
			Voluntary	TOTAL			Voluntary
Package Control	5	1	6	6	83	17	100%
Security	2	3	5	5	40	60	100%
Transportation	4	3	7	7	57	43	100%
Communication	8	8	8	100	100%		
Laundry	1	6	7	7	14	86	100%
Food	2	6	8	8	25	75	100%
Material Usage	7	7	14	14	50	50	100%
Purchasing	6	6	12	12	50	50	100%

APPENDIX II: LIST OF REGULATORY BODIES

FEDERAL REGULATORY BODIES

1. Office of Consumer Affairs
2. Office for Civil Rights
3. Education Division
4. Surgeon General
5. Office of Population Affairs
6. Office of Equal Employment Opportunity
7. Office of Professional Standards Review Organizations
8. Office of Nursing Home Affairs
9. Center for Disease Control
10. Food & Drug Administration
11. Division of Long Term Care
12. Bureau of Quality Assurance
13. National Institutes of Health
14. Alcohol, Drug Abuse & Mental Health Administration
15. Office of Child Health Affairs
16. Administration on Aging
17. Office of Child Development
18. Bureau of Health Insurance
19. National Center for Social Statistics
20. Rehabilitation Services Administration
21. Medical Services Administration
22. Office for Handicapped Individuals
23. Bureau of Disability Insurance
24. Bureau of Retirement & Survivors Insurance
25. Bureau of Supplemental Security Income
26. Department of Agriculture
27. Atomic Energy Commission
28. Department of Defense
29. Environmental Protection Agency
30. Department of Commerce
31. Equal Employment Opportunity Commission
32. Federal Communications Commission
33. Interstate Commerce Commission
34. Department of Justice
35. Department of Labor
36. National Labor Relations Board
37. Postal Service
38. Department of Transportation
39. Treasury Department
40. Veterans Administration

25. Emergency Medical Service
26. Employment Security Administration
27. Energy Policy Office
28. Fire Prevention Commission and Fire Marshall
29. Health & Higher Education Facilities
30. Health Services Cost Review Commission
31. Human Relations Commission
32. Juvenile Services Administration
33. Kidney Disease Program
34. Laboratories Administration
35. Maryland Board of Pharmacy
36. Maryland Health Planning and Resources Development Agency
37. Maryland Occupational Safety and Health Administration (MOSHA)
38. Maryland Planning and Development Agency
39. Maryland State Police
40. Medical Care Programs (Medicaid)
41. Maryland Civil Defense & Preparedness Agency
42. Mental Hygiene Administration
43. Mental Retardation Administration
44. Motor Vehicle Administration
45. Office of Aging
46. Office of Chief Medical Examiner
47. Office of Energy
48. Office of Hearings and Regulations
49. Office of Radiation Control
50. Preventive Medicine Administration
51. Social Services Administration
52. State Board of Examiners of Nursing
53. State Board of Physical Therapy Examiners
54. State Board of Examiners of Social Work
55. State Board of Examiners of Speech Pathologists
56. State Health Coordinating Council
57. State Treasurer's Office
58. Title VI Office (Civil Rights Compliance Office)
59. Water Resources Administration
60. Workmen's Compensation Commission
61. Workmen's Compensation Fund Board

STATE REGULATORY BODIES

1. Aged and Chronically Ill Services
2. Board of Boiler Rules
3. Board of Medical Examiners
4. Board of Osteopathic Examiners
5. Board of Public Works
6. Bureau of Air Quality and Noise Control
7. Bureau of Food and Drugs
8. Bureau of Legal Aid
9. Bureau of Sanitary Engineering
10. Center for Health Statistics
11. Codes Administration (Department of Economic and Community Development)
12. Commission on Medical Discipline
13. Commission on Radiologic Technicians
14. Controller's Office
15. Department of Labor and Industry
16. Department of Licensure and Certification
17. Department of Post Mortem Examiners
18. Department of Social Services
19. Department of Vital Records
20. Development and Construction Permit Coordination (Board of Public Works)
21. Division of Drug Control
22. Division of Radiation Control
23. Division of Radiological Health
24. Drug Abuse Administration

CITY/COUNTY AGENCIES

1. Local Health Departments
2. County Prosecutors
3. Local Fire Departments

QUASI-PUBLIC/VOLUNTARY AGENCIES

1. Joint Commission on Accreditation of Hospitals
2. Hospital Cost Analysis Service
3. United Fund
4. Health Systems Agencies

Mr. BAUMAN. Everyone of these blocks indicates a separate agency, and the lines indicate their specific regulatory power?

Mr. CHASIN. More or less. After a while, it got to the point where there were just too many lines, so what we did—we say we know there are 40 Federal, so we put the 40 red boxes in, and tried to approximate where they would go.

Mr. BAUMAN. Now, of course there is a proposal that we have before us in the Congress that we create a Federal control over the cost of operating hospitals, which I assume would be in addition to all of your charts.

My question is, Have you quantified the cost of just the Federal segment of your chart so far as they impact on Maryland hospitals or on an individual patient's stay in the hospital in days?

Mr. CHASIN. We have not attempted to quantify the costs, but really it was just to get to the time that we were looking at with regard to the overlap, so the answer is we have not really looked at cost in any systematic attempt.

Mr. BAUMAN. Would you give us a guess at the percentage of the average patient bill that might result from this kind of regulation?

Mr. CHASIN. The best I can do, and I have some concerns with the estimate which comes from the Hospital Association of New York State, which did a cost study. They estimated that \$38.40 of every patient's bill in New York City dealt with Federal regulations per day.

Mr. BAUMAN. What would the average bill be per day?

Mr. CHASIN. That I am not sure about, but they estimated 25 percent of all costs that a hospital has, deal with regulations. I have some problem with 25 percent, but since you expressed it, I will give you that.

Mr. BAUMAN. But you could say that 25 percent or less results from Federal regulatory activity or State and local.

Mr. CHASIN. That is what New York State has for all regulations.

Mr. BAUMAN. Have you had any direct experience with the Federal agencies that regulate, so far as their interpretation, or application of Federal statutes?

I am sure the local hospital will be able to address that more specifically with its own experience.

Mr. CHASIN. The Federal regulators themselves?

Mr. BAUMAN. Yes; agencies such as HEW.

Mr. CHASIN. As a matter of fact, one of the best areas concerns the Department of Energy in recent grants programs. The programs include grants to hospitals and schools. The problem was that DOE was not quite geared up for attempting to do everything together at once so what we had were regulations that were blatantly incorrect. Therefore we had to go back and remind them that they were incorrect. I don't know if they ever put out an official policy on that issue.

Mr. BAUMAN. In order to qualify? What about exemptions from temperature control?

Mr. CHASIN. The Department of Energy, in looking at the area of temperature control in buildings, they initially said that any section of the building in which patients were taken care of, that part would be exempt from temperature control.

After the American Hospital Association and I made some calls, they realized they were incorrect, and what they meant to say was that any building, the entire building, could be exempt if there were any patient care areas.

Mr. BAUMAN. In other words, you would have had to keep the cafeteria for the employees at a different temperature than the other areas, and many buildings obviously would not be equipped to do that.

Mr. CHASIN. Correct.

Mr. BAUMAN. A small oversight.

Mrs. Layfield, would you like to testify?

First, are there any questions of Mr. Chasin?

Mrs. Layfield is the associate administrator of the Peninsula General Hospital Medical Center.

You may proceed.

STATEMENT OF VIRGINIA LAYFIELD, ASSOCIATE ADMINISTRATOR, PENINSULA GENERAL HOSPITAL MEDICAL CENTER

Mrs. LAYFIELD. Congressman Bauman, you have already introduced the rest of our group. We want to express our concern about overregulation, conflicts in regulation, and the difficulties we find with these and also with excessive regulation.

I want to specifically give examples of the kinds of things I have to work with, and I think I know what I am talking about.

The one that I believe concerns me the most has to do with a medicare regulation that relates to preadmission testing.

Now, we have been, since 1964, working on a preadmission program that we feel is unusually good. We have been able to achieve 94 to 96 percent of all elective admissions coming in mostly for surgery, of preadmission testing. Through this, we believe we have been able to reduce costs and reduce hospitalizations.

It only makes sense if a person can walk around the hospital and have tests, and go home at night, and eat someplace else. It will cost us much less and cost them less than if we have to put them in a bed, and push them around in a wheelchair, and take care of them and feed them; so we really have pushed this.

We spend anywhere from sometimes 5 to 7 days getting this testing done. When the physician schedules the patient for surgery, they come to the admitting office, and we do them at the patient's convenience, within this brief period of time, sometimes 7 o'clock at night, sometimes on Saturday, before we are able to schedule it, so they do not have to miss work in order to come.

Now, there is a recent medicare regulation which says all tests for preadmission must be done within 48 hours of admission.

Now, these tests are added to the patient's bill, because they really are a substitute or alternate for inpatient care.

Now, depending on what is added and what is required for these older patients, and it is only logical that the older patients will be more in for pulmonary work on how well do they breathe before they go to surgery. Perhaps they would need an intravenous pyrogram; one follows the other; but they cannot be done in 48 hours. So there is no alternative, you admit the patient, and you do the wheelchair thing, push him or her around. This does increase the costs and what I consider costs and the utilization of beds.

This is the kind of thing that I am talking about. I understand the reasoning behind it, because I am sure there is an effort to insure that there will not be additions to a patient's bill, but it does have to be immediately related to the scheduled surgery that is planned. But in our experience it is defeating the purpose, and we are concerned about it.

Mr. BAUMAN. Has this problem been brought to the attention of the officials in Washington? Have they shown any interest in allowing flexibility in the application of this rule?

Mrs. LAYFIELD. We have written letters, but we have not had a response.

Mr. BAUMAN. And this is a recent imposition of this rule?

Mrs. LAYFIELD. Within a year or two.

Mr. BAUMAN. You do think the rule is consistent with good medicine? You can conduct these tests within a 48-hour period, but as far as convenience and costs and necessity, that it is unnecessary to admit them?

Mrs. LAYFIELD. It depends on how many tests you are doing. Sometimes one must follow another and it cannot be accomplished within 48 hours. Another problem is that we need the reports to get to the physician. We try to gather these reports and send them by courier to their office, so they can then evaluate them and determine if this patient's results of tests indicate subsequent tests are needed.

Occasionally it might indicate that surgery be delayed. This is especially true in hemoglobin. When that is low, the patient needs treatment, and therefore he does not need to be admitted at all.

Mr. BAUMAN. So conceivably the rule could be medically unsound?

Mrs. LAYFIELD. I would not say unsound.

Mr. BAUMAN. In a given instance of a patient.

Mrs. LAYFIELD. Not economically good.

Mr. BAUMAN. I see.

Mrs. LAYFIELD. The doctors will do what needs to be done medically. It is just a question of the effects economically.

Mr. BAUMAN. When these medicare regulations are promulgated, is there a general effort to bring hospitals, physicians, and other health personnel into the process of making comments, so that the regulations bear some relationship to reality?

Mrs. LAYFIELD. In my experience we try to read the Federal Register and the Maryland Register to be alert.

No; we do not find we are asked to comment. We recognize we are a small hospital in a small town, but unless we find regulations, we generally do not have the opportunity.

Mr. BAUMAN. So your first awareness of the rules is when they are placed in the Federal Register for the comment period, this is your first instance of knowledge?

Mrs. LAYFIELD. That is right.

Mr. BAUMAN. Thank you.

Mrs. LAYFIELD. Other examples, one relates to the Civil Rights Act, and that is title VI.

There is some interesting wording in that act. We try to follow those wordings.

Executive Order 246 makes it illegal to discriminate in any way against a person because of race, creed, color, and sex.

We adhere to this. We do not have any problems in conforming to it, but the only problem we have is that we must document and demonstrate how we do this.

Well, that is not quite as easy, so we thought very diligently, and we have been guided by the State people who make the survey for the public health and welfare annually. We have a survey, and so we have devised a system of not putting into the admitting office the race of the individual. This must be on the medical records because there are some diseases which are more serious among one race than another, but in the admitting office, we have nothing about race so that the person who is making a room assignment cannot know what the race of the other person is, and we feel very comfortable that we have adhered to this. But when the time comes for an annual survey, we must complete records which say exactly what is the race of people in the rooms, and so we go around and literally count person by person, nose by nose, one, two, three, four, five; that is just what it is, but it is a little annoying.

Mr. BAUMAN. So in that effort to carry out regulations, it in fact makes it very difficult for you to do your job.

Mrs. LAYFIELD. That is what it amounts to.

Miss CULLEN. Have you found in the last few years you either had to hire more people or put a heavier workload on your staff to be able to keep up with the rules and regulations?

Mrs. LAYFIELD. Without question, in both finance and personnel records.

Miss CULLEN. Thank you.

Mrs. LAYFIELD. We have concerns about incineration of waste. The Federal regulations require a provision of an incinerator with a complete destruction of pathological waste.

The Maryland regulations permit transport of waste, and so we have a conflict here.

Interestingly enough, the Maryland regulations, the Maryland water resources rules are in conflict with other Maryland regulations, but we are speaking in particular about Federal, and we find when we have a Federal regulation, it states one thing, and the State regulation says another; we have to remember to try to accede to both of them.

Mr. BAUMAN. Would there be a significant saving if you were able to live by the somewhat more liberal standard of the Maryland authorities on this issue or if you had a shared facility for destruction of waste?

Mrs. LAYFIELD. At the present time, no, because when we built our incinerator we built the new hospital, we went by that.

Mr. BAUMAN. But the problem for the small hospitals in the area would be alleviated if they could use your facilities?

Mrs. LAYFIELD. Let us put it this way; they do.

Mr. BAUMAN. I suspect we will have a Federal agent knocking on somebody's door.

Mrs. LAYFIELD. It is all right for Federal. It is only State. We do have a good cooperative relationship locally.

Mr. BAUMAN. I understand. You work collectively.

Mrs. LAYFIELD. We also had concerns about the parent care program.

Mr. BAUMAN. Is this the relationship to reasonable volume of care issue?

Mrs. LAYFIELD. When I say concerns, what is concerning us is that we far exceed the amount of money that is specified through the grants that we have received over the years of the Gilberton Fund. That is not the point.

The point is keeping up with changing regulations so that we are able to keep records in the form in which they need to be kept in order to conform to the present regulations.

There are regulations that were made in 1969, and then regulations again in 1972, and again in 1979, which changed the record-keeping.

Last year we gave \$334,000, and we are required to give \$152,000 to charity. There is no question of the amount we give; it is simply a question of the changing regulations and trying to be sure we conform to the recordkeeping, so that we can demonstrate for Federal agencies what we are doing.

Mr. BAUMAN. The original Hill-Burton Act passed in the 1940's required that any hospital receiving building funds under that program had to provide a reasonable volume of care to charity patients?

Mrs. LAYFIELD. That is correct, but it was not a specified volume; it was an undetermined amount.

Mr. BAUMAN. And that was not really implemented until the last year or so as an actual definition of percentage?

Mrs. LAYFIELD. The percentage, yes; it has been within the last few years. We did have to keep more stringent records beginning in 1972.

Mr. BAUMAN. Now, the only statutory authority for HEW issuing regulations is in defining what the reasonable volume of care was; is that phrase in the law?

Mrs. LAYFIELD. That is correct. I remember, it was an undetermined amount, but it was that we shall provide a reasonable amount of charity care, and it was up to us, and that did not seem to be any problem at the time, because we always did.

Mr. BAUMAN. But you say in the last year, under these regulations, you were assigned a minimum of \$125,251 by HEW?

Mrs. LAYFIELD. That is based on the relationship—they did not assign the amount—we calculated, based on the relationship of the money that we were given over the period of years, because we had a number of Hill-Burton grants.

Mr. BAUMAN. But if HEW wished to base their action on their regulatory power, they could come into your hospital, examine your records, and if you did not come up with that determined standard, they could affect your funding in the future?

Mrs. LAYFIELD. Because of the change in regulations, this could go up and up and up.

At the present time we have a 20-year period of time, that we, according to the regulations as they stand now, are affected by.

Mr. BAUMAN. And then your obligation terminates after 20 years from the grant?

Mrs. LAYFIELD. That is correct.

Mr. BAUMAN. When does your last grant expire as far as you are concerned?

Mrs. LAYFIELD. 1992.

Mr. BAUMAN. So until that time, even if you accept no more Federal funding for building or anything, you remain under an obligation because you accepted Federal funds in the past.

Mrs. LAYFIELD. That is correct.

Mr. BAUMAN. Now, what happens to this \$234,000 or \$152,000 in regards to 5-year cost accounting, who pays for that?

Mrs. LAYFIELD. That is a cost of doing business.

Mr. BAUMAN. But the other patients pay for it?

Mrs. LAYFIELD. That is correct.

Mr. BAUMAN. And of course any hospital in the country is under the same regulatory restrictions if they have accepted funds?

Mrs. LAYFIELD. Yes.

Mr. BAUMAN. Which would be many thousands of hospitals, I would imagine.

Mrs. LAYFIELD. Yes.

Mr. BAUMAN. Has there been any disposition not to take Federal money because of this kind of regulation?

Mrs. LAYFIELD. We did not have Federal money in the last construction of the new hospital.

Mr. BAUMAN. Was that one of the prime reasons?

Mrs. LAYFIELD. That and the long delay involved in getting approval of financing, and we needed to move quickly.

Mr. CHASIN. This was going back to the grants program for energy conservation, one of the concerns of the American Hospital Association was the hospitals in Maryland, of those hospitals it was that particular concern.

There were questions raised if they took any money for the energy conservation measure, would they in fact be required to start giving so much care, because they took those grants, even though in fact the law does not speak to that at all, and according to the Department of Energy (DOE), that will never occur.

However, I do not suspect that the time has passed that anybody has foreseen what has occurred now, so that issue is a very real issue.

Mr. ALLEN. Congressman, in regard to the Hill-Burton Act, I think it is unfortunate we do not get the funds after a certain date, after a certain year, you are locked in forever.

The early 1970's, we were in there, but we do see the end of the tunnel, as far as you might say the statutory obligation is concerned.

We will always give charity care, but as to an obligation imposed, we do have the end of the tunnel.

Mr. BAUMAN. So what you are telling us, Mr. Duval, is that by regulation, or by statute—

Mr. DUVAL. HEW draws a distinction by regulation between Hill-Burton grants, and I think it is called the community assistance program.

I do not have the citation, and those who are unfortunate enough to accept the money after say, sometime in the early 1970's by regulation, are obligated to provide the care in perpetuity.

Mr. BAUMAN. That would, to this one Member of Congress, seem to require the quality of a statute rather than a regulation, a decision of that magnitude, but it was done by regulation.

Mr. DUVAL. Yes.

Mr. BAUMAN. Could you address yourself to what the regulations say as far as testing is concerned, of the prospective charity patients. When they come to you, is there some criteria?

Mrs. LAYFIELD. Yes.

Mr. BAUMAN. How stringent is it?

Mrs. LAYFIELD. It is very stringent. The income limit is specified.

Mr. BAUMAN. You are permitted to require proof that the patient is in fact unable to pay?

Mrs. LAYFIELD. That is correct.

Mr. DUVAL. We are required to give them notice that is available in English and Spanish, and to invite them to apply for it, which creates a problem, because we can satisfy our requirements in 3 months.

I think our finance people think in terms at 3 months a year, and by giving notice on an annual basis, it is somewhat a superfluous exercise, because if we were to satisfy the requirement by October or November 1, there is no more charity care available until the following July 1, and there is the problem of possibly misleading the patients, but it has to be there to satisfy the regulation.

Mr. BAUMAN. So that once you meet your quota of charitable cases, the dollar quota, you are not obligated under Federal regulations to provide it for the rest of the year, and still you have to tell them it is available, but not now.

Mr. ALLEN. The new regulations, that is not the way it reads, but the fact of the matter is that you are supposed to aggressively advertise your charity care, and in the process a lot of people do not qualify because the criterion is not necessarily advertised, is that correct?

Mrs. LAYFIELD. Yes.

Mr. ALLEN. So therefore administratively, when you advertise charity care, you disappoint a lot of people because they do not qualify, you probably get a lot of people who will pay it anyway, or their families, who say maybe there is no need to pay this, it is a Federal program that will pay for it, and as a matter of fact, the American Hospital Association has a suit in the district court in Illinois on this subject, which has not been finally resolved, but the judge has said go ahead and comply, while we talk it over, but we see now a serious public relations problem with it with increased administrative costs as a result of the new implementation.

Mr. BAUMAN. Mr. Chasin gave a rather graphic numerical description of the problem that hospitals in Maryland face, as far as the number of regulatory agencies involved is concerned. Have you done any sort of analysis, based on your recent budget, as to the number of personnel, and actual costs to Peninsula General to comply with the regulatory process?

Mrs. LAYFIELD. No; we have not.

Mr. BAUMAN. You would not even hazard a guess?

Mrs. LAYFIELD. I do not think that would be fair.

Mr. BAUMAN. Is it a considerable amount of your budget, not just something insignificant?

Mrs. LAYFIELD. When I say hazard a guess, I would feel without question we have had a full-time person on the staff because of regulations, but I would not estimate the total cost at that. That would be both in personnel and in the finance area.

Mr. BAUMAN. Well, the figure I used this morning before you arrived was from one reported authority which indicated that about \$90 billion a year results from the costs to the private sector because of Federal regulations. I am not saying you are a large part of that but you are in there somewhere.

Mrs. LAYFIELD. We have so many, so many surveys, I could go over on laboratory, and I did not come with that as an idea, but the laboratory has regulation after regulation, and, yes, it is important that they be regulated, because it is a vital area, but there are at least seven different agencies and most of them are Federal, whether it is the American Association of Blood Banks or the Communicative Disease Center in Atlanta, there are a lot of things that come into review for the same sort of thing. It is all over the hospital.

Mr. BAUMAN. The Professional Standards Review Organization, PSRO's, were established by Federal statutes some years ago. My experience has been that these foundations and other associations are set up to enforce these laws. In any given regional area they are now spending enormous budgets, hundreds of thousands of dollars, to specifically carry out Federal regulations for doctors and to see whether they are living up to the standards that are in the law and what the regulations say.

Have you seen any increase in professional standards and their quality?

Mrs. LAYFIELD. In improvement?

Mr. BAUMAN. A stricter application of medical standards to professionals.

Mrs. LAYFIELD. No. I might mention that we are excused by the Professional Standards Review Organization from admission review. They could find something like one-tenth of 1 percent admissions to question, so we are excused from that review.

Mr. BAUMAN. But other hospitals may be subjected to review of their admissions policy?

Mrs. LAYFIELD. If they are not as good as we are.

Mr. BAUMAN. Do we have any other questions?

Mr. DOOLING. Mrs. Layfield, how do you find out about the regulations that you are subject to?

Is there any service or publications that enable you to transact business with some assurance that you are not in violation of the newly promulgated regulations?

Mrs. LAYFIELD. No. We read the Federal Register, and through various other organizations we learn of these, and we spend a lot of our time reading, trying to find out what is going on, but I do not know of any organization, and if there is one, I would be happy to subscribe to it.

Mr. CHASIN. Our office goes through the Federal and Maryland Register both for comments and for new regulations. What we then

very often will do is summarize and send them out, but Mrs. Layfield is quite right, there is no one central service.

Mr. DOOLING. At the beginning of the Carter administration, the President issued a directive that the head of all agencies are supposed to read all regulations that are put out by their offices. Secretary Califano was advised that the directive would require him to go through the equivalent of reading "War and Peace," twice each week. You are running a hospital in a town of, say, 50,000 or 60,000 people without any of the staff resources that he has and I just cannot conceive of how it can be done.

Mrs. LAYFIELD. It really is not. Most of us try to read our own particular area. The Director of Finance tries to read for himself, the Director of Personnel, I try to read the patient care areas, the Administrator tries to do the safety and we each try to read our own.

Mr. CHASIN. The professional organizations will hear of a new regulation and very often they will play it up in the Journal, but most of the time if you are afraid you are violating something, you can normally call your hospital legal counsel.

Mr. WOLFENSBERGER. While your regulations are being formulated, do you contribute, do you comment, or do you assign a part of your State Hospital Association to go into it?

Mr. CHASIN. The State helps us. If something comes into radiology, I immediately send into radiology and say: "Read this, tell me what it says, and tell me if we already comply, is it good, tell me what is good and inferior," that is another way we try to keep up.

Mr. WOLFENSBERGER. So you do file comments frequently on proposed regulations?

Mrs. LAYFIELD. Yes.

Mr. BAUMAN. So you do periodically comment on both the Federal and State regulations?

Mrs. LAYFIELD. We did on one with respiratory, and it is driving me wacky.

Mr. BAUMAN. In the interest of time, we will not ask you to go into it.

Let me ask you this question. We have in the Congress of the United States, when it comes to matters of health, a number of committees that deal with health regulations: the Ways and Means Committee, the Health Subcommittee at Interstate and Foreign Commerce, and so on. It has not been my experience as a Member to serve on any of these health subcommittees, but in the House at large the Members tend to take the advice of the subcommittee members on good faith. Much of the health regulations are written in broad general terms, and left to the agencies that carry out the programs to promulgate and write regulations, simply because of the complicated nature of the health programs.

Do you have any confidence that if the Congress enacted legislation for review of such regulations, that we would have collectively, even with our staff assistants, the competency to judge health care policy?

I am asking you a hard question, but I question whether we would.

Mrs. LAYFIELD. Well, this is a record being made, and I certainly would hesitate to question your competence.

Mr. BAUMAN. I do not think you will have trouble with regulatory agencies, Mrs. Layfield. I think you have to admit it would be very difficult for statutory law to carry out in great detail many of the problems that you face in health care. Let me ask you this, do you think the political impact of congressional review, where someone could call me on the phone, or call a Senator, and say here is the regulation as now proposed, and under the law now on the books. Let us say it has been promulgated, you have 90 days to comment on this or veto it. Do you think something like that would inject some needed sanity into regulation writing?

Mrs. LAYFIELD. Your suggestion is that it might induce caution, is that it?

Mr. BAUMAN. Yes.

Mrs. LAYFIELD. I think it would.

Mr. BAUMAN. Any other questions?

I want to thank you for a very thorough presentation and one I think will be very useful to the committee.

Mrs. LAYFIELD. Thank you.

[Mrs. Layfield's prepared statement follows:]

THE PENINSULA
GENERAL HOSPITAL
MEDICAL CENTER

October 15, 1979

Prepared Statement of Virginia Layfield,
Associate Administrator,
Peninsula General Hospital Medical Center

My name is Virginia Layfield. I am the Associate Administrator of the Peninsula General Hospital Medical Center in Salisbury, Maryland. With me today are Mr. Richard M. Allen, President of the hospital's Board of Trustees and Mr. William G. Duvall, legal counsel to the hospital. We are here to express our concern about over regulation and conflict in regulations when two and more agencies promulgate requirements for the same aspect of hospital business activity.

Mr. Steven Chasin, who preceded me, has spoken of the problems identified and described by the hospitals in Maryland, and presented a study made by Maryland hospitals which demonstrates the duplication of regulation. I would like to briefly describe several examples of ineffective, conflicting and excessive regulation from among the many we experience.

On March 6, 1979, the Secretary of Health, Education and Welfare sent to Congress a draft of a bill called the Hospital Cost Containment Act of 1979 designed to establish voluntary limits on the annual increases in total hospital expenses and to provide for mandatory limits on the annual increases in hospital inpatient revenues to the extent that the voluntary limits are not effective.

The calculation of the voluntary limits on hospital costs are computed without regard to volume changes. Therefore, an institution in a growth area could experience an increase in admissions which in turn add to cost and would certainly be forced to the mandatory program.

For Maryland hospitals the Cost Containment Act would be a duplication of regulations because there is a system (Health Services Cost Review Commission) which has operated since 1974.

THE PENINSULA
GENERAL HOSPITAL
MEDICAL CENTER

October 15, 1979

The Commission has been very successful in this effort to control cost in the state. In 1977, cost per admission in Maryland increased by 8.6% compared to the national average of over 13%. In 1978, the Maryland figures were 8.75% compared to national average of nearly 13%.

Based on the experience of the Commission in Maryland, there certainly is not any need for duplicate regulations at the federal level which certainly would cause some additional cost to comply with two systems.

CIVIL RIGHTS COMPLIANCE

The Federal Civil Rights Act of 1964 and U. S. Public Health and Welfare Executive Order 11246 make it illegal to discriminate in any way against any person because of race, creed, color, sex or national origin through any program, service or activity which receives Federal or State financial assistance.

We must document "continued, conscientious efforts to assure non-discrimination" and how patients are "assigned to rooms without regard to race, color or national origin". In order to be able to demonstrate that assignment is made without discrimination, no record of race is maintained on the admitting files used for room assignment.

However, it is necessary annually to provide evidence of Title VI Hospital Compliance to the State of Maryland. This requires that we must furnish a breakdown of the number of minority inpatients by type of room assignment. (Copy of form attached). The only way this can be accomplished is a person-to-person, room-by-room count and tabulation which illustrates the difficulty of complying with conflicting regulations.

(The form referred to follows:)

(2)

STATE OF MARYLAND
OFFICE OF THE SECRETARY OF HEALTH AND MENTAL HYGIENE

TITLE VI COMPLIANCE OFFICE

201 WEST PRESTON STREET
BALTIMORE, MARYLAND 21201
(301)383-2725



Title VI Hospital Compliance Report

Peninsula General Hospital Medical Center

December 20, 1978

NAME OF HOSPITAL

DATE

- Hospitals, in writing, must provide staff, employees, patients, the general public, and volunteers with a statement which clearly expresses their nondiscriminatory policies and practices. The following are examples of how this can be accomplished: Yellow page listings, newspaper advertisements and brochures having wide public circulation, statement of admission policies, staff manuals, and employee handbooks. The person or persons conducting the on-site review will request verification of the above on the day of the review.
- Indicate the number of patients by race of patient receiving any of the following types of care on one day. (Preferably the day before this report is prepared) Indicate date December 18, 1978

Type of Care	Total (All)	Negro	American Indian	Oriental	Spanish Surnamed American
OUT-PATIENT SERVICE	77	11			
CLINIC SERVICE	21	9			
EMERGENCY	100	42			
OTHER					
IN-PATIENT CARE	67	22			
TOTAL	265	84			

Indicate below the number of minority in-patients in the above census by type of room assignment, according to the following breakdown:

Type of Room Assignment	Negro	American Indian	Oriental	Spanish Surnamed American
Number of minority patients in single rooms or in room alone	21		1	
Number of minority patients in semi-private or ward rooms having only minority patients	6			
Number of minority patients in semi-private or ward rooms with one or more non-minority patients	24			1
TOTAL	51		1	1

THE PENINSULA
GENERAL HOSPITAL
MEDICAL CENTER

October 15, 1979

PRE-ADMISSION TESTING

An effective program of pre-admission testing was instituted in 1969 to reduce hospital length of stay by having pre-operative evaluation testing performed on an outpatient basis. There is a total commitment to this system, with orders written in the physician's office; scheduling of tests at patient's convenience so time is not lost from work; and courier delivery of test results to physicians' offices so he can evaluate; order additional tests, if indicated; and even postpone admission if there is therapeutic indication for treatment prior to surgery. This program has been extremely successful with 94-96% of all elective admissions for surgery have P.A.T. Both patient length of stay and hospital costs have been reduced. The charges for this testing are included on the inpatient bill.

Now a change in Medicare regulations requires that pre-admission testing be done within 48 hours of admission. It is possible only to complete minimal evaluation within this time frame. If a series of tests such as an upper GI and barium enema is indicated, the physician has no choice but to admit a patient who could have these procedures as an outpatient. Neither does this stringent 48-hour requirement permit time to order subsequent tests that could be indicated by initial Laboratory, Pulmonary or Cardiology tests. The patient must instead be admitted, operative schedule delayed, and preparatory work up done as an inpatient.

The result of this regulation is definite increase in cost and increase in utilization of hospital beds - an effect none of us favors.

THE PENINSULA
GENERAL HOSPITAL
MEDICAL CENTER

October 15, 1979

INCINERATION OF WASTE

Federal regulations (Hill-Burton, copy attached) require provision of an incinerator for the complete destruction of pathological and infectious waste. This involves expensive duplication, because it is sometimes more economical to transport waste to a shared incinerator facility.

It is interesting that Maryland Regulations permit transport of hospital waste. However, the Maryland Water Resources Administration requires hospital waste to be autoclaved before shipping for disposal; while the Division of Licensing and Certification requires waste to be placed in leak proof containers and not autoclaved before shipment. Also of interest is that Maryland Regulations require that records shall be made available for review of the Department of Health and Mental Hygiene relative to the amount of waste. Also Maryland prohibits incineration of general waste such as paper unless special permission is granted. (Copy attached).

It seems impossible for hospitals to comply with these conflicting requirements.

(The copy of regulations referred to follows:)

④

GENERAL HOSPITAL
Section 7.21.

7.21. LINEN SERVICES

A. On-Site Processing.

If linen is to be processed on the hospital site, the following shall be provided:

(1) Laundry processing room with commercial-type equipment which can process seven days' needs within a regularly scheduled work week. Hand-washing facilities shall be provided.

(2) Soiled linen receiving, holding, and sorting room with handwashing facilities.

(3) Storage for laundry supplies.

(4) Clean linen inspection and mending room or area.

(5) Clean linen storage, issuing, and holding room or area.

(6) Janitors' closet containing a floor receptor or service sink and storage space for housekeeping equipment and supplies.

(7) Cart storage. (See sec. 7.22 for cart sanitizing facilities.)

B. Off-Site Processing.

If linen is processed off the hospital site, the following shall be provided:

(1) Soiled linen holding room.

(2) Clean linen receiving, holding, inspection, and storage room(s).

(3) Cart storage. (See sec. 7.22 for cart sanitizing facilities.)

7.22. FACILITIES FOR CLEANING AND SANITIZING CARTS

Facilities shall be provided to clean and sanitize carts serving the central medical and surgical supply department, dietary facilities, and linen services. These may be centralized or departmentalized.

7.23. EMPLOYEES' FACILITIES

In addition to the employees' facilities such as locker rooms, lounges, toilets, or shower facilities called for in certain departments (see secs. 7.2.B(6), 7.3.B(4), 7.7.D(13) and (17), 7.8.D(13) and (14), 7.14.B(4), and 7.16.B(12), a sufficient number of such facilities as required to accommodate the needs of all personnel and volunteers shall be provided.

7.24. JANITORS' CLOSETS

In addition to the janitors' closets called for in certain departments (see secs. 7.4.H, 7.7.D(18), 7.8.D(15),

7.16.B(13), and 7.21.A(6)) sufficient janitors' closets shall be provided throughout the facility as required to maintain a clean and sanitary environment. Each shall contain a floor receptor or service sink and storage space for housekeeping equipment and supplies.

7.25. ENGINEERING SERVICE AND EQUIPMENT AREAS

The following shall be provided:

A. Room(s) or Separate Building(s) for Boilers, Mechanical Equipment, and Electrical Equipment.

B. Engineer's Office.

C. Maintenance Shop(s).

D. Storage Room for Building Maintenance Supplies.

E. Yard Equipment Storage.

A separate room or building for yard maintenance equipment and supplies.

7.26. WASTE PROCESSING SERVICES

A. Storage and Disposal.

Space and facilities shall be provided for the sanitary storage and disposal of waste by incineration, mechanical destruction, compaction, containerization, removal, or by a combination of techniques.

B. Incinerator.

A gas, electric, or oil-fired incinerator shall be provided for the complete destruction of pathological and infectious waste. Infectious waste shall include, but shall not be limited to, dressings and material from open wounds, laboratory specimens, and all waste material from isolation rooms.

(1) The incinerator shall be in a separate room or placed outdoors.

(2) Design and construction of incinerators and trash chutes shall be in accordance with NFPA Standard 82.

(3) Incinerators shall be designed and equipped to conform to requirements prescribed by air pollution regulations in the area.

7.27. DETAILS AND FINISHES

All details and finishes for modernization projects as well as for new construction shall comply with the following:

A. Details.

(1) Compartmentation, exits, automatic extinguishing systems, and other details relating to fire pre-

201 WEST PRESTON STREET • BALTIMORE, MARYLAND 21201 • Area Code 301 EE 393-2740

Neil Solomon, M.D., Ph.D., ~~SECRET~~

ACTION	INFO
☐	☒
☐	☒
☐	☒
☐	☒
☐	☒
☒	☒
☒	☒

Done
 Tech Thompson
 and Glee

FROM: Neil Solomon, M.D., Ph.D.
Secretary of Health and Mental Hygiene

- A. Laboratory wastes, including pathologic specimens and disposal fomites attendant thereto: Pathologic specimens shall include all body tissues, specimens of blood elements, excreta and secretions obtained from patients.
- B. Operating room, out-patient areas, and emergency room pathologic specimens and disposable fomites, and other patient contact materials.
- C. Equipment, instruments, utensils, fomites of a disposable nature, and other wastes from the rooms of patients with suspected or diagnosed communicable disease, which by nature of the disease, are required to be isolated by public health agencies.

(6)

- 2 -

II. Disposal of Infectious Waste

The approved method of disposing of all "infectious waste" shall be by incineration. Both off-site and on-site incineration shall be acceptable providing that the generator or the disposer of the waste complies with the requirements set forth in this interpretive guideline and complies with all other Departmental requirements relating to the construction and use of incinerators and general handling of wastes generated by health care facilities. Incineration of general waste such as paper, kitchen waste and general trash is prohibited unless special permission is granted by the Department. The Environmental Health Administration, within the Department, is the approving authority for the disposal of wastes.

III. Transportation of Infectious Waste

The transportation of infectious waste to an off-site incinerator is permissible. The waste must be packaged in an airtight, leakproof, puncture-resistant bag of no less than 3 mil thickness and housed within a separate outer container. The outer container shall be constructed of corrugated cardboard of no less than 1/2 inch thickness, single use, liquid-proof, sealable, and combustible. If the infectious waste is to be transported at a distance greater than 10 miles, the infectious waste must be, in addition to the aforementioned packaging, housed in a metal container which is able to withstand any impact should an accident occur. All outer containers shall be appropriately labeled so as to identify the material being transported. Records relative to the amount of waste, methods of packaging, transportation and the destination for off-site incineration shall be made available for review by the Department. No infectious waste shall be stored for more than 24 hours. Under no circumstances shall infectious waste be combined with other general waste.

IV. Maryland Air Quality Requirements

Incinerators used for the disposal of infectious waste must be capable of meeting the Department's air pollution control regulations. All existing incinerators must be registered, and new or replacement incinerators must receive a construction permit from the Department. All infectious waste incinerators must obtain a designated hazardous substance (DHS) permit from the Department.

V. Federal Requirements (Hill-Burton Program)

All health care facilities which have in the past, are now, or will be participating in Federal funding, must comply with Federal requirements for the period of their commitment (normally twenty years). Federal requirements generally call for on-site incineration of infectious waste from hospitals; however, they allow on-site or off-site incineration of infectious waste from nursing homes.

NS:dk

cc: Mr. Donald H. Noren
Dr. Benjamin D. White

THE PENINSULA
GENERAL HOSPITAL
MEDICAL CENTER

October 15, 1979

An example of excessive regulation would be the Hill-Burton Program (Title VI of the Public Health Service Act).

This program was originally instituted in the mid 1940's to help hospitals construct needed facilities with the requirement that hospitals provide an undetermined amount of charity care. Through the years, the requirement to provide charity care has become more specific and stringent. Detailed specifications concerning dollar amounts of charity care and the administration of charity care policies were included in regulations published in 1972. These regulations were made retroactive and placed additional administrative burdens on hospitals which are essentially matters of recordkeeping. PGHMC consistently exceeds the minimum amount of charity care specified for our Hospital by Hill Burton regulations, which is \$152,251. Last year, the amount of charity care provided was \$234,195.

In 1979, regulations were again changed substantially increasing the administrative burdens and including an inflation factor which would increase the amount of charity care the hospitals would be required to give. These items put additional pressure on hospitals in their attempt to voluntarily control rising cost.

This, perhaps, sums up our real concern with over regulation -- it is time consuming and expensive.

8

Mr. BAUMAN. Our next witness will be Mr. Edward J. Kremer of the Hanna and Kremer Insurance Co.

We are very honored to have one of the top award winners in the Nation, in the insurance field, testifying before us today. Mr. Kremer was this year's recipient of the Woodworth Memorial Award from the IIAA.

**STATEMENT OF EDWARD J. KREMER, HANNA AND KREMER
INSURANCE CO.**

Mr. KREMER. Thank you, Congressman.

I have a few copies of my testimony with me this morning. They are not prepared as professionally as I might have preferred, but I have been out of town and got in this morning and found my secretary was ill.

My name is Edward J. Kremer and I am president of Hanna and Kremer Insurance, Inc. a local independent insurance agency located here in Salisbury, Md. In addition, so that no one will think that an attempt to withhold information from the committee, I wish to advise you that I have just recently completed a 6-year stint as chairman of the Federal Affairs Committee for the Independent Insurance Agents of America, Inc., this is the largest insurance producers trade association in the country. I do not represent nor do I speak for that organization this morning and I point out this former assignment so that you will clearly understand that I may have a higher degree of interest in legislative and regulatory matters and access to more pertinent information.

The purpose of these hearings is to provide the subcommittee with information regarding the problems created for small business people by Federal regulatory agencies. My testimony may be somewhat unique because I have not come here to tell horror stories. I could document cases in which bureaucratic redtape required by HEW has caused serious financial difficulties for clients of ours who are contractors but that would best be covered by others. I could document a story about a client who closed his business here and moved back to his former State of residence to work for someone else because he could not meet demands placed upon him by OSHA. Also I could tell you about serious difficulties that the insurance business has with the Farmers Home Administration and the Farm Credit Administration and I would be happy to submit written comments with regard to those agencies if the subcommittee desires.

My comments this morning will be directed to the need for legislative control over the Federal Trade Commission which in my opinion is the most difficult bureaucracy with which the free-enterprise system has to cope today.

It has been said that the Federal Trade Commission has become a second legislative branch of our Government. There is no doubt in my mind that the Federal Trade Commission has willfully exceeded its statutory limitations in many areas, but that is best left to the lawyers. However, I believe I can today shed some factual light on the Federal Trade Commission's activities in an area where they have no authority.

It is ironic that the insurance industry enjoys certain immunities from Federal regulation provided by the McCarran-Ferguson Act

which provides the States the official status of insurance regulators and yet I am participating in this hearing. There is no question in my mind that the Federal Trade Commission's insurance activities go far beyond the scope that Congress intended and that unless legislative control of this agency is established they will eventually erode the statutory effect of the McCarran-Ferguson Act to the point where it is meaningless.

There are many Federal insurance programs of questionable value, but the best example of Federal Government trespass on the State's insurance authority is the Federal Trade Commission. Despite the specific exemption in the McCarran-Ferguson Act of "the business of insurance" from regulation by the Federal Trade Commission, over the past 2 years it has embarked on a coordinated program of insurance investigations, 29 last year alone, even while seeking repeal of McCarran as a legal obstacle to these very activities undertaken. There are currently eight full-time employees working on insurance exclusively.

Because its mandate is so broad the Federal Trade Commission assumes it can regulate anything it wants including insurance under its ambiguously defined consumer protection authority. Except for appropriations, neither Congress nor the President has direct control over the Federal Trade Commission's activities. In its various capacities as investigator, prosecutor, judge, and rule-maker, the Federal Trade Commission can overrule, all 50 State legislatures and State supreme courts in determining which commercial acts are fair and lawful. Recently, at least, it has served as a lightning rod for collecting self-styled consumer advocates whose most notable feature in common is their lack of direct experience with consumers in the business world. Finally its current director, Michael Pertschuck, has announced to the Nation's private sector that "We've got to police virtually the whole economy."

Can you imagine the impact of these so-called consumer protectionists in an industry whose sole function in our free-enterprise system is the selection and pricing of risk? Obviously with the Federal Trade Commission regulating the insurance business there would be no need for underwriters or raters because their very purpose would be considered discriminatory and hence prohibited by regulation. In fact there would be no use for insurance companies or agents. The Federal Government could then take care of all of us from cradle to grave.

I have personally been interviewed by an attorney from the Federal Trade Commission's Bureau of Competition and I understand, by the way, that in its employ, that section of the Federal Trade Commission alone has 600 attorneys. If his thinking is at all representative of the Commission then I can tell you that the Federal Trade Commission would regulate the insurance business to oblivion.

It is quite evident that the individual to whom I spoke felt that any price variation on auto insurance, for example, based on age, driving record or lack of one, accident record or lack of one, geographic location, sex, use of the vehicle should not be permitted on the grounds that it is discriminatory. Companies would not be allowed to make profits because consumer interests would not countenance profitmaking on a service that was mandated by Fed-

eral regulation. Hence no capital would be generated from the transfer of risk and the Federal apparatus would have to fill the vacuum. The Federal Trade Commission cannot conceive the notion that any industry can properly serve the citizens of this Nation without the benefit of their tampering with the machinery. They assume absence of the Federal Trade Commission regulation means unfair pricing and conspiracy to restrain trade and artificially elevate prices.

Probably the best example of the efficiency and durability of the free-enterprise system is the property and casualty insurance industry. I can assure you that there is keen competition on every level, price, service, method of delivery and even more importantly in meeting the needs of the consumer with new and broader and innovative coverages. We believe that congressional legislative veto authority over the programs and activities of the Federal Trade Commission and other Federal regulatory agencies is necessary for the maintenance of fair and open competition in a free enterprise system. If the system must be changed for reasons of overriding social justice then, at least, let these decisions be made by the elected Representatives who are answerable to the public.

I sincerely hope that this subcommittee will give a favorable report on H.R. 1776. We need the strongest possible legislation designed to impose congressional veto power over all Federal regulatory agencies including the Federal Trade Commission. If there are any questions I will try to answer them. Thank you very much.

Mr. BAUMAN. Thank you very much for a very pointed statement, as it pertains to the FTC.

Do I understand from what you say that it is your feeling that the McCarran-Ferguson Act which has not been repealed, is in effect being repealed by subsequent statutory authority? If properly interpreted, do you think these two statutes would be complementary rather than exclusive of each other?

Mr. KREMER. I am not sure of that.

Mr. BAUMAN. My concern is that they may be going beyond the consumer protection authority that the law gives them.

Mr. KREMER. I do not think there is any question of that, and our feeling is that it should be reviewed by Congress, and if Congress in fact says yes, the FTC should do this, then in the consumer's best interest, we feel we could accept that.

Our concern is that they may be avoiding the intent of Congress. Congress has specifically immunized the insurance industry from Federal regulations, and the FTC gets into things like agreements with body shops and health care services and things like that, and says that it is really not part of the insurance business, that is other commerce, and, therefore, we have the authority to do it. We think it is a highly questionable position for them to take, because it does in fact impose Federal regulations on insurance.

Mr. BAUMAN. What are the areas of insurance activity the FTC has been getting into?

You mentioned there are 29 studies.

Mr. KREMER. There were 29 studies last year, the broad range, the impact of repeal, McCarran-Ferguson on various segments of the business, consumer reports with regard to the life insurance industry, which is not my field of expertise, but they have come out

with a report on the life insurance business. This one treats life insurance solely as an investment, and makes comparison of life insurance with other forms of capital investment, and certainly life insurance has other purposes, but they are very narrow. They have reports in which they question pricing methods, and certainly there are other areas than just what they point out, where competition can take place, as I tried to indicate in my testimony.

Mr. BAUMAN. And do you think this results from the advocacy role which the FTC is assuming under its current chairman?

Mr. KREMER. I have been asked that question before, Congressman, and let me say that it is my personal feeling that the staff, the full-time permanent staff over at the FTC would continue to pursue these activities regardless of who the chairman was.

Mr. BAUMAN. Because of its composition?

Mr. KREMER. Yes.

Mr. BAUMAN. Does the Federal Trade Commission regulate the insurance industry in any way now?

Mr. KREMER. Only in the areas of advertising, and things like that. They feel this mandate does give them authority to do so and they have recently intervened, as I say, in two cases I know of, that had to do with agreements that certain insurance carriers wanted to enter into, with body shops, in an effort to hold down the cost of automobile repairs. Also in, I believe it was prescription drugs for sick and injured people.

Mr. BAUMAN. Mr. Gladden mentioned a number of pieces of legislation that would in fact perhaps invite the Federal control of the various areas of the insurance industry; workmen's compensation and several others.

So far the FTC has not done anything other than its studies, before going into any proposed rulemaking. They do not have that authority?

Mr. KREMER. That is right.

Mr. BAUMAN. I am trying to recall, because I know there has been a great deal of controversy in the Congress about the FTC, what the status of congressional reaction of that is. I do not serve on the committees involved. We have not had an FTC authorization bill for 2 years.

Mr. KREMER. That is right.

Mr. BAUMAN. In fact, it will be before our Rules Committee next Wednesday.

Mr. KREMER. I think there is some kind of 45-day provision to continue existing programs or something like that.

Mr. BAUMAN. The continuing resolution deals with that.

Mr. KREMER. Yes.

Mr. BAUMAN. But there will be a number of attempts made, I have been informed, to restrict the FTC's activity.

Mr. KREMER. Yes; specifically, as a result of the apparent broadening of this, as I mentioned in the testimony, the principle place where the consumer protection seems to be.

Mr. BAUMAN. If in fact the McCarran-Ferguson Act were to be repealed and amended, and the FTC were given the authority to issue Federal regulations for insurance, do you have any doubt about the direction that they would go if they were given Federal regulation writing power?

Mr. KREMER. Not based on the interview I have had, no, sir, there is no question. It is in the testimony. I think when you begin to apply the principles of the bureau, competition for example adheres to a business whose very nature as I said has to be discriminatory, because what you are trying to do is select and price a risk, and you cannot do that without being discriminatory. You can do it without being unfairly discriminatory, and I think that is the important distinction.

Mr. BAUMAN. So what we see here is an instance where the Congress is reacting to an agency which has already overstepped its bounds, and we are in effect attempting to exercise a legislative veto.

Mr. KREMER. I hope so.

Mr. BAUMAN. Any other questions?

Mr. MCGINNIS. I have been following the Federal Trade Commission regulations this year. I think one of the things I can reasonably assure you is that they are not going to get into any new areas of regulation this year. There has been quite a fight to hold onto what they already have. One of the points that should be made is that on the Rules Committee, we will be meeting on the authorization for 2 or 3 years for the Federal Trade Commission. It is a foregone conclusion that that bill, as it passes the House, will provide a congressional veto to specifically be applicable to that agency.

That is quite aside from what the committee does with the generic bill applied to all Federal regulations.

Mr. KREMER. That is good news for us, but nevertheless, we do support, I do support the legislation that will give congressional veto to cover all of the Federal agencies.

Mr. BAUMAN. I notice in your comments, you are trying to provide information regarding possible abuse or misapplication of Farmer's Home and Farm Credit Administration regulations. I do not want to place a burden on you, because I know you are in private business, and that is the important thing, but if you do have any ready examples we could have of this abuse of regulatory power we would appreciate it. Many of the complaints I have had involve those agencies and their policies.

Mr. KREMER. We have a particular interest in the Farm Credit Administration, and in the interpretation of the 1970 amendments to the Farm Credit Act. I think there is some appropriation legislation before the Congress now having to do with the Farm Credit Administration. I will be glad to get you some written material in regard to that.

Mr. MCGINNIS. Thank you very much. We thank you for your statement.

Mr. KREMER. Thank you.

[The material referred to above follows:]

COMMENTS
OF THE
INDEPENDENT INSURANCE AGENTS OF AMERICA, INC.
BEFORE THE AGRICULTURAL CREDIT AND
RURAL ELECTRIFICATION SUBCOMMITTEE
OF THE
COMMITTEE ON AGRICULTURE,
NUTRITION, AND FORESTRY
OF THE
UNITED STATES SENATE
ON
S. 1465
FARM CREDIT ACT AMENDMENTS OF 1979

Presented By

Daniel J. Morrissey,
IIAA Farm Consultant

October 9, 1979

My name is Daniel J. Morrissey; I am an independent property-casualty insurance agent affiliated with Lohman Brothers, located in Geneseo, Illinois, and have responsibility within that agency for a farm department that generates approximately one-half million dollars annually in premium volume.

I appear before you today as the farm consultant to the Independent Insurance Agents of America, Inc. (IIAA), a national association representing approximately 126,000 licensed independent property-casualty agents, and 250,000 insurance persons located in virtually every community in the United States -- including just about every rural and farming district in the country. IIAA's member agents are small businessmen who take great pride in the personal insurance counselling and service they provide to this nation's farmers and rural homeowners.

Accompanying me today is Jeffrey M. Yates, IIAA's General Counsel.

On the occasion of your consideration of the amendments contained in S.1465, designed to improve the operation of the Farm Credit System,

it is appropriate to take a close look at one aspect of the program, entirely unrelated to credit, where Congressional intent as embodied in the Farm Credit Act of 1971 has not been carried out; and where if current initiatives continue, the long-term interests of this nation's farmers will not be served, and unaffiliated small businesses will continue to be faced with unfair competition from government backed Farm Credit lending institutions. The programs are the Production Credit Association (PCA) and Federal Land Bank Association (FLBA) crop-hail and collateral insurance programs under which Farm Credit institutions in certain districts have been authorized to sell virtually every type of property-casualty farm insurance coverage, with the exception of automobile, in spite of the clearly expressed Congressional intent in 1971 that these coverages be strictly limited, and only offered when similar service is not being provided adequately in terms of cost, quality, and availability by unaffiliated businesses in the community.

Congress hotly debated the sections of the Farm Credit Act of 1971 that would permit PCAs and FLBAs to sell insurance as a "financially related" service. In an effort to reach an accommodation on the issue, the conferees agreed to limit strictly the lines of insurance that PCAs and FLBAs could sell, because of the competitive advantages these institutions would have over unaffiliated small businesses, and because of the Conferees' fear that these institutions would be diverted from their primary function of extending agricultural credit. The Conferees concluded that:

"...the sale of liability insurance, and any insurance on passenger automobiles, is not "necessary and incident" to the functions of the lending institutions; but that they should be able to sell such insurance as may be necessary to protect the loan. Thus, credit life insurance could be sold in an amount appropriate to insure repayment of the loan, and insurance against loss of any collateral securing a loan could be sold for the full value of such collateral."¹

¹ See footnotes at end of article.

In spite of this Conference Report language, PCAs and FLEAs have been authorized to offer liability coverages as a part of farmowners and homeowners packages and have read the "collateral" restriction out of the report language by defining "collateral" to be any asset where "...loan repayment reasonably may be considered to be jeopardized if such assets are not protected by insurance."²

Further, before reaching this compromise, the 1971 Conferees were assured by the then Governor of the Farm Credit System in a letter to Senator Talmadge, dated November 3, 1971 that the Farm Credit System would not enter the insurance business unless unaffiliated businesses were not adequately providing the service in a particular community:

"The need factor has been evaluated at the local district and Federal Board levels. This approval procedure should reassure the committee that the system is only concerned with providing services where member owners have determined that real needs exist."³

The requirement to demonstrate need for the particular service before authorizing it reflected the conclusions of the Commission on Agricultural Credit, the proposals of which ultimately emerged as the Farm Credit Act of 1971:

"(1) The term "credit related" should mean such business services as recordkeeping, credit life insurance, and estate planning. The term does not include services relating to the physical farming operation.

(2) Credit related services should be undertaken only when a substantial number of members, on an Association or district-wide basis, have a need for the System to provide such services.

(3) The primary consideration in offering any service should be the benefit it provides members and the lender in using and extending credit, and not the

See footnotes at end of article.

remuneration which may accrue to the Banks or Associations.

(4) The availability of competent services through other normal business channels should be recognized and, where they are provided at reasonable cost, the System should not develop competing services but assist members in the profitable use of such services."⁴

Even the Farm Credit Administration's regulations condition approval for an association to offer a financially related service upon four criteria, one of which is:

"(1) Need for the service based on persuasive evidence that membership need for and interest in the proposed service is sufficient to insure that a quality service can be provided at reasonable cost and that similar service is not being provided adequately (cost, quality, availability) by others in the community."⁵ (Emphasis added)

The basic problem is that in spite of the Report of the Commission on Agricultural Credit, the will of Congress as expressed in the Conference Report, and the Farm Credit Administration's own regulations, PCA and FLBA insurance programs have been authorized with absolutely no showing that comparable insurance services are not being adequately provided by unaffiliated businesses in the community in which the particular PCA and FLBA operates.

We believe that S.1465 should be amended specifically to require that before the Farm Credit Administration can authorize a Farm Credit institution to offer insurance as a financially related service it must make a finding based on the preponderance of the evidence contained in the factual record that similar service is not being provided adequately in terms of cost, quality, or availability by others in the particular community served by the Farm Credit institution. The statute should also require that notice of each such application be published in at least two newspapers having general circulation in each of the trade areas in which the particular association does business. Such notice would summarize

See footnotes at end of article.

the application of the association and would invite interested parties to submit written comments on the availability of the particular lines of insurance that are the subject of the application in terms of "cost, quality or availability."

Such procedures would assure that the Farm Credit Administration's own regulations are carried out and that the decision to authorize a particular insurance service is based on credible evidence as to what is available in the insurance markets in the particular community. The establishment of meaningful procedures to make the need determination has been IIAA's central goal in Comments submitted to the Farm Credit Administration in April 12, 1972 and February 9, 1976, and continuing correspondence with the Governor of the Farm Credit System since those formal comments. The Farm Credit Administration has shown absolutely no inclination to adopt these or equivalent procedures to assure that there is an objective determination of need before authorizing an insurance service in a particular community.

We also believe the statute should be amended to reflect the agreement of the Conferees in 1971 not to permit the sale of liability coverages and to limit the sale of property coverages to the collateral that is the formal security interest granted in connection with the secured loan.

Unless Congress acts now to carry out the original intent of the Commission on Agricultural Credit and the 1971 Conferees, Farm Credit insurance programs are likely to expand on a wholesale basis because of the promise of extra income to the cooperatives. Section 404 of S.1465 would directly facilitate the expansion of these insurance programs by authorizing the establishment of service corporations for the specific purpose of performing financially related services for Farm Credit institutions.

We believe wholesale entry of PCAs and FLBAs into the insurance agency business would be against the best interests of this nation's farmers for several reasons. First, the promise of growing income from expanded insurance activities will divert associations from their primary function of extending farm credit, thereby potentially jeopardizing the solvency of particular cooperatives and frustrating the goals of S.1465 to build a stronger Farm Credit System. This danger is very real because the cooperatives are already marketing

these insurance programs as moneymakers for the cooperative; not out of a demonstrated member need for the service.

Second, as a general rule, farmers will not receive the same professional counselling and service when purchasing insurance from a PCA or FLBA employee who sells insurance as a sideline to his lending responsibility. In contrast, the independent agent's primary business is selling insurance, and he depends upon a satisfied insured to stay in business.

Third, whenever insurance is sold in connection with the lending of money, there is the danger that the borrower's freedom to choose the insurance of his choice will be compromised whether through the subtle suggestions of the loan officer or his own perception that he will stand a better chance of procuring the loan from the institution if he buys his insurance there. The fact that PCAs and FLBAs are cooperatives, and the borrower is part owner, is irrelevant; what is relevant is the particular borrower's situation -- how badly he needs credit and the risk that the cooperative will deny the loan. The greater the need or risk, the more inevitable the tying effect. Not only is this tying effect contrary to the best interests of the farmer, who buys his insurance from the cooperative to facilitate getting his loan, rather than because it is the best product; it is unfair to the unaffiliated agent.

The 1971 Conferees were keenly aware of the potential for unfair competition from wholesale entry of Farm Credit institutions into the insurance business. This awareness was a large reason for the restrictions placed on these insurance activities by Congress. In presenting the Conference Report to the House, Congressman Poage reflected this concern:

"I shall not take the time of the House to elaborate on the substance of the conference agreement. The details are included in the statement of managers. I would only mention that there was considerable controversy over House report language dealing with the insurance services which should be rendered by Farm Credit System lenders to their members. The House report language was quite restrictive while the Senate report was silent on the issue. In conference, we

worked out report language which we feel will permit the Farm Credit System to adequately serve its borrowers without endangering legitimate insurance agents and companies with unfair competition."⁶

Consider the following substantial competitive advantages PCAs and FLBAs have over unaffiliated agencies:

1. The likelihood that the purchase of insurance will be tied to the lending of money as discussed above;
2. The ability to "dangle the carrot" of using commission income to reduce future interest rates; unaffiliated agents are prohibited by the anti-rebate laws from offering any similar incentive or discount;
3. Access to confidential policy information submitted in connection with loans, including dates of expiration, premium amounts, coverages, and coverage amounts. This is an incredible advantage, unavailable to the unaffiliated agent, which enables the cooperative to quote selectively on risks it knows it can beat. The use of expiration information submitted in connection with a loan by cooperatives to pursue their insurance activities should be strictly prohibited by statute; and
4. While FLBAs and PCAs have repaid their indebtedness to the government, they still derive important advantages in being able to call upon the resources of the other institutions in the Farm Credit System. In addition, FLBAs are exempt from federal income tax and the interest on the notes that both FLBAs and PCAs issue to raise money are exempt from state and local taxation making them extremely attractive investments. Thus, these institutions have substantial capital at their disposal to finance their insurance activities that unaffiliated agencies do not

There is no way to neutralize the competitive advantages that PCAs and FLBAs have over unaffiliated insurance agencies. This is why the Conferees in 1971 strictly limited the types of insurance these

institutions could sell and limited such sales to those communities where similar services were not being provided by unaffiliated businesses. We ask that S.1465 be amended to carry out the congressional intent expressed in the Farm Credit Act of 1971. Only in this way will the long-term interests of the farmers of this nation be served, and unfair competition with unaffiliated independent small businessmen be avoided.

Respectfully submitted,

Daniel J. Morrissey
IIAA Farm Consultant

FOOTNOTES

¹Conference Report No. 92-679, 92d Congress, 1st Session 50, 54, 55 (1971). (Emphasis added)

²FCA letter of approval and instruction to pilot district banks regarding collateral insurance.

³Conference Report No.92-679, 92d Congress, 1st Session, P. 53 (1971).

⁴The Farm Credit System in the 70's at 21. (Emphasis added)

⁵(Section 618.8010) The Federal Farm Credit Board Policy Statement on Financially Related Services, formulated and approved by the Board in February, 1974, contains the same requirement:

"...The primary consideration in offering any service should be the benefit it provides members and the lenders rather than the remuneration which may accrue to the banks or associations. Consistent with the policy of the law, these services should be undertaken only when there is evidence of lack of availability as to convenience, quality, or cost and there is sufficient interest on an association or district-wide basis to assure that the service will be at least self-sustaining..."

"...When request for approval of a service is made, the request shall be supported by an in-depth study determining the feasibility of the service and the contribution it provides in meeting the objective of the

Continuation of Footnote 5

System. The submission should document the nature of the program, those to whom it will be offered, and the basis on which the service is judged to meet the tests set forth in Section 8010 of the Farm Credit Administration Regulations."

"Farm Credit Administration approval shall be based on the determination that legal authority to offer the service exists, an administrative determination that the proposed service can be authorized, and that the submission establishes the need for the service to be offered."

⁶ 117 Cong. Rec. H11538 (Daily Ed., Dec. 1, 1971). (Emphasis added)

Mr. BAUMAN. The last witness of the morning is Mr. Hugh Mohler from the Peninsula Bank.

Mr. Mohler good morning.

STATEMENT OF HUGH MOHLER, PRESIDENT, PENINSULA BANK

Mr. MOHLER. My name is Hugh Mohler, I am president and chief executive officer of the Peninsula Bank, which is a bank with total assets of approximately \$6 million.

We are an independent bank on the Eastern Shore, but part of a larger bankholding company.

Rather than a prepared statement, I have made some notes, and I hope to testify on a more casual basis.

In thinking about this, I did some research, and attempted to take a look at the total cost of regulation on business, particularly small business. It would appear that, first, it has higher productivity, as the cost of Government regulation has become more burdensome all the time, approximately \$98 billion is the total cost I understand of complying with Government regulations, which is about 20 times the actual administrative cost of running the regulators.

In 1976, there were 41 regulatory agencies in the United States, and the cost of running those agencies has grown approximately 115 percent in 5 years, far more than normal inflation.

Right now businessmen fill out a total of 4,400 different forms at a cost of \$25 billion to \$32 billion a year.

It adds typically to an average home these days \$2,200 in new costs. That is the cost of regulations and the aggregate cost today, is, I think, as was pointed out, literally over \$100 billion a year. It typically hurts the consumer, the businessman, and the investor, in addition to the normal burden of the cost of regulations, as also apply today, the so-called hidden tax; that is, the cost of complying with the various regulations, including OSHA, and so forth.

From a small businessman's standpoint, it forces him to fill out forms similar to that of large business. Large business in many cases has the staff; the small businessman does not.

A bank I think is typical of this situation, in that many large banks of course, have staffs and reams of lawyers. The regional banks as opposed to maybe 5 years ago now have two, three, or four lawyers.

In front of me is the compliance handbook on just one factor of the Government regulations concerning compliance. Amounting to 650 pages, it is a synopsis of these regulations and how to comply with them prepared by the American Banker Association.

Mr. BAUMAN. This is on only one topic?

Mr. MOHLER. Consumer compliance as opposed to maybe some other regulations a bank has to comply with.

In our bank we have one officer who is designated as a consumer compliance officer. He estimates that he spends about 50 percent of his time working with our compliance situation.

I myself will see approximately one piece of new legislation or proposed legislation come across my desk, I would say at least every 2 weeks. These are not small pieces of material to read, and they are voluminous, and they are of course in legalese, which makes it even much more difficult to read.

Mr. BAUMAN. You said Federal regulations.

Mr. MOHLER. Federal regulations. Consider in this particular book the regulation in truth and lending, regulation Q, which has to do with interest ceiling, the Federal or credit report, the Mortgage Disclosure Act, the New Community Reinvestment Act, RESPAH, Real Estate Settlement Procedures Act, the Federal Practices Act, and the new Financial Institution Regulatory Act. The last two or three have all come within the last few years.

It seems to me that at the present time the total regulatory environment has added to the total cost of business, it has created or added to inflation, it has created inefficiencies, and this of course results in poorer service to the customers.

As an example, a normal standard loan application. The number of forms is approximately three times the number of forms that a typical loan or similar loan which would have been used 5 years ago, or 10 years ago. It has added frustrations to the customer and to the employee. I know of an example of an individual I worked with several years ago was a most competent loan officer. He decided to actually get out of the business because of the overwhelming regulatory problems, and in complying with those regulations.

He enjoyed the banking business, but the idea of complying and working with the regulations became just too burdensome. It just seems to me, with the list of regulations that have been proposed, some of which I have just listed, it just seems to be overwhelming, particularly in light of maybe what our industry was like 10 years ago.

It is hard for me to fathom that there were so many abuses, in the financial institutions industry to have warranted a dozen or so complicated acts.

During a particular year we get reviewed, examined by the FDIC from a compliance standpoint, as well as by a normal bank examination.

We have a similar State banking examination, of course, and various other audits to comply with for our accounting procedures.

The Bert Lance legislation I think was perhaps promulgated due to a very isolated case, something I do not believe was rampant in our industry.

It would appear that some legislation is needed to comply with, and to control some undue practices that might have occurred in the past period. However, it would appear also that some of these regulations have gotten away from us, and probably not to the intent that Congress has legislated.

It is our suggestion that perhaps various forms of sunset legislation be passed so that the Congress can periodically review, or do this on a continual basis, to weed out unnecessary and old legislation that has been instituted in the past.

Perhaps there could also be some oversight responsibilities on the part of Congress to allow them to review what is included in the regulations, and to perhaps see that they are indeed similar to the original intent that Congress had originally instituted in the legislation.

The legislation in our opinion, in my opinion is most burdensome. I would hope that there is a great deal of attention paid to the weeding out and simplifying of the current procedures.

Mr. BAUMAN. How much of the problem presented to the banking industry, in your experience, stems from regulations, as opposed to the basic statutes?

Of course, they both come from the statutes obviously, but is it an over-zealous application of the regulatory power.

Mr. MOHLER. It would seem that in most cases the latter would be the case, somewhat more the results of application.

In some cases, particularly with maybe FDIC I am not sure the legislation is warranted, the current abuses that were listed, that occurred—

Mr. BAUMAN. And yet the application is to all institutions, lending institutions?

Mr. MOHLER. Yes.

Mr. BAUMAN. Could you give us any idea of how successful the banking industry has been in meeting some of these problems through changes in legislation?

It seems, in the Banking Committee, that we are always trying to clean up some mess that one of the agencies has caused by their interpretation of the various regulations.

Mr. MOHLER. Can you restate that?

Mr. BAUMAN. Has the industry generally been successful in making changes in Federal law that are needed because of the Federal agencies?

Mr. MOHLER. I asked the ABA to send me some information, and currently they are looking at 31 pieces of Federal legislation at the present time, and then they are also involved in 17 pieces of litigation.

Mr. BAUMAN. All growing out of Federal regulations and laws?

Mr. MOHLER. I would say most, yes.

Mr. BAUMAN. Now, most of these laws as they go through in the Congress are billed as being necessary for the protection of consumer's rights, particularly as opposed to the big bad banking industry, as it has been portrayed.

How or where is the average individual that comes into your institution in regards to the so-called protections offered him, does he know about all of these, and must you inform him?

How much time does that take, and what obligation is placed on you?

Mr. MOHLER. It places a tremendous obligation on us, particularly in the truth and lending aspect of things, and the Reinvestment Act, the Community Reinvestment Act which has just come out. I do not believe the individuals are that much concerned about disclosure. I think most individuals recognize that a 10-percent rate is quoted, they understand 10 percent, they do not have to read it, or see it all out on multiform disclosure. I think they are probably not as interested, as maybe some people think they are in regulation.

Mr. BAUMAN. Are they generally well informed about the Federal laws, let us say for example the average person wanting to borrow for a mortgage?

Mr. MOHLER. I really don't know. I do not think they expect all of the various forms that are placed upon them for a simple consumer loan. I do not think they are interested in how much money we lend in various particular areas such as in the Reinvestment Act.

Mr. BAUMAN. Have you noticed any instances where people come in and as a result of the Federal regulations or the forms, ask about say the interest they will pay over 20 years and then say no, I will not take it?

Mr. MOHLER. No.

Mr. BAUMAN. They may be better informed as to dollar amounts, but it has not changed the pattern of lending to borrowers?

Mr. MOHLER. Exactly.

Mr. BAUMAN. Have you tried to quantify any costs as they pertain to the average home loan, what it would add to that?

Mr. MOHLER. I have not seen that document.

Mr. Bauman. Certainly part of the interest rate would have to reflect the cost.

Mr. MOHLER. Absolutely. One interesting comment with regard to regulations in truth and lending, is that we have just had a situation with our compliance examination, this is sort of a dichotomy that exists. In one case of one group of FDIC examiners who will come in and criticize us for perhaps not having a particular loan paid off in a reasonable period of time, a so-called stale loan, an unsecured loan, that might go on for 18 months, to a year, and should have been paid. They insist that all sorts of documents be filed, to get the borrower to repay the loan accordingly.

We have another set of FDIC examiners that come in and say we have disclosure problems, if we document accordingly, because we have heretofore as all banks disclosed a demand and interest rate, a disclosure of 6 months.

If we asked the person to pay it within 18 months, these FDIC compliance examiners indicate we have a contradiction here and have not disclosed properly, and they severely criticized us for it,

and perhaps are looking into the possibility of us paying penalties for doing so. This is a matter of some discussion. As a matter of fact, I believe the American Banking Association has followed suit on a class action basis to give consideration to this whole matter. But as a typical example, when the right hand does not really know what the left hand is doing you have confusion.

Mr. BAUMAN. Yet they are both from the FDIC?

Mr. MOHLER. Exactly.

Mr. BAUMAN. Do you have a specific experience with the extent of the Internal Revenue Service and their regulations on your banking customers?

I know they have probably the greatest power of any agency, as far as regulation writing and rules that have an impact on you.

Mr. MOHLER. We have very little dealing actually with the IRS.

Mr. BAUMAN. Any questions?

Thank you very much. We appreciate your coming. We will stand in recess until 1:15.

Before we do that, I want to enter into the record a statement by Mr. Robert Prior, the executive director of the Chesapeake Bay Seafood Industries Association.

[Statement submitted for the record by Mr. Robert Prior follows:]

STATEMENT OF ROBERT PRIOR, EXECUTIVE DIRECTOR, CHESAPEAKE BAY SEAFOOD INDUSTRIES ASSOCIATION

Our lives are governed from before conception to after death by governmental regulations. For example, try and enter school, get a job, get a drivers' license or apply for social security without first proving you were born and exactly when. Some of these regulations are undoubtedly necessary to maintain our life style, but in creating the necessary regulations, we seem to have the capacity to go beyond that critical balance and either enact regulations that border on the ridiculous or over extend the intent of the original regulation.

The seafood industry has come in for its share of this over extension of intent, or the regulations are written in such a manner that allows for wide interpretation. We have seen agency representatives come into an area without proper background or training and extrapolate from regulations written to cover other food processors on to the seafood industry with adverse results.

An oyster or clam is a quite different creature from a steer, hog, or chicken and the process to harvest and prepare these various animals is entirely different, yet under the new proposed FDA umbrella of Current Food Manufacturing Practices, no differential is made. As an example, reference is made in these proposed regulations to wash all raw products, which could be interpreted to mean that all oyster shell stock must be washed to remove bottom sediment, which may or may not be a benefit, but in reality it is next to impossible to do because another Federal agency, the EPA, prohibits the discharge into tidal waters of material that is on the shell oyster and of course, came from those very waters to begin with. These same regulations state that all toilet facilities must be within the main processing building which again, is impossible in many of our processing areas, because no central sewer system exists and the State health department will not allow holding tanks within the processing building.

These few illustrations show how complex and confusing many of our Government regulations are leaving those being governed forced to violate some regulation or be out of business.

It would seem there should be a clearinghouse or agency where all governmental regulations governing an industry could be reviewed for conflict and workability, otherwise, confusion will continue to reign.

Mr. BAUMAN. We stand in recess until 1:15 p.m.

[Whereupon, the subcommittee recessed to reconvene at 1:15 p.m., the same day.]

AFTER RECESS

[The subcommittee reconvened at 1:15 p.m., Hon. Robert E. Bauman, presiding.]

Mr. BAUMAN. We will reconvene the subcommittee.

Our first witness is Mr. John L. Graham III, of George, Miles & Buhr.

Mr. Graham, do you have a statement?

Mr. GRAHAM. No; I am sorry.

Mr. BAUMAN. That is perfectly all right. You can proceed.

STATEMENT OF JOHN L. GRAHAM III, OF GEORGE, MILES & BUHR

Mr. GRAHAM. I am chairman of the chamber of commerce, energy and environmental committee, and as a result of that, we have followed very closely a lot of the affairs relating to the environment and energy in the local area, and we have been really horrified at the length of time that it takes to get some of the permits through. Like that for dredging, which has taken about 3 years to go through the various Federal agencies.

It seems most unreasonable to us that permits have to go through in some cases five or six Federal and State agencies.

I think the more knowledge that is involved, the greater the odds you will wind up with somebody unreasonable somewhere in the governmental process. Whether it is because of their background or their idealism, I think their personal judgment can become suspect in some of these cases.

Regarding the congressional veto, I think it is long overdue, but I do not think it will correct all of the problems concerning Government regulations.

I think most regulations were conceived of with very good intentions, and I think most Government employees are administering these regulations to their judgment in a good way.

I think what is really needed is some sort of appeal. A quick appeal process wherein a good regulation, such as we have with wetlands, certainly those are needed regulations, but when it gets into a situation where it just becomes unreasonable, and there is no common sense applied, there should be some easy quick appeal, rather than going through the courts to get some relief.

Just to mention a very extreme situation, I was involved in a project in Pocono City, and we requested permission to fill some mud flats that probably took up less than half the area of this room. It took 8 or 9 months to go through the various procedures, and we were finally denied permission to fill this mud flat between the two bridge piers.

Certainly this little bit of wetland in which I did not observe any grasses or anything else can have no significant influence on the ecology of the Chesapeake Bay or on the fisheries.

The same thing is happening in St. Michaels. There is a beach there, and they are wanting to fill in a very small area. There are probably a few grasses among the oyster shells, but the agency stands there with just completely unreasonable positions, and I think this is where we need relief. Somehow this can be done, I do not know how, but if there could be some committee of Congress

that could hear some of these problems when they occur, this would be a greatly desirable thing.

In the construction industry, the area of concern is the OSHA regulations. The Federal Register devotes nine full pages of small print on how to build scaffolds. They are now requiring ladders up the side of the scaffolds, to the guard rails, the job of building a scaffold is getting to be more lengthy than the work to build the project.

The contractors are getting scared to death because these inspectors show up, and they will plant very high fines upon the contractor, \$1,000 or more. They delay jobs, and it really does not make much commonsense, because when a steelworker is working upon a beam when the building is first being erected, they do not even have scaffolds.

Once the building is enclosed, and fairly protected, you don't need scaffolds. Scaffolds have been used pretty safely for years, maybe a few accidents, but certainly no major problem. Now they are being forced to get these very elaborate means of safety.

This all has an impact on cost and inflation, whether it is to the taxpayers or ultimately to the consumers.

Whenever any of these unreasonable regulations are enforced, somebody has to pay for it, and we understand that inflation is one of the biggest problems in our country today. I think it is important to determine what impact these Federal regulations have on inflation.

I do not know what the answer is, but it is important to realize a lot of people in the Government employment, for instance, inspectors, I think it is human nature for the inspector to find something to justify his job. I think they have a negative attitude when they come to a job site or a business. Unfortunately, a lot of people who are not in the free enterprise system directly, I think they formulate an opinion that business is bad, that profits are bad, so when you have a large number of these types of people, and I have run into a number of these people, they have this attitude. They do not understand what profit is, they think it is wrong, and with that attitude they will tend to penalize the business interests that are involved, so I would urge the Congress to somehow pass this legislative veto. I think going on further, it is important to really develop some sort of good appeal system.

Thank you very much.

Mr. BAUMAN. Let me ask you some questions, Mr. Graham. We had a number of witnesses from our areas other than construction this morning.

Have you found any particular impact, for instance, from OSHA inspectors, or other types of inspectors? For instance, there are several court cases in which they have in fact been curtailed somewhat in their powers. Has, for example, the requirement to obtain a search warrant in any way lessened their appetite for handing out fines, or has it just made them all the more zealous?

Mr. GRAHAM. I really have not noticed this. Sometimes it is hard to distinguish between the Maryland OSHA people and the Federal.

The Marylanders will basically use the Federal regulations, but the inspector is actually a State employee, and sometimes I am not at the job site.

For instance, at the marina, we are having problems right now, with delays because of OSHA. I think it is actually a Maryland employee that has cost that job about 3 weeks time. To require a ladder to be passed vertically is not a particularly safe device anyway, but to require it to be tied vertically to the scaffold, this does not make sense.

Just the size of the scaffold I think is safer than required.

Mr. BAUMAN. That is a recent requirement?

Mr. GRAHAM. Within the last 2 weeks. There is one they have discovered on our job, and they are inclined to hit us about every week now, and the contractors are scared to death.

Mr. BAUMAN. You made the point that a rapid decisionmaking process is what was really needed in the case of regulatory agencies. Of course, the legislation we are holding these hearings on is H.R. 1776. This would allow the Congress up to 90 days, and various other lengths of time to disapprove regulations. One of the things we have heard is that this may just add to the delay in trying to bring about changes in regulatory policy.

Do you think it would be any worse adding another 3 months, if indeed it offered a mechanism for changing regulations?

Mr. GRAHAM. I think it would probably help in the overall regulatory process, but in the individual project, it may take more time than that. Certainly, the regulations we have in the long run, I think they will certainly be better. But what seems to happen now, the various agencies, for instance, the National Fisheries and Wildlife, and the EPA, seem to just pass the ball between them. It gets to the point that they do not have to answer you. They wear you down by just the time it takes.

Mr. BAUMAN. Have you also experienced instances where they disapprove of various arrangements, or of processes being used by business, but they will not tell you what it is they want?

In other words, they say, "That will not meet our standards," but they will not tell you what arrangement will.

Mr. GRAHAM. I have not heard of that. The main thing I think it is just the time element, where I have a problem with it, and it just takes months to get an answer from them.

Mr. BAUMAN. The Occupational Safety and Health Administration, and its State counterparts have been the ones most subject to criticism, because I suppose they are closely tied to a number of ongoing activities like construction.

Have you noticed anything in particular in the application of these rules, any change? I believe there was a repeal of any number of regulations, a few months ago. There was a rather big fanfare about trying to tighten up their rules, and to do away with the meaningless ones. Has that helped at all?

Mr. GRAHAM. I think up until recently, a great number of the rules were just ignored. I do not think they have found the Eastern Shore. Unfortunately now they are beginning to find us, and a lot of the contractors just simply could not wade through these regulations to know what they are supposed to do. They are just filled

with legalese, and I think as long as there is nobody around to police them, they are generally ignored.

Obviously some of the more religious ones, like requiring toilets within a certain distance of work spaces, things like that, were apparently repealed, but I think generally, there just has not been a great deal of enforcement up until now.

Mr. BAUMAN. How about the cost factor? Do you have any overall percentage increase on the contracts that these requirements usually cost?

Mr. GRAHAM. No; there is none broken down.

I think the handicap regulations have added significantly to the cost of construction. I think this is another issue of how can you be against the handicapped. But it is also important to realize the actual numbers requiring elevators and ramps in all buildings. It may add 10 percent to the cost of many buildings. I think there are really a smaller percentage of people in wheelchairs than the handicapped that are on crutches. There are those with loss of hearing, and all sorts of handicaps, but these regulations seem more geared to the wheelchair person. I realize it is something nobody wants to discriminate against, but when we consider the total cost, I think this is something that should be taken into consideration.

Mr. BAUMAN. I was told by somebody in construction in Ocean City, somebody building a small condominium that they were required by some regulations, in a 16- or 12-unit condominium, to construct 1 unit that complied with every rule of the handicap regulations. What agency is that, HUD?

Mr. GRAHAM. Well, it is a State law, but that is probably what again reflects the Federal regulations. We have the book that dictates that. I am not sure offhand what agency it was.

Mr. BAUMAN. There was a complaint that that was the unit they could not sell, because no one wanted it. In fact, it costs a great deal more to build that unit with the different appliances and ramps. It was the last unit left for sale, and they had to sell it for a lower price.

Mr. GRAHAM. And motels and all sorts of things are having to do that, so I think it is important to assess really what the problem is before you regulate, just on good intentions. I think it is important to find out how important, or how much of a problem it actually is.

Mr. BAUMAN. Is there any systematic effort made, that you know of, to contact the various businesses in the construction field to get input before regulations are issued?

Mr. GRAHAM. Not that I have been aware of.

Mr. BAUMAN. Not by either Maryland or Federal agencies?

Mr. GRAHAM. No. Generally it is an after process, after you realize what is it, then you try to object to your professional organizations. They are trying to influence regulations, but I would say generally it is after the fact, and it is probably very difficult to get a regulation changed.

Mr. BAUMAN. I just observed that the bill before us requires not only contacts with those that will be affected, but also if controversy develops, especially paying attention to that controversy and addressing it in the rules that are issued.

Mr. GRAHAM. From what I have read of the proposal, I am very much in support of it, and I certainly hope it success.

Mr. BAUMAN. Any questions?

Miss CULLEN. The 90-day period in which one could respond, do you think that period is too long or too short?

Mr. BAUMAN. She means that the Congress would have to respond.

Mr. GRAHAM. I think it is probably too long. The shorter time is the better in any of these things. I do not know why it would take so long. A business generally has to respond quickly. I do not know why Government would respond more slowly.

Miss CULLEN. Thank you.

Mr. BAUMAN. Thank you, Mr. Graham.

Mr. GRAHAM. Thank you.

Mr. BAUMAN. We have a statement from Mr. Donald D. Littleton, Wicomico County Farm Bureau, which we will submit for the record since he will not be with us.

[Statement submitted for the record by Donald D. Littleton follows:]

STATEMENT OF DONALD D. LITTLETON, WICOMICO COUNTY FARM BUREAU

I would like to thank you for the opportunity to express the views of the Farm Bureau. My testimony will address a few selected areas in order to conserve time.

Our long-time efforts to bring pressure on OSHA, the ineffectual Occupational Safety and Health Agency, has brought about a flurry of minor reforms. Under pressure, OSHA has withdrawn from areas where it should not have gone in the first place. Many misgivings still exist.

According to Vincent Tofany, president of the National Safety Council, government intervention in the safety area had added to the costs of accidents while doing little or nothing to improve the health and safety of the American worker.

"It is the consumer who picks up the bill," Tofany adds.

There is some evidence that since OSHA is on the scene the industrial safety record has worsened rather than improved.

Again, according to the president of the NSC, "After 7 years of active work by OSHA, it is not possible to establish whether the cause of occupational safety and health has been aided or hindered by the agency."

What is certain, is that OSHA is good at creating paperwork and their simple meddling of the thing has made it a laughing stock among Federal agencies. In one publication it pointed out the monumental fact that manure is slippery.

This is a perfect example of an unneeded agency and the regulations that it establishes.

For years farmers have identified a wide array of forces negative to private enterprise agriculture, and which if allowed to develop, could turn farming into a public utility and farm people into Government employees.

Let's examine several of these proposals:

We in agriculture are told to report to ASCS and establish our acreage in order to get a fuel allotment. This requirement could have far reaching effects on agriculture. The Government would have all acreage farmed by each and every farmer and what crops are being grown on each farm. Through the allocation of fuel a farmer could be forced to produce what the Government wanted. It could also control expansion of the total agricultural complex.

The Army Corps of Engineers have established regulations that make little or no sense at all. They have regulations that give them the authority to prohibit the disposition of spoils. A regulation of this nature really says one thing—they will have control over drainage. The Corps has established a criteria for water of 5 cubic feet per second average yearly flow as being under this regulation and a few on the Eastern Shore. In fact, many farms in Wicomico County, with rainfall the way it has been in 1979, would be prohibited from draining their farms under the guise of this nebulous regulation.

A regulation that requires an individual to quit work in order to get assistance for home heating expense is absolutely ridiculous. It is counterproductive to the American way.

A regulation or law, that gives an individual the right to determine if a job is below their dignity, needs to be removed. If I need a job to support my family and pay my bills then no job is demeaning. We in agriculture need labor in many aspects of farming, but Government regulations and requirements have made it more lucrative to not work.

In many instances those individuals writing regulations have no idea what they are trying to regulate. All they are interested in is preservation of their Government job.

Yes; the "legislative veto" would be a step forward if it will be permitted to work. It is useless if it requires years to get a regulation removed.

Again, I thank you for your time and wish you the very best.

Mr. BAUMAN. Our next witness is Mr. Sam Stein, of H.D. Metals, Inc.

Mr. Stein, will you give your name and position for the record?

STATEMENT OF SAM STEIN, EXECUTIVE DIRECTOR OF H. D. METALS, INC.

Mr. STEIN. My name is Sam Stein, I am the executive director of H. D. Metals, Inc.

I am here in reference to the trigger price mechanism that the Treasury Department uses for importing steel; would this cover it?

Mr. BAUMAN. We are looking for anything that has to do with Federal regulatory powers, or the regulations that Federal agencies issue, and the impacts they have on the lives of individuals in America.

Mr. STEIN. When the trigger pricing was first established, shortly thereafter it was established that they recognized the fact that there was a loophole. They regulated the price of imported steel as it came into this country by virtue of costs of the manufacturer in different countries. But one place the loophole was, I think, and other people have been beginning to feel it too, there is no control over if an exporter of a foreign country has an outlet in this country. He can bring it in, he can put it in his outlet, and turn around and sell it basically for the same price he would sell it to me as imported steel. I think I made myself clear, and consequently, we in the steel service industry are beginning to feel this more all the time, and that is all I have to say.

Mr. BAUMAN. Is that as a result of Federal regulations?

What agency would have the power?

Mr. STEIN. I say the Treasury Department established this. I do not think there are any of the other agencies that come to this.

Mr. BAUMAN. And they actually set the price?

Mr. STEIN. They set the price for imported steel, yes.

Mr. BAUMAN. How reflective is that price as far as protecting Americans?

Mr. STEIN. From what I have been getting, we used to buy imported steel, it used to be anywhere from a 15- to 30-percent savings on imported steel. Today the savings generally run anywhere from 5 to 10 percent, which in our position, locally here, we do not consider that to be sufficient because of inventory imbalance, the cost of money and everything else. If I were an end user, of 5 or 10 percent, it would be a lot of money, but when we are warehousing, and we turn around to look for reselling, 5 percent is not that great.

Mr. BAUMAN. So in fact, under the program which I think is authorized by law, not by regulation, you have a protection for the steel industry.

Have you found any of the problem described by Mr. Graham, as a manufacturer and distributor business?

Mr. STEIN. We have some problems with OSHA.

We do some erection in the field with our own crews and we were slapped on the wrist once for one small violation regarding scaffolding. The next time they came back, even though the men had their proper gear, but they did not have it in position, we were fined a substantial amount of money.

Mr. BAUMAN. You were fined?

Mr. STEIN. Yes. I think it was \$1,000. This was 6 or 8 months ago. I'm not sure.

Mr. BAUMAN. Is that a common practice in the construction field, \$1,000 fines for individual problems?

Mr. STEIN. Let me say it is not unusual.

Mr. BAUMAN. Well, do you really think the problem would be solved by congressional intervention in the rulemaking process, or would that just complicate things? Are you at the point where it could not get much worse or anything might be better?

Mr. STEIN. Something like that. You brought out a point when talking with Mr. Graham earlier, about does Government ever consult with the people in the industry before the laws are made, and before the regulations are made. I do not think they really do, and I think this is the area that it should be done.

Mr. BAUMAN. What qualifications do you find that the OSHA inspector for instance has for conducting the inspections?

Do most of them come out of the construction industry?

Mr. STEIN. Someone else in our organization has been handling this. I myself have not been too closely associated with the inspections.

There are a couple of things that have been brought to my attention, such as a fire extinguisher that has to be say 42 inches off the floor, or whatever the case may be. If it happens to be 40 inches or 44 inches, it would have to be moved, which is costly. Some of the things such as the wiring outlets have been there and have been in use for several years. All of a sudden if not grounded properly, you have to call in an electrician, and I am not saying that is not good, but it still becomes costly for industry to have to do. Some of the things as I explained a while ago such as that fire extinguisher having to be moved 3 or 4 inches, are kind of ridiculous.

Mr. BAUMAN. There is not much flexibility in the way the regulations are administered?

Mr. STEIN. Right. No commonsense.

Mr. BAUMAN. Any questions?

Well, thank you very much. I appreciate you coming in to give us your views.

Mr. STEIN. Thank you.

Mr. BAUMAN. Our next witness is Mr. Patrick Cavanaugh, Jr., of Cavanaugh Ford, Inc. He is well known in the area.

STATEMENT OF PATRICK CAVANAUGH, JR., OF CAVANAUGH
FORD, INC.

Mr. CAVANAUGH. Ladies and gentlemen, good afternoon. If I may just comment on our OSHA situation, I have to tell you that it is much better. I think it is better because Congress sent a flood of protests to the OSHA people and said, you are doing crazy things, stop that, and you turned that situation around, it is better.

I see the OSHA inspectors personally. I saw them when they first came in after we had spent about \$5,000 getting ready.

I do not like to get caught short, so I was going to do everything I could. I brought in my insurance company, I said read the regulations, tell me what I need to do, because when they come in, I will be ready.

Still, after spending \$5,000, we got written up on five items. One was a fire extinguisher system in a body shop and they were right about that. I hated to put the money out, but most dealerships are burned from the bodyshop forward, and my people are safe, and they were right.

What did irritate me was \$570 for three bathroom doors.

I had bathroom doors, but it was possible to stand outside and look through the cracks into the cubicle.

Now, what that possibly has to do with safety I do not know, but we had to buy three tightly sealing bathroom doors, and it took quite a while to get them.

Lately, however, the people who come around, both the State and Federal are more reasonable. They are now doing something they did not do before, and that is, they are suggesting where you might buy a certain item, how you can solve a certain problem.

Before they were scared to death to do that. I asked them, there is no water out here in the country, where do I get an extinguisher system? They said that is not our problem, we just write you up because of this situation. That is changed, I think also the lady administrator, the head of OSHA, came out and said I will get rid of a lot of these things, and they did so.

She has done a good job, so if congressional pressure helped that situation, legislative veto would help it even more, so I am for H.R. 1776. I think it is great.

I was interested in the commentary about why do regulators, and I distinguished between legislators and regulators, why do regulators feel the way they do. I was next door not too long ago, where there were some hearings on auto repair problems by State regulatory agencies. There were 5 hours of hearings, I was there the whole time, recording equipment, and everything else, but nobody showed up.

That does not mean that there are no problems, but it does mean the percentage of problems is small.

The attorney who chaired this inquiry was furious. In a television interview afterward he said we obviously have got to educate the people on their rights. If we do not have a problem, we have to create one.

That is the sort of thing we run into, and I think H.R. 1776 will help. But after all, the regulators deal with the wrong end of the ball all day long, they see nothing but problems. It has to color their outlook. Horror stories are easy to remember in auto repair,

in fact they are a small percentage of the total, you forget this after a while. Let us face it, they ought to justify to you ladies and gentlemen their appropriations. We have to have problems because we have to have reason to exist, and most importantly, I think there is a new theory of social activism among the regulators, the head of the FTC in my opinion is a prime example of this. He has been very vocal about it, except more recently he has been quieter because his appropriations have been slowed down. All of a sudden he is not in the press so much. They are thinking the legislature is so slow, so conservative, it takes so much time that we will get this job done by expanding on our functions they think. It brings up our old idea of where Congress makes the laws, the Executive enforces them, and the courts arbitrate them. That is not good enough. That is not fast enough, so I think you are faced with this new theory of social activism, and I hope this corrects it.

I have got a wonderful example. This is the new FTC used car sticker. If we put many more stickers on the glass parts of the automobiles, you will not see the outside at all. I am sorry I brought only one.

Mr. BAUMAN. There must be at least 300 blocks to check on that.

Mr. CAVANAUGH. As you can see, it says to check items that are OK, not OK, as is.

It says has the car been submerged, has it been in a total wreck, and what kind of repairs have you done on it.

Some Members of Congress have already objected to this, saying where did you come up with this?

The purpose of this was to disclose to the customer whether you had a warranty or not, and what was the nature of the extent of the warranty, so when he bought a vehicle, he knew if anybody was going to take care of it and what his coverage was.

Social activism says that is not quit good enough, what we need here is a warranty. We will make it so that the commercial seller, and not the private, the commercial seller of a used vehicle will have to come up with this thing. Immediately we run into problems with the State's position on this.

It is true that you can say, well, I am going to sell this vehicle as is, except in Maryland, Maryland does not want anything sold as is.

Maryland like most States subscribes to the universal, uniform commercial code and they say there is always an implied warranty of fitness and merchantability, I think that is right.

You sell a car, it has got to act like a car. So we went from a position where Congress said OK, disclose about warranties, and let us have a whopping big one, 60 blocks to check.

There is a tendency for many of us to say, OK, if I have to do this, I want to sell it as is, and to aggregate warranties that we now have.

This often happens in consumer legislation, when you take a look at what your choices are, you say I was doing something, but this makes it so difficult, so I am not going to do anything, and the poor consumer gets less than before.

I may surprise you, I do everything on this, OK.

My dealership does everything on this, but that does not mean that I endorse the proposal necessarily, because I look at the consequences.

I have found that the average car I sell costs \$3,500, because I spend from \$350 to \$400, and when you do that, you spend that much, you have to sell at a higher price. So one of the effects of this is fewer cheaper used cars, and less basic transportation sold to the working class. I never sell anything under \$2,000, it does not pay me after I do those things, and I do all of them. I even take a Polaroid picture of what it looked like first, and I make you sign off on it. I do not want you to come back, say this car has been in a wreck, that system works fine.

I make money selling used cars, I get very few complaints, I love this technique, but across the United States, if everybody dealt this way, a lot of the people would get lost.

I think that is the gist of my remarks. Thank you for the opportunity.

Mr. BAUMAN. I find your comments very informative.

Do I understand that this FTC form for used cars is now in effect?

Mr. CAVANAUGH. No, sir, it is proposed.

We are getting in early enough for a change, instead of dealing after the fact.

Mr. BAUMAN. And this is done under the authority of the Magnuson-Moss Act?

Mr. CAVANAUGH. The FTC said they get that from the Magnuson-Moss Act.

Mr. BAUMAN. But there is a dispute about that?

Mr. CAVANAUGH. Yes, sir, there certainly is, and several Members of Congress have challenged that, and it is just such a situation where the law says one thing, and the regulations come out with another. I thought it was worth bringing this to your attention.

Mr. BAUMAN. Is this published in the Federal Register? Do you know if it has gone that far?

Mr. CAVANAUGH. I do not know that.

Mr. BAUMAN. If a dealer wanted to comply with this inspection in order to make these judgments, what would it cost a dealership, \$400 to \$500, is that what you spent?

Mr. CAVANAUGH. That is what I spent.

Mr. BAUMAN. What would it cost to do this kind of a check?

Mr. CAVANAUGH. The average dealer spends about \$150. So since I spend roughly double that, and comply with all of this, I am saying it will cost about \$150 more and all dealers are to do that which is now going to be required.

Mr. BAUMAN. That would have to be added directly to the sale price, without question?

Mr. CAVANAUGH. What it costs me is not what it would cost the customer. I assume you would get some kind of markup over and above the \$150. I really think you are talking more about at least \$200 or so added to every vehicle.

Mr. BAUMAN. So the old \$500 clunker suddenly becomes \$700?

Mr. CAVANAUGH. You know, we used to sell on the same lot I have now, cars for \$100, and they were called transportation spe-

cials. What happens, if you drove them for 2 or 3 months and they absolutely collapsed and died, you came back and we gave you another, but some of those things drove for years. The risk was commensurate with the price, and regulators do not like that statement, they do not want any risk in the free economy, and you can certainly take risk out.

If you sell \$3,500 cars there is no risk, but what do you do with someone who has to get to work, who needs a second car, and he wants to spend \$500 to \$600?

The first car you ever had, you bought it for \$150, you fixed it up and worked on it, but today you cannot do that. There is no way you can buy a car for that.

Mr. BAUMAN. I know. I have a 19-year-old son.

Mr. CAVANAUGH. Would you be interested in a \$3,500 automobile?

Mr. BAUMAN. No.

Have you had any thoughts on the various controls, pollution controls that have been proposed for vehicles, whether they are in fact keeping with the cost that is added to the vehicle?

Mr. CAVANAUGH. Absolutely, I was just in Ireland on a Ford trip driving an English Ford, and it is getting like 38 miles to the gallon, it is a nice four-door car.

I said I have got to find out why we do not import this. This is the kind of car our country needs.

I said I want to import some of those cars. They said fine, who will put the pollution controls on. That is the difference.

They run very badly with those, and yet, I have to tell you at the same time, when you travel, and you see fog mixed with pollution, you know that something has to be done on that, and I think the automobile industry has done a good job. But again the regulators are pushing for perfection, they really are. We are getting down to really fine tuning, and again, you can eliminate the risk, you can eliminate pollutants 100 percent, if you are willing to pay the price for them, and the price is getting pretty steep.

Mr. BAUMAN. My impression is the National Auto Dealers Association is one of the better organized groups representing specific interests in this country. I say that because I always hear from auto dealerships whenever a legislative issue arises. One of the charges made against the legislative veto is that it would allow political pressures to be brought in Congress, by well organized groups. Perhaps I am not asking the right person, but does that give you some thoughts?

Mr. CAVANAUGH. I was not of the opinion there was anything wrong with that. Really, for organized political pressures, that means voters, does it not?

There is absolutely nothing wrong with that. Certainly we are going to pressure you all for our interests, and it is your job to siphon out those requests and say this is a good one and this is a bad one. Is not that the way it works?

Mr. BAUMAN. That is the way it is supposed to work.

Mr. CAVANAUGH. But, for example, Mr. Graham, I do not know how you look at his society of professional architects, but if they contacted such a subcommittee, and they said, Listen, we want to show you some things here about scaffolds. You guys may not

know an awful lot about scaffolds, but, look, I think you would listen to them, and I do not think you would suspect they are political and of commercial intent.

There is all sorts of information that can flow to you, that I think you would be well advised to listen to, that I would label more commonsense.

Mr. BAUMAN. Any questions?

Thank you very much.

Mr. CAVANAUGH. Thank you.

[Prepared statement of Mr. Patrick Cavanaugh, Jr., follows:]

PREPARED STATEMENT OF PATRICK CAVANAUGH, JR., CAVANAUGH FORD, INC.

Gentlemen, some years ago, I attended a meeting next door called by a State regulatory agency to investigate local consumer problems in auto repair. I sat through 5 hours of hearings complete with a staff of five and a bevy of sophisticated recording equipment. To my surprise and to the obvious irritation of the young attorney serving as chairman, there were no complainants—not one. I later discovered this pattern of low interest had been repeated all over the State.

As I left the hearing, I stopped to watch a filmed interview with our local TV station. The turnout at the meeting, said the chairman, clearly indicated the need for his agency to educate the consumer as to his rights.

I think that in time I have learned to understand why regulators think this way. First, as regulators they deal almost exclusively with problem areas. It makes no difference that the percentage of bad repairs compared to the total number of satisfactory repairs was miniscule—the horror stories are easier to remember. Second, there is the necessity for the regulatory agency to survive; to justify its existence to the legislators who fund it, it must constantly strike a heroic pose. Finally, I think some regulators think that the legislator is too slow, too conservative and that the regulator must seize the initiative in social change by being innovative in administration of laws—innovative to the point of pre-empting some of the legislative function.

Until quite recently, the chairman of the FTC has been quite vocal in his theories of social activism. House Bill 1776, the so called legislative veto, is a proper response to this challenge of our traditional system whereby the Congress initiates the law, the Executive enforces it and the courts arbitrate it.

The FTC used car sticker is a textbook case of the regulator overstepping his bounds. This proposed regulation requires the non private or commercial sellers of used cars to inspect approximately 60 items or functions of the vehicle and disclose on a window sticker whether each is "OK" or not "OK". For items marked not "OK" a description of the problem and an estimate of the repair cost must be given. Items marked "OK" will bear an express warranty. There is a provision for selling a car as is. Special sections indicate prior commercial use, flood damaged cars, major collision cars, and mileage information. A summary of get ready repairs is at the bottom.

The Magnuson Moss Warranty Act under which the FTC derives its authority only provided for disclosure of warranty, if one was given, and it definitely did not call for inspection. Clearly a sticker that indicates an item is "OK" creates an express warranty, particularly if it is backed by an inspection. Congress said, "disclose your warranty—if you have one"; the FTC says, "sell it as is or create a warranty."

It may surprise you to know that my dealership operates well within the requirements of most of the FTC sticker. We inspect everything, warrant every sale in writing, furnish mileage affidavit and name of prior owner, and furnish Polaroid shots of prior sheet metal damage before sale. Most of my fellow dealers in this area operate similarly. Our used car business is very successful and growing.

But just because I do all these things is no endorsement of the FTC sticker and an endorsement of enlarging more Federal regulation. For openers, my system is very expensive—we spend \$350-\$400 per sold vehicle for reconditioning and warranty versus a group average of approximately \$165. My average car sells for \$3,500, and I almost never sell a used vehicle under \$2,000. Eliminating all the risk in used car sales eliminates many of the lower priced models and escalates the price. It also escalates the new car price by making older high mileage cars worth less money. A national FTC program would dramatically lower the supply of used cars and escalate the price on the remainder.

The same lot where I now sell 55 cars per month used to sell 125. Some were as low as \$100—transportation specials. The risk was commensurate with the cost—but the customer understood that. Generally, I find the customer has more good common sense than the regulator who thinks he needs to watch over his interests.

If the consumers' interest is to really be served, what about the fact that private sales would be totally lacking in supervision under the FTC proposal? And that's at least 60 percent of all used car sales in the country today. This proposal is very discriminatory against the small businessman.

But besides being a businessman, I'm a consumer and a taxpayer too! I see no need for Federal intrusion into an area that is now being successfully and economically administered by the States. Maryland has its own inspection sticker program and it is a tough one, administered by the State police. The dealer licensing section of the DMV promptly investigates motor vehicle complaints with a field force of competent investigators. The consumer protection division of the Attorney General's office backs up these functions. In fact, in their attitude toward as is sales, Maryland is much tougher than the proposed Federal regulation. In Maryland, private individuals who sell cars are subject to the same inspections as dealers, so that the ultimate consumer has better protection than in the proposed FTC sticker.

The FTC used car sticker is a good example of a Federal regulation which creates more problems than it solves. It will raise used car prices, increase nonregulated sales in the private sector, may create extensive Federal inspection stations, and preempt successful monitoring operations now operated by the States. I believe that Congress by oversight committees and regulative veto, can expose the weakness of such regulations before they wreck havoc in our economy. I am convinced that congressional pressure played a major role in converting OSHA from a regulators nightmare to the effective force it is today, by insisting on common sense approach to occupational safety.

Two years ago, despite the fact that we had spent over \$5,000 for compliance, we were written up for 5 violations. One involved installation of a costly fire extinguisher system in our paint shop. That hurt, but it did help to reduce my fire insurance premium and did insure the safety of my people, so it was a necessary move. But the \$570 I spent for three bathroom doors because "you could peep through the cracks" of the old ones—I will resent that expenditure to my dying day. A legislative veto over poorly conceived, cost ineffective, and unnecessary regulation would be a real asset to the small businessman.

Mr. BAUMAN. We will now hear from Mr. David F. Rodgers, vice president of First Shore Federal Savings & Loan Association, Salisbury, Md.

STATEMENT OF DAVID F. RODGERS, VICE PRESIDENT, FIRST SHORE FEDERAL SAVINGS & LOAN ASSOCIATION, SALISBURY, MD.

Mr. RODGERS. Mr. Chairman, my name is David F. Rodgers. I am vice president for First Shore Federal Savings & Loan Association of Salisbury, Md. We are an association with assets of \$88 million. The association was founded in 1953 for the purpose of providing thrift and homeownership opportunities to the people of our community and the surrounding counties.

I am pleased to appear here today to give you my comments on H.R. 1776. I am here on my own behalf and I do not represent the views of any of the trade associations which represent savings and loan associations, although some of them may be similar or parallel.

I will not comment on every section of H.R. 1776 which was introduced by Congressman Levitas and which has over 200 cosponsors including my own Congressman, Bob Bauman. However, I would like to express my strong support for chapter VI, "Congressional Review of Agency Rulemaking." I have a particular interest in this section because, in my opinion, the savings and loan business is one of the most highly regulated businesses in this country.

Justice William O. Douglas probably put the whole matter of Government regulation into proper place when he said:

The might and power of the Federal Government have no equal * * *. Men of goodwill, not evil ones, invent, under feelings of urgency, new and different procedures that have an awful effect on the citizen.

The encroachment of Government in the private sector in the past few years has been massive. Moreover, it has been in the main, self defeating. Despite noble intentions, Government intervention on an increasing scale has interfered with and inhibited an ability of the typical business enterprise to meet the needs of the consumer. Furthermore, the intervention has occurred in ways which have tended to minimize, rather than maximize, the achievement of the basic social objectives which have been the motivating force for the expansion of Government involvement in private decisionmaking.

Federally chartered savings and loan associations are not only restricted as to the kinds of loans they can make, but unlike banks, there are strict limitations on the dollar amount of loans which are made. Also restricted are the loan-to-value ratios, the lending territory, and the kind of security upon which one must lend. The savings and loan business has been hit by a series of major regulatory developments in the past years which has left the business reeling.

In a 5-year period from 1974 to 1978, Congress enacted 25 additions to the arsenal of regulatory power over business. Among them were the Redlining Disclosure Act, the Community Re-Investment Act of 1976—CRA—and the Real Estate Settlement Procedures Act. Each of these are well-intended measures to protect the American public. By the time those in the bureaucratic maze responsible for writing the regulations completed their tasks, these laws became nightmares for the savings and loan business.

Other regulations affecting our business involve broad new supervisory powers for Federal regulatory authority with corresponding reporting requirements. Many, because of their complexity, have added materially to the cost of doing business.

It is difficult, of course, to obtain an aggregate measure of the total cost involved on complying with Government regulation. An effort was made at the Center for the Study of American Business at Washington University in St. Louis. By using a conservative estimating procedure, they put the total annual cost of Federal regulation for 1976 at \$66 billion, consisting of \$3 billion of taxpayer costs to operate the regulatory agencies and \$63 billion—20 times as much—for business to comply with the regulations. For each dollar appropriated by Congress for regulation it costs the private sector \$20 million. The \$66 billion cost of regulation is equivalent to 3.6 percent of the gross national product, or \$307 for every man, woman, and child living in the United States in 1976.

The point that cannot be overemphasized is not that the plight of American business is severe, but rather that it is the American citizen—each one of us—who ultimately pays the heavy cost of Government regulation.

This year Congress began a positive effort to reduce regulation of savings associations in at least one area by providing S. & L.'s with the same exemption from Federal Trade Commission jurisdiction

which banks now enjoy. Under the exemption, the Federal Home Loan Bank Board still must write trade regulations rules which are substantially similar to the rules promulgated by the Federal Trade Commission. At the present the FTC is considering two important trade rules which would materially affect our business. One is the creditors amendment to the holder-in-due-course rule. The second is the credit collection practices rule which would prohibit many of the traditional collection practices engaged in by S. & L.'s. Both of these rules, in my opinion, will add tremendously to the cost of doing business and alter well settled methods of operation. Both, if finalized, would, if Congress had the power, be candidates for congressional veto. Thus, although Public Law 96-14 provided an exemption for S. & L.'s, the job would be truly "completed" if chapter VI was in place and Congress had an opportunity to review such actions before they were final.

Earlier, I mentioned the costs of regulation and I would like to return briefly to that point.

The budgeted \$4.8 billion to run the various Federal regulatory bureaus in fiscal 1979 represent a 115-percent expansion from the \$2.2 billion level of 1974. Government regulation of business literally has become a major growth area of the American economy.

The Commission on Federal Paperwork reported that 5 million small businesses spend from \$15 billion to \$20 billion a year, an average of over \$3,000 each, on Federal paperwork. As pointed out by the Commission, small businesses are relatively harder hit by Federal information requirements than larger firms and often lack the necessary expertise to comply.

The United States League of Savings Association, the national trade association of which my association is a member, commissioned a study last year on the costs of Government regulation. One conclusive outgrowth of this study is that Government regulation weighs more heavily on smaller associations, that is, those under \$100 million in assets, than on the larger associations. An association like First Shore Federal may spend as much as 2.24 percent of its operating budget to comply with reporting regulations. The study provides breakdowns for a wide variety of Government regulations and allocates the cost for each. With your permission, I would like to insert it in the records of these proceedings. That is why I personally support title VI of H.R. 1776.

I am not saying that Government intervention, in and of itself, is evil and should be eliminated. But the massive exercise of Government power raises some key questions:

Do its advantages in a given situation outweigh its disadvantages?

Do its ends justify either its means or its unplanned side effects?

In the large part, the private sector is faced with Government officials who have never worked in a private company and who simply may not understand the impact of their actions on business and the economy. It is a question not of intentional malice, but of lack of understanding.

I see no evil in permitting Congress to selectively review rules promulgated by a Federal agency and overriding them if such action is appropriate.

Newsweek magazine, in its October 15 issue, quotes Congressman Levitas as saying: "Unselected regulators are passing a hell of a lot of laws, at a ratio of 18 to 1, to those passed by Congress."

This bill would add to congressional workload. However, I believe that in time it could also cause the Federal agencies to think carefully about the rules they promulgate. This would be most helpful, since the difficulty at present is that once certain regulations are finalized, there is no way to remove them from an agency ledger. Bayless Manning, former dean of the Stanford Law School, once said, "Old laws and old agencies neither die nor fade away; being nonbiodegradable, they only accumulate."

This bill would at least allow independent review of agency rules before they are finalized. We in the savings and loan business would benefit because we find that an increasing amount of time is devoted to complying with regulations—many of which go beyond the parameters of the statutes which spawned them.

The authority of H.R. 1776 would cause the agencies to avoid finalizing needless rules. I sincerely hope that the House of Representatives is able to make this bill law. It will give Congress a meaningful method for reviewing agency rules. I welcome this approach very much, and I appreciate the opportunity which permits me to share my views with you.

Mr. BAUMAN. I want to thank you for a very comprehensive and statistic-filled statement, which very succinctly puts the perspective of the impact of regulatory powers on the savings and loan industry.

Is it your feeling in the case of the two regulations you mentioned, holder in due course and credit practice, that the Federal Trade Commission has the power to promulgate such regulations? Are they exceeding their statutory authority?

Mr. RODGERS. I believe they are, and I think it will cost us more time and more money and more headaches with the consumer than there were.

Mr. BAUMAN. Then despite the recent passage of exemptions, that banks have had, they have gone ahead with it.

Mr. RODGERS. The Federal Home Loan Bank has gone ahead and done what they have been told to, as I understand, the Federal Home Loan Bank must write the same or similar regulations as the Federal Trade Commission has suggested in the first place.

Mr. BAUMAN. And that is in the statute?

Mr. RODGERS. Right.

Mr. BAUMAN. So that the Congress, probably many of us not knowing, considered legislation that mandated more regulations of a certain character?

Mr. RODGERS. That is my understanding of it, and that is the impression I have had of what I have read.

Mr. BAUMAN. Do you think that it would be well to require a regulatory proposal that goes into the Federal Register to be accompanied by some sort of economic impact statement?

Mr. RODGERS. I think all you would be doing is creating more agencies.

Mr. BAUMAN. Yes; it would be. As I said in the statement, I think many regulations or rules, or whatever you want to call them, are passed, merely because people that break them do not

understand what they are doing. If you were to choose between trying to change through the normal course of the Administrative Procedures Act a proposed regulation, and coming to the Congress which might have a veto power over those regulations, which do you think would be most productive?

Mr. RODGERS. I don't know, and I support the congressional veto, because I think there will be less rules written, and the rules written will be more in touch with what business is doing.

Mr. BAUMAN. Any questions for Mr. Rodgers?

Thank you very much.

Mr. RODGERS. There is a study I was able to get a hold of, and I copied it.

Mr. BAUMAN. We will make that a part of the record at the conclusion of your testimony. Thank you very much for providing this.

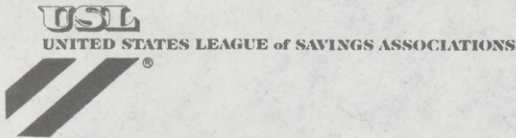
Mr. RODGERS. Thank you for the opportunity. I appreciate it. [Testimony resumes on p. 139.]

[The document referred to follows:]

Case Studies on the Cost of Compliance with Federal Regulations

A report prepared for the U.S. League by Peat, Marwick, Mitchell & Co.

October 1978



INTRODUCTION

The burden of shuffling papers to satisfy government regulations weighs far more heavily on smaller associations than on larger ones.

According to a study conducted for the U.S. League by Peat, Marwick, Mitchell & Co., an association in the less-than-\$100-million asset category may spend 2.24% of its operating budget to comply with reporting regulations and special procedures of the federal government. This contrasts with .62% of total operating expenses for a sample association in the \$100-\$500-million size group. The figure drops to .45% of operating expenses for a sample association in the \$500-million-and-over category.

The study covered 15 areas that account for the bulk of the paperwork required by federal regulators other than examiners. Compliance costs imposed by 18 laws and regulations were investigated.

One group, "Miscellaneous Discrimination," covered the costs of complying with four federal statutes which were, most associations said, impossible to segregate. The four laws were: the Veterans Employment and Readjustment Act, which requires federal associations to list job openings with state employment agencies and to give special emphasis to hiring disabled and Vietnam veterans; the Rehabilitation Act, requiring federal associations to take affirmative action to hire handicapped people; the Age Discrimination Act, which applies to all associations and requires both record keeping and the placement of posters, and Title II of the Civil Rights Act, which bans discrimination based on race, color, sex or national origin and applies to all employers of 15 or more people.

Other record keeping and reporting chores surveyed were:

- ° The Real Estate Settlement Procedures Act (RESPA), with its extensive disclosure demands.
- ° The Flood Insurance Act, which applies to many areas that were not considered flood prone until the Department of Housing and Urban Development began to issue maps of hazard areas.
- ° The Home Mortgage Disclosure Act, which requires associations with assets of \$10 million and an office in a Standard Metropolitan Statistical Area to make public the location of their mortgage security properties.
- ° The Equal Credit Opportunity Act, which prohibits discrimination on the basis of sex or marital status. Besides having to provide unsuccessful loan applicants an ECOA notice with the reason they were turned down, associations must maintain a record of refusals.
- ° The Fair Housing Act, which prohibits discrimination based on sex, race, color or national origin.

- Fair Credit Reporting, a part of the Consumer Credit Protection Act, which requires that the loan applicant be notified if a "consumer investigative report" is to be used in evaluating his credit standing. It also requires that the unsuccessful applicant be told the reason for loan rejection if it is based on the credit report.
- Truth-in-lending, which requires preparation and disclosure of TIL statements that include the "annual percentage rate" as defined by the act. TIL rules must be followed in advertising mortgage terms.
- The Employee Retirement Income Security Act (ERISA), which affects the pension plan of every association. It imposes record keeping, reporting and disclosure requirements that include reporting to the Internal Revenue Service and the Labor Department and giving employees a description of the plan.
- Keogh accounts, which under ERISA have more extensive reporting requirements than previously.
- Individual Retirement Act accounts. Disclosure rules call for new reports for compliance and a special disclosure statement to participants.
- Treasury Order No. 11246, which requires associations with 50 or more employees to have a written affirmative action program on minority hiring. It must include detailed timetables, goals and records.
- The Fair Labor Standards Act, which necessitates record keeping and disclosure activities.
- The Bank Protection Act, which requires security devices and annual statements that security regulations are being followed.
- "Reporting Customer Interest on 1099 Forms," which must be mailed to every depositor who receives more than \$10 a year in interest.

Complying with this array of laws and regulations imposes such a diverse burden on associations that it did not appear feasible to survey a large sample of the business. Accordingly, a list was compiled to provide some geographic and size distribution. These associations were divided into three groups: Those with assets less than \$100 million, those with assets between \$100 and \$500 million, and those with assets over \$500 million.

The survey of compliance costs necessitated such extensive paperwork that associations on the list were first asked if they could participate -- could add to their reporting chores one more, reporting on reporting. Those that were able to allot the necessary employee time were sent the 37-page

-3-

questionnaire that Peat, Marwick, Mitchell developed based on a study of federal compliance requirements by the Legal Department of the U.S. League. Later a PMM consultant visited the associations on a field survey. The questionnaire package is available to League members from the Research Department, U.S. League.

Some large variations in compliance costs were reported, apparently the result of differences in: (1) emphasis on cost accounting and accuracy of cost accounting systems; (2) the methods used to process the information required by regulators; ("Significant cost variations were observed between the use of clerical personnel, automated data processing and the purchase of outside professional services," PMM reported.) (3) the number of branch offices and the need for duplicate effort for compliance, and (4) the degree of emphasis on compliance.

In the tables that follow, asterisks appear where a particular cost was not applicable or not available. Rather than use rough estimates, no figures were reported if an association was unable to identify a cost.

Cost data were collected on salary and non-salary expenses. For salary costs the number of clerical hours and supervisory hours spent on each task was determined, and these figures were converted to dollars using the U.S. League's Compensation Survey 1976. The survey covered the year ended September 30, 1977, and these were the most recent compensation figures available. Fringe benefits were assumed to boost the wage figures by 25%. For non-salary costs, one-time expenses for equipment and training were amortized to obtain annual costs. Eight years was considered the useful life of equipment, and three years was used for other non-salary items such as training programs.

The survey confirmed that the cost of satisfying RESPA requirements is substantial for most associations, generally the largest cost of the 18 areas of compliance investigated. Other findings of the survey include: (1) the cost of complying with ERISA is substantial for some associations; (2) postage and printing for 1099 reporting, a recurring cost that cannot be expected to be reduced by efficiency programs, may be the largest single item for a number of associations, and (3) complying with federal regulations requires considerable supervisory time in addition to the routine clerical work involved in reporting and record keeping.

A summary of the survey findings follows: The association costs shown are considered representative of their size groups.

COST OF COMPLIANCE WITH FEDERAL REGULATIONS

Asset Category: Less Than \$100 Million

Sample Associations

Regulation

RESPA

Recurring Clerical				
Type File	\$ 410	\$ 528	\$ 750	\$ 113
File Maintenance	29	266	500	23
Collect-Summarize Data	*	266	500	*
Prepare-Mail Reports	*	8	500	*
Photocopying	*	13	*	9
Explaining Regulations	*	*	1,500	*
Form Distribution	*	25	*	*
Total Recurring Clerical	439	1,106	3,750	145
Recurring Supervisory				
Policy Development	100	130	3,125	311
Designing Forms	*	684	*	50
Data Collection	*	2,042	2,000	12
Data Summarization	*	684	2,000	50
Report Completion	*	684	1,000	75
Correspondence	*	272	1,875	*
Customer Consultation	*	2,716	2,500	75
External Consultation	*	22	625	*
Total Recurring Supervisory	100	7,235	13,125	573
Recurring Nonsalary	350	250	400	350
Non-Recurring Clerical	*	*	*	*
Non-Recurring Supervisory	67	56	*	*
Non-Recurring Nonsalary	75	300	656	*
Total	\$ 1,031	\$ 8,947	\$17,931	\$ 1,068

- 5 -

COST OF COMPLIANCE WITH FEDERAL REGULATIONS

Asset Category: Less Than \$100 Million

Sample Associations

Regulation

FLOOD INSURANCE

Recurring Clerical	\$ *	\$ *	\$ 1,750	\$ *
Recurring Supervisory	*	*	*	*
Policy Development	8	*	375	75
Designing Forms	*	*	31	*
Data Collection	*	132	250	25
Data Summarization	*	*	250	25
Correspondence	*	*	2,500	12
Report Completion	*	132	125	*
Customer Consultation	*	*	625	*
External Consultation	*	20	62	*
Total Recurring Supervisory	8	284	4,218	137
Recurring Nonsalary	*	*	5	115
Non-Recurring Clerical	*	*	*	*
Non-Recurring Supervisory	*	17	*	*
Non-Recurring Nonsalary	*	*	50	*
Total	8	301	6,023	252

HOME MORTGAGE DISCLOSURE

Recurring Clerical	55	*	656	318
Recurring Supervisory	*	*	*	*
Policy Development	14	*	1,500	50
Designing Forms	*	*	312	25
Data Collection	*	*	1,000	*
Data Summarization	*	*	250	*
Correspondence	*	*	*	*
Report Completion	*	*	375	25
Customer Consultation	*	*	62	*
External Consultation	*	*	62	*
Total Recurring Supervisory	14	*	3,562	100
Recurring Nonsalary	*	460	25	*
Non-Recurring Clerical	*	*	*	*
Non-Recurring Supervisory	*	*	*	*
Non-Recurring Nonsalary	23	133	*	*
Total	\$ 92	\$ 593	\$ 4,243	\$ 418

COST OF COMPLIANCE WITH FEDERAL REGULATIONS

Asset Category: Less Than \$100 Million

Sample Associations

Regulation

EQUAL CREDIT OPPORTUNITY

Recurring Clerical	\$	*	\$	190	\$	750	\$	*
Recurring Supervisory		*		395		1,500		*
Recurring Nonsalary		*		*		12		*
Non-Recurring Clerical		*		*		*		*
Non-Recurring Supervisory		*		*		*		*
Non-Recurring Nonsalary		*		*		*		*
Total		*		585		2,262		*

Regulation

FAIR HOUSING

Recurring Clerical	\$	*	\$	442	\$	*	\$	*
Recurring Supervisory		*				*		*
Policy Development		*		100		1,250		*
Data Collection		*		*		500		*
Report Completion		*		*		500		*
Customer Consultation		*		150		750		*
External Consultation		*		16		62		*
Correspondence		*		*		125		*
Total Recurring Supervisory		*		266		3,187		*
Recurring Nonsalary		*		130		365		*
Non-Recurring Clerical		*		*		*		*
Non-Recurring Supervisory		*		*		*		*
Non-Recurring Nonsalary		*		*		*		*
Total	\$	3	\$	838	\$	3,552	\$	*

COST OF COMPLIANCE WITH FEDERAL REGULATIONS

Asset Category: Less Than \$100 Million

Sample Associations

Regulation

FAIR CREDIT REPORTING

Recurring Clerical	\$	*	\$	114	\$	*	\$	*
Recurring Supervisory								
Policy Development		*		96		625		*
Data Collection		*		*		500		*
Report Completion		*		96		500		*
Correspondence		*		48		31		*
Customer Consultation		*		96		750		*
External Consultation		*		16		250		*
Total Recurring Supervisory		*		352		2,656		*
Recurring Nonsalary		*		310		22		*
Non-Recurring Clerical		*		*		*		*
Non-Recurring Supervisory		*		*		*		*
Non-Recurring Nonsalary		*		*		*		*
Total	\$	*	\$	776	\$	2,678	\$	*

Regulation

TRUTH-IN-LENDING

Recurring Clerical	\$		\$		\$		\$	
Type File		135		249		750		1,138
File Maintenance		29		*		500		46
Summarize Data		*		498		500		*
Photocopying		*		*		*		9
Explain Regulations		12		149		1,500		*
Prepare Reports		*		100		375		*
Total Recurring Clerical		176		996		3,625		1,193
Recurring Supervisory		*						
Policy Development		*		123		1,875		72
Designing Forms		*		*		312		36
Data Collection		*		627		500		180
Data Summarization		*		449		500		36
Report Completion		*		271		375		90
Correspondence		*		*		500		90
Customer Consultation		*		891		312		180
External Consultation		*		192		625		90
Total Recurring Supervisory		*		2,553		5,000		774
Recurring Nonsalary		100		210		*		400
Non-Recurring Clerical		*		*		*		*
Non-Recurring Supervisory		*		*		*		*
Non-Recurring Nonsalary		*		*		292		*
Total	\$	276	\$	3,759	\$	8,917	\$	2,367

COST OF COMPLIANCE WITH FEDERAL REGULATIONS

Asset Category: Less Than \$100 Million

Sample Associations

Regulation

IRA

Recurring Clerical	\$ 155	\$ *	\$ 281	\$ *
Recurring Supervisory	149	1,172	251	*
Recurring Nonsalary				
Form Distribution	*	*	105	*
Report Completion	*	*	105	*
Distribution/Postage	200	*	*	*
Additional Storage	75	25	5	*
Data Processing	*	1,380	*	*
Insurance	*	25	*	*
Purchase of Fed. Forms, Manuals	*	70	*	*
Total Recurring Nonsalary	275	1,500	215	*
Non-Recurring Clerical	25	*	*	*
Non-Recurring Supervisory	51	*	*	*
Non-Recurring Nonsalary	352	376	*	*
Total	\$ 1,007	\$ 3,048	\$ 747	\$ *

Regulation

KEOGH

Recurring Clerical	\$ 79	\$ *	\$ *	\$ *
Recurring Supervisory	83	73	31	*
Recurring Nonsalary	150	1,430	719	*
Non-Recurring Clerical	*	*	*	*
Non-Recurring Supervisory	57	376	*	*
Non-Recurring Nonsalary	352	*	*	*
Total	\$ 721	\$ 1,879	\$ 750	\$ *

Regulation

ERISA

Recurring Clerical	\$ 14	\$ 395	\$ 250	\$ *
Recurring Supervisory	344	638	1,688	*
Recurring Nonsalary	2,500	590	1,175	*
Non-Recurring Clerical	*	*	*	*
Non-Recurring Supervisory	*	*	*	*
Non-Recurring Nonsalary	37	8	*	*
Total	\$ 2,895	\$ 1,631	\$ 3,113	\$ *

- 9 -

COST OF COMPLIANCE WITH FEDERAL REGULATIONS

Asset Category: Less Than \$100 Million

Sample Associations

Regulation

FAIR LABOR STANDARDS

Recurring Clerical	\$ *	\$ 108	\$ 63	\$ 4
Recurring Supervisory	*	228	125	6
Recurring Nonsalary	*	50	*	*
Non-Recurring Clerical	*	*	*	*
Non-Recurring Supervisory	*	*	*	*
Non-Recurring Nonsalary	*	*	*	*
Total	\$ *	\$ 386	\$ 188	\$ 10

Regulation

MISCELLANEOUS DISCRIMINATION ACTS

Recurring Clerical	\$ 7	\$ 603	\$ *	\$ *
Recurring Supervisory	25	1,053	125	*
Recurring Nonsalary	*	180	*	*
Non-Recurring Clerical	*	8	*	*
Non-Recurring Supervisory	123	*	*	*
Non-Recurring Nonsalary	*	*	*	*
Total	155	1,844	125	*

Regulation

TREASURY ORDER

Recurring Clerical	\$ *	\$ 489	\$ *	\$ *
Recurring Supervisory	*	60	*	*
Recurring Nonsalary	*	*	*	*
Non-Recurring Clerical	*	*	*	*
Non-Recurring Supervisory	*	*	*	*
Non-Recurring Nonsalary	*	25	*	*
Total	\$ *	\$ 574	\$ *	\$ *

- 10 -

COST OF COMPLIANCE WITH FEDERAL REGULATIONS

Asset Category: Less Than \$100 Million

Sample Associations

Regulation

BANK PROTECTION

Recurring Clerical	\$ *	\$ *	\$ 188	\$ 18
Recurring Supervisory	133	482	625	45
Recurring Nonsalary	1,700	420	400	*
Non-Recurring Clerical	*	*	*	*
Non-Recurring Supervisory	110	36	*	*
Non-Recurring Nonsalary	2,500	1,125	2,125	*
Total	\$ 4,443	\$ 2,063	\$ 3,338	\$ 63

Regulation

1099 REPORTING

Recurring Clerical	\$ 2,034	\$ 1,260	\$ 938	\$ 18
Recurring Supervisory	281	18	125	19
Data Processing	2,500	464	75	*
Distribution/Postage	500	3,016	500	*
External Services	*	30	*	*
Total Recurring Nonsalary	3,000	3,510	575	*
Non-Recurring Clerical	*	*	*	*
Non-Recurring Supervisory	45	*	*	*
Non-Recurring Nonsalary	*	*	*	*
Total	\$ 8,360	\$ 8,298	\$ 2,213	\$ 37

- 11 -

COST OF COMPLIANCE WITH FEDERAL REGULATIONS

Asset Category: \$100-\$500 Million

Sample Associations

Regulation

RESPA

Recurring Clerical	\$	\$	\$	\$	\$
Type File	2,111	1,916	6,984	177	193
File Maintenance	422	49	*	70	*
Collect-Summarize Data	985	573	*	528	772
Key punch Time	*	*	*	*	*
Prepare Forms	*	*	74	*	*
Photocopying	141	98	1,164	36	*
Explaining Regulations	4,223	1,146	1,746	36	386
Form Distribution	141	*	*	36	*
Prepare-Mail Reports	*	482	*	107	*
Total Recurring Clerical	8,024	4,269	9,968	990	1,351
Recurring Supervisory					
Policy Development	329	*	617	*	*
Designing Forms	*	653	77	*	*
Data Collection	165	3,914	*	56	*
Data Summarization	*	7,822	*	56	*
Report Completion	*	3,914	*	56	*
Correspondence	*	1,307	*	111	*
Customer Consultation	1,070	1,960	*	56	*
External Consultation	206	*	3,050	*	*
Total Recurring Supervisory	1,770	19,570	3,744	334	*
Recurring Nonsalary	*	295	559	1,400	48
Non-Recurring Clerical	51	*	*	*	*
Non-Recurring Supervisory	1,371	18	*	*	73
Non-Recurring Nonsalary	*	*	*	*	31
Total	\$11,216	\$24,152	\$14,271	\$ 2,724	\$ 1,503

Regulation

FLOOD INSURANCE

Recurring Clerical	\$ 2,024	\$ 476	\$ *	\$ 224	\$ 116
Recurring Supervisory	898	807	*	236	*
Recurring Nonsalary	*	450	*	150	18
Non-Recurring Clerical	*	*	*	*	*
Non-Recurring Supervisory	621	6	*	*	21
Non-Recurring Nonsalary	*	*	*	*	*
Total	\$ 3,543	\$ 1,739	\$ *	\$ 610	\$ 155

- 12 -

COST OF COMPLIANCE WITH FEDERAL REGULATIONS

Asset Category: \$100-\$500 Million

Sample Associations

Regulation

HOME MORTGAGE DISCLOSURE

Recurring Clerical	\$ 511	\$ 147	\$ 2,521	\$ 68	\$ 517
Recurring Supervisory	716	*	1,683	643	*
Recurring Nonsalary	*	*	129	645	24
Non-Recurring Clerical	8	*	*	*	*
Non-Recurring Supervisory	65	*	*	*	*
Non-Recurring Nonsalary	*	*	*	*	*
Total	\$ 1,300	\$ 147	\$ 4,333	\$ 1,356	\$ 541

Regulation

EQUAL CREDIT OPPORTUNITY

Recurring Clerical	\$ 559	\$ 1,266	\$ 246	\$ 19	\$ 830
Recurring Supervisory					
Data Collection	*	3,912	77	*	*
Data Summarization	*	1,953	*	*	*
Report Completion	*	1,953	*	*	*
Correspondence	*	1,306	*	*	*
Customer Consultation	791	1,566	694	*	*
Policy Development	151	*	*	*	*
External Consultation	19	*	1,221	*	*
Photocopying	113	*	*	*	*
Prepare Forms	*	*	51	*	*
Total Recurring Supervisory	1,074	10,689	2,043	19	830
Recurring Nonsalary	*	*	*	150	216
Non-Recurring Clerical	*	*	*	*	*
Non-Recurring Supervisory	84	19	*	*	114
Non-Recurring Nonsalary	*	125	*	*	*
Total	1,717	12,099	2,289	169	1,160

Regulation

FAIR HOUSING

Recurring Clerical	\$ 848	\$ 914	\$ *	\$ *	\$ *
Recurring Supervisory	74	*	*	*	*
Recurring Nonsalary	*	45	345	200	*
Non-Recurring Clerical	*	*	*	*	*
Non-Recurring Supervisory	*	*	*	*	21
Non-Recurring Nonsalary	*	*	*	*	*
Total	\$ 922	\$ 959	\$ 345	\$ 200	\$ 21

- 13 -

COST OF COMPLIANCE WITH FEDERAL REGULATIONS

Asset Category: \$100-\$500 Million

Sample Associations

Regulation

FAIR CREDIT REPORTING

Recurring Clerical	\$ 1,269	\$ 2,117	\$ *	\$ 190	\$ 58
Recurring Supervisory	90	3,778	*	177	*
Recurring Nonsalary	*	*	850	30	*
Non-Recurring Clerical	*	*	*	*	*
Non-Recurring Supervisory	*	6	*	*	21
Non-Recurring Nonsalary	*	*	*	*	*
Total	\$ 1,359	\$ 5,901	\$ 850	\$ 397	\$ 79

Regulation

TRUTH-IN-LENDING

Recurring Clerical	\$	\$	\$	\$	\$
Type File	786	479	1,164	374	233
File Maintenance	562	47	*	75	39
Collect-Summarize Data	1,685	574	*	374	233
Computer Operation	*	*	*	*	19
Photocopying	45	18	*	112	*
Explaining Regulations	1,124	483	*	30	310
Form Distribution	*	*	*	*	*
Prepare-Mail Reports	562	*	*	187	*
Total Recurring Clerical	4,764	1,601	1,164	1,152	834
Recurring Supervisory	509	1,993	*	783	*
Recurring Nonsalary	*	125	66	1,060	72
Non-Recurring Clerical	*	*	*	*	*
Non-Recurring Supervisory	163	6	*	*	176
Non-Recurring Nonsalary	*	*	*	*	98
Total	\$ 5,436	\$ 3,725	\$ 1,230	\$ 2,995	\$ 1,180

- 14 -

COST OF COMPLIANCE WITH FEDERAL REGULATIONS

Asset Category: \$100-\$500 Million

Sample Associations

Regulation

IRA

	\$	\$	\$	\$	\$
Recurring Clerical					
Type File	1,125	*	4	111	212
File Maintenance	574	*	2,508	22	12
Collect-Summarize Data	*	*	768	*	55
Computer Operation	15	*	230	*	16
Photocopying	*	*	19	*	12
Explaining Regulations	505	*	2,745	*	86
Form Distribution	5	*	96	*	*
Prepare-Mail Reports	40	*	96	22	24
Total Recurring Clerical	2,264	*	6,467	155	416
Recurring Supervisory	190	*	1,268	704	1,149
Recurring Nonsalary	1,800	*	2,184	94	1,525
Non-Recurring Clerical	*	*	*	*	*
Non-Recurring Supervisory	13	*	*	*	17
Non-Recurring Nonsalary	2,025	*	*	*	*
Total	\$ 6,292	\$ *	\$ 9,919	\$ 953	\$ 3,106

Regulation

KEOGH

	\$	\$	\$	\$	\$
Recurring Clerical					
Type File	*	*	15	111	286
File Maintenance	*	*	833	22	*
Collect-Summarize Data	*	*	576	*	46
Photocopying and Key Punch Time	*	*	19	*	28
Explaining Regulations	*	*	2,745	*	*
Form Distribution	*	*	96	*	*
Prepare-Mail Reports	*	*	96	22	55
Total Recurring Clerical	*	*	4,381	155	416
Recurring Supervisory	*	*	1,555	704	1,149
Recurring Nonsalary	*	*	2,363	94	1,525
Non-Recurring Clerical	*	*	*	*	*
Non-Recurring Supervisory	*	*	*	*	18
Non-Recurring Nonsalary	*	*	*	*	*
Total	\$ *	\$ *	\$ 8,299	\$ 953	\$ 3,108

- 15 -

COST OF COMPLIANCE WITH FEDERAL REGULATIONS

Asset Category: \$100-\$500 Million

Sample Associations

Regulation

ERISA

Recurring Clerical	\$	*	\$	440	\$	*	\$	101	\$	388
Recurring Supervisory										
Policy Development		140	*	*			105		425	
Designing Forms		*	*	*			53		136	
Data Collection		*	*	*			*		136	
Data Summarization		*	*	*			105		136	
Report Completion		*	1,035	*			158		51	
Correspondence		*	*	*			158		*	
Customer Consultation		*	129	*			*		255	
External Consultation		*	1,551	*			*		*	
Total Recurring Supervisory		140	2,715	*			579		1,139	
Recurring Nonsalary										
Data Processing		*	*	*			*		*	
Report Completion		*	800	*			*		191	
Insurance		*	*	*			950		*	
Research-Training Changes		*	*	*			*		143	
External Services		*	*	*			3,000		2,500	
Additional Storage Space		*	*	*			*		700	
Purchase of Materials		*	*	*			300		4	
Total Recurring Nonsalary		*	800	*			4,150		3,538	
Non-Recurring Clerical		*	*	*			*		*	
Non-Recurring Supervisory		*	*	*			525		*	
Non-Recurring Nonsalary		*	133	*			2,500		17	
Total	\$	140	\$ 4,088	\$	*		\$ 7,855		\$ 5,082	

Regulation

FAIR LABOR STANDARDS

Recurring Clerical	\$	*	\$	1,106	\$	*	\$	2,072	\$	21
Recurring Supervisory		*		517		*		285		102
Recurring Nonsalary		*		31		*		1,805		269
Non-Recurring Clerical		*	*	*		*	*	*		*
Non-Recurring Supervisory		*	*	*		*	*	6		*
Non-Recurring Nonsalary		*	*	*		*	*	*		17
Total	\$	*	\$ 1,654	\$	*		\$ 4,168		\$ 408	

- 16 -

COST OF COMPLIANCE WITH FEDERAL REGULATIONS

Asset Category: \$100-\$500 Million

Sample Associations

Regulation

MISCELLANEOUS DISCRIMINATION ACTS

Recurring Clerical	\$	*	\$	221	\$	*	\$	128	\$	272
Recurring Supervisory		*		1,035		*		104		214
Recurring Nonsalary		*		*		*		*		1,092
Non-Recurring Clerical		*		*		*		*		*
Non-Recurring Supervisory		*		*		*		*		*
Non-Recurring Nonsalary		*		*		*		*		*
Total	\$	*	\$	1,256	\$	*	\$	232	\$	1,578

Regulation

TREASURY ORDER

Recurring Clerical	\$	*	\$	221	\$	*	\$	295	\$	17
Recurring Supervisory		*				*		*		87
Policy Development		*		1,078		*		*		70
Data Collection		*		3,232		*		126		35
Report Completion		*		1,078		*		231		2
Correspondence		*		646		*		63		35
Data Summarization		*		*		*		210		131
External Consultation		*		*		*		918		358
Total Recurring Supervisory		*		6,034		*		918		363
Recurring Nonsalary		*		*		*		500		*
Non-Recurring Clerical		*		*		*		*		*
Non-Recurring Supervisory		*		*		*		346		*
Non-Recurring Nonsalary		*		*		*		8		17
Total	\$	*	\$	6,255	\$	918	\$	1,779	\$	755

- 17 -

COST OF COMPLIANCE WITH FEDERAL REGULATIONS

Asset Category: \$100-\$500 Million

Sample Associations

Regulation

BANK PROTECTION ACT

Recurring Clerical	\$ 13	\$ 4	\$ *	\$ 5	\$ *
Recurring Supervisory	72	*	*	810	*
Recurring Nonsalary	500	*	*	25	*
Non-Recurring Clerical	*	*	*	*	*
Non-Recurring Supervisory	*	*	*	33	*
Non-Recurring Nonsalary	*	*	*	*	*
Equipment	<u>2,975</u>	<u>*</u>	<u>*</u>	<u>*</u>	<u>*</u>
Total Non-Recurring Nonsalary	2,975	*	*	*	*
Total	\$ 3,500	\$ 4	\$ *	\$ 873	\$ 117

Regulation

1099 REPORTING

Recurring Clerical	\$ 471	\$ 860	\$ 1,500	\$ 1,085	\$ 245
Recurring Supervisory	*	*	*	325	425
Recurring Nonsalary					
Data Processing	*	2,000	4,500	1,000	2,250
Additional Storage	*	*	5,200	100	500
Form Distribution	6,500	4,810	*	*	3,450
Report Preparation	275	*	*	*	*
Disclosure Forms Distribution	*	*	*	*	100
Total Recurring Nonsalary	<u>6,775</u>	<u>6,810</u>	<u>9,700</u>	<u>1,100</u>	<u>6,300</u>
Non-Recurring Clerical	*	*	*	*	34
Non-Recurring Supervisory	*	*	*	42	*
Non-Recurring Nonsalary	*	18	*	*	150
Total	\$ 7,246	\$ 7,688	\$ 11,200	\$ 2,552	\$ 7,154

COST OF COMPLIANCE WITH FEDERAL REGULATIONS

Asset Category: Over \$500 million

Regulation	Sample Associations		
<u>RESPA</u>			
Recurring Clerical			
Type File	\$ 3,117	\$ 1,976	\$ 1,633
File Maintenance	1,556	657	*
Collect-Summarize Data	3,117	*	1,633
Prepare Forms	*	*	100
Photocopying	*	441	151
Explaining Regulations	261	*	226
Form Distribution	3,117	*	75
Prepare-Mail Reports	3,117	*	*
Total Recurring Clerical	<u>14,285</u>	<u>3,074</u>	<u>3,818</u>
Recurring Supervisory			
Policy Development	2,219	7,497	271
Designing Forms	51	7,497	271
Data Collection	4,161	767	*
Data Summarization	2,074	767	*
Report Completion	834	767	*
Correspondence	4,154	544	6,501
Customer Consultation	4,154	1,154	203
External Consultation	72	*	*
Photocopying	1,269	*	306
Total Recurring Supervisory	<u>18,988</u>	<u>18,993</u>	<u>7,552</u>
Recurring Nonsalary			
Data Processing			200
Report Record Cost		500	800
New Equipment	*	*	100
Public Relations	*	*	100
Form Development	*	100	*
Changes in Training	*	*	200
Insurance Costs	*	1,000	*
External Services	*	5,000	*
Purchase of Federal Materials	*	100	25
Total Recurring Nonsalary	<u>*</u>	<u>6,700</u>	<u>*</u>
Nonrecurring Nonsalary	537	*	*
Total	<u>\$33,810</u>	<u>\$28,767</u>	<u>\$12,795</u>

COST OF COMPLIANCE WITH FEDERAL REGULATIONS

Asset Category: Over \$500 million

Regulation

Sample Associations

FLOOD INSURANCE

Recurring Clerical			
Type File	\$ 5,065	\$ 220	\$1,633
File Maintenance	699	220	*
Collect-Summarize Data	5,243	*	817
Key punch Time	*	*	75
Prepare Forms	*	*	101
Photocopying	*	221	50
Explaining Regulations	5,243	*	75
Prepare-Mail Reports	3,495	*	*
Total Recurring Clerical	19,745	661	2,751
Recurring Supervisory			
Policy Development	*	250	135
Designing Forms	*	250	135
Data Collection	*	128	51
Data Summarization	*	128	*
Report Completion	*	129	*
Correspondence	*	544	3,251
Customer Consultation	*	190	*
Photocopying	*	*	102
Total Recurring Supervisory	*	1,619	3,674
Recurring Nonsalary	*	700	560
Total	\$19,745	\$ 2,980	\$6,985

Regulation

HOME MORTGAGE DISCLOSURE

Recurring Clerical	\$ 397	\$ 877
Recurring Supervisory		
Policy Development	*	1,250
Designing Forms	*	1,250
Data Collection	*	128
Data Summarization	*	128
Report Completion	*	128
Correspondence	*	544
Customer Consultation	*	190
Total Recurring Supervisory	*	3,618
Recurring Nonsalary	*	1,484
Total	\$ 397	\$ 5,979

- 20 -

COST OF COMPLIANCE WITH FEDERAL REGULATIONS

Asset Category: Over \$500 million

Regulation

Sample Associations

EQUAL CREDIT OPPORTUNITY

Recurring Clerical			
Type File	\$ 6,233	\$ 220	\$ 633
File Maintenance	1,556	220	1,269
Collect-Summarize Data	1,632	*	150
Key punch Time	3,117	*	1,633
Prepare Forms	*	*	251
Photocopying	54	221	151
Explaining Regulations	6,528	*	226
Form Distribution	1,556	*	75
Prepare-Mail Reports	*	*	*
Total Recurring Clerical	<u>20,676</u>	<u>661</u>	<u>5,388</u>
Recurring Supervisory			
Policy Development	5,273	250	677
Designing Forms	1,504	250	271
Data Collection	*	128	610
Data Summarization	2,069	128	*
Report Completion	*	129	*
Correspondence	4,149	544	4,876
Customer Consultation	4,149	190	406
External Consultation	1,127	*	203
Photocopying	1,735	*	204
Total Recurring Supervisory	<u>20,006</u>	<u>1,619</u>	<u>7,247</u>
Recurring Nonsalary			
Data Processing	*	*	400
Report Record Cost	*	*	350
New Equipment	*	*	6
Public Relations	*	*	300
Form Development	*	*	1,050
Changes in Training	*	*	300
Insurance Costs	*	*	*
External Services	*	1,000	*
Additional File/Storage	*	*	63
Purchase of Federal Materials	*	100	50
Total Recurring Nonsalary	<u>*</u>	<u>1,100</u>	<u>2,519</u>
Nonrecurring Nonsalary	391	*	*
Total	<u>\$41,073</u>	<u>\$3,380</u>	<u>\$15,154</u>

COST OF COMPLIANCE WITH FEDERAL REGULATIONS

Asset Category: Over \$500 million

Regulation

Sample Associations

FAIR HOUSING

Recurring Clerical			
Type File	\$ *	\$ 220	\$ *
File Maintenance	*	220	1,269
Prepare Forms	*	*	100
Photocopying	*	221	*
Explaining Regulations	9,792	*	*
Total Recurring Clerical	9,792	661	1,369
Recurring Supervisory	2,439	1,619	203
Recurring Nonsalary	20	600	*
Nonrecurring Nonsalary	112	*	*
Total	\$12,363	\$2,880	\$1,572

FAIR CREDIT REPORTING

Recurring Clerical			
Type File	\$ 3,120	\$ 200	\$ *
File Maintenance	1,554	220	*
Collect-Summarize Data	1,555	*	1,633
Photocopying	54	221	*
Explaining Regulations	3,115	*	*
Form Distribution	1,554	*	*
Prepare-Mail Reports	1,555	*	75
Total Recurring Clerical	12,507	\$ 661	1,708
Recurring Supervisory			
Policy Development	*	250	*
Designing Forms	*	250	*
Data Collection	4,155	128	68
Data Summarization	*	128	*
Report Completion	*	129	*
Correspondence	2,074	544	34
Customer Consultation	2,074	190	*
Photocopying	363	*	*
Total Recurring Supervisory	8,665	1,619	102
Recurring Nonsalary	100	600	*
Nonrecurring Nonsalary	8	*	*
Total	\$21,291	\$2,880	\$1,810

COST OF COMPLIANCE WITH FEDERAL REGULATIONS

Asset Category: Over \$500 million

Regulation

TRUTH IN LENDING

Sample Associations

Recurring Clerical	\$7,018	\$ 5,927	\$6,494
Recurring Supervisory	*	*	*
Policy Development	*	14,994	406
Designing Forms	*	14,994	271
Data Collection	*	1,533	*
Data Summarization	*	1,533	*
Report Completion	*	1,534	*
Correspondence	*	544	*
Customer Consultation	174	2,318	610
External Consultation	174	*	230
Total Recurring Supervisory	<u>348</u>	<u>37,450</u>	<u>1,490</u>
Recurring Nonsalary	*	*	300
Data Processing	*	*	300
Report Record Cost	300	117	850
New Equipment	*	*	12
Public Relations	150	*	250
Form Development	*	100	*
Changes in Training	*	*	200
Insurance Costs	*	1,000	*
External Services	*	5,000	*
Purchase of Federal Materials	*	100	25
Total Recurring Nonsalary	<u>450</u>	<u>6,317</u>	<u>1,637</u>
Nonrecurring Nonsalary	230	*	*
Total	<u>\$8,019</u>	<u>\$49,694</u>	<u>\$9,621</u>

- 23 -

COST OF COMPLIANCE WITH FEDERAL REGULATIONS

Asset Category: Over \$500 million

Regulation

Sample Associations

IRA

Recurring Clerical			
Type File	\$ 803	\$ 3,060	\$12,500
File Maintenance	*	2,040	2,500
Collect-Summarize Data	*	*	1,500
Key punch Time	*	408	7,500
Prepare Forms	*	20	250
Photocopying	*	*	1,500
Explaining Regulations	*	3,060	500
Form Distribution	*	*	250
Prepare-Mail Reports	577	204	1,000
Total Recurring Clerical	<u>1,380</u>	<u>8,792</u>	<u>27,500</u>
Recurring Supervisory			
Policy Development	299	2,732	1,000
Designing Forms	*	55	1,000
Data Collection	*	*	1,500
Data Summarization	*	*	500
Report Completion	*	273	1,500
Correspondence	*	*	750
Customer Consultation	*	2,733	1,000
External Consultation	*	55	1,500
Photocopying	*	109	1,500
Total Recurring Supervisory	<u>299</u>	<u>5,957</u>	<u>10,250</u>
Recurring Nonsalary			
Report Record Cost	200	2,500	250
Public Relations	*	1,000	500
Form Development	*	750	1,500
Changes in Training	*	500	500
Insurance Costs	*	1,500	*
External Services	*	4,500	21,500
Additional File/Storage	*	25	*
Purchase of Federal Materials	*	200	*
Total Recurring Nonsalary	<u>200</u>	<u>10,976</u>	<u>24,250</u>
Nonrecurring Nonsalary	505	62	*
Total	<u>\$2,074</u>	<u>\$25,787</u>	<u>\$62,000</u>

- 24 -

COST OF COMPLIANCE WITH FEDERAL REGULATIONS

Asset Category: Over \$500 million

Regulation

KEOGH

Sample Associations

Recurring Clerical			
Type File	\$ 111	\$ 306	\$12,500
File Maintenance	*	204	2,500
Collect-Summarize Data	*	*	1,500
Key punch Time	*	102	7,500
Prepare Forms	*	20	250
Photocopying	*	*	1,500
Explaining Regulations	212	306	500
Form Distribution	*	*	250
Prepare-Mail Reports	72	21	1,000
Total Recurring Clerical	<u>395</u>	<u>959</u>	<u>27,500</u>
Recurring Supervisory			
Policy Development	998	273	1,000
Designing Forms	*	55	1,000
Data Collection	*	*	1,500
Data Summarization	*	*	500
Report Completion	76	109	1,500
Correspondence	399	*	750
Customer Consultation	*	1,093	1,000
External Consultation	*	55	1,500
Photocopying	<u>1,383</u>	<u>55</u>	<u>1,500</u>
Total Recurring Supervisory	<u>2,856</u>	<u>1,640</u>	<u>10,250</u>
Recurring Nonsalary			
Report Record Cost	300	500	250
Public Relations	250	100	500
Form Development	*	500	1,500
Changes in Training	*	500	500
Insurance Costs	*	270	*
External Services	*	500	21,500
Additional File/Storage	*	12	*
Purchase of Federal Materials	<u>190</u>	<u>100</u>	<u>*</u>
Total Recurring Nonsalary	<u>740</u>	<u>2,482</u>	<u>24,250</u>
Nonrecurring Nonsalary	210	*	*
Total	<u>\$4,201</u>	<u>\$5,081</u>	<u>\$62,000</u>

COST OF COMPLIANCE WITH FEDERAL REGULATIONS

Asset Category: Over \$500 million

Regulation

Sample Associations

ERISA

Recurring Clerical	\$1,415	\$ 989	\$ 975
Recurring Supervisory	830	2,167	2,350
Recurring Nonsalary	*	*	*
Data Processing	*	*	2,000
Report Record Cost	*	38	*
Public Relations	225	*	*
External Services	240	5,000	*
Additional File/Storage	50	*	*
Total Recurring Nonsalary	515	5,038	2,000
Total	\$2,760	\$8,194	\$5,225

Regulation

FAIR LABOR STANDARDS

Recurring Clerical	\$ 1,482	\$ 147	\$ *
Type File	1,117	*	*
File Maintenance	1,117	*	*
Collect-Summarize Data	1,770	*	700
Key punch Time	379	287	*
Explaining Regulations	379	153	*
Form Distribution	508	*	*
Prepare-Mail Reports	6,752	587	700
Total Recurring Clerical	3,926	1,608	2,200
Recurring Supervisory			
Recurring Nonsalary			
Data Processing	1,200	*	1,000
Report Record Cost	95	40	400
External Services	7,000	1,000	*
Additional File/Storage	100	25	*
Purchase of Federal Materials	100	500	*
Total Recurring Nonsalary	8,495	1,565	1,400
Total	\$19,173	\$3,760	\$4,300

- 26 -

COST OF COMPLIANCE WITH FEDERAL REGULATIONS

Asset Category: Over \$500 million

Regulation

Sample Associations

MISCELLANEOUS DISCRIMINATION ACTS

Recurring Clerical		
Type File	\$1,066	\$ 115
File Maintenance	232	*
Collect-Summarize Data	232	64
Prepare Forms	223	38
Photocopying	*	64
Explaining Regulations	232	*
Form Distribution	232	13
Prepare-Mail Reports	418	6
Total Recurring Clerical	<u>2,635</u>	<u>300</u>
Recurring Supervisory		
Policy Development	838	279
Data Collection	*	84
Data Summarization	344	196
Report Completion	344	*
Correspondence	1,046	*
External Consultation	<u>*</u>	<u>224</u>
Total Recurring Supervisory	<u>2,572</u>	<u>783</u>
Recurring Nonsalary	275	195
Total	<u>\$5,482</u>	<u>\$1,278</u>

- 27 -

COST OF COMPLIANCE WITH FEDERAL REGULATIONS

Asset Category: Over \$500 million

Regulation

Sample Associations

TREASURY ORDER

Recurring Clerical		
Type File	\$ 3,387	\$ 638
File Maintenance	847	32
Collect-Summarize Data	847	*
Key punch Time	885	*
Prepare Forms	212	*
Photocopying	212	*
Explaining Regulations	847	160
Form Distribution	847	6
Prepare-Mail Reports	1,270	*
Total Recurring Clerical	9,354	836
Recurring Supervisory		
Policy Development	1,529	*
Designing Forms	765	*
Data Collection	885	*
Data Summarization	1,258	*
Report Completion	629	*
Correspondence	1,886	*
Customer Consultation	*	70
Total Recurring Supervisory	6,952	70
Recurring Nonsalary		
Data Processing	1,200	*
Report Record Cost	170	*
Changes in Training	1,200	*
External Services	500	*
Additional File/Storage	150	2
Purchase of Federal Materials	1,500	*
Total Recurring Nonsalary	4,770	2
Total	\$21,076	\$ 908

Regulation

BANK PROTECTION ACT

Recurring Clerical	\$ 17	\$ 1,341	*
Recurring Supervisory	*	713	\$ 600
Recurring Nonsalary	*	*	*
New Equipment	*	*	1,800
Form Development	*	20	*
Nonrecurring Nonsalary	*	*	1,000
Total	\$ 17	\$ 2,074	\$3,400

COST OF COMPLIANCE WITH FEDERAL REGULATIONS

Asset Category: Over \$500 million

Regulation

Sample Associations

1099 REPORTING

*Recurring Clerical			
Type File	\$ *	\$ 39	\$ 31,010
File Maintenance	*	39	3,870
Collect-Summarize Data	*	112	30,960
Key punch Time		58	79,000
Photocopying	*	8	1,935
Explaining Regulations	*	12	38,700
Form Distribution	*	*	774
Prepare-Mail Reports	*	406	3,674
Total Recurring Clerical	*	674	189,923
Recurring Supervisory			
Policy Development	*	140	1,494
Designing Forms	*	14	1,348
Data Collection	*	*	1,868
Data Summarization	*	*	998
Report Completion	*	*	798
Correspondence	*	503	1,046
External Consultation	*	*	772
Photocopying	*	*	24,900
Total Recurring Supervisory	*	657	33,224
Recurring Nonsalary			
Data Processing	2,420	12,800	4,000
Report Record Cost	22,840	*	31,640
New Equipment	176	*	*
Public Relations	*	*	5,000
Form Development	350	17,756	5,750
Changes in Training	426	*	*
External Services	3,250	*	400
Additional File/Storage	480	3	*
Purchase of Federal Materials	380	*	*
Total Recurring Nonsalary	30,322	30,559	46,790
Nonrecurring Nonsalary	*	*	1,750
Total	\$30,322	\$31,890	\$271,687

Mr. BAUMAN. The next witness is Mr. J. Edwin Hobbs, Delmarva Power & Light Co.

STATEMENT OF J. EDWIN HOBBS, PRESIDENT, DELMARVA POWER & LIGHT CO. OF MARYLAND, SALISBURY, MD.

Mr. HOBBS. Thank you, Mr. Chairman.

I have a prepared statement that I would like to run through.

My name is J. Edwin Hobbs. I am southern division president of Delmarva Power & Light Co. and also president of Delmarva Power & Light Co. of Maryland and Delmarva Power & Light Co. of Virginia, Delmarva's subsidiaries. My experience in the utility industry totals more than 46 years. I have previously testified before both Senate and House subcommittees regarding railroad service on the Delmarva Peninsula and its effect on the local economy.

My remarks today are my perception of the effects of rules and regulations made and enforced by Federal agencies and also the rules and regulations of State agencies as required by Federal law. The reference to State regulation is made because several Federal agencies—notably EPA, WRA, OSHA—require that the States have approved implementation plans under which they delegate control, or be subject to Federal inspections and control. This, to some extent, allows an applicant to deal with local people, but at the same time, insulates the Federal agency which pulls the strings from contact with the abused part. Rulings by the State agency are often subject to veto by the Federal agency.

It is my opinion that the jungle of the regulations and the plethora of permits required to construct almost anything is slowly, but surely, strangling American business. Administrators in the regulatory agencies have all the tools to slow down, halt, or order changes in projects already underway, yet have no responsibility whatever to consider the cost of their actions in either time or money. Regulations provide the means for intervenors, no matter how biased their intentions, to enter a case with nothing at risk, but which may cost a permit applicant thousands of dollars to fend off their attacks. Much of the time, talent, and money devoted to working an applicant's way through this maze is nonproductive, expensive, and surely a major cause of inflation. Many an applicant has decided that it is just not worth the effort, thus further retarding the formation of capital that our country needs so badly.

Allow me to cite some examples: I thought I would have a little trouble citing some specifics. I have 11 of them here, and I thought of a dozen more before I got through writing the statement.

One: Standard Oil of Ohio, recognizing the need to move Alaskan crude oil from Long Beach, Calif., to Midwestern and Eastern refining capacity and markets, endeavored to build a pipeline. After years of attempting to obtain the more than 600 permits involved, and the expenditure of more than \$100 million, Sohio abandoned the project stating that their projections were such that if they were ever able to get the permits, and then construct the line, the market for its use would have disappeared.

Two: For more than 7 years, a refiner has attempted to locate an oil refinery at Portsmouth, Va. He has obtained permit upon permit only to find that there are others he must get. President

Carter's energy message contained the statement, "If we need to build a refinery, we will build it." Here is an excellent example for him to prove it.

Three: The siting process to locate a powerplant now requires 5 to 6 years for acceptance of a site alone. If the site is designated to be a nuclear plant, the process can take even more years with no assurance that a permit will ever be granted. It is now estimated that 70 percent of the cost of obtaining an approved nuclear site is in attorneys' fees. I submit that this does little to increase the gross national product.

Four: Should site clearance be obtained for fossil-fueled powerplant, the EPA considers that, under the Clean Air Act of 1977 requiring best available control technology known as BACT, they have the right at any stage of design or construction to require changes to meet improvements in the state of the art regardless of cost. Construction of major projects such as powerplants is complicated and expensive enough without the added burden of shooting at a moving target of regulations.

Five: In a recent case, in our company, involving the spill of less than 2 gallons of PCB fluid—polychlorinated biphenol—State inspectors, abetted by EPA, required digging up the street to a depth of 18 inches, destruction of valuable tools, resodding a lawn, and hauling the debris hundreds of miles to a soon-to-be-closed disposal site at a cost exceeding \$56,000.

You can work that out to \$28,000 a gallon if you would like.

When the material was unloaded at the site in sealed barrels, the workmen on the site broke the barrels open, took the tools, and drove them away off the site. Just a bit ridiculous.

There is no quarrel that PCB's are nonbiodegradable and that, if ingested by humans or in the food chain, it may lead to complications. But such environmental overkill in applying regulations is absurd.

Mr. BAUMAN. I would interject at this point that several Federal agencies have been guilty of that.

Mr. HOBBS. On the PCB's, there are millions of gallons around the country, and with equipment built over the last 50 years, I was talking to a man from a service site, and there is not one disposal agency in the country today. All we are doing is accumulating these things on sites, and there are a couple of landfills, but the Rollins plant over in New Jersey that would have disposed of these by incineration is so blocked in local zoning problems they cannot even make a test run.

We thought this was going to be our answer. They are very close by, they would incinerate it and be done with it. The plant is completed, and they cannot even make a test run. That is a local New Jersey problem, just across the Delaware Memorial Bridge.

Six: EPA regulations preventing significant deterioration—PSD—of air quality in national parks and Government reservations require that there be no measurable pollutants within such reservations. Has no one ever told EPA that growing plants digest carbon dioxide? Or that healthy vegetation requires sulphur as part of its diet? I would submit to you that such open spaces should serve a function of being absorption and purification areas for the air as well as for recreation areas.

Seven: ERISA came into being with the commendable goal of providing standards for protecting the pensions due workers who had earned them. But, look what has happened. The multitude of reports required, the standards for investment, the Simon-pure attitude toward the fiduciary responsibility of the company, have been so great that at the last count I had more than 5,000 pension plans discarded completely in the face of these requirements. In these discarded plans, the workers have less than they had before, however small it may have been.

Eight: In our company, a few years ago, we went through the prescribed process to obtain a certificate of convenience and necessity from the State of Maryland to build an electric transmission line. This required signoff by more than 30 agencies, State, Federal, and local. One of these was the Corps of Engineers. With the certificate in hand, we proceeded to design the line, procure the materials, and start construction. By this time, certain rules of the Corps of Engineers had changed, and an inspector riding by the jobsite noted that work was going on without the required permit under the recently changed rule. He halted the job immediately, making it necessary to terminate the contractor at considerable cost and take him off the job. The permitting process was begun anew, under new rules, and became bogged down for months, for what reason we could not determine. The documents were eventually traced to the desk of a Corps of Engineers attorney, with all approvals intact, but being held by him to determine whether or not he should bring suit for violation of the new regulations. This attorney should have a legal staff large enough to keep current on regulations as they are promulgated, and implied that he intended to "teach us a lesson."

You may recognize this.

Mr. BAUMAN. I think I do.

Mr. HOBBS. It was only through the intervention of Congressman Bauman that we were able to have this permit released. It is worthy of note that the construction eventually was completed as originally planned, and originally approved.

Nine: The difficulties in dredging our bays, rivers, and harbors to accommodate shopping is becoming a national disgrace. Not only is it difficult to acquire the approvals to dredge, it is nearly impossible to comply with all the restrictions on spoil disposal of the dredged material.

There are two cases in point: First, Baltimore Harbor is strangling in its own silt for lack of disposal sites.

I guess we could go on for hours, and hours, and hours, about this Baltimore Harbor island, but I guess the case is obvious.

Second, only after 2 years of repeated rejections of spoil sites, for the flimsiest of reasons, does it appear that the dredging of the Wicomico River here in Salisbury, Md., will soon get underway.

Ten: Need I mention the infamous snail darter case at the Tellico Dam? I do not intend to debate whether or not the dam was necessary. The Congress decided that it was. And yet, objectors to the project were able to use as a tool the supposed harmless language of the Endangered Species Act. It appears that the waters got just a bit too muddy for the Congress and for the President and they ran from the problem with a one-case exemption.

Eleven: As a final example, let us look at the way air quality regulations work in actual practice. In one of our coal-burning plants, an electrostatic precipitator meets the emission limitation specified by the State to assure that the public health and welfare are not compromised. The ambient air quality levels of the area of the plant are well in compliance with the Federal air quality standards, also designed to protect public health and welfare with a wide margin of safety. However, this plant has difficulty in meeting an opacity standard for its plume.

You can translate opacity for its visibility.

This standard addresses esthetics only, but may require a completely new precipitator at a cost of more than \$8 million to satisfy. This cost will be borne by the ultimate consumers, our customers.

Now, my comments may come down pretty heavily on air and water quality regulations, because this is my ox that is being gored. This is where we feel the strongest.

I firmly believe that most environmental legislation is intended to be both beneficial and reasonable. However, the amount and complexity of legislation leads to serious problems. A look at the examples above will indicate that the regulatory agencies can either say no or take no action whatever and slow, stop, or even cancel projects without offering any alternatives or considering any of the costs involved. They are rarely held to any time frame for action and can effectively pocket veto just about any application they wish. Frequently, several competing agencies insist on being the last to sign off, an impossible requirement to satisfy.

That happens regularly, incidentally.

Some means must be found to make these agencies responsive to the public need. A recent editorial in "Public Utilities Fortnightly" comments that EPA requirements under the 1977 Clean Air Act alone will increase costs of compliance by 15 times while producing an incremental improvement of air quality of only 1 percent.

What then should be done? I would first suggest that the Congress, in providing legislative basis for these agencies, should take a more realistic look at what they are doing before they state an idealistic principle and then say, in effect, "Let the regulatory agencies work out the means."

Second, there must be some oversight authority, outside the specific agency, which has the authority and the muscle to look at the proposed and promulgated regulations, speak up and say, "This is not doing the job. It must be repealed or changed," and have the support of the Congress that it will be done.

And third, the inflationary aspects of overregulation, overreporting, "moving target" designing, and drawn-out proceedings at every step of the way must be considered. Cost-benefit ratios are important in most considerations in life; why not in Government regulations?

I have not addressed myself to the bill H.R. 1776, because I realized I did not have a copy, so I stated some problems, some principles in law, and I would respond to any questions on any of this material.

Mr. BAUMAN. The bill H.R. 1776 contemplates Congress having set forth a specific period of time after the regulations are proposed by an agency, and during this time we could either say that we

reject them completely, or suggest possible changes, and so on and so on. Instead of the situation where we now have the regulations becoming law, and we are then forced to live with the consequences. Now our only recourse is to try to change those many regulations by new laws to overrule the rules and regulations.

H.R. 1776 also tries to bring into the formation of those regulations the people affected, the businesses, and so on. It would allow the Congress a large say in the regulations carrying out the original congressional mandate.

My question to you is, as you have observed the Congress, what is your view regarding the ability or inability of Congress to carry out such a detailed process.

It is my experience that many of the committees which are writing the laws, which have given rise to the regulations, are sympathetic to the regulatory process and to the control these agencies have, and might be reluctant to veto regulations once issued.

In other words, the majority at many of the committees in this jurisdiction of the House are not unsympathetic to Government regulations, no matter what the cost. Do you really think, with that kind of a situation, that a veto, a legislative veto, would work?

Mr. HOBBS. I don't know. I honestly do not know. I would caution one thing: I do not think Congress should try to write the regulations. I think they would be worse, considering the very broad background of Congress. I think they would be worse than the people in the agency. But the veto process, or some means of recalling bad regulations, I think, is very badly needed.

Mr. BAUMAN. You have certainly given us graphic examples of precisely what the utility industries face in the way of regulations.

Have you had any quantification of what it adds to the average consumer's monthly electric bill in the way of percentages? Certainly it is some factor.

Mr. HOBBS. It is a large factor.

Well, the Vienna, Md., powerplant—the coal-burning plant—we were burning about 2½ percent sulfur coal, and we were making smoke. It was an old plant. We began to design a precipitator that would take the particulate matter out of the area.

We were very much surprised when the regulations first came out in 1970 that limited the fuel to 1 percent sulfur. You could not buy, sell, burn, store any fuel that had more than 1 percent sulfur. You could not do that with coal. It in effect drove us to oil.

We went over to oil; it cost us a couple of million dollars to change over. The cost of oil is now more than double the cost of coal, and coal has been going up as well as oil. But we are burning a fuel twice as expensive as the fuel before, and we became that way very shortly after the change, and as a result of this, we stuck our necks way out by depending on imported oil. It was not just our company, it was happening all over the country.

And what have we done now? When oil supply was cut off in 1973, the sulfur regulations were redone, and it was decided in outlying areas such as this you could burn 2 percent sulfur oil.

If you could burn 2 percent sulfur oil, and you burn 2 percent sulfur coal, we would never have gone to oil at all; we would have

been burning coal all the time. As it stands now, we have a plant now that cannot accommodate coal there.

Mr. BAUMAN. So Federal clean air regulations drove you to a conversion from coal to oil?

Mr. HOBBS. Which increased our dependence on oil.

Mr. BAUMAN. Which doubled the cost of the fuel?

Mr. HOBBS. Absolutely. At the time of the conversion we were paying about 32 cents a Btu for coal. We are up in the neighborhood of \$1.60 now and about \$3 per Btu for oil.

Mr. BAUMAN. And subsequently the Federal regulatory powers came along and said that what you had previously been doing was now acceptable?

Mr. HOBBS. Yes; as far as the sulfur, yes. Well, the plant is old, with almost 10 more years life on it and it is too old to go back and pick up coal. We would scrap it before we would spend the money to go back to coal on the original part of the plant. The unit came on line down there, right at about the time the new regulations came out. It is strictly an oil-fired unit and cannot go back to coal. We were forbidden to put in coal-burning capability. We must burn oil and nothing else.

Mr. BAUMAN. So it makes it even more difficult to reconvert?

Mr. HOBBS. There is no reconversion possible on this plant, but we are considering reconversion and the design is well on the way for the plant in Wilmington, for two of the units.

Mr. BAUMAN. How big a role did the Federal regulations play in your decision? For instance, not to go ahead with the Summit nuclear powerplant and any similar facility?

Mr. HOBBS. I do not think—we were working our way through the maze of permits. I do not think the Federal regulations had anything to do with it. Our supplier got into financial trouble and bought his way out, and we never picked it up again.

Mr. BAUMAN. Do the Federal regulatory powers make it as attractive as an expansion?

Mr. HOBBS. Not now; not in the current climate. A utility company would be a damn fool to try to build a nuclear plant from scratch today, because of the money involved and the climate is such that you might never get there.

Mr. BAUMAN. What you are telling us is there will be no nuclear expansion?

Mr. HOBBS. Unless something is changed, there will not. This is my opinion, please.

Mr. BAUMAN. That leads me to one other question. We are being asked now to override all these Federal regulatory agencies and create a superagency that will have the power, for a limited number of energy projects, to cut all this redtape and proceed within certain bounds.

Is that the better path to follow, as opposed to going into each of these Federal regulatory agencies and cutting back their power?

Mr. HOBBS. There is a lot of overlap in the agencies, and that overlap should be removed, or some such agencies have no such authority.

With the superagency, one of the big things is synthetic fuels. I would challenge the attempt to go whole hog, gung-ho, and build 40 such plants right now.

I think we have to make a few mistakes on some prototype plants before we wind up with 40 plants that will not run, because occasionally the processes, no matter how well designed, do not work out. You wind up with a rather large investment that is of no use of anyone.

I would not like to see us make that mistake, but I do think that some of these coal-to-gas, coal-to-liquid-fuel plants should be built. I think the oil shale should very definitely be given the kind of push that is suggested in the legislation.

In fact, I strongly support the idea that contracts should be made with a shale oil extractor to provide military contracts. They guarantee that military contract. I think I made that suggestion several years ago when we were asked, what do you see in the details, exactly that way. Somebody read me, and turned it in, but the plan is very closely akin to what I suggested.

Mr. BAUMAN. You mentioned here the ability of Federal agencies to pocket veto when they are applying their powers.

Mr. HOBBS. They have two speeds, slow and stop. You just do not get an answer; nothing happens. You sit for months, waiting, waiting, waiting, for the deal to go through.

Mr. BAUMAN. I gather that it would not be out of the question to perhaps adopt statutory times by which a decision ought to be made?

Of course, I guess the answer would be more Federal bureaucrats.

Mr. HOBBS. We do have such limitations in Maryland. Our company goes in for a rate increase; there is a 30-day period that they are to consider it, and at the end of 30 days they may suspend for another 5 months, and they do regularly, making it a total of 6 months, and the opinion will come out on the very last day of the 6-month period to go into effect tomorrow. They have 6 months to play with the thing; we have got to get the computer program and everything in place to start billing the following day.

A bad ruling, it will not work in both directions.

Mr. WOLFENBERGER. You mentioned the purpose is to encourage greater public participation and also if need be, greater public participation during the congressional review period. I think, earlier in your testimony, you were quite a bit critical of intervenors, saying no matter how biased their intentions, they could enter a case with nothing at risk.

Granted, this is at a judicial stage. I am not quite clear whether you think there should be more public participation or less. On the one hand, when you encourage public participation, you will be delaying these things all the longer, and delays are one of our problems.

Mr. HOBBS. Our problem is public participation in what, let us call it the very fine print of regulations, you can't find one little phrase that can open the door to most of the litigation. That is what that reference is to.

In terms of the regulations, we subscribe to the Federal Register, but I defy anybody to read that thing from cover to cover on a daily basis, and find out what is happening to them.

We have a department that gets the thing, scans it, and if we see our name mentioned, our industry mentioned, we mark it down

and try to read it, but then that is only the beginning, because some of the changes refer to a paragraph number that is about that long and change the third word from this to that, and I have to go back and research that whole thing to find out what it said. It is not in easily understood language.

Mr. BAUMAN. I know what you mean because I have gone through the Federal Register myself, and it is quite cumbersome. Any other questions?

Thank you very much. We appreciate your statement.

Mr. HOBBS. Thank you.

Mr. BAUMAN. Our next witness is Mr. Donovan Peters, Committee on Administrative, Executive and Legislative Review.

We are trying to find in the course of considering H.R. 1776 what arrangements the individual States have had for addressing the Federal regulatory process, so we would be glad to hear from you.

STATEMENT OF DONOVAN PETERS, COMMITTEE ON ADMINISTRATIVE, EXECUTIVE, AND LEGISLATIVE REVIEW

Mr. PETERS. I do have copies of the relevant Maryland statutes in this area. You may or may not find these useful [see p. 154].

The AELR Committee is a statutory joint committee of the Maryland General Assembly. It is composed of five senators and five delegates. The power of the committee is outlined in the statute before you.

The statutory powers are very brief and very general, and in some cases, they look a little weak on paper, although in practice they are more substantial than they appear.

One of its powers is to review rules and regulations. This applies to both any rule and regulation which is currently on the books, as well as the rules and regulations which are being proposed.

In the case of proposed rules or regulations, the Maryland Administrative Procedure Act requires a 45-day notice between proposing of a regulation and its adoption by an agency.

In both cases it has to appear in the Maryland Register, in other words, at least 45 days before they intend to adopt it, and they have to have it printed in the Maryland Register, and then after it has been in there for 45 days, and after there has been this opportunity for public comment, and the agency may adopt it.

If they make any substantial statement, they have to go through the 45-day period. When it is submitted to the Maryland Register, at the start, there is a bylaw it is submitted to the AELR Committee, so they get notice at the same time as the public does.

There is an exception to this 45-day notice period, and this is for emergency rules and regulations. If an agency for some reason feels there is emergency circumstances that makes it necessary that this regulation be adopted immediately rather than go through the 45-day waiting period, it has to be submitted to the AELR Committee, and the AELR Committee must approve it or disapprove it. If the AELR Committee disapproves it, it may not go into effect, but it may go into effect after it goes through the process.

The AELR Committee has another function including the power to review operations and controls of executive agencies, it has certain supervisory functions with regard to the Maryland Regis-

ter, which is the State equivalent of the Federal Register including supervisory power over the contents, reprinting, and the subscription price.

The committee also has several other functions, such as review power over executive orders issued by the Governor, regarding any emergency.

Some of these powers appear weak on paper. For instance, regarding the regular rules and regulations, there is no power for the AELR Committee to veto the regulations. The statute does not really specify what this review involves, other than if the committee is to report to the general assembly.

The implication is if they were really upset over a particular regulation, statutory changes could be made that could nullify or amend the effected rule or regulation, but this is only implied.

In practice though, the committee has been very effective. It seems the executive agencies in Maryland want to get along with the Federal Assembly, and rather than pick a fight with the AELR Committee over one particular rule or regulation out of the hundreds they may have on the books, they usually almost invariably accommodate the committee.

The committee in the time I have been staffing it, has asked for the repeal of rules and regulations, have asked for amendments in them, and in all cases, these requests have been honored.

Are these State agencies in fact cooperative in changing, or in modifying the regulations?

Mr. PETERS. Yes; because of the committee, they have withdrawn rules and regulations, and this is something under the statute.

Mr. BAUMAN. Has there been any attempt to change the Maryland law to give the committee greater specific powers?

Mr. PETERS. Yes; as a matter of fact, in the next to last session in the 1978 session, there was a bill that would have given a pretty straightforward veto power over proposed rules and regulations to the AELR Committee. This bill passed both Houses of the Maryland legislature overwhelmingly, but it was vetoed by the Governor.

You may be familiar with the Maryland constitution, and it is that the veto cannot be overridden, following a general election, which was the case in 1978, so the 1979 session was not even able to override this veto, which if they could, they probably would have.

In their last session, the 1979 session, the bill was reintroduced to give the veto power to the AELR Committee.

A representative of the Governor appeared before the standing committee handling the bill, and the committee was given notice that the Governor would cooperate fully with the AELR Committee, and paid very close attention to any recommendations they had.

Mr. BAUMAN. Do you find any jealousy between the existing committees of the Maryland State Senate as opposed to the joint committee?

Mr. PETERS. I think there is a little bit of jealousy. I knew of one of the legislators who is preparing a bill that will give the review power to the standing committees rather than to the AELR Committee, so I think there is a natural human tendency here to

maximize one's power as much as possible, but in practice, the committee members have always been very responsive to the other legislators.

Any time a legislator is not on a committee, and had a problem with the legislation, they have cooperated fully in order to handle the matter, so there has not been that much jealousy.

Mr. BAUMAN. How many hearings would you say the committee holds, on how many different regulations in a given year?

Mr. PETERS. Well, let's see. This past year the committee has held public hearings I would say close to once a month, maybe once about every 3 weeks.

Some of these public hearings have two or three regulations on the agenda, so you are talking in the neighborhood of maybe 20 rules and regulations in which they have had public hearings this year.

Mr. BAUMAN. You indicated that major cases have been brought to your attention as a result of public opposition or concern about a given regulation.

You do not undertake any comprehensive review of all regulations issued?

Mr. PETERS. Theoretically, yes. In reality, no.

Each rule and regulation that is proposed, every rule and regulation appears on the Register at the same time it is filed with the Maryland Register for the public, another copy of that is by law required to be filed with the committee for its review, so every rule and regulation is sent to the committee for review and this has to be done by statute. Sometimes it depends on the committee members, they do have a review system. The committee has set up a system by which the 10 members are each assigned to the subject matter under jurisdiction, and all proposed rules and regulations within this subject matter of jurisdiction are sent to them, and this happens every 2 weeks, as the Maryland Register is published.

Mr. BAUMAN. Is that an assigned area of interest?

Mr. PETERS. Generally, yes.

We had only one by the Real Estate Commission that would affect real estate signs and the real estate brokers really complained about this one, because they had to buy new signs for the building outside, their stationery and everything else, and they thought it was completely unnecessary, and the committee just notified the agency they were considering having a hearing on it, and the agency withdrew the regulation, so in that case there was not a need to go to that extent. This happens a lot. A lot of these matters are handled by communications between the committee member, the committee staff, the agency, the constituents, before it ever comes to anything.

Mr. BAUMAN. So what you are saying is that the committee, despite its lack of statutory power, has a great deal of influence.

Mr. PETERS. Yes.

Mr. BAUMAN. I must say, however, the Federal experience is directly to the contrary. When the complaints arise in Congress against a given regulation, usually the agency fights twice as hard. Until it is repealed by law, nothing is done. This has been my experience. I think you have given us an excellent explanation of the Maryland system.

Any questions?

Mr. DOOLING. Most of the bills we have provided for increased public participation. What has your experience concerning this been in Maryland?

Mr. PETERS. After a talk with the Governor's office an agency has come around, so in practice, this has developed in the formal system of communication between the Governor's office, between the committee, between the executive agencies that have resulted in the necessary accommodations being made to the satisfaction of the committee in regard to rules and regulations, and where questions arose.

Usually the question arises because the constituent complains, either a regulation is adopted and published as proposed, and generally speaking, the people are to be affected by that rule or regulation, they hear about it, and if they are really upset, they start screaming to the AELR Committee, and the committee takes action, often times holding a public hearing, just to get both sides. They do not necessarily have to act upon every complaint, but if there are substantial amounts of complaints, they usually have a public hearing, at which time the agency can defend itself, the affected party can give its views, anybody else can give his views, and in practice, it has worked out to be a very good system.

This problem of the administrative review of rules and regulations seems to be a growing one among the various States. This appears to be a very active item of legislation in this State, I think the National Conference of State Legislatures keeps tabs on this, I think in the neighborhood of 35 of the States have established some form of legislative review.

Some States have a much more extensive program than Maryland does, with the legislative connection, it can veto the rule or regulation.

Different States handle this in different ways, and in some States, any legislature can amend or nullify the rule or regulation.

In other States the statutory committees handle the review of rules and regulations. In other States, like Maryland, they have a specialized committee for this major purpose in reviewing rules and regulations.

In some States they have an active one with a big staff and they do a thorough job, so there are a real variety of approaches on how to handle this problem, but at the State level, it does seem to be a problem that has attracted attention, and it has to be addressed with review mechanisms in which Maryland was one.

Two problems that I think might be of interest to you, that have occurred in the functions of the Maryland system, are one, what to do if the agency is acting according to some rule or regulation which has not been promulgated.

In other words, it has not been written into a regulation, but it has just been an administrative guideline of the agency, and in Maryland, we have encountered this problem, we had a recent situation with the parole commission by which the statute says the commission establishes rules and regulations for the parole system for the State correctional institutions, and the State went ahead with its rules and regulations and listed fairly specific guidelines for the criteria on parole, but the regulations were not specifically

detailed or flexible enough to allow for the constant changes needed in the prison population, because the prison system has limited capacity, their main guide here is they cannot have more people in prison than they have room, so to keep the prison population stable, they have to up and down the strictness of their parole guidelines, and they do this through administrative orders, or administrative guidelines, which are not promulgated as rules and regulations, because they simply feel there would not be time to constantly keep changing these, and that the published rules and regulations which are more generally provided, that they provide sufficient public notice, so in a case like this, the AELR Committee reviewed this and acted under its statutory power to review the operations and controls of any executive agency, and this statutory committee allowed it to examine the particular actions of the agency here which it may not have been able to do under its statutory power to review rules and regulations.

The second problem the committee has had is that often times they have disagreed with a regulation that has been promulgated, but felt compelled to go along with the executive agency because it was a rule and regulation required by Federal law, and rather than give up the Federal funds, which usually come with a lot of strings attached to them, the AELR Committee has gone along with the agency on the grounds the Federal statutes required the State to act in this matter, otherwise, so you go along with it, although from the particular point of view of the State, it may be an unreasonable or unnecessary rule or regulation, so there may be some thought as to the Federal system which allows enough latitude to the State in their operations, so I think this basically covers the powers of the AELR Committee.

Mr. BAUMAN. Do I understand you correctly in describing the power of the committee, the only time they have the right to veto is in designated emergency situations?

Mr. PETERS. Yes; the only time they have the full veto is for emergency regulations and technically, their only power is to waive the 45-day notice period and allow the regulation to become effective immediately.

The AELR Committee or Agency can still go ahead and promulgate it through the regular process and give the 45 day notice, and then adopt it 45 days later.

Mr. BAUMAN. So it is not an actual veto of the regulations, but only one of the steps?

Mr. PETERS. Yes.

Mr. BAUMAN. We do have one bill that would create a specific committee in the House to handle this. Since you have this sort of situation, I was somewhat curious, one of the things we have been running into in all of the testimony we have had today, more than the problem of excesses by the specific regulatory agency, is that two or three agencies may be doing perfectly logical things in their own jurisdiction that simply do not fit the classic case of the industry. Such as would be the case with the meatpacking industry. They have their work areas, they are either tile floors which can be very clean, but they are also quite slippery, or a grated floor, which gives a very firm footing, but is not very easy to clean. The meatpacking industry is under direction of the Department of

Agriculture to use tile floors exclusively, and they are under direction from OSHA to use grated floors exclusively.

There is no way they could ever comply.

Does your committee get into this kind of area?

Do you find yourself trying to balance competing regulations?

Mr. PETERS. No; that has not been the committee's experience. There was maybe one case that I could recall, I just happened to glance through this, that was foam insulation, where there was a possible regulation established for foam insulation, it was established to be used in residential structures, and the kind of trade off was between a fire safety factor, versus the energy conservation factor, because the more stricter fire safety standards, the more costly the installation would be, and so there was a trade off there, and in fact, we did have people from both the Department of Economic and Community Development, they challenged the energy conservation which handles it, the fire marshall's office, which handles the fire safety, but it was not a conflict between the regulations, it was a conflict between two values.

Maybe because the State apparatus is not as extensive, we have not experienced those problems.

Mr. WOLFENBERGER. When the proponents of H.R. 1776 testified before our committee, one of them said the purpose was to return powers to the people, because the unelected bureaucrats have gotten out of hand. The criticism raised is that you are really not doing that, because what will happen is you will have these negotiations going on behind closed doors, between maybe one or two Members of Congress, not representatives of the entire Congress and the agency, trying to get the agency to change them and so on.

Yet, when you have one member of that committee reviewing let us say a particular agency, and maybe talking not necessarily in a public hearing with that agency, is not this criticism confirmed in a way that we are having a rather undemocratic way of influencing that regulation. Even though the agency may have had an open public hearing in developing that regulation originally?

Mr. PETERS. I think no matter what you will do, you will have that problem, because in practice you do not have organized dealing with each other you have people dealing with each other, and if there is a bill introduced, oftentimes it is just pushed by one or a number of very small groups of legislators for whatever reason.

If it is an executive agency, sometimes the regulators themselves will push something out of their personal desires, whatever, so anytime you are dealing with human beings, you will have this problem, but at the same time you do need specialization, because not everybody can do everything. You have to have certain delegation and certain specialization.

Mr. WOLFENBERGER. I take it your staff situation has improved considerably since the 1977 report, which is one part-time staff member.

Do you have full-time staff now?

Mr. PETERS. No; we have three part-time staff people, and we are able to handle it that way, because the business of the committee is very cyclical, it goes up and down a lot, depending on constituent pressures and that sort of thing.

Mr. WOLFENSBERGER. Do you think the AELR should have the power to suspend regulations as recommended by their staff report, until the legislature would then meet?

Mr. PETERS. I think it would be desirable certainly to the extent, not only desirable, but probably right, in that the rulemaking authority of executive agencies are a delegation of the legislative power from the legislative branch to the executive agency, and I think it is not only right, it is right and necessary that the legislature have some oversight against the exercise over the Executive power as delegated to make sure they have fulfilled the legislative intent.

Mr. WOLFENSBERGER. In other words, there is a tendency to slip through a lot of regulations when the legislature is not meeting.

Mr. PETERS. Yes.

Mr. BAUMAN. Is that your experience, that you are more active in the 9 months of the year when you are not in session? You have to keep a closer eye on what they are doing?

Mr. PETERS. Yes; an agency once tried to sneak by around Christmas last year, there was a classical case in which they sent the emergency regulation request to the committee just 3 or 4 days before Christmas, and the committee approved it, and then in January the screaming from the affected groups was unbelievable, and the committee had a public hearing, and requested that the agency withdraw, so they do try to sneak one by, but we caught it.

Mr. BAUMAN. Do you have a rotating membership on your committee?

Mr. PETERS. No; the chairmanship rotates back and forth between the House and Senate each year, which is always a source of confusion to everyone as to who the chairman is.

Currently the chairman is Senator Stone of the Senate.

Next year it will be Delegate Hickman of the House. The committee members, once they get on, they usually stay a while before they resign. When they resign, somebody is appointed to their place.

Mr. WOLFENSBERGER. Do you think it would be a good idea to have a limited time for members?

Mr. PETERS. My personal experience is the most important thing is to have members on the committee that are really interested in what the committee is doing. Anytime you have a group, you will have some that are more active, and some less active. I find the committee members that are more active really look over the rules and regulations that contribute a lot more to the committee's functions than those who have just a passive role, so I would say not so much the rotation is important, but that getting people on it that really are concerned about the administrative, the legislative oversight of the administrative regulations is the key factor.

Miss. CULLEN. The bill pending now, is it just a committee veto as opposed to a House veto?

Mr. PETERS. One in there calls for the committee to review it with veto power, and then the committee's decision would have to be submitted if the committee chose to veto it, the veto decision would not go into effect until the next session of the general assembly, at which time the joint resolution is introduced, and the general assembly has to endorse or deny the committee action.

Mr. WOLFENBERGER. Would this be a joint resolution that would go to the Governor?

I understand you have both kinds of resolutions.

Mr. PETERS. The joint resolutions in the Maryland General Assembly never have to be signed by the Governor. The Governor sometimes chooses to sign them for the favorable publicity.

Mr. BAUMAN. It is like the President signing constitutional amendments. It has been known to happen.

Based on my experience of 3 years in the Maryland State Senate, I recall distinctly in the 90-day session, except in the early parts, there was very little time to consider the legislation before us, much less review State regulations in the office. Especially when the committees were meeting perhaps once a month, in a meeting that was usually crammed with things that had to be done then. Most of the members, having other professions, did not pay that much attention in the interim between the monthly meetings. My question is, would it really be in the best interest of true regulatory review to assign the veto according to the committee's jurisdiction, or is it better to leave it in the hands of one committee which has no other goal than that?

Mr. PETERS. I think having a special committee for it is a better way of handling it, because when you do have a committee whose primary or sole responsibility is review of administrative rules and regulations, I think they cannot help but pay more attention than giving it for instance to a standing committee, where the review would be a secondary role for them, so having a standing committee would guarantee they would pay more attention, and you also have a chance to develop specialized staff and develop expertise.

Mr. BAUMAN. Mr. Peters, I certainly thank you. I think you have included in the end of your remarks, at least the Maryland statute creating the committee.

Mr. PETERS. Thank you.

[Testimony resumes on p. 266.]

[The documents referred to follow:]

Art. 40, § 40A ANNOTATED CODE OF MARYLAND

JOINT STANDING COMMITTEE ON ADMINISTRATIVE, EXECUTIVE
AND LEGISLATIVE REVIEW

§ 40A. Generally.

(a) *Created; name.* — A joint standing committee of the Senate and House of Delegates of Maryland is created, to be known as the Joint Standing Committee on Administrative, Executive and Legislative Review and to have the powers and duties here provided.

(b) *Composition; appointment and terms of members; chairman.* — At the conclusion of each regular session of the General Assembly the President of the Senate and the Speaker of the House of Delegates, each with the approval of the respective house of the General Assembly, shall appoint respectively five Senators and five Delegates to comprise the committee until the following year. The number of Senators and the number of Delegates of each political party shall be approximately in the same proportion as their membership in each house. In alternate years the President and the Speaker shall name the chairman of the committee, alternating between members from the two houses.

(c) *Inquiries and reviews.* — The committee may inquire into any failure, actual or alleged, of an officer or employee of either the legislative, executive, or judicial branches of the State government to comply with the statutory or constitutional law of the State. It may review the rules and regulations which are adopted and promulgated by any of the several departments, boards, commissions, or other agencies of the executive branch. It may review the operations and controls of any such department, board, commission, or other agency, making recommendations in the discretion of the committee for improvements in these operations and controls.

(d) *Staff assistance and procedural aid; reimbursement for expenses; powers.* — The committee shall be supplied with staff assistance and procedural aid from the Department of Legislative Reference, and the committee members shall be reimbursed for their expenses incurred on committee business from the General Legislative Expenses Fund as administered by the Legislative Accounting Office; and the committee has also the same powers as are given the Legislative Policy Committee in § 30 of this article.

(e) *Annual report.* — At least once each year the committee shall report to the members of the Legislative Council and of the General Assembly of its work and studies of the year, together with any recommendations it may have for the more effective operations of the three branches of government within the framework of the statutory and constitutional law of Maryland. The report shall also include any recommendations for appropriate legislative action necessary to modify, change or reverse any rule, regulation or standard which the committee has considered.

(f) *Submission to committee of proposed rule, regulation or standard.* — At least 45 days prior to the adoption, amendment, or repeal of any rule, regulation, or standard by any of the several departments, boards, commissions, or other agencies of the executive branch, the rule, regulation, or standard shall be submitted to the committee as provided in Article 41, § 256-I. The rule, regulation or standard is not effective until so submitted. However, the submission of the proposed rule, regulation, or standard to the committee does not prevent the adoption and promulgation of the rule, regulation, or standard by the department, board, commission or other agency after the 45-day period.

(g) *Emergency measures.* — (1) If the adopting agency declares the rule, regulation, or standard necessary as an emergency measure, the rule, regulation, or standard may become effective immediately after submission to the committee if approved by any one of the following:

(i) A majority of the committee members present and voting at a regularly constituted meeting; or

- (ii) The chairman, or, if he is unavailable;
- (iii) The vice-chairman; or
- (iv) The member of the committee assigned to review the request and the chairman, or if he is unavailable, then the vice-chairman.

(2) Approval may be secured by the committee reporter either in writing, personally, or by telephone.

(3) If any member of the committee objects to the emergency adoption of the rule, waiver of the usual time period may not be given to the adopting agency until a public hearing is held. A majority of a quorum present and voting shall approve the emergency request before it may be permitted to be implemented.

(4) The emergency approval may be made subject to one or more conditions including, but not limited to, a time limit. Upon expiration of the time limit, if final adoption of the emergency measure in accordance with procedures specified in Article 41, § 256-I has not been accomplished, the text of a regulation affected by the emergency measure reverts to its original language, as if the emergency measure had not been approved.

(1978, ch. 1.)

Editor's note. — Chapter 1, Acts 1978, which was Senate Bill No. 997 of 1977, was passed over the Governor's veto in the Senate on Jan. 11, 1978, and in the House of Delegates on Jan. 13, 1978. It does not give effect to the 1977 amendment to § 40A other than to add "(g)" preceding the former fourth sentence in subsection (f), which was designated as the first sentence in subsection (g) by the 1977

amendment. The 1978 amendment adds two sentences following the sentence preceded by the designation "(g)." Those two sentences appear above as sub-subsection (4) of subsection (g).

As the other subsections were not affected by the 1978 amendment, only subsections (f) and (g) are set forth above.

Art. 41.

§ 9. Adoption of rules and regulations.

Prior to the adoption of any rule or regulation by an officer or department of the executive branch of the State of Maryland under any rule-making power granted by the General Assembly of Maryland, the rule or regulation shall be submitted to the Attorney General of Maryland for approval as to its legality. Every officer, department, board, commission, bureau and similar agency of the State government other than those within the Legislative and Judiciary Departments who has power to make, promulgate, adopt or enforce rules and regulations shall file copies of them pursuant to the provisions of the State Document Law. No rule or regulation hereafter made, promulgated or adopted is effective until after compliance with this section. (An. Code, 1951, § 9; 1943, ch. 872; 1949, ch. 738; 1955, ch. 480; 1966, ch. 571, § 2; 1969, ch. 797; 1974, ch. 600, § 4.)

Applied in *Maryland Tobacco Growers' Ass'n v. Maryland Tobacco Auth.*, 287 Md. 20, 298 A.2d 578 (1972).

Quoted in *Samson v. State*, 27 Md. App. 326, 341 A.2d 817 (1975).

Cited in *Wrenn v. Vincent et Vincent of Langley, Inc.*, 235 Md. 468, 201 A.2d 768 (1964);

Sallsbury Beauty Schools v. State Bd. of Cosmetologists, 268 Md. 32, 300 A.2d 867 (1973);
Mules v. Maryland Racing Comm'n., 30 Md. App. 533, 353 A.2d 684 (1976).

Art. 41, § 130 ANNOTATED CODE OF MARYLAND
 EXECUTIVE AND ADMINISTRATIVE DEPARTMENTS, ...
 DIVISION OF STATE DOCUMENTS

§ 131B. Created; duties.

The Division of State Documents is created within the office of the Secretary of State. It shall compile, edit, and supplement the Code of Maryland Regulations as provided by the State Documents Law. (1974, ch. 600, § 2; 1975, ch. 491, § 1.)

§ 131C. Administrator generally.

(a) *Office created.* — The Division of State Documents shall be administered by the administrator of the State documents division.

(b) *Appointment.* — The Administrator of the Division of State Documents shall be appointed by the Governor.

(c) *Tenure.* — The Administrator of the Division of State Documents shall hold office during good behavior. He may be removed by the Governor on charges brought by him and on proof of inefficiency, neglect of duty, or misconduct in office. Before the Administrator is removed from office, he shall be given a copy of the charges made against him and an opportunity of being heard publicly in person or by counsel in his own defense on not less than ten days' notice. (1974, ch. 600, § 2.)

§ 131D. Duties of Administrator.

Subject to the general supervision and control of the Secretary of State, the Administrator of the State Documents Division shall perform the duties and functions as provided in the State Documents Law. (1974, ch. 600, § 2.)

ART. 41

ADMINISTRATIVE PROCEDURE ACT

§ 244. Definitions.

For the purpose of this subtitle:

(a) "Agency" means any State board, commission, department or officer authorized by law to make rules or to adjudicate contested cases, except those in the legislative or judicial branches, and the Governor, and except the Maryland Parole Commission, the Workmen's Compensation Commission, the State Accident Fund, the State Insurance Department of Maryland, the Public Service Commission, the Employment Security Board and the State Tax Commission. The Maryland Automobile Insurance Fund shall not be considered an "agency" within the meaning of this section as to any matter or action with regard to which the Insurance Commissioner has made an express, written finding or determination that compliance with the provisions of the Administrative Procedure Act by the Maryland Automobile Fund is unnecessary. "Agency" also includes any agency created by general law, which operates in two or more political subdivisions, except the Maryland-National Capital Park and Planning Commission.

(b) "Rule" includes every regulation, standard, guideline, or statement of policy or interpretation of general application and future effect, including the amendment or repeal thereof, adopted by an agency, whether with or without prior hearing, to implement or make specific the law enforced or administered by it or to govern its organization, procedure, or the practice before such agency, but does not include regulations concerning only the internal management of the agency and not directly affecting the rights of or procedures available to the public, responses to petitions for adoption of rules issued pursuant to § 248 of this article, or declaratory rulings issued pursuant to § 250 of this article.

(c) "Contested case" means a proceeding before an agency in which the legal rights, duties, statutory entitlements, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing.

(d) "License" includes the whole or part of any agency permit, certificate, approval, registration, charter, or similar form of permission required by law, but it does not include a license required solely for revenue purposes.

(e) "Licensing" includes the agency process respecting the grant, denial, renewal, revocation, suspension, annulment, withdrawal, or amendment of a license. (1957, chs. 94, 428; 1963, ch. 305; 1972, ch. 569; 1974, ch. 211; 1976, ch. 648; 1977, ch. 528, § 1; 1978, chs. 858, 884.)

Effect of amendments.

Chapter 858, Acts 1978, eliminated "the Division of Parole and Probation" following "Maryland Parole Commission" in the first sentence in subsection (a) and eliminated "and/or the State Documents Law" preceding

"by the Maryland Automobile Fund is unnecessary" at the end of the second sentence in that subsection.

Chapter 884, Acts 1978, effective July 1, 1978, added "and the Governor" near the beginning of subsection (a), also eliminated "the Division of

Parole and Probation" following "Maryland Parole Commission" in the first sentence in that subsection, added the last sentence in the subsection, added "guideline" near the beginning of subsection (b), substituted "organization, procedure, or the practice before such agency" for "organization or procedure" in that subsection, added at the end thereof the language beginning "responses to petitions for adoption," added "statutory entitlements" in subsection (c) and added subsections (d) and (e). University of Baltimore Law Review. — For article, "Recent Changes in the Law Affecting Educational Hearing Procedures for Handicapped Children," see 7 U. Balt. L. Rev. 41 (1977).

Rules and regulations established for the operation and administration of the Office of the Public Defender and for the conduct of

professional legal services by private attorneys do not fall within the definition of a "rule" as set forth in subsection (b) of this section. 61 Op. Att'y Gen. 3 (1976).

"Contested case."

A proceeding under article 81, § 67, is not a contested case within the meaning of this section. State Dep't of Assmt. & Taxation v. Clark, 281 Md. 385, 380 A.2d 23 (1977).

Sovereign Immunity. — In the absence of a specific waiver of sovereign immunity in the Administrative Procedure Act, that defense is available to the State. Frosburg v. State Dep't of Personnel, 37 Md. App. 18, 375 A.2d 682 (1977).

Applied in Department of Health & Mental Hygiene v. Lions Manor Nursing Home, 281 Md. 425, 378 A.2d 1351 (1977).

Art. 41, § 244.

Effect of amendments. — The 1976 amendment added the second sentence in subsection (a).

The 1977 amendment substituted "Maryland Parole Commission" for "Board of Parole" and "Division of Parole and Probation" for "Department of Parole and Probation" in the first sentence in subsection (a).

Maryland Law Review. — For article, "Constitutional Limits on the Decisional Powers of Courts and Administrative Agencies in Maryland," see 35 Md. L. Rev. 414 (1976).

For comment, "The Maryland Inmate Grievance Commission or the Federal Courts? A Problem of Exhaustion," see 35 Md. L. Rev. 458 (1976).

jurisdiction is limited. *Bernstein v. Board of Educ.*, 245 Md. 464, 228 A.2d 243 (1967).

Board of Pharmacy is an "agency." *Maryland Bd. of Pharmacy v. Peco, Inc.*, 234 Md. 200, 198 A.2d 273 (1964).

The police department of Baltimore City is a State agency. *Kaufman v. Taxicab Bureau, Baltimore City Police Dep't.*, 236 Md. 476, 204 A.2d 521 (1964), cert. denied, 382 U.S. 849, 86 S. Ct. 95, 15 L. Ed. 2d 88 (1965).

The Baltimore City police department is a State agency, and appeals from it are governed by the Administrative Procedure Act. *Commissioner, Baltimore City Police Dep't v. Cason*, 34 Md. App. 487, 368 A.2d 1067 (1977).

Inmate Grievance Commission within definition of State agency. — Section 204F (a) of this article places the Inmate Grievance Commission within the definition of a State agency as that term is defined by the Maryland Administrative Procedure Act. *Bryant v. Department of Pub. Safety & Correctional Servs.*, 33 Md. App. 357, 365 A.2d 764 (1976).

County agencies are not included within the provisions of the Administrative Procedure Act. *Urbana Civic Ass'n v. Urbana Mobile Village, Inc.*, 260 Md. 458, 272 A.2d 628 (1971).

Also Commission on Judicial Disabilities is not within ambit of Administrative Procedure Act. *In re Formal Inquiry Concerning Disner*, 268 Md. 659, 304 A.2d 587 (1973), cert. denied, 415 U.S. 989, 94 S. Ct. 1586, 39 L. Ed. 2d 885 (1974).

Administrative Procedure Act inapplicable to Maryland Tax Court. — This section and § 318 of this article, when read together with article 81, § 247A, establish beyond question that the Administrative Procedure Act does not apply to the Maryland Tax Court. *Dickinson-Tidewater, Inc. v. Supervisor of Assmts.*, 273 Md. 245, 329 A.2d 18 (1974).

And likewise Baltimore City health department. — The Baltimore City health department is not a State agency so that the Administrative Procedure Act, which would empower an appeal from a decision of a State agency, does not apply. *American Ambulance & Oxygen Serv. v. Mayor & City Council*, 31 Md. App. 432, 356 A.2d 580 (1976).

County boards of education are not State agencies within Administrative Procedure Act. *Bernstein v. Board of Educ.*, 245 Md. 464, 228 A.2d 243 (1967).

Authorized to make rules or adjudicate cases. — County boards of education are not State agencies authorized to make rules or adjudicate cases. *Bernstein v. Board of Educ.*, 245 Md. 464, 228 A.2d 243 (1967).

When act does not apply mandamus is available to challenge planning board decision. — Where no appeal was provided by statute or ordinance from decision of planning board withholding approval of preliminary plan

Constitutionality. — Article 27, § 577B, read in conjunction with this section and § 251 of this article, is constitutional. *Dunkel v. Elkins*, 325 F. Supp. 1235 (D. Md. 1971).

The Administrative Procedure Act shall apply to all State agencies except those expressly excluded. *Kaufman v. Taxicab Bureau, Baltimore City Police Dep't.*, 236 Md. 476, 204 A.2d 521 (1964), cert. denied, 382 U.S. 849, 86 S. Ct. 95, 15 L. Ed. 2d 88 (1965).

Board is not State agency merely because it has administrative powers. — A board is not a State agency under this subtitle merely because, under its statutory authorization, it has administrative powers in the county to which it

for subdivision of applicant's property and Administrative Procedure Act did not apply, mandamus was available to applicant. *Maryland-National Capital Park & Planning Comm'n v. Rosenberg*, 269 Md. 520, 307 A.2d 704 (1973).

"Contested case." — A hearing held relative to a claim for emergency assistance under the Aid to Families with Dependent Children program is a "contested case" within the meaning of that term as defined in Maryland's Administrative Procedure Act. *Murray v. State Dep't of Social Servs.*, 260 Md. 323, 272 A.2d 16 (1971).

Article 27, § 577B, does not itself require a hearing. Nor seemingly does any other Maryland statute. Thus, § 577B notice to an accused creates a "contested case" as defined by subsection (c) of this section only if the accused has a constitutional right to a hearing. *Dunkel v. Elkins*, 325 F. Supp. 1235 (D. Md. 1971).

Denial of a builder's request for an exception from an agency head's order did not involve a contested case as that term is defined in subsection (c) of this section as it was not a proceeding in which the builder's legal rights, duties, or privileges were required by law or constitutional right to be determined after an agency hearing. *Montgomery County v. One Park N. Assoc.*, 275 Md. 193, 338 A.2d 892 (1975).

Difference between legislative power and position in contested cases. — The difference between the legislative, or rule-making, power of a body such as the board of county commissioners, and its position in contested cases, is set forth in the definitions of "rule" and "contested case" in this section. *Mandel v. Board of County Comm'rs*, 238 Md. 208, 208 A.2d 710 (1965); *Hyson v. Montgomery County Council*, 242 Md. 55, 217 A.2d 578 (1966).

One test for determining whether action by a commission is legislative where vested rights of liberty and property are not involved is whether there is laid down a rule of future action which affects a group, and not the direct application of policy or discretion to a specific individual. *Mandel v. Board of County Comm'rs*, 238 Md. 208, 208 A.2d 710 (1965).

Hearing before denial of access under article 27, § 577B. — See *Dunkel v. Elkins*, 325 F. Supp. 1235 (D. Md. 1971); *Kiratel v. State*, 13 Md. App. 482, 284 A.2d 12 (1971), dismissed, 409 U.S. 943, 93 S. Ct. 287, 34 L. Ed. 2d 214 (1972).

Inconsistent provisions of Baltimore City Charter and Public Local Laws repealed. — Any provisions under the Charter & P.L.L. of Baltimore City (1949) inconsistent with the Administrative Procedure Act, under its provisions, are repealed. *Kaufman v. Taxicab Bureau, Baltimore City Police Dep't.*, 236 Md. 476, 204 A.2d 521 (1964), cert. denied, 382 U.S. 849, 86 S. Ct. 95, 15 L. Ed. 2d 88 (1965).

Act. 41, § 244.

Applied in *Nugent v. State Ins. Comm'r*, 231 Md. 543, 191 A.2d 222 (1963); *Board of Liquor License Comm'rs v. Leone*, 249 Md. 283, 239 A.2d 82 (1968); *Banach v. State Comm'n on Human Relations*, 277 Md. 502, 356 A.2d 242 (1976); *Jackson Marine Sales, Inc. v. State Dep't of Assmts. & Taxation*, 32 Md. App. 213, 359 A.2d 228 (1976).

Quoted in *Elison v. State Rds. Comm'n*, 231 Md. 257, 139 A.2d 649 (1953).

Stated in *Chesapeake & Potomac Tel. Co. v. Pincoffs*, 23 Md. App. 474, 328 A.2d 78 (1974); *Stillman & Dolan, Inc. v. C & P Tel. Co.*, 30 Md. App. 179, 351 A.2d 172 (1976).

Cited in *Character Comm. for Third Judicial Circuit v. Mandras*, 233 Md. 285, 196 A.2d 630

(1964); *State Dep't of Health v. Walker*, 238 Md. 512, 209 A.2d 555 (1965); *Public Serv. Comm'n v. Hahn Transp., Inc.*, 253 Md. 571, 233 A.2d 845 (1969); *Brudekwa v. Police Comm'r*, 257 Md. 36, 263 A.2d 210 (1970); *David W. Chertkof Trust v. Department of Natural Resources*, 265 Md. 291, 289 A.2d 314 (1972); *Rogers v. Radio Shack*, 271 Md. 126, 314 A.2d 113 (1974); *Board of License Comm'rs v. R.N. & W. Corp.*, 20 Md. App. 278, 315 A.2d 107 (1974); *Criminal Injuries Comp. Bd. v. Gould*, 273 Md. 486, 331 A.2d 55 (1975); *Prince George's County v. Fahey*, 28 Md. App. 312, 345 A.2d 102 (1975); *Associated Bldrs. & Contractors v. Commissioner of Labor & Indus.*, 31 Md. App. 171, 355 A.2d 509 (1976); *Toland v. State Bd. of Educ.*, 35 Md. App. 389, 371 A.2d 161 (1977).

§ 245. Adoption of rules.

In addition to other rule-making requirements imposed by law:

(a) Each agency shall adopt rules governing the formal and informal procedures prescribed or authorized by this subtitle. The rules shall include rules of practice before the agency together with forms and instructions; but no rule or practice may interfere with the right of any lawyer to practice before any agency, or grant the right to practice law to anyone not authorized to do so.

(b) To assist interested persons dealing with it, each agency shall so far as practicable supplement its rules with descriptive statements of its procedures.

(c) Except for emergency regulations adopted pursuant to Article 40, § 40A, prior to the adoption of any rule authorized by law, or its amendment or repeal, the adopting agency shall publish notice of its intended action in the Maryland Register, and afford interested persons opportunity to submit data or views orally or in writing. An agency may not adopt or amend any rule or administrative act which increases the agency's expenditures beyond budgetary limitations without the express approval of the General Assembly; or if the General Assembly is not then in session, without the express approval in writing of the President of the Senate and the Speaker of the House of Delegates, acting jointly and after consulting with and receiving the advice in writing of the joint budget and audit committee. Approval by the General Assembly or its presiding officers, as provided in this section, is not required if the Governor by proclamation declares that the rule or administrative act to increase an agency's expenditures beyond budgetary limitations is necessary and a matter of emergency. This limitation with respect to the agency's budget is applicable to every agency in the executive, judicial, and legislative branches of government, except bicounty commissions appointed by local governing bodies who review the commissions' budgets, notwithstanding any exemptions from the provisions of this subtitle contained in § 244 (a) of this subtitle.

(d) When an agency publishes a notice of intended action pursuant to subsection (c), it also shall publish in the same notice an estimate of the economic impact of the intended action upon:

(1) The revenues and expenditures of the agency publishing the intended action;

(2) The revenues and expenditures of any other State or local governmental agency affected by the intended action; and

(3) The taxpayer, consumer, industry or trade groups or other applicable groups or segments of the population which would be affected by the intended action.

(1978, chs. 515, 884.)

Effect of amendments. — Chapter 884, Acts 1978, effective July 1, 1978, added "except bicounty commissions appointed by local governing bodies who review the commissions' budgets" in the last sentence in paragraph (c). Chapter 515, Acts 1978, effective July 1, 1978, added paragraph (d).

As the remainder of the section was not affected by the amendments, only the introductory paragraph and paragraphs (c) and (d) are set forth above.

When the final text of a proposed agency rule contains provisions which are substantially different from the text as originally proposed and published, the

adequacy of notice depends on whether the affected class reasonably could have anticipated from the published notice the substance of a regulation finally proposed for adoption, and if not, the agency should treat its revised version as a newly proposed rule and once again apply the rule-making procedures of § 236-I of this article and give the public additional notice and opportunity to be heard in accordance with subsection (c) of this section. 61 Op. Atty Gen. 6 (1976).

Cited in *Health Servs. Cost Review Comm'n v. Franklin Square Hosp.*, 280 Md. 233, 372 A.2d 1051 (1977).

Act 41, § 245

Different procedures for legislative and judicial duties. — In the field of administrative law, agencies may have duties which are quasi-legislative as well as quasi-judicial. This is a distinction which the Administrative Procedure Act recognizes by setting up

different procedures to be followed in the promulgation of rules and regulations on the one hand and the hearing of contested cases on the other. Board of Liquor License Comm'n v. Leone, 249 Md. 263, 239 A.2d 82 (1968).

Quoted in Public Serv. Comm'n v. Hahn Transp., Inc., 253 Md. 571, 253 A.2d 845 (1969).
Cited in Dunkel v. Elkins, 325 F. Supp. 1235

(D. Md. 1971); Blue Cross of Md., Inc. v. Franklin Square Hosp., 277 Md. 93, 352 A.2d 798 (1976).

§ 246. Compliance with § 9 and State Documents Law.

Each agency, except bicounty commissions appointed by local governing bodies, shall comply with the provisions of § 9 of this article and the State Documents Law.

A rule is effective as provided in the State Documents Law, unless otherwise provided by law. (1957, ch. 94; 1969, ch. 797; 1973, chs. 10, 777; 1974, ch. 600, § 4; 1978, ch. 884.)

Effect of amendment. — The 1978 amendment, effective July 1, 1978, added "except bicounty commissions appointed by local governing bodies" in the first paragraph.

Cited in Health Servs. Cost Review Comm'n v. Franklin Square Hosp., 280 Md. 233, 372 A.2d 1051 (1977).

Applied in Maryland Tobacco Growers' Ass'n v. Maryland Tobacco Auth., 267 Md. 20, 296 A.2d 578 (1972).

Cited in Wrenn v. Vincent et Vincent of Langley, Inc., 235 Md. 466, 201 A.2d 768 (1964);

Salisbury Beauty Schools v. State Bd. of Cosmetologists, 268 Md. 32, 300 A.2d 367 (1973).

§ 247. Publication, compiling and indexing of rules or regulations.

Financial responsibility. — Agency rules and regulations which are required to be published pursuant to the Administrative Procedure Act must be published in the Code of Maryland Regulations and the Maryland Register, and the financial responsibility for the publication of the

documents which must be included in those publications rests solely on the division of State documents. 60 Op. Att'y Gen. 3 (1975).

Cited in Health Servs. Cost Review Comm'n v. Franklin Square Hosp., 280 Md. 233, 372 A.2d 1051 (1977).

§ 248. Petition for adoption of rules.

Any interested person may petition an agency requesting the promulgation, amendment, or repeal of any rule. Each agency shall prescribe by rule the form for such petitions and the procedure for their submission, consideration, and disposition. Within 60 days after submission of a petition, the agency shall either deny the petition in writing (stating the reasons for the denial) or initiate rule-making proceedings. (1957, ch. 94; 1978, ch. 884.)

Effect of amendment. — The 1978 amendment, effective July 1, 1978, added the third sentence.

§ 247. Publication, compiling and indexing of rules or regulations.

Every agency, department, or other governmental body or unit, quasi-governmental body or unit having the authority or power to adopt or promulgate rules or regulations affecting any member of the general public, shall prepare and provide for the editing, publishing, compiling and indexing of all the rules and regulations. The form and manner of printing the compilations and any other details relating thereto shall be pursuant to the State Documents Law.

Nothing in this section applies to an agency whose authority is limited to the promulgation of rules and regulations affecting its internal administration. (1957, ch. 94; 1964, ch. 183, § 1; 1974, ch. 600, § 4.)

Art. 41

§ 249. Declaratory judgment on validity of rules; severability of rule provisions.

(a) The validity of any rule may be determined upon petition for a declaratory judgment thereon addressed to the circuit court of the particular county or to the Baltimore City Court either where the petitioner resides or has his or its principal place of business, when it appears that the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the petitioner. The agency shall be made a party to the proceeding. The declaratory judgment may be rendered whether or not the petitioner has first requested the agency to pass upon the validity of the rule in question.

(b) The court shall declare the rule invalid if it finds that it violates constitutional provisions or exceeds the statutory authority of the agency or was adopted without compliance with statutory rule-making procedures.

(c) The provisions of a rule are severable unless the rule expressly states that its provisions are not severable. The finding by a court that a provision of a rule is void or unenforceable does not affect the validity of any other provisions of the rule unless the court finds that the remaining valid provisions alone are incomplete and incapable of being executed in accordance with the regulatory intent. (1957, ch. 94; 1976, ch. 585, § 1.)

Effect of amendment. — The 1978 amendment added subsection (c).

§ 250. Petition for declaratory rulings by agencies.

On petition of any interested person, the agency may issue a declaratory ruling with respect to the applicability of any rule, order, or statute enforceable by it to any person, property, or statement of facts. If issued a declaratory ruling is binding between the agency and the petitioner on the state of facts alleged. Such a ruling is subject to review in the circuit court of the county or the Baltimore City Court, as the case may be, in the manner hereinafter provided for the review of decisions in contested cases. Each agency shall prescribe by rule the form for such petitions and the procedure for their submission, consideration, and disposition. (1957, ch. 94; 1978, ch. 884.)

Effect of amendment. — The 1978 amendment, effective July 1, 1978, rewrote the first and second sentences.

§ 250A. Grant, denial or renewal of license.

(a) *Application of provisions concerning contested cases.* — The provisions of this act concerning contested cases apply when the grant, denial, or renewal of a license is required by law or constitutional right to be preceded by notice and opportunity for hearing.

(b) *Limitations on expiration of license after application for renewal.* — When a licensee has made timely and sufficient application for the renewal of a license, the existing license may not expire until the agency has taken final action on the application and the time for seeking judicial review of the agency's action has expired without being extended by a reviewing court. For the purposes of this subsection, timely application for renewal is no less than two calendar weeks prior to the expiration of the license being reviewed.

(c) *Notice prior to suspension or revocation of license.* — An agency official or employee may not revoke, suspend, annul, or withdraw any license prior to giving the licensee written notice of facts which warrant such action and an opportunity to be heard; except that upon a finding that public health, safety, or welfare imperatively requires emergency action, an agency official or employee may, by means of a written order which sets forth that finding and the reasons therefor, summarily suspend a license pending prompt notice and a hearing on the suspension. (1978, ch. 884.)

Editor's note. — Section 2, ch. 884, Acts 1978, provides that the act shall take effect July 1, 1978.

Ans. 41.

§ 251. Contested cases — Notice.

(a) In a contested case, all parties shall be afforded an opportunity for hearing after reasonable notice. Publication in the Maryland Register pursuant to § 256 P of this article may not constitute reasonable notice to a party.

(b) The notice shall include:

- (1) A statement of the time, place, and nature of the hearing;
- (2) A statement of the legal authority and jurisdiction under which the hearing is to be held;
- (3) A reference to the particular sections of the statutes and rules, including rules of procedure, involved; and
- (4) A short and simple statement of the matters asserted. If the agency or other party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved. Thereafter upon application a more definite and detailed statement shall be furnished. (1957, ch. 94; 1978, ch. 884.)

Effect of amendment. — The 1978 amendment, effective July 1, 1978, rewrote the section.

Constitutionality. — Article 27, § 577B, read in conjunction with this section and § 244 of this article, is constitutional. *Dunkel v. Elkins*, 325 F. Supp. 1235 (D. Md. 1971).

Cited in *Froberg v. State Dep't of Personnel*, 37 Md. App. 18, 375 A.2d 582 (1977).

This section requires a hearing only in a "contested case." *Eliason v. State Rds. Comm'n*, 231 Md. 257, 189 A.2d 649, cert. denied, 375 U.S. 914, 84 S. Ct. 211, 11 L. Ed. 2d 182 (1968).

Hearing before denial of access under article 27, § 577B. — See *Dunkel v. Elkins*, 325 F. Supp. 1235 (D. Md. 1971); *Kiratal v. State*, 18 Md. App. 482, 284 A.2d 12 (1971), dismissed, 409 U.S. 948, 98 S. Ct. 257, 84 L. Ed. 2d 214 (1972).

Adequate notice essential to fair play. — Basic tenet of fair play in administrative proceedings is the right of a party to be given adequate notice of the nature of the proceeding in order that he may prepare his defense. *Ferguson v. United Parcel Serv.*, 270 Md. 202, 311 A.2d 220 (1973), cert. denied, 420 U.S. 1000, 94 S. Ct. 1602, 39 L. Ed. 2d 895 (1974).

Section not applicable to city agency. — The provisions of this section were not applicable to the board of trustees of the employee's retirement system of the City of Baltimore, since

it is a city rather than a State agency. *Severn v. Mayor of Baltimore*, 280 Md. 160, 186 A.2d 199 (1962).

Different procedures for legislative and judicial duties. — In the field of administrative law, agencies may have duties which are quasi-legislative as well as quasi-judicial. This is a distinction which the Administrative Procedure Act recognizes by setting up different procedures to be followed in the promulgation of rules and regulations on the one hand and the hearing of contested cases on the other. *Board of Liquor License Comm'rs v. Leone*, 249 Md. 263, 239 A.2d 82 (1968).

Cited in *Bethesda Mgt. Servs., Inc. v. Department of Licensing & Regulation*, 276 Md. 619, 350 A.2d 390 (1976).

§ 251A. Same — Prehearing conferences; hearing officer; stipulation, agreed settlement, etc.; rules of procedure.

In contested cases:

(a) An agency may provide by regulation for prehearing conferences or other appropriate prehearing procedures.

(b) In addition to any other hearing authority or procedure authorized by law: Any agency, official, or employee authorized by law to hear and decide a contested case may, on an ad hoc basis, delegate its hearing authority to a hearing officer who shall conduct a hearing and shall submit written findings of fact and proposed conclusions of law to the agency head, official, or employee.

(c) Disposition may be made of any case by stipulation, agreed settlement, consent order, or default, unless otherwise precluded by law.

(d) Each agency shall adopt rules of procedure for hearings in contested cases. (1978, ch. 884.)

Editor's note. — Section 2, ch. 884, Acts 1978, provides that the act shall take effect July 1, 1978.

ART 41.

§ 252. Same — Rules of evidence; official notice.

In contested cases:

(a) Agencies may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonable and prudent men in the conduct of their affairs. They shall give effect to the rules of privilege recognized by law. They may exclude incompetent, irrelevant, immaterial and unduly repetitious evidence.

(b) All evidence, including records and documents in the possession of the agency, of which it desires to avail itself, shall be offered and made a part of the record in the case, and no other factual information or evidence shall be considered in the determination of the case. Documentary evidence may be received in the form of copies or excerpts, or by incorporation by reference.

(c) Every party shall have the right on every genuine issue: (1) to call witnesses and present evidence; (2) to cross-examine every witness called by the agency or any other party; (3) to submit rebuttal evidence; and (4) to present summation and argument.

(d) Agencies may take notice of judicially cognizable facts and in addition may take notice of general, technical, or scientific facts within their specialized knowledge. Parties shall be notified either before or during hearing, or by reference in preliminary reports or otherwise, of the material so noticed, and they shall be afforded an opportunity to contest the facts so noticed. Agencies may utilize their experience, technical competence and specialized knowledge in the evaluation of the evidence presented to them. (1957, ch. 94; 1978, ch. 884.)

Effect of amendment. — The 1978 amendment, effective July 1, 1978, rewrote paragraph (c).

Section not applicable to city agency. — See same catchline in note to § 251 of this article.

In general, administrative agencies are not bound by the technical common-law rules of evidence. *Fairchild Hiller Corp. v. Supervisor of Assmts.*, 267 Md. 519, 298 A.2d 148 (1973).

But they must observe the basic rules of fairness as to parties appearing before them. *Fairchild Hiller Corp. v. Supervisor of Assmts.*, 267 Md. 519, 298 A.2d 148 (1973).

Hearsay evidence is admissible before an administrative body in contested cases and, indeed, if credible and of sufficient probative force, may be the sole basis for the decision of

the administrative body. *Fairchild Hiller Corp. v. Supervisor of Assmts.*, 267 Md. 519, 298 A.2d 148 (1973).

Burden of proof. — With respect to the weight of the evidence in an administrative proceeding, a mere surmise or conjecture that it is sufficient is not enough. The comparative degree of proof by which a case must be established is the same in an administrative as in a civil judicial proceeding, i.e., a preponderance of the evidence is necessary, but proof beyond a reasonable doubt is not required. *Bernstein v. Real Estate Comm'n.*, 221 Md. 221, 156 A.2d 657 (1959).

Consideration of negative evidence. — In a case where the bona fides of the acts of real estate brokers was under attack, the Real Estate Commission in the exercise of their skill and judgment, as they were specifically empowered to do by this section, should also consider, together with the positive evidence, the so-called

negative evidence — that the sales agent had not been paid his commissions, etc., and the inferences deductible from such negative evidence. *Bernstein v. Real Estate Comm'n.*, 221 Md. 221, 156 A.2d 657 (1959).

Applied in *Melfa v. Commissioner of Personnel*, 240 Md. 744, 215 A.2d 755 (1966).

§ 252A. Same — Record.

(a) Except when a de novo review is provided by law, the record in a contested case shall include:

- (1) All pleadings, motions, intermediate and final rulings;
- (2) Documentary evidence received or considered;
- (3) Any statement of matters officially noticed;
- (4) Any questions and offers of proof, objections, and rulings thereon;
- (5) Any proposed findings and exceptions;
- (6) The decision, opinion or report by the officer presiding at the hearing; and
- (7) Any staff memorandum submitted to the hearing officer or any other member of the agency involved in the decisional process of that case by any agency official or employee other than those authorized to participate in the decisional process of that case.

(b) Oral proceedings or any part thereof shall be transcribed on request of any party and upon payment of costs as may be required. (1978, ch. 884.)

Editor's note. — Section 2, ch. 884, Acts 1978, provides that the act shall take effect July 1, 1978.

Act 41.

§ 253. Same — Examination of evidence by agency.

Whenever in a contested case, a majority of the officials of the agency who are to render the final decision have not heard the evidence, the decision, if adverse to a party to the proceeding other than the agency itself, shall not be made until a proposal for decision, including findings of fact and conclusions of law, has been served upon the parties, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to a majority of the officials who are to render the decision, who shall personally consider the whole record or such portions thereof as may be cited by the parties. (1957, ch. 94.)

Origin of section. — With one salient exception, the language of this section is taken verbatim from § 10 of the original Model State Administrative Procedure Act which was approved by the National Conference of Commissioners on Uniform State Laws and the American Bar Association in 1946. The critical difference between this section and § 10 of the original model act is that in the latter, the requirements of service of the proposed decision and opportunity for argument are triggered only when a majority of officials "have not heard or read the evidence." When the Maryland legislature enacted the Administrative Procedure Act, it deleted the words "or read." When the legislature deleted the words "or read," it meant, for reasons of policy, to require service of the proposed decision, including findings of fact and conclusions of law, and argument whenever a majority of the decision makers was not actually present at the taking of testimony. *Bethesda Mgt. Servs., Inc. v.*

Department of Licensing & Regulation, 276 Md. 619, 350 A.2d 890 (1976).

Requirements of section. — This section requires that a proposed decision be served on the parties and affords an adversely affected party an opportunity to file exceptions and present argument. *Bethesda Mgt. Servs., Inc. v. Department of Licensing & Regulation*, 276 Md. 619, 350 A.2d 890 (1976).

While not requiring those who decide to actually attend the proceeding and hear the testimony, this section does mandate service and argument prior to a final decision where the decision makers have only read a cold record. *Bethesda Mgt. Servs., Inc. v. Department of Licensing & Regulation*, 276 Md. 619, 350 A.2d 890 (1976).

The evidence need not be heard by all those who will render the final decision in a "contested case." *Younkin v. Boltz*, 241 Md. 839, 216 A.2d 714 (1966).

§ 254. Same — Decisions and orders.

A final decision or order adverse to a party in a contested case shall be in writing or stated in the record. A final decision shall include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings. If, in accordance with agency rules, a party submitted proposed findings of fact, the decision shall include a ruling upon each proposed finding. A copy of the decision and order and accompanying findings and conclusions shall be delivered or mailed promptly to each party or to his attorney of record. (1957, ch. 94; 1978, ch. 884.)

Effect of amendment. — The 1978 amendment, effective July 1, 1978, substituted

the present first four sentences for the former first and second sentences.

Notice to be sent within meaning of Maryland Rule B4 a. — The Administrative Procedure Act requires sending of notice in contested case within meaning of Maryland

Rules, Rule B4 a. *Nuger v. State Ins. Comm'r*, 281 Md. 543, 191 A.2d 222 (1963).

Applied in *Maryland Bd. of Pharmacy v. Peco, Inc.*, 234 Md. 200, 198 A.2d 273 (1964).

Art. 41

§ 254A. Same — Ex parte communications.

(a) Any persons, including an agency head, not authorized to participate in the decisional process of a contested case shall not communicate ex parte with the hearing officer, or any other agency official or employee involved in the decisional process of that case regarding any issue of fact or law in the case. The hearing officer or agency officials may communicate with members of an advisory staff, including any agency legal counsel, who do not otherwise participate in the proceeding.

(b) A hearing officer, or agency official or employee involved in the decisional process of a contested case who is personally aware of an ex parte communication in violation of subsection (a) shall place on the record all written communications received, a memorandum stating the substance of all oral communications received, all written responses to the communication, and a memorandum stating the substance of all oral responses made and shall send copies of such communications, memoranda, and responses to all parties. Any party desiring to rebut the ex parte communication shall be allowed to do so upon request within ten days after notice of the communication. The hearing officer, may, if he deems it necessary to eliminate the effect of a prohibited ex parte communication: (1) withdraw from the proceeding; or (2) terminate the proceeding without prejudice. Whenever the hearing officer terminates a proceeding without prejudice, the order terminating the proceeding shall specify the date by which the proceeding may be reinstated. (1978, ch. 884.)

Editor's note. — Section 2, ch. 884, Acts 1978, provides that the act shall take effect July 1, 1978.

§ 255. Same — Judicial review.

(a) *Right to review.* — Any party aggrieved by a final decision in a contested case, whether such decision is affirmative or negative in form, is entitled to judicial review thereof under this subtitle.

(b) *Where proceedings instituted; intervening parties.* — Proceedings for review shall be instituted in the circuit court of the county or in the Baltimore City Court, as the case may be, either where any party resides or has his or its principal place of business. The court, in its discretion may permit other interested persons to intervene.

(c) *Stay of enforcement of decision.* — The filing of the petition does not itself stay enforcement of the agency decision. Except as otherwise provided by law, the agency may grant, or the reviewing court may order, a stay upon appropriate terms.

(d) *Additional evidence.* — If, before the date set for hearing, application is made to the court for leave to present additional evidence on the issues in the case, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon such conditions as the court deems proper. If additional evidence is taken before the agency, it may modify its findings and decision by reason of the additional evidence and shall file with the reviewing court, to become a part of the record, the additional evidence, together with any modifications or new findings or decision.

(e) *Hearing without a jury; testimony, oral argument and written briefs.* — The review shall be conducted by the court without a jury. In cases of alleged irregularities in procedure before the agency, not shown in the record, testimony thereon may be taken in the court. The COURT SHALL, UPON REQUEST, hear ORAL argument and receive written briefs.

(f) *Affirmance, remand, reversal or modification of decision.* — The court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional provisions; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedure; or
- (4) Affected by other error of law; or
- (5) Unsupported by competent, material, and substantial evidence in view of the entire record as submitted; or
- (6) Arbitrary or capricious.

(1978, ch. 884.)

Art 41, § 255

Effect of amendment. — The 1978 amendment, effective July 1, 1978, added present subsection (c), redesignated former subsections (e), (f) and (g) to be present subsections (d), (e) and (f), respectively, eliminated "in open court or" following "taken" near the end of the first sentence in present subsection (d), substituted "if" for "in cases in which the" at the beginning of the second sentence in that subsection, eliminated former items (6) and (7) in present subsection (f) and renumbered former item (8) to be item (6).

As the other subsections were not affected by the amendment, they are not set forth above.

"Contested case."

The right to judicial review provided by this section extends only to a final decision in a contested case, and a proceeding under article 81, § 67, does not fall within the meaning of "contested case." *State Dep't of Assmt. & Taxation v. Clark*, 261 Md. 335, 380 A.2d 28 (1977).

Hospital rates. — The determination of the Health Services Cost Review Commission as to the factors involved in establishing reasonable

hospital rates in each case is always subject to judicial review under the standards of the Administrative Procedure Act. *Health Servs. Cost Review Comm'n v. Franklin Square Hosp.*, 280 Md. 233, 372 A.2d 1051 (1977).

Court not to substitute its judgment, etc.

It is not permissible for the appellate court to substitute its judgment for that of an agency such as the Department of Natural Resources, if its determination finds any support in the facts. *Oxon Hill Recreation Club, Inc. v. Water Resources Administration*, 281 Md. 110, 375 A.2d 567 (1977).

Scope of review. — Appellate review of actions taken or determinations made by an administrative agency like the Department of Natural Resources is narrowly limited to considering whether there was illegality, arbitrariness or unreasonableness in the action which was taken. *Oxon Hill Recreation Club, Inc. v. Water Resources Administration*, 281 Md. 110, 375 A.2d 567 (1977).

Cited in *Freeburg v. State Dep't of Personnel*, 37 Md. App. 12, 375 A.2d 883 (1977).

& Loan Ass'n v. Equitable Sav. & Loan Ass'n, 261 Md. 245, 274 A.2d 383 (1971).

Since the legislature amended article 23, § 161H to bring the appeal provisions generally in conformity with Maryland Rules, Rule B2 e, it would seem to be a logical extension of the legislative intent to give as full interplay among the rules, the Administrative Procedure Act, and article 23, § 161H (e) as a reasonable interpretation might permit. *County Fed. Sav. & Loan Ass'n v. Equitable Sav. & Loan Ass'n*, 261 Md. 245, 274 A.2d 383 (1971).

The provision for a de novo appeal found in article 23, § 161H (e), should be read in conjunction with Maryland Rules, Rules B1 through B12, which are grouped under the subtitle "Administrative Agencies — Appeal From," and the Administrative Procedure Act, article 41, § 244 et seq. *County Fed. Sav. & Loan Ass'n v. Equitable Sav. & Loan Ass'n*, 261 Md. 245, 274 A.2d 383 (1971).

In view of the wording found in Maryland Rules, Rules B1 through B12 and in subsection (g) of this section, the circuit court on appeal under article 23, § 161H should take into consideration the evidence (the record) before the Board of Building, Savings and Loan Association Commissioners, together with the evidence presented at the de novo hearing. *County Fed. Sav. & Loan Ass'n v. Equitable Sav. & Loan Ass'n*, 261 Md. 245, 274 A.2d 383 (1971).

Decision by the board of review of the Department of Health and Mental Hygiene is a prerequisite for judicial review under the Administrative Procedure Act. *Leatherbury v. Gaylord Fuel Corp.*, 276 Md. 967, 347 A.2d 826, aff'g 24 Md. App. 410, 332 A.2d 41 (1975).

No provision for new trial. — Proceedings under the Administrative Procedure Act do not include provision for a new trial. Instead, the reviewing court is given broad discretion to order the taking of new evidence in open court or before the agency, or, where justice requires, to remand the case for further proceedings. Through the medium of this intermediate appeal, the aggrieved party is given a complete opportunity to "show cause" why an administrative judgment should not be entered. *Lucke v. Commissioner of Personnel*, 245 Md. 706, 228 A.2d 313 (1967), cert. denied, 392 U.S. 928, 88 S. Ct. 2270, 20 L. Ed. 2d 1384 (1968).

Maryland Rule 564 not applicable. — Maryland Rule 564 b, relating to the entry of judgment nisi, does not apply to proceedings under the Administrative Procedure Act. *Lucke v. Commissioner of Personnel*, 245 Md. 706, 228 A.2d 313 (1967), cert. denied, 392 U.S. 928, 88 S. Ct. 2270, 20 L. Ed. 2d 1384 (1968).

Court not to substitute its judgment for that of agency. — While it appears that the scope of judicial review by a trial court of the findings, inferences, conclusions and decisions of administrative agencies under the statute has

Cross reference. — For other provisions as to appeal from administrative agencies, see Maryland Rules, Rules B1 to B12.

Maryland Law Review. — For article, "Constitutional Limits on the Decisional Powers of Courts and Administrative Agencies in Maryland," see 35 Md. L. Rev. 414 (1976).

Section to be followed by party seeking initial judicial review. — Aggrieved party seeking initial judicial review of a decision of an administrative agency does so in accordance with the provisions of this section. *Maryland State Bd. of Motion Picture Censors v. Marhenke*, 18 Md. App. 175, 303 A.2d 501 (1973).

Time limitations. — An appeal to judicially review an administrative agency determination under this section is governed by the time limitations set forth in Maryland Rules, Rule B4. *Clinton Community Hosp. Corp. v. Maryland Comprehensive Health Planning Agency*, 31 Md. App. 285, 355 A.2d 775 (1976).

County was not "party aggrieved." — Notwithstanding a county's interest in an agency head's order and in a review board's order, not being a party to either of these proceedings, a county was not a "party aggrieved" under this section, and hence, was not entitled to judicial review under the provisions of this section. *Montgomery County v. One Park N. Assoc.*, 275 Md. 193, 338 A.2d 892 (1975).

"Contested case." — A hearing held relative to a claim for emergency assistance under the Aid to Families with Dependent Children program is a "contested case" within the meaning of that term as defined in Maryland's Administrative Procedure Act, and judicial review of the decision of the State Department of Social Services is available. *Murray v. State Dep't of Social Servs.*, 260 Md. 323, 272 A.2d 16 (1971).

The Department of Health and Mental Hygiene's Secretary's review and denial of a request for an exception to his moratorium orders does not involve a "contested case" within the meaning of the Administrative Procedure Act. Thus, the board of review under §§ 206A and 206B of this article has no jurisdiction to hear an appeal from the Secretary's decision and there is no available administrative remedy for plaintiffs to exhaust. *Smoke Rise, Inc. v. Washington Sub. San. Comm'n*, 400 F. Supp. 1369 (D. Md. 1975).

Section authorizing appeal from specified agency should be reconciled with this subtitle.

— The statute authorizing appeal from the Board of Building, Savings and Loan Association Commissioners (article 23, § 161H), which provides for an appeal de novo, must be read in conjunction with Maryland Rules, Rules B1 through B12 and with particular reference to Rule B2 e, and should also be reconciled with the Administrative Procedure Act. *County Fed. Sav.*

EXECUTIVE AND ADMINISTRATIVE DEPARTMENTS Art. 41, § 255

been broadened to some extent, it is clear that the statute did not intend that the court should substitute its judgment for the expertise of those persons who constitute the administrative agency from which the appeal is taken. *Bernstein v. Real Estate Comm'n*, 221 Md. 221, 156 A.2d 657 (1959); *State Bd. of Registration, etc. v. Ruth*, 223 Md. 428, 165 A.2d 145 (1960); *Kaufman v. Taxicab Bureau, Baltimore City Police Dep't*, 236 Md. 476, 204 A.2d 521 (1964), cert. denied, 382 U.S. 849, 86 S. Ct. 95, 15 L. Ed. 2d 83 (1965); *Nuger v. State Ins. Comm'n*, 238 Md. 55, 207 A.2d 619 (1965).

Courts are not permitted to substitute their judgment for the expertise of those persons who constitute the administrative agency from which the appeal is taken. *Grosman v. Real Estate Comm'n*, 267 Md. 239, 297 A.2d 257 (1972).

In reviewing decisions of administrative agencies, the court's appraisal or evaluation must be of the agency's fact finding results, and not an independent, original estimate of, or decision on, the evidence. *Zeitcheil v. Board of Educ.*, 274 Md. 69, 332 A.2d 906 (1975).

A reviewing court may, and should, examine facts found by an agency, to see if there was evidence to support each fact found. If there was evidence of the fact in the record before the agency, no matter how conflicting, or how questionable the credibility of the source of the evidence, the court has no power to substitute its assessment of credibility for that made by the agency, and by doing so, reject the fact. *Commissioner, Baltimore City Police Dep't v. Cason*, 34 Md. App. 487, 388 A.2d 1067 (1977); *Toland v. State Bd. of Educ.*, 35 Md. App. 389, 371 A.2d 161 (1977).

A reviewing court may, and should, examine any inference, drawn by an agency, of the existence of a fact not shown by direct proof, to see if that inference reasonably follows from other facts which are shown by direct proof. If it does, even though the agency might reasonably have drawn a different inference, the court has no power to disagree with the fact so inferred. *Commissioner, Baltimore City Police Dep't v. Cason*, 34 Md. App. 487, 388 A.2d 1067 (1977).

A reviewing court may, and should, examine any conclusion reached by an agency, to see whether reasoning minds could reasonably reach that conclusion from facts in the record before the agency, by direct proof, or by permissible inference. If the conclusion could be so reached, then it is based upon substantial evidence, and the court has no power to reject that conclusion. *Commissioner, Baltimore City Police Dep't v. Cason*, 34 Md. App. 487, 388 A.2d 1067 (1977); *Toland v. State Bd. of Educ.*, 35 Md. App. 389, 371 A.2d 161 (1977).

Especially in public education matters. — The principle that a court should not substitute its judgment for the expertise of the

administrative agency from which an appeal is taken is especially true in matters involving public education. *Zeitcheil v. Board of Educ.*, 274 Md. 69, 332 A.2d 906 (1975).

When court should reverse or modify an order. — If the court should find that substantial rights of a petitioner for review have been prejudiced, by one or more of the causes specified in this section, because of an administrative finding, inference, conclusion or decision, then it is the function of the court to reverse or modify the order. *Bernstein v. Real Estate Comm'n*, 221 Md. 221, 156 A.2d 657 (1959).

When court should affirm an order. — When the entire record shows that the findings of fact and conclusions of law are supported by competent, material and substantial evidence taken before the agency and such de novo evidence, if any, as may be taken by the court, and such findings and conclusions are not against the weight of such evidence, it is the function of the court to affirm the order of the agency or remand the case for further proceedings if that be necessary. *Bernstein v. Real Estate Comm'n*, 221 Md. 221, 156 A.2d 657 (1959).

Distinction between party and intervenor. — Subsection (b) of this section, prior to the 1962 amendment, appeared to recognize a distinction between time limitations in regard to the appearance of a party to a proceeding as opposed to an intervenor. *Pearce v. Board of Liquor License Comm'rs*, 228 Md. 515, 180 A.2d 651 (1962).

Administrative Procedure Act recognizes a distinction between time limitations in regard to the appearance of a party to a proceeding as opposed to an intervenor. *Warrack v. Bradley Club, Inc.*, 242 Md. 394, 219 A.2d 12 (1966).

Where the agency's regulations do not provide for a hearing which is a condition precedent to judicial review, the Administrative Procedure Act offers no relief. *State Dep't of Health v. Walker*, 238 Md. 512, 209 A.2d 555 (1965).

The bases for review of a Real Estate Commission order suspending a real estate broker's license are set forth in subsection (g) of this section. *Grosman v. Real Estate Comm'n*, 267 Md. 239, 297 A.2d 257 (1972).

Where the action of the Real Estate Commission is affected by error of law and unsupported by competent, material, and substantial evidence in view of the entire record as submitted, there are grounds under subsection (g) of this section for reversal of the Commission's action. *Grosman v. Real Estate Comm'n*, 267 Md. 239, 297 A.2d 257 (1972).

No review of county agency decision. — Since county agencies are not included within the provisions of the Administrative Procedure Act, this subtitle cannot be the basis for review

of decisions of a county planning commission or county commissioners. *Urbana Civic Ass'n v. Urbana Mobile Village, Inc.*, 260 Md. 458, 272 A.2d 628 (1971).

Subsection (g) inapplicable to Criminal Injuries Compensation Board. — The legislature showed its clear intention to exclude decisions by the Criminal Injuries Compensation Board from being within the broad scope of judicial review permitted under subsection (g). *Criminal Injuries Comp. Bd. v. Gould*, 273 Md. 488, 331 A.2d 35 (1975).

Section does not confer jurisdiction upon Circuit Court of Baltimore City. *Maryland State Bd. of Motion Picture Censors v. Marhenke*, 18 Md. App. 175, 305 A.2d 501 (1973).

Applied in Maryland Bd. of Pharmacy v. Peco, Inc., 234 Md. 200, 195 A.2d 273 (1964); *Melfa v. Commissioner of Personnel*, 240 Md. 744, 215 A.2d 735 (1966); *Jacobson v. Maryland Racing Comm'n*, 261 Md. 180, 274 A.2d 102 (1971); *Halsey v. Board of Educ.*, 273 Md. 596, 381 A.2d

806 (1975); *Merritt Sav. & Loan, Inc. v. Board of Bldg., Sav. & Loan Ass'n Comm'rs*, 26 Md. App. 694, 338 A.2d 302 (1975); *Mules v. Maryland Racing Comm'n*, 30 Md. App. 533, 353 A.2d 564 (1976); *Soley v. State Comm'n on Human Relations*, 277 Md. 521, 356 A.2d 254 (1976).

Quoted in *Nuger v. State Ins. Comm'r*, 231 Md. 543, 191 A.2d 222 (1963); *Board of Liquor License Comm'rs v. Leone*, 249 Md. 263, 239 A.2d 82 (1968); *County Council v. Investors Funding Corp.*, 270 Md. 403, 312 A.2d 225 (1973); *Rogers v. Radio Shack*, 271 Md. 126, 314 A.2d 113 (1974).

Cited in *Board of County Comm'rs v. Donohoe*, 220 Md. 362, 152 A.2d 555 (1959); *Volz v. State Rds. Comm'n*, 221 Md. 209, 156 A.2d 671 (1959); *State Ins. Comm'r v. National Bureau of Cas. Underwriters*, 248 Md. 292, 236 A.2d 282 (1967); *Commissioner of Motor Vehicles v. Lee*, 254 Md. 279, 255 A.2d 44 (1969); *Gutwein v. Easton Publishing Co.*, 272 Md. 563, 325 A.2d 740 (1974); *Holmes v. Criminal Injuries Comp. Bd.*, 278 Md. 60, 359 A.2d 84 (1976).

Art 41.

§ 256. Same — Appeals to Court of Special Appeals.

An aggrieved party may secure a review of any final judgment of the circuit court or Baltimore City Court, as the case may be, under this subtitle by appeal to the Court of Special Appeals. The appeal shall be taken in the manner provided by law for appeals from law courts in other civil cases. This section does not apply to cases arising under the Maryland Vehicle Law unless a right to appeal to the Court of Special Appeals is specifically provided, or to review or to further review of a final judgment of a circuit court or the Baltimore City Court in relation to an action of the Inmate Grievance Commission. (1957, ch. 94; 1976, ch. 472, § 9; 1977, ch. 311, § 2; ch. 765, § 10; 1978, ch. 149.)

Effect of amendments.

The 1978 amendment, effective July 1, 1978, substituted "or" for "of" preceding "the Baltimore City Court" near the end of the section.

Hospital rates. — The determination of the Health Services Cost Review Commission as to the factors involved in establishing reasonable

hospital rates in each case is always subject to judicial review under the standards of the Administrative Procedure Act. *Health Servs. Cost Review Comm'n v. Franklin Square Hosp.*, 280 Md. 233, 372 A.2d 1051 (1977).

Cited in *United States Fire Ins. Co. v. Schwartz*, 280 Md. 518, 374 A.2d 896 (1977).

Effect of amendments. — The 1976 amendment substituted "Court of Special Appeals" for "Court of Appeals" in the first and last sentences.

Chapter 311, Acts 1977, substituted "the Transportation Article of the Annotated Code" for "Article 664 of the Annotated Code of the Public General Laws of Maryland" in the third sentence, added "or to review or to further review of a final judgment of a circuit court of [or] the Baltimore City Court in relation to an action of the Inmate Grievance Commission" at the end of that sentence and made two style changes.

Chapter 765, Acts 1977, substituted "the Maryland Vehicle Law unless a" for "Article 664 of the Annotated Code of the Public General Laws of Maryland in which no" in the third sentence and also made one of the style changes made by ch. 311.

To the extent possible, effect is given to both 1977 amendments in the section as set out above. Where the two conflict, effect is given to ch. 765.

Method of appeal is as from law courts in civil cases. — Method of appeal under the Administrative Procedure Act is limited to "the manner provided by law for appeals from law courts in other civil cases." *Maryland State Bd. of Motion Picture Censors v. Marhenke*, 18 Md. App. 175, 305 A.2d 501 (1973).

"Circuit court" does not refer to Circuit Court of Baltimore City. — Term "circuit court" as used in this section is an obvious reference to the circuit courts of the several counties and does not include within its ambit as therein used the "Circuit Court of Baltimore City," from where this appeal originates. *Maryland State Bd. of Motion Picture Censors v. Marhenke*, 18 Md. App. 175, 305 A.2d 501 (1973).

Section not applicable to appeals from Motion Picture Censor Board. — While the legislature did not explicitly exclude the Maryland State Motion Picture Censor Board from the ambit of the Administrative Procedure Act, it, by providing a special method of judicial review to the Circuit Court of Baltimore City,

effectively did exclude the Board from the act insofar as appeals from the Board's decisions are concerned. *Maryland State Bd. of Motion Picture Censors v. Marhenke*, 18 Md. App. 175, 305 A.2d 501 (1973).

Section applicable to appeal from Baltimore City taxicab bureau. — On appeal from judgment affirming the action of the taxicab bureau of the police department of Baltimore City, this section was the law governing the appeal, since the police department of Baltimore City is a State agency and the Administrative Procedure Act, by its terms, is applicable to all State agencies not expressly excluded. *Kaufman v. Taxicab Bureau, Baltimore City Police Dept.*, 236 Md. 475, 204 A.2d 521 (1964).

"Aggrieved party". — Since the Board of Pharmacy, on an appeal from its decision, is only a "party" in the circuit court for the purpose of

producing the record or of notifying the parties, in the original proceeding, of the appeal, it cannot be considered an "aggrieved party." *Maryland Bd. of Pharmacy v. Peco, Inc.*, 234 Md. 200, 198 A.2d 273 (1964).

Applied in Board of Liquor License Comm'rs v. Leone, 249 Md. 263, 239 A.2d 82 (1968); *Miles v. Maryland Racing Comm'n*, 30 Md. App. 533, 353 A.2d 664 (1976); *Commissioner, Baltimore City Police Dept. v. Cason*, 34 Md. App. 457, 368 A.2d 1067 (1977).

Quoted in *Lucks v. Commissioner of Personnel*, 245 Md. 706, 228 A.2d 313 (1967).

Cited in *Public Serv. Comm'n v. Hahn Transp., Inc.*, 253 Md. 571, 253 A.2d 845 (1969); *Soley v. State Comm'n on Human Relations*, 277 Md. 521, 355 A.2d 254 (1976); *Holmes v. Criminal Injuries Comp. Bd.*, 278 Md. 60, 359 A.2d 84 (1976).

§ 256A. Status of political subdivisions and their agencies and instrumentalities.

For the purposes of this subtitle, the political subdivisions of this State and their agencies and instrumentalities have the status of an interested person, petitioner, or party, as the case may be, in all matters including appeals. (1972, ch. 449.)

Effect of section.— This section removes any question of the right of a county, its agencies, and instrumentalities to participate in proceedings under the Administrative Procedure Act to the same extent as any other legal entity. *Montgomery County v. One Park N. Assocs.*, 275 Md. 193, 338 A.2d 892 (1975).

Nothing in this section invests a county with status as an aggrieved party where it was not

a party to the proceedings before the administrative agency. *Montgomery County v. One Park N. Assoca.*, 275 Md. 193, 338 A.2d 892 (1975).

Quoted in *Board of Exmrs. of Landscape Architects v. McWilliams*, 270 Md. 383, 311 A.2d 792 (1973).

STATE DOCUMENTS LAW

§ 256B. Definitions.

(a) In this subtitle the following words have the meanings indicated unless otherwise provided.

(b) "*AELR Committee*" means the Committee on Administrative, Executive and Legislative Review.

(c) "*Agency*" has the same meaning as under the Administrative Procedure Act.

(d) "*Executive order*" has the same meaning as provided in Article 41, § 15CA.

(e) "*Register*" means the Maryland Register.

(f) "*Rule*" has the same meaning as under the Administrative Procedure Act.

(g) "*Administrator*" means the administrator of the division of State documents.

(h) "*Code of Maryland Regulations*" includes the permanent supplements of the Code published under § 256G of this subtitle. (1974, ch. 600, § 1; 1975, ch. 294; 1976, ch. 585, § 1; 1978, ch. 858.)

Effect of amendment.

The 1976 amendment rewrote subsection (c). Rules and regulations established for the operation and administration of the office of the Public Defender and for the conduct of professional legal services by private attorneys

do not fall within the State Documents Law and are not subject to the provisions of the State Documents Law as to publications, etc., and the procedures established thereunder. 61 Op. Att'y Gen. 3 (1976).

Effect of amendment — The 1976 amendment added subsection (h).

Cited in *Samson v. State*, 27 Md. App. 328, 841 A.2d 817 (1975).

§ 256C. Compilation of regulations and other documents.

(a) *Code of Maryland Regulations created.* — The division of State documents shall compile, edit, and supplement an official legal compilation called the Code of Maryland Regulations.

(b) *Contents of Code.* — Except as otherwise provided by law, the following documents shall be compiled in the Code of Maryland Regulations:

(1) Every executive order that is generally permanent in nature;

(2) Every administrative rule adopted by any agency pursuant to the procedures of the Administrative Procedure Act, including administrative rules adopted pursuant to the procedures of the Administrative Procedure Act prior to July 1, 1974;

(3) Every document or class of documents required to be published in the agency rules by the General Assembly; and

(4) Any other document or class of documents which the AELR Committee permits to be published unless otherwise privileged.

(c) *Annotations.* — The administrator may prepare, or procure by contract, and include in the Code of Maryland Regulations annotations of judicial decisions and other explanatory material relating to any document published in the Code of Maryland Regulations.

(d) *Editorial standards and codification system.* — The administrator may establish editorial standards and a codification system to which all documents, except court rules, published in the Code of Maryland Regulations, the permanent supplements, and the Maryland Register shall conform. After consultation with the promulgating authority, the administrator may edit previously adopted rules and regulations to conform to the established editorial standards and codification system. Captions, tag lines or the numbering system are not a part of any document, but the editorial standards and codification system may include captions, tag lines and a numbering system. (1974, ch. 600,

(e) *Removal of obsolete regulations.* — With the consent of the Attorney General, the administrator may remove obsolete regulations or parts of regulations from the Code of Maryland Regulations when:

(1) The regulations are declared unconstitutional by a court of final appeal; or

(2) The adopting agency ceases to exist and the regulations are not transferred to a successor agency under Article 41, § 8. (1978, ch. 551.)

Effect of amendments.

The 1978 amendment, effective July 1, 1978, added subsection (e).

As the other subsections were not affected by the amendment, they are not set forth above.

Effect of amendments. — The 1976 amendment substituted "Administrative Procedure Act" for "Administrative Procedures Act" near the end of paragraph (2) in subsection (b).

The 1977 amendment eliminated "requires or" preceding "permits" in paragraph (4) of subsection (b).

§ 256D. Documents to be filed with division of State documents.

Any document required or permitted to be published in the Code of Maryland Regulations or Maryland Register shall be filed with the division of State documents. If the text of an adopted rule is the same as the text of the rule as proposed, the text of the adopted rule need not be filed with the division of State documents, but a notice that the rule has been adopted without change shall be filed in its place. A reference to the date of the Register containing the proposed rule shall be given. If a document has been forwarded to the Department of Legislative Reference prior to July 1, 1974, it need not be filed with the division of State documents, unless the administrator otherwise notifies the person responsible for filing the document. (1974, ch. 600, § 1; 1977, ch. 609.)

Effect of amendment. — The 1977 amendment added the second and third sentences.

§ 256E. Publication of Code.

The administrator shall provide for the prompt printing and distribution of the Code of Maryland Regulations pursuant to the provisions of § 256L (1974, ch. 600, § 1.)

Financial responsibility. — Agency rules and regulations which are required to be published pursuant to the Administrative Procedure Act must be published in the Code of Maryland Regulations and the Maryland Register, and the

financial responsibility for the publication of the documents which must be included in those publications rests solely on the division of State documents. 60 Op. Atty Gen. 3 (1975).

§ 256F. Maryland Register.

(a) *Temporary supplement to Code.* — The administrator also shall publish a temporary supplement called the Maryland Register.

(b) *Contents.* — The Register shall include:

(1) Every document required to be published in the Code of Maryland Regulations;

(2) Every notice of proposed agency rule making or repeal;

(3) Every notice of public hearings issued by an agency;

(4) Every rule of court proposed for adoption and directed to be published by the Chief Judge of the Court of Appeals;

(5) Every rule of court adopted or permitted to be adopted by the Court of Appeals; every administrative regulation adopted by the Chief Judge of the District Court; and those administrative orders or memoranda issued by the Chief Judge of the Court of Appeals or the Administrative Office of the Courts which are directed to be published by the Chief Judge of the Court of Appeals;

(6) The hearing calendars of the Court of Appeals and Court of Special Appeals;

(7) Every executive order;

(8) A synopsis of all laws enacted during each session of the General Assembly;

(9) Every agency document required by law to be published at the expense of the agency filing the document unless the AELR Committee determines the document is inappropriate for inclusion;

(10) Every document required to be published by the Maryland Architectural and Engineering Services Act; and

(11) Any other document the General Assembly requires or AELR Committee permits to be published unless otherwise privileged.

(c) *Frequency of publication.* — (1) The Register shall be published at least once every two weeks and shall contain every previously unpublished document in any category listed in subsection (b) and filed with the division prior to the closing date and hour of the issue. The closing date and hour shall appear on the first page of the issue.

(2) Each issue of the Register shall contain a table of contents and an index of all titles of the Code of Maryland Regulations affected.

(3) An index shall be published at least once every three months. The last index for each calendar year shall be a cumulative index for that year.

(4) The AELR Committee may provide for the more frequent publication of the Register as circumstances require.

(d) *Official synopsis of rules.* — The AELR Committee may permit an official synopsis of a rule or regulation in the Register instead of the full text if the full text will be published pursuant to § 256G within 90 days of publication of the official synopsis.

(e) *Notation of adopted rule similar to proposed rule.* — If the text of an adopted rule is substantially similar to the text of the proposed rule, the administrator may insert in the Register a notation to this effect giving a reference to the date of the Register containing the proposed rule.

(f) *Alteration of proposed rule after initial publication.* — If, after the proposed rule has been published initially in the Register, the Agency decides to alter the initial text so that the proposed rule is substantially different from the initial text, the Agency shall submit the altered text as though for initial publication. The alterations shall be indicated by the use of symbology determined by the administrator.

Art 41, § 256F, continued

(g) *Withdrawal of proposed rule.* — A proposed rule may be withdrawn by the proposing agency at any time before adoption. A withdrawn rule may not be adopted unless it is again proposed in accordance with § 256-I.

(h) *Regulations regarded as withdrawn.* — Regulations not adopted within 1 year after publication of the text as last proposed in the Maryland Register shall be regarded as withdrawn. An agency may not thereafter adopt the text of the regulations without filing the text in accordance with § 256-I. The administrator shall give notice of the withdrawal in the Register. (1978, chs. 732, 733.)

Effect of amendments.
Chapter 732, Acts 1978, effective July 1, 1978,
reenacted subsection (f) without change and
added subsection (g).
Chapter 733, Acts 1978, effective July 1, 1978,

reenacted subsection (f) without change and
added the subsection designated herein as
subsection (h).

As the other subsections were not affected by
the amendments, they are not set forth above.

Effect of amendments. — The 1976
amendment substituted "An" for "A
cumulative" at the beginning of paragraph (3)
of subsection (c) and added the second sentence
therein.

Chapter 353, Acts 1977, added "requires"
following "General Assembly" in present
paragraph (11) of subsection (b) and eliminated
"requires or" preceding "permits" in that
paragraph.

Chapter 806, Acts 1977, added present
paragraph (10) in subsection (b) and renumbered
former paragraph (10) to be paragraph (11).

Chapter 848, Acts 1977, added subsection (f).
Neither 1977 amendment to subsection (b)
gave effect to the other, but both have been
given effect in the subsection as set forth above.

§ 256G. Permanent supplements to official codification.

(a) *Frequency of publication.* — At least once a year, every document required to be compiled pursuant to § 256C shall be permanently integrated into the Code of Maryland Regulations by publication of looseleaf pages or other appropriate permanent supplements of the Code of Maryland Regulations. The index to the Code of Maryland Regulations shall be similarly supplemented or reissued.

(b) *Annotations.* — The administrator may prepare, or procure by contract, and include in the permanent supplements annotations of judicial decisions and other explanatory material relating to any document published in the permanent supplement. (1974, ch. 600, § 1.)

§ 256H. Material not to be published.

(a) *Text of generally available material.* — Unless otherwise provided by the AELR Committee or specified in the order adopting the document, the Code of Maryland Regulations and the Register may not contain a reprint of, but may incorporate by reference, any text from the following publications:

- (1) Annotated Code of Maryland;
- (2) United States Statutes at Large;
- (3) United States Code;
- (4) Session laws;
- (5) Code of federal regulations;
- (6) Federal register; and
- (7) Any other generally available publication specified by the administrator.

(b) *News releases.* — Notwithstanding any other provision of this subtitle, no press release, speech, other comment, or news material may be published in the Code of Maryland Regulations, permanent supplements, or the Register. (1974, ch. 600, § 1; 1976, ch. 585, § 2.)

Effect of amendment. — The 1976
amendment rewrote the introductory paragraph
in subsection (a), changed the punctuation in the

list which follows and substituted "and" for "or"
at the end of item (6).

§ 256-I. Filing future documents with administrator.

(a) *Proposed rules and regulations.* — Except as provided by Article 40, § 40A, at least 45 days shall elapse from the date of first publication in the Register before the adoption, amendment, or repeal of any rule or regulation by any agency. Three certified copies of the rule or regulation shall be filed with the administrator. The administrator immediately shall forward to the AELR Committee one certified copy and prepare another copy for publication and transmit it to the printer.

(b) *Emergency rules and regulations.* — Two certified copies of any emergency rule or regulation shall be filed by the AELR Committee with the administrator as soon as the rule is approved pursuant to Article 40, § 40A. The administrator immediately shall prepare one copy for publication and transmit it to the printer.

(c) *Other documents.* — Except for executive orders and court rules, two certified copies of every other document required or authorized to be included in the Code of Maryland Regulations or the Register shall be filed with the administrator. The Secretary of State shall transmit to the administrator two certified copies of each executive order he receives. The Clerk of the Court of Appeals shall transmit to the administrator two copies of each court rule adopted or permitted to be adopted by the Court of Appeals, and two copies of every administrative order or memorandum issued by the Chief Judge of the Court of Appeals or the Administrative Office of the Courts and directed to be published by the Chief Judge. The Chief Clerk of the District Court shall transmit to the administrator two copies of each administrative regulation adopted by the Chief Judge of the District Court.

(d) *Public inspection; copies to Hall of Records.* — When filed with the administrator, a certified copy of each document is available for public inspection and shall be retained one year after publication. Every document, except executive orders and court rules, shall be delivered to the Hall of Records Commission. (1974, ch. 600, § 1, 1975, ch. 10, § 2, ch. 491, § 1, 1976, ch. 585, § 2.)

(e) *Notice when regulation declared invalid and unconstitutional.* — When a regulation, in whole or in part, is declared invalid and unconstitutional by a court of final appeal, the adopting agency shall give notice to that effect in the Register. The administrator also shall give notice in the Code of Maryland Regulations. (1978, ch. 551.)

Effect of amendment.

The 1973 amendment, effective July 1, 1973, added subsection (e).

As the other subsections were not affected by the amendment, they are not set forth above.

When the final text of a proposed agency rule contains provisions which are substantially different from the text as originally proposed and published, the adequacy of notice depends on whether the

affected class reasonably could have anticipated from the published notice the substance of a regulation finally proposed for adoption, and if not, the agency should treat its revised version as a newly proposed rule and once again apply the rule-making procedures of this section and give the public additional notice and opportunity to be heard in accordance with § 245 (c) of this article. 61 Op. Att'y Gen. 6 (1976).

Effect of amendment. — The 1976 amendment divided the former first sentence in subsection (a) into the present first and second sentences, rewrote the present first sentence and the last sentence therein, added "by the

AELR Committee" in the first sentence in subsection (b), substituted "the rule" for "it" in that sentence and rewrote the last sentence in that subsection.

§ 256J. Publication of individual regulations.

(a) The Code of Maryland Regulations and permanent supplements shall be published pursuant to typographical and contractual arrangements which ensure to every agency and court an opportunity to procure at reasonable cost individually printed pamphlet copies of the regulations and rules of the agency published under the authority of this subtitle.

(b) An agency rule or regulation published in the Register or Code of Maryland Regulations may not be reset or otherwise reprinted at public expense without the written permission of the AELR Committee. Before any reprinting of an agency rule or regulation under this subsection, the text of the rule or regulation shall be submitted to the division of State documents for comparison with the official text. (1974, ch. 600, § 1; 1976, ch. 585, § 2.)

Effect of amendment. — The 1976 amendment designated the former first sentence in the section as subsection (a), designated the former second sentence as the present first sentence in subsection (b), rewrote that sentence and added the last sentence in that subsection.

§ 256K. Pricing and distribution of Code and Register.

(a) *Pricing.* — The AELR Committee shall establish guidelines for the fixing of prices to be charged for individual copies of or a subscription to the Code of Maryland Regulations, permanent supplements, and the Register. The committee may provide for volume discounts and for the free reciprocal exchange of publications between the State and other jurisdictions.

(b) *Distribution to public.* — Copies of every publication printed pursuant to this subtitle are available to the public at a cost as provided by this subtitle.

(c) *Free distribution generally.* — One copy of every publication printed under the authority of this subtitle shall be distributed free of charge to the following:

- (1) Every judge of a state court, except orphans' court judges;
- (2) The Enoch Pratt Library; and
- (3) The State Library.

(d) *Free distribution of Register to legislature.* — One copy of each issue of the Register shall be distributed free each year to every member of the General Assembly. (1974, ch. 600, § 1.)

§ 256L. Printing contracts.

After reasonable public invitations for proposals, a contract for printing every publication authorized by this subtitle shall be awarded to the lowest responsible bidder and pursuant to conditions as established by the AELR Committee. No officer or employee of the State may be interested in any purchase made by the State under the contract or otherwise. (1974, ch. 600, § 1.)

§ 256M. Official text of documents.

(a) *Official text only valid text.* — The official text of a document is the only valid and enforceable text regardless of any discrepancies between it and any other text.

(b) *What constitutes official text.* — (1) With respect to a document to be incorporated in the Code of Maryland Regulations, the official text of the document is as follows:

(i) Until incorporation, the text as published in the Register in final adopted form; and

(ii) After incorporation, the text as most recently published in the Code of Maryland Regulations.

(2) With respect to a document not to be incorporated in the Code of Maryland Regulations, the official text of the document is the text as most recently published in the Register.

(c) *Published document as evidence.* — A document published under this subtitle is evidence in accordance with § 10-203(a)(2) of the Courts Article. (1974, ch. 600, § 1; 1975, ch. 491, §§ 1, 3; 1976, ch. 585, § 2.)

Effect of amendments. — The 1976 amendment rewrote the section and no explanation of changes made by the 1975 amendment is now practical.

§ 256M-1. Errors in publication of documents.

(a) *Correction by errata list.* — Subject to subsection (b) of this section, the administrator shall correct errors in the official text of a document as published in the Register or the Code of Maryland Regulations by the publication of an errata list in the Register or by publication of the document or the affected part of the document in its corrected form.

(b) *Correction of error changing legal effect.* — Correction of an error changing the legal effect of a proposed or adopted rule or proposed amendment to a rule as published in the Register shall be made in accordance with § 256-I of this subtitle.

(c) *Severability of provisions.* — The provisions of a document are severable unless the document expressly states that the provisions are not severable. An error in publication of a document that changes the legal effect of a provision of the document does not affect the validity of any of its other provisions unless the remaining valid provisions alone are incomplete and incapable of being executed in accordance with the regulatory intent. (1976, ch. 585, § 3.)

§ 256N. Certification of Code, permanent supplements and Register.

Each Register shall contain a certificate by the administrator that it contains all documents filed as of the closing date. This certificate is conclusive evidence of this fact. Each part of the Code of Maryland Regulations and each permanent supplement shall contain a certificate by the administrator that it contains all regulations or other documents effective and codified as of a specific date determined by the administrator. (1974, ch. 600, § 1; 1978, ch. 731.)

Effect of amendment. — The 1978 amendment, effective July 1, 1978, deleted "part of the Code of Maryland Regulations, each permanent supplement, and" preceding

"Register" and substituted "filed" for "required to be codified" in the first sentence and added the last sentence.

§ 256-O. Effective date of published documents.

(a) *Generally.* — The effective date of any rule is the issue date of the Register or permanent supplement in which notice of final adoption is published unless the document specifies a later date. The issue date of the Register or permanent supplement is the date of its deposit in the United States mail for distribution and shall be printed prominently on the first page of each issue.

(b) *Exceptions.* — The effective date of executive orders, court rules, administrative regulations promulgated by the Chief Judge of the District Court, administrative memoranda, administrative orders, and emergency rules and regulations is the effective date indicated on the document. (1974, ch. 600, § 1; 1975, ch. 10, § 2; ch. 491, § 1; 1976, ch. 480; 1977, ch. 609.)

Effect of amendments. — The 1976 amendment rewrote the section.

The 1977 amendment substituted "document" for "rule" near the end of the first sentence in subsection (a).

§ 256P. Notice by publication — Constructive notice; notice of hearings.

(a) *Constructive notice.* — Unless otherwise specifically provided by law, publication of any document under this subtitle is sufficient to give notice of the contents of the document to any person subject to or affected by it, except in cases where notice by publication is insufficient in law.

(b) *Notice of hearings.* — If notice of hearing or of opportunity to be heard is required or authorized to be given by an agency under any law, or otherwise properly may be given, the notice, except in cases where notice by publication is insufficient in law, is deemed to have been given to all persons residing within the State, and to all persons owning or having any interest in any property located within it, if the period between the date of publication in the Register and the date fixed in the notice for the hearing or for the termination of the opportunity to be heard is:

(1) Not less than the time specifically prescribed for the publication of the notice by law, or

(2) Not less than 15 days if no time for publication is specifically prescribed by law, without prejudice, however, to the effectiveness of any notice of less than 15 days when it is reasonable. (1974, ch. 600, § 1.)

§ 256Q. Same — Other notice requirements.

(a) Publication of any notice as required by this subtitle and publication as required by any other provision of the Code, are both necessary to constitute full compliance with law.

(b) This subtitle does not affect any other notice requirement, including the time specifically prescribed for the publication of notice. (1974, ch. 600, § 1; 1976, ch. 892.)

Effect of amendment. — The 1976 amendment rewrote the section.

§ 256R. Presumptions created by publication.

The publication of any document in the Code of Maryland Regulations or the Register creates a rebuttable presumption:

- (1) That it was duly issued, prescribed, repealed, or adopted;
- (2) That it was approved as to legality by the Attorney General, if the document is an agency rule; and
- (3) That all requirements of this subtitle have been complied with. (1974, ch. 600, § 1; 1975, ch. 491, § 1; 1976, ch. 585, § 4.)

Effect of amendment. — The 1976 amendment eliminated "(a)" at the beginning of the section, eliminated former subsection (b) and eliminated "the permanent supplement" following "Code of Maryland Regulations" in the introductory paragraph. Quoted in *Samson v. State*, 27 Md. App. 326, 341 A.2d 817 (1975).

§ 256S. Rules not affected prior to October 31, 1974.

The provisions of the State Documents Law, insofar as they impose requirements for notice prior to adoption of rules, publication of proposed and adopted rules, effective dates of rules, and filing of proposed and adopted rules, may not be considered to have invalidated any rule or prevented the adoption of any rule prior to October 31, 1974. (1975, ch. 491, § 3.)

Editor's note. — Section 2, ch. 491, Acts 1975, renumbered former § 256S to be § 256T.

§ 256T. Short title.

This subtitle may be cited as the State Documents Law. (1974, ch. 600, § 1; 1975, ch. 491, § 2.)

Editor's note. — This section was formerly § 256S. It was renumbered by § 2, ch. 491, Acts 1975.

New York
(State)
Legislature
Administra-
tive Rules

Administrative Rules . . .

What is the Legislature's Role?

LEGISLATIVE DEPT. OF
LEGISLATIVE SERVICE
BUDGET
ANNEAPOLIS, MARYLAND

Senate Research Service
Task Force on Critical Problems
New York State Senate
Albany, New York
June 1976

Introduction

Faced with the responsibility of acting on complex and technical issues in many areas, legislatures increasingly have delegated broad rule-making powers to executive agencies--which theoretically have the expertise to write detailed rules and regulations implementing general legislative intent. For the most part this system works satisfactorily, but with broad delegation of authority there exists the potential for legislative intent being distorted, whether purposefully or through lack of understanding. Many state legislatures are concerned about executive agency abuse of rule-making powers. This has resulted in various proposals for legislative review of the rules promulgated by agencies in order to prevent or rectify agency mistakes, capriciousness, or unreasonableness.

The issue is not a new one. Michigan, for example, has had a system of review since 1947. During the 1960's this idea was discussed at length along with the companion issue of an administrative procedures act. Recently, the issue has resurfaced with increased vigor. For example, in Florida the issue of "phantom government" (government by non-responsible agencies through rules which bypass the legislature) was a focal point in the last statewide election. There a legislator discovered that a group of provisions which the legislature had struck from a bill before passage had reappeared as agency rules implementing that bill. An illustration of a similar abuse can be drawn from New York State experience. Senate 10698, a bill to give scholar incentive awards to private business schools, passed both houses of the Legislature but was vetoed by the Governor on June 17, 1974. Five months later on November 18, 1974, the Commissioner of Education amended Section 145.8 of the Department's regulations to approve scholar incentive awards for private proprietary business schools. The estimated fiscal impact of this action was \$3.6 million over two years.

The idea of legislative review has been gaining popularity because of:

- large-scale spending on complex and technical programs conducted according to agency regulations;
- controversial environmental protection laws with rules incurring significant economic impact.

New York State legislative interest in a legislative review of administrative rules is considerable--at least six bills have been introduced this session!

A legislative review of administrative rule-making raises two categories of questions:

- constitutional questions about the separation of powers;
- questions about the practical effects of such a device-- every gain in close scrutiny by the legislature has its cost in terms of delay in effecting rules, costs in legislators' time, and staff costs.

This report addresses both types of questions in a brief review of the issue. The practices of other states and of the Federal government are noted.

Is Legislative Review Desirable?

A discussion of this key question calls for delving into some practical considerations based on the experiences of review systems elsewhere. The most important pro and con arguments regarding legislative review of administrative rule-making have been put into proposition form for discussion.

Encourages Agency Responsiveness

From all indications, the assertion that legislative review encourages agency responsiveness to legislative intent seems to be valid. The presence of review committees in other states has certainly stopped agency attempts to put in by regulation what was denied in bills, an infrequent but serious offense which originally inspired the creation of most review committees. Beyond this, the Florida Administrative Procedures Committee reports a declining error rate in agency rules. Some of the improvement can be attributed to Committee scrutiny, although some of the poor draftsmanship may have resulted from agency attempts to meet new Administrative Procedures Act requirements on time. In contrast, an official of the Connecticut Department of Environmental Protection reported that their agency rules contained more technical errors lately and that they were getting more objections from the Legislative Regulations Review Committee. The official attributed this problem to a cutback in legal counsel, not to any lack of desire on the agency's part or to any action of the Committee. Most agencies insisted that they did not do anything differently, but only tried to write good regulations in line with legislative intent.

Makes for Better Legislation

The proposition that reviewing agency regulations would make legislators more aware of the need to write bills with clear expressions of intent and well-through out delegations of rule-making authority did not receive any support in the other states. For example in Connecticut, a state with a legislative review process, an agency official complained about a freshman legislator who insisted on pushing a improperly worded bill with vague standards because he needed an issue for his reelection campaign. The legislator did not appear to care that the Attorney General would reject the bill on grounds of legality.

Opens Agencies to Review

Legislators are able, through the review procedure, to determine whether or

not agencies are blatantly disregarding legislative intent. Review does reduce legislative suspicion of agencies. In fact, this is the chief, undisputed virtue of the concept.

Clarifies Legislative Intent

It gives agencies a surer sense of legislative intent. Agencies report that they do appreciate this knowledge. Most agencies' problems result not from outright subversions but from honest mistakes made in trying to interpret vague statutes. Although agency perceptions of the common good may differ from legislative perceptions, most agencies would prefer to follow the legislative intent if it can be defined. The drawback in the review committee approach is that the legislative intent is spelled out when rule-making process is well under way. It would be more economical and helpful to the agency to have a clear sense of intent in the enabling legislation. But this is not always possible and agencies would generally appreciate clarification at any point in the process.

Interest Group Pressure

It opens up another arena for interest group politics. This is a major consequence of the establishment of a review committee and it has both positive and negative effects. The legislature, as a generalist forum, can act as a court of last resort in which a voice, dismissed or underrated by the agency with its more single-minded goal orientation, can be heard. It is often clearer and more satisfactory to resolve conflicts here than in the courts after the rules take effect. Many committees hold public hearings and in some cases redress serious problems in the rules at this time. For example, as a result of a Michigan Joint Committee on Administrative Rules hearing, the Construction Code Commission agreed to incorporate a statewide fire code into its general building code rules at the urging of the State Fire Marshall Office.

The negative aspects are pretty much the opposite side of the coin. The committee becomes a forum where personal and parochial interests of the committee members can be asserted at the expense of the common good or even of the original legislative intent. Pressure from interest groups and lobbyists can be exerted on the legislators. In spite of an overall favorable agency opinion of review committee concept and performance, it did not prove difficult to come up with examples of at least questionable committee actions.

• In Michigan a Mine Reclamation Act passed in 1972 but the regulations have not yet been put into effect because of the lengthy Administrative Procedures Act process and determined mining industry opposition. The statute itself is virtually the industry bill and is meaningless without extensive implementing regulations. The Joint Committee on Administrative Rules did not rule that the regulations violated legislative intent, but disapproved because of the fiscal implication of enforcing them. Strong

pressure from legislators from mining districts was in evidence. The Department of Natural Resources favored implementing regulations even if enforcement would be less than ideal.

- In Connecticut the Legislative Regulations Review Committee disapproved of rules for a Federally-mandated Soil and Water Conservation District. According to the report, an influential member of the Legislature, without any background information, "Soil, Water! Sounds like wetlands legislation to me. I'm against it." Earlier real estate interests had vigorously attacked wetlands regulations. The opposing member was a real estate developer. The Committee later reversed itself when it found out that Soil and Water Conservation Districts had no connection with wetlands legislation. The problem is more than just private interest here. A part-time legislature and an understaffed committee complicate the picture.

- In Florida the Committee disapproved of a set of water district rules on the grounds that the water cropping theory on which the rules were based was not a part of the legislative grant of authority. The effect of the rules was to limit the amount of water that the district could sell to an adjacent metropolitan area with limited water supply. Four of the Committee members happen to come from the metropolitan area in need of the district's water.

Any party that would be harmed by the rules can express its concern before the committee, giving the legislature a chance to decide and be responsible for economic impacts of rules. The elected officials should have to bear responsibility for these rules, not bureaucrats who are not directly accountable to the electorate.¹

It Can Be Costly

Other states have handled the cost aspects in different ways. Florida's program is by far the most extensive, costing about \$250,000 annually. Michigan's review program is funded at \$75,000 per year, and Connecticut's program has only one full time staffer, but can draw on other legislative staff. In many states, inadequate staffing results in an ineffective process or one in which considerable extra work load is placed on committee members, who may not do a conscientious job. The most effective systems have provisions for hearings which are time consuming. The process also places expenses and delays on the agencies. All of these factors need to be considered.

Congressional Overview

The Federal government has been concerned with the growth of the administrative branch for many years. As agencies grew, regulatory powers increased and Federal spending multiplied. Franklin Roosevelt stated:

The practice of creating independent regulatory commissions, who perform administrative work in addition to judicial work, threatens to develop a "fourth branch" of the Government for which there is no sanction in the Constitution.²

The courts through the years have abdicated much of their power in interpreting legislative intent of laws. Professor Louis Jaffe has written:

...the practice of the Supreme Court, for example shows the Court sometimes asserting the correctness of the agency rule, at other times going no further than to hold that the administrator can but is not required to adopt such a rule. It is this latter practice which has given rise to profound difficulties of description and analysis, and to intense controversy. It has seemed to some that a court which thus leaves to an administrator the power to bind and to loose is abandoning the prime function of a court of law.³

In 1932 the Congress instituted the legislative veto which does not require presidential signature or veto:

- executive discussions (usually Federal regulations) are submitted to Congress for a waiting period (usually 60 days before going into effect);
- Congress may disapprove the action by concurrent resolution, by a simple resolution or by action of the standing committees.

Congress has even greater informal means of administrative rule-making control because of the full-time nature of the body and the extensive staffing of committees and subcommittees which exercise oversight of administrative agencies.

Nevertheless, there has been and there is considerable interest in a stronger congressional review mechanism. Different bills have been proposed within the last 15 months by Senators Fannin, Bumpers, and Kennedy and Congressman Flowers. These bills have a wide range of alternative methods for regulatory review. Although it is unlikely that stiffer Federal controls will appear at this time, it does indicate that concern for the problem is growing.

Review Of Administrative Rules In Other States

The growing interest among legislators in the exercise of legislative review over the administrative rule-making process is exemplified by the creation of legislative review committees in several states in the last few years and by proposals for some such review process in numerous other state legislatures.

At the present time, at least 22 states provide for some form of legislative review of administrative rule-making. The practices of these states are summarized in Table 1.

Typically, the review function is assigned to a specially created bipartisan joint committee; less frequently it is assigned to regular standing committees. In some cases, a combination of special and standing committees is used with initial review by a special committee which refers any questionable rules to the relevant standing committee for further consideration and comment.

While legislative mandates vary, most limit committee review to assessing administrative rules for conformity with legislative intent and scope.

Almost all of the states require that administrative agencies submit proposed rules and amendments to existing rules to the legislature prior to the rule taking effect. The submission dates vary considerably from "10 days before the agency hearing date" to "60 days before the agency's adoption date."

Fourteen of the 22 states have more than advisory powers and can cause an agency rule to be promulgated, approved, amended, modified, or annulled. Only two states require formal legislative approval prior to agency implementation of rules and in these cases prior approval is limited to selected rules. Typically, the entire legislature rather than the review body must vote to exercise a "binding" power. A limited number of states empower the review body to suspend rules until the full legislature can act. In those states the time allowed for legislative action was on the average 60 days. The mechanism used to exercise these powers appears to be evenly divided between concurrent resolutions and statutes.

Staffing patterns for rule review bodies also vary. Most states seem to have staff assigned from a central agency such as a legislative research council. In a few states rule review bodies have permanent staff. Personnel types include clerks, administrative assistants, and attorneys. Staff size ranges from a single clerk to six full-time attorneys and four full-time administrative assistants, to 12 part-time attorneys and 24 part-time researchers.

Table 1

LEGISLATIVE REVIEW OF ADMINISTRATIVE RULES IN OTHER STATES

State/ Statutory Authority	Legislative Mandate	Legislative Power/ Mechanism	Review Body	Procedure
Alaska (Chap. 27, Laws 1975)	To annually review all administrative rules, published Federal and State court decisions to determine whether or not: a) agencies and courts are properly implementing legislative purposes; b) there are agency or court expressions of dissatisfaction with State statutes; c) agencies or regulations indicate conflict or ambiguous status.	power-annual mechanism-concurrent resolution of both houses of Legislature.	Administrative Regulation Review Committee-paras. 1-3 interim committee; 3 representatives, 3 Senators.	all regulations must be submitted within 45 days of their filing to Committee. aSpot-check.
Arkansas (Ark. St. 6-610 Adopted, 1973)	To review all administrative rules for conformity with legislative intent and to ensure that agencies not authorized are not promulgated.	power-advisory mechanism-committee files complaint with agency.	Legislative Council-16 representatives, 9 Senators, 2 Governor representatives.	all rules, promulgated or proposed must be filed with Legislative Council 10 days before Agency hearing date. aReviews all rules. aThree attorneys allocate half their time to this function. aLegislative Council notifies agency of any proposed rule. aIssues not resolved by negotiations are submitted to the General Assembly with recommendations for action. aMeetings, on call.
Connecticut (Conn. Gen. St. 4-170)	To review all administrative rules for conformity with legislative intent.	power-approve, annual mechanism-join resolution of the General Assembly.	Legislative Regulations Review Committee-bipartisan; 8 representatives, 6 Senators; may hold public hearings.	all rules must be submitted to Committee 10 days before agency hearing date to become effective. aStatutorily directed to review all rules, in practice committee reviews selectively, i.e. game laws and public utilities regulations are approved automatically. aReviewed about 250-300 regulations per year). aReviewed about 60-70 regulations per year (failure to act within 60 days constitutes an approval). aDisapproved rules may not be implemented and remain suspended until reversed by General Assembly. aDisapproved rules forwarded to appropriate House and standing committee for review and public hearings. aGeneral Assembly votes to sustain or reverse, if General Assembly fails during regular session to sustain a disapproved rule implementing a Federal assistance program, the disapproval is automatically reversed. aStaff - 1 clerk, use of Legislative Legal Services--deemed inadequate, need at least 1 full-time attorney.

Table 1 con't.

Florida (Administrative Procedures Act, Law 1975)	•to review proposed rules. •to maintain a continuous review of statutory authority to delegating each rule and note when that authority is changed legislatively or judicially. •to review administrative matters, as they relate to Administrative Procedures Act.	•power-advisory. •mechanism-committee files complaint with agency.	Joint Administrative Procedures Committee-3 Senators, 2 Representatives.	•Committee reviews all rules (10,432 as of 1/75). Proposed rules have priority. Agencies must submit to committee proposed rules 21 days prior to adoption. •Committee's objections reported to agency. If agency does not respond within 30 days, more to this effect is published in Florida Administrative Weekly and Florida Administrative Code. If agency takes no action within 30 days of Committee's notice of objection, rule is automatically withdrawn. (79% of rules found objectionable). •6.3% exceed statutory authority. •6 sheets-monthly, 6.3% exceed statutory authority. •Staff - 6 attorneys, 4 administrative personnel.
Idaho (Idaho Code Ch. 52, Title 67, 1969)	To review existing regulations for conformity with legislative intent; not empowered to review rules prior to their becoming regulations (legislature sought review of proposed regulations; vetoed by Governor, 1975).	•power-annual, modify. •mechanism-concurrent resolution of both houses (simple majority)	Standing Committees	•all rules submitted to Senate and House for distribution to appropriate standing committees. •Standing committee submits recommendations to General Assembly. •any member may introduce resolution to amend, modify or reject a rule.
Iowa (Iowa Code Ann. Sec. 17A.8 Law 1975)	To selectively review regulations referred to determine whether they are unreasonable, arbitrary, capricious or otherwise beyond the agency's delegated authority.	•power-advisory. •mechanism-committee files complaint with agency.	Administrative Rules Review Committee-bipartisan, 3 representatives, 3 Senators. Standing Committees may review any rule on their own motion.	•while authorized to review selectively committee is currently reviewing all rules. objectionable rules may be dealt with by Secretary of State prior to its taking effect or in certain cases within 70 days of the effective date. In addition or in the alternative the Committee may refer a rule to the leaders of the House and Senate for recommendations. The House and Senate Assembly overturn the rule by statute. •leadership refers to appropriate standing committees for review. •meetings-monthly or more frequently; open to public. •if objections transfer the burden of proof to the agency, if litigated, and makes it liable for court costs and attorney's fees.
Kansas (K.S.A. 1974, Supp. 77-426)	To review administrative rules for conformity with legislative intent.	•power-approve, annual. •amend, modify. •mechanism-statute.	Interim-Legislative Coordinating Committee in interim. Regular Session-Standing Committees.	•Kansas law limits promulgation of regulations, except emergency regulations, to May 1 - August 1. Regulations become effective the following May 1. •all regulations filed with Revisor of Statute except emergency regulations must be submitted to the Senate and House during the regular session and the legislative coordinating committee during interim.

Table 1 con't.

Kentucky (KRS 13.087)	To review administrative rules for conformity with statutory authority and legislative intent.	power-advisory. Legislative committee files objections with agency.	Administrative Regulations Review sub-committee - 3 members.	•The regular legislature must act on regulations within 60 days of their submission. Emergency rules dealt with by a board consisting of the Governor, the Auditor of State, and the Secretary of State. •Staff--12 attorneys and 24 researchers; staff has many other functions. •Review all proposed rules. •Legislative rules are returned to agency with legislative objections forwarded to an appropriate standing committee or joint interim committee for second review. •Objections are forwarded to the agency for consideration. •Meetings monthly.
Massachusetts (No statutory authority. Implied constitutional authority which provides legislature with power of investigation)	To review administrative rules for conformity with legislative intent.	power-advisory mechanism--committee files objections with agency.	Legislative Post Audit and Oversight Bureau. Other bodies engaged in review - Judicial Committee, Legislative Research Council, interim study committees and commissions.	•Agencies requested by legislature to send Legislative Post Audit and Oversight Bureau copies of rules. •Check for shortages provide more than spot-check. Shortages problems come to attention of the Bureau. •Other review bodies also review on spot-check basis.
Maryland (Art. 40 Constitution Assembly, Sec. 40A)	To inquire into failing of an officer or employee of the executive or judicial branches to comply with laws; review rules; review operations and controls of agencies and department and make recommendations for improvement.	power-advisory. mechanism--committee files objections with agency.	Joint Standing Committee on Administrative, Executive and Legislative Review - 5 Delegates, 5 Senators.	•All proposed rules must be submitted to Committee 60 days before adoption for effect. •Review and comment on rules. Under emergency rules can become effective immediately with the approval of Committee or its chairman or vice-chairman. •Staff assistance provided by State Department of Legislative Reference.
Michigan (Mich. St. Ann. 2.1235, 2.1429 f. Mich. Const. 1963 Art IV, Sec. 37)	To review administrative rules for conformity with legislative intent and to determine if rules not authorized are not promulgated; certain regulations, i.e. fish and game, rates and tariffs, emergency rules are exempt.	power--approves, disapproves. mechanism--concurrent resolution of disapproval.	Joint Committee on Administrative Rules--5 Representatives, 3 Senators.	•All rules except those exempted by law, are transmitted to Committee for review before they can become effective. •Committee may deliberate on a rule. Approved rule certified to agency and both Houses of legislature. Disapproved rules sent to either or both houses as a resolution of disapproval. •Legislature has 30 days to act upon rule. If no action taken, rule becomes effective. Disapproved rules may not be implemented. •Rule not acted upon within time limit becomes effective automatically. •Meets weekly; open to public; attempt to notify interested persons; may hold hearings.

the State Bulletin and made available to persons specified by law and agencies or persons having filed a written request. The notice must include:

•statutory authority under which the rule is proposed, amended, etc.;

•time and place of public hearings;

•how data, views and arguments can be presented;

•text of proposed rule, amendment, etc. or where obtainable, and description of substance of proposed rule, amendment, etc.

Upon adoption of a rule, the agency shall publish notice of the action taken in the State Bulletin, referring to statutory authority and text or where obtainable and description of such action. Emergency rules may be adopted without conforming to above procedures, but a statement of reasons must accompany the emergency measure. Emergency rules are effective for 60 days only.

Constraints On Legislative Review

CONSTITUTIONAL CONSIDERATIONS

Constitutional considerations involved with legislative review of administrative rules are complex and focus on:

- Does legislative review of administrative rules constitute a breach of the separation of powers?
- May the legislature void rules by concurrent or joint resolution?
- May the legislature delegate a joint committee the power to suspend or void rules?

At this time there are no definitive answers to these questions. The Supreme Court of the State of Wisconsin is now hearing a case on the powers and procedures of the Wisconsin Legislature's administrative rules review process which includes a joint committee with the power to suspend rules. The Court's decision has yet to be handed down.

Separation of Powers

Legislative review of rules is part of the larger question of legislative control of the executive. And in this regard, "A perennial problem, then, in all except authoritarian regimes, is to devise and maintain methods of legislative control that keep things in proper balance--that keep the activities of executive officials under effective scrutiny and control while at the same time preserving the values of administrative flexibility and discretion."⁵ To approach the constitutional question as purely one of separation of powers to be solved by a precise demarcation of legitimate legislative and administrative spheres is fruitless. They can never be totally separate and distinct. Either extreme of keeping the legislature out entirely or involving it intimately with the administrative process violates the doctrine of checks and balances (fully as important as separation of powers) and does not promote the public welfare.

A provision granting great formal powers to a review body is likely to come under unnecessary constitutional attack--a system of fewer formal powers can be as effective. Effectiveness depends more upon legislative interest and adequate staff than upon questionable formal powers to negate or modify rules. Some type of legislative review of rule-making is healthy; legislative interference over specific agency decisions is not. It is particularly dangerous for the legislature or, for

that matter any agency, to affect specific decisions by manipulating broad rules which may be generally sound.

This question of separation of powers has been put before attorney generals in several states. Typically, they have taken a restrictive view of legislative powers in this area--an expected stance, given their executive orientation. But this is not always the case. In a 1958 report the Attorney General of Michigan stated that agency rule-making is a legislative or quasi-legislative function and, therefore, there was no question of a violation of the separation of powers in a legislative review of administrative rules.⁵

Resolution or Bill

The separation of powers question usually comes down to this: Can a legislature amend, modify, suspend or annul agency rules by resolution or must changes be accomplished through legislation? The governor is denied a role when a resolution is employed. This carries the separation of powers question one step further: Does legislative action on agency rules have to be by a bill which in turn must be signed by the governor?

Attorney generals in several states have written opinions on this critical question. The Michigan Attorney General's position is indicative of most other attorney generals: "...since according to the state constitution, 'all legislation by the legislature shall be by bill,' a concurrent resolution could not be used to suspend or revoke rules."⁶ The Tennessee Attorney General noted that there were "few, if any, controlling principles of law" to guide him on the issue. He found that legislative review of rules "is not a violation of the doctrine of separation of powers, but that it is an unlawful delegation of legislative power". Thus, he concluded, the General Assembly could not delegate the power and repeal had to be by bill, not by resolution.⁷

This is however not necessarily a correct position. Bernard Schwartz, professor of law, argues that to consider legislative disapproval as a law-making function is a perverted construction of the separation-of-powers doctrine. If this concept were consistently applied, he states, it would not only invalidate legislative disapproval of rules but would also destroy the rule-making powers of agencies, because in this case the agencies would have to be considered as having the power to make law, which would be an unconstitutional exercise. In his opinion legislative approval is merely one of the contingencies specified in the enabling statute upon which the agency exercise of rule-making power is to take effect. A resolution is a proper instrument in such a situation.⁸

Power of Legislative Committee to Suspend or Annul Rules

The chances of a constitutional challenge vary considerably with the powers granted to the review body. Allowing a committee or a committee chairman to abolish or modify rules is likely to bring constitutional challenge. But effective review does not depend on a committee having such powers. The Florida Legislature, through its Joint Administrative Procedures Committee with a staff of six attorneys does a thorough job of scrutiny, yet it does not have the power to nullify a rule nor to prevent an agency's rule from being adopted.⁹ The ultimate formal sanction in Florida is a committee Legislative notice of disapproval printed with the rule. Informal means of showing legislative disapproval are, of course, open to the Legislature and its committees. Florida has found that these powers have been sufficient to accomplish the intent of the act.

In 1963 Michigan adopted a new constitution with a provision (Article IV, Section 37) for joint committee suspension of administrative rules:

The Legislature may by concurrent resolution empower a joint committee of the Legislature, acting between sessions, to suspend any rule or regulation promulgated by an administrative agency subsequent to the adjournment of the last preceding regular legislative session. Such suspension shall continue no longer than the end of the next regular legislative session.

Furthermore the administrative procedure act (Act 88, P.A. 1943, being M.S.A. §3.560 (7b) (C.L. 1948 §24, 71b), as amended provides:

the Legislature reserves the right to approve, alter suspend or abrogate any rule promulgated pursuant to the provisions of this act.

PRACTICAL CONSTRAINTS

Legislative review of administrative rule-making involves both benefits and costs. A sense of the effect was gathered principally by talking to committee staff in states with comprehensive rules review committees. Agency officials in these states were also contacted to obtain their views on the process.

No state legislature employs a mechanism that requires an affirmative vote of the legislature on every agency rule before it becomes effective. All employ some variety of negative check in which the regulations become effective if no adverse legislative action is taken within a certain time period. The main practical variable among states is the presence or absence of a joint committee of the legislature to scrutinize all regulations. Without a committee (with at least some staff resources,) a review mechanism becomes a device to catch the occasional controversial rule whose importance is made known to the legislature by interest groups or by an individual legislator who has an intense interest in the matter.

Work Load

If a serious effort to review all rules is contemplated the question of how much work is involved becomes important. Work load depends on the number and nature of regulations and the mandate given the review committee. New York State has 40 volumes of currently effective administrative rules. These are in loose-leaf binders known as the Official Compilation of Codes, Rules and Regulations of the State of New York. The Secretary of State has the responsibility for compiling these regulations. Agencies vary considerably in their production of regulations. The Education Department regulations are contained in a single volume whereas the Department of Environmental Conservation regulations take six volumes (five of which are concerned with a single subject--water pollution control standards). The Department of Mental Hygiene rules take up only half of a volume, while the Department of Motor Vehicles regulations take up four volumes. As a general rule, an agency with fewer regulations is likely to have a larger body of statutes which pertain to its activities.

In 1975, the Department of State received almost 3,000 filings of new rules or rule changes from the state agencies. Each filing may represent only one new or changed rule, or there may be many changes. According to the Office of the State Reporter, in 1975 the Department of Transportation had the most filings, followed by the Executive Department. The Department of Commerce and Labor had the fewest filings.¹⁰

Table 2

New and Revised Rules and Regulations Filings
With Department of State

Year	Number of Filings
1975	2,995
1974	2,698
1973	2,740

Although the number of filings appear to be stable from year to year, this situation may change when the State Administrative Procedures Act goes into effect on September 1, 1976. The Editor-in-Chief, New York State Official Compilation believes that the number of filings will increase. This increase with an APA has been felt in Kansas and in Florida where agencies promulgated 4,500 rules in a six-month period.

The numbers of regulations vary state by state. The Connecticut Legislature's Regulations Review Committee handles only 25-50 regulations per month which, if the units are comparable, would be only 10 percent of the New

York volume. Connecticut is working on a procedure for automatic pass-through of such routine regulations as fish and game laws. The Committee reduces its volume of work by rubber-stamping public utility regulations because of their complexity. The Michigan Legislature's Joint Committee on Administrative Rules reviews approximately 135 filings per year. Each filing may contain up to 200 individual changes. Certain categories including fish and game laws and tariff and rate regulations are explicitly eliminated from review. This cuts the workload considerably. The Florida Legislature's Joint Administrative Procedures Committee handled an average of 840 rules per month during last year. The Florida Committee does not exclude anything. The regulations of the universities, for example, are included. Florida would appear to handle approximately the same volume as New York.

The volume of an agency's filings has no direct relationship with the significance and economic impact of the proposed rules. Many rules are filed to comply with Federal laws and others are tendered simply to allow minor changes in state or local government operation. Therefore, the substance of rules varies considerably. For example, in Table 3 it is evident that almost two-thirds of all rules and regulations filed by the Department of Environmental Conservation were for fish and game matters--usually not a controversial area nor one likely to create major economic impacts. On the surface, only two of the rules filed by Environmental Conservation appear to have a potential for controversy and economic impact. Similar situations are found with the other agencies' rules--often the rules are for minor changes and do not warrant significant review.

Context of New and Revised Rules

In many cases, new and revised rules filed with the Department of State fit into a previous filing, with the result that reading the changes by themselves may be meaningless. Often it is necessary to read large portions of the relevant section in the Official Compilation of Codes, Rules and Regulations of the State of New York in order to put the new or revised rules in their proper context. This situation necessitates that the reviewers of new and revised rules keep an up-to-date Official Compilation close at hand for ready reference.

Staffing and Financing

What resources are necessary to operate effective review committee? Even though most committees claim to limit themselves to determining whether the rules are consistent with the legislative intent behind the authorizing statute and do not consider the substantive merits of either the statute or the rules, the resource commitment varies considerably. The Florida Joint Administrative Procedures Committee employs an executive director, six attorneys, and four clerks and has a budget of \$250,000.

Table 3

Sample of Rules and Regulations Filed by Three State Agencies in 1975

Department of Environmental Conservation	
<u>Fish and Game</u>	
1. Taking Muskellunge in Chautauque Lake.	11. Shellfish lands - Islip.
2. Taking scup ducks below the foot of Niagara Falls.	12. Hunting beaver- migratory game birds, hunting, fishing, trapping, trespassing in Oak Orchard and Tonawanda Nat. areas.
3. The use of tip-ups when fishing.	13. Hunting migratory game birds.
4. Trapping Beaver in Oswego county.	<u>Marine and Recreational Vehicles</u>
5. Hunting deer and bear in Canaanville cooperar area; taking of Walleye in Oneida Lake; special fishing regulations for certain areas; trapping mink and muskrat.	14. Operation of mechanically propelled vessels on certain lakes and ponds which was adopted 11/20/75.
6. Shellfish transplant project in town of Babylon.	15. Operation of mechanically propelled vessels on certain lakes.
7. Body gripping traps; hunting in Cayuga and Tompkins County cooperar area.	16. Operation of mechanically propelled vehicles on the forest preserve.
8. Hunting, trapping, fishing in Clay Marsh Wildlife Management area.	<u>Water and Air Quality</u>
9. Hunting of various mammals and fowl.	17. Emissions from motor vehicles propelled by gasoline engines (preventing prohibitive controlling air pollution authority enables Emission to require installation of exhaust emission control devices on certain heavy duty vehicles registered in the state in order to achieve Federal ambient air quality standards for carbon monoxide and hydrocarbons).
10. Fishing for trout and landlocked salmon.	18. State pollutant discharge elimination system procedures substantive rules, requirement of permit, prohibited discharges, exceptions, etc.
11. Deer hunting permits in Southern Zone.	19. Delegating administration of ANYCR part 201 in FPA City of New York.
12. Fishing regulations.	<u>Public Access</u>
13. Shellfish lands in town of Oyster Bay.	20. Public use of Ft. Drum cooperar area
14. Shellfish lands in Suffolk county.	21. Hunting, fishing, public use in Montezuma National Wildlife Refuge. Hunting in Troquois National Wildlife Refuge.
15. Shellfish lands in Suffolk county.	22. Steward Airport cooperar area public use.
16. Taking fish with spears and long bows.	23. Public access to Emission records.
17. Deer hunting in Livingston county reforestation area #).	24. Horses on forest preserve lands.
18. Fishing Oneida Lake.	25. Trespassing on Iron Sides Island.
19. Scap and dip netting.	<u>Other</u>
20. Use of bait fish.	26. Construction in flood plains areas having special flood hazards - building permits.
21. Hunting wild turkey.	27. Employees who enforce the Emission Law.
22. Trapping mink and muskrat.	28. Forest fire suppression.
23. Fishing.	29. Nurseries and planting stock.
24. Trespassing on Iron Sides Island.	30. Protected native plants.
25. License fees for commercial fishing in lake water.	
26. Fishing, Designation of Employees (peacepowers).	
27. Bait fish.	
28. Muskellunge in Chautauque Lake.	
29. Trout.	
30. Shellfish transplant project.	

Department of Mental Hygiene	Department of Labor
1. Accreditation of drug abuse agencies; confidentiality of records; maintenance of adequate records; right to a hearing.	1. Amend equal employment opportunity apprenticeship training (def. of disability). Amended 11 placed added "disability or marital status."
2. Hearings.	2. Public access to Labor Department records.
3. Public access to Drug Abuse Commission records.	3. Public access to Labor Department records.
4. Onondaga County on-premises consumption; off premises consumption, grocery store, drug store.	4. Wage deductions.
5. Emergency treatment facilities.	5. Sand gravel...operations underground mining (conformance with Fed).
6. Procedure for treatment and hospitalization of certain mentally ill prisoners in jail; service of legal process and execution of instruments by patients; transfer of involuntary patient to mid-Hudson Psychiatric Center.	6. Sand gravel...operations underground mining (conformance with Fed).
7. Investigation - reports of incidents.	7. Open pit mining (ear, respirators, hoists) (conform to Fed).
8. Designation of T. A. Coughlin III as Deputy Commissioner.	8. Construction, evacuation, demolition near underground facilities (all units of government must have central registry) stating; reporting damage, back filling, use explosives.
9. Designation of Mental Hygiene regions.	9. Protection in construction, excavation demolition operations.
10. Designation of Deputy Commissioners; approvals for mortgage program.	10. Chiropractic fee schedule for Workmen's Compensation and Volunteer Firemen's Benefit Law.
11. Quality of care and treatment.	11. Workmen's Compensation Board medical centers operated jointly by labor and management.
12. Work activities of patients.	12. Medical fee schedule for treatment under Workmen's Compensation and Volunteer Firemen's Benefit Law.
13. Long Island Research Institute	13. Public access to Workmen's Compensation Board records
14. Records, access, officers; fiscal officers.	14. Osteopathic physicians rendering care under Workmen's Compensation (who you register with, arbitration disputed bill).
15. Patient held pursuant to Family Court action, criminal procedure law; public access to department records.	15. Medical fee schedule - Workmen's Compensation and Volunteer Firemen's Benefit Law.
16. King Park Psychiatric Center; assignment of service districts to state schools and children's hospitals; standards for physical facilities of hospitals for the mentally ill, schools for the retarded and alcoholism facilities.	
17. Schedule of fees for services by department facilities.	

The staff scrutinizes each rule and matches it with the authorizing statute. Some 79 percent of the first group of rules reviewed contained some error. Most of these were of a technical nature and were rectified by the agencies in response to staff suggestion and then were not considered by the Committee. As of March 14, 1975, the Committee has sustained 42 objections brought to it by the staff. Connecticut's Legislative Regulation Review Committee staff consists of one secretary-clerk. The review work is parceled out to the Legislative Commissioner's staff, who also serve standing committees. The budget is only \$10,000 and the Director of the Legislative Legal Services considers the Committee understaffed and thinks it needs a full-time attorney. In Connecticut, each member of the Committee is assigned rules to review and report on at Committee meetings. The Michigan Joint Committee on Administrative Rules employs a staff of one attorney and one clerk and has a budget of \$75,000.

The discrepancy in staff size between Michigan and Florida, states of similar population, can be explained to a certain extent. Michigan excludes many routine rules whereas Florida is all inclusive. Under the Michigan Administrative Procedure Act (APA), the Legislative Service Bureau must review and approve rules as to form, then the Attorney General approves the rules as to legality. It is only then that the Joint Legislative Committee on Administrative Rules reviews the rules as to conformity with legislative intent. Florida's APA does not contain either of the other reviews and so the Joint Committee deals with drafting errors and technical matters that presumably do not arise at the Joint Committee stage in Michigan. (Connecticut also requires that a review by the Attorney General be undertaken to determine legality). Another factor is that the Michigan Committee's staff attorney has been involved in the review process for 20 years and is able to use well-established informal connections which make the process more economical. Also, many rules receive no Committee action in Michigan. Florida's Committee is new and is reviewing all the rules that were on the books as well as reviewing proposed rules. The Executive Director estimates that 25 percent of the previous rules can be reviewed in a year and he expects the Committee staffing to shrink with attrition as this task is completed. He envisions a staff of two or three attorneys to handle the flow of proposed regulations.

What does this mean for New York? The Office of State Reporter which reviews rules for form and style has an attorney and two editorial assistants. The Director of this Office estimates that a staff of six attorneys would be necessary to do a competent job of reviewing proposed rules for conformity with legislative intent and that 12 attorneys for two years would be necessary to review regulations now on the books. He notes that the 1960 effort to compile all agency regulations took six attorneys and several years. This estimate is not out of line with the Florida staff size, since the number of regulations is about the same for the two states and both states apparently are defining a rule change in the same manner.

Options For Legislative Review Of Administrative Rules

The following list of possible legislative review mechanisms represents a range of available alternatives listed in order generally from the strongest to the weakest. The following four key questions must be addressed as part of the selection process.

- How much power does the Legislature want to assume?
- Should all regulations be reviewed?
- How many staff and financial resources can be expended?
- Is the procedure Constitutional?

Option I

JOINT LEGISLATIVE COMMITTEE

A Joint Legislative Committee (JLC) could have varying powers, and could consolidate and centralize the review process for the entire legislature. Generally, the pros and cons of a JLC approach are:

- Pros
- consolidates and centralizes review.
 - allows a bipartisan review process.
 - provides consistent and continuous review of regulations.
 - allows for review of all rules.
 - allows for JLC to call on experts and standing committees for advice.

- Cons
- demands staffing at a cost.
 - political problems if both houses are not of the same party.

Table 4 presents six variations of the JLC approach ranging in power from full authority to act for the legislature (Suboption A) to advising the legislature on rules not meeting legislative intent (Suboption F).

Option II

STANDING COMMITTEES

Individual standing committees in each house of the legislature could be empowered in about the same way JLC's could be empowered (Option I above). Some

Table 4

Joint Legislative Committee Review of Administrative Rules
Options for Committee Mandate

Suboption A <u>JLC with Power to Annul, Amend, Abrogate, or Disapprove Rules</u> This type of JLC could effectively speak for the legislature and could have tight control over executive agency actions. The JLC would be able to work with the agencies to assure quality control of rules and regulations, and if persuasion fails the JLC could disapprove rules. A prime function of this type of JLC would be to follow legislation that would require agency rules and regulations and assure that, upon enactment, the responsible agency carries out the legislation with its rules. Pros gives the legislature final authority. would allow last action on rules thus could cut the delay time of waiting for the full legislature to act. allows tight control over the agencies. Cons approbation constitutional problem with sole JLC disapproval. does not give the full legislature a voice in the process; JLC members may not reflect the views of their legislative colleagues.	Suboption D <u>JLC with Power to Suspend Pending Non-Binding Legislative Resolution</u> The legislature would have to sustain a JLC disapproval with a non-binding resolution. Such a resolution would not require signature by the Governor. Pros eliminates some of the constitutional problems. allows full legislature to act. Cons constitutional question then centers on whether a JLC can suspend a rule. could create long delays.
Suboption B <u>JLC With Disapproval Powers Only</u> While similar to (A) above, this JLC could not amend, annul or abrogate rules, only disapprove after the agency presents the rules. Effectively, proposed rules would be suspended while the agency redrafts to meet the JLC objections. Pros spurs burden on agency to revise rules to conform with JLC desires. reduce staff needs. Cons constitutional problem still exists. entire legislature is still not included. slows the process, since the JLC cannot conduct entire revision.	Suboption E <u>JLC with Power to Suspend Pending Legislative Bill</u> This approach likewise suspends any JLC-disapproved rule pending passage of a legislative bill and approval of the bill by the Governor. This is the Wisconsin approach. Pros enactment effectively reduces constitutional question on the separation of powers. allows full legislature to act. Cons constitutional question is reduced to whether a JLC can suspend a rule. time-consuming due to need to wait for legislative session.
Suboption C <u>JLC with Disapproval Power Contingent on Binding Legislative Resolution</u> Similar to (B) above, this option would necessitate that any disapproval be sustained by the full legislature. Any rule disapproved would be suspended until the legislature acts on a resolution of disapproval. This is essentially the substance of the Connecticut and Michigan programs. Pros allows the full legislature to participate. spurs burden on agencies to revise disapproved rules. gives agencies time to revise prior to next legislative session. Cons constitutional question is softened, but not eliminated (i.e., power of JLC to suspend, and the legislature to disapprove by resolution are problems). creates potential for long delays--both with the legislature out of session for up to 7 months and the fact that action may not be taken at start of session (some states require legislature to act within 30-60 days of session opening).	Suboption F <u>JLC with Power to Comment on Rules and Report to Legislature if Agency Does Not Revise Rules Accordingly</u> This is the Florida approach. It allows the JLC to comment on agency rules and to work with the agency to revise proposed rules. If agency does not comply with JLC objections, the JLC could publish its objections and report to the full legislature with recommendations for legislative action. Pros constitutionally strong. gives an agency a chance to respond to objections. delay can be reduced since the agency does not have to wait for full legislative approval. Cons may not give the full legislature a full voice in the process.

Congressional committees operate in this manner. The standing committee approach would have essentially the same pros and cons as the JLC approach, with a few exceptions:

Pros
 ●committee staff could carry out the review.

Cons
 ●not all committees are active on an annual basis.
 ●problem of coordination between the houses of the legislature.
 ●possible inconsistency in treatment of rules from committee to committee.
 ●dealing with more than one committee can be a burden to some agencies.
 ●may find biased interests in members of standing committees toward the areas of jurisdiction of each committee.

Each of the JLC suboptions apply to the standing committee approach:

- A) Standing Committee Annul, Amend, Abrogate or Disapprove
- B) Standing Committee Disapproval
- C) Standing Committee Disapproval Pending Legislative Resolution
- D) Standing Committee Suspend Pending Legislative Resolution
- E) Standing Committee Suspend Pending Legislative Bill
- F) Standing Committee Comment on Rules and Report Disapproval to Legislature

Option III

ANNOTATED RULES

One method of bringing the legislature into the review process in a meaningful way is to have the promulgating agency submit proposed rules with sufficient annotation to explain the intent and the impact of the rules. The pros and cons of this approach are:

Pros
 ●allows legislature to perceive the controversial rules easily.
 ●allows for inexpensive review.

Cons
 ●no central control.
 ●hard to keep rule changes in context.
 ●have to wait for session to begin before there can be formal action.

Table 5 presents two variations of the annotated rules option.

Table 5

Annotated Rules to the Legislature Options

Suboption A

Annotated Rules to All Members of the Legislature

Proposed rules could be submitted to the 210 members of the legislature for review. The legislature could, upon introduction of a bill or resolution, act to disapprove a proposed rule. There are pros and cons to this approach as well.

Pros

- full legislature can act
- constitutionally strong if legislative action is by bill.

Cons

- no central coordination
- proliferation of paper (Environmental Conservation's rules for 1975 would have required about 250 reams of paper to provide copies to 210 legislators).
- legislators unable to read through all regulations.
- difficult to keep rules in context.
- constitutional problem if legislative action by resolution.
- delay possible if have to wait for legislature to convene

Suboption B

Annotated Rules to Majority Leader and Speaker

The majority leader of the Senate and the speaker of the Assembly would have to review the rules and/or provide copies to each member. There are clerical problems involved and there may be resentment over concentration of power in the leadership offices. Again, action could be by bill or resolution. The pros and cons are essentially the same as those noted for suboption A above.

Option IV

UNANNOTATED RULES

Currently, all rules are sent to the Majority Leader of the Senate and the Speaker of the Assembly. Distribution could be extended to all members of the legislature. This amounts to a vast proliferation of paperwork and generally will be ineffective because the rules would be out of context and the volume would probably overwhelm most members' offices.

An Approach For The New York State Legislature

The first question to settle is whether or not to institute a legislative review of administrative rule-making. Principal costs in doing so are the added delays in the rule-making process and the opening of another arena for political baragining with the attendant possibility of power abused to serve private, not public ends. Delays are an unavoidable cost of review. Much of the virtue of the review process, however, stems from the operation of this same political arena, where officials responsible to the electorate can resolve conflicts in a manner that accounts for all the legitimate public interests. This balanced view is difficult to achieve within an agency which understandingly and properly has a somewhat narrow focus.

The need for a review process arises out of the nature of the modern governmental process. Legislatures must often act in areas of great technical complexity without being themselves expert in those areas. Vague legislation with provision for agency experts to flesh it out with rules and regulations is often the result. It is not at all presumptuous of the legislature to want to review the work of the agencies in writing rules and regulations because the rules often determine the operating character of the legislation. And legislators can be held accountable at the polls for legislation. Power must accompany accountability. A legislative review of administrative rules is a tool for responsible government and would be a desirable practice for the New York Legislature.

It might be added that legislative review is not counter to the best interests of the agencies. In states with review processes agency officials generally reacted positively, because it clarified legislative intent. Agencies would much rather have direction than to be forced to grope in the dark.

WHAT KIND OF A REVIEW PROCESS IS BEST?

The purpose of a legislative review process is to ensure that regulations follow legislative intent and that regulations do not effectively negate other articulated social goals in ways that the Legislature does not intend. A review mechanism should be designed to further this end and to prevent the process from becoming a quasi-judicial forum for redress of individual complaints or one in

which the private interests of lobbyists and legislators are advanced at the expense of the public interest.

Executive Branch Review

A goal should be to keep legislative exercise of power at a minimum. The burden on the legislature can be reduced if the executive branch does its job properly. The Governor, as the chief elected official of the executive branch and the one directly responsible to the electorate, shares with the Legislature the duty to reconcile conflicting interests. Under present conditions this function is not consistently performed regarding regulations. Regulations written by specialized agencies may reflect narrow biases that are harmful when seen in a larger perspective. The Legislature should insist that the executive branch do its job of resolving conflicts created by regulations. A mandated review of regulations by the Governor prior to the legislative review would be desirable. In this way the Governor can be held responsible for seeing that regulations are in line with overall policy goals. This should reduce the legislative workload, since fewer questionable regulations would reach the Legislature for review.

Administrative Rules Review Committee of the Legislature

A joint administrative rules review committee of the Legislature appears to be the best mechanism for legislative review. Alternatives to a joint committee are to establish a review committee in each house or work through standing committees. For the agencies, dealing with a single committee would be more efficient than dealing with a multiplicity of committees. A single committee would foster consistency in the review process and minimize delays. The joint committee should be able to consult with standing committees in order to tap expert opinion. A joint committee with its balance of forces is less likely to act rashly than a single-house committee.

POWERS OF AN ADMINISTRATIVE RULES REVIEW COMMITTEE

A review committee should be powerful enough to command the respect of the agencies, yet it should not have the final say on the fate of a regulation, this being the proper function of the whole Legislature, not a part of it. This balance can be achieved by giving the review committee the power to approve, disapprove, or disapprove without prejudice any regulation. With committee approval the agency could move ahead and put the regulation into effect. A disapproval without prejudice would allow an agency to rework an objectionable part and return directly to the committee. A committee disapproval would carry with it the ultimate committee

sanction--suspension of the rule until the Legislature could act on it. It is anticipated that the committee and the agencies would work informally to resolve problems before the committee would resort to formal disapprovals.

POWERS OF THE LEGISLATURE

The question here is whether the Legislature may stop regulations by passing a concurrent resolution or whether the Legislature must pass a bill to do so. A strong case can be made for the Legislature to act by resolution. The review is a contingency of the original statute exercised by the Legislature; it is not a new law-making exercise. Because there is little judicial case law on this subject, this position might be challenged on constitutional grounds. Nevertheless, this interpretation appears sound and would probably stand the test of judicial scrutiny. It might be added that similar review procedures in Michigan and Connecticut have not been challenged.

The Legislature should have the power to review regulations which are in effect, as well as review proposed regulations. Obviously, it is less desirable to conduct the review after regulations are effective, but the principle is the same--the Legislature is held responsible for the operation of the law including the regulations and should therefore have the power to see that the regulations reflect legislative intent. Regulations are changed by the promulgating agencies to reflect changing times and circumstances, and there is no good argument for preventing legislative review for the same reasons.

Footnotes

1. On this theme see Lloyd N. Cutler and David R. Johnson, The Yale Law Journal 84:7 (June, 1975), pp. 1395-1418.
2. Kenneth Culp Davis, Administrative Law Treatise, (1958), Sec. 1.14, p. 28.
3. Louis Jaffe, Judicial Control of Administrative Action, (1966), pp. 557-558.
4. Joseph P. Harris, Congressional Control of Administration, (Washington, D.C.: The Brookings Institution, 1964), pp. 2-3.
5. State of Michigan, Report of the Attorney General, (Lansing) No. 3352, pp. 246-254. October 8, 1958.
6. State of Michigan, Report of the Attorney General, (Lansing) No. 4586, pp. 65-73, July 13, 1967.
7. State of Tennessee, opinion of Richard Lodge, Assistant Attorney General, in letter to Honorable Ray Blanton, Governor, December 22, 1975.
8. Bernard Schwartz, New York University Law Review 30: 1031 at 1043.
9. Carroll Webb, Executive Director, Florida Legislature, Joint Administrative Procedure Committee, "The Legislature's Role in Executive Regulations and Rulemaking," remarks to National Conference of State Legislatures, Philadelphia, Pennsylvania, October 7, 1975.
10. Letter from Gregory A. Rutnik, Editor-in-Chief, Official Compilation, March 26, 1976.

Published Reports Of The Task Force On Critical Problems

Oil - It Never Wears Out. It Just Gets Dirty. Report on Waste Oil. October, 1974. 39 pages.

Insurance and Women. October, 1974. 30 pages.

The Other Side of Crime...The Victim. January, 1975. 18 pages.

No Deposit, No Return...A Report on Beverage Containers. February, 1975
106 pages and Appendices.

Subsistence or Family Care...A Policy for the Mentally Disabled. March, 1975.
37 pages and Appendices.

"...But We Can't Get a Mortgage!" Causes and Cures. May, 1975. 61 pages and
and Appendices.

Productivity. October, 1975. 107 pages.

One in Every Two...Facing the Risk of Alcoholism. February, 1976. 101 pages.

Small Business in Trouble. March, 1976. 50 pages.

The Three Billion Dollar Hurdle...Information for Financing Education. April,
1976. 66 pages.

Vital Signs...Sustaining the Health of Tourism. (A Report on Highway Advertising
Signs). June, 1976. 83 pages and Appendices.

OPINIONS
OF THE
ATTORNEY GENERAL
OF
MARYLAND



FRANCIS B. BURCH
ATTORNEY GENERAL

Legislative Veto
of Proposed
Administrative Regulations

May 26, 1978

OFFICES OF

FRANCIS B. BURCH
ATTORNEY GENERAL
JON F. OSTER
GEORGE A. NILSON
DEPUTY ATTORNEYS GENERAL



JUDSON P. GARRETT, JR.
ASSISTANT ATTORNEY GENERAL
COUNSEL TO THE GENERAL ASSEMBLY

THE ATTORNEY GENERAL

ROOM 104

LEGISLATIVE SERVICES BUILDING

90 STATE CIRCLE

ANNAPOLIS, MARYLAND 21401

301-269-3786

May 26, 1978

Honorable Blair Lee, III
Acting Governor of Maryland
State House
Annapolis, Maryland 21401

Re: House Bill 619

Dear Governor Lee:

House Bill 619 has passed the General Assembly and been submitted to us for review and comment as to its constitutionality. In general, this bill would provide a statutory mechanism whereby the Joint Standing Committee on Administrative, Executive, and Legislative Review (AELR)^{1/} would have the ability to disapprove proposed administrative regulations, subject to an ultimate "override" by joint resolution of the General Assembly. Such oversight mechanisms are rooted in the English "laying system,"^{2/} are characterized as "legislative veto" provisions and have been couched in a variety of forms,^{3/} for a variety of purposes.^{4/} Their wisdom and their constitutionality have been the subject of an increasing amount of comment and controversy at both the federal and state levels.^{5/}

On the federal level,

"[i]t began in earnest in 1932, when Congress gave the legislative branch a veto power over executive reorganization plans. Since then, over 125 separate statutes have given the legislative branch direct review powers."

Stewart, Constitutionality of the Legislative Veto, 13 Harv. J. of Legis. 593, 594 (1976). The Attorney General of the United States has consistently expressed the opinion that such statutes are unconstitutional. See, 41 Opinions of the Attorney General 300 (1955); 41 Opinions of the Attorney General 56 (1933).^{6/}

Honorable Blair Lee, III
Page Two

Indeed, mirroring what the Court of Claims termed "the long-standing objections of all recent Presidents against what is viewed as an incursion into the constitutional domain of the Presidency," the Department of Justice recently conceded the constitutional invalidity of a legislative veto provision which the Court ultimately found to be valid. Atkins v. United States, 556 F.2d 1028, 1058 n. 15 (1977), cert. den. 98 S. Ct. 718 (1978).7/

On the state level, according to the latest issue of State Legislatures,:

"[m]ost state legislatures now conduct some form of regulation review. The total increased to 34 last year, as nine states ... established formal review procedures. In ... [three states], similar bills were vetoed by the governors.

"Five other states ... amended their regulation review last year, either to clarify existing procedures or to strengthen the legislature's role in the process. In ... [two], amendments to existing review procedures were vetoed by the governors, while [in one] the ... amendments were enacted over the governor's veto.

"The powers of the legislatures in the review process generally fall into four categories:

(1) Advisory review power. * * * [8/]

(2) Repeal [or disapproval] of an objectionable regulation by the legislature through passage of a bill or a resolution. * * * [9/]

(3) Committee suspension of a regulation for a certain period of time, during which the full legislature must ratify the committee's suspension in order for the regulation to be nullified. * * * [10/]

(4) Permanent suspension of a regulation by the committee. * * * [11/]

"Within these four categories, there is a multitude of approaches to legislative review of regulations. * * *

"For the past two years, the Legislative Improvement and Modernization (LIM) Committee of the National Conference of State Legislatures has been studying these alternative approaches, and has now prepared a report with recommendations for improving the regulation-review process. * * * [12/]

Honorable Blair Lee, III
Page Three

"The LIM Committee's basic recommendation is that legislatures should establish procedures for reviewing all agency rules and regulations promulgated with the force of law, [and t]hese review procedures should be as strong as the constitution of each state allows.

"[Moreover, in the Committee's view, b]ecause of the size of most legislatures, the most effective way of conducting review is through the [joint] committee procedure. * * *"

Wyatt, "Runaway Bureaucracy: How to Get it Under Control," State Legislatures, 8, 9 (March/April 1978).

The Attorneys General of several other states which have either enacted or considered such legislation have expressed grave concerns about the constitutionality of such statutes.^{13/} This is the first time we have formally addressed the issues presented by the legislative veto of proposed regulations;^{14/} however, on April 23, 1965, Attorney General Finan expressed the view that an Act which would have prohibited open seasons for the hunting of doe in certain counties, unless authorized by the Game and Inland Fish Commission and concurred in by the Legislative Delegation for each of these counties, was unconstitutional because it: (1) contravened the separation of powers mandated by Article 8 of the Declaration of Rights, "if the action taken by the County Delegation is considered an executive function"; (2) constituted an impermissible attempt to authorize a group of legislators less than the whole to make laws; and (3) fatally provided no standard whatsoever by which the Delegation was to exercise its authority. Laws of Maryland (1965), pp. 1690-1692.

Nevertheless, these objections remain questions of first impression in the courts of Maryland, and the few courts which have even remotely addressed the issues in other jurisdictions are not in accord.^{15/} Moreover, the most recent case on the subject persuasively upheld a significant federal statute which presented substantially the same issues as those posed by House Bill 619,^{16/} and some such mechanisms already are law in Maryland.^{17/} Furthermore, although "[t]he Supreme Court deliberately avoided the issue in Buckley v. Valeo, [424 U.S. 1, 692 n. 176 (1976)], aff'g in part and rev'g in part 519 F.2d 821 (D.C. Cir. 1976)] Mr. Justice White, writing separately, expressed a belief that the legislative veto [provision presented therein] was constitutional." Stewart, Constitutionality of the Legislative Veto, supra, at 595.

Consequently, "the question of legislative review of Executive and Administrative agency actions is a sweeping [and constitutionally significant] subject to be treated in a gingerly fashion...." Clark v. Valeo, 559 F.2d 642, 650 n. 10 (D.C. Cir. 1977) aff'd 97 S.Ct. 2667.

Honorable Blair Lee, III
Page Four

I.

THE STANDARD OF REVIEW

"The Legislative, Executive, and Judiciary are all creatures of the Constitution, each confined in its action to the circumscribed sphere assigned it, and cannot rightfully exercise any power which is repugnant to that instrument, or not within their respective sphere of action." Regents v. Williams, 9 G. & J. 365, 410 (1838). However, since the powers of the General Assembly are not derived from specific or enumerated constitutional restraints, "plenary power in the Legislature for all purposes of civil government is the rule, [and] a prohibition to exercise a particular power is an exception, ... [which] can be founded only on some constitutional clause plainly giving rise to it," Leonard v. Earle, 155 Md. 252, 260 (1928), aff'd 279 U.S. 392. Thus, it is now well settled that, unlike its federal counterpart (which has only such authority as the federal constitution expressly or by necessary implication confers upon it, Afroyim v. Rusk, 387 U.S. 253, 257 (1967)), the General Assembly of Maryland, like the legislatures of virtually all of its sister states, inherently "possesses all legislative power and authority except in such instance, and to such extent as the constitutions of the State and the United States have imposed limitations and restrictions thereon," Kenneweg v. Allegany Co. Commissioners, 102 Md. 119, 123 (1905). Accordingly, an Act of the General Assembly, however unwise it arguably may be, is presumptively constitutional; Miedzinski v. Landman, 218 Md. 3 (1958), app. dism'd. 358 U.S. 644; Salisbury Beauty School v. State Board of Cosmetology, 268 Md. 32, 48 (1972); Aeromotors v. Administrator, Motor Vehicles Administration, 274 Md. 567 (1975); and is not to be declared constitutionally impermissible "unless it plainly contravenes some provisions of the Constitution; a reasonable doubt as to its constitutionality ... [being] sufficient to sustain it,," Hennegan v. Geartner, 186 Md. 551, 555 (1945). Consequently, our analysis must focus upon whether the bill under review would, if approved, be clearly unconstitutional. Lane Const. Corp. v. Comptroller of the Treasury, 228 Md. 90 (1962); Fell v. State, 42 Md. 71 (1875). We conclude that it would not.

II.

THE STATUTORY SCHEME

Under present Code, Article 40, §40A(f), each of the several departments, boards, commissions, or other agencies of the Executive Branch, 18/ must submit to the A.E.L.R. Committee every proposed rule, regulation or standard, including the amendment or repeal thereof; however, Committee approval of the proposal is not required, except

Honorable Blair Lee, III
Page Five

to the extent that the agency desires that a rule be adopted on an emergency basis.19/ House Bill 619 would amend Sec. 40A for the purpose of vesting in the A.E.L.R. Committee, subject to ultimate review by the General Assembly at its next Session, the duty to approve or disapprove all such rules, regulations and standards proposed after July 1, 1978. Specifically, the bill would amend Code, Art. 40, §40A to provide:

" (H) (1) DURING THE 45-DAY PERIOD PROVIDED FOR IN SUBSECTION (F) THE COMMITTEE SHALL APPROVE OR DISAPPROVE ALL RULES, REGULATIONS, AND STANDARDS SUBMITTED AFTER JULY 1, 1978, BY A DEPARTMENT, BOARD, COMMISSION, OR OTHER AGENCY OF THE EXECUTIVE BRANCH. THIS APPROVAL OR DISAPPROVAL BY THE COMMITTEE MAY BE OF THE WHOLE OR A PART OF ANY RULE, REGULATION, OR STANDARD.

(2) PURSUANT TO THIS SUBSECTION THE COMMITTEE SHALL PROVIDE THE DEPARTMENT, BOARD, COMMISSION, OR OTHER AGENCY OF THE EXECUTIVE BRANCH AND THE DIVISION OF STATE DOCUMENTS WITH WRITTEN NOTICE OF ITS APPROVAL OR DISAPPROVAL. IN THE EVENT OF DISAPPROVAL THE NOTICE SHALL CONTAIN THE GROUNDS THEREFORE AND A BRIEF EXPLANATION OF THE COMMITTEE'S ACTION.

(3) IN THE EVENT OF THE FAILURE OF THE COMMITTEE TO PROVIDE WRITTEN NOTICE TO THE DEPARTMENT, BOARD, COMMISSION, OR OTHER AGENCY OF THE EXECUTIVE BRANCH OF ITS APPROVAL OR DISAPPROVAL THE RULE, REGULATION, OR STANDARD IS DEEMED TO HAVE BEEN APPROVED.

(4) UPON THE RECEIPT OF WRITTEN NOTICE OF DISAPPROVAL, THE DEPARTMENT, BOARD, COMMISSION, OR OTHER AGENCY OF THE EXECUTIVE BRANCH PROPOSING THE REGULATION SHALL DETERMINE WHETHER TO WITHDRAW OR TEMPORARILY ADOPT THE DISAPPROVED RULE, REGULATION, OR STANDARD OR PORTION THEREOF AND SHALL ADVISE THE COMMITTEE OF ITS DECISION IN WRITING.

(5) DISAPPROVAL BY THE COMMITTEE HAS THE EFFECT OF PROHIBITING FINAL ADOPTION OF THE DISAPPROVED RULE, REGULATION, STANDARD, OR PORTION THEREOF, EXCEPT AS PROVIDED IN SUBSECTION (J).

(6) TEMPORARY ADOPTION HAS THE EFFECT OF ALLOWING IMPLEMENTATION OF A DISAPPROVED RULE, REGULATION, STANDARD, OR PORTION THEREOF, IF PERMITTED BY THE COMMITTEE, UNTIL THE ADJOURNMENT OF THE GENERAL ASSEMBLY SESSION IN WHICH THE RESOLUTION PROVIDED FOR IN SUBSECTION (J)

Honorable Blair Lee, III
Page Six

IS INTRODUCED AND ALSO COMPELS PREPARATION AND SUBMISSION OF THE RESOLUTION PROVIDED FOR IN SUBSECTION (J).

"(I) (1) DISAPPROVAL OF ANY RULE, REGULATION, OR STANDARD OR PORTION THEREOF BY THE COMMITTEE PURSUANT TO SUBSECTION (H) SHALL BE BASED SOLELY ON THE FOLLOWING GROUNDS:

(I) THE RULE, REGULATION, OR STANDARD OR PORTION THEREOF FAILS TO COMPLY WITH THE LEGISLATIVE INTENT OF THE LAW AUTHORIZING PROMULGATION; OR

(II) THE DEPARTMENT, BOARD, COMMISSION, OR OTHER AGENCY OF THE EXECUTIVE BRANCH HAS EXCEEDED THE AUTHORITY DELEGATED TO IT BY THE GENERAL ASSEMBLY.

(2) ANY RULE, REGULATION, OR STANDARD OR PORTION THEREOF WHICH IS DISAPPROVED BY THE COMMITTEE MAY NOT BE RESUBMITTED IN SUBSTANTIALLY THE SAME FORM PENDING REVIEW AS PROVIDED IN SUBSECTION (J) OR WITHDRAWAL AS PROVIDED IN SUBSECTION (H).

(3) THE COMMITTEE MAY EITHER SUSPEND OR ALLOW THE TEMPORARY IMPLEMENTATION OF ANY RULE, REGULATION, OR STANDARD OR PORTION THEREOF PENDING THE REVIEW BY THE GENERAL ASSEMBLY AS PROVIDED IN SUBSECTION (J). THE TEMPORARY IMPLEMENTATION OF ANY RULE, REGULATION, OR STANDARD MAY ONLY BE ALLOWED BY THE COMMITTEE IN ORDER TO AVOID LOSS OF FEDERAL MONEYS OR TO AVOID CONFLICT WITH FEDERAL LAW.

-(J) IN THE EVENT OF DISAPPROVAL BY THE COMMITTEE OF ANY RULE, REGULATION, OR STANDARD OR PORTION THERETO:

(1) THE RULE, REGULATION, OR STANDARD OR PORTION THEREOF DISAPPROVED SHALL HAVE NO FURTHER EFFECT UNLESS THE GENERAL ASSEMBLY, WITHIN ONE YEAR OF THE COMMITTEE'S DISAPPROVAL, ADOPTS A JOINT RESOLUTION APPROVING THE PROPOSED RULE, REGULATION, OR STANDARD, AND STATING THE DATE UPON WHICH IT SHALL BECOME EFFECTIVE.

Honorable Blair Lee, III
Page Seven

(2) IF THE DEPARTMENT, BOARD, COMMISSION, OR OTHER AGENCY OF THE EXECUTIVE BRANCH INVOLVED SO REQUESTS IN WRITING, THE COMMITTEE SHALL CAUSE SUCH A JOINT RESOLUTION TO BE PREPARED AND SUBMITTED (BY REQUEST) INTO EACH HOUSE OF THE GENERAL ASSEMBLY. THE JOINT RESOLUTION SHALL CONTAIN A COPY OF THE RULE, REGULATION, OR STANDARD OR PORTION THEREOF AND THE SUBSTANTIVE TEXT OF THE NOTICE PROVIDED PURSUANT TO SUBSECTION (H)."20/

III.

CONSTITUTIONAL ISSUES

House Bill 619 presents several significant questions of State constitutional law, viz., does the legislative veto mechanism which it creates:

(1) Contravene the bicameralism mandated by Article III, Sec. 1, of the Constitution by delegating the authority to legislate to a committee?

(2) Violate the separation of powers mandated by Article 8 of the Declaration of Rights by:

(a) authorizing a legislative committee to exercise or fatally encroach upon an executive function?

(b) authorizing a legislative committee to exercise or fatally encroach upon a judicial function?

(3) Violate the presentments clauses of Article II, Sec. 17 Article III, Sec. 30, by authorizing lawmaking in a fashion which is not subject to the gubernatorial veto power?

In addressing these questions in the context of a statute which permitted a one-house veto of a presidentially proposed, judicial salary increase, a majority of the Court of Claims initially considered four factors, all of which are directly applicable here.

"First of all, the pay of ... judges and justices ... is, historically and intrinsically, at the heart of Congress's own competence and concern. * * * Secondly, ... the fixing of pay scales ... may properly be delegated to the President.

Honorable Blair Lee, III
Page Eight

Third, in making such a delegation in the Act, Congress was much concerned with its own pay and with the relationship of its own pay to that of the judges and other officials. * * * The fourth factor flows naturally from the above: although it wished to delegate, Congress was intent on retaining a large measure of control over the pay levels set by the Commission and the President."

Atkins v. United States, supra, 556 F.2d at 1059.

In our view, these factors are equally present in the measure we have under consideration. First, like the fixing of judicial salaries, there can be no dispute that the oversight of administrative agencies is peculiarly a matter of legislative concern, especially with respect to their rule-making authority.

"The primary function of administrative agencies is to advance the will and weal of the people as ordained by their representatives - the Legislature. These agencies are created in order to perform activities which the Legislature deems desirable and to forward the health, safety, welfare and morals of the citizens of this State."

Department of Natural Resources v. Linchester Sand & Gravel Corp., 274 Md. 211, 222 (1975). "Indeed, administrative boards and officials are arms and instrumentalities of the Legislature..., they belong to and derive all their authority from the legislative branch under our form of government." Dal Maso v. County Commissioners of Prince George's County, 182 Md. 201, 205 (1943). Moreover, it is axiomatic that the rule-making authority which the Legislature has vested in such statutory creatures is itself a legislative power. Department of Natural Resources v. Linchester, supra at 222; Stewart, supra, at 605-607.

Secondly, although there may have been some doubt in the past, it is now settled beyond cavil that "this particular power, though legislative in character, can be delegated under proper standards, at least so long as ... [the Legislature] retains the ultimate authority." Atkins v. United States, supra, 556 F.2d at 1060. See also, Pressman v. Barnes, 209 Md. 544 (1956), Comptroller of the Treasury v. M. E. Dockhill, Inc., 205 Md. 226 (1954); Mahoney v. Byers, 187 Md. 81 (1946); Algren v. Cromwell, 179 Md. 243 (1941); Goldman v. Crowther, 147 Md. 282, 320-22 (1925) (Bond, C. J., dissenting), quoted with approval in Department of Natural Resources v. Linchester, supra, at 219-220. Indeed, the rule-making authority is delegable in the first instance precisely because of the General

Honorable Blair Lee, III
Page Nine

Assembly's functional inability to deal directly with the multitude of details inherent in the complex conditions on which it legislates. 1 M.L.E., Administrative Law and Procedure, §24; Davis, Administrative Law Treatise, §2.07. Thus, "[a] legislative veto power limited to agency rule-making would supervise an area of ... action [by a creature of the legislature] that involves the exercise of legislative powers," Stewart, supra, at 607.

Thirdly, in making such a delegation the General Assembly is properly concerned with the relationship between its acts and the delegated quasi-legislative acts of its creatures. Thus, here also the fourth factor flows naturally from the above, viz., the General Assembly's intent to retain a large measure of control over the exercise of that rule-making power which it has delegated to its administrative offspring.

In the words of the Atkins court, the problem, then, becomes one of the propriety of the manner in which the Legislature has chosen to exercise its authority under the Act. What is the constitutional underpinning of the device used here? To paraphrase the Court, it is a combination of Article III, which assigns the legislative power exclusively to the General Assembly, Pressman v. Barnes, 209 Md. 544, 552 (1956), and Article III, Sec. 56, the so-called "necessary and proper" clause, which literally vests in the Legislature the power:

"... to pass all ... Laws necessary and proper for carrying into execution the powers vested, by this Constitution, in any Department, or office of the Government, and the duties imposed upon them thereby."

See, Atkins v. United States, supra, 556 F.2d at 1061. Specifically:

"[Article III of the Maryland Constitution, like] Article I, Section 1 [of the U.S. Constitution] ... endows ... [the legislative branch] with the broadest reach of power in this instance, so long as executive functions are not infringed and ... [gubernatorial] veto rights not compromised, because the subject of [this legislative veto, administrative agency rules and regulations, like] the salaries of judges ... [et al.,] is at the center of the ... [legislative] sphere. On this foundation, the necessary and proper clause authorizes [the General Assembly, like] Congress to choose, first, to delegate the initial power to make ... [rules] to the ... [agencies,] and, then, to select for itself the appropriate method for checking and monitoring the ... [agency's] action."

Honorable Blair Lee, III
Page Ten

Against this background, we turn to an examination of the specific constitutional objections which were put to rest in Atkins.

A. The Bicameral Legislative Power. In rejecting the contention that the legislative veto mechanism before it contravened the bicameralism mandated by the U.S. Constitution,^{21/} the Court noted that the Constitution itself makes specific grants of authority to a single House of Congress acting alone, e.g., impeachment, judging the election and qualifications of its members, determining its own rules, and punishing its members for unacceptable behavior; and, further, that each House of Congress has long engaged in other practices which are not specifically granted in the Constitution, viz., expressing its opinion through simple resolutions, carrying on investigations, and acting through committees with respect to many matters, including which bills to take up and consider, whether and when to report matters to the floor, or how far to carry an investigation.^{22/} Thus, the Court concluded that the bicameralism mandated by the U.S. Constitution:

"... does not automatically call for affirmative bicameral action every time a legislative power or function is being exercised or authorized. The purpose of the clause is to locate the central source of legislative authority in Congress, rather than the Executive or the judiciary. But the clause does not itself, as a textual matter, mechanically direct the manner in which Congress must exercise the legislative power. On that problem, the core purpose of the clause must, of course, be taken into account (as it is in appraising the extent of appropriate delegation), but there are also other pertinent considerations, including the reach of the separation-of-powers doctrine and of the necessary and proper clause, as well as the constitutional sphere of the Executive. There is no textual or linguistic solution, which declares, in self-operating fashion, that everything Congress can do or authorize under article I, section 1, must necessarily be done by itself through a statute passed by both Houses, or through other bicameral action. Article I, section 1, does indeed call upon Congress to confine itself to legislative matters, but the clause allows some measure of leeway for the manner in which Congress fulfills the legislative function.

Honorable Blair Lee, III
Page Eleven

Just as we conclude that Congress may perform in a manner that does not require affirmative bicameral action, we likewise decide that the one-House veto here in controversy--being confined to the matter of salaries traditionally within the peculiar province of the legislative branch, not impinging upon presidential functions or veto rights, and having no effect upon persons other than those whose salaries are at issue--does not fall within the class of acts that Congress must perform through the affirmative concurrence of both Houses, but rather is properly exercisable by a single House. We reach this decision by virtue of the simple fact that the single House, in voting by a majority to block the otherwise automatic effectiveness of the President's recommendations, is not doing anything for which the Constitution requires the concurrence of both Houses. The single House is certainly not making new law. Plaintiffs seem to think that the House, when it casts its 'veto,' is attempting to make law, which act they define as one that 'repeals, modifies, or amends the law.' However, even accepting that definition for the sake of argument, plaintiffs' view is erroneous, for the one-House veto does not alter the existing law in any fashion, but only preserves the legal status quo. Plaintiff's error is traceable back to the faulty assumption that the President's recommendations themselves are automatically the law, which the single House's action of veto then changes. But, at the most, the Act accords the President's recommendations only the potentiality of becoming law--if neither House objects within 30 days of their announcement--and does not give them the force and effect of law ab initio.

It is important to note that the one-House veto is not, in the context of the present case, a device employed or available for the circumvention of the Constitution's scheme for the enactment of statutes. Further, it neither expands nor contracts the powers of either House of Congress severally. When a single House negatives the President's recommendations, as the Senate did by S.Res. 293, precisely the same result is reached as if one House voted down a proposal for new legislation: there is no change in the law."

Honorable Blair Lee, III
Page Twelve

Atkins, supra, 556 F.2d at 1062 and 1063 (emphasis supplied). See also, Cooper & Cooper, The Legislative Veto and the Constitution, 30 Geo. Wash. L. Rev. 417, 477 (1962).23/ Contra, Watson, Congress Steps Out: A Look At Congressional Control of the Executive, 63 Calif. L. Rev. 983 (1975).

The bicameralism mandated by Article I, Section 1 of the U.S. Constitution literally has its origin in Article III, Section 1 of the Maryland Constitution, and their common purpose is that each House be a check upon the other, and prevent the passage of hasty and ill-conceived legislation. Maryland Committee For Fair Representation v. Tawes, 229 Md. 406, 410-414 (1962). Thus, observing that the respective houses of the Maryland General Assembly enjoy functions which, in pertinent part, are wholly analogous to those Congressional functions of which the Atkins Court took note, we find the Court's reasoning on this question to be wholly applicable to the Maryland environment. Indeed, while the Court observed that it was not going beyond a delegation of authority to a single House and examining the propriety of a delegation to a committee, Atkins v. United States, supra, 556 F.2d at 1064, its logic compels us to reach the same conclusion at the committee level. Simply put, the rejection of a proposed administrative rule, regulation or standard is not the passage of new law, is wholly analogous to the role which committees perform with respect to proposed legislation, and consequently does not offend Article III, Sec. 1. Thus, in our opinion, House Bill 619 does not, at the very least, clearly offend Article III, Sec. 1 of the Constitution of Maryland any more than does a committee's rejection of proposed legislation.

B. The Presentment Clauses and the Gubernatorial Veto. In pertinent part, Article III, Sec. 30, of the Maryland Constitution establishes the duty and authority of the General Assembly to present enacted bills to the Governor, viz.,"

"Every bill, when passed by the General Assembly, and sealed with the Great Seal, shall be presented by the presiding officer of the house in which it originated to the Governor for his approval. All bills passed during a regular or special session shall be presented to the Governor for his approval no later than 20 days after adjournment. Within 30 days after presentment, if the Governor approves the bill, he shall sign the same in the presence of the presiding officers and Chief Clerks of the Senate and House of Delegates."

Honorable Blair Lee, III
Page Thirteen

This provision is complimented by Article II, Sec. 17, which sets the duty and authority of the Governor to act with respect to a presented bill. Hamilton v. State, ex. rel. Wells, 61 Md. 14, 28-29 (1883). In pertinent part, Section 17 provides:

"To guard against hasty or partial legislation and encroachment of the Legislative Department upon the co-ordinate Executive and Judicial Departments, every Bill which shall have passed the House of Delegates and the Senate shall, before it becomes a law, be presented to the Governor of the State; if he approves he shall sign it, but if not he shall return it with his objections to the House in which it originated, If any Bill presented to the Governor while the General Assembly is in session shall not be returned by him with his objections within six days (Sundays excepted), the same shall be a law in like manner as if he signed it, unless the General Assembly shall, by adjournment, prevent its return, in which case it shall not be a law.

"Any Bill presented to the Governor within six days (Sundays excepted), prior to adjournment of any session of the General Assembly, or after such adjournment, shall become law without the Governor's signature unless it shall be vetoed by the Governor within 30 days after its presentment."

In testing the legislative veto provision before it under a presentment clauses' challenge, the Atkins Court observed that the language of Article I. Sec. 7, Clause 3 of the U.S. Constitution literally applies only to actions "to which the Concurrence of the Senate and House of Representatives may be necessary." Since the majority had previously concluded that the exercise of the legislative "veto" before it was not an act requiring such an occurrence, it had no difficulty in concluding that the form of the mechanism did not contravene the presentment clause of the U.S. Constitution. 556 F.2d at 1065. Because of the relatively narrow reach of Maryland's presentment clauses, we believe that that analysis applies with even more vigor to the provisions here under review.

In Warfield v. Vandiver, 101 Md. 78 (1925), the Court of Appeals was presented with the issue of whether a proposed constitutional amendment, adopted by the General Assembly, required Executive approval (or passage over Executive disapproval) before being submitted to the Electorate. The question was resolved in the negative, the Court (per Chief Judge McSherry) holding:

Honorable Blair Lee, III
Page Fourteen

"The right which the Governor has to sign or veto is strictly confined to bills which when signed, or if vetoed, when passed by the requisite vote over the veto, become laws."
(Emphasis in original). 24/

Since Article II, Sec. 17 is consistent with Article III, Sec. 30,25/ it necessarily follows that, under the Constitution of Maryland, only a bill embodying distinct legislation must be presented to the Governor and only such a bill is subject to gubernatorial veto. Thus, the question presented once again is whether the power of the Committee to disapprove a rule temporarily, or that of the Houses to do so permanently by joint resolution, is the equivalent of enacting law.

The case for a contravention of the presentment clauses has been forcefully put by R.W. Ginnane in his article entitled The Control of Federal Administration by Congressional Resolutions and Committees, 66 Harv. L. Rev., 569 (1953). Ginnane's view is that a disapproval is the equivalent of a policy decision, and therefore constitutes legislation. He reaches this conclusion by means of the following deduction:

"Since the Constitution plainly requires presidential participation in the exercise of legislative power, a power must be classified as non-legislative to justify its exercise by Congress or one of its branches in a way other than that prescribed." Ginnane, supra, at 593.

The contrary view is stated by Geoffrey S. Stewart, supra. His analysis is essentially three-fold:

- (1) The veto power is supposed to protect the executive from legislative encroachment, rather than make the executive an arbiter of the legislature's wisdom.
- (2) A disapproval does not permit the Legislature to set standards; neither does it require affirmative action by either the Executive or the Judiciary in their respective functions of executing and interpreting the law; hence it is not law making.
- (3) The Executive initially had the opportunity to veto the legislation which established the legislative veto mechanism.

Stewart, supra. A similar analysis is developed in Cooper & Cooper, supra, who view the legislative intent, as expressed in a committee disapproval, as a condition upon which the delegation of power to the agency depends in the first instance, i.e., the disapproval is not new legislation, but a guarantee that the original policy is fulfilled. This same view is adopted in Schwartz, Legislative

Honorable Blair Lee, III
Page Fifteen

Control of Administrative Rules and Regulations, 30 N.Y.U. L. Rev.
1031 (1955).

On balance, we find the latter view to be more persuasive. The very language of Article II, Sec. 17, confirms that its role is to protect the Executive, but not to grant it an enlarged role in the system of governance. Secondly, the disapproval vehicle is conditioned on meeting existing policy as delegated, rather than on changing that policy.^{26/} Therefore, what is at issue is not a "Bill" to become "law," but the administrative fleshing out of an existing "law," which itself was subject to the Executive veto. Consequently, the approval or disapproval of the regulation is no more distinct legislation, requiring a new submission to the Governor, than is the promulgation of an administrative regulation under present law, especially the promulgation of an emergency rule, regulation or standard which currently must be approved by the AELR Committee. See, Code, Art. 40, §40A. Thirdly, even if the rejection of a proposed administrative rule somehow constitutes lawmaking, it certainly cannot be any more subject to the presentments clause or the veto power than the rejection of a proposed bill -- and it is well settled that presentment clauses do not operate with respect to proposed legislation which has been rejected by a committee of either House, or by a single House.

Thus, in our view, the rejection of a proposed administrative rule presents neither of the mischiefs which the presentment clauses were designed to obviate, viz., neither the opportunity for encroachment nor for hasty or partial legislation. Accordingly, House Bill 619 does not, at the very least, clearly contravene either Article II, Sec. 17 or Article III, Sec. 30.

C. Separation of Powers: Executive and Legislative. Article 8 of the Maryland Declaration of Rights commands:

"That the Legislative, Executive and Judicial powers of Government ought to be forever separate and distinct from each other; and no person exercising the functions of one of said Departments shall assume or discharge the duties of any other."

Although "the legislative department is nearest to the source of power, and is manifestly the predominant branch of the government," *Crane v. Maginnis*, 1 G. & J. 463, 472 (1829), it is now well settled that each branch is supreme in its own realm, and that the purpose of this article is to parcel out and separate the powers of government, and to confine particular classes of them to particular branches of the Supreme Authority, *Wright v. Wright*, 2 Md. 429, 452 (1852). It is also clear that Article 8 presents

Honorable Blair Lee, III
Page Sixteen

"a more concrete barrier than any which the Supreme Court has had to hurdle under the Federal Constitution." Oppenheimer, Administrative Law in Maryland, II Md. L. Rev. 185, 188 (1938), cited with approval in Dept. of Natural Resources v. Linchester, supra, at 218. Nevertheless, Article 8 does not enjoin a complete separation of powers between the several departments, McCrea v. Roberts, 89 Md. 238, 251 (1899); Baltimore v. State, 15 Md. 376, 457 (1860). Thus, it is generally recognized that there are no bright dividing lines among the duties assigned each department; that to attach labels to the various governmental functions is but conclusory, Cooper & Cooper, supra, at 482; that the nature of the act performed and not the title of the performer determines whether an act is legislative or executive, Opinion of the Justices, 266 A.2d 823, 827 (N.J. 1970); that any attempt to allocate governmental authority on a purely "functional" model, (*viz.*, the Legislature "makes law" while the executive "carries it out") is of little further assistance in determining whether an encroachment has occurred, Cooper & Cooper, supra, at 483-487; and that the several branches are not wholly separated, Buckley v. Valeo, 426 U.S. 1, 120-23 (1976) (per curiam opinion). "Indeed, there are governmental powers of doubtful classification which may be held properly to belong to either of more than one department of government." II Pound, Jurisprudence, 330-331. See also, Opinion of the Attorney General (Tenn. 12/22/75).27/

As Mr. Justice Holmes "... in a classic formulation of the principles of the separation of powers, observed...":

"The great ordinances of the Constitution do not establish and divide fields of black and white. Even the more specific of them are found to terminate in a penumbra shading gradually from one extreme to the other.... It does not seem to need argument to show that however we may disguise it by veiling words we do not and cannot carry out the distinction between legislative and executive action with mathematical precision.... When we come to the fundamental distinctions it is still more obvious that they must be received with a certain latitude or our government could not go on.

"The fact that the boundaries between the powers of the different branches are vague and uncertain implies that the authority of each branch should be absolute only within the core of the powers the Constitution assigns it. Beyond the core of its powers, a branch certainly may act, but its activities begin to operate in an area where authority is shared with other branches. '[T]here is a

Honorable Blair Lee, III
Page Seventeen

twilight in which [the President] and Congress may have concurrent authority, or in which its distribution is uncertain.' Within this 'gray area' Congress may act to the extent that it has legislative authority and does not encounter an express constitutional limitation or intrude upon the core of powers held by another branch."

Stewart, *supra*, at 602-603. See also, 16 C.J.S. Constitutional Law §130.28/ Thus, the question for analysis here is whether the proposed legislation would inject the General Assembly into the realm which the Constitution has reserved to the Executive Branch alone.

In addressing this aspect of the separation of powers question, the Court of Claims summarized the attack as follows:

"The principal objections on this score are rooted in plaintiffs' analysis that: (a) legislative power 'to adjust salaries' once delegated by Congress becomes an executive power, and Congress can then no longer meddle in the execution of that power; if Congress is displeased with the results of the administration of the power, it must act through a new statute; (b) legislative veto in the Act abrogates the President's constitutional duty to faithfully execute the laws; (c) Congress can delegate power, and can even delegate power with conditions, but it cannot affix an unconstitutional condition upon the delegation, i.e., review or veto by one House; and (d) the legislative veto involves Congress in day-to-day administration and hence expands the role of legislators into administrators in violation of article I, section 6, clause 2.

Atkins v. United States *supra*, 556 F.2d at 1066. See also, Ginnane, *supra*; Watson, *supra*. Thereupon, observing that the three branches of government necessarily share constitutional powers because such powers cannot be neatly ascribed for all time to one or another, the majority held:

"The nub of [plaintiff's] ... argument stems from a rigid segregation of powers into executive and legislative, a categorization we deem unilluminating in determining whether the exercise of a power by a given branch is constitutional or not. If plaintiffs' contention is that the only role of Congress is to legislate and set policy, and having done

Honorable Blair Lee, III
Page Eighteen

so, necessarily cedes all further review of the execution of that policy, the position is untenable. We assume that plaintiffs do not question the long-established principle that Congress may seek assistance from another branch of the Government by delegating authority to the executive branch or to administrative agencies under proper standards, and thereby to direct the details of the execution of the authority granted. Hampton & Co. v. United States, 276 U.S. 394, 406, 48 S.Ct. 348, 72 L.Ed. 624 (1928). Unless Congress invades a power specifically granted to the President in the Constitution, such as the power of appointment, or fails to provide guidelines, no separation-of-powers problem arises from such a delegation. Moreover, when Congress delegates authority of the kind we have here to a member of the executive branch, the delegation does not convert the authority granted into an irrevocable executive power, because in exercising the delegated functions, the executive officer merely acts as an agent of the legislative branch of the Government. This is particularly true when, as here Congress utilizes an executive officer or administrative agency to make investigations and reports for the ultimate information of Congress. Sunshine Coal Co. v. Adkins, 310 U.S. 381, 398, 60 S.Ct. 907, 84 L.Ed. 1263 (1940); Humphrey's Executor v. United States, 295 U.S. 602, 628, 55 S.Ct. 869, 79 L.Ed. 1611 (1935). To plaintiffs' argument that Congress cannot meddle once it has delegated power, it may be observed that legislation is itself a form of supervision. Congress has two roles: initial formulation of policy and supervision. The only pertinent question is in what manner Congress can oversee. In this case, whether the answer is by full-fledged statute or by one-House veto, there would be neither a violation of the separation-of-powers principle nor an invalid intrusion on executive power since the pay-setting function is basically legislative in character and embodies no substantial element of, or incursion into, the administration, enforcement, or execution of the laws."

Atkins v. United States, supra, 556 F. 2d at 1067-1068 (emphasis supplied).^{29/} We find the Atkins rationale to be both persuasive and fully consistent with the inhibitions of Article 8, as thus far construed by the Court of Appeals of Maryland.

Honorable Blair Lee, III
Page Nineteen

In addition, we note that administrative rulemaking itself was originally attacked as an attempt to vest legislative power in the Executive contrary to Article 8,30/ and that it was upheld, first of all, on the basis that administrative agencies:

"... while operating as independent and important agencies in the carrying out of state policies, do so on a plan which, in theory at least, is subordinate in importance to that occupied by the legislative, judicial and executive branches of government. It is certainly true that their policies and indeed their very existence is dependent upon the will of the Legislature which created them, while the functions and powers of the Governor, the Judges and the Legislature are imbedded in the Constitution. Article 8 of the Declaration of Rights is to be taken, upon this reasoning, as having reference only to those three orthodox parts of the Government and is, therefore, not applicable to other subordinate agencies.[31/] It may be noted in passing, as a commentary upon the vagaries of nomenclature, that this line of thought invokes the so-called strict interpretation of the Constitution to attain a so-called liberal result."

Oppenheimer, supra, at 189. Thus, Mr. Justice White, concurring in part and dissenting in part in Buckley v. Valeo, 424 U.S. 1, 280-281 (1976), observed:

"There is no doubt that the development of the administrative agency in response to modern legislative and administrative need has placed severe strain on the separation-of-powers principle in its pristine formulation. See Kilbourn v. Thompson, 203 U.S. 168, 191, 26 L.Ed. 377 (1881). Any notion that the Constitution bans any admixture of powers that might have been deemed legislative, executive, and judicial has had to give way. The independent agency has survived attack from various directions: that it exercises invalidly delegated legislative power; Sunshine Coal Co. v. Adkins, 310 U.S. 381, 60 S.Ct. 907, 84 L. Ed. 1263 (1940); that it invalidly exercises judicial power, ibid; and that its functions are so executive in nature that its members must be subject to Presidential control, Humphrey's Executor v. United States, 295 U.S. 602, 55 S.Ct. 869, 79 L. Ed. 2d 1611 (1935)."

Honorable Blair Lee, III
Page Twenty

See also, Mr. Justice Jackson in F.T.C. v. Ruberoid Co., 343 U.S. 470, 487-488 (1952),^{32/} Davis, Administrative Law Treatise, §1.09; Niles, Maryland Constitutional Law, 21-22 (1915);^{33/} Cohen, supra.

Thus, the separation of powers mandated by Article 8 should invalidate the legislative veto no more than does the initial delegation of rule-making authority to the administrative agency. Schwartz, supra, at 1043 (1955). If Article 8 is not offended by the delegation of the rule-making authority, surely it is not offended by the qualification of that delegation. Opinion of the Justices, 66 A.2d 823, 826 (N.H. 1970).^{34/} See also, Opinions of the Attorney General (So. Dakota), Official Opinion No. 75-35;^{35/} Opinion of the Attorney General (Tenn.) supra.^{36/} Indeed, essential to the constitutional validity of that delegated rule-making authority is the concurrent obligation that it be employed solely within the boundaries of that statutory policy which the Legislature has endorsed. Comptroller of the Treasury v. Rochill, Inc., supra, 205 Md. at 233. Thus, the legislative veto arguably is merely a device for enabling the Legislature to more directly oversee the execution of its policy, by its offspring exercising its delegated authority.^{37/} In this light, a rather strong case can be made for the proposition that, rather than violating Article 8, the legislative veto

"... device serves that aspect of the separation of powers principle which seeks to prevent the total vesting of the power of one branch in another and that aspect of the principle which enjoins the branches to act as checks and balances which lies at the heart of the separation of powers principle."

Cooper & Cooper, supra at 515'. See also, Stewart, supra, at 619, viz.:

"'New institutions of government have developed as new times produced new problems,' Professor Archibald Cox has written, 'subject only to the fundamental necessity of maintaining the essential balance of the three departments and preventing one from taking over functions falling exclusively in the core of power belonging to another.' The legislative veto power is a mode of congressional action that permits Congress to rectify an imbalance that has arisen between the branches due to Congress' delegation of legislative authority to other government organs. If limited in scope to those activities of executive and administrative agencies that involved legislative interests, the legislative veto does not impinge upon the prerogatives of Congress' co-ordinate branches."

Honorable Blair Lee, III
Page Twenty-one

Indeed, it has been asserted, with merit in our view, that "one of the unique advantages of the veto, when properly used and structured, is that in areas where ... extensive powers must be delegated to the executive on the basis of vague and incomplete standards, it offers a mechanism for combining executive initiation and leadership with ... [legislative] deliberation and control to the mutual advantage of both." Cooper & Cooper, *supra*, at 513.

For these reasons, we are of the opinion that, at the very least, House Bill 619 does not, in contravention of Article 8 of the Declaration of Rights, clearly inject the Legislative Branch into a realm which the Constitution has reserved to the Executive Branch.

D. Separation of Powers: Judicial and Legislative. Although the Court was not presented with this issue in *Atkins*, some have suggested that to disapprove a proposed administrative rule on the grounds that it is contrary to legislative intent or beyond the authority of the promulgating agency is a judicial power, which the Legislature may not exercise. Compare, 63 Opinions of the Attorney General 159, 164 (Wisc. 1974); and Unpublished Opinion of the Attorney General (Mich. 1953), cited at II Opinions of the Attorney General 246, 251 (Mich. 1958), 38/ both of which appear to have concerned the suspension of existing rules.

In our opinion, this assertion fallaciously fails to recognize the fundamental distinction between disapproving a proposed rule and suspending one which has already taken effect. While only that branch which is authorized to exercise the judicial function may effectively suspend the operation of a duly promulgated rule, the expression of an opinion which is a statutorily required condition precedent to the valid promulgation of a rule certainly is not inherently judicial. For example, under the provisions of Code, Article 31, §9, it has long been required that:

"[p]rior to the adoption of any rule or regulation by an officer or department of the executive branch of the State of Maryland, the rule or regulation shall be submitted to the Attorney General of Maryland for approval as to its legality. * * * No rule or regulation hereafter made, promulgated or adopted is effective until after compliance with this section."

Applied in *Md. Tobacco Grower's Association v. Md. Tobacco Authority*, 267 Md. 20 (1972). Furthermore, although perhaps administratively burdensome and of questionable wisdom, the requirement for approval by two different authorities is not of constitutional magnitude. See, 60 Opinions of the Attorney General 771, 773-774 (1975).

Honorable Blair Lee, III
Page Twenty-two

Consequently, we agree with our colleague from Tennessee, who while expressing the opinion that only the Legislature may suspend duly promulgated rules and regulations, nevertheless, also concluded:

"..., the Legislature may delegate to committees or to a single committee the authority to review rules and regulations before those rules and regulations become effective. This power to review, which would carry the power to veto those rules and regulations found lacking, should be clearly circumscribed so that the committees have lucid guidelines within which to act. The power to review and veto could run to rules and regulations which the committees find to be illegal, unreasonable or contrary to legislative intent. There may be other criteria upon which guidelines could be drawn. The ability to act must be clearly defined, however, and probably should include some reasonable time within which the committees must act, if they are going to act at all."

Unpublished Opinion of the Attorney General (Tenn. 1975). See also, Schwartz, supra; Stewart, supra.

IV.

THE NECESSARY AND PROPER CLAUSE

Maryland Constitution, Article III, Section 56, provides:

"The General Assembly shall have power to pass all such Laws as may be necessary and proper for carrying into execution the powers vested, by this Constitution, in any Department, or office of the Government, and the duties imposed upon them thereby."

Relying upon the landmark decision in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), the Atkins majority concluded:

"The necessary and proper clause authorizes Congress 'to exercise its best judgment in the selection of measures, to carry into execution the constitutional powers of government,' 17 U.S. (4 Wheat.) at 20, and 'avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances,' 17 U.S. (4 Wheat.) at 415.

* * *

Honorable Blair Lee, III
Page Twenty-three

"Where there has been no violation of separation-of-powers principles or of any specific provision of the Constitution, the necessary and proper clause can authorize a given method of obtaining a desired result, as well as ground a substantive provision (as in McCulloch)."

Atkins v. United States, supra, 556 F.2d at 1061.

In our view, this rationale provides even greater support for the authority of the General Assembly of Maryland to enact a legislative veto provision such as House Bill 619; for, as we have previously noted, the legislative authority which the sovereign People have delegated to the General Assembly is, significantly unlike that which they have delegated to the Congress, plenary. Thus, although it is amply there, we need not look to the necessary and proper clause or any other provision of the Constitution of Maryland in order to ground a substantive act of the General Assembly; rather, we look for a specific prohibition against such an enactment, and finding none we accord the measure a presumption of constitutionality. Consequently, where, as here, we find persuasive reasons for at least doubting that the measure violates either the separation of powers mandate or any other provision of the Constitution, "the necessary and proper clause can [amply] authorize a given method of obtaining a desired result," and the underlying authority of the General Assembly will be presumed.

CONCLUSION

For the foregoing reasons, we advise that, although House Bill 619 poses several significant and close questions of constitutional law, it is not clearly unconstitutional. On the contrary, we are persuaded that there are substantial arguments in favor of such legislation, however unwise as a matter of policy it arguably might be.

Very truly yours,

Francis Bill Burch
Francis Bill Burch
Attorney General

George A. Nilson
George A. Nilson
Deputy Attorney General

Judson P. Garrett, Jr.
Judson P. Garrett, Jr.
Assistant Attorney General

FBB:GAN:JPG:mar

FOOTNOTES

- 1 This statutory committee exists by virtue of Code, Article 40, §40A. Its present authority and its history are discussed at 62 Op. Atty. Gen. _____ (1977) (Rules Service Edition No. 77-10). See also, Sachs, The Joint Legislative Committee On Administrative, Executive and Legislative Review (AELR): Its Past, Procedures and Proposals for Reform, Legislative Study Group, Inc. (February 7, 1977).
- 2 See, Bosivert, A Legislative Tool For Supervision of Administrative Agencies: The English Laying System, 25 Ford. L. Rev. 638 (1956-57).
- 3 "The actual form of the veto can vary greatly depending on the way in which three sets of variables are combined. First, the wielder of the device can vary. The veto can be-and has been-vested in the whole Congress, in one House of Congress, in the committees, and even in a committee chairman. Second the manner in which the veto is expressed can vary. It can be expressed in a negative, affirmative, or deliberative manner and, in addition, it may be tied on to the appropriations process rather than defined as a condition on which the authorization of a proposal is made contingent." Cooper & Cooper, *infra*, at 468.
- 4 "Legislative control of administrative direction has been attempted through the use of legislative veto clauses which condition executive authority in several areas including contracting, administration of personnel, acquisition of property, and fact finding." Jackson & Howard, Legislative Oversight, Legislative Research Series, The University of Georgia (October 1976) p. 46.
- 5 See, Bruff & Gellhorn, Congressional Control of Administrative Regulation: A Study of Legislative Vetoes, 90 Harv. L. Rev. 1369 (May 1977); Cooper & Cooper, The Legislative Veto and the Constitution, 30 Geo. Wash. L. Rev. 417 (1962); Cotter & Smith, Administrative Accountability to Congress: The Concurrent Resolution, 9 Western Pol. Q. 955 (1956); Gelhorn & Byse, Administrative Law, 122-27, (6th Ed. 1974); Ginnane, The Control of Federal Administration by Congressional Resolutions and Committees, 66 Harv. L. Rev. 569 (1953); Harris, Congressional Control of Administration (1964), pp. 238-244; Helstad, New Law on Administrative Rule Making, Wisc. L. Rev. 407, 428 (1956); Howe, Current Trends in State Legislation 1955-56, Legislative Review of Admin. Rules, U. Mich. (1958) pp. 218-219; Jackson, A Presidential Legal Opinion, 66 Harv. L. Rev. 1353 (1953); Jackson & Howard, *supra*; Jackson, Legislative Review of Administrative Rules & Regulations, U. of Ga. (July 1977); Newton & Keaton, Congress and the Faithful Execution of the Laws-Should Legislators Supervise Administrators? 41 Calif. L. Rev. 565 (1953); Sachs, *supra*; Schaufler, The Legislative Veto Revisited, 8 Pub. Policy 296 (1958); Shubert, Legislative Adjudication of Administrative Legislation, 7 J. of Public Law 134 (1958); Schwartz & Carr, Legislative Control of Administrative Rules & Regulations, 30 N.Y.U. L. Rev. 1031 (1955) (separate articles); Small, The Committee Veto: Its Current Use and Appraisals of Its Validity, Library of Congress Research Service Document JK 1015c (Jan. 16, 1967); Stewart, Constitutionality of

the Legislative Veto, 13 Harv. J. Legis. 593 (April 1976); Stone, The Twentieth Century Administrative Explosion and After, 52 Calif. L. Rev. 513 (1964); Schwartz, Legislative Control of Administrative Rules & Regulations, 30 N.Y. L. Rev. 1031 (1955); Watson, Congress Steps Out: A Look at Congressional Control of the Executive, 63 Calif. L. Rev. 983 (1975); Whelan, Law and Public Administration, 53 Geo. L. J. 953, 991 (1965); Wyatt, "Runaway Bureaucracy: How to Get It Under Control", State Legislatures 8-10 (March/April 1978).

- 6 See also, Remarks of [then Assistant Attorney General] J. William Rehnquist to the Section of Administrative Law of the American Bar Association Meeting in Dallas, Texas (August 12, 1969).
- 7 While the federal experience is wholly analogous, state legislative veto provisions pose no federal constitutional issue; for it cannot be doubted "that the states under our federal scheme have, within broad constitutional limits, the exclusive power to allocate the functions of the executive, judicial, and legislative powers as they wish." *U. S. v. Mandel*, 415 F. Supp. 1025, 1031 (D. Md. 1976).
- 8 "Eleven states [including Maryland], now use this system." *Id.*
- 9 "This action usually is taken on the recommendation of the reviewing committee. Fourteen state legislatures currently have this power; of these, seven states may repeal by joint or concurrent resolution and five by statute. Oklahoma law permits repeal of a regulation by simple resolution of either house. Kansas law requires passage of a statute to repeal an existing regulation, but passage of a concurrent resolution is sufficient to prevent a proposed regulation from taking effect." *Id.*
- 10 "Of the four state legislatures which have this power, only Ohio permits legislative ratification of the suspension by concurrent resolution; Minnesota, South Dakota and Wisconsin require passage of a statute." *Id.*
- 11 "The suspension is considered permanent unless the legislature reverses the committee's action. Connecticut, Michigan, Tennessee and West Virginia are the only legislatures which use this system." *Id.*
- 12 The recommendations are summarized at Appendix One hereof.
- 13 The Attorneys General of Idaho, Minnesota, Montana, Oklahoma, South Dakota, Tennessee, Vermont, Virginia and West Virginia report no opinions of the Attorney General thereon and no litigation thereon; the Attorney General of Alaska has rendered no opinion thereon, but in litigation thereon has taken (unsuccessfully at the trial level) the position that the statute is constitutionally impermissible (see, *Voluntary v. Alaska*, In the Superior Ct., 3d Jud. Dist., C.A. No. 77-1900); the Attorney General of Connecticut has rendered no opinion thereon and has taken no position thereon in litigation which presently is pending at the trial level; the Attorney General

of Michigan has expressed the opinion that the legislature may not, except by the enactment of a law, validly suspend the operation of a rule or regulation; the Attorney General of South Carolina has expressed the opinion that the General Assembly may disapprove rules or regulations only by means of an act or a joint resolution having the effect of law; and the Attorney General of Wisconsin has twice expressed the view that the Legislature lacks the constitutional ability to empower a committee to void an administrative rule.

- 14 On March 4, 1974, a member of this office informally advised the Chairman of the House Constitutional & Administrative Law Committee that then House Bill 517, which would have authorized the AELR Committee to disapprove or amend a proposed rule or regulation, was unconstitutional because it: (1) contravened the separation of powers mandate; (2) attempted to delegate the authority to legislate to a body of legislators which was less than a majority of both houses; and (3) constituted a delegation of authority unsupported by a standard sufficient for its reasonable exercise.
- 15 See, *Atkins v. U.S.*, *supra*; *Clark v. Valeo*, 559 F.2d, (D.C. Cir. 1977) (en banc), *aff'd* mem. sub nom. *Clark v. Kimmitt*, 97 S. Ct. 2667; *Buckley v. Valeo*, *infra*; Opinion of the Justices, 266 A.2d 832 (N.H. 1970); Opinions of the Justices, 83 A.2d 738 (1950); *Watrous v. Golden Chamber of Commerce*, 218 P.2d 498 (Colo. 1950); *People v. Tremaine*, 168 N.E. 817 (N.Y. 1929). See also, *Jay v. Boyd*, 351 U.S. 345, 351 (1956) (in which a "legislative veto" provision of the Immunity and Nationality Act of 1952 is discussed, although not at issue); *Carlson v. Landon*, 342 U.S. 524 (1952) (in which a concurrent form of the veto was referred to, although not at issue); and *Morgan v. Tenn. Valley Authority*, 115 F.2d 990, 993 (6th Cir. 1942), *cert. den.* 312 U.S. 701 (1941) (in which the court suggested doubts about the constitutionality of a legislative veto provision).
- 16 *Atkins v. U.S.*, *supra*, 556 F.2d at 1057-1071 (in which the court sustained the "one-house veto" provision of the Federal Salary Act of 1976).
- 17 See, Code, art. 40, §40A(g) (AELR Committee approval of emergency administrative rules); §107 (Joint Legislative Committee on Metropolitan Mass Transit's review and approval of plans for the future development or extension of the rapid rail system in Baltimore; art. 41, §15B (AELR Committee approval of certain gubernatorial emergency orders, rules and regulations); and Transportation Article, §8-610 (Local Delegation review and approval of 20-year highway needs study).

- 18 This requirement applies to all Executive Branch agencies and not just those which are subject to the Administrative Procedure Act. 62 Op. Atty. Gen., supra.
- 19 "If the adopting agency declares the rule, regulation, or standard necessary as an emergency measure, the rule, regulation, or standard may become effective immediately after submission to the committee if approved...." Sec. 40A(g).
- 20 Significantly, this bill does not authorize the suspension, amendment, annulment, or repeal of existing rules. Thus, we need not address the wholly novel question of whether such a provision would either contravene or be implicitly authorized by Article 9 of the Declaration of Rights, which provides, "...no power of suspending laws or the execution of laws, unless by, or derived from the Legislature, ought to be exercised or allowed. (Emphasis supplied).
- 21 "The alleged contravention....arises from plaintiff's syllogism that: (1) Congress possesses only the powers delegated by the Constitution; (2) the Constitution delegates only legislative power to Congress; (3) all legislative power is delegated to both Houses, acting bicamerally; (4) the one-House veto is either a legislative act, or it is not; (5) if it is not legislative, it is beyond the power of Congress; (6) if it is legislative, Congress must follow the constitutionally prescribed legislative route, which involves action by both Houses." 556 F.2d at 1062.
- 22 "Many policy choices are made within Congress which do not call for bicameral action and are not susceptible to presidential veto. The decision not to introduce a bill, or not to vote on a bill once introduced, is an example. Laws are allowed to lapse and not be reenacted. On the level of other actions taken by less than the full Congress, the House of Representatives can refuse to introduce legislation authorizing the raising of revenue; and the comments of a single Congressman or Senator can often result in changed policies, not only throughout the Federal Government, but in the private sector." 556 F.2d at 1062, n. 24.
- 23 "Does the veto violate the Constitution by delegating the legislative power of the Congress to one of its parts? The conclusion must be no. If the legislative veto can be said to be ancillary to legislation and not legislation per se, and if therefore the veto can be accepted as properly exercisable by the Congress as a whole, then it would seem to be permissible for it to delegate the power to some part of Congress. Indeed, congressional committees can and do exercise power ancillary to legislation within the sphere of activity committed to them by Congress in other areas. In so doing they make decisions independent of congressional action as a whole which have policy significance, as for example in deciding which of the many bills referred to them

to take up and consider, whether and when to report matters to the floor, or how far to carry an investigation. Of course the committees do not have power to enact legislation in the constitutional sense, but then neither does the President nor a group of farmers. The political desirability of giving this power to a committee or its chairman may be doubted but this does not mean it is constitutionally objectionable."

24 See also, 20 Op. Atty. Gen. 357 (1935) and 21 Op. Atty. Gen. 387 (1936), advising that Joint Resolutions do not require the approval of the Governor.

25 Hamilton v. State ex rel. Wells, 61 Md. 14 (1883).

26 This raises a subsidiary question, which we address below, of whether the disapproval of a rule constitutes the exercise of the judicial function.

27 "Administrative agencies are, in a very real sense, a blend of all three branches of government; but their creation and the extent of their powers rest exclusively in the General Assembly. See generally 1 Davis, Administrative Law Treatise §1.09 (1958)."

28 "The Legislative may impose reasonable limitations on the exercise of executive powers conferred by it on the executive and not inherent in the office, and it may limit and define the functions of the agencies created by it."

29 The argument for a violation of the separations principle also has been most forcefully put by R. W. Ginnane.

30 Oppenheimer, *supra*, at 188, Cohen, Some Aspects of Maryland Administrative Law, XXIV Md. L. Rev. 1, 3-8 (1964).

31 "See Crane v. Meginnis, 1 G. & J. 463 (1829) and Wright v. Wright, 2 Md. 429, 452 (1852)."

32 "Administrative agencies have become a veritable fourth branch of the Government, which has deranged our three-branch legal theories much as the concept of a fourth dimension unsettles our three-dimensional thinking. Courts have differed in assigning a place to these seemingly necessary bodies in our constitutional system. Administrative agencies have been called quasi-legislative, quasi-executive or quasi-judicial, as the occasion required, in order to validate their functions within the separation-of-power scheme of the Constitution. The mere retreat to the qualifying 'quasi' is implicit with confession that all recognized classifications have broken down, and 'quasi' is a smooth cover which we draw over our confusion as we might use a counterpane to conceal a disordered bed."

- 33 " In the wake of the decision in Gregg v. Public Service Commission, 121 Md. 1 (1913), it may be... that the difficulty of classifying a governmental agency will lead to difficulties in applying the rule laid down in ... Article 8 of the Declaration of Rights."
- 34 "Since the Legislature may delegate its power to fix salaries and 'to name civil officers' (Pt. II, Art. 5) it may properly impose conditions upon the exercise of such authority. Rosenthal v. McGoldrick, ... [19 N.E. 2d 660 (N.Y. 1939)]."
- 35 "House Bill 556 only allows the suspension of a rule until the next legislative session; it does not give to the interim rules committee any permanent veto power. Although there is no case law presently on point, it is my view that if the legislature can delegate rulemaking authority to administrative agencies, they can also delegate to a legislative committee a limited suspension power over proposed substantive administrative rules that go beyond a specific standard set by the legislature."
- 36 "Any power the Legislature delegates, it may repeal, alter or restrict."
- 37 "If the trend toward bureaucratic predominance is successfully to be resisted, the legislature must not surrender control as it has delegated power." Schwartz, *supra*, at 1034.
- 38 "Under date of December 17, 1953, the Attorney General in response to a request from a state representative held that the provisions of Act 88, as amended, purporting to give a legislative committee power to suspend an administrative rule was unconstitutional." The basis of the opinion was that the legislature itself could not lawfully determine whether an administrative rule was in conformity with the statute under which it was promulgated for the reason that it was obviously necessary for the legislature to construe the statute and the rule in order to make such a determination which the opinion said is a judicial function and therefore exclusively within the judicial branch of state government. Since the Attorney General concluded that the legislature could not perform a judicial function as a body, he held it could not lawfully delegate such review power to one of its committees.

* * * *

"The Attorney General's opinion has been criticized as being based on fallacious reasoning even under the strictest doctrines of separation of powers. It is said the opinion assumes that the legislature would exercise the same mental process under its review power as a court would in the exercise of judicial power. It can as well be said that officers in the executive branch are exercising "judicial" power every time one decides to enforce a law because the reasoning

process is the same i.e., interpretation of a statute and decision of its applicability to the facts of a given case. For further comments see Howe, "Legislative Review of Administrative Rules." *supra*. pp. 220-224."

See also, Schwartz, *supra*, 1042-1043, (who expressly viewed such conclusions as stemming from "a perverted construction of the separation-of-powers doctrine"); Note, Congressional Veto of Administrative Action: The Probable Response to a Constitutional Challenge, 1976 Duke L. J. 285; J. Wm. Rehnquist, *supra*.

Restoring the Balance: Nine Recommendations

In recognition of the need for a process of legislative review of regulations in every state, NCSL's Legislative Improvement and Modernization Committee has offered a set of nine recommendations in its report, "Restoring the Balance: Legislative Review of Administrative Recommendations." Following is the committee's summary of those recommendations.

1. Because of the proliferation of agency regulations and the possibility of promulgation of regulations which violate legislative intent or exceed statutory authority, the committee strongly recommends that legislatures establish priorities for reviewing all agency rules and regulations promulgated with the force of law under authority granted by the legislature, whether or not they are covered by the administrative procedures act. These review procedures should be as strong as the constitution of each state allows. In establishing these procedures, legislatures will be reasserting their legislative prerogatives and regaining the basic lawmaking authority granted to them under state constitutions.

Legislatures should also enact comprehensive administrative procedures acts for their states, or review existing laws, to insure a thorough review of all regulations. These procedures, of which the legislative review process should be a key part, should include: (a) a clear definition of an agency regulation; (b) a requirement that agencies' regulations clearly show additions to and deletions from existing regulations; (c) a requirement that all proposed regulations be published in advance of their effectiveness; and (d) a requirement that all regulations be filed with the legislature as provided by the legislative regulation review procedures. The procedures should also allow maximum opportunity for public comment both in the promulgation and adoption of regulations as well as in the legislative review process.

To assist legislatures in establishing effective procedures for the legislative review of regulations, the committee makes the following additional recommendations:

2. After considering the alternative regulation review structures, the

committee recommends that a single joint committee, empowered to meet year-round, be designated or established to perform the regulation review function. The committee should include members representing both houses. Legislatures may also wish to consider including representation from the major substantive standing committees from the review committee.

3. Recognizing the difference in state constitutions and judicial interpretations, the committee recommends that the strongest possible review structure be created in each state, consistent with the state's constitution.

4. The committee recommends that the committee or committees designated to perform regulation review be adequately staffed by permanent legislative staff, so that review of regulations is effectively accomplished.

5. The committee recommends that the review committee in each state have the authority to review all proposed and pre-existing regulations.

6. The committee recommends that reasonable time constraints be imposed on all levels of the regulation review process to provide for adequate review and for expeditious final disposition of regulations by both the committee and the legislature.

7. The committee recommends that procedures be established for the promulgation of emergency regulations, with reasonable time limitations on committee review and on the effectiveness of those regulations to prevent agency circumvention of the legislative review process.

8. The committee recommends that the review committee meet often enough to provide adequate review of proposed regulations which agencies file.

9. The committee recommends that legislative bill drafting and counseling agencies adopt specific guidelines to assure that all bills granting rulemaking authority to administrative agencies be reviewed before introduction to assure that (1) legislative intent is clearly spelled out in the bill, and (2) adequate standards are included to guide agencies in rule promulgation pursuant to the bill.

OFFICES OF

FRANCIS B. BURCH
ATTORNEY GENERAL
JON F. OSTER
GEORGE A. NILSON
DEPUTY ATTORNEYS GENERAL



JUDSON P. GARHETT, JR.
ASSISTANT ATTORNEY GENERAL
COUNSEL TO THE GENERAL ASSEMBLY

THE ATTORNEY GENERAL

ROOM 104

LEGISLATIVE SERVICES BUILDING

90 STATE CIRCLE

ANNAPOLIS, MARYLAND 21401

301-269-3786

May 25, 1978

Honorable Blair Lee, III
Acting Governor of Maryland
State House
Annapolis, Maryland 21401

Re: Senate Bills 278 and 296

Dear Governor Lee:

Senate Bills 278 and 296 are designed to accomplish the same thing with respect to two different functions of the Board of Public Works. Specifically, Senate Bill 296 would provide:

"that the requirement that contracts for the expenditure of the proceeds of a loan authorized by the General Assembly shall be subject to the approval of the Board of Public Works before they are executed if otherwise provided by law; [and] ... that the Board of Public Works may adopt regulations, subject to approval by ... [the A.E.L.R.] committee, by which State departments, boards, commissions, or other agencies may enter into capital project related contracts and change orders prior to or without Board of Public Works approval under certain conditions specified in the Act; ..."

Senate Bill 278 provides:

"That the requirement that the Secretary ... of General Services shall submit all proposals for leases for office or pending space rental to the Board of Public Works for final approval shall not apply if Board of Public Works regulations provide otherwise; [and] that the

Honorable Blair Lee, III
Page Two

Board ... may adopt regulations, subject to approval by ... [the A.E.L.E.] committee by which State departments, ... [etc.] may enter into ... [such] leases or lease renewals prior to or without Board ... approval under certain conditions ..."

These measures present two constitutional questions, viz, (1) may the General Assembly validly delegate such rule-making authority to the Board of Public Works; and (2) may the General Assembly validly delegate such review authority to the A.E.L.E. Committee?

1. As we have pointed out at length in our letters regarding Houses Bill 70 and 619, it is well settled that, under the separation of powers mandated by Article 8 of the Maryland Declaration of Rights, the lawmaking function is assigned exclusively to the General Assembly, and cannot be delegated to any other authority. See, e.g., Pressman v. Barnes, 209 Md. 544 (1956). Nevertheless, the right of the General Assembly to delegate rule-making powers to administrative agencies, such as the Board of Public Works, has been recognized in Maryland for more than 125 years. Department of Natural Resources v. Linchester Sand and Gravel Corp., 274 Md. 211 (1975). Ordinarily when such authority is delegated to administrative officials, there must be sufficient standards for the guidance thereof; for, Article 8 demands that such rules be in furtherance of a policy of the Legislature, not the agency. However, it also has been recognized that the complexity of modern economic conditions may make it impossible to tailor specific guidelines for every conceivable situation, and that latitude in granting rule-making discretion is necessary. Governor v. Exxon, 279 Md. 410 (1977).

Senate Bill 296 vests rule-making authority in the Board to be exercised under the following conditions:

"(I) That the subject matter of each contract falls within an expenditure classification established for this purpose by the Board of Public Works, (II) that the aggregate annual dollar value of each contract and its attendant change orders is less than a monetary threshold established for the applicable expenditure classification by the Board of Public Works,

Honorable Blair Lee, III
Page Three

(III) that the monetary thresholds be sufficiently high to free the Board from direct review of relatively insignificant items while not impairing the strong public policy in favor of direct Board review of items having a substantial fiscal impact, and (IV) that an accountability or reporting system approved by the Board is established to inform the Board with respect to actions taken by agencies under authorities granted them by the Board."

With the exception of the difference in subject matter, Senate Bill 278 carries exactly the same standard. In our opinion, such standards are more than adequate to support the delegation of such rule-making authority to the Board of Public Works without contravening Article 8 of the Declaration of Rights.

2. In requiring the approval of the A.E.L.R. Committee for regulations promulgated pursuant thereto, these bills also present the "legislative veto" questions which we have considered at length in connection with House Bill 619.

Comparing the "legislative veto" mechanisms fashioned by these measures with that provided for in House Bill 619, we note that the approval authority which these bills would vest in the A.E.L.R. Committee is final, i.e., is not subject to further review by either House. While this distinction might present a more difficult policy question, it does not, in our opinion, render the measure clearly unconstitutional.

We also note that in these instances the Legislature is not reviewing the action of one of its offspring; for, the Board of Public Works is a creature of the Constitution, not a creature of statute. See Maryland Constitution, Article XIII, Secs. 1 & 2. Nevertheless, the Constitution directs the Board to hear and determine such matters as affect the Public Works of the State and as the General Assembly may decide, and to perform such other duties as may hereafter be prescribed by law. Although the Court of Appeals has yet to construe this provision, we have expressed the view that "the authors of the Constitution [did not intend] . . . to vest uncontrolled discretion in the Board with respect to the public

Honorable Blair Lee, III
Page Four

works of the State, but intended that the General Assembly circumscribe the duties of the Board in administering this duty. 62 Opinions of the Attorney General (1977) (Rules Service Company Edition #77-24). Consequently, while this difference too might present a more difficult policy question, it does not, in our opinion, render these measures clearly unconstitutional.

Finally, we note that these bills do not give the A.E.L. R. Committee an express standard to guide them in the exercise of the approval authority. However, for at least two reasons, we view the absence of an express standard as being not constitutionally fatal to the bills. First, in our opinion, if a standard is required, there is a very good possibility that the courts will construe these measures as implicitly requiring the Committee to apply those standards which the Board is expressly required to apply. Secondly, we are of the opinion that the rationale underlying the delegation doctrine's traditional requirement for a standard to guide an administrative agency in the exercise of its delegated legislative authority may well not apply to the exercise of rule review authority by an agency of the legislative branch. In our view, the judicially perceived (albiet weakening¹/) necessity for a standard springs from the finding that the separation of powers mandated by Art. 9 of the Declaration of Rights would be fatally offended by the delegation of a legislative function (i.e., rulemaking) to an executive agency absent the a standard to guide it in implementing the underlying legislative policy. See Pressman v. Barnes, 209 Md. 544 (1956); Comptroller v M.E. Dockhill, Inc., 205 Md. 226 (1954); Mahoney v. Byers, 187 Md. 81 (1946). In short, the cases teach that, with increasing exceptions, rulemaking without the benefit of a standard is lawmaking, and consequently prohibited by Article 9. Clearly, the delegation of any legislative function to a legislative committee could never offend Article 9. Moreover, if, as we have suggested in connection with our review of House Bill 619, the review of proposed administrative rules by a legislative committee is an exercise of the oversight authority of the legislative branch and is not lawmaking, the absence of a standard does not offend any other provision of the Constitution.

¹ See, e.g., Governor v. Exxon Corp., 279 Md. 410 (1977)

Honorable Blair Lee, III
Page Five

In sum, while these measures also present significant constitutional issues of first impression in Maryland, in our considered opinion it is not clearly unconstitutional for the General Assembly to enact legislation delegating such rule-making authority to the Board of Public Works and conditioning the exercise of that delegated quasi-legislative authority upon approval by a statutory committee of the Legislature.

Very truly yours,

Francis B. Burch
Francis B. Burch
Attorney General

FBB:JPG:g

cc: Honorable Fred L. Wineland
Thomas J. Peddicord, Jr., Esquire
Dr. Carl N. Everstine
Honorable Roy N. Staten

EXHIBIT A

**HOUSE CONSTITUTIONAL
AND
ADMINISTRATIVE LAW
COMMITTEE
1977 REPORT
to the
GENERAL ASSEMBLY
of
MARYLAND**



Annapolis, Maryland

CONSTITUTIONAL AND ADMINISTRATIVE LAW COMMITTEE REPORT
THE CONSTITUTIONAL AND ADMINISTRATIVE LAW COMMITTEE

DELEGATES

CHARLES J. KRYSIAK, Chairman
CHARLES J. SULLIVAN, JR., Vice Chairman
WILLIAM H. AMOSS
HAROLD L. BACHMAN
BERT BOOTH
WILLIAM B. BYRNES
THOMAS B. CUMISKEY
GERALD J. CURRAN
EDWARD J. DABROWSKI, JR.
B. W. MIKE DONOVAN
ARTHUR S. DREA, JR.
RICHARD W. EMORY, JR.
LEO E. GREEN
HELEN L. KOSS
LENA K. LEE
THEODORE LEVIN
PAULINE H. MENES
AMERICAN J. MIEDUSIEWSKI
DONALD B. ROBERTSON
DONALD L. ROSENSHINE
JOHN W. SELING, SR.
CHARLES F. WAGAMAN, JR.
KENNETH L. WEBSTER

DON P. EVELETH
Legislative Analyst

October 25, 1977

The Honorable Steny H. Hoyer, Co-Chairman,
The Honorable John H. Briscoe, Co-Chairman,
and the Members of the Legislative Policy Committee

Dear Ladies and Gentlemen:

The Constitutional and Administrative Law Committee herewith submits a report of its activities during the 1977 Interim. This report contains a resume of the studies and proposed legislation made by the four Subcommittees of the Constitutional and Administrative Law Committee: Elections, Administrative, Executive and Legislative Review, Joint Subcommittee on Sunset Legislation, and Administrative Procedure Act. In addition, the report includes the final action taken on the proposed legislation presented by each of the Subcommittees, and a copy of each has been attached.

The Constitutional and Administrative Law Committee appreciates the assistance of the State officials and members of the public who testified at the public hearings, or supplied the Committee with information. I would like to thank the members of the Committee for their time and effort during this Interim.

Respectfully submitted,
Charles J. Krysiak
Chairman

THE CONSTITUTIONAL AND ADMINISTRATIVE
LAW COMMITTEE 1977 INTERIM REPORT

The Constitutional and Administrative Law Committee was assigned several topics for summer study by the Policy Committee, three of which were handled by the Committee as a whole. However, the majority of the workload was carried out by the four subcommittees, which are:

- | | |
|---|--|
| (1) Elections | Chairperson
Delegate Helen L. Koss |
| (2) Administrative, Executive
and Legislative Review | Chairman - Delegate
Charles F. Wagaman, Jr. |
| (3) Joint Subcommittee on
Sunset Legislation | Co-Chairman - Delegate
B. W. Mike Donovan |
| (4) Administrative Procedure
Act | Chairman - Delegate
Arthur S. Drea, Jr. |

I. Budget Briefings

The first assignment was to review the budgets of three State Departments: the State Board of Election Laws, the Military Department, and the Workmen's Compensation Commission. The Committee found these briefings to be enlightening and potentially very useful in the evaluation of legislation submitted during the regular session of the General Assembly. The Committee, therefore, concluded that this budget briefing process should be continued, so that the Committee may effectively consider legislation concerning these State Departments.

* * *

II. Administrative, Executive and Legislative Review Subcommittee

The Administrative, Executive and Legislative Review (AELR) Subcommittee, held numerous meetings during the interim to discuss legislative disapproval of rules, regulations, and standards promulgated by State departments, boards, commissions, or other executive branch agencies. Initially, the Subcommittee considered whether the legislature could constitutionally disapprove, and in effect veto, rules, regulations, or standards proposed by State agencies without a constitutional amendment, or whether a constitutional amendment is needed.

In answering the constitutional questions presented, the Subcommittee sought the advice of the Attorney General's Office. An informal opinion from the Attorney General's Office indicated that there are two possible courses of action; first, the legislature could review rules, regulations, or standards and disapprove them prior to final adoption, without a constitutional amendment, and secondly, the legislature could disapprove a rule, regulation, or standard following adoption by the agency, which would require a constitutional amendment. Based on the informal advice of the Attorney General, the Subcommittee, in a desire to follow the more moderate approach of allowing disapproval prior to final adoption, proceeded to discuss the various options available under this alternative. (Attachment #9) (Presently the Subcommittee is awaiting a formal opinion from the Attorney General's Office, which is expected to conform to the informal advice already received.)

In order further to understand the various options open, the Subcommittee reviewed more than twenty states which presently have procedures for legislative review. The Subcommittee found that enabling statutes vary greatly in thoroughness and authority. The standard procedure used in a vast majority of these states is for all the state governments' rules, regulations, and standards to be submitted to a special bipartisan review committee of both houses of a legislature, as is the case in Maryland. The remaining states reviewed by the Subcommittee, provide that the rule overview be handled either by the standing committees of the legislature or a legislative council.

Review of these other states' procedures for handling rule overview also indicates that staffing procedures vary widely from one or more part time personnel from a central agency to a large full time professional and supportive staff with a large budget. It was also found that, as expected, where large staffing was authorized, the review authority was also larger.

In general, the Subcommittee found that legislative review falls into three categories:

(a) Review committees can make comments or observations, but no authority exists in the committee or legislature to suspend any administrative rule. This is the weakest method of review. Examples: Arkansas, Iowa, Kentucky, Maryland, Oregon.

(b) Review committees can make recommendations to the legislature, which may annul or modify regulations. Examples: Alaska, Montana, Nebraska.

(c) Review committees have the authority to suspend rules temporarily with the suspension to be sustained by the full legislature within a specific period of time during the next legislative session. This is the strongest method of review. Examples: Connecticut, Michigan, Minnesota, South Dakota, Wisconsin.

Not surprisingly, the Subcommittee's proposal of increasing the power of the AELR Committee did not meet with great cries of joy from the State agencies asked to comment on the various options. The overwhelming majority feel that the present system was sufficient and see no need for increasing the AELR Committee's power. This opposition did not come as a vehement negative response, but was tempered by the suggestion that if the authority of the AELR Committee is to be expanded, it not be the final word on the subject of disapproval. The major concern expressed by the agencies is the fear that additional power would further delay the implementation of needed rules, regulations, or standards.

The bill proposed by the Subcommittee addresses the concerns of the State agencies and provides the following: (1) staff assistance, with primary responsibility to the AELR Committee, shall be provided by the Department of Legislative Reference; (2) the AELR Committee must approve or disapprove all rules, regulations, or standards submitted after July 1, 1978. Disapproval may be of the whole or part of any rule, regulation, or standard; (3) written notice of approval or disapproval must be given to the department, board, commission, or other executive agency; (4) following the receipt of notice of disapproval, the agency proposing the rule, regulation, or standard, may withdraw the rule or seek authority temporarily to adopt it; (5) grounds for disapproval by the AELR Committee are limited to (i) failure of the agency to comply with the legislative intent, or (ii) the agency exceeded the authority delegated to it; (6) The AELR Committee may either suspend or allow temporary implementation, following disapproval, pending the review of the General Assembly; (7) a rule, regulation, or standard disapproved cannot have any effect unless the General Assembly, within one year of the disapproval, adopts a joint resolution approving the proposed rule, regulation, or standard; and (8) the method and contents of the joint resolution are also provided. (Attachment #10)

ACTION TAKEN BY THE FULL COMMITTEE

The full Committee approved the AELR Subcommittee's Report and adopted the proposed legislation entitled "Joint Standing Committee on Administrative, Executive, and Legislative Review - Rules, Regulations and Standards" for introduction as a Committee bill during the 1978 Session of the General Assembly.

EXHIBIT B

HOUSE OF DELEGATES

81r0843

No. 619
(PRE-FILED)

By: Chairman, Committee on Constitutional and Administrative Law	27
Requested: September 20, 1977	29
Introduced and read first time: January 11, 1978	30
Assigned to: Constitutional and Administrative Law	31
Committee report: Favorable	32
House action: Adopted	33
Read second time: February 14, 1978	34
	35
	36
CHAPTER _____	39
AN ACT concerning	43
Joint Standing Committee on Administrative, Executive, and Legislative Review - Rules, Regulations and Standards	46
	47
	48
FOR the purpose of providing a procedure whereby the Committee can approve or disapprove rules, regulations, or standards or a portion thereof; providing notice of approval or disapproval to the department, board, commission or other agency of the executive branch and the effect of not providing such notice; providing the grounds for disapproval; providing that disapproval by the Committee will either suspend or allow temporary implementation pending review; providing for the withdrawal of a rule regulation or standard by the department, board, commission or other agency of the executive branch; providing a procedure for the review, by General Assembly, of the Committee's decision to disapprove; and generally relating to the authority of the Committee.	52
	53
	54
	55
	56
	57
	58
	59
	60
	61
BY repealing and reenacting, with amendments,	63
Article 40 - General Assembly	66
Section 40A(d) and (f)	68
Annotated Code of Maryland	70
(1971 Replacement Volume and 1977 Supplement)	71
BY adding to	74
Article 40 - General Assembly	77
Section 40A(h), (i), and (j)	79

EXPLANATION: CAPITALS INDICATE MATTER ADDED TO EXISTING LAW.
 [Brackets] indicate matter deleted from existing law.
 Numerals at right identify computer lines of text.
Underlining indicates amendments to bill.
~~Strike-out~~ indicates matter stricken by amendment.

Annotated Code of Maryland	81
(1971 Replacement Volume and 1977 Supplement)	82

SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND, That section(s) of the Annotated Code of Maryland be repealed, amended, or enacted to read as follows:	86
	87

Article 40 - General Assembly	90
-------------------------------	----

40A.	93
------	----

(d) The committee shall be supplied with staff assistance WITH PRIMARY RESPONSIBILITY TO THE COMMITTEE and procedural aid from the Department of Legislative Reference, and the committee members shall be reimbursed for their expenses incurred on committee business from the General Legislative Expenses Fund as administered by the Legislative Accounting Office; and the committee has also the same powers as are given the Legislative Policy Committee in § 30 of this article.	96
	97
	98
	99
	100
	101
	102

(f) At least 45 days prior to the adoption, amendment, or repeal of any rule, regulation, or standard by any of the several departments, boards, commissions, or other agencies of the executive branch, the rule, regulation, or standard shall be submitted to the committee as provided in Article 41, Section 256-I. The rule, regulation or standard is not effective until so submitted. [However, the submission of the proposed rule, regulation, or standard to the committee does not prevent the adoption and promulgation of the rule, regulation, or standard by the department, board, commission or other agency after the 45-day period.]	104
	105
	106
	107
	108
	109
	110
	111
	112

(H) (1) DURING THE 45-DAY PERIOD PROVIDED FOR IN SUBSECTION (F) THE COMMITTEE SHALL APPROVE OR DISAPPROVE ALL RULES, REGULATIONS, AND STANDARDS SUBMITTED AFTER JULY 1, 1978, BY A DEPARTMENT, BOARD, COMMISSION, OR OTHER AGENCY OF THE EXECUTIVE BRANCH. THIS APPROVAL OR DISAPPROVAL BY THE COMMITTEE MAY BE OF THE WHOLE OR A PART OF ANY RULE, REGULATION, OR STANDARD.	114
	115
	116
	117
	118

(2) PURSUANT TO THIS SUBSECTION THE COMMITTEE SHALL PROVIDE THE DEPARTMENT, BOARD, COMMISSION, OR OTHER AGENCY OF THE EXECUTIVE BRANCH AND THE DIVISION OF STATE DOCUMENTS WITH WRITTEN NOTICE OF ITS APPROVAL OR DISAPPROVAL. IN THE EVENT OF DISAPPROVAL THE NOTICE SHALL CONTAIN THE GROUNDS THEREFORE AND A BRIEF EXPLANATION OF THE COMMITTEE'S ACTION.	120
	121
	122
	123
	124

(3) IN THE EVENT OF THE FAILURE OF THE COMMITTEE TO PROVIDE WRITTEN NOTICE TO THE DEPARTMENT, BOARD, COMMISSION, OR OTHER AGENCY OF THE EXECUTIVE BRANCH OF ITS APPROVAL OR DISAPPROVAL THE RULE, REGULATION, OR STANDARD IS DEEMED TO HAVE BEEN APPROVED.	126
	127
	128
	129

(4) UPON THE RECEIPT OF WRITTEN NOTICE OF DISAPPROVAL, THE DEPARTMENT, BOARD, COMMISSION, OR OTHER AGENCY OF THE EXECUTIVE BRANCH PROPOSING THE REGULATION SHALL DETERMINE WHETHER TO WITHDRAW OR TEMPORARILY ADOPT THE DISAPPROVED RULE, REGULATION, OR STANDARD OR PORTION THEREOF AND SHALL ADVISE THE COMMITTEE OF ITS DECISION IN WRITING.	131 132 133 134 135
(5) DISAPPROVAL BY THE COMMITTEE HAS THE EFFECT OF PROHIBITING FINAL ADOPTION OF THE DISAPPROVED RULE, REGULATION, STANDARD, OR PORTION THEREOF, EXCEPT AS PROVIDED IN SUBSECTION (J).	137 138 139
(6) TEMPORARY ADOPTION HAS THE EFFECT OF ALLOWING IMPLEMENTATION OF A DISAPPROVED RULE, REGULATION, STANDARD, OR PORTION THEREOF, IF PERMITTED BY THE COMMITTEE, UNTIL THE ADJOURNMENT OF THE GENERAL ASSEMBLY SESSION IN WHICH THE RESOLUTION PROVIDED FOR IN SUBSECTION (J) IS INTRODUCED AND ALSO COMPELS PREPARATION AND SUBMISSION OF THE RESOLUTION PROVIDED FOR IN SUBSECTION (J).	141 142 143 144 145 146
(I) (1) DISAPPROVAL OF ANY RULE, REGULATION, OR STANDARD OR PORTION THEREOF BY THE COMMITTEE PURSUANT TO SUBSECTION (H) SHALL BE BASED SOLELY ON THE FOLLOWING GROUNDS:	148 149 150
(I) THE RULE, REGULATION, OR STANDARD OR PORTION THEREOF FAILS TO COMPLY WITH THE LEGISLATIVE INTENT OF THE LAW AUTHORIZING PROMULGATION; OR	152 153
(II) THE DEPARTMENT, BOARD, COMMISSION, OR OTHER AGENCY OF THE EXECUTIVE BRANCH HAS EXCEEDED THE AUTHORITY DELEGATED TO IT BY THE GENERAL ASSEMBLY.	155 156
(2) ANY RULE, REGULATION, OR STANDARD OR PORTION THEREOF WHICH IS DISAPPROVED BY THE COMMITTEE MAY NOT BE RESUBMITTED IN SUBSTANTIALLY THE SAME FORM PENDING REVIEW AS PROVIDED IN SUBSECTION (J) OR WITHDRAWAL AS PROVIDED IN SUBSECTION (H).	158 159 160
(3) THE COMMITTEE MAY EITHER SUSPEND OR ALLOW THE TEMPORARY IMPLEMENTATION OF ANY RULE, REGULATION, OR STANDARD OR PORTION THEREOF PENDING THE REVIEW BY THE GENERAL ASSEMBLY AS PROVIDED IN SUBSECTION (J). THE TEMPORARY IMPLEMENTATION OF ANY RULE, REGULATION, OR STANDARD MAY ONLY BE ALLOWED BY THE COMMITTEE IN ORDER TO AVOID LOSS OF FEDERAL MONEYS OR TO AVOID CONFLICT WITH FEDERAL LAW.	162 163 164 165 166
(J) IN THE EVENT OF DISAPPROVAL BY THE COMMITTEE OF ANY RULE, REGULATION, OR STANDARD OR PORTION THERETO:	168 169
(1) THE RULE, REGULATION, OR STANDARD OR PORTION THEREOF DISAPPROVED SHALL HAVE NO FURTHER EFFECT UNLESS THE GENERAL ASSEMBLY, WITHIN ONE YEAR OF THE COMMITTEE'S DISAPPROVAL, ADOPTS A JOINT RESOLUTION APPROVING	171 172 173

4

HOUSE BILL No. 619

THE PROPOSED RULE, REGULATION, OR STANDARD, AND STATING THE
DATE UPON WHICH IT SHALL BECOME EFFECTIVE. 174
175

(2) IF THE DEPARTMENT, BOARD, COMMISSION, OR 177
OTHER AGENCY OF THE EXECUTIVE BRANCH INVOLVED SO REQUESTS IN 178
WRITING, THE COMMITTEE SHALL CAUSE SUCH A JOINT RESOLUTION 179
TO BE PREPARED AND SUBMITTED (BY REQUEST) INTO EACH HOUSE OF 180
THE GENERAL ASSEMBLY. THE JOINT RESOLUTION SHALL CONTAIN A
COPY OF THE RULE, REGULATION, OR STANDARD OR PORTION THEREOF 181
AND THE SUBSTANTIVE TEXT OF THE NOTICE PROVIDED PURSUANT TO 182
SUBSECTION (H).

SECTION 2. AND BE IT FURTHER ENACTED, That this Act 185
shall take effect July 1, 1978. 186

Approved:

Acting Governor.

Speaker of the House of Delegates.

President of the Senate.

SENATE OF MARYLAND

8lr1424

No. 278
(PRE-FILED)

By: Senator Staten (Departmental - TF/BPW)	27
Requested: October 27, 1977	29
Introduced and read first time: January 11, 1978	30
Assigned to: Budget and Taxation	31
Committee report: Favorable with amendments	32
Senate action: Adopted	33
Read second time: January 17, 1978	34
	35
	36

CHAPTER _____ 39

AN ACT concerning 43

The Board of Public Works - Leases Subject to 46
Board Approval 47

FOR the purpose of providing that the requirement that the 51
Secretary of the Department of General Services shall 52
submit all proposals for leases for office or building
space rental to the Board of Public Works for final 53
approval shall not apply if Board of Public Works 54
regulations provide otherwise; providing that the Board 55
of Public Works may adopt regulations by which State
departments, boards, commissions, or other agencies may 56
enter into land, building, or facility space leases or 57
lease renewals prior to or without Board of Public
Works approval under certain conditions specified in 58
the Act; and clarifying language.

BY repealing and reenacting, with amendments, 60

Article 41 - Governor-Executive and Administrative 63
Departments 64
Section 231G-1(a) 66
Annotated Code of Maryland 68
(1971 Replacement Volume and 1977 Supplement) 69

BY repealing and reenacting, with amendments, 72

Article 78A - Public Works 75
Section 8 77
Annotated Code of Maryland 79
(1975 Replacement Volume and 1977 Supplement) 80

EXPLANATION: CAPITALS INDICATE MATTER ADDED TO EXISTING LAW.
[Brackets] indicate matter deleted from existing law.
Underlining indicates amendments to bill.
~~Strike-out~~ indicates matter stricken by amendment.

SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND, That section(s) of the Annotated Code of Maryland be repealed, amended, or enacted to read as follows: 84
85

Article 41 - Governor-Executive and Administrative Departments 88
89

231G-1. 92

(a) The Secretary of the Department of General Services shall accept proposals for leases for office or building space rental. [and] THE SECRETARY SHALL submit all the proposals, along with his recommendations, to the Board of Public Works for the Board's final approval, UNLESS BOARD OF PUBLIC WORKS REGULATIONS PROVIDE OTHERWISE. 95
96
97
98
99

Article 78A - Public Works 102

8. 105

(1) The Board of Public Works shall approve every lease and renewal of the lease of land, buildings or office space before it is executed by any department, board, commission, State officer or institution of the State, and may designate the location of any State agency, after review by the Secretary of General Services subject to the provisions of subsection (2) of this section. 109
110
111
112
113

(2) After June 1, 1967, no appropriation may be obligated or expended for the rent of any building or part of a building to be occupied for State purposes at a rental in excess of the per annum rate of 15 percent of the fair market value of the rented premises at the date of the lease under which the premises are to be occupied by the State or by any of its agencies. 117
118
119
120
121

(3) The provisions of this section do not apply to leases made prior to June 1, 1967 except when renewals of the leases are made after that date. 125
126

(4) [The provisions of this section apply only where the rental to be paid exceeds \$2,000 per annum.] THE BOARD OF PUBLIC WORKS MAY ADOPT ~~REGULATIONS~~ REGULATIONS BY WHICH STATE DEPARTMENTS, BOARDS, COMMISSIONS, INSTITUTIONS, OR OTHER AGENCIES MAY ENTER INTO LAND, BUILDING, OR FACILITY SPACE LEASES OR LEASE RENEWALS PRIOR TO OR WITHOUT BOARD OF PUBLIC WORKS APPROVAL, PROVIDED (I) THAT THE SUBJECT MATTER OF EACH LEASE OR LEASE RENEWAL FALLS WITHIN AN EXPENDITURE OR USE CLASSIFICATION ESTABLISHED FOR THIS PURPOSE BY THE BOARD OF PUBLIC WORKS, (II) THAT THE ANNUAL DOLLAR VALUE OF EACH LEASE OR LEASE RENEWAL IS LESS THAN A MONETARY THRESHOLD ESTABLISHED FOR THE APPLICABLE EXPENDITURE OR USE CLASSIFICATION BY THE BOARD OF PUBLIC WORKS, AND (III) THAT AN ACCOUNTABILITY OR REPORTING SYSTEM OR ~~AN ACCOUNTABILITY AND REPORTING SYSTEM~~ APPROVED BY THE BOARD IS ESTABLISHED TO INFORM THE BOARD WITH RESPECT TO ACTIONS TAKEN BY AGENCIES UNDER AUTHORITIES GRANTED THEM BY THE BOARD. 130
131
132
133
134
135
136
137
138
139
140
141
142

SECTION 2. AND BE IT FURTHER ENACTED, That this Act
shall take effect July 1, 1978.

145
146

Approved:

Acting Governor.

President of the Senate.

Speaker of the House of Delegates.

SENATE OF MARYLAND

81rl1423

No. 296
(PRE-FILED)

By: Senator Staten (Departmental - TF/BPW)	27
Requested: October 27, 1977	29
Introduced and read first time: January 11, 1978	30
Assigned to: Budget and Taxation	31
Committee report: Favorable with amendments	32
Senate action: Adopted	33
Read second time: January 17, 1978	34
Returned to Second Reading: February 1, 1978	35
Senate Action: Adopted with floor amendments	36
Read second time: February 2, 1978	37
	38
	39

CHAPTER _____ 42

AN ACT concerning 46

The Board of Public Works - Contracts Subject 49
to Board Approval 50

FOR the purpose of providing that the requirement that 54
contracts for the expenditure of the proceeds of a loan 55
authorized by the General Assembly shall be subject to 56
the approval of the Board of Public Works before they
are executed, does not apply if otherwise provided by 57
law; providing that the Board of Public Works may adopt 58
regulations, subject to approval by a certain 59
committee, by which State departments, boards, 60
commissions, or other agencies may enter into capital 61
project related contracts and change orders prior to or 62
without Board of Public Works approval under certain
conditions specified in the Act; and clarifying 63
language.

BY repealing and reenacting, with amendments, 65

Article 78A - Public Works 68
Section 1 and 7(1) and (6) 70
Annotated Code of Maryland 72
(1975 Replacement Volume and 1977 Supplement) 73

SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF 77
MARYLAND, That section(s) of the Annotated Code of Maryland 78
be repealed, amended, or enacted to read as follows:

Article 78A - Public Works 81

EXPLANATION: CAPITALS INDICATE MATTER ADDED TO EXISTING LAW.
[Brackets] indicate matter deleted from existing law.
Underlining indicates amendments to bill.
~~Strike out~~ indicates matter stricken by amendment.

1.

84

The Board of Public Works, as constituted under Article XII of the Constitution, [and § 196 of Article 41,] shall have and exercise such powers and duties as may be delegated to it from time to time in regard to the creation of State debt, the fixing of interest thereon, the terms and conditions thereof, the preparation of certificates of indebtedness and the advertising and sale thereof. All contracts for the expenditure of the proceeds of any loan authorized by any act of the General Assembly shall be subject to the approval of [said] THE Board before [the same] THEY are executed , UNLESS OTHERWISE PROVIDED BY LAW.

87

88

89

90

91

92

93

94

95

7.

97

(1) The Board of Public Works shall in like manner supervise the expenditure of all sums appropriated for the acquisition of land, buildings, equipment, new construction and other capital expenditures, except in connection with State roads, bridges and highways, whether made through the medium of a budget bill, a supplementary appropriation bill or a State bond issue bill, and all contracts for the expenditure [thereof] OF SUMS SO APPROPRIATED shall be subject to the approval of [said] THE Board before [the same] THEY are executed, after review by the Secretary of General Services. THE BOARD OF PUBLIC WORKS MAY ADOPT REGULATIONS, SUBJECT TO APPROVAL BY THE JOINT STANDING COMMITTEE ON ADMINISTRATIVE, EXECUTIVE AND LEGISLATIVE REVIEW, BY WHICH STATE DEPARTMENTS, BOARDS, COMMISSIONS, INSTITUTIONS, OR OTHER AGENCIES MAY ENTER INTO CAPITAL PROJECT RELATED CONTRACTS AND CHANGE ORDERS PRIOR TO OR WITHOUT BOARD OF PUBLIC WORKS APPROVAL, PROVIDED (I) THAT THE SUBJECT MATTER OF EACH CONTRACT FALLS WITHIN AN EXPENDITURE CLASSIFICATION ESTABLISHED FOR THIS PURPOSE BY THE BOARD OF PUBLIC WORKS, (II) THAT THE AGGREGATE ANNUAL DOLLAR VALUE OF EACH CONTRACT AND ITS ATTENDANT CHANGE ORDERS IS LESS THAN A MONETARY THRESHOLD ESTABLISHED FOR THE APPLICABLE EXPENDITURE CLASSIFICATION BY THE BOARD OF PUBLIC WORKS, ~~AND (III) THAT THE MONETARY THRESHOLDS BE SUFFICIENTLY HIGH TO FREE THE BOARD FROM DIRECT REVIEW OF RELATIVELY INSIGNIFICANT ITEMS WHILE NOT IMPAIRING THE STRONG PUBLIC POLICY IN FAVOR OF DIRECT BOARD REVIEW OF ITEMS HAVING A SUBSTANTIAL FISCAL IMPACT, AND (IV) THAT AN ACCOUNTABILITY OR REPORTING SYSTEM OR AN ACCOUNTABILITY AND REPORTING SYSTEM APPROVED BY THE BOARD IS ESTABLISHED TO INFORM THE BOARD WITH RESPECT TO ACTIONS TAKEN BY AGENCIES UNDER AUTHORITIES GRANTED THEM BY THE BOARD.~~ Except as may be otherwise permitted by other provisions of law regarding emergencies, all State construction contracts in excess of \$10,000 shall be awarded on a competitive basis. However, the Board of Public Works may approve the award of such contracts to other than the lowest bidder if the Board determines that to be in the best interest of the State.

99

100

101

102

103

104

106

107

108

109

110

111

112

113

114

115

116

117

118

119

120

121

123

124

125

126

127

128

129

130

131

SENATE BILL No. 296

3

(6) The Board may waive the requirements of paragraph (1) of this section as to awarding [such] OF contracts on A competitive basis if: 134 135

(i) The public health and safety is endangered after a natural disaster or act of God; 138 139

(ii) A state of emergency is declared by the Governor; or 141

(iii) A bona fide single source of supply or a proprietary product or process is required; or 143 144

(iv) [Its] THE Board determines it is in the best interests of this State. 146

Each waiver and the reasons therefor shall be documented and recorded and immediately reported to the Maryland Register for printing in the next available issue. 149 150

SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall take effect July 1, 1978. 153 154

Approved:

Acting Governor.

President of the Senate.

Speaker of the House of Delegates.

EXHIBIT C



BLAIR LEE III
ACTING GOVERNOR

STATE OF MARYLAND
EXECUTIVE DEPARTMENT
ANNAPOLIS, MARYLAND 21404

May 29, 1978

Honorable John Hanson Briscoe
Speaker of the House of Delegates
State House
Annapolis, Maryland 21404

Dear Mr. Speaker:

In accordance with Article II, Section 17 of the Maryland Constitution, I have today vetoed House Bill 619.

This bill authorizes the Joint Standing Committee on Administrative, Executive, and Legislative Review to approve or disapprove all or part of any rule, regulation, or standard submitted by any department, board, commission, or agency of the Executive Branch.

The Committee may disapprove a rule or regulation on the basis that it "fails to comply with the legislative intent of the law authorizing promulgation", or that the agency "has exceeded the authority delegated to it by the General Assembly". A disapproved rule has no effect unless, within one year of disapproval, the General Assembly adopts a joint resolution approving the rule. The bill also contains procedures for the temporary adoption of a rule pending the General Assembly's review.

The Committee on Administrative, Executive, and Legislative Review (AELR Committee) is the successor to the Committee on Legislative Review which had originally been established in 1964 as an adjunct of the General Assembly's Legislative Council. In 1972 the General Assembly renamed this Committee as the AELR Committee and altered its powers and duties.

Under present law each Executive Branch agency must submit to the AELR Committee every proposed rule or regulation, or amendment or repeal thereof. Committee approval of the

Honorable John Hanson Briscoe
Page two

proposal is not required, except to the extent that the agency desires that a rule be adopted on an emergency basis.

When the AELR Committee was thus restructured in 1972, I believe that there was a legitimate concern among the members of the General Assembly about the increasing volume of rules being promulgated by Executive Branch agencies. A second concern was that this increased regulatory activity could, in some instances, begin to infringe upon the Legislature's duty to determine policy. Therefore the Committee was given its current oversight function, and I believe that it has alleviated the General Assembly's concerns while performing that function.

House Bill 619 would now vest in the AELR Committee, subject to ultimate review by the General Assembly at its next session, the duty to approve or disapprove a rule or regulation proposed after July 1, 1978. This function is usually characterized as a "legislative veto" provision. The wisdom and constitutionality thereof has been the subject of an increasing amount of comment and controversy at the federal and State levels.

The Attorney General has advised me, in a lengthy Opinion, that at least 14 States have enacted some form of legislative veto mechanism, and that the Attorneys General of several of these States have expressed grave concerns regarding their constitutionality. However, the concerns expressed by these legal officers are questions of first impression in the Maryland Courts.

In his Opinion, which I have attached to this message, the Attorney General has focused upon several Constitutional issues inherent in the provisions of House Bill 619. He has concluded that House Bill 619 is "not clearly unconstitutional". That conclusion ultimately is based upon the strong presumption of constitutionality accorded to each enactment of the General Assembly. However, his very thorough analysis of these issues clearly reveals the breadth of the disagreement among the legal authorities, and I must respectfully disagree with the conclusion of the Attorney General for the reasons I set forth herein.

Honorable John Hanson Briscoe
Page three

However, before addressing the Constitutional issues of House Bill 619, I must discuss one of the greatest practical problems which I find inherent in the mechanism it creates. This problem is rooted in the nature of the rules promulgated by some State agencies. Many State programs are partially funded with federal matching funds. The change proposed by House Bill 619 in the State's regulatory process may impede or prohibit the issuance of a regulation designed to comply with a federal requirement. The potential for the loss of millions of federal dollars by the exercise of the "legislative veto" is conceivable. Even if the General Assembly, at its next session, overrides the judgment of the AELR Committee, the result would be a loss of those funds, and possible future entitlement, during the interim period.

However, my most serious concerns about House Bill 619 are generated by my concern for the preservation of the Constitutional balance of powers created by the people.

Article 8 of the Declaration of Rights of the Maryland Constitution mandates that the Legislative, Executive, and Judicial branches of government are to be separate, and that no person exercising the functions of one of these Departments shall assume or discharge the duties of any other. Even assuming that House Bill 619 does not violate the terms of Article 8, I believe that it severely tramples upon the spirit of this most fundamental tenet of the Constitution. House Bill 619, in my judgment, injects the General Assembly into a realm which the Constitution has reserved to the Executive Branch alone.

The Constitution of Maryland charges the Chief Executive to faithfully execute the laws of the State. Pursuant to that mandate, the General Assembly passes bills, and if signed into law, the Governor executes the Legislative policy.

Pursuant to laws enacted by the General Assembly, I must appoint officials to implement legislative programs. Most of these officials are appointed subject to the advice and consent of the Senate and therefore are subject to legislative scrutiny and guidance regarding the manner in which they are to implement legislative policy.

Honorable John Hanson Briscoe
Page four

More important, the provisions of the State Documents Law assure legislative and public input into the rule making process. Yet House Bill 619 would allow the members of a single legislative committee to disapprove a proposed rule based upon a judgment that it fails to comply with the legislative intent of the law authorizing its promulgation. This can only help to thwart the purpose of the State Documents Law by negating the public input which it currently guarantees. In those instances in which a majority of the members of the General Assembly finds that an agency rule has exceeded the legislative grant to that agency, the General Assembly can and should pass a law to correct the situation, and the Chief Executive will then execute that policy judgment.

My objections to House Bill 619 also are grounded in my reading of the provisions of Article II, Section 17 of the Maryland Constitution. It provides that in order to "guard against hasty or partial legislation and encroachment of the Legislative Department upon the co-ordinate Executive and Legislative Departments...", each bill passed by the General Assembly shall be presented to the Executive for his decision to sign it into law or to veto it. The power of gubernatorial veto was granted to the Executive of the State when the Constitution of 1867 was adopted by the people. The purpose of that grant is, as stated in the Constitution, to guard against the encroachment of the Legislature upon the Executive branch of government. I believe that the power of a legislative committee to disapprove a rule is the equivalent of making law. It is the equivalent of a policy decision and therefore constitutes legislation.

The contrary argument is that such a disapproval of a rule is not law making because the Executive could have vetoed the legislation which established the legislative veto mechanism. A second argument is that the disapproval is not new legislation, but a guarantee that the original legislative policy is fulfilled. As for the first contention, it assumes that the Executive, by signing the legislative veto mechanism into law, has waived any future objections to the exercise of the legislative veto. I cannot subscribe to that theory. As for the second argument, I believe that the Legislature may guard against a violation of its original policy decision by means of the safeguards afforded by the current provisions of the State Documents Law and by the oversight function performed by the

Honorable John Hanson Briscoe
Page five

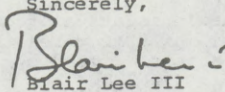
AELR Committee. Finally, if a policy decision is violated, the General Assembly may pass and present to the Executive a bill to correct the situation, and the Executive may act in accordance with the mandate of Article II, Section 17.

The Maryland Constitution mandates that the Chief Executive manage the Executive Branch of government. In my judgment, the duties and functions of the Legislative and Executive Branches are clearly delineated in the Constitution. I believe that House Bill 619 oversteps the boundary drawn by the people between these two branches of our government by injecting the Legislature into the role of managing the Executive Branch.

The AELR Committee currently exercises a critical function of government. Since 1972 it has provided the needed review of the day-to-day implementation of its policy decisions as set forth in State law. I have the utmost respect for this Committee and the role which it performs. However, I greatly fear the erosion of the Constitutional balance of power which the enactment of this bill, in my judgment, clearly creates.

For these reasons, I have decided to veto House Bill 619.

Sincerely,


Blair Lee III
Acting Governor



BLAIR LEE III
ACTING GOVERNOR

STATE OF MARYLAND
EXECUTIVE DEPARTMENT
ANNAPOLIS, MARYLAND 21404

May 29, 1978

Honorable Steny H. Hoyer
President of the Senate
State House
Annapolis, Maryland 21404

Dear Mr. President:

In accordance with Article II, Section 17 of the Maryland Constitution, I have today vetoed Senate Bill 278.

This bill requires the Secretary of General Services to submit proposals for office space rentals to the Board of Public Works and authorizes the Board to adopt regulations by which State agencies may enter into office space leases.

During the legislative process, an amendment was adopted to the bill which requires that the AELR Committee approve such regulations adopted by the Board of Public Works.

I have today vetoed House Bill 619. Based upon the same policy considerations set forth in the veto message accompanying House Bill 619, I have decided to veto Senate Bill 278.

Sincerely,

Blair Lee III
Acting Governor



BLAIR LEE III
ACTING GOVERNOR

STATE OF MARYLAND
EXECUTIVE DEPARTMENT
ANNAPOLIS, MARYLAND 21404

May 29, 1978

Honorable Steny H. Hoyer
President of the Senate
State House
Annapolis, Maryland 21404

Dear Mr. President:

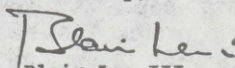
In accordance with Article II, Section 17 of the Maryland Constitution, I have today vetoed Senate Bill 296.

This bill requires the Board of Public Works to adopt regulations by which State agencies may enter into certain capital project related contracts.

During the legislative process an amendment was adopted to the bill which requires that the AELR Committee approve any such regulations adopted by the Board of Public Works.

I have today vetoed House Bill 619. Based upon the same policy considerations set forth in the veto message accompanying House Bill 619, I have decided to veto Senate Bill 296.

Sincerely,


Blair Lee III
Acting Governor

Mr. BAUMAN. Our next witness is Mr. Michael Abercrombie of CATO, Inc.

Please proceed Mr. Abercrombie.

STATEMENT OF MICHAEL ABERCROMBIE

Mr. ABERCROMBIE. Mr. Chairman and members of the subcommittee. Good afternoon. My name is Michael Abercrombie and I am a Texaco wholesaler located in Salisbury, Md. Thank you for the opportunity to appear before you and address the topic of regulatory impact and reform.

I am just one of millions of small business people in this great country of ours crying out in the ever-increasing sea of regulations that threatens to drown us. We want less Government, not more. Excessive regulation strangles initiative and reduces productivity. We must not allow the great strengths of the free enterprise system to be sapped away by unnecessary regulation.

When I say small business, that's exactly what I mean. We lack the resources to absorb regulations in the manner big corporations can and do. If they don't like the regulations, big corporations have lobbyists which can work on the responsible agency to change the regulations and they have lawyers to guide them in compliance or legal noncompliance. A small business person has neither, hence regulations fall most heavily on small business.

As an aside, I would point out the philosophy of small business is basically keep it simple. That is why they are flexible and adaptable, can react quicker. That is what keeps them in the marketplace in competition with large business. They do not have the resources, so to exist it has to be a relatively simple thing, an individual or a small group of individuals can analyze, and they can come to grips and react.

In 1974, the Employee Retirement Income Security Act, better known as ERISA was passed into law. I understood that the need for legislation was to protect the future retirement income of workers by preventing looting of pension funds by fund managers with less than noble motives. In fact, what has happened is that rules governing pension and retirement have become so complex and detailed that (1) it is impossible for a lay person to comprehend them, (2) administration costs are soaring, and (3) the risk, hassle, and expense is such that Government records show large numbers of plans are being canceled. Rather than protect the workers' future retirement income, regulation is eliminating it!

Without citing cases, we have a profit-sharing retirement plan, it has become an increasing burden, and I am legally accountable, and so forth, and it is something I would look forward to, and it would help me, and every individual employed by me, that eventually they will have greater retirement income, but when you take the risk, and you break down the costs, and all of these things, and the complexities, the legal niceties of it are so great, you have to look at it and say it is not worth it. And that literally is happening in many small businesses around the country. And I am sure the IRS and Labor Department will show that.

There has been a mass of cancellations because of this very thing. I think we are heading into the wrong direction. That law basically was a reaction to some major abuses, and you had orga-

nized crime involved in some of this. And certainly nobody in their right mind will defend that type of practice, but on the other hand, the arm of regulation has gone so far that we are actually doing the same thing in a legal manner, by making it too complex and too expensive to set up and administer.

Further, benefits routinely given to employees such as health insurance or life insurance have been brought under the provisions of the law. All manner of necessary paperwork is required to be given to our employees. Paperwork which might be and I stress might be desirable for a pension plan but which I feel is unnecessary and ridiculous for health and life insurance benefits. I don't think Congress intended this when ERISA was passed.

I did not make a long string of copies. I have a couple copies here of the idea of what I am referring to there.

In this case here, there is 12 pages of information that under a so-called summary plan description is required to be given to every member [see p. 277].

This New York oil heating fund I used to give term life insurance to my employees. If they should be killed, their widow or beneficiary would receive a settlement under these requirements. I have 12 pages to pass out, they look at it and throw it away. It means nothing. It might mean something if I happened to be the lawyer going after somebody pilfering a major fund, and I have to look at these people day after day, work with them, I am interested in their family, and their future, but it is ridiculous.

Mr. BAUMAN. But you are required by Federal law to give each one of these to all of your employees?

Mr. ABERCROMBIE. Yes; and anytime a new employee is hired, and annually, I have to give it to all participants—and again, this is for the life insurance portion—for this particular fund.

Frankly, I do not even spend the time to read and study this and say, well, they look pretty good, and they are safe to carry this term insurance for one more year.

I do not have time to do that. I use a responsible and respected fund that I have every reason to believe they will perform as indicated.

The insurance industry is highly regulated, and I am sure if there is a major problem, we would all be long aware of it. I had Blue Cross and Blue Shield, and I have to give the same, if you will, garbage out to every employee. It is just an exercise in paperwork with no useful end result, as far as I am concerned, as far as my employees are concerned.

Basically, everybody knows what Blue Cross is, so why give them 12 pages of legalese. Certainly they have a brochure that tells them their benefits, but this type of thing is useless.

My business is most affected by regulations issued by the Department of Energy—DOE—that concern sale of gasoline. It requires a great deal of my time to read and study them from all possible sources the changes and proposed changes in DOE regulations. Because the potential effects of these regulations on my business are so far-reaching, I can't afford to do less.

For example, DOE, under emergency powers, issued a so-called downward certification rule in August without any hearings. The rule was to take effect September 1, 1979. Downward certification

means a marketer such as myself who closes a gasoline outlet for whatever reason will be required to notify his supplier who will then no longer make that gasoline allocation available to the marketer. Until now, until this rule, the gasoline would simply be allocated to the marketer's remaining accounts so it is a little like being asked to hang yourself. Not only would the marketer lose income but the geographic area where the gasoline had historically been sold would be short by the amount of allocation downward certified. Regulation would thereby have caused a shortage that didn't need to exist. The marketer is caught in a "Catch 22" situation where if he attempts to streamline to better serve the consumer, he loses his allocation with which to serve the consumer.

It makes very little sense. I might point out my supplier is Texaco, Inc. This month we are on 78 percent allocation. Texaco allocates to me 78 percent of the gasoline my firm purchased 1 year ago, so I am already down 22 percent of my potential sales under a great deal of pressure, and when DOE says if you have changed anything, you have got to give that gasoline back to your supplier. I think you are well aware of the law and the cry on this subject. It shows the excess of the agency.

Mr. BAUMAN. A great many Members of Congress have held repeated meetings with officials of DOE, and most of them have been centered around the changing regulations that have caused this problem.

The problem is really with the allocations, for stations that were closed, to remain in this area, where the State law caused a lot of stations to close. That is really our problem. Am I correct in that?

Mr. ABERCROMBIE. I think it is partially correct. First of all, they delayed it for a month and the pressure kept building. Obviously there was a great deal of concern, and they postponed it indefinitely, so it went to rest, but all of the rumors are that it is coming back, with the form modified somewhat.

Mr. BAUMAN. So here is a case where a Federal regulation worsened or caused a gasoline shortage in some areas.

Mr. ABERCROMBIE. It certainly would. In that sense, it would take a substantial number of gallons right out of the marketer's control and give it back. And the argument would be the major oil companies would reallocate, but it would not come back in the same proportion into the area. It would create distortion.

Mr. WOLFENBERGER. The initial withdrawal has nothing to do with consumption patterns in the area?

Mr. ABERCROMBIE. I think it is the idea if you are given an allocation, you can apply for a new allocation, and it takes months and months and months and not too many people are successful, but you can apply for it. Therefore somebody is pushing the idea, but at this point it is creating havoc in the marketplace, and it is unnecessary.

If I am there, and I have a number of stations, and one of them basically just cannot operate economically, if you close that and redistribute the allocation, the consumers in the area still have supply, and I am able to keep alive a little longer, but the way DOE wants it, they say take it back which would then serve a severe financial hardship on myself and on the dealers who have

gotten the additional product and on the consumers, where there is inadequate product in the market area.

The other point, they have made some changes in the Maryland divestiture law, where firms like Hess and Ashland there was a great deal of work done with DOE, as I understand it, they had either issued or are issuing a rule which required the companies to work out some kind of arrangement that the product could not be withdrawn from the State. So, upon a much bigger scale, that is the same thing, or a much bigger instance in which they can point to the millions of gallons, that is the same impact on me, or every other marketer across the country. I am a little unclear as to what might be in store for the future, but the fact is that they would step in and make this sweeping change like that, for a little justification in my opinion. This is the type of thing that scares me. It is the type of thing I am speaking out against at this time.

Another area that is highly complex and confusing is DOE pricing regulations. Only after retail dealers threatened a strike earlier this year did DOE move to simplify and update the allowable dealers margin and to date they have failed to accord similar treatment to wholesale marketers.

That was given in essence to avoid a so-called nationwide strike. The middle marketers, the wholesalers have not made such a threat, nor are interested in such a threat. They are interested in equity and justice, and that should be considered. If DOE can move with dispatch as they did under the threat of the dealers, I cannot see why they cannot make a good effort to revise, to simplify and update, which would mean in essence we are running on less gallons, and we need some kind of increase in the allowable margin. They need to do that, instead they are presently studying it today.

A bureaucrat's income is not affected by his actions in the way the income of a small business person is affected by his own actions. Consequently, a bureaucrat is essentially in a 9-to-5 job and all too often is insensitive to the effects of his actions as he pursues a regulatory goal. A regulation may be the life or death of a business and it is vital that regulatory actions be fair, proper, and in the best interest of the country.

As written, H.R. 1776 reflects a sense of the checks and balances our forefathers so carefully wrote into the Constitution. Federal agencies which have all too often passed unnecessary, inequitable or ill-conceived regulations will take greater care when their actions can swiftly be brought to accountability.

I feel that enacting the so-called legislative veto as outlined in H.R. 1776 would be a substantial improvement in our regulatory process because it would give Congress the capability to quickly block improper regulations issued by Federal agencies.

Thank you. If you have any questions I'll be happy to try to answer them.

Mr. BAUMAN. How great a part do you think Federal regulations played in the recent gasoline shortages nationwide and in Maryland?

Mr. ABERCROMBIE. A sweeping question. I think it has had a great deal to do with it. It is one of these things, I do not envy the Department of Energy and their job to try to do it, but I think you

can make a persuasive case that in fact the allocation regulations have worsened a situation and I believe that right now today we are heading into the same thing.

DOE and President Carter established a target of 200 million or 240 million gallons of distilled product in primary storage as of September 1 originally. They meant the major refining companies should have in their tanks 240 million barrels. The thought was we would have enough stocks to go into the winter to be ready for the situations that may arise, so they did slide today, because basically they found, I guess feedback from the industry, they could not make that particular deadline. So you simply change the deadline, and they made it October.

The latest I see is that they will not only reach the goal, but they will exceed it. However, in the meantime, you have farmers in the Midwest that do not have diesel fuel for crops, because the product is being held back unnecessarily and too long.

Secondary storage, in which middle marketers would be filling, perhaps aided by the oil companies to finance that, are not filling. The product is not being made available in order to meet the goal of 240 million barrels in storage. The major companies are withholding from their marketers what they would normally pass on to them. There is information passing on that areas in the Midwest would be resupplied by backshipments. At the rate that they are going when they are trying to ship the product to them, they will have missed part of their needs, and the rivers will be frozen, and they will be unable to move at that time. So I think the idea is commendable, but you have to not chip it in steel, which is in essence what they have done. They are blindly pursuing a number, when, in fact, they will make a worse situation than we should have.

We should have plenty of product, and the DOE officials sort of off the record said they would go right on by that, that they would be awash in product, and yet, I am sure if you have read the papers, and you get this all the time, we have shortages, people who cannot get enough, people who cannot fill their tanks, farmers who cannot bring in the harvest right now, and the question is why, and that is a case of overregulation.

Mr. BAUMAN. In this instance, the DOE has the power to mandate the supplies on hand?

Mr. ABERCROMBIE. Yes; they are using a great club with the major oil companies. They can pretty well have the major oil companies do whatever they want.

If I might drop back, you asked did the regulations make things worse than it was. I bring an example which again can be found in regulatory problems, and so forth. When they have this situation develop as it did in Iran, and Iran shut down during the revolution last winter, we stopped those shipments, and the concern came in March or so. The revolutionary government in Iran said we will not honor the contracts we previously had.

We were getting \$12 per barrel, and we had auctions for oil for \$18 or \$20, and that was terrible at the time, and all this, the Department of Energy and the President said we should not compete for that oil. And they have in essence forbid the major oil companies to bid for this oil on the basis that it would bring the

prices up, and they held back. I believe Shell Oil Co. got like a tanker load, and Ashland got a small amount, and at which point they were severely chastised by the Federal Government, and from the visible press. All activity and all attempts to purchase the crude stopped, so what happened, Western Europe had just finished the worst winter in 100 years. Their tanks were on the bottom, Japan's was on the bottom, and when Iran was down 6 million barrels a day, that represented almost 10 percent of the daily oil crude production, so everybody had to be down. They had drawn the inventory down to meet the demand, to try to listen to those demands as they could, and they tried to meet those demands, so since our Government decides that we should not bid for this oil, Western Europe and Japan very happily bid for it and got it, and the rest of the world did not have such a severe shortage as we suffered here. We in essence self-inflicted the worst shortage, because the Federal Government was dictating to the industry what it should or should not do.

The same type of problem occurred in DOE, where with President Carter's approval, the override of the deal that was concocted about a year and a half ago, was that natural gas companies negotiated with Pemex, which is the Mexican Oil Co., and they agreed on a long-term basis to purchase 1 million cubic feet per day in natural gas. At a stipulated price, which is about \$2.60 per thousand cubic feet for natural gas, and that particular agreement was subject to a veto by the Department of Energy. Their Secretary Schlesinger decided that was not a good deal, and in the interest of this country, he felt that way, and despite the fact that businesses concluded from a business point of view it was a reasonable, rational and desirable deal to make, DOE overrode that and canceled that agreement.

I think we are all too painfully aware of what happened to President Carter when he went to Mexico and he got lambasted. The reason was this deal was so firm, that the President of Mexico had actually staked his political life on this deal, and he was already constructing the pipeline that was to run into Texas into our system. We were talking about millions and millions and millions of dollars. They were going full into it, and the last thing in the world they expected or even understood, is that the Federal Government of the United States could step in and block a commercial transaction. When they did, they simply announced they would flare that gas, and they have been literally shooting the flame up into the sky and using it for nightlights ever since.

They redirected the pipeline into one of their cities and are using it in their own industry, and then comes the realistic fact that we really do need the natural gas, and President Carter goes down and humbles himself to the President of Mexico, takes a severe shel-lacking, which I think unfortunately he deserves, and we come away without 1 million cubic feet a day, but 300,000 and the price is now \$3.61.

Mr. BAUMAN. As opposed to \$2.20.

Mr. ABERCROMBIE. I am sorry. \$3.16. It has jumped up now, and I think the rationale for rejecting it had to do with the fact that Canada has natural gas under contract at \$2.80, and if we gave

Mexico a higher price, certainly Canada would want to renegotiate theirs; why should they take less?

Mr. BAUMAN. Those are two specific instances where Federal power was used to bring about the objective the agency wanted, presumably to keep the price lower, and in both instances it resulted in shorter supply and higher prices.

Mr. ABERCROMBIE. Absolutely.

Mr. BAUMAN. Could you tell me what the Federal regulations do in the way of distribution, say in the way of the average gasoline dealer?

They sell to meet the Federal regulations, but in the case of these folks, they seem to be on the end. They cannot raise the price for a long period of time at the pump, and therefore they have to absorb the loss. If indeed they want to change the amount the Federal Government allows them to have on the pump, it sometimes takes 6 months to even get a response to an emergency request.

Mr. ABERCROMBIE. That is true. Basically DOE is not interested in upgrading or improving the allocation of existing resale outlets. I personally had experience in November of last year. I spent \$24,000 with one of my dealers putting in new tanks, he put in new pumps, all his own money, he spent it obviously with anticipation of higher sales. Unfortunately in November, and I was not able to crystal ball and see what was going to happen down the road, that we were about to fall into one of these terrible shortages. Once a shortage came, it took this guy into the same gallons he had the year before, and now I am sitting there with a major investment, and no way to try to recoup that cost. I begged, borrowed, and pleaded, and they do not want to hear it. There is no appeal, but down the street, a quarter of a mile, three-tenths of a mile, another fellow says I want to put in an outlet, I want to invest, and he invests something in the way of \$30,000, and I want to give myself an allocation of gasoline, he tells them, and I want to sell gas, and the rules allow him to build this thing and appeal, and get an allocation, and have that allocation. He got an allocation which exceeds the original allocation I had already spent the money on, unless knowing we were going to have a shortage, and finding myself in a situation where they offered no relief, and he goes in and simply says I will build it from magic, and he gets gas, and I cannot.

Mr. BAUMAN. So the regulations treat the two types differently.

Mr. ABERCROMBIE. Yes; obviously they are worried about people making false plans, but they will not even consider claims, because they are so worried about it, yet they will give allocations right and left, if you are building it from ground up.

Mr. BAUMAN. The House voted this week to repeal the allocations system for gasoline completely by a very narrow margin.

I am not at all sure the vote will hold.

Do you think that that removal of regulation will make gasoline more plentiful, or at least distribute it to areas where it is needed?

Mr. ABERCROMBIE. Allocation and price controls are two things. It is very difficult in a time—

Mr. BAUMAN. I am talking about the allocation.

Mr. ABERCROMBIE. In essence, if you removed allocation controls, which is a great fear of marketers, then the major oil companies will drive us right out of business. If Congress did not do anything, they would in fact cut you off, and there you would be. It is one of these things that I am stuck with, I believe very strongly in the free enterprise system, but we are not totally in a free enterprise system in petroleum in the United States at this time.

I do believe we should have removal of price controls, which is to allow prices to reach their own levels, I do not believe we would be shackled with this problem that we have now if we had that.

I think you will see people seeking financial gain, and you will have that product, but as long as you monkey with the financial gain aspect, and you create all these other disproportions, and perimeters, if you remove allocations, I think you will do great harm to the market in this country.

Mr. BAUMAN. Do you think the Congress has the capacity to respond under legislative veto, as we are talking about under this bill, quickly enough in the area of energy?

Mr. ABERCROMBIE. I was listening to some areas of comments, as to the position you would take if you would try to review each one and react, and I can appreciate your days are very full, it is a difficult problem.

My only hope in this particular approach is that it can succeed, at least that which Congress conceives, and that it can be brought a little more into bay, although you might not be reading these regulations that affect, for instance, the petroleum industry as closely as I am going to, but if I find I have a case saying they are inequitable and unjust, and I can come to you, and your constituents can come to you, then I think the law will work better, and at least we could get a sympathetic hearing, I think you would have a valid base.

Right now, at least as I see it, I know you work very hard, and you can help us in these things, but you are a little bit helpless, you are sort of pleading with this monster over there out of control. I think the regulatory process whereby you have the veto is enough of a time frame, if you did not pick it up already, that you would be made aware of it by effect of the constituents, and could in fact step in and bring the scales back into balance.

Mr. BAUMAN. Any questions?

Mr. WOLFENBERGER. The thing we talked the most about on H.R. 1776, is Congress having the possible veto over proposed regulations.

There is another provision you do not hear as much about, and I would like to get your reaction to it. That would permit either House of Congress to pass a simple resolution to force an agency to reconsider an existing regulation.

Under this consideration, for rules already on the books, you would have to either promulgate or repeal them.

How do you feel about that, knowing it might affect something that you may like, and it might throw this whole thing into uncertainty, and the planning has been done on the basis of regulation done on the books. Do you think Congress might be able to force this consideration, that it might be thrown out, and something completely different be put in its place?

Mr. ABERCROMBIE. Yes; I do. I think if there is a legitimate case that can be made, and can be made to you all, that you would act, as you saw first. Right now the regulatory agencies in Washington are having their ear bent if you will be the affected industry, and it is not the same fellows up there today, day in and day out, bending their ear out. It is the lobbyists for the major corporations, and it creates and inequity. If you analyze it, all too often the regulatory action is something that is benefiting the big and not the small, so I think it is inequitable, so I submit if I can bring in a valid case and show you, you would be reasonably willing to say that justice should be served to take whatever action necessary.

On another point here, it concerns me, I managed to get a copy of your particular bill this morning, and I have read it a couple of times very quickly, I do not profess to be an expert by a long shot, but it appears to me there is a hole in here in the emergency regulations, how you bring them back to bay, how they are affected.

It seems to me that they go into effect, and I did not find something about where they have to be done in so many days and so forth. I did not read in there where a resolution of disapproval would override that period.

It might be there, but I did not see it. Right now the Department of Energy is operating in a rather flagrant manner in that area. Everything they are passing out is an emergency regulation, whether it is an emergency or not. Certainly there were problems facing this country at the first of the year, and somebody by gosh has to take a leadership position and do something, but these certification rules, I am not quite sure about. What is there is inequitable and wrong, so in defense of that, the DOE officials will tell you we have always had downward certification, we have not just implemented these. Why do you have to implement as an emergency rule?

Why could you not do it on a regular process or on a regular basis?

It is making a bad situation worse.

Mr. WOLFENBERGER. That is the complaint we have received in Dallas, it was put in as an emergency rule, and there was no opportunity to comment or try to effect some type of change.

Mr. ABERCROMBIE. There are many things that DOE right now does which is a flagrant abuse of power. I recognize you can construct a situation, or you have the situation, somebody has got to take action, but if they under the emergency rules are more or less outside what you are intending as a legislative veto, I am afraid you will find the regulatory agencies will use that avenue more frequently to evade the intent of Congress, so you should look closely at the loophole.

That does not mean you cannot have an emergency, but you also have a means of saying that it is not an emergency.

Mr. BAUMAN. We also have rules within the Rules Committee very much like this. What you are saying is that the Department of Energy, and the regulatory power in your experience since its creation, has in fact been used by the companies themselves. So we are seeing that the Federal regulatory power is not being used to

the best interest of suppliers, or others, but rather for whoever gets to the regulators.

Mr. ABERCROMBIE. You can bend their ear, and I am not saying this is necessarily a sinister motive on the part of DOE, but they are hearing one side very persuasively from very capable polished people. He is not really listening when the other side tries to talk, and it works against small business, and I think the consumers of this country.

If I might point out one other thing on regulatory overlap that affects our industry, I think it is worth pointing out.

Certainly we are subject to many agencies, but two of these agencies, the Coast Guard and the Corps of Engineers also regulate us. The Coast Guard is charged with responsibility to prevent pollution in the navigable waters of the United States, and the Corps of Engineers is charged with responsibility of dredging and so forth, and that is an overlap which is totally illogical, and it should be considered. It is somewhat like having the Maryland State Police in charge of signs and the highway department of building roads, and one or the other ought to take the whole thing and run it as a system, and not as a fragmented part. That is perhaps and aside from the basic consideration, just one more case of overlap.

Mr. BAUMAN. Thank you very much for testifying.

Mr. ABERCROMBIE. Thank you.

[The summary plan description referred to follows:]

New York Oil Heating Insurance Fund

1220 Broadway
New York, N. Y. 10001
(212) 695-1383

Trustees

PETER J. CARINI
PETER F. HEANEY
LAWRENCE J. MURPHY, JR.

EDWARD T. HEEG
Administrator

November 7, 1977

TO: OUR EMPLOYER MEMBERS

We enclose copies of the Summary Plan Description (SPD) which, under ERISA Regulations, must be furnished to all of your employees who now receive or who will hereafter receive insured welfare benefits under our program.

As we do not have the addresses of your employees we cannot utilize the mails. Hence, as in the past we shall rely upon you to make hand delivery of copies to them at your place or places of business. Additional copies are available upon request.

We shall appreciate your cooperation in this regard and we look forward to the opportunity of being of continued service to you.

Edward T. Heeg
ADMINISTRATOR

New York Oil Heating Insurance Fund

1220 Broadway
New York, N. Y. 10001

(212) 695-1383

TRUSTEES

PETER J. CARINI
PETER F. HEANEY
LAWRENCE J. MURPHY, JR.

EDWARD T. HEEG
Administrator

November 7, 1977

TO ALL PARTICIPANTS

The Regulations promulgated by the UNITED STATES DEPARTMENT OF LABOR under the EMPLOYEE RETIREMENT INCOME SECURITY ACT (ERISA) (Public Law 93-406), requires that you, as participants in our Welfare Benefit Program, be supplied with what is termed a "SUMMARY PLAN DESCRIPTION" (SPD). The SPD is designed to acquaint you with the essential details of our Insured Welfare Benefit Program and to advise you of your rights and obligations under ERISA.

The Regulations governing SPD's were published in a July 19, 1977 issue of the Federal Register (F.R. VOL. 42, at Pages 37178 et seq.). The Regulations are set forth in two parts: Part I - DESCRIPTION OF THE RULES and Part II - TECHNICAL EXPLANATION OF THE REGULATIONS. They consist of four Subparts, lettered and entitled as follows:

- SUBPART B - CONTENTS OF PLAN DESCRIPTIONS AND SUMMARY PLAN DESCRIPTIONS;
- SUBPART D - PROVISIONS APPLICABLE TO BOTH REPORTING AND DISCLOSURE REQUIREMENTS;
- SUBPART E - REPORTING REQUIREMENTS;
- SUBPART F - DISCLOSURE REQUIREMENTS.

In addition, the Regulations are issued under numbered sections, with appropriate descriptive captions. Several sections apply only to Pension Benefit Programs. In as much as our Plan provides only for Insurance Welfare Benefits and not for Pension Benefits, the sections relevant to the latter have been omitted from this SPD. Moreover, many of the sections, by their terms, have no applicability to our Plan; accordingly these sections have been omitted.

SUBPART B - CONTENTS OF PLAN DESCRIPTIONS AND SUMMARY PLAN DESCRIPTIONS

SECTIONS NUMBERS:

2520. 102-2 STYLE AND FORMAT OF SUMMARY PLAN DESCRIPTION.
2520. 102-2(a) METHOD OF PRESENTATION.
Our SPD has been composed in simple language in order that it will be readily comprehensible by all of our participants. Wherever possible we have attempted to avoid the use of technical or insurance phraseology and when appropriate, illustrations, examples and cross references have been utilized. A Table of Contents has also been attached hereto.
2520. 102-2(3) GENERAL FORMAT.
We have used, wherever it is appropriate, capital letters to indicate the headings, titles and other material appearing in the published Regulations. Small letters of the same printing type and prominence have been employed to explain our several Plan Benefits and procedures to be followed in processing of claims for benefits.
2520. 102-3 CONTENTS OF SUMMARY PLAN DESCRIPTION.
The name of the Plan is NEW YORK OIL HEATING INSURANCE FUND; occasionally it is referred to as or known by the acronym "NYOHA" Plan; its address is 1220 Broadway, New York, N.Y., 10001; its telephone number is (212) 695-1383.
2520. 102-3(4) The Plan, established in 1949, is maintained by the employer members of NEW YORK OIL HEATING ASSOCIATION, NEW YORK (NYOHA) who elect to participate in the Plan for the purpose of procuring Insurance Welfare Benefits for their employees. The term, "employees", as used herein, is consistent with the description of the term used in the Insurance Law of the

State of New York. NYOHA is a not-for profit trade association composed of persons, firms and corporations engaged in the oil heating industry and related activities. Membership in NYOHA is prerequisite for participation in the Plan under the Insurance Law of the State of New York. The operations of the Plan are conducted by the Plan Administrator and the Assistant Plan Administrator and three management Trustees, designated by the employer members of NYOHA.

2520. 102-3(4)(1)

A complete list of members of NYOHA who contribute to the Plan may be secured by participants and other interested parties upon request in writing to the Plan Administrator at the address given above. The list of contributors is also available for examination by participants and other interested parties at the office of the Plan Administrator given above on any business day during the hours of 9 A.M. and 5 P.M., except during July and August when the hours are between 9 A.M. and 4 P.M. (By way of cross reference, see the descriptive material under Section 2520. 104-(b) set forth below.)

2520. 102-3(a)(4)(ii)

Participants and other interested parties may secure from the Plan Administrator upon written request information indicating whether a particular employer is a member of NYOHA and a contributor to the Plan.

2520. 102-3(c)

The Identification Numbers assigned by the Internal Revenue Service are as follows:

To the Sponsor - NYOHA - 13-5168120
To the Plan - 13-5668118
To the Plan Administrator - 13-6722728

2520. 102-3(d)

The Plan procures several types of Insured Welfare Benefits such as life insurance, accidental death and dismemberment, disability benefits under

Part II of the Workmen's Compensation Law of the State of New York, hospitalization, surgical, medical, dental and benefits supplemental to Medicare for those participants who have attained the age of sixty-five years.

2520. 102-3(e)

Part of the welfare benefits provided under the Plan are insured by John Hancock Mutual Life Insurance Company of Boston, Massachusetts which is authorized to engage in business in the State of New York. Other benefits are procured under contractual arrangements with Blue Cross, Blue Shield of Greater New York and Group Health, Incorporated, service organizations under the jurisdiction of the Superintendent of Insurance of the State of New York.

2520. 102-3(f)

Edward T. Heeg is the Administrator of the Plan; his business address and telephone number are as given above.

2520. 102-3(g)

Service of legal process may be made upon the Plan Administrator and the Assistant Plan Administrator (Henry Klotz), or their successors in their office at the address given above; service of legal process may also be made upon the Plan Trustees whose names and principal places of business are given in the succeeding section.

2520. 102-3(h)

The Trustees of the Plan, each of whom is the chief executive officer of the company which he heads and their respective principal places of business are as follows:

Peter J. Carini
Ace Fuel Oil Co.
1 Coffey Street
Brooklyn, N.Y. 11231

Peter F. Heaney
Skaggs-Walsh, Inc.
12-01 Broadway
Long Island City, N.Y. 11106

Lawrence J. Murphy, Jr.
 Murphy Fuel Company, Inc.
 178-28 Jamaica Avenue
 Jamaica, N.Y. 11432

2520. 102-3(i)

The Plan is maintained in part under and pursuant to a collective bargaining agreement (union contract) between some of the members of NYOHA and Local Union 553 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers (IBTW). A copy of the union contract may be obtained by participants and other interested parties upon written request to the Plan Administrator and is available for examination by participants and other interested parties at the place and times set forth in Section 2520. 102-3(4)(i), supra.

2520. 102-3(j)

As set forth above, the primary function of the Plan is to procure Insured Welfare Benefits for the employer members of NYOHA who elect to contribute to the Plan. For administrative purposes the contributing employers are divided into two Branches: the New York Branch consisting of employers engaged in business in the New York Metropolitan Area and the National Branch composed of employers engaged in business in other geographical areas and who were formerly contributors to the Plan operated by National Oil Fuel Institute, Inc. Insurance Trust (NOFI). In a limited number of instances contributing employers have coverage under both Branches of the Plan.

2520. 102-3(j)(2)

All employees who are members of Local 553 are eligible for and must receive the Welfare Benefits set forth in the Union Contract. Non-union employees of employer member companies of the New York Branch are eligible for such benefits as the member companies elect to procure under the Plan provided such benefits are granted under an arrangement which precludes adverse selection. Under the National Branch of the Plan

all employees (other than those who cannot submit medical evidence satisfactory to the Insurer) are eligible for and must receive benefits where the employer pays the entire cost of coverage; where employees contribute to the cost of coverage seventy-five percent of the employees must receive benefits. Health Benefits are provided under both Branches of the Plan; detailed schedules of the benefits thereunder are available without cost to any participant or beneficiary who so requests.

2520. 102-3(1)

The Insured Welfare Benefits provided under the Plan may be lost or denied under any of the following circumstances:

(1) By the termination of the employment of any insured person; under the New York Branch of the Plan, members of Local 553 are entitled to benefits until the end of the month succeeding the interruption of employment; and union members who become disabled are entitled to benefits during the continuation of the disability for a period of one year from the date of the disability;

(2) By failure of an employer to make monthly contributions to the cost of operating the Plan;

(3) By failure of an employer to maintain membership in NYOHA;

(4) Under the National Branch of the Plan by the failure of an employee to be actively employed for at least 30 hours per week.

2520. 102-3(p)

All monthly contributions to the Plan must be made by employers including those cases in which employees contrib-

utions are calculated upon the cost of Insured Welfare Benefits and the reasonable expenses of administering the Plan.

2520. 102-3(q)

The following benefits are provided under the New York Branch of the Plan: Life Insurance, Accidental Death and Dismemberment (A.D. & D.), Off Job Disability Benefits under Part II of the Workmen's Compensation Law, Surgical, Medical, Dental, Major Medical, Benefits Supplemental to Medicare, Hospitalization and Senior Care. Life, A.D. & D., Off Job Disability Benefits, Major Medical and Benefits Supplemental to Medicare are underwritten by John Hancock Mutual Life Insurance Company (Hancock) under Policy Number 13515. Surgical, Medical and Dental Benefits are underwritten by Group Health, Inc. (GHI) under Group Numbers S-2400 (Union) and S-1844 (Non-Union) and DS-135. Hospitalization Benefits under the New York Branch of the Case are provided by Blue Cross and Blue Shield of Greater New York (Blue Cross) under Contract or Payment Identification Number 119219-P.

The following benefits are provided under the National Branch of the Plan: Life Insurance, including coverage for dependent spouses and children, A.D. & D., In Hospital Medical and Surgical and Major Medical, all coverages are underwritten by Hancock under Policy Number 13515 (Off Job Disability Benefits are not provided under the National Branch of the Plan). Benefits provided under Section 41 of the Union Contract are funded under the general assets of the Plan.

2520. 102-3(r)

The fiscal records of the Plan are maintained on a calendar year basis, the year ending December 31st.

2520. 103-3(s)

Claims for the Welfare Benefits provided under the Plan may be presented as follows:

In the case of Life Insurance and A. D. & D., written by Hancock, by the

execution and filing in the Plan office, the prescribed Hancock Claim Forms which will be supplied upon request and which are available in the offices of many contributing employers. The Plan certifies claims to Hancock; upon payment of claims a Hancock check is transmitted to the contributing employer for delivery to the named beneficiary or the insured employee, as the case may be. In those instances where a named beneficiary or an insured employee engages the services of an attorney, the payment is sent to the attorney with an appropriate notice to the contributing employer. In claims for Off Job Disability Benefits under the Workmen's Compensation Law, the Plan sends New York State Form DB 450 and the prescribed Hancock claim form to the contributing employer. Claims for Medical, Surgical and Dental Benefits underwritten by GHI may be processed by the claimant executing and filing the prescribed GHI form with the Plan office; the Plan certifies the eligibility of the claimant to GHI; payments made by GHI are sent either directly to the claimant or to a physician who has accepted assignment. With respect to Blue Cross Hospitalization claims under the New York Branch of the Case, the Plan issues identification cards to the participants. The cards may be presented to any qualified Blue Cross hospital; no further action is required on the part of the participants. Claims for Hancock Health and Major Medical Benefits under the National Branch of the Plan are handled by the use of Hancock forms and processed under the procedure described above. Participants whose claims for benefits are denied will be supplied with an adequate notice in writing, setting forth the specific reasons for such denial in a manner calculated to be understood by the participant. Participants, whose claims have been denied, will be afforded a reasonable opportunity for a full and fair review by the Plan Administrator of the decision denying payment.

2520. 102-3(t)(2)

As participants under the New York Oil Heating Insurance Fund you are entitled to certain rights under ERISA which provides in relevant parts as follows:

Examine, without charge, at the Plan Administrator's office and at other specified locations, such as worksites and union halls, all plan documents, including insurance contracts, collective bargaining agreements and copies of all documents filed by the Plan with the U.S. Department of Labor, such as detailed annual reports and plan descriptions.

Obtain copies of all plan documents and other plan information upon written request to the Plan Administrator. The Administrator may make a reasonable charge for the copies.

Receive a summary of the Plan's annual financial report. The Plan Administrator is required by law to furnish each participant with a copy of this summary annual report.

In addition you have the following rights under ERISA:

No one, including your employer, your union, or any other person, may fire you or otherwise discriminate against you in any way to prevent you from obtaining a welfare benefit or exercising your rights under ERISA. If your claim for a welfare benefit is denied in whole or in part you must receive a written explanation of the reason for the denial. You have the right to have the plan review and reconsider your claim. Under ERISA, there are steps you can take to enforce the above rights. For instance, if you request materials from the Plan and do not receive them within 30 days, you may file suit in a federal court. In such a case, the court may require the Plan Administrator to provide the materials and pay you up to \$100 a day until you receive the materials, unless the materials were not sent because of reasons beyond the control of the Administrator. If you have a claim for benefits which is denied or ignored, in whole

(9)

or in part, you may file suit in a state or federal court. If it should happen that plan fiduciaries misuse the plan's money, or if you are discriminated against for asserting your rights, you may seek assistance from the U.S. Department of Labor, or you may file suit in a federal court. The court will decide who should pay court costs and legal fees. If you are successful the court may order the person you have sued to pay these court costs and fees. If you lose, the court may order you to pay these costs and fees, for example, if it finds your claim is frivolous. If you have any questions about your rights under ERISA, you should contact the nearest Area Office of the U.S. Labor-Management Services Administration, Department of Labor.

SUBPART D - PROVISIONS APPLICABLE TO BOTH REPORTING AND DISCLOSURE REQUIREMENTS;

SUBPART E - REPORTING REQUIREMENTS;

SUBPART F - DISCLOSURE REQUIREMENTS

SECTIONS NUMBERS:

2520. 104-5(c)

This Summary Plan Description has been filed within the time authorized (November 16, 1977) by this section of the Regulations.

2520. 104a-3(d)

This Summary Plan Description has been filed with the Secretary of Labor by mailing to SPD, Pension and Welfare Benefit Programs, U.S. Department of Labor, 200 Constitution Ave., N.W., Washington, D.C., 20216.

SUPPLEMENTAL INFORMATION NOT REQUIRED UNDER THE REGULATIONS.

Both NYOHA and the Insurance Fund have tax exempt status under determination letters issued by the Internal Revenue Service.

The Trustees of the Fund serve without compensation.

The financial records and accounts of the Fund are audited monthly by Elias Mintz, C.P.A., who also certifies the accuracy of the reports filed with the Treasury Department and the Department of Labor.

Participants who receive life insurance benefits should notify the Fund office of the death of a named beneficiary and should arrange to name a successor beneficiary. Changes of beneficiaries may be made at any time; forms for that purpose will be supplied upon request to the Fund office. The Fund office will assist any participant who, after termination of employment, wishes to convert from a group policy to an ordinary policy.

Edward J. Keeg
ADMINISTRATOR

See reverse side for Table of Contents.

SUMMARY PLAN DESCRIPTION OF
NEW YORK OIL HEATING INSURANCE FUND

TABLE OF CONTENTS

PAGE	
1	Introduction
2	Method of Presentation General Format Contents of Summary Plan Description
3	Information Regarding Membership IRS Identification Numbers
3, 4	Insurance Benefits
4	Name of Administrator Service of Process Names of Trustees
5	Union Contract Branches of Plan Eligibility
6	Loss of Benefits
7	Benefits and Insurance Fiscal Year
7, 8	Claims Procedure
9	ERISA Rights
10	Filing and Service
10, 11	Supplemental Information

Mr. BAUMAN. Our next witness is Mrs. Joseph W. Fehrer. Please proceed, Mrs. Fehrer.

STATEMENT OF MRS. JOSEPH W. FEHRER

Mrs. FEHRER. At this time I would have to be representing my own views, because I only received the information I am responding to yesterday. It came Saturday, and I was away on a coastal conference since Wednesday afternoon, I received the call you wanted me to come here on Wednesday, so it did not give me a whole lot of time to prepare.

Mr. BAUMAN. We apologize for the short notice, particularly in view of your being away, but we know you are active in any number of environmental causes, and we do appreciate your coming.

Mrs. FEHRER. I want to thank you for having a hearing. I did not have to travel to Washington for that reason. It is very considerate of my gasoline supply. I am Mrs. Fehrer, and I have been active for many years as a concerned citizen promoting a clean environment and raising environmental issues which I feel need to be raised.

I appreciate having been asked to comment on H.R. 1776, which would permit a legislative veto, granting Congress authority to review or veto regulations promulgated by the Federal agencies and supposedly expanding opportunities for public participation. It is not clear to me what prompted the introduction of this bill, and if you could enlighten me on that, I would appreciate it.

Mr. BAUMAN. I would respond by saying the reason 226 Members of the House have cosponsored this legislation probably grows out of the number of problems we have had, as we have heard today from many witnesses, in instances in which the Federal regulatory agencies have either overstepped their powers or have made decisions which seem to run contrary to the best interests of those regulated. It has expanded to such an extent that some review of the effects of the regulations, before they take effect, we felt was needed.

We have abdicated our lawmaking functions to the executive branch, and that is the thesis of the bill.

Mrs. FEHRER. I just heard Mr. Abercrombie point out some of the problems he has had. I wanted to get a little more background on it. In the short time I have to comment on this, I hope it is not indicative of the type of public participation you foresee in the implementation of the bill if it was enacted.

I think there is a need to involve the public more in governmental decisionmaking. Presumably we have elected representatives, but to reiterate what Mr. Abercrombie mentioned, sometimes it is the people with the time, the money, and the power, who can get to the elected representatives, rather than people who are suffering abuse when they are impacted by something that someone else wants for his profit.

One thing that I am concerned about with the bill is the language, the way it is written, it was very hard for me to understand. It is presumably amending another piece of legislation which I did not have, it is a lot easier to comply with the rules on how to fill out my income tax than it was to plow through that bill.

Mr. BAUMAN. That is really saying something.

Mrs. FEHRER. Yes; and this is no fun. I think that when you ask for public participation, the public should have something to comment on in language that they can understand, and for that I appreciate the succinct explanation you gave in your letter, and I think the public should be given the time to think about and to talk with others on the issues involved.

In other instances, where public participation is involved in a regulatory action, I am thinking primarily about EPA regulations, and this involvement in public participation in their 201 facility grant program and 208, and 303, which I have been very involved in. Whenever meetings are required, that entail distance of travel, I think it is almost incumbent on the agency to provide, or to help out a little bit with the cost of transportation and any overnight lodging that is involved, I feel that should also be necessary.

I think that in reviewing, in thinking about this particular legislation H.R. 1776, we have to involve the specialists that are involved, economists, scientists, and social workers.

We are not just looking at a certain agency, but we are looking at all of the agencies that of course have to have regulations in order to operate. But a lot of times you get the hue and cry from the public, I am not making as much money as I would like to make, or this is causing me a problem because I have these regulations I have to adhere to, but we do not often think about the reason why those regulations came into being, the abuses that those regulations were written to overcome.

Now, if something is wrong with the regulations, perhaps with the background that the agency which has promulgated them could give you plus the expertise that they had to rely on in order to write the regulations certainly ought to be included in the process that the bill seems to be concerned about.

I think the pros and cons of all the issues have to be involved, or have to be addressed, and the public, those people that are interested enough to be aware, and eager to participate shall be made privy to the information provided by the specialists, and be given the opportunity to get further information if necessary.

Now, as I understand, the public would be given a role in the decisionmaking. Now, am I correct in that, or is this left up to the Congress and the staff?

Mr. BAUMAN. One of the more important features of the legislation requires, actually requires amendments as you indicated in the Administrative Procedures Act, but would in fact require the agencies to give much more information to the general public. Prior to the promulgation of the rule, or a regulation, the public would have available to them the basis on which to make their comments known. They would know before the fact how this regulation might affect them.

Many times we find the hue and cry arises once the regulation becomes effective, and has the force of law, and then the difficulty of changing it is far greater. This bill, H.R. 1776, would definitely allow and require the agency to make that kind of information available. If a controversy develops over any part of this, prior to promulgation, the red flagging of it, they red flag the agency. The agency would then have to answer questions and make the infor-

mation available. There would be much greater public participation before rules actually become effective.

Mrs. FEHRER. I think that is very important. I feel that informed broad based public participation is one of the best ways to insure prompt effective decisionmaking, and to resolve conflicts.

Agencies such as EPA and NOAA, in its coastal zone management program are already involving citizens in resolving water quality or coastal zone issues, and I think sometimes concerned citizens can head off ill-conceived regulations, perhaps that ensue.

Public interest groups such as the League of Women Voters, Isaac Walton League, the Baltimore Environmental Center, to name a few, have been doing an exemplary job in publicizing issues, and informing the public about ways to get involved and have input.

I do not know if there would be another sort of legislative group. Of course the League of Women Voters is concerned with the broad gambit of legislation that involves social and environmental and legislative issues. I think this bill would require almost the involvement of some of those national groups that sort of are watching legislation that comes down the road, and to get the message out to its constituency to get involved. A lot of times it is through public interest forums, or meetings that people learn about these things, and learn how to interact with the system, so to speak. In regard to H.R. 1776, Congress would have to make a sincere and honest attempt to bring out all of the issues involved, and thereby affect the social and environmental and economic health of the Nation, and involve concerned groups.

Citizen participation is presently saving the Federal Government millions of dollars, our dollars, by stopping ill-conceived sewer facility projects, demanding good coastal zone management, or saving lives and property and asking for an accounting of so-called pork-barrel work projects.

These are items I am constantly involved with in my environmental work. Faith in our elected officials seems to be at an all-time low, and unless the public feels it is being heard, this lack of confidence will continue.

I am concerned that politics and special interest expediency and lack of concern for public health and welfare may override the Government.

Too often old boys are called on instead of the dissidents and the concerned and those who have to resort to the courts to resolve conflicts.

Many of the regulations we now have were promulgated as a result of abuses.

For example, industry's disregard for health and safety of employees and neighbors. One thing that Mr. Abercrombie mentioned, he mentioned the conflict between the Corps of Engineers and the Coast Guard. The Corps of Engineers as far as the dredging of the Wicomico River, has adopted a policy that they will not fill wetland, but as far as I understand, a local councilperson said he wanted to see filled in one of the instances, and was pushing that action. The corps has to be consistent and if they feel the wetlands are valuable and are having more value promoting the nourishment of our fisheries and the Chesapeake Bay and the sea, the

Coast Guard is supposed to protect wetlands. People are relying on this to happen, so we cannot allow expediency of getting boats with oil up to Salisbury. We have to begin to look at what is causing the river to silt in. Is it poor drainage practices of the streams that are not being perhaps managed properly by the Sewer Conservation Service, that they are not using very good management practices, that we have a similar problem with farmers in letting their topsoil go down the river into the channel, that is creating the necessity of have to dredge the river. I think if perhaps the local government had to be more responsible for finding a good dredge spoil site, that will not impact wetlands, and some of our valuable environmental areas, they would be perhaps a little more cautious. It would have impact on the people who are contributing to the degradation of the river, so those kinds of things I think have to be all spelled out.

Now, I know it is incumbent on the oil companies to supply oil to the people. Everyone will be screaming if they do not have a supply of oil when they are cold, but yet Government is a very intricate thing, so there are many checks and balances. We cannot let just one agency assume too much power. I think we have to begin to look at why certain actions are needed, before we just jump on the Corps of Engineers and say they are being very strict. I have been watching the implementation of the corps, of the regulations of the corps and I feel they are very, very fair. As far as the Coast Guard, I think it is questionable the amount of pollution control that they are involved in.

Well, I feel that this bill might be transferring the rulemaking power from agencies where we find experienced, working relationship with concerned citizens, constituents, and with precedent that has been ensuing through the years through to a congressional level.

Now, I understand an advisory committee on intergovernmental relations has been working and coming out with a record, in which I would like to examine in order to comment more effectively on this bill, but I have some questions now with more to do. Will Congress want another pay hike; will staffs have to be increased; will there be more fragmentation in the decisionmaking process; will more duplication occur?

Will yet another more powerful bureaucracy be established which will have to be trained to interface with citizens and to tackle important issues which is now out of their particular expertise?

Certain Congressmen are more interested in certain facets of Government, some are interested in the environment, some are interested as you are, in rules, some are interested in social programs.

Now, if those Congressmen have to be involved in everything, it is almost mind boggling the amount of work they would have to do and the amount of staff they would have to have in order to render an intelligent decision on various types of legislation that might be of the hue that might be coming before you.

I feel that maybe we should be looking at a way of balancing the increase of power that Congress would have by perhaps decreasing the term of office that they would serve. I can see that Congress

can be abused. You can watch television and see where certain Congressmen or Senators are being censored for one thing or another. This can raise a lot of important questions in my mind as to the money that the Congressmen are getting in contributions, the lobbying effort that is being made. Citizens like me cannot get to Washington, but you do hear paid lobbyists all the time. They are the people you hear of all the time. They would be harboring around you cases where you would be reviewing legislation that could be detrimental to your interests. This worries me.

Our Constitution has seen this country through good times and bad. I think our present three branches of Government provide good systems of checks and balances. I feel that while we do have a burgeoning bureaucracy, and there are a lot of programs that they have that definitely should be cut, but at a meeting I was attending over the weekend, we were talking about the Federal flood insurance program, how they are going in time after time, building homes for people only to have them washed out again.

That is the second most expensive bill that the Government has to pay after social security; flood insurance. Yet the person has a right after his home is washed away to get it back.

I think we have to have some sort of monitoring of what power the Government has, and some sort of monitoring of the legislation establishing the Federal flood insurance program is in order to keep it under control. When a person's property is washed away, perhaps his home or car, whatever, one time would be enough to see it replaced. I cannot go for seeing it built again and again on the same sight to have it constantly destroyed by floods that are being increasingly caused by poor land use practices in this country. Yet if you mention land use people get very upset and very excited, but I think we are going to have to have some sort of land use program, or else we are going to have to cut back on subsidizing practices that encourages better land use if we do not get a program that will direct people from using our resources to their advantage, instead of to the public disadvantage, as the flood insurance program right now is doing. With those comments, I am going to conclude my remarks unless you have any questions.

Mr. BAUMAN. I take it that in general you have some concern about advances that may have been made in the area of environmental restrictions, or preservation that might be undone by a congressional veto provision.

Mrs. FEHRER. Yes; I am thinking particularly of the snail darter case. I think our legislative veto—this is on the Tellico Dam. Of course, the snail darter is an endangered species, and the law says, up until that point, that because this was an endangered species that was involved, the dam would not be allowed to continue to be built. It had already been almost finished, as I understand. I have never been to the site, but yet there were so many other issues on that whole project that would never be solved, the loss of valuable farmland, the heritage, the historical heritage, where people have had to leave the valley or be inundated by the dam.

We are not getting more farmland in this country. Our topsoil is washing away, but yet a big utility company in this case had gotten to Senator Baker and said: I want this dam. Senator Baker, he is a big boy down there; he decided he will build a dam for his constitu-

ency, but the people were trying to find anything to pin their hopes on to try to save their homes. They were eventually all bought out and relocated, but some scientists came down there and found the little snail darter, and then it was a big thing about the snail darter that stopped the dam. The people there did not want a dam; the Indians I understand are filing suit and challenging the thing again. If those issues would have all been resolved before the legislation would have been passed, then the dam could be built. We would have saved an awful lot of money, and we would not have delayed the project and displaced so many people involved in the case. It seems sometimes the powerful and the utility companies and the people with money seem to override when it comes to getting something through the legislature.

I think we will have to see a stop to it, and this is what worries me about the impact that this type of legislation could have on the environment against what has been done in regard to the history of the country. Those things are written in law now because of the abuses that the environment and the Nation suffers.

We desperately need more regulation to govern toxic chemical disposal, or perhaps we need to look at the ones we have enforced, and to get them enforced, maybe we will need more regulations. It is a big issue, but I think it is something we cannot overlook, and it is something that does bother me.

Mr. BAUMAN. The committee thanks you very much for taking the time to come and to give us your views.

Mrs. FEHRER. I will type this up and mail you a copy.

Mr. BAUMAN. You need not do that, because our reporter will do it.

Mrs. FEHRER. Thank you.

Mr. BAUMAN. Our next witness is Mr. E. Stanton Atkins of E. S. Atkins & Co.

STATEMENT OF WILLIAM J. BOSTIAN, E. S. ATKINS & CO.

Mr. BOSTIAN. Thank you, Mr. Chairman. My name is William J. Bostian, and I am here on behalf of Mr. Atkins of the E. S. Atkins & Co.

It is a little bit unfortunate that Mr. Atkins could not be here, because he is a great deal more familiar with the building materials business, the building business, and the timberland business, but I can give us some idea of some of the problems we have had with Federal regulations, and what we think about the legislative veto concept.

The major problems that we have with Federal regulations come in the form of increased recordkeeping, dealing with what we think is the unintended consequences. Those are the two main ones, particularly in something like the Social Security Administration, or the ERISA and the IRS; the regulations are sometimes incomprehensible.

We basically support the concept behind the legislative veto. The idea to have the Federal agencies more accountable is something we think is very important. We believe a lot of times a regulation will come through that does not make sense, or does not really consider the increased burden of recordkeeping. For instance, 10 years ago or so, the Social Security Administration made the deci-

sion to accelerate the transfer of funds from the employers to the Treasury, so most employers rather than filing them quarterly, have to file them every week.

This puts a very large burden on particularly someone like us who have nine branches throughout the Eastern Shore.

We have to compile all of these numbers, put them together, make a report, and pay our money. We still have to do the quarterly report, and we still have to do the annual report.

If you start thinking about each different set of recordkeeping, you end up with a lot of time spent keeping records that would not be ordinarily done in the course of business. I am not exactly sure how one defines excessive regulation, but it appears to me anyway that possibly doing something that you would not normally do in the course of a properly run business could be termed to be excessive. That might be a little bit narrow, but that is something in the order of it.

I talked to the bookkeepers, people who do the land use planning for us, and we spend a great deal of time dealing with both Federal, State, and municipal regulations.

Whether it is the 20 percent that I have here, I believe this is the figure of the National Association of Realtors. It seems a little bit high to me, 20 percent of our cost of construction is due to Federal or State regulations. Maybe it is a little high, but it is certainly not in the order of magnitude, magnitude that we sometimes think of. Our position on the legislative veto is that it is a little bit besides the point. It would be fine for making Federal agencies accountable in the future.

There have been a great number of Federal regulations since 1970. I have forgotten how many, how many more since 1970 than before, so the legislative veto would be welcome. It might serve to cut down on the effects of the regulations.

Mr. BAUMAN. Specifically, it will allow the Congress to go back and review existing regulations and change or make suggestions to those regulations.

Mr. BOSTIAN. I would be much happier to see that that is in the bill. I think that is where the focus should be.

Maybe we are living too much in the present, but we have a great deal of trouble with it, with some of the regulations. As Mrs. Fehrer said, it is difficult to get some of these things changed.

Mr. BAUMAN. You mentioned the IRS. I asked one of our earlier witnesses to give us some examples of abuse. That is an agency about which I have received a great deal of complaints from individual taxpayers. Could you elaborate on that?

Mr. BOSTIAN. This is why I would like to have Mr. Atkins here. He is much more knowledgeable about the specific problems we have with agencies like the IRS.

I, for one, cannot really tell you. I could not find out. This is on short notice that I knew for sure I was going to come here.

Mr. BAUMAN. We thank you very much for your statement, it is very extensive.

In fact, is there any logical reason why there are 52 separate reports of payments that have to be made, other than to assure that the Government gets its hands on the money more quickly?

Mr. BOSTIAN. I think that is the reason. The decision was made without regard to the increased costs of society as far as bookkeepers and spending more time on it, I suspect. It is the kind of decision that should be avoided in the future. They should be able to be forced to take these things into account, and possibly making them more accountable will help in the future. We do have problems, and I am glad to hear there are more provisions in this law that would provide for facilitation.

Mr. BAUMAN. We will enter into the record your entire statement, and if you would like to add anything further, fine. I certainly appreciate the statement you have given us.

Mr. BOSTIAN. Thank you.

[The prepared statement by Mr. Bostian follows:]

PREPARED STATEMENT

E.S. ADKINS & COMPANY

We at E.S. Adkins and Company are pleased to have the opportunity to appear before the House Subcommittee on Rules to discuss our views on the concept of a Legislative Veto of federal agency rules and regulations in view of our experience of having to deal with those rules and regulations on a day-in, day-out basis.

There is no question but that the Federal and State governments have a huge impact on just about every aspect of business life. It is our position that many, if not most, of these intrusions are entirely legitimate, theoretically. Income taxes, Social Security taxes, Unemployment taxes, Wage and Hour Laws, ERISA requirements, Interstate Land Sales Laws, Credit Laws, Federal Election reform laws, Safety in the Work Place laws and Environmental Protection laws are just some of many examples of well-intentioned efforts by the Federal and State governments to protect either the specific workers of specific employers or all of us as the general public.

However, there are many areas for improvement in practice and, in the current anti-government climate, the apparent inefficiencies of implementation or unintended consequences, have come under increasing attack at least for four broad reasons. First, the number of laws and their associated rules, regulations and vagaries have increased enormously since 1970. The combined burden of these requirements have pushed those of us forced to comply with them to the point of frustration. We now must have lawyers and accountants who are specialists in just about every field the Federal and State governments have regulated or we run the risk of severe penalties and possible criminal responsibility.

Secondly, and not at all unrelated, is the comparative importance of governmentally required inefficiencies given the current financial circumstances. As the relative productivity of the work force decreases, and inflation and the cost of debt

accelerate, we in business are looking for ways of operating more efficiently in order to temper their effects. We can cut the fat from our operations, but we can do nothing about the inefficiencies foisted upon us by the governments. Even in good times inefficiencies are undesirable, but we are able to live more easily with them. It is no surprise, then, that in hard times, when we do all we can to streamline our operations to make it worth our time operating, the waste of time and effort we can do nothing about cause us to raise a hue and cry for changes.

Thirdly, everyone has been affected by the acceleration of inflation from the late sixties to now, and we are all looking for any possible means of eliminating it. Business people see the apparent wasted time and effort and, realizing that every other business is afflicted with it, speak out against the cumulative effects the waste must have on the inflation rate. The general public, looking for any potential remedy, espouse it and bring it to the attention of their elected officials who, quite properly, want to investigate what is actually happening.

Fourthly, and partly tongue-in-cheek, federally elected officials are learning first-hand what it is like to be regulated be a Federal Agency (F.E.C.) and maybe that has made them more responsive as well.

Under these circumstances, it is not surprising that federal officials are responding more to the complaints of their constituents concerning the rules and regulations of the Federal agencies.

SPECIFIC UNDERLYING CAUSES

The underlying causes of the widespread rhetoric are many, but we would like to address three that we feel are particularly troublesome. The first is the combined burden of keeping records, sometimes even different records of the same transactions for different agencies. The second is that so often the original intentions of the legislation or the regulators are subverted by what we have chosen to call unforeseen and unintended consequences, and the third is the extraordinary complexity of many regulatory schemes.

With the little time that we have had to prepare for this presentation, we have not been able to assess what the overall burden of "excessive" regulation actually is on us. However, Daniel I. Hovde, the President of the National Association of Realtors has stated that fully 20% of the cost of construction is due to such regulations. That figure seems a little high to us, but we do know that we spend a great deal of our time keeping records, and pondering vague regulations that we would not otherwise do in the normal course of conducting our business.

We can, however, point out particularly gross examples of our three underlying causes.

Social Security taxes (F.I.C.A.) are an example of both the record keeping burden and some of the unintended consequences of the Federal decision to accelerate the treasury's receipt of the Social Security taxes. Some years ago, the decision was made to have most employers transfer both the employee and employer F.I.C.A. shares to the Treasury on a weekly basis, rather than a quarterly or monthly basis.

The Treasury no doubt received more money as a result of obtaining the F.I.C.A. taxes more quickly and, consequently, did not have to raise those taxes for a period of time. But we wonder whether that decision considered the effects of the increased burden of keeping and compiling the records. As a result of this decision, rather than just filing four quarterly reports and one yearly report based on the F.I.C.A. taxes assessed on each employee, and the employers matching amount, we have to file 52 separate weekly reports in addition. Furthermore, not only are there 52 additional reports required, but there are also that many more chances for errors in entering the figures. Any error will lead to incorrect totals and far more time is required when a bookkeeper must sift through 52 reports than if he or she only has to examine 4 reports to find an error. When there is an error, it is not unusual for several people to spend a day looking for it, particularly if the employer has a branch yard involved.

In light of the amount of time we alone spend keeping records concerning F.I.C.A. taxes, we can not help but wonder whether the decision to accelerate the transfer of the money to the Treasury was properly evaluated in light of the actual cost to society in increased overhead - inflation.

Another example of wasted time and effort due to record keeping and compiling is the reporting that is required under the pension laws (ERISA). A great deal of information is requested and we question whether all of the information asked for is used. Even if it is used, is it desirable to ask all employers to spend an extra day or more answering questions as to how many employees are under the age of 25, over the age of 50, and so on, and requiring that the figures be absolutely correct. We do not see how some employers could possibly do this, but since we are able to, we do, even though this one set of questions may require an entire day or two to answer correctly.

Examples of incomprehensible federal regulatory schemes abound, but two of the most difficult that we must deal with are the Internal Revenue Code and the regulations under the various federal credit laws. Meeting the requirements of the I.R.C. as interpreted by its agents, who, as everyone knows, can not be trusted to be correct in their analyses, is probably the largest single drain on our time outside of our regular business chores.

The Credit regulations are little better. The regulations provide forms for credit application and billing statements and then turn around and say you can not rely on them to be correct.

Something must be done to provide more guidance in both these areas.

We think that a particularly appropriate example of increased record keeping, incomprehensibility and unintended consequences is the Federal Election Campaign Act, administered by the F.E.C., whose powers were broadly amended in 1974 after the problems of Watergate. The main objectives of the election reform laws were: to limit the

special interest money in federal elections; to limit the advantages enjoyed by personally wealthy candidates; to promote public participation; and to encourage outside challenges to incumbents.

The effects of the law have been just the opposite in almost every case, partly because of the action of the Supreme Court in Buckley v. Valeo. At the same time, the law has increased the amount of record keeping required of a campaign. Furthermore, the time between the beginning of an audit and its end has been prolonged so that some offenders are already out of office by the time the audit of their campaign is finished.

What you legislators are discovering is that you need a lawyer and an accountant on your staff, they must be thoroughly versed in the intricacies of the law and they are very expensive. We have heard that fully 1/5 of a candidate's campaign budget can be spent in attempting to comply with the law. We hope that you will stop, assess the increased burden on running your campaigns and then think what businesses must go through with all the regulations we must deal with.

LEGISLATIVE VETO

Having identified three of the underlying causes of the current complaints aimed at federal regulatory intrusion, we would like to comment on some of the suggested responses to "what is perceived as excessive federal regulations which go beyond the intent of Congress....".

The concept of the Legislative Veto is a good one if used properly. It would serve as a vehicle to force regulatory agencies to be more accountable prospectively. They would have to answer questions such as, do we really need the information that the increased record keeping will provide, or what other consequences may occur? Obviously, the agencies are accountable to the Congress in the broad sense that Congress could eliminate them, but they are accountable only to the Judiciary for specific actions. Then, their decisions are changed only if those actions

are arbitrary and without substantial evidence in their support, or, outside the scope of their powers, or, if they have somehow in considering or failing to consider certain evidence, abused their discretion. And, of course, their decisions are reversed only if the complaining party has enough money to challenge the agency in court, after having gone through the appeal process within the Agency. Senator Bumpers' recent suggestion that the burden of proof be put on the Agency acknowledges that there is a problem with accountability, but does not really provide a substantially better means attaining it.

If there were a Legislative Veto and it were used as it is now intended, the agencies would be on notice that their carefully designed regulatory schemes would be disrupted by the Congress if it so chose, presumably for some valid reason.

However, as just suggested, we once again have all sorts of potential unintended consequences. The political horsetrading that accompanies so much of what is done in Congress will surely hold certain quite proper regulatory schemes hostage. There is the danger that certain key parts of a regulatory scheme could be eliminated to change its entire approach to one not intended by the agency. Furthermore, the special access of special interests would leave those with no access no recourse.

These are just a few of the potential unintended consequences. The crucial component to the success of the Legislative Veto is whether it would be used properly by the Congress to make sure that the increased record keeping is truly justified (and not just to satisfy a bureaucrat's curiosity), that the agency has thought out the potential consequences of their regulations and eliminated, as best they could, those that are unintended, subversive or vague.

Though the concept of a Legislative Veto is possibly a good one for future regulations, what really is necessary is a means of reassessing regulations once there has been enough experience on the part of those being regulated and the agency itself to know what is wrong. Experience is often a very instructive process.

A means of making the agencies more responsive after-the-fact is what is needed. This might possibly take the form of hearings a year after the regulation goes into effect, or more solicitation of suggested procedures from those being regulated. It might even involve some sort of institutionalized Congressional supervision.

We believe that the efficiency of the agencies must be increased and the only way for that to be done is to evaluate methods and procedures in light of new experience.

We also believe that society should be able to demand demonstrable results from the agencies. When there are no such results, the agencies must be cut or eliminated without regard to the preservation of the jobs of the bureaucrats.

Respectfully submitted,

William J. Bortoni

E.S. ADKINS & COMPANY

Mr. BAUMAN. Our next witness is Mr. Mike Bloxham of the Maryland National Bank.

Please proceed, Mr. Bloxham.

STATEMENT OF MIKE BLOXHAM, MARYLAND NATIONAL BANK

Mr. BLOXHAM. I thank all of you for coming here to Salisbury. We appreciate your presence here. I have a very brief statement.

Mr. BAUMAN. You are only the 19th witness today.

Mr. BLOXHAM. I know there has been a great deal of discussion on this subject today, and I wanted to say it is my understanding that the intent of such legislation is to permit a review by Congress of the rules and regulations promulgated by Federal agencies. I am pleased to urge support of such legislation.

As an officer of the largest bank in Maryland, I am on the receiving end of the effects of a tremendous number of Federal mandated rules and regulations.

I do not deal with the agencies directly, but a major concern of all of us is that because of the conflagration of conflicting rules, and the changes to those rules, we end up not complying with the law, or even worse, with the spirit of the law.

Another consequence is that our customers are seriously inconvenienced with effects of the rules and regulations. Truth in lending is one of the examples of confusing rules.

Even today after so many years after truth in lending came into our lives, the rules are being changed.

We have to have at our disposal large staffs of lawyers who interpret the current regulations and rewrite our documentation in order to comply.

No longer can you simply say I promise to give you \$20,000 and return it in equal sums, at a rate of 11 percent. We cannot even promise to lend it to them, all we can say, we agree to lend you \$20,000, you agree to borrow it, and pay us back and then sit around for 3 days and see if anything comes up that changes our minds.

Frankly, it has been my experience that rarely has anything come up. If a guy needs \$20,000 to buy a house, he needs it. Another thing is the legislation, is the so-called plain language bills.

The intent here is very clear, and I intend to support it.

The legal intent is to make a legal contract between the bank and its customers understandable, which is fine, because if this comes about, I am hopeful that the contract will be more understandable, but let us not take 7 years, as in the case of truth in lending, to set up the regulations and the changes of those regulations.

At present, most of the regulations passed by the U.S. Congress contains words such as rules and regulations to be promulgated by such and such an agency.

My suggestion is that when Congress enacts legislation, it should put in the bill the precise rules, in the piece of legislation, the precise rules to be guided by.

I am told under the leadership of the Maryland Economics Affairs Committee for the past several years has not favorably passed

legislation opposed by the Governor's staff, which actually did not have the rules and regulations spelled out in the bill.

Maybe a simplistic solution, which I suppose will create some problems for the legislators, should be looked to, but we are concerned because of the differing goals in various legislative packages, but after a piece of legislation is passed, there will be no doubt, no confusion, as it is today, we should have that kind of thing.

There will be no delay or waiting for the rules, or more importantly, it changes through those rules.

Since the Maryland General Assembly has taken steps to put the rules and regulations where they belong, I hope the U.S. Congress will follow suit.

In any event, some deal is important, and I hope passage for the next session of Congress will be seen.

Thank you.

Mr. BAUMAN. Thank you for a very precise statement.

Let me ask you this. We heard testimony earlier from an official of the Peninsula Bank, which is somewhat smaller than the Maryland National Bank.

Quite obviously, the Maryland National Bank could handle the problems of Federal regulation somewhat more easily, despite the fact it will cost a great deal more money. Is that a proper characterization of the size of the problem?

Mr. BLOXHAM. I think so. I think the size tends to compound the problem somewhat, because instead of—I do not know how many branches they have, but we have 145, which means we have 145 branch managers all throughout the State. With a piece of paper likely to say the wrong things about that piece of paper, and it is complicated for our legal staff to explain it to our senior managers, and for our senior management to explain it down the line.

This is what I was referring to when I say we are afraid that we are not in compliance with the spirit of the law as well as the intent of the law.

With my managers we meet on a weekly basis, at least part of that meeting is taken up discussing some regulation, that is unclear to them or to us.

There are a lot of other things we could talk about and we do talk about.

Mr. BAUMAN. How extensive is the presence of Federal agencies in enforcement of these regulations?

Obviously, we have bank examiners, we have the FDIC.

You are talking about the truth in lending law.

Have you found the agencies to be rather evasive in their presence, so far as making sure you abide by them?

Mr. BLOXHAM. The only experience I have had is when we had a visit from the National Bank Examiners who came to our regional operations center, and were reviewing various documents. We have these on file, going back several years, and they were pointing out in a friendly way at that time, that this was a pre-audit examination. It seems as though practically every truth in lending document that we sent in had some kind of technical error in it.

How badly they will come down on us for that I am not sure.

Certainly we were complying with the spirit of the law in our case, technically we were in violation, we were in substantial violation in terms of the numbers of documents incorrectly prepared.

Mr. BAUMAN. And you may face some penalty because of it?

Mr. BLOXHAM. I do not think it was that serious. It was not as though we were seriously understating or we were overcharging customers. We are talking about technical violations that should have been on the bottom of the page instead of on the top of the page. I think we disclosed properly what we were supposed to disclose, but I think the examiners came from the Federal Reserve Bank.

Mr. BAUMAN. The contention was made to us that the average customer neither needs, nor apparently knows about, nor cares once he is told about, many of the regulations now in effect that are supposed to protect him. Is that an improper characterization?

Mr. BLOXHAM. That is absolutely true. Most of the customers are impatient with our explanations of the laws designed to protect them.

Mr. BAUMAN. Are you familiar with any of the pension funds that have been closed down rather than complied with in regard to ERISA?

Mr. BLOXHAM. I am aware it is taking place.

Mr. BAUMAN. Of course, there have been 3,000-plus pension plans terminated because of it, so we are concerned.

Mr. BLOXHAM. An interesting comment on this matter concerning the rules and regulations set down by the Farmers Home Loan Administration. They use the example of a farmer with seven golden Cadillacs on the program "60 Minutes," a hypothetical example. Under the rules and regulations of Farmers Home Administration, they could lend to that individual to support his lifestyle. There is a rule and regulation there that is not working to the benefit of those people in need.

Mr. BAUMAN. I was not aware of the criterias of the FMHA. Thank you for coming. We certainly appreciate it.

Mr. BLOXHAM. Thank you.

Mr. BAUMAN. Our last but not least witness, Mr. Ken Endres, representing Hess Apparel.

STATEMENT OF KEN ENDRES OF HESS APPAREL

Mr. ENDRES. Thank you, Mr. Chairman.

I am glad I came a few minutes early to listen to the testimony. I realize I do not have anything new for you to hear, I am afraid.

Mr. BAUMAN. No; but a different perspective.

Mr. ENDRES. Thank you.

Being the son of an executive in the meatpacking industry, having started my working career in the auditing and accounting department of a nationally known milk and ice cream manufacturer for 8 years, and then spending 14 years in the retail field in various controller and operational positions, I have had a wide range of experiences with many Government agency regulations. I do not purport to be an expert of any sort as to these agencies effectiveness, necessity, rationale, or dedication. I have simply tried to comply with all orders and dictates to the best of my ability,

only questioning in my own mind the rationale of many of these changes. Questions such as:

Who wanted the changes or regulations?

Who benefited from the regulations?

Who monitored the regulations to make sure each accomplished the specific purpose intended?

Has any regulatory body considered the fact that by attempting to compensate for an oppressed or unequal problem for a minority group, their corrective action or regulation may now oppress a vast majority group?

A sample of this type of regulation can be found in the Consumer Protection Agency rules and regulations of the past several years. The attempt to restrict certain information being asked for on the credit application has caused many companies to further tighten their credit standards since they are unable to obtain enough information to pass on the credit worthiness on everyone. The recent regulations on collection activity for bad accounts has only helped the delinquent customer, but losses suffered by the businessman must be passed on to the good customers who do in fact pay full price and on a timely basis.

The Internal Revenue Service is in the habit of making policies and regulations, as well as interpretations of the tax laws. Yet each week, I read of tax courts reversing some of these interpretations at a great cost to the taxpayer who is being pursued by IRS.

All regulations are not bad or unnecessary but due to human intervention and—often times—overexuberance, some are bad for this country. The OSHA regulations have gained a lot of newspaper commentary during the last year. In an effort to protect human life and safety, they have penalized businesses like retailing—where this problem had never been serious—to protect construction workers, coal miners, and steel workers. The recordkeeping requirements have added an annual cost to my company of approximately \$3,000 in additional clerical help. What have my personnel accomplished in the way of increased safety for their job performance? Nothing as of this time, because we have never had a review of Federal regulations and agency rules by our elected representatives is most unnecessary. However, the method and timing of the review I leave up to you worthy gentlemen to decide. The possibility of reviewing regulations before they are allowed to be implemented is an alternative, although I realize this is not pertinent to the bill, H.R. 1776 now being discussed.

I am not here to attack any specific regulation or agency. I simply want to express myself as favoring an added part of our "checks and balances" system of government. Congress should be the lawmaker; and regulatory agencies should be responsible and accountable to this worthy body when establishing rules and regulations that eventually gain the same status as the law.

Mr. BAUMAN. You mentioned a piece of legislation. The one involving the collection of delinquent accounts.

I recall this was defeated once and then passed on the second time around, and it is now law.

Have regulations been issued pursuant to that?

Mr. ENDRES. I do not know if the regulations concerning the bill you are talking about have been issued.

Regulations were implemented about 8 months ago that have been very extensively gone into by the telephone company with commercials in an effort to publicize what they are.

Mr. BAUMAN. What you are talking about is the bill that was passed with regard to creditors calling after certain hours?

Mr. ENDRES. Yes.

Mr. BAUMAN. And restricted them from certain means of contact, such as they could not call to their place of employment.

Mr. ENDRES. Yes; our attorneys have told us this is the law.

Mr. BAUMAN. Have you found your losses have increased since that law?

Mr. ENDRES. Yes, we have, because people have been told their rights and the bad debt person, the person notorious for not paying his bills is the first one to scream harassment on the telephone to you when you make the second call in a month's time asking for payment.

The honorable customer we have never had a problem with, one phone call and an explanation is given, and we are more than satisfied to wait, and generally received payments as promised.

The bad customer continues to get worse, and now feels that he has the law on his side.

They know that you have a limit to harassment per se. They flaunt the whole point of an honorable debt.

I think the law in my opinion was probably passed for a specific reason that certain unethical collectors were using very unethical methods, and frightening the poor, uneducated, primarily blacks, I would guess.

I have read papers and saw "60 Minutes" like everybody else, and some practices from a few agencies around the country were certainly unethical.

I would say part of the law may have been unnecessary. I just wonder about the teeth of it.

My point is to restrict a few unethical people you put such a burden on the ethical businesses, it becomes almost prohibitive to function.

I am in charge of the credit problems at our store, and to be honest with you, our first opinion, when we got the legislation was let us stop all credit, let us drop charge accounts. It has become so prohibitive to try to keep charge accounts open. For instance on a credit application you cannot ask a person if he or she is married, you cannot ask their husband's names, yet turn around under the present legislation and you must give that customer the option of having both she and her husband's name, I am saying she, because we are dealing 90 percent with women customers, so we have had to send notice to every woman to give the option to adding her husband's name to the charge account, yet we were not allowed to ask his name, therefore we could not check his creditability, but now we have to give him a right to become a member of the charge account.

Mr. BAUMAN. And you cannot check his credit?

Mr. ENDRES. No; once the account is opened, he has the right to come on, in my understanding of it, once the account is open in his wife's name, being that they are married, he has a right to attach his name onto the account.

Mr. BAUMAN. So you have one set of Federal regulations dealing with specific discrimination, coming in conflict with another dealing with creditability.

Mr. ENDRES. Right. It is a fact that we must retain a full time lawyer and a full time accountant and we still do not keep up with all of the regulations.

Mr. BAUMAN. I appreciate your statement if only for that one example. Your testimony is a classic and one of several we have heard today.

Mr. ENDRES. Being an all women's store, it has been funny, because the legislation has been geared to the restriction of women, and I have gotten several questionnaires from various Washington groups when this legislation was being considered, it was funny to fill it out, did I restrict women's charge accounts, that I had to keep answering that question, but I do not, that is my business. Most of the legislation really was detrimental to us.

Mr. BAUMAN. In spite of the fact you were a firm that consistently, and for your very existence gave credit to women.

Mr. ENDRES. We tried to get all of the women to come into the store to open charge accounts. We loved it.

Mr. BAUMAN. Thank you very much.

Mr. ENDRES. Thank you.

Mr. BAUMAN. Are there any other matters to be entered into the record?

We stand adjourned.

[Whereupon the subcommittee was adjourned at 4:30 p.m.]

