

BOSTON COLLEGE INDUSTRIAL AND COMMERCIAL LAW REVIEW

VOLUME XIII

JUNE 1972

NUMBER 6

ECONOMIC CONTROL REGULATIONS: A DESCRIPTIVE COMMENTARY

EDWARD R. LEV*

Laws are like cobwebs, someone once said. If a trifling and powerless thing falls into them, they hold it fast; but let it be something weightier, and it breaks through. There is enough truth in that to give a practitioner pause. The purpose of this article, nevertheless, is not to complain about the linear distance between the announced purpose of legislation and the manner in which it is applied, nor to engage in aimless detours about the nature of law. Instead, it is to make some effort to put the legislation and the regulations into readable prose with such comments as fellow practitioners might find useful.

The regulations are detailed and complex. No attempt will be made to track them into their gullies and crevices. The reader is cautioned that he must parse them carefully to advise on a particular problem. The draftsmanship in many instances is puzzling and obscure which perhaps can be attributed to their extensive coverage and the haste of their preparation. The Government has conceded that their effectiveness will depend on voluntary compliance. The presumption is that most lawyers and accountants will honor their duty to persuade clients to obey the law by simply telling them what it is. But once across the ethical bridge, there are many available routes through the forest. The purpose of this article is to illuminate a few of the road signs.

Apologies are submitted in advance for errors which result from oversimplification, deliberate omission, inaccurate paraphrasing, or changes in the law after submission for publication. Moreover, there is no way to tell at this stage which regulations the government will choose to enforce. It would be naive to assume that enforcement will be evenhanded and imprudent to think that the regulations will not change. Their underlying purpose is to cool off the inflationary furnace.

* LL.B. University of Cincinnati, 1955; LL.M. Northwestern University, 1956; Member of the Boston law firm of Sullivan & Worcester.

The primary targets of regulation are the giant companies and unions whose wage and price decisions dominate the economy, although such decisions are concededly less a function of regulation than of political negotiation. The smaller companies and employee units were included either because of their collective impact or perhaps to impress everyone into the war against inflation.

Inasmuch as a lawyer must have a general yet thorough awareness of the new economic control scheme, this article will focus on the congressional legislation, executive orders and administrative regulations which have been promulgated as the framework of this scheme. Particular attention will be accorded to those regulations covering wages and salaries, prices, rents, and dividends and interest. Further, the reporting rules will be explained and analyzed. Finally, the article will conclude with a discussion and an analysis of the judicial decisions which have upheld the legality of the Economic Stabilization Act of 1970.

I. THE LEGISLATION

On August 15, 1970, Congress granted the President authority to stabilize the economy.¹ A year later the President did so by issuing Executive Order No. 11615,² which set in motion Phase I of his stabilization program. Its purpose was to freeze the economy, or at least chill it, for ninety days. The Order covered "prices, rents, wages and salaries" and prohibited increases in those categories beyond the levels reached in the thirty-day period preceding the date of the Order. It excluded raw agricultural products from regulation and made no mention of interest rates or dividends.³

The Order created the Cost of Living Council and delegated to it all

¹ Economic Stabilization Act of 1970, P.L. 91-379, 84 Stat. 799 (Aug. 15, 1970). The Act has been amended by the Economic Stabilization Act Amendments of 1971, P.L. 92-210, 85 Stat. 743 (Dec. 22, 1971). The swift and almost daily changes in the regulations require the use of secondary sources for citation purposes. The Commerce Clearing House publications, *Economic Controls (EC)* and *Economic Controls—Stabilization Program Guidelines (SPG)*, have been most helpful. Cost of Living Council (CLC) regulations appear in Chapter I of Title 6 of the Code of Federal Regulations (1972) and SPG § 3511 et seq.; Pay Board regulations (PB) in Chapter II and SPG § 3701 et seq.; regulations of the Price Commission (PC) in Chapter III and SPG § 3901 et seq.; and Internal Revenue Service regulations in Chapter IV and SPG § 4201 et seq.

² Exec. Order No. 11615, 3 C.F.R. 199 (1971); EC § 8005. The constitutional validity of the Order was upheld in *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737, EC § 9995 at 9865 (D.D.C. 1971), despite the sparseness of standards provided to guide the President in the use of the authority conferred. The court relied on an "implicit" standard of "broad fairness," and a legislative admonition to avoid "gross inequities." *Id.* at 9876-77.

³ The 1971 Amendments, § 203, authorize the President to regulate interest rates and dividends. However, Exec. Order No. 11627, 3 C.F.R. 223 (1971), EC § 8010 subjects them only to voluntary restraints.

ECONOMIC CONTROL REGULATIONS

the powers which the Act had given to the President.⁴ The Order also provided that anyone who willfully violated it, or any of the regulations issued under its authority, would be fined up to \$5,000 for each violation,⁵ and would be subject to appropriate injunctive relief.⁶

Phase II was born on November 14, 1971. It was conceived by Executive Order No. 11627.⁷ This Order created a Pay Board made up of fifteen members, five each from the general public, business and organized labor,⁸ and a Price Commission composed of seven public members.⁹ The Order was subsequently confirmed and refined by Executive Order No. 11640,¹⁰ which was issued on December 22, 1971,

⁴ Exec. Order No. 11615, 3 C.F.R. 199 (1971). The Cost of Living Council delegated administrative authority to the Director of the Office of Emergency Preparedness (OEP). CLC Order No. 1, 36 Fed. Reg. 16215 (1971). Further, the CLC delegated certain administrative functions to the Secretary of the Treasury. CLC Order No. 5, 36 Fed. Reg. 21798 (1971); SPG ¶ 4307. The Treasury Department then redelegated this authority to the Internal Revenue Service. Treasury Department Order No. 150-76, 36 Fed. Reg. 22188 (1971); SPG ¶ 4312. The CLC, while preserving its overall authority, assigned wage responsibility to the Pay Board and price responsibility to the Price Commission. CLC Order No. 3, 36 Fed. Reg. 20202 (1971), SPG ¶ 4303; CLC Order No. 4, 36 Fed. Reg. 20202 (1971), SPG ¶ 4305.

Exec. Order No. 11627, *supra* note 3, which inaugurated Phase II, created a number of committees: Committee on Interest and Dividends, Committee on the Health Services Industry and the Committee on State and Local Government Cooperation. 3 C.F.R. 219 (1971); EC ¶ 8010.05. Superimposed over the above framework are the various executive agencies with existing responsibility over regulated industries who must now coordinate with the economic control agencies. See SPG ¶¶ 4322-4531.

⁵ Section 204 of the 1970 Act provided that "[w]hoever willfully violates any order or regulation under this title shall be fined not more than \$5,000." The words "for each violation" made their first appearance in Exec. Order No. 11615, apparently without any statutory authority. 3 C.F.R. 201 (1971), EC ¶ 8005.40. The issue has been mooted by § 208 of the 1971 Amendments which provides for civil penalties (\$2,500) and criminal penalties (\$5,000) "for each violation." The Price Commission has construed this to mean that the penalty can be imposed "for each day" of violation. See SPG ¶ 971.15. In the unlikely event this construction can be sustained, it will be used more as a threat than anything else. Experience with executive administrative personnel indicates that the Government will be reasonable.

⁶ Act, § 209; SPG ¶ 4623.

⁷ Exec. Order No. 11627, 3 C.F.R. 222 (1971).

⁸ Exec. Order No. 11627, § 7(b), 3 C.F.R. 222 (1971), EC ¶ 8010. Most of the labor members have since departed. See statement by Mr. Meany on April 25, 1972, delivered before the Joint Economic Committee protesting the increase in food prices accompanied by the restriction in wages. AFL-CIO Release, May 20, 1972; EC ¶ 9940.05. The political furor over the failure to control food prices cannot be discounted in predicting changes in the regulations. It is significant, in an election year, that the exclusion from regulation of raw agricultural products originated not in Congress but in Exec. Order No. 11615 which initiated Phase I. 3 C.F.R. 199 (1971); EC ¶ 8005.10. It will not help much to regulate the supermarkets because they can increase prices based on allowable costs (subject to profit margin restrictions) which include higher farm prices. But an attempt to regulate food prices at their source will be difficult at best, politically impossible at worst.

⁹ Exec. Order No. 11627, § 8(a), 3 C.F.R. 222 (1971), EC ¶ 8010.45. The Order also established some specialized Committees (Interest and Dividends, Health Services Industry, State and Local Government Cooperation, Rent Advisory Board) and confirmed the existence of a Construction Industry Stabilization Committee.

¹⁰ 37 Fed. Reg. 1213 (1972); SPG ¶ 4702.

concurrently with the President's signing of the 1971 amendments to the original Act. The 1971 amendments evidenced congressional dissatisfaction with some of the myriad regulations which the newly-created agencies had issued during the ninety-day freeze to implement the President's original order of August 15, 1971. The amendments, effective as of December 21, 1971, not only struck down certain regulations but also introduced new provisions.¹¹

The original Act had failed to establish standards to guide the President in the exercise of his authority to stabilize the economy. The amended Act (which expires on April 30, 1973, except for actions then pending) purports to furnish the necessary standards, although it does so in such vague terms as to add little that the due process clause has not already impliedly furnished. Thus, among other things, the President was directed to be "fair and equitable," and to prevent "gross inequities." The standards called "for generally comparable sacrifices by business and labor as well as other segments of the economy."¹² Of more practical significance, the amendments (a) prohibited the President from reducing wages and benefits which had been scheduled to go into effect before or after November 13, 1971, under an employment contract executed, or pay practice established, prior to August 15, 1971,¹³ subject only to a finding that the retroactive payments would not be "unreasonably inconsistent" with the wage and salary standards; and (b) required the President to order the payment of wage and benefit increases (scheduled under a contract or practice) which had been held up because of the freeze, unless "unreasonably inconsistent" with the wage and salary standards.¹⁴ In other words, Congress restored to employees anything they had lost because of the freeze, if called for by law or contract prior to August 15, 1971, or if the employer had increased prices or taken other action based on the wage commitment.¹⁵

¹¹ Both the 1970 Act and the 1971 Amendments prohibited reduction of wage, price and rent levels (with an exception for windfall profits) below those prevailing on May 25, 1970. Act, § 203(a)(1); SPG ¶ 4617.

¹² Act, § 203(b)(5); SPG ¶ 4617.

¹³ Act, § 203(c)(1); SPG ¶ 4617. This prohibition was made subject only to a finding that the retroactive payments would not be "unreasonably inconsistent" with the wage and salary standards. *Id.*

¹⁴ Act, § 203(c)(2); SPG ¶ 4617.

¹⁵ Act, §§ 203(c)(3)(A), (B); SPG ¶ 4617. The Pay Board has decided that the retroactivity increases in excess of 7% would be "unreasonably inconsistent" with its standards, but will permit such excess if the company reports them and no one challenges them within fourteen days. 6 C.F.R. § 201.13(b)(1)(4)(i) (1972); SPG ¶ 3728.10. "Base compensation," on which the retroactive percentage is to be calculated, is the average cost of wages, salaries and benefits per man hour for the appropriate employee unit on the day before the payment is to be made. 6 C.F.R. § 201.13(b)(1)(4)(ii) (1972); SPG ¶ 3728.10. Retroactivity increases, if otherwise permissible, may be paid immediately, if less than 7%. 6 C.F.R. § 201.13(a) (1972); SPG ¶ 3728.10. Special provisions govern one-time benefits

The Act excludes from the definition of "wages and salaries" employer contributions to pension, profit sharing, or annuity and savings plans which qualify under appropriate provisions of the Internal Revenue Code,¹⁰ any group insurance plan or any disability and health plan.¹⁷

The Act prohibits limitation on increases for those earning "sub-standard" wages, or who are members of the "working poor," at least until such time as they are no longer in those categories.¹⁸ Moreover, no wage increase can be denied if it is otherwise required by the Fair Labor Standards Act¹⁹ or is to be paid under existing or newly established incentive programs designed to reflect increases in employee productivity.²⁰

The Act provides for a civil penalty of not more than \$2,500 for each violation. Further, criminal penalties not to exceed \$5,000 (again for each violation) may be imposed on willful violators.²¹ As an additional remedy, the agencies can ask the Attorney General to seek temporary or permanent injunctive relief in the appropriate federal district court, where restitution of moneys wrongfully received may be ordered.²²

Private actions are also authorized. Any "person suffering legal wrong" by reason of a violation of the Act, the orders or the regulations may sue in federal court, without regard to the amount in controversy, either for declaratory judgment, injunctive relief, or damages, or for all three.²³ If the action is against a landlord, or a seller of goods or

such as a frozen increase in life insurance benefits. 6 C.F.R. § 201.13(b) (1972); SPG ¶ 3728.10. Accrued interest on retroactive obligations may be paid. SPG ¶ 1731.15.

¹⁰ Specifically, the exemption applies to plans treated in Int. Rev. Code of 1954, §§ 401(a), 403(b) and 404(a).

¹⁷ Act, § 203(g); SPG ¶ 4617. The Board has fixed the limits for these "qualified benefit plans" above which the payments would be "unreasonably inconsistent." Disability and health plan contributions by an employer may be subject to regulation if the President determines that they are "unreasonably inconsistent" with the general standards issued by him for wages. Act, § 203(g)(3); SPG ¶ 4617.

¹⁸ Act, § 203(d); SPG ¶ 4617; 6 C.F.R. § 201.13(g) (1972); SPG ¶ 3728.35.

¹⁹ Act, § 203(f)(1); SPG ¶ 4617. Further, wage increases cannot be denied if (a) required by executive agency wage determinations for work performed under contracts carried out with federal assistance or (b) performed by alien immigrants temporarily admitted into the United States under the Immigration and Nationality Act. 37 Fed. Reg. 7615, 7620 (1972); SPG ¶ 3733F.35.

²⁰ Act, § 203(f)(3); 37 Fed. Reg. 3357, 3361 (1972); SPG ¶ 3745. The Price Commission, not the Pay Board, has finally implemented a productivity regulation. 37 Fed. Reg. 8941 (1972); SPG ¶ 3906A.

²¹ Act, § 208; SPG ¶ 4622. Information submitted to the various agencies which relates to trade secrets or other matters referred to in 18 U.S.C. § 1905 (1970) is to be treated as confidential. Act, § 205; SPG ¶ 4619. The agency heads are given broad subpoena powers to compel attendance of witnesses and production of records. Act, § 206; SPG ¶ 4620.

²² Act, § 209; SPG ¶ 4623.

²³ Act, § 210(a); SPG ¶ 4624.

services, the plaintiff may recover, at the court's discretion, reasonable attorney's fees and costs, plus the greater of

- (a) not more than three times the overcharge, or
- (b) not less than \$100 or more than \$1,000,

provided, however, that if the defendant can establish that the overcharge was not intentional, and resulted from a bona fide error despite his maintenance of procedures reasonably designed to avoid such errors, then the plaintiff can recover only the amount of the overcharge.²⁴ Further, except where the overcharge is willful the plaintiff cannot recover unless he has demanded a refund of the overcharge and has not been paid within ninety days of the demand.²⁵ "Overcharge" is defined to mean the amount charged in excess of the ceiling fixed by the regulations.²⁶

The federal district courts are given exclusive jurisdiction of cases arising under the Act.²⁷ Appeals from district court decisions lie exclusively in a newly created Temporary Emergency Court of Appeals, which, with one important qualification, is granted the powers of a Circuit Court of Appeals.²⁸ The Act provides that the Emergency Court is deprived of power to issue interlocutory decrees "staying or restraining in whole or in part any provision of this title, or the effectiveness of any regulation or order issued thereunder."²⁹ Similarly, the district court is deprived of its customary power to grant interlocutory relief to stay enforcement of a regulation it considers unlawful, except with regard to a party before it,³⁰ and then only for the same reasons which authorize the Emergency Court to invalidate the regulations and orders. If a district court concludes that a substantial constitutional question exists, the question must be certified to the

²⁴ Act, § 210(b); SPG ¶ 4624. The section is ambiguous. It is not clear in a case of an *unintentional* overcharge whether the plaintiff can nevertheless recover reasonable attorney's fees. If attorney's fees are recoverable in such cases there will be more than enough private plaintiffs to enforce the Act. In any case, the award of attorney's fees is discretionary with the court. There is no provision entitling a defendant to recover attorney's fees, regardless of outcome.

²⁵ Act, § 210(b)(2); SPG ¶ 4624.

²⁶ Act, § 210(c); SPG ¶ 4624.

²⁷ Act, § 211(a); SPG ¶ 4625. State courts may, however, consider a defense based on the Act or the regulations, unless such defense questions the constitutionality of the Act or the validity of the regulations, in which event removal by either party to a federal court is permitted. Thus, a tenant may plead a regulation to resist a landlord's state action to evict, or a buyer may plead a regulation as a defense to a seller's suit in state court for breach of contract. *Id.*

²⁸ Act, §§ 211(b)(1), (2); SPG ¶ 4625.

²⁹ Act, § 211(b)(1); SPG ¶ 4625.

³⁰ Act, § 211(c)(1); SPG ¶ 4625.

Emergency Court.³¹ A regulation can be set aside by the Emergency Court only after final judgment, and then only if the regulation is

- (a) in excess of the agency's authority, or
- (b) arbitrary or capricious, or
- (c) otherwise unlawful under 5 U.S.C. § 706(2).³²

An agency order can be set aside by the Emergency Court only after final judgment and then only if the order is in excess of the agency's authority or is based upon findings which are not supported by substantial evidence.³³ Appeals from interlocutory decisions of district courts may be taken under 28 U.S.C. § 1292(b) to the Emergency Court.³⁴ Further appeal rests on the certiorari jurisdiction of the Supreme Court.³⁵

This brief summary of the Act indicates that Congress has decided to give the regulatory agencies in this area practically unlimited discretion. The vagueness of the standards furnished, coupled with the prohibition against temporary restraints by the district courts, constitutes a grant of immense power to the new agencies. The authority of the agencies to fashion exceptions, the relative immunity of agency determinations from effective judicial supervision, and the complexity of the regulations themselves suggest that the public can merely hope that the power thus conferred will not be abused. The lawyer's role becomes a limited one. It is to make a good faith attempt to understand the letter of the regulations and, where a client is affected by their application, to seek relief either by way of persuading the agency that an inequity will result, or to seek special treatment, which is well within the agency's authority to grant. It is foreseeable that the rules will become pockmarked with exceptions, because virtually all powers have been entrusted to the regulatory discretion of the agencies. We turn now to the manner in which the broad discretionary powers have been exercised thus far.

II. THE REGULATIONS

A. *Wages and Salaries*³⁶

1. 5.5%

Effective on and after November 14, 1971, the maximum allow-

³¹ Act, § 211(c); SPG ¶ 4625.

³² Act, § 211(d)(1); SPG ¶ 4625.

³³ Act, § 211(d)(1); SPG ¶ 4625.

³⁴ Act, § 211(d)(2); SPG ¶ 4625.

³⁵ Act, § 211(g); SPG ¶ 4625.

³⁶ "Wages and salaries" are broadly defined to cover all direct and indirect remuneration "reasonably subject to valuation." The term includes, among other items, vacation

able wage and salary increase is fixed at 5.5%.³⁷ Before refinement, qualifications, exceptions and explanations, this "general wage and salary standard" means that an employer³⁸ is forbidden to pay, and employees are forbidden to receive, an increase of more than 5.5% of the wage or salary he was being paid on November 13, 1971. Upon examination, however, an employer can lawfully double (to pick a figure) an employee's salary if he wishes. Thus, on November 4, 1971, the Pay Board approved a rate hike of 16.8% under the bituminous coal agreement on the ground that it was not unreasonably inconsistent with the wage criteria previously established. On January 13, 1972, the Board approved an 8.3% increase for aerospace employees.³⁹

The reason an employee may lawfully receive a large salary increase is that the 5.5% limitation applies to an appropriate employee unit, and not to an individual employee. "Appropriate employee unit" is a term of art in the labor field.⁴⁰ Essentially, it refers to a group of employees who perform the same kind of work.⁴¹ It is the total wages of that group to which the 5.5% applies.⁴² If some employees in the group

and holiday pay, severance pay, insurance contributions (except for social security and public retirement plans), deferred compensation, bonuses, payments in kind, tuition refund programs, cost-of-living allowances, and increased pay resulting from less work. 36 Fed. Reg. 21790 (1971); SPG ¶ 3724.35. An increase in income because of increased overtime, if bona fide, is not counted if the overtime rate is not increased. Economic Stabilization Q & A's, No. 8, Feb. 1, 1972; SPG ¶ 1651.

³⁷ 6 C.F.R. § 201.10 (1972); SPG ¶ 3725.

³⁸ "Employer" is a firm which employs one or more persons who receive a wage or salary. 6 C.F.R. § 101.2 (1972); SPG ¶ 3513.20. "Firm" means a person or any entity, however organized, including estates, trusts, joint ventures, charitable and educational institutions, and the federal, state and local governments. 6 C.F.R. § 101.2 (1972); SPG ¶ 3513.35.

³⁹ EC ¶ 9980. The inequity of uneven enforcement is hard to justify but even harder to assail because of the vagueness of the standards and the ability of any competent administrator to rationalize and articulate good reasons for a different result. In the aerospace agreement the Board relied on the necessity "to prevent gross inequities and to preserve the equitable position of the employees involved." That kind of specificity warms the skeptic's heart. The facts of political life are that the 5.5% limit has been and will continue to be ignored by the Pay Board if enough pressure is exerted. One would think that students of constitutional law would whet their conceptual knives over this issue.

⁴⁰ The regulations clearly state that the "employee unit" in a given employment setting shall be recognized so as to conform with the historical and contractual relationships in that setting. 6 C.F.R. § 201.3 (1972); SPG ¶ 3724.04. Generally recognized labor groupings include production and maintenance, skilled craftsmen, clericals, salesmen, executives, truck drivers, professionals, and guards.

⁴¹ Appropriate units of employees will be recognized so as to preserve "contractual or historical wage and salary relationships." 6 C.F.R. § 201.3 (1972); SPG ¶ 3724.04; see also SPG ¶ 1421.10. Duties usually determine their description, but they may be plant-wide, company-wide or even industry-wide. Administratively, the Pay Board will probably recognize as one unit the employees covered by a particular labor agreement.

⁴² The Pay Board has established computation rules for pay adjustments in appropriate units. 37 Fed. Reg. 7615, 7616 (1972); SPG ¶ 3733. The formula includes: (a) the

ECONOMIC CONTROL REGULATIONS

receive no increase, the amount which they could have received remains in the pool from which the others may draw.⁴³ The 5.5%, to be accurate, is the "maximum permissible annual aggregate wage and salary increase," "aggregate" referring to the appropriate employee unit.⁴⁴

But there are exceptions. The standard can be exceeded if the employee unit can show that another group, in a "tandem relationship" with them, got a greater increase.⁴⁵ Thus, unorganized clericals, who usually receive an increase after their organized brothers get one, are entitled to what their brothers obtained even if this increase exceeds 5.5%, so long as it does not exceed 7%. If an employer can show that he has to increase wages by more than 5.5% to attract and retain "essential employees," which he has been losing, the increase can go up to 7%.⁴⁶ If an employer has increased wages in each of the last three years by less than 7%, he can "catch up," by adding to the 5.5% the percentage difference in each year between the 7% and what he actually paid, to determine the lawful maximum increase for the next twelve months, which may not exceed 7%.⁴⁷ An employer can utilize all of these exceptions, but cannot cumulate them beyond 7%.⁴⁸ In some situations he must secure prior approval (tandem relationships and essential employees), whereas catch-up increases (and calculation

contract year (generally either November 14, 1971, to November 13, 1972, or the labor agreement year), (b) the base compensation rate (average rate of pay stated in dollars and cents per hour which is equal to the sum of): (c) the average straight time hourly rate and (d) the average hourly benefit rate. "Base date" is the day prior to the first day of the control year. 37 Fed. Reg. 7615, 7616 (1972); SPG ¶ 3724.06. "Base year" is the twelve-month period ending on the base date. 37 Fed. Reg. 7615, 7616 (1972); SPG ¶ 3724.08.

⁴³ Since the 5.5% applies to "wages and salaries" which have been defined to include practically all employment benefits, an employer must determine the value of each benefit. For example, an employer can improve the vacations but the value of the improvement must be included in the 5.5%. Fringe benefits, because of their exclusion from wages and salaries in § 203(g) of the Act, are given special treatment. 37 C.F.R. 7615, 7620 (1972); SPG ¶ 3733G. See note 51 *infra*.

⁴⁴ 6 C.F.R. § 201.10 (1972); SPG ¶ 3725. The 5.5% refers to a twelve-month period. In the case of a labor agreement, the period begins on its effective date. Where there is no labor agreement, the twelve months begin on November 14, 1971. See SPG ¶ 1421.

⁴⁵ 6 C.F.R. § 201.11(a)(1) (1972); SPG ¶ 3726.10. The Pay Board has defined "tandem relationship" as:

[A] well established and consistently maintained practice whereby the precise timing, amount and nature of general increases in wages and salaries of a given appropriate employee unit have so followed those of another such unit of employees of the same employer or of other employers within a commonly recognized industry (such as the Standard Industrial Classification two-digit category) that a general increase, in the normal operation of the practice, would have been put into effect and have been applicable to work performed on or before November 13, 1971, but for the operation of the freeze.

6 C.F.R. § 201.3 (1972); SPG ¶ 3724.30.

⁴⁶ 6 C.F.R. § 201.11(a)(2)(b) (1972); SPG ¶ 3726.15.

⁴⁷ 6 C.F.R. § 201.11(a)(3) (1972); SPG ¶ 3726.20.

⁴⁸ 6 C.F.R. § 201.11(b) (1972); SPG ¶ 3726.30.

of a cost of living allowance) can be implemented unilaterally by Category II and III employers (those with less than 5,000 employees) if followed by a report to the Pay Board.⁴⁹ If the Board desires, it can approve increases of even more than 7% by resort to "additional criteria" for exceptions which include ongoing collective bargaining, the equitable position of the employees involved, the fostering of economic growth, and other facts of like particularity.⁵⁰

What does this mean practically? Under the general standard, employers confronted with unions are given a powerful weapon to resist demands in excess of 5.5%. "We have no choice but to abide by the law" will be heard from employers in negotiating rooms throughout the land. Just as predictable is the response: "Give us what we want and we will submit it to the Pay Board for approval."⁵¹ Moreover, union demands for fringe benefits, such as pensions and insurance, will escalate dramatically because the cost of such benefits is not entirely included in "wages and salaries."⁵² If the employees are un-

⁴⁹ 6 C.F.R. § 201.11(c) (1972); SPG ¶ 3726.35.

⁵⁰ 6 C.F.R. § 201.11(d) (1972); SPG ¶ 3726.40.

⁵¹ Suppose a union strikes to enforce a wage demand which unlawfully exceeds the regulatory limits. A strike in support of this unlawful demand might constitute an unfair labor practice under § 8(b) of the Taft-Hartley Act, 29 U.S.C. § 158(b) (1970). Does the possibility of a Pay Board exception immunize what would otherwise be illegal? May an employer who bows to the demand plead the strike as a defense to an action by the Attorney General for criminal violation of the regulations? Suppose a union demands that an employer escrow the difference between what the employer agreed to and what the Pay Board allows, to await the potential lifting of controls? See 37 Fed. Reg. 9350 (1972), SPG ¶ 1801.15; 37 Fed. Reg. 7996 (1972), SPG ¶ 1451.10; 37 Fed. Reg. 2893 (1972), SPG ¶ 1461.05; 37 Fed. Reg. 9350 (1972), SPG ¶ 1461.05; PB Release 48, Feb. 9, 1972, SPG ¶ 1461.25. May an employer under strike pressure agree to an unlawful wage demand and then renege, prior to a Pay Board determination? Union officers, because of the Pay Board's relaxation of the 5.5% limit in a number of large agreements, have little choice politically but to demand and strike for wages in excess of the standards. Management negotiators, on the other hand, would be ill-advised to agree to an exorbitant pay settlement in the hope that the Pay Board will reduce it. It amounts to an abdication of management responsibility which, except for companies *in extremis*, is unwise. Moreover, the Pay Board need not reduce the settlement in which event the company may become non-competitive. Also, and this is critical, the Price Commission has decided not to permit as "allowable costs" an amount agreed to in excess of the wage regulations even though the Pay Board approves it. SPG ¶ 445.15. Further, the IRS has indicated it will disallow business deductions for wages (and prices) paid in excess of the ceilings, on the theory that any unlawful payment is nondeductible. Rev. Rul. 72-236, 1972-20 Cum. Bull. 7, EC ¶ 9929. The Ruling seems to be limited to *willful* violations.

⁵² Fringe benefits: the exclusion from "wages and salaries" of the employer contributions for qualified pension, profit sharing and savings plans, group insurance and disability and health plans (Act, § 203(g); SPG ¶ 4617) is subject to modification by the President (and therefore the Pay Board) if he deems the contributions unreasonably inconsistent with the established wage and price standards. Act, § 203(g)(3); SPG ¶ 4617. The Board has concluded that an increase in "fringes" of 0.7% of the unit's base compensation rate, as defined in 37 Fed. Reg. 7615, 7616 (1972) (including the exempted fringes), will not count as part of the 5.5%. There are exceptions to this, including one which says that the employer can choose to pay fringes to a value of 5% of the base compensation rate if

ECONOMIC CONTROL REGULATIONS

organized, the effect will be to limit their increase to 5.5% overall, or probably slightly more because of exceptions and the inevitable corner-cutting. The employer must calculate the annual wages he was paying as of November 13, 1971, to the appropriate unit of employees (adjusted for changes in the unit) and may grant increases, if he wants to, of not more than 5.5% of that amount for the following twelve months. There is no limit on the frequency of such increases so long as the sum of the percentage increases does not exceed 5.5% over the twelve-month period.⁵³ He can improve the pension and insurance fringes without regard to the 5.5%, and, as noted, he can pay more than 5.5% to some of the group so long as others receive proportionately less.

Nothing is that simple, of course. An employer may promote an employee, and pay him the salary called for by the new job, without regard to the 5.5% limitation. The pay follows the job, not the person.⁵⁴ Longevity increases, and automatic progressions within rate ranges, if paid under well-established practices, can be granted without regard to the 5.5%.⁵⁵ Labor agreements, employment contracts or pay practices in effect prior to November 14, 1971, may continue to operate according to their respective terms, unless challenged by the Pay Board.⁵⁶ With regard to merit increases, the Pay Board has run a zigzag pattern. As of this writing, it has been decided that, under labor agreements, merit increases may be granted within rate ranges without regard to the 5.5% standard.⁵⁷ In the absence of a labor agreement, the employer may grant merit increases only up to 5.5%. This distinction will not escape the attention of union organizers. The presumed basis for it is that unfettered employers could grant practically any desired increase simply by attaching a merit label to it.

There are special provisions governing bonuses. They may still be granted, but are to be included within the allowable 5.5% increase, except that if paid pursuant to *established* bonus plans,⁵⁸ the 5.5% figure may be disregarded as to those dollar amounts which do not exceed by more than 5.5% the bonus dollars paid to an appropriate unit

in doing so his total contributions for fringes does not exceed 10% of the base compensation rate. See 37 Fed. Reg. 7615, 7620 (1972); SPG ¶¶ 1541, 3733G.20.

⁵³ SPG ¶ 1421.15.

⁵⁴ 37 Fed. Reg. 7615, 7619 (1972); SPG ¶ 3733F.10. There appear to be no restrictions on what an employer may pay a new employee. However, the new employer will have to include the employee within the appropriate unit.

⁵⁵ 37 Fed. Reg. 7615, 7619 (1972); SPG ¶¶ 1621, 3733F.15.

⁵⁶ 6 C.F.R. § 201.14 (1972); SPG ¶ 3729.

⁵⁷ 6 C.F.R. § 201.14 (1972); SPG ¶ 3729.15.

⁵⁸ 6 C.F.R. § 201.74 (1972); SPG ¶ 3739. In order to qualify as an "established" bonus plan, payments must have been granted under the plan during any one of the three years ending Nov. 14, 1971. 6 C.F.R. § 201.74(a)(1) (1972); SPG ¶ 3739.05.

in any one of such three preceding fiscal years.⁵⁹ As expected, there are special rules for executive employees paid under variable compensation plans, although they too are generally subject to 5.5% limits.⁶⁰ Essentially, an employer may continue to apply the variable formula (except for stock options)⁶¹ as set forth in an established written plan and may pay the resulting amounts so long as they do not exceed the highest annual amount paid during any of the three fiscal years ending prior to November 14, 1971, plus 5.5%. The same general rules apply where the employer has no written plan, but has followed an established practice (two of the last three fiscal years ending prior to November 14, 1971) of compensating employees on a variable basis. Sales incentives; commission and production incentive plans (which do not include incentives based on profits) may continue to operate in accordance with their terms, if such plans were in effect before November 14, 1971, even if the income to be paid thereunder exceeds the 5.5% standard.⁶² New incentive plans may be adopted only with the prior approval of the Pay Board and then only if the administration of such plan does not increase the employees' aggregate incentive compensation.⁶³ Greater productivity resulting in greater income to the employer is not barred. But an employer cannot alter the method of calculating the *rate* of compensation without infringing upon the 5.5% limit.⁶⁴

2. Coverage, Exemptions and Exceptions

The Act covers only "prices, rents, wages and salaries." The Cost of Living Council has decided that these terms do not include

- (a) state and local income, sales and real estate taxes;
- (b) workmen's compensation payments;

⁵⁹ 6 C.F.R. § 201.74 (1972); SPG ¶ 3739.

⁶⁰ 6 C.F.R. § 201.74 (1972), SPG ¶ 3739; 6 C.F.R. § 201.75 (1972), SPG ¶ 3740.

⁶¹ If a stock option plan was established before November 14, 1971, the recipient may exercise options granted prior to December 16, 1971. With regard to new options under the plan, they may be granted and exercised if (a) the plan was approved by the stockholders, (b) it stipulates the maximum number of shares to be made available, (c) the option price is not less than 100% of the fair market value on the date of grant, (d) the plan is administered in accordance with past practice, and (e) the aggregate number of shares made available does not exceed the average number of shares made available annually during the three years between August 15, 1968, and August 15, 1971, or the average number of shares made available annually during the existence of a plan established after August 15, 1968. 6 C.F.R. § 201.76 (1972); SPG ¶ 3742.05.

⁶² 6 C.F.R. § 201.77(a) (1972); SPG ¶ 3742.05.

⁶³ 6 C.F.R. § 201.77(b) (1972); SPG ¶ 3742.10.

⁶⁴ 6 C.F.R. § 201.78 (1972); SPG ¶ 3743. New companies, that is, those enterprises established after November 14, 1971, may inaugurate incentive or variable compensation programs for their salesmen or executives provided that they report to the Pay Board and demonstrate that in all respects the plan was not adopted for the purpose of circumventing the wage stabilization program. The Board can disapprove the plan if it finds it unreasonably inconsistent with its policies. 6 C.F.R. § 201.79 (1972); SPG ¶ 3744.

ECONOMIC CONTROL REGULATIONS

- (c) welfare payments;
- (d) child support payments; or
- (e) alimony payments.⁶⁵

Beyond that, there can be other exemptions (a general regulatory waiver of a class otherwise included)⁶⁶ and exceptions (a specific waiver in a particular case).⁶⁷ Thus, exempt from the 5.5% restriction are the "working poor," which as of this date refers to employees earning less than \$2.75 an hour (until increases bring them up to that rate).⁶⁸ Pay increases required by the federal minimum wage laws are also exempt.⁶⁹ Government employees (except postal workers) and American employees working abroad are exempt, as are employees working in Puerto Rico and other outlying possessions, but not employees of foreign corporations.⁷⁰ Wage increases resulting from existing or new incentive programs, designed to reflect directly increases in employee productivity, are also exempt.⁷¹

The Cost of Living Council has exempted the "small business" from both wage and price controls. The term "small business" currently means an enterprise with sixty or fewer employees (with qualifications if 50% of those employees are covered by master labor agreements which themselves cover more than sixty employees). To be eligible for the exemption the employing firm must have had an *average* of sixty or fewer employees in the four quarterly pay periods beginning with the one including June 30, 1971.⁷² Firms established after December 31, 1971 compute the average number of employees by looking to later calendar quarters. The exemption does not apply to (a) firms with annual revenues of \$50 million or more, (b) institu-

⁶⁵ 6 C.F.R. § 101.1(c) (1972); SPG ¶ 3512.15.

⁶⁶ 6 C.F.R. § 101.2 (1972); SPG ¶ 3513.30.

⁶⁷ 6 C.F.R. § 101.2 (1972); SPG ¶ 3513.25. Requests for exceptions generally must be made in the first instance to the local IRS office. Treas. Reg. 401.302; SPG ¶ 595.40.05.

⁶⁸ 37 Fed. Reg. 14998 (1972); SPG ¶¶ 1631, 3542.

⁶⁹ 37 Fed. Reg. 7615, 7619 (1972); SPG ¶ 3733F.30. An employee earning the current federal minimum wage (\$1.60) who gets an increase not required by the Fair Labor Standards Act apparently must include such increase for 5.5% purposes. This seems inconsistent with the ruling which states that wages of employees earning less than \$2.75 per hour can be increased without regard to 5.5% until the rate reaches \$2.75.

⁷⁰ 6 C.F.R. § 101.35 (1972); SPG ¶ 3532.

⁷¹ Section 203(f)(3) of the Act states that payments of any increase "in conjunction with existing or newly-established employee incentive programs which are designed to reflect directly increases in employee productivity" shall not be precluded. This may be intended to cover only piecework incentive plans usually associated with hourly workers. But conceivably the language would also cover variable compensation plans for executives (who are also spurred to greater productivity by more money) which are presently subject to a 5.5% restriction. The words "to reflect directly," on the other hand, may restrict the section to piecework and similar incentive plans. See SPG ¶ 1601.

⁷² This exemption is available only to firms in existence prior to Jan. 1, 1972. 37 Fed. Reg. 8939, 8940 (1972); SPG ¶ 3535.

tional and non-institutional providers of health services (doctors, dentists, hospitals et al.), or (c) construction firms. The small business exemption is a significant one.⁷³

B. Prices

One need not be an economist to know that the erosion of a monetary unit is a complex function of costs, wages and profit levels, all immersed in a solution whose ingredients include international trade, supply, demand and the comparative strength of the nation. There are as many theories regarding inflation as there are commentators who presume to know about it. It would be nonsense, for example, to limit wages without putting a ceiling on prices, even if it were politically feasible, as it would be equally so to restrain prices without containing the wages and costs in which they are rooted. In this context, wages, costs, prices and profits are different words to describe the same thing. The real issue is the short-run distribution of the fruits of production among politically definable groups.

The administration of a wage program is simple compared to the fixing of price levels. The truth of this is exhibited by a comparison of the regulations. Whereas wage increases are to be calculated according to a 5.5% limit, with the exceptions hereinbefore noted, prices are to be controlled by a formula whose components include allowable costs, productivity gains and profit margins, all of which escape mathematical precision.⁷⁴ There are three broad groups to which price regulations apply: manufacturers, retailers and wholesalers, and service and professional organizations.⁷⁵ Each group is treated differently but

⁷³ 37 Fed. Reg. 8939, 8940 (1972); SPG ¶ 3535.05. Affected by the exemption are five million small firms and local governments, approximating \$500 billion in annual sales and nineteen million employees (some of whom were already exempt). It should be emphasized that the small business exemption relates to both *wages* and *prices* (but not rents). The Regulation, when first released on May 1, 1972, did not explain whether affiliated companies would be treated as a single entity for purposes of determining an average number of employees. A presently maintainable view is that for *prices*, affiliates must combine the number of employees whereas for *wages* they need not. See note 115 *infra*.

⁷⁴ The publicized 2½% limit on prices has no application to an individual enterprise. It is a broad governmental objective to limit the nationwide average price increases to that figure. No enterprise can be compelled to reduce its prices below those prevailing on May 25, 1970. Act, § 203(a)(1); SPG ¶ 4617.

⁷⁵ 6 C.F.R. § 300.11 (1972); SPG ¶ 3906. Many organizations do not fit neatly into any category or, at the least, are afforded special treatment. Thus, the Pay Board has adopted specific regulations for automobile dealers. SPG ¶¶ 451, 537. The Price Commission has concluded that advertising firms should be classified as service organizations, not retailers. Price Commission Q & A's, Jan. 20, 1972; SPG ¶ 411.05. Doctors and dentists are treated specially. In addition to the general limitations (allowable costs and profit margins) the aggregate price increase levied by a doctor (a non-institutional provider of health services) cannot exceed 2.5% in the aggregate per year. 6 C.F.R. § 300.19(c) (1972); SPG ¶ 3914.15; see also SPG ¶ 585. For hospitals and nursing homes, the limit

ECONOMIC CONTROL REGULATIONS

all are subject to the general rule that prices cannot be increased over the *base price* except when justified by allowable cost increases and not even then if the effect of the price boost is to raise the company's profit margins. Thus,

A manufacturer may charge a price in excess of the base price only to reflect increases in allowable costs that it incurred since the last price increase in the item concerned, or that it incurred after January 1, 1971, whichever was later, and that it is continuing to incur, reduced to reflect productivity gains, and only to the extent that the increased price does not result in an increase in its profit margin over that which prevailed during the base period.⁷⁶

Before defining the terms, the question arises as to how a manufacturer (or other seller of goods or services) is to know, when he sets his prices, what his eventual profit margin will be. Profit margins are tied to sales volume, which is unpredictable. If a manufacturer's estimate of future sales is wrong, a price increase previously set may be unlawful. May a purchaser seize upon this to offset an overcharge against future sales, or sue to recover the overcharge? If a manufacturer increases prices on January 1, which becomes unlawful on December 31 because of an unanticipated improvement in sales and profit margins, may he plead an *ex post facto* defense against *civil* penalties? What leeway is to be granted? What advice does the lawyer offer, except to cite the regulations? There have been practical assurances that reasonable leeway will be granted. The Phase I freeze achieved its dramatic effect. The purpose of Phase II is merely to keep the temperature down.

The base price applicable to all three categories for a particular product or service is the highest price charged to purchasers in a substantial number of transactions (10%)⁷⁷ during the *freeze base period*, i.e., (a) July 16, 1971 to August 14, 1971, or (b) the nearest preceding thirty day period if no transaction occurred during the first period.⁷⁸ There are qualifications to this for manufacturers, covering temporary special deals such as discounts and other promotional ar-

is 6%. 6 C.F.R. § 300.18(c)(1) (1972); SPG ¶ 3913. For insurers, see 6 C.F.R. § 300.20 (1972); SPG ¶ 3915. Concerning lawyers, accountants, architects and other professionals, see 6 C.F.R. § 300.14 (1972); SPG ¶ 3909.

⁷⁶ 6 C.F.R. § 300.12 (1972); SPG ¶ 3907.

⁷⁷ 6 C.F.R. § 300.432 (1972); SPG ¶ 3935. A "transaction" occurs at the time a binding contract is entered into. 6 C.F.R. § 300.5 (1972); SPG ¶ 3905.81. For the purpose of determining a lawful price, the transaction must be bona fide and at arm's length. 6 C.F.R. § 300.5 (1972); SPG ¶ 3905.81.

⁷⁸ 6 C.F.R. § 300.5 (1972); SPG ¶ 305.27. There is a substantial difference, of course, between an allowable percentage markup and a dollar for dollar increase.

rangements. New products and new services (those not offered during the preceding twelve months) must be priced no higher than the average price charged for comparable products and services during the freeze base period.⁷⁹ Contracts entered into prior to August 15, 1971, calling for performance after November 13, 1971, may be carried out regardless of price, if the seller's resulting profit margin is not greater than that of the base period.⁸⁰ For retailers and wholesalers, the base price may be exceeded only if the customary initial percentage markup⁸¹ is equal to or less than either the markups made (a) before November 14, 1971, or (b) during the last fiscal year ending August 14, 1971, whichever is chosen by the seller; but then only if the aggregate effect of all price changes does not increase the profit margin over that of the base period.⁸² *Base period* as used here means any two of the last three fiscal years ending before August 15, 1971, the two years to be selected by the company. To determine base period profit margins, the weighted average of the two years chosen is to be used.⁸³

Allowable cost is what the Price Commission says it is. It is defined as "any cost, direct or indirect, unless disallowed by the Commission."⁸⁴ Productivity gains for manufacturers and construction contractors are calculated for pricing purposes on the basis of the average percentage gain in the applicable industrial category, which is set forth in the Standard Industrial Classification, 1967.⁸⁵ Profit margin is defined as

the ratio that operating income (net sales less cost of sales and less normal and general recurring costs of business operations, determined before non-operating items, extraordinary

⁷⁹ 6 C.F.R. § 300.409(c)(1) (1972); SPG ¶ 3939.15; see also SPG ¶ 451.13.

⁸⁰ 6 C.F.R. § 300.101 (1972); SPG ¶ 3928.

⁸¹ Defined in 6 C.F.R. § 300.5 (1972), SPG ¶ 3905.18, as the markup applied to the retailer's cost (purchase price plus transportation) when first offered for sale determined on an item, product line, department, store or other pricing unit basis according to the retailer's customary practice. See SPG ¶ 801. Fair trade laws have been overridden, according to the Price Commission. 6 C.F.R. § 300.13 (1972); SPG ¶ 841.75.

⁸² 6 C.F.R. § 300.12 (1972); SPG ¶ 3907. Premarking by a manufacturer does not release a retailer or wholesaler from compliance responsibility. SPG ¶ 461.10. Retailers with revenues of less than \$200,000 during their last fiscal year are exempt from the posting requirements. See 6 C.F.R. § 300.13(e) (1972); SPG ¶ 3908.25.

⁸³ 6 C.F.R. § 300.5 (1972); SPG ¶ 3905.06. For profit margin calculation, see SPG ¶ 1021.

⁸⁴ 6 C.F.R. § 300.5 (1972); SPG ¶ 3905.03. Allowable costs apply to a particular product or product line, not to the company as a whole. Economic Stabilization Q & A's, No. 10, Feb. 9, 1972; SPG ¶ 445. Overall increases in such costs are to be allocated to particular products. Allowable costs do not include non-depreciable capital investments. SPG ¶ 837. Costs to be allowable are limited to those that have occurred on or after January 1, 1971, or since the last price increase occurring after that date. 6 C.F.R. §§ 300.12, 300.14 (1972); SPG ¶¶ 3907, 3909.

⁸⁵ 6 C.F.R. § 300.11(a) (1972); SPG ¶ 3906A.

items, and income taxes) bears to net sales as reported on the person's financial statement prepared in accordance with generally accepted accounting principles consistently applied.⁸⁰

Firms which have made little or no money during the base period have been granted relief through special regulations applicable to "low-profit" concerns.⁸⁷ A "low-profit firm" is one which, during its most recently ended fiscal year (or in an alternative fiscal year obtained by combining the net sales and average total capital in any two of the three fiscal years of the base period, and dividing by two) had (a) net sales of less than \$1,000,000 and a profit margin of less than 3% or (b) net sales of \$1,000,000 or more but a profit margin calculated on a basis of capital turnover ratios and tabulated in the regulations. Capital turnover ratios are obtained by dividing the net sales for the year by the average total capital. "Average total capital" is obtained by adding the outstanding total capital (long-term debt plus owner's equity) at the beginning and end of the fiscal year and dividing by two. Firms which satisfy these requirements may increase their prices (not to exceed 8%) without regard to allowable costs until their profit margins exceed those which precipitated their classification as low-profit firms. Certain enterprises, e.g., service organizations, public utilities, insurers) are excluded from the "low-profit" relief.⁸⁸

Many organizations, commodities and transactions have been completely exempted from price regulation. The list is lengthy and detailed, ranging from brokerage fees to college tuitions, and from exports and imports to taxidermists' services.⁸⁹ There seems to be no

⁸⁰ 6 C.F.R. § 300.5 (1972); SPG ¶ 3905.60.

⁸⁷ 37 Fed. Reg. 10943 (1972); SPG ¶ 3917.

⁸⁸ 37 Fed. Reg. 10943-44 (1972); SPG ¶ 3917. The limit of an 8% price increase to low- or no-profit firms raises a constitutional issue. Suppose an 8% increase is not enough to permit break-even operations. The company, after its petition for exception is denied, may be required to continue a loss operation which could result in bankruptcy. Is there any constitutional impediment to this based on confiscation without due process? Thus, there are situations which would fairly justify more than an 8% increase as the sole means to preserve an investment and it would be overlooking an argument if constitutional objections to the 8% limit were not raised.

⁸⁹ The major areas of exemption are the following:

- (a) raw unprocessed agricultural products, including seafood and raw sugar;
- (b) handicraft, antiques, art objects, precious stones and mountings therefor, collectors' coins and stamps;
- (c) exports, imports (first sale) and international shipping rates;
- (d) dues of non-profit organizations;
- (e) tuition charged by private non-profit educational institutions;
- (f) securities and financial instruments, property subject to net leases as defined in Int. Rev. Code of 1954, § 163(d)(4)(A), commercial paper and commodity futures;
- (g) retail firms, including restaurants, with sales or revenues of less than \$100,000 (but not including "service" firms such as laundries, dry cleaners, restaurants, or repair shops);
- (h) small business firms currently defined as those with sixty or fewer employees;

unifying factor to explain the nature and scope of the exemptions, except perhaps to ease the administrative burden.

C. Rents

Broadly speaking, rents are permitted to rise $2\frac{1}{2}\%$ above the *base rent*.⁹⁰ Base rent varies according to the lease duration and the date of occupancy. If the property became occupied between May 25, 1970, and May 15, 1971, on a month-to-month basis, or less, the base rent is the greater of (a) the monthly rent charged in the rental period which includes May 25, 1970, *plus* 5% or (b) the monthly rent charged for the most recent rental period before May 16, 1971.⁹¹ If the lease duration is greater than month-to-month, and if the property was occupied before May 15, 1971, the base rent computation becomes somewhat more complicated, involving "average transaction rents," "eligible transactions" and fractions with specific numerators and denomina-

(i) damaged and used goods;

(j) custom services and products made to individual order, including jewelry, leather goods, wigs, furs, tailoring, picture framing, and taxidermy;

(k) brokerage fees charged for trading on a securities exchange subject to SEC regulations and for over-the-counter transactions if consistent with SEC-certified fee schedules;

(l) royalties and copyrights for materials prepared for publication;

(m) sales of unimproved real estate and real estate with improvements completed prior to August 15, 1971. If improvements were completed on or after August 15, 1971, the real estate is still exempt where the sales price is determined after completion of construction or the wage rates are known to the builder and not altered by the Pay Board after the improvement price is set;

(n) rentals of nonresidential property including property leased for industrial, farm or commercial purposes; rental units which are constructed and first offered for rent after August 15, 1971; rehabilitated dwellings first offered for rent after August 15, 1971, under certain conditions; single family dwellings and units in owner occupied multi-family dwellings under certain conditions (and if lessor and family do not have an interest in more than four of such units); rentals of single and multi-family dwelling units at a monthly rent of \$500 or more on January 19, 1972, or during the base rental period; rentals under the so-called Baltimore system of real estate land leases;

(o) insurance purchased or renewed after November 13, 1971, including (1) life insurance (ordinary, term and group policies, endowments, and fixed or variable annuities) but excluding credit life insurance; (2) reinsurance; (3) ocean marine insurance; and (4) certain policies in excess of \$100,000 (all other forms of insurance, such as health, property, and casualty insurance are subject to regulation);

(p) federal, state and local governmental fees, including franchise and license fees, postal rates, and tuition charged for schools and colleges operated by a state or local government. However, fees charged by state and local governments for utilities and health services (including gas, electricity, telephone, telegraph, public transportation by vehicle, but excluding water and sewage disposal services) are not exempt;

(q) transactions occurring in the insular possessions and territories.

6 C.F.R. §§ 101.31-101.36, 101.51 (1972); SPG §§ 3529-3533, 3535.

⁹⁰ 6 C.F.R. § 301.102(a)(1) (1972); SPG § 3971.05. The Act, § 203(h), SPG § 4617, provides that neither states nor subdivisions thereof shall be exempt from federal rent regulation solely because they regulate rent themselves. The Price Commission's rent regulations in effect let local regulatory agencies determine the lawful increases according to their own rent control programs. But the Commission has reserved jurisdiction.

⁹¹ 6 C.F.R. §§ 301.203(a), 301.207(a) (1972); SPG § 3981.

ECONOMIC CONTROL REGULATIONS

tors.⁹² If the property became occupied between May 16, 1971, and November 13, 1971, the base rent is the most recent monthly rent charged during that period regardless of duration. The same rules apply to property first occupied between November 14, 1971 and December 28, 1971.⁹³

After December 28, 1971, the landlord may charge the base rent, determined as outlined above, plus

- (a) 2½% of the base rent for such property for each twelve-month period commencing after December 28, 1971 (the 2½% may not be accumulated from one period to another period) *plus*
- (b) the amount of any increase in allowable costs.⁹⁴

"Allowable costs" includes state and local real estate taxes, fees, levies, and charges for all municipal services, except those for gas and electricity. Allowable costs do not include special assessments.⁹⁵ Provision is made for allocation of an increase in allowable costs, the method of allocation, and special adjustments to compensate a landlord for an inability to recover for such increases.⁹⁶ Rent increases over the base rent are also permitted where capital improvements have been made. Formula-determined rentals may continue to be charged under the formula but the total dollar amount cannot exceed base rent plus allowable cost increases.⁹⁷ Seasonal increases are also permitted.⁹⁸ A landlord owning a unit subject to governmental rent controls may increase the rent beyond the base rent only to the extent authorized by the rent control authorities which themselves are now under regulatory review.⁹⁹ As in the area of price regulation, exemptions from rent regulation are provided for specific categories of rental property.¹⁰⁰

⁹² 6 C.F.R. §§ 301.203(b), 301.206 (1972); SPG ¶¶ 3982.10, 3985.

⁹³ 6 C.F.R. §§ 301.202, 301.204, 301.205 (1972); SPG ¶¶ 3981, 3983-84.

⁹⁴ 6 C.F.R. § 301.102(a) (1972); SPG ¶ 3971.05.

⁹⁵ 6 C.F.R. § 301.102(b) (1972); SPG ¶ 3971.10.

⁹⁶ *Id.*

⁹⁷ 6 C.F.R. § 301.104 (1972); SPG ¶ 3973.

⁹⁸ 6 C.F.R. § 301.105 (1972); SPG ¶ 3974.

⁹⁹ 6 C.F.R. § 301.106 (1972); SPG ¶ 3975. Except where premises are rent-controlled, a landlord cannot raise rents except upon thirty days notice thereof to the tenant which notice must contain specific information including, among others, the amount (dollars and percentage) of the increase, and how calculated. 6 C.F.R. § 301.501 (1972); SPG ¶ 3989.

¹⁰⁰ The following are exempt from the Phase II rent regulations:

(a) all non-residential property, which includes farm, industrial and commercial property;

(b) residential rental property on which construction is completed, and offered for rent for the first time, after August 15, 1971;

(c) rehabilitated dwellings where the cost of rehabilitation is more than one-half of either the undepreciated cost or the fair market value of the property before the rehabilitation and which is offered for rent for the first time after August 15, 1971;

D. Dividends and Interest

Neither the original Economic Stabilization Act of 1970, nor the President's Executive Order of August 15, 1971, alluded to dividends or interest. Subsequently, in his Executive Order of October 15, 1971,¹⁰¹ the President established a Committee on Interest and Dividends whose duty was to devise and execute a program to obtain voluntary restraint on interest rates and dividends. This proposal was ratified by Congress in the 1971 amendments to the Act when the President was authorized to issue appropriate orders and regulations to stabilize "interest rates and corporate dividends and similar transfers."¹⁰² The President has chosen to continue a program of voluntary restraint, and while detailed regulations have been issued by the Committee, there is no legal compulsion to honor them.¹⁰³

Corporations have been asked to limit their 1972 dividend increases to 4% over the highest total paid during any of their three fiscal years ending in 1969, 1970, or 1971, all adjusted for stock dividends and splits.¹⁰⁴ If a company has paid no dividend in those years, or if the dividends that it did pay would result in a 1972 dividend of less than 25% of net income (after taxes and preferred dividends) for the fiscal year ending in 1971, it may declare cash dividends on common stock not to exceed 25% of such net income.¹⁰⁵ There are special rules for companies whose dividends for the three fiscal years would require a 1972 payment which is less than that paid in 1971, and

(d) apartment units renting for \$500 per month or more on January 19, 1972, or during the base period if unoccupied;

(e) owner-occupied dwellings of four or fewer units under leases of greater than month-to-month duration on January 19, 1972, or during the base period if unoccupied;

(f) single family rental dwellings (where the landlord owns four units or fewer) rented for greater than month-to-month duration on January 19, 1972, or during the base period if unoccupied.

6 C.F.R. § 101.33(2) (1972); SPG ¶ 3530.05.

¹⁰¹ See note 8 *supra*.

¹⁰² Act, § 203; SPG ¶ 4617.

¹⁰³ See note 3 *supra*. The Committee on Interest and Dividends has issued guidelines which may be found generally in EC ¶¶ 7751-7758.

¹⁰⁴ Comm. on Interest and Dividends, News Release, Feb. 15, 1972; SPG ¶ 561. Exemptions from the dividend guidelines have been provided for the following:

(a) corporations with assets of less than \$1,000,000;

(b) corporations with a class of common stock held of record by less than five hundred persons;

(c) corporations which are not subject to the reporting requirements under Section 12 of the Securities Exchange Act of 1934;

(d) insurance companies without capital stock;

(e) regulated investment companies, real estate investment trusts or personal holding companies as defined in Subchapters M and G of the Internal Revenue Code; or

(f) a company 80% or more of whose common stock is owned by a company to which the guidelines apply.

Id.

¹⁰⁵ *Id.*

special rules for calculations by merged companies. Companies which comply with the guidelines will be exempt from the accumulated earnings tax to the extent that the dividends were withheld by reason of such compliance.¹⁰⁶

The Committee has published no formal regulations on interest rates. The Cost of Living Council is aware of its authority to do so but has not yet found it necessary.¹⁰⁷

III. REPORTING RULES

A. Wages

There are three categories of employers, each with different reporting requirements, based on the number of employees affected by the intended increase. Category I employers are those with 5,000 or more affected employees.¹⁰⁸ These employers must notify and obtain Pay Board approval *before* implementing any increase.¹⁰⁹ Category II employers are defined as those with between 1,000 and 4,999 affected employees. They may implement a lawful increase but must notify the Pay Board at the time they do so.¹¹⁰ Category III employers, those with fewer than 1,000 affected employees, may implement a lawful increase without seeking prior approval and without reporting it to the Pay Board. They are subject to monitoring and spot checks.¹¹¹

B. Prices

Reporting requirements for price increases are determined by the volume of the firm's activity and its annual sales or revenue. Again, there are three categories of firms. Category I includes firms with annual sales or revenue of over 100 million dollars, operators of mass transportation systems, health service institutions with annual sales or revenues over \$10,000 and large construction firms with sales or revenues of \$50 million or more.¹¹² These firms must obtain the approval of the Price Commission before implementing any price increase *above* the base price.¹¹³ Insurers become "prenotifiers" at reve-

¹⁰⁶ See SPG ¶ 561.15.

¹⁰⁷ See SPG ¶ 777.05.

¹⁰⁸ 6 C.F.R. § 101.21 (1972); SPG ¶ 3522.

¹⁰⁹ 6 C.F.R. § 101.21(a) (1972); SPG ¶ 3522. State and local government employees in Category I need not prenotify; those in Category II need not report under certain circumstances if the wage increases are less than 5.5%, but all categories must secure prior approval of those in excess of 5.5%. 6 C.F.R. § 101.28 (1972); SPG ¶ 3525.

¹¹⁰ 6 C.F.R. §§ 101.23(a),(b) (1972); SPG ¶ 3523.05. Category II involves 4,000 employee units and about 7% of the work force.

¹¹¹ 6 C.F.R. § 101.25(a) (1972); SPG ¶ 3524. See note 120 *infra* regarding IRS audits.

¹¹² 6 C.F.R. § 101.11(a) (1972); SPG ¶ 3115.05.

¹¹³ 6 C.F.R. § 101.11(c) (1972); SPG ¶ 3315.15. See also 6 C.F.R. § 101.16 (1972), SPG ¶ 3518, relaxing prenotification requirements for price increases based on raw or

nues of \$250 million or more.¹¹⁴ For reporting purposes, parents and subsidiaries are treated as one firm.¹¹⁵ The Commission will decide whether each segment of a multi-industry firm must prenotify. Pre-notification companies with many products are subject to the Term Limit Pricing rule which in substance enables them to increase prices on a weighted average basis for all product lines up to a maximum of 2%.¹¹⁶

Category II includes firms with annual sales or revenues of between fifty million and one hundred million dollars and certain health service firms and construction firms not included in Category I.¹¹⁷ These firms are obligated to file quarterly reports setting forth all price adjustments.¹¹⁸ They need not obtain approval by the Commission before implementing an increase but must not exceed the applicable ceilings.

Category III includes firms with annual sales and revenue of less than fifty million dollars. They need neither prenotify nor file periodic reports.¹¹⁹ Their adherence to the regulations will be policed by monitoring and spot checks.¹²⁰

IV. THE COURTS

There have been a number of actions filed to date both by the Government seeking to enforce the regulations and by individuals challenging them. Little more than a month after the freeze went into effect, the Attorney General sought to enjoin a planned wage increase for teachers in Louisiana.¹²¹ The Atlanta Falcons were shortly there-

partially dressed products, price increases below the base price, certain utilities, certain insurance premium levels, health services, certain leases, multi-product industries, and certain milk products.

¹¹⁴ 6 C.F.R. § 101.16(d) (1972); SPG ¶ 3518.20.

¹¹⁵ 6 C.F.R. § 101.2 (1972); SPG ¶ 3513.35. See Int. Rev. Code of 1954, § 1563(a) establishing the "80% rule." 6 C.F.R. § 300.5 (1972), SPG ¶ 3905.39 (manufacturers); 6 C.F.R. § 300.5 (1972), SPG ¶ 3905.69 (retailers); 6 C.F.R. § 300.5 (1972), SPG ¶ 3905.78 (service organizations); 6 C.F.R. § 300.5 (1972), SPG ¶ 3905.90 (wholesalers). These citations establish that all entities in a corporate or similar group will be combined and treated as one entity, not only for reporting purposes, but also for pricing purposes relative to profit margins. Combining affiliated entities for wage purposes is not presently justified by the CLC or PB regulations. See 6 C.F.R. § 201.3 (1972); SPG ¶ 3724.04 (appropriate employee units).

¹¹⁶ PC News Release 37, Dec. 22, 1971; SPG ¶ 1231.101. This figure has recently been reduced to 1.8%. PC News Release 72, Mar. 23, 1972; SPG ¶ 1231.105.

¹¹⁷ 6 C.F.R. § 101.13(a) (1972); SPG ¶ 3516.05.

¹¹⁸ 6 C.F.R. § 101.13(b) (1972); SPG ¶ 3516.10.

¹¹⁹ 6 C.F.R. § 101.15(b) (1972); SPG ¶ 3517.10.

¹²⁰ 6 C.F.R. § 101.15(b) (1972); SPG ¶ 3517.10. If the IRS persists in its announced intention to disallow tax deductibility for wages and prices paid in excess of the ceilings there will be no need for Price Commission monitoring inasmuch as IRS tax audits would, in the normal course, pick up the violations.

¹²¹ *U.S. v. Jefferson Parish School Board*, 333 F. Supp. 418 (E.D. La. 1971). The

after charged with unlawfully increasing the price of football tickets.¹²² Private plaintiff suits then began to proliferate. Teachers, professional football teams, landlords and municipal employees seemed the most affronted.

Most of the actions initially brought were mooted by the Phase II retroactivity rulings prompted by the 1971 amendments. The first important opinion was rendered by the District Court for the District of Columbia in *Amalgamated Meat Cutters v. Connally*.¹²³ Judge Leventhal, writing for a three-judge court, upheld the validity of the original Stabilization Act and the Phase I regulatory action taken thereunder. The court, noting that "the Rule of Law had been beleaguered but not breached,"¹²⁴ ruled in substance that the delegation of congressional power was within permissible constitutional limits and that the legislative standards were sufficient to enable a court to determine whether the Presidential action was consistent with the legislative will.¹²⁵

As of this writing, (May 1972), there have been twenty-one suits (one criminal) filed by the government, twenty-four filed by private persons against the government challenging the validity of the stabilization program and certain of its regulations, and one action brought by a private individual against another.¹²⁶ Only six have gone to opinion. The *Meat Cutters* case is the most significant in terms of a thorough treatment of the issues. There, the union had sought to enjoin the government from barring, under the authority of Phase I, a wage increase which had been granted to plaintiff's members prior to August 15, 1971, but which was to be implemented during the freeze. The Act and the regulatory scheme were upheld against the union's contentions of unconstitutional delegation of legislative power and impairment of contracts.¹²⁷ The court exhaustively reviewed the delegation argument and concluded that the standards furnished by Congress to the President (in the original Act adopted in 1970) were constitutionally adequate.¹²⁸ The court looked to the legislative history

motion for injunction was denied because the court found that the teacher salary increases were not subject to the provisions of Exec. Order No. 11615. *Id.* at 422.

¹²² Suit was filed in the United States District Court for the Northern District of Georgia on Sept. 27, 1971. EC ¶ 9998(3).

¹²³ 337 F. Supp. 737, EC ¶ 9995 at 9865 (D.D.C. 1971).

¹²⁴ *Id.* at 755, EC ¶ 9995 at 9875.

¹²⁵ *Id.* at 763, EC ¶ 9995 at 9882. In *Letter Carriers v. Postal Service*, 333 F. Supp. 566 (D.D.C. 1971), the court ruled that the Act applied to government employees despite the absence of specific language to that effect. See *Huber v. Connally*, 337 F. Supp. 507, EC ¶ 9975 at 9830 (S.D. Ohio 1972) (construing and upholding rent ceiling regulations as against the challenge that the use of different standards for rent than for other prices violated due process clause on equal protection grounds).

¹²⁶ See EC at 9051-55.

¹²⁷ 337 F. Supp. at 743, EC ¶ 9995 at 9867.

¹²⁸ *Id.* at 746-47, EC ¶ 9995 at 9868-69.

of the Act to discern the underlying Congressional purpose which, had the Act contained clear and explicit standards, would have been unnecessary. It would not be useful here to analyze the *Meat Cutters* opinion because the amendments to the Act have mooted the arguments about inadequate standards even though, as a practical matter, the amendments furnish no more meaningful standards than did the original Act, which provided virtually none at all. It is enough to say that the opinion is an exercise in careful legal scholarship with little relevance to the overriding issue of *how* to control inflation.

Courts need not challenge Congress or the President head on to reach a desired result. In *United States v. Jefferson Parish School Board*,¹²⁹ the court dismissed the government's application for an injunction against a school board's implementation of a pay increase for teachers by ruling that the increases had become effective before the freeze, even though few teachers had actually worked at the higher salary. In an interesting passage, the court alluded to the administrative difficulties of Phase I:

The Court recognizes the difficulty incumbent in the administration of the Stabilization Act and Executive Order. The Court takes notice that the federal agencies responsible for this gargantuan task have been swamped with myriad requests for administrative determinations and have been beset from all directions with inquiries as to the specific application of the wage-price freeze. Conflicting guidelines are perhaps inevitable because of the immediacy and urgency of the administrative inquiries. Nevertheless, the Court cannot elevate to the level of enforceable law the inconsistent and contradictory directives provided by the various Circulars. Instead, the Court will adhere to Regulation No. 1 as properly interpretive of the Executive Order.¹³⁰

In *Huber v. Connally*,¹³¹ the court enjoined a landlord from increasing rents above the ceiling fixed by the Regulations and directed it to restore to tenants the amount of the overcharge. The landlord did not challenge the authority of the President to promulgate the regulations; rather it asserted that the Cost of Living Council rent regulation was inconsistent with Executive Order No. 11615 in that it imposed a ceiling based on rents charged for the *same* property whereas the Order had frozen rents at the level charged for similar units in a substantial number of transactions.¹³² This inconsistency,

¹²⁹ 333 F. Supp. 418, EC ¶ 9996 at 9887 (1971).

¹³⁰ Id. at 423-24, EC ¶ 9996 at 9891.

¹³¹ 337 F. Supp. 507, EC ¶ 9975 at 9830 (S.D. Ohio 1972).

¹³² Id. at 510, EC ¶ 9975 at 9832.

according to the landlord, amounted to a due process violation which the court disposed of by ruling that the challenged regulation did not "manifest a patently arbitrary classification; utterly lacking in rational justification."¹³³ The same issue was again raised in *United States v. Intone Corp.*¹³⁴ with the same result. The court compared the Executive Order with the Regulation and concluded that they were perfectly consistent with each other.¹³⁵

In the only criminal action to date, *United States v. Futura, Inc.*,¹³⁶ a landlord was convicted of unlawfully raising rents during Phases I and II and engaging in an unlawful practice designed to get more rent (kickbacks). An "unconstitutional delegation" argument was rejected on the authority of the *Meat Cutters* case.¹³⁷ Deciding first that Congress intended Section 204 of the Act to create a penal offense, the court then ruled that the section was not void for vagueness.¹³⁸ The conduct of the defendant was flagrant, especially with respect to the demand that the tenants kick back additional rent payments to conceal the violations.

In *United States v. Cincinnati Transit, Inc.*,¹³⁹ the court, reserving judgment on a rollback of a transit company's fare increase and a restoration of a service cut, found the company's actions in violation of the price freeze regulations. The standards furnished by the Act were declared "intelligible," at least when examined in the context of Congressional purpose.¹⁴⁰ Of more doubtful precedent, the court concluded that, despite the language of Section 210(a) of the Act which authorizes suits by private plaintiffs, "including an action for declaratory judgment" Congress did not intend to permit declaratory actions against the government by a company which itself was about to be charged with a violation.¹⁴¹ According to the court, it was unfair that private parties should beat the Government to the punch.

It seems apparent from these cases that a general challenge to the economic legislation on constitutional grounds is doomed to failure. Wage and price stabilization is not novel. It is not a startling departure from economic custom. The concept of a federal government with limited powers has just about vanished. The political power unit is the nation. If inflation is a national problem, it must be solved by the national legislature. The courts are simply not prepared to intervene.

¹³³ Id. at 512, EC ¶ 9975 at 9833.

¹³⁴ 334 F. Supp. 905, EC ¶ 9947 at 9767 (N.D. Tex. 1971).

¹³⁵ Id. at 908, EC ¶ 9947 at 9769.

¹³⁶ — F. Supp. —, EC ¶ 9959 at 9790 (N.D. Fla. 1972).

¹³⁷ Id. at —, EC ¶ 9959 at 9791.

¹³⁸ Id. at —, EC ¶ 9959 at 9793.

¹³⁹ 337 F. Supp. 1068, EC ¶ 9950 at 9773 (S.D. Ohio 1972).

¹⁴⁰ Id. at 1072, EC ¶ 9950 at 9779.

¹⁴¹ Id. at 1074, EC ¶ 9950 at 9778.

Rather, they will preserve their independence in another manner, by striking down particular regulations where their application to particular defendants is unfair. If the need for stabilization passes, or if economic dislocations occur by continued application of the regulations, the courts will gradually nullify them. The point is that no client should be advised to ignore the Act on the surmise that the underlying regulatory scheme is invalid. It may be invalid in a theoretical or speculative scheme, but it will not be ruled so. If a particular regulation is unfair, arguments based on improper delegation, due process, vagueness, arbitrary action, or inconsistency, all of which are nothing more than legal euphemisms for unfairness, will continue to be the major avenues available to parties seeking relief from the economic controls.