United States General Accounting Office

GAO

Report to the Chairman, Subcommittee on Commercial and Administrative Law, Committee on the Judiciary, House of Representatives

January 1999

REGULATORY BURDEN

Some Agencies' Claims Regarding Lack of Rulemaking Discretion Have Merit

GAO/GGD-99-20

GAO

United States
General Accounting Office
Washington, D.C. 20548

General Government Division

B-279405

January 8, 1999

The Honorable George W. Gekas
Chairman, Subcommittee on Commercial and Administrative Law
Committee on the Judiciary
House of Representatives

Dear Mr. Chairman:

In November and December 1996, we reported what officials from 15 private sector companies said were the federal regulations that were most problematic for their businesses.[1] The 125 concerns that the officials identified focused on a variety of regulatory issues, including the perceived high cost of compliance; excessive paperwork; unreasonable, unclear, and inflexible requirements; and severe penalties for noncompliance. Our report also listed responses from the 19 federal agencies that issued the regulations underlying the 125 company concerns. In response to about one-quarter of the concerns, the agencies indicated that the companies' concerns were, at least in part, attributable to statutory requirements underlying their regulations.

This report responds to your request that we examine the agencies' assertions that some of the 125 regulatory concerns were, at least in part, attributable to the underlying statutes. Our specific objectives were to determine, for each of 27 such concerns that we focused on in this report, (1) the amount of discretion the underlying statutes gave the rulemaking agencies in developing the regulatory requirements that the agencies had said were attributable to the underlying statutes,[2] (2) whether the regulatory requirements at issue were within the authority granted by the underlying statutes, and (3) whether the rulemaking agencies could have developed regulatory approaches that would have been less burdensome to the regulated entities while still meeting the underlying statutory requirements.

Results in Brief

We concluded that the statutes underlying 13 of the 27 regulatory concerns that we examined gave the rulemaking agencies no discretion in establishing the regulatory requirements at issue. In these cases, the

[1] Regulatory Burden: Measurement Challenges and Concerns Raised by Selected Companies (GAO/GGD-97-2, Nov. 18, 1996); and Regulatory Burden (GAO/GGD-97-26R, Dec. 11, 1996).

[2] In some of the concerns, the statutory provisions were enforced through the use of policy statements or directly through the statutes themselves. Therefore, we interpreted "regulatory requirements" to include the various approaches used by the agencies to enforce their statutory requirements.

underlying statutes specifically stated what the regulated entities must do and, by inference, what the related regulations must require. We concluded that the underlying statutes for 12 of the 27 concerns gave the agencies some discretion in developing the regulatory requirements at issue. In these cases, the agencies often had no rulemaking discretion with regard to certain issues but had some or broad discretion regarding other issues (e.g., the exact type and/or frequency of the action required). We concluded that the agencies had broad discretion in developing the regulatory requirements at issue in the two remaining concerns.

We also concluded that the regulatory provisions the agencies developed in relation to all of the 27 company concerns were within the authorities granted by the underlying statutes. For those concerns in which the underlying statutes gave the agencies no discretion as to how the associated regulations could be developed, those regulations were consistent with, and often mirrored, the specific requirements in the statutes. For those concerns in which the statutes gave the agencies some or broad rulemaking discretion, the regulations did not appear to exceed the discretion allowed in those statutes.

Finally, for the 13 concerns for which we concluded agencies had no discretion, we also concluded that there were no less burdensome regulatory approaches available to the agencies that would have met the requirements of the statutes. We could not determine whether less burdensome regulatory approaches were available for the remaining 14 of the 27 concerns, for which the statutes gave the agencies some or broad rulemaking discretion. To make those determinations, we would have had to conduct a detailed examination of the implementation of each of the regulatory provisions that the agencies had said were attributable to the underlying statutes and/or the implications of alternative approaches—analyses that would have required time and resource commitments that were beyond the scope of this review.

Although this review focused on only 27 regulatory concerns, we believe that it can offer insights into some broader issues. For example, the review suggests that regardless of how much or how little rulemaking discretion the underlying statutes permit, the entities being regulated may still consider the associated regulations burdensome. Also, if an underlying statute is the source of regulatory burden, that burden can be alleviated only by changes in the statute. In such cases, regulatory reform initiatives focused on the agencies (e.g., cost-benefit analysis requirements) are unlikely to have much direct effect on the regulatory burden that those agencies impose.

Background

Regulations generally start with an act of Congress and are the means by which statutes are implemented and specific requirements are established. The statutory basis for a regulation can vary in terms of its specificity, from (1) very broad grants of authority that state only the general intent of the legislation and leave agencies with a great deal of discretion as to how that intent should be implemented to (2) very specific requirements delineating exactly what regulatory agencies should do and how they should do it. For example, the Agricultural Adjustment Act provides a broad grant of authority to the Secretary of Agriculture, stating only that agricultural marketing should be "orderly" but providing little guidance regarding which crops should have marketing orders or how to apportion the market among growers. On the other hand, the Department of Transportation (DOT) has concluded that it has no discretion in setting the average fuel economy standards (known as the "Corporate Average Fuel Economy" or "CAFE" standards) for light trucks. DOT's 1998 appropriations act stated that "(n)one of the funds in this Act shall be available to prepare, propose, or promulgate any regulations (prescribing CAFE standards for automobiles) . . . in any model year that differs from standards promulgated for such automobiles prior to the enactment of this section." At the time this appropriations act was enacted, DOT was preparing the CAFE standard for model year 2000. Therefore, DOT concluded that it was required to keep the same light truck CAFE standard for model year 2000 that applied to model year 1999—20.7 miles per gallon.[3]

Views Regarding Congressional Delegation of Authority

Some regulatory analysts believe that Congress too often writes overly broad laws that provide too much discretion to regulatory agencies.[4] Similarly, the perception by some Members of Congress that federal agencies have promulgated regulations that go beyond the intent of Congress helped lead to the establishment of expedited congressional regulatory review procedures in the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996.[5] In a joint statement

[3] DOT 's 20.7 mile per gallon CAFE standard for model year 1999 was a continuation of the standard for model years 1998 and 1997 because of similar language in DOT's 1997 and 1996 appropriation acts. See Department of Transportation, National Highway Traffic Safety Administration: Light Truck Average Fuel Economy Standard, Model Year 2000 (GAO/OGC-98-42, Apr. 17, 1998).

[4] See, for example, David Schoenbrod, Power Without Responsibility: How Congress Abuses the People Through Delegation (New Haven: Yale University Press, 1993).

[5] Under SBREFA's congressional review procedures, Congress can review rules before they take effect and disapprove those it considers too burdensome, excessive, inappropriate, duplicative, or otherwise objectionable. The act requires agencies to submit a copy of each final rule to both Houses of Congress and the Comptroller General before they take effect. SBREFA also requires the Comptroller General to provide a report on each "major" rule within 15 calendar days after the rule is submitted. In the first 2 years of the act, we received 8,284 rules, of which 122 were major rules. For an analysis of these rules,

intended to provide a legislative history of the SBREFA review procedures, some Members said:

"As the number and complexity of federal statutory programs has increased over the last fifty years, Congress has come to depend more and more upon Executive Branch agencies to fill out the details of the programs it enacts . . . . As more and more of Congress' legislative functions have been delegated to federal regulatory agencies, many have complained that Congress has effectively abdicated its constitutional role as the national legislature in allowing federal agencies so much latitude in implementing and interpreting congressional enactments . . . ."

"Because Congress is often unable to anticipate the numerous situations to which the laws it passes must apply, Executive Branch agencies sometimes develop regulatory schemes at odds with congressional expectations . . . . Rules can be surprisingly different from the expectations of Congress or the public. Congressional review gives the public the opportunity to call the attention of politically accountable, elected officials to concerns about new agency rules."

Similar concerns about agencies' regulatory actions have led Congress to establish analytical requirements that agencies must comply with during the rulemaking process. For example, the Regulatory Flexibility Act of 1980, as amended, requires agencies to analyze the anticipated effects of rules they plan to propose on small entities unless they certify that the rules will not have a "significant economic impact on a substantial number of small entities." Title II of the Unfunded Mandates Reform Act of 1995 requires federal agencies (other than independent regulatory agencies)[6] to prepare written statements for certain rules. Those written statements must, among other things, contain a qualitative and quantitative assessment of the anticipated costs and benefits of the rules.[7] Various executive orders have imposed similar analytical requirements on federal agencies.[8]

In contrast, other regulatory analysts have concluded that Congress has, at times, been overly restrictive in writing the statutes underlying agencies' regulations. For example, in an April 1998 policy statement, the Committee for Economic Development (CED) pointed out that those

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see Regulatory Reform: Major Rules Submitted for Congressional Review During the First 2 Years (GAO/GGD-98-102R, Apr. 24, 1998).

[6] Independent regulatory agencies include such agencies as the Federal Communications Commission, the Securities and Exchange Commission, and the Consumer Product Safety Commission.

[7] For an analysis of these requirements, see Unfunded Mandates: Reform Act Has Had Little Effect on Agencies' Rulemaking Actions (GAO/GGD-98-30, Feb. 4, 1998).

[8] For example, Executive Order 12866 requires nonindependent regulatory agencies to assess the costs and benefits of "economically significant" proposed and final rules.

statutes can, at times, be too narrow.[9] In particular, the policy statement said that the traditional focus of regulatory reform on improving the way federal agencies write regulations

> "ignores the fact that the key decisions occur when Congress writes an Occupational Safety and Health Act or an amendment to the Food, Drug, and Cosmetics Act or any other important regulatory law, usually with hundreds of pages of detailed specifications. . . . The way those statutes are written frequently precludes the agencies from even considering the most cost-effective approaches."

Therefore, CED concluded that the traditional focus of regulatory reform should be shifted from regulatory agencies to Congress. CED recommended, among other things, that each congressional committee be required, when writing a regulatory statute, to articulate the expected benefits and costs of the regulatory program in the report accompanying the legislation. It also recommended that Congress eliminate provisions in existing statutes that prevent or limit regulatory agencies from considering costs or comparing expected benefits with costs.[10]

Related Reports and Testimonies

Several of our recent reports and testimonies have raised the issue of whether regulatory burden was based on the underlying statutes. As noted previously, in our 1996 reports on which this review is based, the agencies responding to some of the companies' concerns said that the specific requirements that the businesses mentioned were statutorily driven.[11] We noted in our November 1996 report that we did not review the regulations and statutes that the agencies cited to determine whether the underlying statutes required the regulatory provisions that were of concern to the companies. However, we said that if the statutes do not require those regulatory provisions, the agencies have a responsibility to address those concerns on their own and not shift the responsibility to Congress. We also said that if Congress believes an agency's regulation is inconsistent with the intent of the underlying statute, Congress could amend the statute to reflect current congressional intent and, in effect, require the agency to amend its regulation.

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[9] Committee for Economic Development, Modernizing Government Regulation: The Need for Action, April 1, 1998.

[10] See also Murray Weidenbaum, A New Approach to Regulatory Reform, Center for the Study of American Business, Policy Study Number 147, August 1998.

[11] In response to other company concerns, the agencies (1) indicated that the companies mischaracterized, misstated, or misinterpreted the regulations involved; or (2) agreed that corrective actions were needed and said they were taking or had taken such actions.

In three reviews of agencies' implementation of the Paperwork Reduction Act of 1995, we reported that agencies believed the paperwork burden associated with their regulations had increased since the act was passed because of congressionally imposed requirements.[12] As a result of such requirements, we said that some agencies believed that they were limited in the amount to which they can reduce their paperwork burden. For example, the Internal Revenue Service (IRS) said it could not reach the burden reduction goals established in the Paperwork Reduction Act under the current statutory framework and still carry out its mission. We noted that we had not assessed the extent to which the paperwork burden agencies impose is directly a consequence of statutory requirements and, therefore, is out of the agencies' control. However, we also noted that if agencies' paperwork requirements are truly statutorily mandated, those agencies may not be able to reduce their burden-hour estimates by the amounts envisioned in the 1995 act without changes in the legislation underlying those requirements.

In our 1997 review of four agencies' efforts to eliminate or revise pages in the Code of Federal Regulations (CFR), we found that two of the four agencies had added more pages to the CFR than they deleted.[13] Agency officials said that statutory requirements imposed by Congress often drive CFR page additions, and they provided several examples of those statutory requirements. However, we did not examine those statutes to determine the extent to which they required the CFR page additions.

Objectives, Scope, and Methodology

This review focuses on a subset of the 125 regulatory concerns that companies cited in our 1996 reports—the concerns that federal agencies indicated were, at least in part, attributable to the statutes underlying the relevant regulatory provisions. Our objectives were to determine, for each such concern, (1) the amount of discretion the underlying statutes gave the agencies in developing the regulatory requirements, (2) whether the regulatory requirements at issue were within the authority granted by the underlying statutes, and (3) whether the rulemaking agencies could have developed regulatory approaches that would have been less burdensome to the regulated entities while still meeting the underlying statutory requirements.

[12] Paperwork Reduction: Burden Reduction Goal Unlikely To Be Met (GAO/T-GGD-RCED-96-186, June 5, 1996); Paperwork Reduction: Governmentwide Goals Unlikely To Be Met (GAO/T-GGD-97-114, June 4, 1997); Paperwork Reduction Act: Implementation at IRS (GAO/GGD-99-4, Nov. 16, 1998).

[13] Regulatory Reform: Agencies' Efforts to Eliminate and Revise Rules Yield Mixed Results (GAO/GGD-98-3, Oct. 2, 1997).

Appendix I provides a detailed discussion of our scope and methodology. In brief, we identified the 27 company concerns that we focused on in this review by (1) subdividing some concerns in our December 1996 report to facilitate the analysis; and (2) eliminating some of the concerns that were too broad or that focused only on federal statutes, not agencies' regulatory requirements. For example, in one concern company officials said that the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) was expensive and exposed the company to unforeseen liability, but the officials did not cite any EPA regulations in their concern. The 27 concerns were raised by officials from 10 of the 15 companies we visited during the preparation of our 1996 reports, 7 of whom asked that we use generic descriptors such as "Bank A" or "a paper company" to identify them. A total of 11 federal departments and agencies issued the regulations underlying the 27 company concerns at issue in the report.

To address our first objective we reviewed the statutory provisions underlying each of the concerns and coded the level of discretion that we believed those provisions permitted the agencies in developing the specific regulatory requirements at issue in the concerns into one of three categories— "no discretion," "some discretion," or "broad discretion." We coded statutory provisions as allowing rulemaking agencies "no discretion" if they delineated specific actions that regulated entities or the agencies themselves must take and did not allow the agencies to develop their own regulatory requirements. We coded statutory provisions as allowing the agencies "some discretion" if they delineated certain requirements that had to be included in the regulations but gave the agencies at least some discretion regarding other requirements (e.g., the timing or frequency of a reporting requirement). We coded statutory provisions as allowing the agencies "broad discretion" if they contained few specific requirements or imposed few to no constraints on what the agencies had to include in their regulations.

To address our second objective, we compared the relevant statutory and regulatory provisions for each concern and decided whether we believed the regulatory requirements at issue in the concerns were within the authority granted by the underlying statutes.[14] We coded the regulatory provisions as being within the authority granted by the statutes if (1) the statutory provision gave the agency no discretion in how the regulations could be developed and the regulatory provision strictly adhered to the statutory requirements; or (2) the statutory provision gave the agency

[14] If a court considering this matter determined that a regulation exceeded the authority granted by the underlying statute, that regulation could be invalidated.

some or broad discretion, and the regulatory provision was consistent with the requirements or the limitations in the statute.

To address our third objective we examined our answers to the previous objectives and decided whether we believed the rulemaking agencies could have developed regulatory approaches that would have been less burdensome to the regulated entities while still meeting the underlying statutory requirements. If the underlying statutes gave an agency no rulemaking discretion and the agency adopted regulations that strictly adhered to the statutory requirements, we concluded that the agency could not have developed a less burdensome regulatory approach. If the underlying statutes gave an agency some or broad rulemaking discretion, we were not able to determine if the agencies could have developed a less burdensome approach. To do this we would have needed detailed information on how the agencies' regulations were being implemented and how alternative approaches would be perceived by the regulated entities in order to determine whether a less burdensome approach was available. As is discussed in Appendices III and IV, that information was not readily available.

Because this review is based on a subset of the company concerns and agency responses originally presented in our 1996 reports, the results of our analysis are not generalizable to other companies, other regulatory issues, or even to all of the original 125 regulatory concerns. However, as we pointed out in our November 1996 report, the companies' comments were similar in many respects to comments made by companies in some of our previous reports and in the literature.[15] Therefore, we believe that the companies' comments, the agencies' responses, and our analysis of the related regulations and statutes are not atypical and can provide some insights regarding the broader issues addressed in this report.

This report reflects the views of selected companies and regulatory agencies gathered during our earlier effort but does not reflect the views of other individuals and organizations that may be affected by the regulations at issue (e.g., labor unions or potential beneficiaries). We did not attempt to determine whether the companies' or the agencies' views were correct with regard to issues that were outside the scope of this review (e.g., whether any of the agencies' actions were, in fact, "burdensome"). Although we approached this review systematically, our conclusions are ultimately matters of judgement, not determinations that have a legally

[15] See, for example, Workplace Regulation: Information on Selected Employer and Union Experiences (GAO/HEHS-94-138, June 30, 1994).

binding effect on the agencies issuing the rules or the regulated community.

The report focuses primarily on the amount of discretion that the relevant statutes gave rulemaking agencies in developing the regulatory requirements at issue in the companies' concerns. However, the report does not address the amount of discretion that the agencies had in writing regulations outside of the specific issues raised by the companies. Agencies may have broad discretion in how regulations can be developed within a general area, but little or no discretion with regard to particular issues within those areas. Also, the report does not address enforcement issues. As our 1996 reports indicated, agencies may have considerable discretion in carrying out their enforcement authority, and the use of that discretion can significantly affect the burden felt by regulated entities. For example, several companies expressed concerns about rigid and inflexible regulations and about certain regulators' "gotcha" enforcement approach. In response to those concerns, the agencies sometimes indicated that they reduced penalties in response to good faith efforts to comply, were not "aggressively" enforcing certain technical requirements, or were changing their enforcement approaches.

We initially gathered the company concerns and agency responses between June 1994 and September 1996. We conducted our work for this review between February and October 1998 in the Washington, D.C., headquarters offices of each of the 11 departments and agencies that issued the regulations in accordance with generally accepted government auditing standards. During the preparation of this report, the agencies responsible for the regulations related to the company concerns reviewed and commented on our observations regarding each applicable concern. The agencies often offered suggestions regarding how the statutes and regulations should be characterized in the report, and we incorporated those suggestions where appropriate. The agencies ultimately concurred with our analysis in all 27 concerns. At the end of our review we sent a draft of this report for comment to the Director of the Office of Management and Budget (OMB). Executive Order 12866 states that OMB's Office of Information and Regulatory Affairs (OIRA) is "the repository of expertise concerning regulatory issues, including methodologies and procedures that affect more than one agency . . . ." OIRA is also responsible for reviewing significant regulations before their publication as proposed and final rules and for approving agencies' information collection requests under the Paperwork Reduction Act. On December 10, 1998, we met with the Acting Administrator of OIRA, who said he had no comments on the report.

Statutes Provided A Range of Rulemaking Discretion

As shown in figure 1, we concluded that the statutory provisions underlying 13 of the 27 company concerns that we reviewed provided the agencies with no discretion in how the relevant regulatory provisions could be developed. We concluded that the statutory provisions underlying 12 of the remaining 14 concerns permitted the agencies some discretion in establishing regulatory requirements, and the provisions related to 2 concerns allowed the agencies broad rulemaking discretion.

Figure 1: Agencies Appeared to Have No Discretion in Developing Rules Related to About Half of the Company Concerns

Note 1: We reviewed twenty-seven concerns to determine the amount of discretion allowed by the relevant statutory provisions.

Source: GAO analysis based on GAO/GGD-97-2 (Nov. 18, 1996); and GAO/GGD-97-26R (Dec. 11, 1996).

Table 1 shows the number of concerns at each level of discretion for each agency issuing the related regulations.

Table 1: Number of Concerns by Agency and Level of Discretion

	Number of concerns by level of discretion			
Agency	**No discretion**	**Some discretion**	**Broad discretion**	**Total number of concerns**
Board of Governors of the Federal Reserve System (FRB)	6	5	0	11
Environmental Protection Agency (EPA)	3	1	0	4
Federal Deposit Insurance Corporation (FDIC)	1	3	0	4
Internal Revenue Service (IRS)	2	1	0	3
Office of the Controller of the Currency (OCC)	0	2	1	3
Health Care Financing Administration (HCFA)	0	2	0	2
Housing and Urban Development (HUD)	0	1	0	1
Occupational Safety and Health Administration (OSHA)	1	0	0	1
Department of Transportation (DOT)	0	1	0	1
Equal Employment Opportunity Commission (EEOC)	0	0	1	1
Pension Benefit Guaranty Corporation (PBGC)	1	0	0	1
Total number of concerns	**14**	**16**	**2**	**32**

Note: The total number of concerns is greater than 27 because the regulations relevant to 2 of the concerns were issued by 3 agencies, and the regulations underlying another concern were issued by 2 agencies.

Source: GAO analysis based on GAO/GGD-97-2 (Nov. 18, 1996); and GAO/GGD-97-26R (Dec. 11, 1996).

Statutes Permitted No Rulemaking Discretion for About Half the Concerns

For 13 of the 27 company concerns in this report, we concluded that the relevant statutory provisions allowed the agencies no discretion in how the related regulations could be developed. As discussed previously, we considered statutory provisions as allowing rulemaking agencies “no discretion” if they delineated the specific actions that regulated entities or the agencies themselves must take and did not allow the agencies to develop their own regulatory requirements.

The following examples illustrate the types of statutory provisions that we concluded did not allow agencies any discretion in developing the relevant regulations. These and other examples of statutory provisions that did not appear to allow the agencies rulemaking discretion are discussed more fully in appendix II.

- Officials from Multiplex Company, Inc. said increased premium costs paid to PBGC to guarantee their employees' pensions is costly for the company, rising from $2.60 per participant in 1982 to $19.00 per participant in 1994. PBGC officials said the agency's insurance premiums are statutorily established in Section 4006 of the Employee Retirement Income Security Act (ERISA). We concluded that ERISA (codified at 29 U.S.C. 1001 et seq.) gave PBGC no discretion in setting the pension insurance rates at issue in this concern. Under the statute, the $19.00 rate is the minimum amount businesses with single-employer plans must pay for basic benefits.
- Multiplex Company, Inc. officials also said that IRS-required "nondiscrimination tests" for 401(k) thrift savings plans were of questionable value after IRS lowered the amount of money that could be contributed to the plans, thereby making it less likely that higher income employees would dominate the plan. IRS said that both the test, known as the actual deferral percentage test, and the limit on the amount that could be contributed to a 401(k) plan were required by statute. We examined the relevant statutory provisions and concluded that IRS had no discretion in how the regulations could be developed. The deferral percentage test and the deferral limit were both specifically established by statute. A subsequently enacted statute that reduced the amount that could be contributed to 401(k) plans did not eliminate the requirement that companies perform this test.
- An official from Bank A said that a FRB regulation on the availability of funds and the collection of checks (Regulation CC) requires information that is time consuming for banks to develop. Officials from FRB said that the Expedited Funds Availability Act requires depository institutions to provide written copies of their funds availability policies to their customers. We examined the act and concluded that it gave the agency no discretion in how its regulations could be written. The statute specifically requires depository institutions to provide their customers with preprinted slips describing their policies regarding the amount of time between when a deposit is made into a customer's account and when funds can be withdrawn from that deposit.
- A Metro Machine Corporation official said that EPA regulators establish unrealistic requirements that are not attainable with current treatment technology. For example, the official said that federal water quality standards require that water the company discharges be made cleaner than rainwater. In its response to this concern, EPA said that under the Clean Water Act, it could not consider available treatment technologies or the cost of treatment in the development of water quality criteria for a particular designated use. We agreed that EPA had no discretion under the act regarding the role that cost or treatment technologies can play in establishing federal water quality criteria.

Statutes Allowed Agencies Some Rulemaking Discretion for 12 Concerns

For 12 of the 27 company concerns, we concluded that the underlying statutory provisions gave the agencies some discretion in how the associated regulations could be developed. As discussed previously, we considered rulemaking agencies to have "some discretion" if the statutory provisions delineated certain requirements that had to be included in the regulations but allowed the agencies at least some flexibility regarding other requirements.

The following examples illustrate the types of statutory provisions that we concluded allowed agencies some discretion in developing the relevant regulations. These and other examples of statutory provisions that allowed some rulemaking discretion are discussed more fully in appendix III.

- An official from Bank A said that provisions of Regulation DD under the Truth in Savings Act requires the bank to disclose certain information to its customers in a single document. The bank officials said that they had been disclosing this information in a variety of brochures, but had to revise their brochures to disclose this information in one document to comply with Regulation DD. In response to this concern, officials at FRB said that the Truth in Savings Act required all depository institutions to disclose information about the rates paid and fees charged in a uniform manner. We concluded that the Truth in Savings Act gave FRB some discretion in how it could establish what became Regulation DD. Although the act gave FRB no discretion regarding the disclosures that must be required in Regulation DD, the act gave FRB discretion to determine how these disclosures should be made to bank customers.[16]
- Officials from the paper company said DOT regulations that required hazardous materials ("hazmat") training and testing cost the company $475,000 each year. According to DOT, the Hazardous Materials Transportation Uniform Safety Act specifically required the issuance of regulations requiring employers to provide hazmat training to certain employees. We examined the training requirements in the act and concluded that the act gave DOT no rulemaking discretion in some areas and some discretion in other areas. For example, the act said the Secretary of Transportation "shall prescribe by regulation requirements for training that a hazmat employer must give hazmat employees of the employer on the safe loading, unloading, handling, storing, and transporting of hazardous material." The act also required the regulations to establish the date by which the training shall be completed and to

[16] As discussed in appendix III, FRB's regulations require only that these disclosures be made in a clear and conspicuous manner, not in a single document.

require employers to certify that their hazmat employees have received training and been tested on at least one of nine specific areas of responsibility that are delineated in the statute. However, the statute also said that DOT's regulations "may provide for different training for different classes or categories of hazardous material and hazmat employees." Because the statute gave DOT the flexibility to tailor its regulatory requirements for hazmat training to different classes of hazmat materials and employees, we concluded that DOT had some rulemaking discretion.[17]

- Officials from the fish farm said that pesticide manufacturers were either not renewing the aquatic use of certain pesticides or were not seeking EPA approval of the products for use in aquaculture because of the expense associated with the testing requirements in EPA's reregistration program. EPA officials said that the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) requires EPA to certify that all pesticides meet current testing standards for safety. We concluded that these FIFRA provisions gave EPA some discretion regarding the requirements that manufacturers must satisfy in the pesticide reregistration process. Section 4 of FIFRA specifically states that the Administrator of EPA must reregister "each registered pesticide containing any active ingredient contained in any pesticide first registered before November 1, 1984," and it prescribes in detail the approach EPA is to use to reregister pesticides. However, the statute gives the EPA administrator discretion in establishing the data requirements that would be needed to support the reregistration of the pesticides. These requirements can have a direct impact on the expense incurred by manufacturers in the reregistration process.

Statutes Allowed Agencies Broad Rulemaking Discretion for Two Concerns

We concluded that the statutory provisions underlying 2 of the 27 concerns gave the agencies broad discretion in how regulatory provisions could be developed. As noted previously, we coded statutory provisions as allowing rulemaking agencies "broad discretion" if the provisions contained few specific requirements or imposed few to no constraints on what had to be included in agencies' regulations.

In the first of the two concerns, Bank A officials said EEOC's record retention standards were inconsistent with the way EEOC pursued cases. In response to the Bank's concern, EEOC officials said that its record retention requirements were tied to the filing periods in each of the civil rights statutes. For example, EEOC officials said that because an employee could file a discrimination suit under the Equal Pay Act within either 2 or 3 years of the alleged discrimination, EEOC requires that

[17] As discussed in appendix III, DOT's hazmat training regulations reflect the statutory requirements and require some additional information that the statute permits the agency to impose.

related records be kept for 2 or 3 years. EEOC officials also said that under all of the statutes, when a claim of discrimination is pending, the employer must keep all relevant personnel records until final disposition of the charge or action. We concluded that the statutory provisions underlying EEOC's record retention standards gave EEOC broad discretion in developing the standards because those provisions (1) do not specify how long employers must retain records and (2) give EEOC broad authority to establish retention periods. For example, the Equal Pay Act states that every employer must preserve records for such periods of time as the Administrator of EEOC "shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this chapter or the regulations or orders thereunder." Title VII of the Civil Rights Act of 1964, as amended, requires every employer to make such reports from its personnel records "as the Commission shall prescribe by regulation or order . . . ."[18] Therefore, we concluded that EEOC had broad discretion in establishing record retention requirements.

In the second of the two concerns, Bank B officials said that some banking regulations gave "nonbanks" (e.g., investment brokerage firms) an unfair competitive edge in the marketplace. For example, the officials said that one regulation required banks (but not investment firms) to disclose the risks associated with certain investment products. In their 1996 response to this concern, OCC officials said that the examples of competitive inequality cited by the bank officials "are due to the fact that banks and nonbanks operate under different statutory schemes." During this review they explained that under these statutes, banks are subject to a different regulatory scheme than nonbanks because they are federally insured. Therefore, they said it is appropriate for banking agencies to adopt additional disclosure requirements that address the unique features of the banking industry. In 1994, OCC and the other banking agencies issued an interagency policy statement at their own initiative requiring the disclosures that Bank B found burdensome under their general statutory authority to issue rules and regulations. Because (1) the statutes give OCC and the other banking agencies authority to take whatever actions they believe are necessary to remedy or prevent unsafe and unsound banking practices (see 12 U.S.C. 1818), and (2) the disclosures required in the policy statement appear related to that end, we believe that OCC had broad discretion to issue the policy statement requiring the disclosures at issue in this concern.

[18] As discussed in appendix IV, EEOC's record retention requirements align fairly closely with the statutory time limits for filing discrimination complaints.

Appendix IV contains our detailed analysis of the statutory and regulatory provisions relating to both of the concerns for which we concluded the agencies had broad rulemaking discretion.

Agencies' Regulatory Requirements Were Within Statutory Authority

Our second objective was to determine whether the regulatory requirements at issue in each of the 27 company concerns were within the authority granted by the underlying statutes. We concluded that the regulatory provisions related to all of the concerns were within the authority granted by those statutes.

For the 13 concerns in which we concluded the underlying statutes gave the agencies no rulemaking discretion, the language in the agencies' regulations either mirrored the language in the statutes or was substantively consistent with the statutory requirement. Therefore, we concluded that the regulations were within the authority granted by the statutes. For example, in relation to a concern from Zaclon, Inc., regarding a permit application under the Resource Conservation and Recovery Act (RCRA), we compared the relevant RCRA statutory provisions with EPA's regulations and found that the language in the regulations mirrored the language in the statute. The RCRA provisions (codified at 42 U.S.C. 6925(a)) required the EPA Administrator to "promulgate regulations requiring each person owning or operating an existing facility or planning to construct a new facility for the treatment, storage, or disposal of hazardous waste . . . to have a permit issued pursuant to this section." EPA's RCRA regulations (40 C.F.R. 270.1(c)) directly quote the statute's requirements that a permit is needed for the "treatment,' 'storage,' and 'disposal' of any 'hazardous waste'" and goes on to require companies to obtain such permits. Because the regulatory provisions reflected the specific statutory requirements, we concluded that those provisions were within the authority granted by the statutes.

We reached a similar conclusion with regard to a concern from Multiplex Company, Inc., involving what it referred to as IRS' "nondiscrimination tests" for companies' 401(k) thrift savings plans. We compared the nondiscrimination test provisions in the tax code with IRS' regulations and concluded that the regulations essentially mirror the statutory provisions and add some explanatory language. The statute (codified at 26 U.S.C. 401(k)(3)(A)(ii)) specifically requires the test and establishes specific dollar amounts for deferral limits and detailed procedures that companies must follow. For example, the statute says that the "actual deferral percentage for the group of eligible highly compensated employees is not more than the actual deferral percentage of all other eligible employees

multiplied by 1.25." The related IRS regulations (26 C.F.R. 1.401(k)-1(b) and 1.402(g)-1) repeat these statutory requirements word for word.

We concluded that the regulations underlying the 12 concerns for which the agencies had some rulemaking discretion were within the authority granted by the related statutes because they (1) contained the elements required by those statutes and/or (2) did not exceed the authority granted or limits imposed by those statutes. For example, we concluded that the Expedited Funds Availability Act allowed FRB some discretion in developing the regulation (Regulation CC) that established the periods during which banks could hold funds before making them accessible to depositors. Although the act gave FRB no discretion regarding the maximum number of days banks could hold particular types of deposits, it allowed FRB to establish hold periods that were less than those maximums or to standardize those time periods. Regulation CC established hold periods that were consistent with the maximum periods specified in the statute. Therefore, we concluded that the regulation was within the authority granted by the statute.

For the two concerns in which we concluded that the underlying statutes gave the agencies broad rulemaking discretion, the statutes contained language that allowed agencies to develop the rules they believed were necessary to carry out their statutory missions. We viewed regulations that agencies developed to carry out their statutory responsibilities as being within the authority of those statutes. For example, we concluded that EEOC had broad discretion under the various civil rights statutes to impose record retention requirements. Therefore, we also concluded that EEOC's practice of establishing requirements closely related to the filing periods of each statute was within the authority granted by those statutes.

Appendixes II, III, and IV describe our analyses of the relevant regulations for all of the concerns that we categorized as allowing no discretion, some discretion, and broad discretion, respectively.

Less Burdensome Regulatory Approaches Were Not Available for About Half of the Concerns

Our third objective was to determine whether the rulemaking agencies could have developed regulatory approaches that would have been less burdensome to the regulated entities while still meeting the underlying statutory requirements. We concluded that in relation to 13 of the 27 concerns, the agencies could not have developed less burdensome regulatory approaches. For the remaining 14 concerns, we could not determine whether less burdensome regulatory approaches were available to the agencies without substantial additional information about how the

current approaches were being implemented or how alternative approaches would be perceived by regulated entities.

We believe that an agency cannot develop regulatory requirements that are less burdensome to a regulated entity if (1) the statute underlying the regulation gives the agency no discretion regarding how regulatory provisions can be developed, and (2) the agency develops regulations that are consistent with (and sometimes mirror images of) the statutory requirements. Because 13 of the 27 concerns met these criteria, we concluded that the agencies involved in the concerns could not have developed less burdensome regulatory provisions. For example, in one of these concerns, officials from a paper company said that EPA regulations under title V of the Clean Air Act were problematic because they regulated extremely low levels of emissions. We concluded that under title V, EPA had no discretion regarding the development of regulations on the emissions levels that trigger the permitting requirements because the statute specifically requires any "major source" of hazardous air pollutants to obtain a title V permit and defines a major source as any source that emits 10 tons or more a year of any hazardous air pollutant or 25 tons or more per year of a combination of pollutants. EPA's regulations implementing title V are similar to the statutory language and specifically refer to the definition of "major source" in the United States Code. Therefore, we concluded that there was no less burdensome regulatory approach that the agency could have selected that would have met the requirements of the statute. (See app. II for a discussion of all of these concerns.)

For the remaining 14 concerns in which we concluded the underlying statutes gave the agencies some or broad discretion, we could not determine whether a less burdensome regulatory approach was available. To make such a determination in each of these cases, we would have had to do an in-depth review of how the current regulations were being implemented at each agency or how alternative approaches would be viewed by regulated entities. For example, in one of the concerns, a Bank A official complained about the time and effort required to complete call reports that summarize bank operations. We concluded that the various statutes that require or authorize the banking agencies to collect information through the call reports gave the agencies some discretion in drafting the relevant regulatory provisions. However, we could not determine whether the banking agencies could have developed less burdensome requirements without conducting a detailed review of each of the nonstatutory data elements in the call reports and their consistency with the requirements in the statute. This type of detailed analysis would

have required significant time and resource commitments that were beyond the scope of this review. (See app. III and IV for a discussion of all of these concerns.)

For 2 of these 14 concerns, the agencies appeared to have discretion to develop alternative regulatory approaches that may have addressed an aspect of the companies' original concerns. However, we also concluded that the regulated entities might not have viewed those alternatives as less burdensome than the approach that the agencies took. For example, in one of the concerns a Bank A official said that Regulation CC required the development and maintenance of expensive and time-consuming information about the current availability of funds. In response, FRB officials indicated that Regulation CC's requirements were based on the Expedited Funds Availability Act, which establishes different minimum hold periods for different types of deposits (e.g., deposits of local versus nonlocal checks). They said that to ensure compliance with this act, banks must have a system for tracking those deposits. We examined the act and concluded that it allowed FRB some discretion to establish hold periods for various types of deposits. For example, the act said that the hold period for nonlocal checks could not be more than 5 days, but it allowed FRB to establish hold periods that were less than the maximum period. However, FRB's Regulation CC established a 5-day hold period for nonlocal checks. To reduce Bank A's burden of having to track holds on different types of deposits, FRB could have established a standard hold period in Regulation CC for all types of deposits—e.g., 1 day for all types of deposits—that was still consistent with the statutory requirements. However, it is unclear whether banks would welcome a standard 1-day hold requirement because it would reduce the amount of time available to the banks to determine whether sufficient funds existed to cover all categories of checks.

In the other concern, we concluded that EEOC's practice of establishing personnel record retention requirements related to the length of the filing periods of the particular civil rights statutes was within the broad rulemaking authorities granted by those statutes. However, EEOC could also have used its discretion to establish uniform record retention requirements (e.g., 5 or 10 years) for all of the statutes instead of the variable periods for the different statutes. Although this approach could have helped eliminate what the company viewed as an inconsistency between the requirements and the way EEOC pursues cases, it is not clear whether regulated entities would view a record retention requirement that is longer than the current requirement as being less burdensome.

Conclusions

Our review focused on a limited set of issues. It did not attempt to assess the amount of discretion that federal agencies had in enforcing the requirements at issue in the companies' concerns or whether those requirements were, in fact, burdensome. The review focused on 27 regulatory concerns from 10 companies that the agencies issuing the regulations indicated were based on the underlying statutes. Therefore, the results of our review cannot be viewed as being representative of all regulatory concerns, all regulations or statutes, or even all of the concerns that the companies mentioned during our initial 1996 study. In fact, it is important to remember that for about three-fourths of the companies' original 125 concerns, the responding agencies did not indicate that the concerns were based on the statutory requirements underlying their regulations.

On the other hand, although our review focused on 27 regulatory concerns that the agencies said were, at least in part, statutorily based, the companies in our 1996 study mentioned 6 other concerns that centered on the statutes themselves, not the regulations. For example, officials from one company said that compliance with the Comprehensive Environmental Response, Compensation, and Liability Act (not EPA's CERCLA regulations) was expensive and exposed the company to unforeseen liability. These statute-directed concerns suggest that the companies understood the degree to which their problems were traceable to the statutes. Also, the comments that the companies made during our 1996 study were similar in many respects to comments made by companies in some of our previous reports and in the literature. Therefore, we believe that the companies' comments are not atypical, and our analysis of the regulations and statutes underlying those concerns can offer some insights into how regulatory concerns arise and how they can best be addressed.

For about half of the concerns that we reviewed, we concluded that the statutory provisions underlying the regulations that companies perceived as problematic gave the agencies no discretion in how they could develop those regulations. Some of the statutory provisions specifically delineated the actions regulated entities had to take and therefore limited rulemaking agencies' discretion regarding what their regulations could require. As a result, the agencies often mirrored the language of the statutes in their regulations. We therefore concluded that the agencies' regulations were within the authority granted by the underlying statutes and represented the least burdensome option permitted by those statutes. Nevertheless, during our 1996 review the companies told us that the requirements for these 27 concerns were burdensome.

The statutes underlying other company concerns gave the agencies some or broad discretion in developing associated regulatory provisions. In these cases the agencies appeared to have developed regulations that were within the authorities permitted by or the limitations of the statutes. However, we could not determine whether the agencies could have developed less burdensome regulatory alternatives with regard to these concerns because to do so would have required detailed information about how the current requirements were being implemented and/or how alternative regulatory approaches would be perceived by regulated entities. In two of these cases, we concluded that the agencies could have developed alternative regulatory requirements that may have addressed some aspects of the companies' concerns. However, even in those cases, the regulated entities may not have perceived these alternative actions as less burdensome than the actions the agencies took.

Statutory Discretion Appears Unrelated to Regulatory Burden

Different perspectives exist regarding the amount of discretion that Congress should give agencies to establish regulatory requirements. Some observers believe that giving agencies broad discretion to develop regulations represents an abrogation of Congress' legislative responsibilities and is an open invitation for agencies to impose burdensome requirements on the public. They contend that Congress should closely direct agencies' regulatory efforts through narrowly defined statutory requirements. However, other observers believe that some statutory requirements may be to blame for certain types of regulatory burden. In those cases in which Congress has specifically required certain actions or limited agencies' rulemaking discretion, the agencies are precluded from considering the most cost-effective approaches.

Our review indicated that regardless of how much or how little rulemaking discretion is permitted in the underlying statutes, the associated regulations can still be regarded as burdensome by regulated entities. For 13 of the 27 company concerns that we examined, Congress gave the regulatory agencies no discretion in how the relevant regulatory provisions could be developed. Although the statutes specifically delineated the requirements that should be imposed, the companies considered those requirements to be burdensome. In the statutes underlying the other 14 concerns, Congress gave the regulatory agencies some or broad rulemaking discretion. Although the agencies' regulatory requirements were within the authority granted by the relevant statutes, the companies again viewed the requirements as burdensome. Also, it is unclear whether alternative regulations could be developed that would be perceived as less burdensome.

Reduction of Statutorily Based Burden Requires Statutory Changes

Efforts to reduce regulatory burden and reform the regulatory process are often based on the belief that agencies' rulemaking actions must be carefully limited. Several of the executive and legislative branch regulatory reform efforts during the past 20 years have directed federal agencies to conduct cost-benefit or regulatory flexibility analyses for certain regulations to ensure that those rules impose as little burden as possible on the regulated public. When the statutes directing or authorizing agencies to develop regulations give those agencies discretion as to the regulatory approach that they can take and the particular requirements that can be imposed, analytical requirements imposed on the agencies (e.g., cost-benefit analysis and regulatory flexibility analysis) can help ensure that they consider all available regulatory options and select the least burdensome option.

However, when the statutes underlying those regulations give agencies no discretion in how their regulations can be developed, analytical requirements imposed on the agencies are unlikely to have much direct effect on the regulatory burden that those agencies impose. Agencies cannot adopt regulatory alternatives that are outside the boundaries permitted in the underlying statutes. If a statute underlying a regulation is the source of a company's regulatory concern, that concern can be addressed only by changes in the statute. Similarly, if Congress disapproves of a regulation pursuant to its authority under SBREFA because of requirements that are based on the underlying statute, sending the regulation back to the issuing agency for further consideration will not resolve the issue. If a statute established the conditions that Congress finds objectionable, only Congress can address the problem by changing that statute.

Nevertheless, analytical requirements imposed on agencies can serve a useful purpose even when the underlying statutes give the agencies no rulemaking discretion. For example, cost-benefit analysis can highlight the potential advantages of alternative regulatory approaches not permitted in the underlying statutes, perhaps leading to eventual changes in those statutes and thereby alleviating at least some of the burden felt by the regulated entities.

We are sending copies of this report to the Ranking Minority Member of the House Judiciary Committee's Subcommittee on Commercial and Administrative Law; the Director of OMB; the Secretaries of Health and Human Services, HUD, Department of Labor, DOT, and the Treasury; the Comptroller of the Currency; the Administrator of EPA; EEOC; FDIC; FRB; and PBGC. We will also make copies available to others on request.

Major contributors to this report are listed in appendix V. Please contact me on (202) 512-8676 if you or your staff have any questions concerning this report.

Sincerely yours,

L. Nye Stevens
Director
Federal Management and
Workforce Issues

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Abbreviations

ADA	Americans with Disabilities Act of 1990
ADEA	Age Discrimination in Employment Act
CAA	Clean Air Act
CED	Committee for Economic Development
CERCLA	Comprehensive Environmental Response, Compensation, and Liability Act of 1980
CFR	Code of Federal Regulations
DOT	Department of Transportation
EEOC	Equal Employment Opportunity Commission
EPA	Environmental Protection Agency
ERISA	Employee Retirement Income Security Act of 1974
FDIC	Federal Deposit Insurance Corporation
FDICIA	Federal Deposit Insurance Corporation Improvement Act
FIFRA	Federal Insecticide, Fungicide, and Rodenticide Act
FRB	Federal Reserve Board
HCFA	Health Care Financing Administration
HUD	Department of Housing and Urban Development
IRS	Internal Revenue Service
OCC	Office of the Comptroller of the Currency
OIRA	Office of Information and Regulatory Affairs
OMB	Office of Management and Budget
OSHA	Occupational Safety and Health Administration
PBGC	Pension Benefit Guaranty Corporation
RCRA	Resource Conservation and Recovery Act
RESPA	Real Estate Settlement Procedure Act
SBREFA	Small Business Regulatory Enforcement Fairness Act

Objectives, Scope, and Methodology

This review focuses on a subset of the 125 regulatory concerns that companies cited in our 1996 reports—the concerns that federal agencies indicated were, at least in part, based on the statutes underlying the relevant regulatory provisions. Our objectives were to determine, for each such concern, (1) the amount of discretion the underlying statutes gave the agencies in developing the regulatory requirements that the agencies had said were attributable to the underlying statutes, (2) whether the regulatory requirements at issue were within the authority granted by the underlying statutes, and (3) whether the rulemaking agencies could have developed regulatory approaches that would have been less burdensome to the regulated entities while still meeting the underlying statutory requirements.

Identification of Statutorily Based Regulatory Concerns

In 1996, the agencies indicated that 31 of the 125 company concerns were, at least in part, statutorily based. However, we eliminated eight of those concerns from this review because the companies were not expressing concerns about federal agencies' regulatory requirements. Two of the eight concerns were very broad, asserting that "frequent changes to the tax code are costly" and that doing business in multiple states was difficult because of differences in state laws. The other six concerns involved particular federal statutes but did not focus on agencies' regulatory requirements. For example, in one of the six concerns company officials said that compliance with the requirements in the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) was expensive and exposed the company to unforeseen liability. However, the officials did not cite any particular Environmental Protection Agency (EPA) regulations in their concern. Another of the six concerns focused on the potential liability that officials from one company said its managers faced with regard to certain environmental standards. In its response to that concern, EPA indicated that criminal penalties for the violation in question were established in a particular statute rather than in EPA's regulations. We eliminated this concern from our review because EPA is not responsible for enforcing those provisions in criminal law, and the issues in the concern were not associated with EPA regulations.

We eliminated another company's concern from this review because the agency that had issued the underlying regulations no longer contended that the concern was statutorily based. In its 1996 response to a concern that one company described as EPA's "antidegradation policy," EPA said that the company was actually referring to the agency's "antibacksliding" requirements that were statutorily mandated by the Clean Water Act. However, an EPA official told us during this review that (1) the company concern was, in fact, about antidegredation; and (2) the policy was

adopted by the State of Ohio, not EPA, and was not based on federal environmental statutes. We therefore eliminated this concern from our review.

We subdivided 4 of the remaining 22 concerns into 9 separate concerns in order to facilitate our analysis. For example, one such concern involved three separate provisions of Regulation DD, which was issued by the Board of Governors of the Federal Reserve System (FRB) to implement provisions of the Truth in Savings Act. By dividing this concern into three separate concerns, we were able to assess each of the provisions individually. One of the other concerns that we subdivided focused on what one company viewed as a disparity in federal regulations requirements between banks and nonbanks (e.g., an investment brokerage firm) regarding (1) flood insurance and (2) public disclosure requirements. We subdivided this concern into two concerns to focus on the requirements for flood insurance and disclosure requirements separately.

After eliminating some company concerns and separating others into multiple parts, what remained were 27 concerns about federal regulations that the agencies indicated were, at least in part, based on the underlying statutes. These 27 concerns were raised by officials from 10 of the 15 companies we visited during the preparation of our 1996 reports. In 1996, many of the companies asked that their identities not be disclosed during our discussions with regulators or in our reports. As a result, we used generic descriptors in the 1996 reports to identify those companies. We maintained the same policy in this report, using generic descriptors for 7 of the 10 companies and identifying the remaining 3 companies by name. Table I.1 shows the name or generic descriptor and the number of concerns analyzed in this report for each of the 10 companies.

Table I.1: Companies and Number of Concerns Reported by Each Company

Company name or generic descriptor	Description of company	Number of concerns
Bank A	A federally chartered community bank	8
Bank C	A commercial bank	5
Bank B	A state-chartered community bank	3
Fish farm	A tropical fish farm	2
Hospital	A teaching hospital	2
Paper company	A manufacturer of paper and allied products	2
Metro Machine Corporation	A ship repair and maintenance company located in Norfolk, VA	2
Multiplex Company, Inc.	A beverage dispenser equipment manufacturer headquartered in St. Louis, MO	2
Glass company	A manufacturer of consumer glassware and fiber optic systems	1
Zaclon, Inc.	A chemical manufacturing company located in Cleveland, OH	1
Total number of concerns		**28**

Note: The total number of concerns is greater than 27 because 2 companies expressed 1 of the concerns.

Source: GAO analysis based on GAO/GGD-97-2 (Nov. 18, 1996); and GAO/GGD-97-26R (Dec. 11, 1996).

A total of 11 federal departments and agencies issued the regulations underlying the 27 company concerns at issue in this report. Table I.2 shows the number of those concerns that were applicable to each of the 11 departments or agencies.

Table I.2: Number of Concerns Applicable to Each Department and Agency

Department or agency name	Number of concerns
Board of Governors of the Federal Reserve System (FRB)	11
Environmental Protection Agency (EPA)	4
Federal Deposit Insurance Corporation (FDIC)	4
Internal Revenue Service (IRS)	3
Office of the Comptroller of the Currency (OCC)	3
Health Care Financing Administration (HCFA)	2
Department of Housing and Urban Development (HUD)	1
Occupational Safety and Health Administration (OSHA)	1
Department of Transportation (DOT)	1
Equal Employment Opportunity Commission (EEOC)	1
Pension Benefit Guaranty Corporation (PBGC)	1
Total number of concerns	**32**

Note: The total number of concerns is greater than 27 because the regulations relevant to 2 of the concerns were issued by 3 agencies, and the regulations underlying another concern were issued by 2 agencies.

Source: GAO analysis based on GAO/GGD-97-2 (Nov. 18, 1996); and GAO/GGD-97-26R (Dec. 11, 1996).

Amount of Discretion Permitted by Statutes

To address our first objective regarding the amount of discretion the underlying statutes gave the agencies in developing regulatory requirements, we first had to identify the regulatory provisions at issue in the company concerns and the underlying statutory requirements for those provisions. For most of the concerns, either the company or the responding agency provided relevant statutory and/or regulatory citations. However, for other concerns we had only limited information and had to contact the relevant agencies for additional details. For example, in one concern, Bank A said it was frustrating to spend the time and resources comply with so many bank reporting requirements but did not cite any specific relevant regulations or statutes. In its response to this concern, FDIC said that some bank reporting requirements were mandated by statute, but it did not provide any examples of those requirements to support its statement. During this review, we asked FDIC to identify the specific regulatory reporting requirements that it considered to be statutorily mandated and to provide the relevant statutory citations.

We then reviewed the statutory provisions underlying each of the company concerns and coded the level of discretion that we believed those provisions permitted the agencies in developing the specific regulatory requirements at issue in the concerns into one of three categories— "no discretion," "some discretion," or "broad discretion." We coded statutory provisions as permitting "no discretion" if they delineated specific actions that regulated entities or the agencies themselves must take and did not allow the agencies to develop the regulatory requirements at issue in the concern. For example, using a hypothetical illustration unrelated to any of the concerns in this report, assume that a company raised a concern about what it viewed as a burdensome recordkeeping requirement that EPA imposed regarding its recycling efforts. If a statutory provision required companies with 100 or more employees to provide recycling information to EPA on January 30 of each year delineating, for the previous calendar year and for each company work site, (1) the specific materials that were recycled, (2) the manner of recycling, and (3) the costs associated with their recycling efforts, we would have coded the provision as allowing EPA no rulemaking discretion.

We coded statutory provisions as allowing rulemaking agencies "some discretion" if they delineated certain requirements that had to be included in the agencies' regulations but gave the agencies at least some discretion regarding other requirements. For example, in the above illustration, if the statute gave EPA discretion regarding the timing or the frequency with

which recycling information had to be provided by the companies, but EPA still had no discretion regarding the content of the reporting requirement, we would have coded the statutory provision as allowing some rulemaking discretion.

We coded statutory provisions as allowing the rulemaking agencies "broad discretion" if the provisions contained few specific requirements or imposed few to no constraints on what the agencies had to include in their regulations. In the hypothetical recycling example, if the statutory provision only required EPA to periodically report to Congress on businesses' recycling efforts, we would have coded the provision as allowing EPA broad rulemaking discretion. In this scenario, EPA could unilaterally decide what information to collect, from which businesses to collect the information, and the timing and frequency of companies' reporting requirements.

Statutory Authority and Less Burdensome Options

To address our second objective, we compared the relevant statutory and regulatory provisions for each concern and decided whether we believed the regulatory requirements at issue in the concerns were within the authority granted by the underlying statutes.[1] We coded the regulatory provisions as being within the authority granted by the statutes if (1) the statutory provisions gave the agency no discretion in how the regulations could be developed and the regulatory provision strictly adhered to the statutory requirements; or (2) the statutory provisions gave the agency some or broad discretion, and the regulatory language was consistent with the requirements or the limitations in the statutes. For example, if the relevant statutory provision in the above recycling illustration allowed EPA to establish whatever reporting requirements it "deemed necessary" to determine the status of companies' recycling efforts, we would have considered almost any regulatory reporting requirements that EPA established as being within the authority granted by the statute. However, if the statutory provision said EPA could collect information from companies no more than twice annually but the regulation established quarterly reporting requirements, we would have considered the regulatory requirements outside of the authority granted by the statute.

Our third objective was to determine whether the rulemaking agencies could have developed regulatory approaches that would have been less burdensome to the regulated entities while still meeting the underlying statutory requirements. We considered agencies to have been unable to

[1] If a court considering this matter determined that a regulation exceeded the authority granted by the underlying statute, that regulation could be invalidated.

develop less burdensome regulatory approaches if the underlying statutes gave the agencies no rulemaking discretion and the agencies adopted regulations that strictly adhered to the statutory requirements. If the underlying statutes gave the agencies some or broad rulemaking discretion, we were not able to determine if the agencies could have developed a less burdensome approach. To do so, we would have needed detailed information on how the agencies' regulations were being implemented and how alternative approaches would be perceived by the regulated entities in order to determine whether a less burdensome approach was available. As discussed in Appendices III and IV, that information was not readily available.

Review Limitations

Because this review is based on a subset of the company concerns and agency responses originally presented in our 1996 reports, several of the limitations discussed in those reports are also applicable to this report. As we noted in our November 1996 report, the companies from whom we initially gathered the concerns were generally those that (1) were identified by interest groups, identified by officials from the Small Business Administration, or were in the literature; and (2) were willing to participate in our review. Therefore, neither the companies' concerns nor the results of our analysis are generalizable to other companies or to other regulatory issues. The results of this analysis are not even generalizable to all of the original 125 regulatory concerns because this review focuses only on the subset of the concerns and related regulations that the agencies indicated were, at least in part, statutorily based. However, as we pointed out in our November 1996 report, the companies' comments were similar in many respects to comments made by companies in some of our previous reports and in the literature.[2] Therefore, we believe that the companies' comments, the agencies' responses, and our analysis of the related regulations and statutes are not atypical and can provide some insights regarding the broader issues addressed in this report.

In preparing both of the 1996 reports and during this review, we did not collect information from individuals and organizations outside of the companies and federal agencies responsible for the regulatory issues mentioned by the companies. For example, we did not obtain information from labor unions or other employee organizations about the regulations the companies mentioned. Neither did we collect information from individuals and organizations that were the potential beneficiaries of the regulations cited by the companies as being problematic. Collecting the

[2] See, for example, Workplace Regulation: Information on Selected Employer and Union Experiences (GAO/HEHS-94-138, June 30, 1994).

views of all such organizations for all the regulations and statutes cited in the 1996 reports and this report would have been very time consuming, if not impossible. Therefore, as was the case in the 1996 reports, this report does not reflect the full range of opinions that may exist regarding the issues raised during the reviews. However, this report reflects the views of the two stakeholder groups in which we were most interested—the elements of the regulated community that raised these concerns and the agencies that issued the underlying regulations.

Our approach in the 1996 reports was to present the views of both the businesses and the agencies without attempting to resolve the many differences in perspectives and interpretation that arose between the two groups. We followed the same approach in this review, and we did not attempt to determine whether the companies' or the agencies' views were correct with regard to issues that were outside of the scope of this review. For example, one company said that certain IRS-required tests were of questionable value to the agency in determining whether thrift savings plans were being fairly administered. We focused our analysis on whether the tests were (as IRS contended) statutorily required, not on whether they were of value to IRS. Also, we did not attempt to determine whether any of the agencies' actions were, in fact, "burdensome."

The report focuses primarily on the amount of discretion that the relevant statutes gave rulemaking agencies in developing the regulatory requirements at issue in the companies' concerns. However, the report does not address the amount of discretion that the agencies had in writing regulations outside of the specific issues raised by the companies. Agencies may have broad discretion in how regulations can be developed within a general area, but little or no discretion with regard to particular issues within those areas. Also, the report does not address enforcement issues. As our 1996 reports indicated, agencies may have considerable discretion in carrying out their enforcement authority, and the use of that discretion can significantly affect the burden felt by regulated entities. For example, several companies expressed concerns about rigid and inflexible regulations and about certain regulators' "gotcha" enforcement approach. In response to those concerns, the agencies sometimes indicated that they reduced penalties in response to good faith efforts to comply, were not "aggressively" enforcing certain technical requirements, or were changing their enforcement approaches.

We approached our review objectives systematically. First, we developed a coding scheme for each objective to ensure consistency of analysis. Multiple staff members then analyzed the issues related to each concern,

reviewed the statutory and regulatory requirements, and agreed on how each concern should be coded. However, determining how much discretion a statute gives a rulemaking agency, whether a regulation is within the authority granted by the underlying statute, and whether less burdensome regulatory approaches could have been developed are ultimately matters of judgement. Therefore, our conclusions should be viewed in that light, not as determinations that have a legally binding effect on the agencies issuing the rules or the regulated community.

We initially gathered the company concerns and agency responses between June 1994 and September 1996. In this review, we analyzed the statutory and regulatory provisions as they existed between 1994 and 1996. If a statutory or regulatory provision changed after this period, we noted those changes in this report. We conducted our work between February and October 1998 in the Washington, D.C., headquarters offices of each of the previously identified agencies in accordance with generally accepted government auditing standards.

Concerns for Which Agencies Appeared to Have No Rulemaking Discretion

One of the objectives of our review was to determine, for each of 27 company concerns, the amount of discretion the underlying statutes gave rulemaking agencies in drafting the regulatory requirements that the agencies said were attributable to the underlying statutes. The agencies that issued those requirements indicated in two of our 1996 reports that the concerns could, at least in part, be traced to statutory requirements underlying their regulations.[1] In this review we concluded that the statutory provisions underlying 13 of the 27 concerns gave the rulemaking agencies no discretion in how the related regulatory requirements could be drafted. We coded statutory provisions as allowing agencies “no discretion” if they delineated specific actions that regulated entities or the agencies themselves must take and did not allow the agencies to develop their own regulatory requirements.

This appendix provides our detailed analysis of each of these 13 company concerns. Specifically, for each such concern it provides the following information: (1) the portion of the concern in our 1996 reports that the agency or agencies indicated was statutorily based, (2) the portion of the agency response in our 1996 reports that indicated the concern was statutorily based, (3) our analysis of the amount of rulemaking discretion the relevant statutory provisions gave the agencies (the first objective of our review), (4) our analysis of whether the regulatory requirements at issue in the concern were within the authority granted by the underlying statutes (the second objective of our review), (5) our analysis of whether the rulemaking agencies could have developed regulatory approaches that would have been less burdensome to the regulated entities while accomplishing the underlying statutory objectives (the third objective of our review), and (6) the main purpose of the underlying statutes (where such purpose statements were available). Appendix I of this report contains a detailed discussion of our scope and methodology.

Concern 1

Company Concern

A Metro Machine Corporation official said that EPA regulators establish regulations that are not relevant to the industry and establish unrealistic requirements that are not attainable or verifiable with current treatment technology and measurement systems. For example, the official said that federal water quality standards require that the water the company discharges be made cleaner than rainwater. The official also said that up to 90 percent of pollution reduction generally can be achieved with

[1] Regulatory Burden: Measurement Challenges and Concerns Raised by Selected Companies (GAO/GGD-97-2, Nov. 18, 1996); and Regulatory Burden (GAO/GGD-97-26R, Dec. 11, 1996).

reasonable costs, but the last 10 percent of pollution reduction is very difficult or costly (sometimes up to double the cost) because the needed technology is either not available or very expensive.

Agency Response

EPA officials noted that Metro Machine Corporation is located in Virginia and said that the State of Virginia establishes water quality standards for state waters. They also said that the State of Virginia is authorized to administer the National Pollutant Discharge Elimination System (NPDES) program related to this concern. Under the standard-setting process, EPA officials said that states initially establish the "designated use" or water quality goal for individual bodies of water to protect aquatic life and human health. Once states make those designations, they typically adopt EPA-developed water quality criteria to support the designated use. EPA officials said the Clean Water Act stipulates that EPA cannot consider available treatment technologies or the cost of treatment in the development of water quality criteria. EPA officials also noted that, in certain cases, air pollution carried to earth by rainwater may cause surface water to be harmful to aquatic life and/or human health. Because Virginia's water quality criteria are designed to protect aquatic life and human health, the criteria may indeed be more restrictive than for polluted rainwater in certain instances. However, Virginia has the option of providing economic relief in its water quality standards, where justified by the State and approved by EPA, through modification of its goals for a water body or by providing a water quality-based variance for specific discharges.

Amount of Discretion Permitted in the Statute in Drafting Regulatory Requirements

The issue that we focused on in this concern is EPA's assertion that it cannot consider cost or available treatment technologies when it establishes water quality criteria under the Clean Water Act.

Although the State of Virginia had discretion in establishing the designated use for the body of water at issue in the concern, we believe EPA had no discretion to consider cost or available treatment technologies in developing water quality criteria pursuant to the Clean Water Act (codified at 33 U.S.C. Chapter 26). Under the statute (33 U.S.C. 1313(c)(2)), water quality standards consist of designated uses for the body of water involved (e.g., public water supplies or recreation) and water quality criteria. Water quality criteria provide technical information on the effects of pollution on water quality and frequently identify what maximum safe concentrations of pollutants would be to protect particular designated uses.

The statute (33 U.S.C. 1314 (a)(1)) also says that the EPA Administrator must develop and publish criteria for water quality "accurately reflecting the latest scientific knowledge (A) on the kind and extent of all identifiable effects on health and welfare . . . ; (B) on the concentration and dispersal of pollutants, or their byproducts . . . ; and (C) on the effects of pollutants on biological community diversity, productivity, and stability . . . ." The statute also requires the Administrator to develop and publish information "on the factors necessary to restore and maintain the chemical, physical, and biological integrity" of water.

The Clean Water Act sets forth EPA's responsibilities and the factors that it must consider in the development of water quality criteria. Because the consideration of costs and available treatment technologies are not among those factors, we do not believe that EPA could consider costs or technology limits in developing water quality criteria pursuant to the act.

Whether Regulatory Provisions Are Within the Authority Granted by the Statute

We believe that EPA's regulatory provisions delineating the factors that states should consider in establishing water quality standards (codified at 40 C.F.R. Part 131) are within the authority granted by the Clean Water Act. According to those regulations (40 C.F.R. 131.10(a)), in establishing such standards, states must "take into consideration the use and value of water for public water supplies, protection and propagation of fish, shellfish, and wildlife, recreation in and on the water, agricultural, industrial, and other purposes including navigation." Subsection 131.10(b) of the regulation also says, "the State shall take into consideration the water quality standards of downstream waters" and shall ensure that the water quality standards that will be established provide for the attainment and maintenance of the standards for the downstream waters. Also, 40 C.F.R. 131.11 (a)(1) says that states must adopt water quality standards that protect the designated use and "must be based on sound scientific rationale and must contain sufficient parameters or constituents to protect the designated use." Because these regulatory requirements essentially mirror or are logically related to the requirements in the Clean Water Act regarding the establishment of water quality standards, we believe the requirements are within the authority granted by the Clean Water Act.

Whether Less Burdensome Regulatory Approach Was Available

We do not believe that EPA could have developed less burdensome water quality criteria by taking cost or treatment technology into account and still meet the requirements of the Clean Water Act. The regulatory requirements regarding the establishment of water quality standards either mirrored the statutory provisions or were logically related to those provisions.

Statutory Purpose

According to 33 U.S.C. 1251(a), the purpose of the Clean Water Act is to restore and maintain the chemical, physical, and biological integrity of the nation's waters.

Concern 2

Company Concern

Zaclon, Inc. officials said the company was appealing a fine for failure to respond on time to an EPA letter asking them for information related to the Resource Conservation and Recovery Act (RCRA). They said EPA fined them without any follow-up or other communication regarding the original request. The officials also said they were disturbed that the fine was imposed on them because of a procedural matter (failing to file information) rather than something that had a real environmental impact.

Agency Response

EPA officials said the agency sent Zaclon, Inc. a certified letter, which the company acknowledged receiving, notifying the company of its responsibility to either file a RCRA permit application for a hazardous waste pile at a facility that the company had acquired, or submit a demonstration of equivalency indicating that the waste pile had been "clean closed." EPA officials said that the agency initially proposed assessing a penalty against the company of approximately $81,000. However, after discussions with the company, EPA later reduced the penalty to $37,600. EPA officials said the obligation to obtain either the permit or demonstrate that the waste pile has been "clean closed." They also said this is not a "procedural matter." They said this is a substantive requirement to ensure that hazardous waste management units are designed and operated to prevent releases of hazardous waste. The officials also said that under RCRA, companies have a positive obligation to comply even if EPA does not issue any reminders of their responsibility.

Amount of Discretion Permitted in the Statute in Drafting Regulatory Requirements

The issues that we focused on in this concern are EPA's assertions that RCRA requires the company to obtain a hazardous waste permit and to comply with the statutory requirement in the absence of a notice from EPA.[2]

We believe that RCRA gave EPA no discretion in how it could draft its regulations requiring a hazardous waste permit. The statute (42 U.S.C. 6925(a)) says that the EPA Administrator must promulgate regulations requiring each person owning or operating an existing facility or planning

[2] Another issue in this concern was the fine imposed by EPA on the company for the company not obtaining the hazardous waste permit. Because the agency response to this concern had not indicated that the fine imposed on the company was established in the statute, our analysis did not address this issue.

to construct a new facility for the treatment, storage, or disposal of hazardous waste to have a permit. It also states that the treatment, storage, or disposal of any such hazardous waste and the construction of any new facility for the treatment, storage, or disposal of hazardous waste is prohibited except in accordance with such a permit. Therefore, EPA had no discretion in drafting its regulations about requiring a permit for those facilities in existence or under construction that treat, store, or dispose of hazardous waste. Also, the statute does not indicate that EPA is required to notify companies of their responsibility to obtain a RCRA permit.

Whether Regulatory Provisions Are Within the Authority Granted by the Statute

We believe that EPA's regulations requiring a RCRA permit are within the authority granted the agency by the statute. The regulations (40 C.F.R. 270.1(c)) require companies to obtain a RCRA permit for the treatment, storage, or disposal of hazardous wastes identified or listed in 40 C.F.R. 261. The regulation also says that owners and operators of hazardous waste management units must have permits during the active lives of the units, including the closure period. Because these regulatory provisions closely follow the statutory language in 42 U.S.C. 6925(a), we believe that EPA's regulations are within the authority granted by the statute.

Whether Less Burdensome Regulatory Approach Was Available

We do not believe that EPA could have developed a less burdensome regulatory approach for its RCRA permit process while still meeting the underlying statutory requirements. RCRA gave the agency no discretion in drafting the regulatory requirements at issue in this concern, and those requirements closely followed the requirements in the statute.

Statutory Purpose

RCRA does not contain a statement of purpose.

Concern 3

Company Concern

Officials from the paper company said that regulations under Title V of the Clean Air Act (CAA) are problematic because they regulate extremely low levels of emissions. They said that they are required to get a title V permit for methanol emissions that, at the company's fence line, are no more concentrated than the methanol in a person's breath.

Agency Response

According to EPA, the emission levels that trigger Title V coverage are specified in CAA, ranging from 10 to 100 tons of emissions per year depending on the pollutant and/or the location of the emissions' sources. Companies capable of emissions above these levels are called "major"

sources under the act, triggering title V permitting requirements. For hazardous air pollutants, EPA said that title V coverage is triggered by annual emissions of 10 tons of a given pollutant or 25 tons or more of a combination of pollutants. EPA also said that although specific information about the company was not provided, a typical paper mill emits about 600 tons per year of hazardous air pollutants other than methanol, including approximately 20 of the 189 hazardous air pollutants listed in CAA.

Amount of Discretion Permitted in the Statute in Drafting Regulatory Requirements

The issue that we focused on in this concern is EPA's assertion that Title V of CAA establishes the level of emissions of hazardous air pollutants that subjects a company to permit requirements.

We believe that CAA (codified at 42 U.S.C. 7401 et seq.) gave EPA no discretion in developing its regulations regarding the emissions levels that trigger title V permitting requirements (codified at 42 U.S.C. 7661-7661f) when those emissions are above a certain level.[3] The act requires any "major source" of hazardous air pollutants to obtain a title V permit, and defines a major source in 42 U.S.C. 7412(a)(1) as "any stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit considering controls, in the aggregate, 10 tons per year or more of any hazardous air pollutant or 25 tons per year or more of any combination of hazardous air pollutants." Methanol is specifically listed in 42 U.S.C. 7412(b)(1) as a hazardous air pollutant, so a company would have to obtain a title V permit if it emitted 10 tons of methanol per year or more. However, a company could also be required to obtain a permit if it emitted no methanol but emitted 10 tons of any other hazardous air pollutant or 25 or more tons of any combination of covered pollutants.

Whether Regulatory Provisions Are Within the Authority Granted by the Statute

We believe that EPA's regulatory provisions regarding the emissions levels that trigger the title V permitting requirements are within the authority granted by CAA. The regulation (40 C.F.R. 70.2) defines a "major source" that is required to have a permit by specifically referencing the statutory definition of the term in 42 U.S.C. 7412(a)(1). By using the same definition of a major source, EPA's regulations are consistent with CAA's requirements regarding the emissions levels that trigger title V permit

[3] CAA provides that the EPA Administrator may consider a facility to be a "major source" at levels less than 10 tons of any hazardous air pollutant per year or 25 tons of any combination of hazardous air pollutants per year "on the basis of the potency of the air pollutant, persistence, potential for bioaccumulation, other characteristics of the air pollutant, or other relevant factors." Therefore, EPA has some discretion to require permits for facilities that emit levels of hazardous air pollutants that are lower than the level specified in the statute.

requirements, and therefore they are within the authority granted by the statute.

Whether Less Burdensome Regulatory Approach Was Available

We do not believe that EPA could have developed a less burdensome regulatory approach while still meeting the underlying requirements of CAA. The act gave the agency no discretion in drafting the regulatory requirements at issue in this concern, and those requirements were consistent with the requirements in the statute.

Statutory Purpose

According to 42 U.S.C. 7401(c), a primary goal of CAA's air pollution prevention and control program is to "encourage or otherwise promote reasonable Federal, State, and local governmental actions . . . for pollution prevention." Section 7401(b) says that the purposes of the subchapter on "Programs and Activities" are

> " (1) to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population; (2) to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution; (3) to provide technical and financial assistance to State and local governments in connection with the development and execution of their air pollution prevention and control programs; and (4) to encourage and assist the development and operation of regional air pollution prevention and control programs."

Concern 4

Company Concern

Fish farm officials said IRS rules on how to account for the capital costs of company construction projects done by the firm's employees are complex and costly. They said prior to a 1986 change in the tax code, indirect costs (e.g., telephone costs associated with the construction project) could be treated as a business expense and therefore could be deducted from that year's taxes. After 1986, IRS required that indirect costs be included as a capital expense; therefore, they could be deducted only over a long period of time. They said because of this change, the company's deductions decreased and taxable income increased, and they had to pay higher taxes.

Agency Response

IRS officials said the requirement to capitalize indirect costs allocable to the production of self-constructed assets was established by statute rather than by IRS regulations. They said Congress enacted the uniform capitalization rules as a part of the Tax Reform Act of 1986 for two reasons. First, Congress wanted to provide a series of uniform rules of capitalization for construction contractors, manufacturers, and taxpayers that produce property for their own use. Second, Congress believed that allowing the immediate deduction of indirect costs (1) resulted in a mismatch of costs and the income produced by those expenses, (2)

permitted an unwarranted deferral of federal income tax, and (3) resulted in differences in the tax treatment of costs between purchased and self-constructed assets. IRS officials said Congress clearly intended that 26 U.S.C. 263A would result in a decrease in the taxpayer's current deductions and a corresponding increase in taxable income.

Amount of Discretion Permitted by Statute in Drafting Regulatory Requirements

The issue that we focused on in this concern is IRS' assertion that the requirement that taxpayers capitalize indirect costs of construction projects was established by statute.

We believe that the tax code gave IRS no discretion as to how it could write its regulations with regard to the capitalization of indirect costs. According to 26 U.S.C. 263A(a), any "allocable costs" (defined as a property's direct costs and a property's "proper share" of indirect costs that are allocable to the property) must be capitalized. However, if the property "is inventory in the hands of the taxpayer," the statute says that those costs must be included in inventory costs.

Whether Regulatory Provisions Are Within the Authority Granted by the Statute

We believe that IRS' regulatory provisions regarding the capitalization of indirect costs are within the authority granted by the statute. The provisions are substantively the same as the statutory requirements and specifically reference several portions of the statute. For example, 26 C.F.R. 1.263A-2(a)(3)(i) says that "[e]xcept as specifically provided in section 263A(f) with respect to interest costs, producers must capitalize direct and indirect costs properly allocable to property produced under section 263A, without regard to whether those costs are incurred before, during, or after the production period (as defined in section 263A(f)(4)(B))."

Whether Less Burdensome Regulatory Approach Was Available

We do not believe that IRS could have developed a less burdensome regulatory approach that would have met the requirements of the underlying statute. The tax code gave IRS no discretion in how it could draft the regulatory requirements at issue in this concern, and IRS' regulations were consistent with (and specifically referenced) the statutory requirements.

Statutory Purpose

This section of the tax code does not contain a statement of purpose.

Concern 5

Company Concern

Officials from Multiplex Company, Inc., said that the IRS-required nondiscrimination tests for 401(k) thrift savings plans are of questionable value because IRS lowered the amount of money that can be contributed to the plans, thereby making it less likely that higher income employees will dominate the plans.

Agency Response

IRS officials said that the “IRS-required nondiscrimination test” that Multiplex Company, Inc. officials mentioned appears to refer to the actual deferral percentage test, which is required by section 401(k)(3) of the Internal Revenue Code. Similarly, they said that the limit on deferrals under a 401(k) plan was imposed by section 402(g) of the Internal Revenue Code. Therefore, they said it is incorrect to claim that the “IRS lowered the amount of money that can be contributed.”

Amount of Discretion Permitted by Statute in Drafting Regulatory Requirements

The issues that we focused on in this concern are IRS’ assertions that the “nondiscrimination tests” used to determine the actual deferral percentage for highly compensated employees and the amount of money that can be contributed to 401(k) plans are established by statute.

We believe that IRS had no discretion in drafting its regulations requiring the test or setting the dollar amount of the deferral limit because they were both specifically established by statute. According to 26 U.S.C. 401(k)(3)(A)(ii) “the actual deferral percentage” (i.e., the amount that can be put into the thrift savings plan) for eligible highly compensated employees must meet one of the following tests:

“(I) The actual deferral percentage for the group of eligible highly compensated employees is not more than the actual deferral percentage of all other eligible employees multiplied by 1.25.

“(II) The excess of the actual deferral percentage for the group of eligible highly compensated employees over that of all other eligible employees is not more than 2 percentage points, and the actual deferral percentage for the group of eligible highly compensated employees is not more than the actual deferral percentage of all other eligible employees multiplied by 2.”

With regard to the amount that can be contributed and deferred each year, 26 U.S.C. 402(g)(1) states that “the elective deferrals of any individual for any taxable year shall be included in such individual's gross income to the

extent the amount of such deferrals for the taxable year exceeds $7,000."[4] Also, 26 U.S.C. 402(g)(5) states that "[t]he Secretary shall adjust the $7,000 amount under paragraph (1) at the same time and in the same manner as under section 415(d); except that any increase under this paragraph which is not a multiple of $500 shall be rounded to the next lowest multiple of $500."

Whether Regulatory Provisions Are Within the Authority Granted by the Statute

We believe that IRS' regulatory provisions regarding the "nondiscrimination test" referred to in the company's concern are within the authority granted by the statute. IRS' implementing regulations for this requirement (26 C.F.R. 1.401(k)-1(b) and 1.402(g)-1) essentially mirror the language of the statute with some additional explanatory language. For example, 26 C.F.R. 1.401(k)-1(b)(2)(i) contains almost identical language to that in 26 U.S.C. 401(k)(3)(A)(ii). It says that a cash or deferred arrangement satisfies the regulation only if:

> "(A) [t]he actual deferral percentage for the group of eligible highly compensated employees is not more than the actual deferral percentage for the group of all other eligible employees multiplied by 1.25; or (B) [t]he excess of the actual deferral percentage for the group of eligible highly compensated employees over the actual deferral percentage for the group of all other eligible employees is not more than two percentage points, and the actual deferral percentage for the group of eligible highly compensated employees is not more than the actual deferral percentage for the group of all other eligible employees multiplied by two."

The regulation is also similar to the statute with regard to the limits on the amount that can be contributed to the plans. For example, 26 C.F.R. 1.402(g)-1(d) states that "[t]he applicable limit for an individual's taxable year beginning in the 1987 calendar year is $7,000. This amount is increased for the taxable year beginning in 1988 and subsequent calendar years in the same manner as the $90,000 amount is adjusted under section 415(d)."

Whether Less Burdensome Regulatory Approach Was Available

We do not believe that IRS could have developed a less burdensome regulatory approach that would have satisfied the underlying statutory requirements. The statute gave IRS no discretion in drafting the regulatory requirements at issue in this concern, and its regulations essentially mirror the language in the statute.

[4] Although the company referred to an "approximately $9,000 per year" limit and 26 U.S.C. 402(g)(1) establishes the limit as $7,000, 26 U.S.C. 402(g)(5) allows for this amount to be increased annually in accordance with 26 U.S.C. 415(d).

Statutory Purpose

This section of the tax code does not contain a statement of purpose.

Concern 6

Company Concern

Multiplex Company, Inc. officials said that increased premium costs paid to PBGC to guarantee their employees' pensions is costly for the company (over $2,600 in 1994). They said the mandated premium per participant increased from $2.60 in 1982 to $19.00 in 1994.

Agency Response

PBGC officials said that the insurance premiums the agency charges are statutorily established in Section 4006 of the Employee Retirement Income Security Act (ERISA).

Amount of Discretion Permitted by Statute in Drafting Regulatory Requirements

The issue that we focused on in this concern is PBGC's assertion that the increase in pension insurance premiums that Multiplex mentioned was statutorily driven.

We believe that ERISA (codified at 29 U.S.C. 1001 et seq.) gave PBGC no discretion to set pension insurance premium rates below $19 per participant in 1994. The statute establishes specific premium rates for certain types of employer plans. For example, 29 U.S.C. 1306(a)(3)(A) states that the annual premium rate payable to PBGC in the case of a single-employer plan for basic benefits for plan years beginning after December 31, 1990, at "an amount equal to the sum of $19 plus the additional premium (if any) determined under subparagraph (E) for each individual who is a participant in such plan during the plan year." The statute allows PBGC to raise the premium rate for particular plans under certain circumstances. However, the $19 rate is the minimum amount businesses with single-employer plans must pay for basic benefits.

Whether Regulatory Provisions Are Within the Authority Granted by the Statute

We believe that PBGC's regulatory provisions concerning premium rates are within the authority granted by the statute. According to 29 C.F.R. 4006.3,[5] ". . . the premium paid for basic benefits guaranteed under section 4022(a) of ERISA shall equal the flat-rate premium under paragraph (a) of this section plus, in the case of a single-employer plan, the variable-rate premium under paragraph (b) of this section." In paragraph (a) the flat-rate premium is calculated as ". . . equal to the number of participants in the plan on the last day of the plan year preceding the premium payment year, multiplied by-- (1) $19 for a single-employer plan . . . ."

[5] In the 1994 and 1995 editions of the Code of Federal Regulations this section is found at 26 C.F.R. 2610.

Whether Less Burdensome Regulatory Approach Was Available

We do not believe that PBGC could have developed less burdensome premium rates while still meeting the requirements of ERISA. The statute gave the agency no discretion in drafting the regulatory requirements at issue in this concern, and the regulations mirror the statutory requirements.

Statutory Purpose

According to 29 U.S.C. 1001 (a),

> " [t]he Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce; . . . that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential [f]ederal tax treatment; . . . and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness."

Also, 29 U.S.C. 1001(b) states that

> "[i]t is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the [f]ederal courts."

Finally, 29 U.S.C. 1001(c) says that

> "[i]t is further declared to be the policy of this chapter to protect interstate commerce, the [f]ederal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance."

Concern 7

Company Concern

An official from Metro Machine Corporation said that OSHA should differentiate between corporate negligence and employee responsibility in assessing workplace safety. He said OSHA currently holds companies, not

individual employees, accountable for violations caused by employee negligence or willful removal of company-installed safety devices.

Agency Response

OSHA officials said that Section 5 of the Occupational Safety and Health Act of 1970 places specific responsibilities for workplace safety and health on both employers and employees. Although the act gives OSHA the authority to enforce safety and health standards and issue citations to employers for violations of the act, the officials said the act does not authorize OSHA to penalize individual employees for misconduct related to safety or health standards. They noted that in Atlantic & Gulf Stevedores v. OSHRC, 534 F.2d 541, 555 (3rd Cir., 1976), the Court found that the Occupational Safety and Health Act does not confer upon the Secretary of Labor the power to sanction employees who disregard safety standards because the act's enforcement scheme is directed only against employers. Therefore, OSHA officials said its enforcement policy of holding companies liable for safety and health violations is wholly consistent with the intent of the act.

However, OSHA officials also noted that since the early 1980s OSHA's policy has been to excuse the employer from a violation when an OSHA compliance officer determines that employees are systematically refusing to comply with safety and health standards and rules. To be excused from the violation, they said the employer would have to demonstrate that (1) his or her employees had received appropriate training and the necessary equipment, (2) the employer had communicated and enforced the work rules designed to prevent employee misconduct, (3) the employees failed to observe work rules that led to the violation, and (4) the employer had taken reasonable steps to discover the violation.

Amount of Discretion Permitted by Statute in Drafting Regulatory Requirements

The issue that we focused on in this concern is OSHA's assertion that the Occupational Safety and Health Act does not allow it to hold individual employees accountable for violations of health and safety rules.

We believe that the Occupational Safety and Health Act (codified at 29 U.S.C. 651 et seq.) gave OSHA no discretion in how it could write its regulations holding companies responsible for health and safety violations. Several sections of the act specifically mention holding employers accountable for violations, but none of those sections say that employees should be held accountable. For example, 29 U.S.C. 658(a) says that "[i]f, upon inspection or investigation, the Secretary . . . believes that an employer has violated a requirement of section 654 of this title, of any standard, rule or order promulgated pursuant to section 655 of this title, or of any regulations prescribed pursuant to this chapter, he shall with

reasonable promptness issue a citation to the employer." Another section of the act (29 U.S.C. 659) says that "[i]f, after an inspection or investigation, the Secretary issues a citation . . . he shall . . . notify the employer . . . of the penalty . . . ." The act goes on to say that "the citation and the assessment shall be deemed a final order . . . [i]f the Secretary has reason to believe that an employer has failed to correct a violation for which a citation has been issued . . . ."

Whether Regulatory Provisions Are Within the Authority Granted by the Statute

We believe that OSHA's regulations holding employers and not employees accountable for safety violations are within the authority granted by the Occupational Safety and Health Act. The regulations, like the statute, specifically hold employers accountable for violations of the act. For example, 29 C.F.R. 1903.14 states that

> " [t]he Area Director shall review the inspection report of the Compliance Safety and Health Officer. If, on the basis of the report the Area Director believes that the employer has violated a requirement of section 5 of the [a]ct, of any standard, rule or order promulgated pursuant to section 6 of the [a]ct, or of any substantive rule published in this chapter . . . he shall issue to the employer either a citation or a notice of de minimis violations. . . ."

Whether Less Burdensome Regulatory Approach Was Available

We do not believe that OSHA could have developed a less burdensome regulatory approach while still meeting the requirements of the Occupational Safety and Health Act. The statute gave OSHA no discretion in drafting the regulatory requirements at issue in this concern, and the agency's regulations were consistent with the statutory requirements.

Statutory Purpose

As stated in 29 U.S.C. 651(b), the purpose of the Occupational Safety and Health Act is to ensure so far as possible every working man and woman in the nation safe and healthful working conditions and to preserve human resources. The statute delineates 13 actions intended to achieve this goal, including (1) encouraging employers and employees in their efforts to reduce the number of occupational safety and health hazards at their places of employment, and to stimulate employers and employees to institute new and perfect existing programs for providing safe and healthful working conditions; (2) providing that employers and employees have separate but dependent responsibilities and rights with respect to achieving safe and healthful working conditions; and (3) authorizing the Secretary of Labor to set mandatory occupational safety and health standards applicable to businesses affecting interstate commerce.

Concern 8

Company Concern

An official from Bank A said that the regulation on the Availability of Funds and Collection of Checks (Regulation CC) requires the development

and maintenance of expensive and time-consuming information on the current availability of funds. The official said that to provide this information to clients as the regulation requires, the bank must regularly review, update, and reprint brochures with this information.

Agency Response

Officials at FRB said that Regulation CC implements the Expedited Funds Availability Act (12 U.S.C. 4001-4010), which limits the length of time depository institutions may place holds on deposits to transaction accounts. They said the act and the regulation also require depository institutions to provide to their customers written copies of their availability policies and written notices when certain types of extended holds are placed on deposits. In addition to providing general policy disclosure notices to customers, depository institutions also incur the ongoing costs of providing exceptions to hold notices and change-in-policy notices, as well as costs related to employee training. FRB officials said that because the disclosure provisions in Regulation CC are required by the Expedited Funds Availability Act, statutory amendments would be necessary to relieve any of the burdens on depository institutions associated with those provisions.

Amount of Discretion Permitted by Statute in Drafting Regulatory Requirements

The issue that we focused on in this concern is FRB's assertion that the Expedited Funds Availability Act requires banks to maintain and disclose specific information about their funds availability policies.

We believe that the Expedited Funds Availability Act gave FRB no discretion in how it could write its regulations requiring depository institutions to disclose their funds availability policies. The statute (12 U.S.C. 4004) requires depository institutions to disclose to their customers, on preprinted deposit slips, their policies regarding the withdrawal of deposits. The statute also requires these disclosures to be provided before an account is opened, whenever there is a policy change within the institution, if the customer requests a copy of the policy, and when deposits are accepted at automated teller machines.

Whether Regulatory Provisions Are Within the Authority Granted by the Statute

We believe that Regulation CC's provisions requiring the disclosure of bank policies on funds availability (codified at 12 C.F.R. Part 229, Subpart B) are within the authority granted by the Expedited Funds Availability Act. The regulation's requirements essentially repeat the requirements in the statute. For example, 12 C.F.R. 229.17 states that before an account is opened, a bank shall provide a potential customer with its funds availability policy. Section 229.18 states that disclosure notices shall be on all preprinted deposit slips and posted at all locations where the bank accepts deposits, including automated teller machines. The regulation also

requires disclosure information to be provided upon customer request and sent to customers at least 30 days before a change in the bank's policy on funds availability is implemented.

Whether Less Burdensome Regulatory Approach Was Available

We do not believe that FRB could have developed a less burdensome regulatory approach that would have satisfied the requirements of the Expedited Funds Availability Act. The act gave the agency no discretion in drafting the regulatory requirements at issue in this concern, and those requirements essentially repeat the requirements in the act.

Statutory Purpose

Neither the Expedited Funds Availability Act nor in the Competitive Equality Banking Act, of which this act was a part, contain a statement of purpose.

Concern 9

Company Concern

Bank B officials said that Regulation DD, which implements the Truth in Savings Act, should be simplified by reducing the number of times that banks are required to disclose transaction information.

Agency Response

Officials at FRB said that the Truth in Savings Act requires institutions to provide information about rates paid and fees charged for consumer deposit accounts (a) upon request, (b) before an account is opened, (c) before terms previously disclosed are adversely changed, (d) if periodic statements are sent, and (e) before automatically renewable ("rollover") time accounts mature. They also said that promoting certain account terms in advertisements triggers the duty to disclose additional account terms.

In adopting Regulation DD, FRB officials said the agency sought to facilitate compliance with the disclosure requirements in several respects. For example, they said change-in-term notices are not required when institutions lower rates for variable-rate accounts or for changes in check printing charges, which are often under the control of third-party vendors. Similarly, information regularly provided to consumers about their certificates of deposit or passbook savings accounts does not trigger the periodic statement disclosure requirements. Finally, although institutions are required to provide account-opening disclosures to all maturing rollover certificates of deposit, Regulation DD provides flexibility in the timing and content of these disclosures. However, because the number and timing of these disclosure provisions of Regulation DD are required by the Truth in Savings Act, the officials said that statutory amendments

would be needed to further relieve the burdens associated with those provisions.

Amount of Discretion Permitted by Statute in Drafting Regulatory Requirements

The issue that we focused on in this concern is FRB's assertion that the Truth in Savings Act requires banks to disclose information about interest rates and fees to their customers repeatedly.

We believe that the Truth in Savings Act (codified at 12 U.S.C. 4301 et seq.) gave FRB no discretion in drafting Regulation DD's requirements for repeated disclosures of depository institutions' terms and conditions. Various provisions in the act require disclosures at various points in time. For example, 12 U.S.C. 4302(a) requires, with certain exceptions, that each institution disclose such information as annual percentage yields and minimum account balances. The institution must also provide a statement that an interest penalty is required for early withdrawal in conjunction with each advertisement, announcement, or solicitation that includes a reference to a specific rate of interest payable. According to 12 U.S.C. 4305(a), a schedule of fees, charges, interest rates, and terms and conditions applicable to each class of accounts offered by a depository institution must be (1) made available to any person upon request, (2) provided to any potential customer before an account is opened or a service is rendered, and (3) provided to depositors at least 30 days before the date of maturity of any time deposits that are renewable at maturity without notice from the depositor.

Before any change is made in any term or condition that is to be disclosed in the required schedule that may reduce the yield or adversely affect any account holder, 12 U.S.C. 4305(c) requires institutions to notify customers and provide them with a description of the change by mail at least 30 days before the change takes effect. According to 12 U.S.C. 4307, each depository institution must include on or with each periodic statement provided to each account holder a clear and conspicuous disclosure of the annual percentage yield earned, the amount of interest earned, the amount of any fees or charges imposed, and the number of days in the reporting period.

Whether Regulatory Provisions Are Within the Authority Granted by the Statute

We believe that the requirements in Regulation DD regarding repeated disclosures (codified at 12 C.F.R. Part 230) are within the authority granted to FRB by the Truth in Savings Act. Many of the regulatory requirements mirror the requirements in the statute. For example, according to 12 C.F.R. 230.4, depository institutions must provide account disclosures to a consumer (a) upon request; or (b) before an account is opened or a service is provided, whichever is earlier. According to 12 C.F.R. 230.5, institutions

must give at least 30 calendar days' advance notice to affected consumers of any change in a term required to be disclosed if the change may reduce the annual percentage yield or adversely affect the consumer. Also, institutions must provide disclosure for time accounts with maturity longer than 1 month that renew automatically. According to 12 C.F.R. 230.6, institutions must include disclosures in the periodic statements mailed or delivered to consumers.

Whether Less Burdensome Regulatory Approach Was Available

We do not believe that FRB could have developed a less burdensome regulatory approach that would have satisfied the requirements of the Truth in Savings Act. The act gave the agency no discretion in drafting the regulatory requirements at issue in this concern, and Regulation DD's requirements were consistent with the statutory requirements.

Statutory Purpose

According to 12 U.S.C. 4301(b), the purpose of the Truth in Savings Act is "to require the clear and uniform disclosure of (1) the rates of interest which are payable on deposit accounts by depository institutions; and (2) the fees that are assessable against deposit accounts, so that consumers can make a meaningful comparison between the competing claims of depository institutions with regard to deposit accounts."

Concern 10

Company Concern

Bank B officials said that Regulation Z (which implements the Truth in Lending Act) requires the bank to disclose the same information regarding bank practices (e.g., interest rates and loan terms) several times during a single transaction (e.g., when taking out a loan or opening an account). They recommended that Regulation Z be simplified to permit banks to disclose information only once during the transaction, or to give them the latitude to ask customers how often they need the disclosure information during a transaction.

Agency Response

Officials at FRB said that the Truth in Lending Act and Regulation Z require creditors to provide increasing levels of detail about the potential cost of a transaction as the consumer progresses through the credit-shopping process. For example, promoting certain terms in advertisements triggers the duty to state additional credit terms; but these disclosures are limited to key terms, such as annual fees for a credit card plan or repayment terms for an installment loan. When consumers apply for a line of credit or certain variable-rate loans secured by their homes, general disclosures about the loan terms are provided that assist consumers in deciding whether to obtain the credit. Disclosures can also be required during the term of a loan, such as when the lender implements

an adverse change to previously disclosed account terms in a revolving credit line or other "open-end" credit plan. Transaction-specific disclosures are given before the consumer becomes obligated for the credit. FRB officials also said that the timing of the disclosures is mandated by the Truth in Lending Act itself and not by Regulation Z. Amendments to the Truth in Lending Act would be required for changes in when and how often a lender must provide most of these disclosures.

Amount of Discretion Permitted by Statute in Drafting Regulatory Requirements

The issue that we focused on in this concern is FRB's assertion that the Truth in Lending Act establishes the frequency with which banks must disclose certain types of information to customers.

We believe the Truth in Lending Act (codified at 15 U.S.C. 1601 et seq.) gave FRB no discretion in drafting the regulatory requirements governing when banks are required to make certain disclosures. The act's requirements in this area are very specific. For example, 15 U.S.C. 1637(a) states that before opening an account under an open-end consumer credit plan, the creditor must disclose to the person getting the credit such items as the conditions under which a finance charge may be imposed and the method for determining the balance upon which to impose the finance charge. Also, 15 U.S.C. 1637(b) states that at the end of each billing cycle for an open-end consumer credit plan for which there is an outstanding balance in that account or with respect to which a finance charge is imposed, the creditor must transmit a statement containing several specific items (as applicable). For example, the statute says the statement should contain the outstanding balance in the account at the beginning and end of the period and the total amount credited to the account during the period. Finally, according to 15 U.S.C. 1637(c), certain information must be disclosed on an application for a credit card or charge card. For example, the application must disclose the annual percentage rates, annual and other fees, any grace period, and method by which the credit balance is calculated.

Whether Regulatory Provisions Are Within the Authority Granted by the Statute

We believe that the requirements in Regulation Z are within the authority granted by the Truth in Lending Act. The regulatory requirements closely parallel the requirements in the statute. For example, 12 C.F.R. 226.5(b)(1) and (2) state that for open-end credit, the creditor must furnish initial disclosures before the first transaction is made under the plan and periodically provide a statement for each billing cycle at the end of which an account has a debit or credit balance of more than $1 or on which a finance charge has been imposed. Section 226.5a of the regulation says that the credit and charge card issuer must provide the disclosures

specified on or with a solicitation or an application to open a credit or charge card account.

Whether Less Burdensome Approach Was Available

We do not believe that FRB could have developed a less burdensome regulatory approach that would have met the requirements of the Truth in Lending Act. The act gave the agency no discretion in drafting the regulatory requirements at issue in this concern, and the agency's regulatory requirements were consistent with the statutory requirements.

Statutory Purpose

The Truth in Lending Act is a subchapter within the Consumer Credit Protection Act. The subchapter (15 U.S.C. 1601(a)) says that the purpose of the Truth in Lending Act is to ensure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit and to protect the consumer against inaccurate and unfair credit billing and credit card practices.

Concern 11

Company Concern

A Bank C official said that Regulation DD reduces the bank's flexibility in providing services to customers. The official said that the bank cannot customize accounts for customers, put customers on analyzed accounts,[6] or do bonus programs because of the expensive and complex computer system changes that would be needed to comply with the regulation.

Agency Response

Officials of FRB said the agency made a concerted effort during the development of Regulation DD to provide flexibility to institutions in order to minimize compliance costs and maximize the development of new products. However, the Truth in Savings Act requires disclosure of the fees that may be assessed against a consumer's account. The officials said if an institution chooses to offer different fees or other terms to different consumers, the disclosures must reflect the terms agreed to by the parties.

Amount of Discretion Permitted by Statute in Drafting Regulatory Requirements

The issue that we focused on in this concern is FRB's assertion that the Truth in Savings Act requires the disclosure of potential fees and other terms, which may have the effect of reducing a bank's flexibility in providing services to its customers.

[6] According to an official at FRB, an analyzed account usually refers to the bundling of individual accounts to determine, on the basis of the total of the balances of all the accounts in one bank (rather than on the basis of each of the accounts), what fees must be paid on the accounts or how much interest the accounts will earn.

We believe the Truth in Savings Act gave FRB no discretion in how it could draft Regulation DD's disclosure requirements. According to 12 U.S.C. 4303(a) through (c), each institution must maintain a schedule of fees, charges, interest rates, and terms and conditions applicable to each class of accounts offered by the institution. The statute specifies the items that must be on the schedule. For example, the statute says that the schedule must contain (1) descriptions and amounts of all fees and service charges and the conditions under which those fees would be applicable; (2) all minimum balance requirements that would affect fees, charges, and penalties; (3) any minimum amount required to open the account; and (4) information on interest rates, such as any annual rate of simple interest and the frequency with which the interest would be compounded and credited. Although the statute does not specifically address whether banks must maintain similar schedules of disclosures about customized and analyzed accounts or bonus programs, it appears that disclosures would be required for these accounts or programs under the general heading of "terms and conditions."

Whether Regulatory Provisions Are Within the Authority Granted by the Statute

We believe the referenced provisions of Regulation DD are within the rulemaking authority granted by the Truth in Savings Act because they are similar to the requirements in the act. For example 12 C.F.R. 230.4(a) and (b) state that a financial institution must provide account disclosures to a consumer before an account is opened, before a service is provided, or upon request. The regulation also states that the disclosures shall include rate information, compounding and crediting information, balance information, fees, transaction limitations, features of time accounts, and bonuses.

Whether Less Burdensome Regulatory Approach Was Available

We do not believe that FRB could have developed a less burdensome regulatory approach that would have satisfied the requirements of the Truth in Savings Act. The act gave the agency no discretion in drafting the regulatory requirements at issue in this concern, and the agency's regulatory requirements were consistent with the statutory requirements.

Statutory Purpose

According to 12 U.S.C. 4301(b), the purpose of the Truth in Savings Act is "to require the clear and uniform disclosure of (1) the rates of interest which are payable on deposit accounts by depository institutions; and (2) the fees that are assessable against deposit accounts, so that consumers can make a meaningful comparison between the competing claims of depository institutions with regard to deposit accounts."

Concern 12

Company Concern

A Bank C official said that Regulation DD requires as part of its “redisclosure” rules that the bank provide customers with a written description of all the bank's services and fees each time the customer opens, changes, or reopens an account--even if the customer had previously received the same information.

Agency Response

Officials at FRB said that the Truth in Savings Act requires financial institutions to provide complete account disclosures when an account is opened, and it also requires institutions to provide consumers with a notice of any change in terms. They said disclosures are required if an account is "re-opened" only if the institution deemed the account closed at some point in time.

Amount of Discretion Permitted by Statute in Drafting Regulatory Requirements

The issue that we focused on in this concern is FRB’s assertion that the Truth in Savings Act establishes when a bank must disclose information on the terms of their accounts to customers.

We believe that the Truth in Savings Act gave FRB no discretion in how it could draft Regulation DD regarding disclosures when an account is opened or when there are changes to the account. According to 12 U.S.C. 4305(a)(2), institutions are required to provide complete account disclosures when an account is opened or when a service is rendered. According to 12 U.S.C. 4305(c), all account holders who may be affected by changes in terms or conditions or adversely affected by changes must be notified and provided with a description of the changes by mail at least 30 days before the changes take effect.

Whether Regulatory Provisions Are Within the Authority Granted by the Statute

We believe that FRB’s disclosure requirements in Regulation DD are within the authority granted by the Truth in Savings Act. The regulatory requirements parallel the statutory requirements in many respects. For example, according to 12 C.F.R. 230.4(a), a depository institution must provide account disclosures to a consumer before an account is opened or a service is rendered, whichever is earlier. The regulation states that an institution is considered to have provided a service when a fee required to be disclosed is assessed. Also, 12 C.F.R. 230.5(a) states that institutions are to provide consumers with advance notice of any change in terms if the change may reduce the annual percentage yield or adversely affect the consumer. No notice is required for variable rate changes, check printing fees, or short-term time accounts. The notice of change shall include the effective date of the change and shall be mailed or delivered at least 30 calendar days before the effective date of the change.

Whether Less Burdensome Regulatory Approach Was Available

We do not believe that FRB could have developed a less burdensome regulatory approach that would have satisfied the requirements of the Truth in Savings Act. The act gave the agency no discretion in drafting the regulatory requirements at issue in this concern, and those requirements are consistent with the statutory requirements.

Statutory Purpose

According to 12 U.S.C. 4301(b), the purpose of the Truth in Savings Act is to require the clear and uniform disclosure of the rates of interest and the fees that can be assessed against deposit accounts so that consumers can make a meaningful comparison between the competing claims of depository institutions with regard to deposit accounts.

Concern 13

Company Concern

A Bank C official said that regulations requiring federally insured institutions to require flood insurance for properties located in floodplains are not applicable to nonbanking organizations such as the Money Store, where the public can apply for loans without having to acquire flood insurance.

Agency Response

Officials at FRB and FDIC said the Flood Disaster Protection Act of 1973 created a significant disparity between the treatment of mortgage companies or other nondepository lenders and depository institutions with respect to flood insurance purchase requirements. The act also directed federal banking agencies to adopt regulations applicable to depository institutions to require the purchase of flood insurance for any improved property used to secure a loan if the property was located in a flood hazard area. No similar requirements were placed on mortgage banks.

Amount of Discretion Permitted by Statute in Drafting Regulatory Requirements

The issue that we focused on in this concern is FDIC's assertion that the Flood Disaster Protection Act created the disparity between depository and nondepository institutions with respect to flood insurance requirements.

We believe the Flood Disaster Protection Act gave FRB and FDIC no discretion in writing their regulations in this area. The statute (particularly 42 U.S.C. 4121(a)(13) and 42 U.S.C. 4012a(b)(1)) requires that regulated lending institutions not make real estate loans in an area having special flood hazards unless the building or property is covered by flood insurance. Also, 42 U.S.C. 4012a(b)(1) requires regulated lending institutions not to make, increase, extend, or renew any loan secured by improved real estate or a mobile home located, or to be located, in an area having special flood hazards and in which flood insurance has been made

available under the National Flood Insurance Act of 1968,unless the building or mobile home and any personal property securing the loan is covered for the term of the loan by flood insurance. A “regulated lending institution” is defined in 42 U.S.C. 4121(a)(13) in such a way that nondepository lenders such as the Money Store would not be subject to the requirements of 42 U.S.C. 4012a(b)(1).

Whether Regulatory Provisions Are Within the Authority Granted by the Statute

We believe that FRB’s and FDIC’s regulatory requirements regarding flood insurance are within the authority granted by the Flood Disaster Protection Act of 1973 because those requirements are, in essence, the same as the statutory requirements. According to 12 C.F.R. 208.23(c), a state member bank may not make, increase, extend, or renew any designated loan unless the building securing the loan is covered by flood insurance for the term of the loan.

Whether Less Burdensome Approach Was Available

We do not believe that FRB and FDIC could have developed a less burdensome regulatory approach while still meeting the underlying statutory requirements of the Flood Disaster Protection Act of 1973. The statute gave the agencies no discretion in drafting the regulatory requirements at issue in this concern, and those requirements were consistent with the statutory requirements.

Statutory Purpose

According to 42 U.S.C. 4002(b), the purpose of the Flood Disaster Protection Act of 1973 is to (1) substantially increase the limits of coverage authorized under the national flood insurance program; (2) provide for the expeditious identification of, and the dissemination of information concerning, flood-prone areas; (3) require states or local communities, as a condition of future federal financial assistance, to participate in the flood insurance program and to adopt adequate flood plan ordinances with effective enforcement provisions consistent with federal standards to reduce or avoid future flood losses; and (4) require the purchase of flood insurance by property owners who are being assisted by federal programs or by federally supervised, regulated, or insured agencies or institutions in the acquisition or improvement of land or facilities located, or to be located, in identified areas having special flood hazards.

Concerns for Which Agencies Appeared to Have Some Rulemaking Discretion

One of the objectives of our review was to determine, for each of 27 company concerns, the amount of discretion the underlying statutes gave rulemaking agencies in drafting the regulatory requirements that the agencies said were attributable to the underlying statutes. The agencies that issued those requirements indicated in two of our 1996 reports that the concerns could, at least in part, be traced to statutory requirements underlying their regulations.[1] In this review we concluded that the statutory provisions underlying 12 of the 27 concerns gave the rulemaking agencies some discretion in how the related regulatory requirements could be drafted. We coded statutory provisions as allowing agencies "some discretion" if they delineated certain requirements regarding how the agencies' regulations could be drafted but gave the agencies at least some flexibility regarding other requirements.

This appendix provides our detailed analysis of each of these 12 company concerns. Specifically, for each such concern it provides the following information: (1) the portion of the concern in our 1996 reports that the agency or agencies indicated was statutorily based, (2) the portion of the agency response in our 1996 reports that indicated the concern was statutorily based, (3) our analysis of the amount of rulemaking discretion the relevant statutory provisions gave the agencies (the first objective of this review), (4) our analysis of whether the regulatory requirements at issue in the concern were within the authority granted by the underlying statutes (the second objective of our review), (5) our analysis of whether the rulemaking agencies could have developed regulatory approaches that would have been less burdensome to the regulated entities while meeting the underlying statutory requirements (the third objective of our review), and (6) the main purpose of the underlying statutes (where such purpose statements were available). Appendix I of this report contains a detailed discussion of our scope and methodology.

Concern 1

Company Concern

Officials from the paper company said DOT's required hazardous materials (hazmat) training is expensive. Under the regulations that took effect in January 1994, they said employees who deal with hazardous materials must be trained and tested, and this training costs the company $475,000 per year.

Agency Response

DOT officials said the Hazardous Materials Transportation Uniform Safety Act, implemented in 1990, specifically required the issuance of regulations

[1] GAO/GGD-97-2 (Nov. 18, 1996); and GAO/GGD-97-26R (Dec. 11, 1996).

requiring that hazmat employers provide training to their hazmat employees.[2] They said DOT's Hazardous Materials Regulations were revised May 15, 1992, to reflect those statutory requirements.

Amount of Discretion Permitted by Statute in Drafting Regulatory Requirements

The issue that we focused on in this concern is DOT's assertion that the Hazardous Materials Transportation Safety Act requires employers to provide certain employees with hazmat training.

We believe that the Hazardous Materials Transportation Uniform Safety Act (now codified at 49 U.S.C. 5101 et seq.) gave DOT some discretion regarding how its regulations on hazmat training could be drafted. The statute said that the Secretary of Transportation "shall prescribe by regulation requirements for training that a hazmat employer must give hazmat employees of the employer on the safe loading, unloading, handling, storing, and transporting of hazardous material. . ." The statute also said the regulation must establish the date by which the training shall be completed, and to require employers to certify that their hazardous materials employees have received training and been tested on at least one of nine specific areas of responsibility that are delineated in the statute. Therefore, DOT had no discretion regarding whether to issue regulations requiring hazmat training or how it could draft those regulations with regard to the provisions described in the statute. However, we believe that DOT had some discretion in how it could draft other regulatory requirements. For example, the statute said that DOT's regulations "may provide for different training for different classes or categories of hazardous material and hazmat employees." It also said that the Secretary of Transportation "may require by regulation" documentation to support employers' training certifications.

Whether Regulatory Provisions Are Within the Authority Granted by Statute

We believe that DOT's regulatory provisions requiring hazardous material training (49 C.F.R. 172.700-172.704) are within the authority granted by the Hazardous Materials Transportation Uniform Safety Act. DOT's regulations contain the requirements that were specifically delineated in the statute. For example, the statute required the regulation to establish the date by which the hazardous materials training shall be completed, and the regulation (49 C.F.R. 172.704 (c)(ii)) says that employees must complete the training within 90 days after beginning employment or a change in job function. In other areas, the regulatory provisions appear to fall within the discretion afforded DOT by the statute. For example, the statute said that the Secretary of Transportation "may require by

[2] In 1994, the Hazardous Materials Transportation Uniform Safety Act was recodified as the Federal Hazardous Materials Transportation Law.

regulation" documentation to support employers' training certifications, and the regulation (49 C.F.R. 172.704 (d)) requires such documentation.

Whether Less Burdensome Regulatory Approach Was Available

We could not determine whether DOT could have developed an alternative approach to hazmat training that would have been less burdensome to regulated entities while still accomplishing the requirements of the Hazardous Materials Transportation Uniform Safety Act. To make that determination we would have had to conduct a detailed examination of DOT's training requirements that were not statutorily mandated and determine whether the Department could have eliminated them or used an alternative approach that regulated entities would have perceived as less burdensome. For example, we would have had to examine DOT's regulatory requirement that employers provide documentation to support training certifications and determine whether DOT could have eliminated or amended that requirement and still met the requirements of the underlying statute. Such an examination of each nonstatutory requirement would have demanded extensive time and resource commitments that were beyond the scope of this assignment.

Statutory Purpose

According to 49 U.S.C. 5101, "[t]he purpose of this chapter is to provide adequate protection against the risks to life and property inherent in the transportation of hazardous material in commerce by improving the regulatory and enforcement authority of the Secretary of Transportation."

Concern 2

Company Concern

According to hospital officials, it is very difficult to keep pace with frequently changing Medicare and Medicaid billing rules. Although the hospital's computer programmers have spent many hours trying to keep their automated patient billing system up to date, the hospital officials said it is like "chasing a moving target."

Agency Response

According to HCFA officials, in a number of situations, the changes to hospital billing procedures are due to enhancements or changes made by Congress.

Amount of Discretion Permitted by Statute in Drafting Regulatory Requirements

The issue that we focused on in this concern is HCFA's assertion that changes to Medicare and Medicaid billing rules are, at times, congressionally driven.

HCFA officials said that the general mechanisms the government uses to pay for medical services are spelled out in the Code of Federal Regulations but are operationalized through the billing instructions published in

numerous HCFA manuals. Although these billing rules do not appear in the Code of Federal Regulations and therefore do not have the force and effect of law, we considered them to be "regulatory requirements" in this report. HCFA's Medicare Hospital Manual contains billing procedures that hospitals must follow when submitting bills to "fiscal intermediaries" (insurance companies with which HCFA contracts for hospital bill processing and payment). Although other HCFA publications may indirectly affect the billing procedures at issue in the hospital's concern (e.g., changes to HCFA's Medicare Part A Intermediary Manual that describe the procedures that intermediaries must follow when processing bills from hospitals), we focused our review on the changes to the billing procedures in HCFA's Medicare Hospital Manual.

We believe that HCFA had some discretion in deciding whether to make specific changes to its billing rules. In general, HCFA has authority to require that certain types of information be submitted and to change those information requirements. For example, one provision of the Social Security Act (codified at 42 U.S.C. 1395g) says

" [t]he Secretary [of the Department of Health and Human Services] shall periodically determine the amount which should be paid under this part to each provider of services . . . except that no such payments shall be made to any provider unless it has furnished such information as the Secretary may request in order to determine the amounts due such provider under this part for the period with respect to which the amounts are being paid or any prior period." (Emphasis added.) "

To determine the extent to which specific changes to HCFA's Medicare Hospital Manual were driven by statutory requirements, we reviewed the 13 changes that HCFA made to the manual in 1995 (the year prior to our 1996 reports on which this review is based). We concluded that 5 of these 13 changes were directly traceable to statutory requirements that gave the agency no rulemaking discretion. For example, one of the changes to the manual implemented a new subsection to the Social Security Act that delineated procedures to be used in calculating payment for surgical dressings. The statute said that

"[p]ayment under this subsection for surgical dressings . . . shall be made in a lump sum amount for the purchase of the item in an amount equal to 80 percent of the lesser of (A) the actual charge for the item; or (B) a payment amount determined in accordance with the methodology described in subparagraphs (B) and (C) of subsection (a)(2) (except that in applying such methodology, the national limited payment amount referred to in such subparagraphs shall be initially computed based on local payment amounts using average reasonable charges for the 12-month period ending December 31, 1992, increased by the covered item updates described in such subsection for 1993 and 1994."

Because the statute specified that payment must be made for surgical dressings, the amount of those payments, and how those charges should be paid, we concluded that HCFA did not have discretion with regard to making changes to its billing instructions in this area.

The other eight changes to the Medicare Hospital Manual appeared to be clarifications and technical corrections to HCFA's billing procedures, and HCFA appeared to rely on its general authority to require "such information as the Secretary may request" in making these changes. In these cases, we believe that HCFA had considerable discretion in deciding whether to make the changes. For example, two of the changes affected billing requirements for inpatient hospital stays. One of the changes added a new requirement that bills be submitted in the sequence in which services were furnished. The other change clarified the previous change, noting that if the new policy disadvantaged (i.e., raised the liability of) the hospital, the beneficiary, or a secondary insurer, the hospital should notify its intermediary to arrange reprocessing of all affected claims.

Whether Regulatory Provisions Are Within the Authority Granted by the Statute

We believe that the changes that HCFA made to the Medicare Hospital Manual's billing procedures were within the authority granted by the underlying statutes. In those cases in which HCFA had no discretion to make statutorily directed changes, the changes were consistent with (and, in some cases, identical to) the statutory requirements. Therefore, we concluded that those changes were within the authority granted by the statutes. For example, in the above illustration involving surgical dressings, HCFA changed the Medicare Hospital Manual to provide instructions for billing and payment that mirrored the requirements in the new subsection of the Social Security Act. In those cases in which HCFA appeared to make the changes at its own initiative, the agency relied on its authority to "periodically determine the amount which should be paid" and to collect "such information as the Secretary may request." The statute also authorizes the Secretary to prescribe "such regulations as may be necessary to carry out the administration of the insurance programs . . . ." We believe that the changes that HCFA initiated to the billing procedures were within the authority provided to the agency in the statute.

Whether Less Burdensome Regulatory Approach Was Available

We could not determine whether HCFA could have made changes to its Medicare Hospital Manual that would have been perceived as less burdensome to the hospitals while still meeting the requirements of the underlying statutes. To do so we would have had to initiate a separate review of each change for which HCFA had at least some rulemaking discretion and determine whether the agency needed to make the change and, if so, whether another approach would have been less burdensome.

Those reviews would have required extensive time and resource commitments that were beyond the scope of this review.

Statutory Purpose

The Social Security Act contains no specific statement of purpose. However, 42 U.S.C. 1395c states that

> " [t]he insurance program for which entitlement is established by sections 426 and 426-1 of this title provides basic protection against the costs of hospital, related post-hospital, home health services, and hospice care in accordance with this part for (1) individuals who are age 65 or over and are eligible for retirement benefits under subchapter II of this chapter, (2) individuals under age 65 who have been entitled for not less than 24 months to benefits under subchapter II of this chapter, and (3) certain individuals who did not meet the conditions specified in either clause (1) or (2) but who are medically determined to have end stage renal disease."

Concern 3

Company Concern

Officials from the hospital said the annual Medicare cost report is extremely difficult to prepare. They said the report's information requirements place a considerable recordkeeping burden on the hospital's health care providers. For example, they said each housekeeping supervisor must spend 2 to 3 hours each month preparing the necessary paperwork that will feed into this annual report, and some staff members must devote all of their time to compiling the required information.

Agency Response

HCFA officials said section 1886(f)(1) of the Social Security Act requires the Secretary of Health and Human Services to maintain a system of cost reporting for prospective payment system hospitals. They also said that under sections 1815(a) and 1861(v)(1)(A) of the act, providers of service participating in the Medicare program must submit annual information to achieve settlement of costs for health care services rendered to Medicare beneficiaries.

Amount of Discretion Permitted by Statute in Drafting Regulatory Requirements

The issue that we focused on in this concern is HCFA's assertion that the Social Security Act requires the information in the annual Medicare cost report.

We believe that the Social Security Act gave HCFA some discretion in how its regulations in this area could be drafted. The act contains several provisions that require the Department of Health and Human Services or HCFA to collect information from hospitals in order to determine the amount of reimbursements that hospitals are due for patient care. Therefore, the agency had no discretion in whether to require a system for reporting cost information by hospitals. However, the Social Security Act

gave HCFA discretion in determining the specific information required in the reports. For example, section 1815(a) of the act (codified at 42 U.S.C. 1395g) states that the Secretary "shall periodically determine the amount which should be paid under this part to each provider of services with respect to the services furnished by it . . . ." This section goes on to say that "no such payments shall be made to any provider unless it has furnished such information as the Secretary may request (emphasis added) in order to determine the amounts due such provider…." Section 1861 of the act (codified at 42 U.S.C. 1395x) states that "[t] he reasonable cost of any services shall be the cost actually incurred . . . and shall be determined in accordance with regulations establishing the method or methods to be used, and the items to be included, in determining such costs . . . ." The section goes on to delineate certain factors the Secretary must take into account in prescribing the regulations, such as considering both direct and indirect costs and using principles generally applied by national organizations.

Whether Regulatory Provisions Are Within the Authority Granted by Statute

We believe that HCFA's regulatory provisions for cost reports (codified at 42 C.F.R. Parts 412 and 413) are within the authority granted by the Social Security Act. According to 42 C.F.R. 412.52, "[a]ll hospitals participating in the prospective payment systems must meet the recordkeeping and cost reporting requirements of [paragraph] 413.20 and [paragraph] 413.24 of this chapter." According to 42 C.F.R. 413.24(a), "[p]roviders receiving payment on the basis of reimbursable cost must provide adequate cost data. This must be based on their financial and statistical records which must be capable of verification by qualified auditors." Similarly, section 413.24(c) states that "[a]dequate cost information must be obtained from the provider's records to support payments made for services furnished to beneficiaries." Other portions of 42 C.F.R. 413 delineate the periods covered by the reports and the frequency with which they must be submitted. All of these regulatory requirements appear to fall within the rulemaking authority granted to HCFA by the Social Security Act.

Whether Less Burdensome Regulatory Approach Was Available

We could not determine whether HCFA could have developed cost reporting requirements that would have been perceived as less burdensome to hospitals while still meeting the requirements of the Social Security Act. To do so we would have had to initiate a separate review of the Medicare cost reports and how HCFA uses the information that it collects—a review that would have required extensive time and resource commitments that were beyond the scope of this review.

Statutory Purpose

The Social Security Act does not contain a statement of purpose regarding the cost reporting requirements. However, section 1811 of the act

(codified at 42 U.S.C. 1395c) states that the purpose of the hospital insurance program is to provide “basic protection against the costs of hospital, related post-hospital, home health services, and hospice care . . .” for covered individuals.

Concern 4

Company Concern

An official from Bank A said the regulation on the Availability of Funds and Collection of Checks (Regulation CC) requires the development and maintenance of expensive and time-consuming information on the current availability of funds.

Agency Response

Officials at FRB said that Regulation CC implements the Expedited Funds Availability Act (codified at 12 U.S.C. 4001-4010), which places limits on the length of time depository institutions may place holds on deposits to transaction accounts. To ensure compliance with the act and the regulation, they said a depository institution must have the capacity to assign and track the availability of each check it accepts for deposit. The costs of developing and maintaining such a system likely vary with the complexity of the depository institution’s availability policy. Because the availability provisions of Regulation CC are required by the act, FRB officials said that statutory amendments would be necessary in order to relieve any of the burdens on depository institutions associated with those provisions.

Amount of Discretion Permitted by Statute in Drafting Regulatory Requirements

The issue that we focused on in this concern is FRB’s assertion that the Expedited Funds Availability Act limits the amount of time that banks can hold deposits, thereby requiring banks to keep track of the availability of funds they accept for deposit.

We believe that the Expedited Funds Availability Act gave FRB some discretion in how it could draft its regulations on funds availability. According to 12 U.S.C. 4002, depository institutions must make funds from different types of deposits available for withdrawal within specified periods of time ranging from 1 day to several days. For example, 12 U.S.C. 4002(b)(2) says that funds must be available for withdrawal not more than 5 business days after the deposit of a check drawn on a nonlocal bank. Therefore, FRB had no rulemaking discretion in establishing the maximum lengths of time banks can hold funds before making them available to the depositor. However, the statute gives the agency discretion to require shorter holds on funds than the maximums established in the act as long as that period of time is within the time in which a bank can reasonably expect to learn of nonpayment on most items for each category of check.

Although the act established varying maximum hold periods for different types of deposits, there is no statutory (or regulatory) provision requiring banks to develop and maintain a system for tracking the availability of deposits. However, in practice, banks need to develop tracking systems to enable themselves to comply with the act and the relevant regulation. FRB officials said that the bank could avoid the need for such a system by providing immediate availability for all deposits.

Whether Regulatory Provisions Are Within the Authority Granted by Statute

We believe that Regulation CC's requirements for expedited funds availability are within the authority granted the agency by the Expedited Funds Availability Act. Subsections 10, 12, and 13 of 12 C.F.R. 229 require that funds be available for withdrawal not later than specified periods of time ranging from 1 to several days. The time periods established in the regulations are consistent with the time periods in the statute for the different types of deposits.

Whether Less Burdensome Regulatory Approach Was Available

As discussed earlier, FRB had some discretion to write regulations requiring banks to hold deposits for less than the maximum time allowed in the statute. Therefore, FRB could have standardized the hold periods at less than the maximum period. Standardizing the hold periods could have been perceived as less burdensome to banks because it would have eliminated the need for banks to have tracking systems for different categories of deposits (e.g., deposits of local checks, government checks, or out-of-state checks). FRB's discretion, however, is limited in that FRB can shorten a hold period only if banks would have a reasonable period of time to learn of the return of checks subject to the shorter hold. Standardization of hold periods across all categories of checks would require that all hold periods be set to the minimum period established by the act (1 day). In today's check system, one day would not allow banks to learn of the return of most dishonored checks. Therefore, FRB does not appear to have the discretion to standardize the hold period for all categories of checks. Even if the hold periods were standardized for only some categories of checks, imposing shorter hold periods could also increase a bank's risk of fraud on those checks. Banks may not have viewed such an approach as less burdensome. Ultimately, we could not determine whether FRB could have developed less burdensome regulatory approaches because to do so would have required extensive time and resource commitments (e.g., surveying the banks on whether standardized minimums would have been less burdensome) that were beyond the scope of this review.

Statutory Purpose

The Expedited Funds Availability Act does not contain a statement of purpose.

Concern 5

Company Concern

An official from Bank A said the Truth in Savings Act's (Regulation DD) requirements have not provided substantive benefits to either the bank or its customers. The official also said that before the act was passed, the bank provided savings account information to customers in several different documents. However, under the act this information must be consolidated into one document.

Agency Response

Officials at FRB said Congress enacted the Truth in Savings Act in 1991 to enhance consumer shopping among deposit accounts. Its purpose is to require all depository institutions to disclose information about the rates paid and fees charged in a uniform manner. They said FRB's Regulation DD requires institutions to disclose terms in a uniform way but allows flexibility in the format of the disclosures. For example, disclosures may be provided in a single document or in several documents, and they may be combined with other contractual provisions or disclosures required by federal or state law.

Amount of Discretion Permitted by Statute in Drafting Regulatory Requirements

The issue we focused on in this concern is FRB's assertion that the Truth in Savings Act requires banks to provide disclosure statements to customers in a uniform manner.

We believe that the disclosure requirements in the Truth in Savings Act (codified at 12 U.S.C 4301 et seq.) gave FRB some discretion regarding how its regulations in this area could be drafted. Although the statute gave the agency no discretion regarding much of the information that had to be disclosed about customers' savings accounts, we believe the agency had some discretion with regard to certain types of information and the format of the disclosures.

The Truth in Savings Act's disclosure requirements were intended to allow consumers to make meaningful comparisons between the competing claims of depository institutions with regard to deposit accounts. The act describes in great detail the specific elements that such institutions must disclose to their customers. For example, 12 U.S.C. 4303(a) states that each banking institution must maintain a schedule of fees, charges, interest rates, and terms and conditions applicable to each class of accounts offered by the institution. According to 12 U.S.C. 4303(b), the schedule for any account must contain (1) a description of all fees, periodic service charges, and penalties that may be charged or assessed against the account, the amount of any fees, charges, or penalties and the conditions under which any amount will be assessed; (2) all minimum

balance requirements that affect fees, charges, and penalties, including a clear description of how the minimum balance is calculated; and (3) any minimum amount required with respect to the initial deposit in order to open the account. Section 4303(c) states that the information on interest rates in the schedules must include 10 specific items, including any annual percentage yield and the effective period of the annual yield, the annual rate of simple interest, the frequency with which interest will be compounded and credited, a clear description of the method used to determine the balance on which interest is paid, any minimum balance that must be maintained to earn the rates and obtain the yields disclosed and how such a minimum balance is calculated, and a description of any minimum time requirements to obtain the yield advertised.

On the other hand, the Truth in Savings Act also gives FRB rulemaking discretion in some areas, particularly with regard to certain types of information and accounts and in the format of the required disclosures. For example, 12 U.S.C. 4303(d) states that the schedule required under subsection (a) "shall include such other disclosures as the Board may determine to be necessary (emphasis added) to allow consumers to understand and compare accounts . . . ." Section 4304 of title 12 permits FRB to make such modifications "as may be necessary" in the disclosure requirements relating to annual percentage yield for certain types of accounts. Section 4303(e) states that the schedules required in section 4303(a) must be "presented in a format designed to allow consumers to readily understand the terms of the accounts offered," but it does not specify the particular format that must be used. Section 4308 of title 12 requires FRB to issue regulations on the disclosure requirements and requires the agency to publish model forms and clauses to facilitate compliance. However, the section goes on to say that depository institutions are not required to use any such model form or clause, and the institutions must be considered in compliance with the disclosure requirements if they use an alternative format that "does not affect the substance, clarity, or meaningful sequence of the disclosure."

Whether Regulatory Provisions Are Within the Authority Granted by Statute

We believe that the disclosure provisions in Regulation DD (12 C.F.R. Part 230) are within the authority granted by the Truth in Savings Act. The regulation's requirements regarding the content of account disclosures mirror, in many respects, the requirements in the statute. For example, 12 C.F.R. 230.4(b) states that account disclosures must (as applicable) include certain elements, including rate information (e.g., the annual percentage yield and the interest rate); balance information (e.g., minimum balance requirements); and the amount of any fees. All of these elements were required in the statute. Although Regulation DD also requires other

disclosures that are not expressly listed in the statute (e.g., any limitations on the number or dollar amount of withdrawals or deposits), these requirements appear to fall within FRB's authority in 12 U.S.C. 4303(d) to require such disclosures in the regulations "as the Board may determine to be necessary."

Regulation DD also states (12 C.F.R. 230.3) that depository institutions must make the required disclosures "clearly and conspicuously in writing and in a form the consumer may keep." It also says that disclosures for each account "may be presented separately or combined with disclosures for the institution's other accounts . . . ." Appendix B to Part 230 states that institutions may modify model disclosure clauses "as long as they do not delete required information or rearrange the format in a way that affects the substance or clarity of the disclosures." Because the regulation gives discretion to depository institutions and mirrors the statute's requirements in this area, we believe the regulation is within the authority granted by the statute.

Whether Less Burdensome Regulatory Approach Was Available

With regard to the elements that the Truth in Savings Act required institutions to disclose, we do not believe that FRB could have developed regulations that would have been less burdensome to financial institutions. For example, the act specifically required the disclosure of information on annual yields and interest rates, so Regulation DD had to contain those elements. However, we could not determine whether FRB could have refrained from requiring other information that is not expressly listed in the statute. To do so would have required us to determine if the information was, in fact, necessary to allow consumers to understand and compare accounts. Making that determination would have required an extensive analysis of consumer understanding and behavior that was beyond the scope of this review.

With regard to the format of the disclosures, we believe that FRB could not have chosen a less burdensome approach than the one taken in Regulation DD. The agency did not require that banks disclose the information in a single document, and (as the statute required them to do) it allowed financial institutions to vary from the model clauses and sample forms as long as those variances did not affect the substance of the disclosures.

Statutory Purpose

According to 12 U.S.C. 4301(b), the purpose of the Truth in Savings Act is "to require the clear and uniform disclosure of (1) the rates of interest that are payable on deposit accounts by depository institutions; and (2) the fees that are assessable against deposit accounts, so that consumers can make

a meaningful comparison between the competing claims of depository institutions with regard to deposit accounts."

Concern 6

Company Concern

A Bank C official said that Regulation DD requires that every fee charged to a customer's account must be separately described on the customer's statement.

Agency Response

Officials at FRB said that the Truth in Savings Act requires institutions that provide periodic statements to consumers to disclose the annual percentage yield earned, any fees imposed, and certain other information on the statements. In adopting the final version of Regulation DD, the officials said that the Board considered concerns raised by commenters on the proposed regulation and implemented several changes to help minimize costs, particularly those associated with periodic statements. For example, information sent in connection with time accounts and passbook savings accounts is exempt from the periodic statement rules.

Amount of Discretion Permitted by Statute in Drafting Regulatory Requirements

The issue that we focused on in this concern is FRB's assertion that the Truth in Savings Act establishes the disclosures that must be made to customers on their statements. We believe that the Truth in Savings Act gave FRB some discretion in how these regulatory provisions could be drafted. According to 12 U.S.C. 4307, each depository institution must include on or with each periodic statement to each account holder a "clear and conspicuous disclosure" of the following information for each account: (1) the annual percentage yield earned, (2) the amount of interest earned, (3) the amount of any fees or charges imposed, and (4) the number of days in the reporting period. Only separate description of fees on customers' accounts with periodic statements would appear to meet the statutory requirement that institutions include a "clear and conspicuous" disclosure of "any fee" imposed. However, 12 U.S.C. 4308(a)(3) states that FRB's regulations

"may contain such classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for any class of accounts as, in the judgement of the Board, are necessary or proper to carry out the purposes of this chapter, to prevent circumvention or evasion of the requirements of this chapter, or to facilitate compliance with the requirements of this chapter."

Therefore, the statute allowed FRB to write regulations excluding certain types of accounts from the fee disclosure requirements if the Board believed such exclusions were "necessary or proper."

Whether Regulatory Provisions Are Within the Authority Granted by the Statute

We believe that this provision of Regulation DD is within the authority granted by the Truth in Savings Act because its requirements either mirror those in the act or are within the rulemaking discretion provided to the agency by the act. According to 12 C.F.R. 230.6, the periodic statement to consumers must include the annual percentage yield earned, the amount of interest, any fees imposed, and the length of the statement period. When FRB promulgated the final rule in September 1992, the agency said it had exercised its exception authority in the act to exclude specific types of accounts (i.e., time accounts and passbook savings accounts) from the periodic statement requirements of the final rule. FRB said it believed exempting these accounts from the disclosure requirements was appropriate because it would encourage institutions to continue providing certain information to customers.

Whether Less Burdensome Regulatory Approach Was Available

We could not determine whether FRB could have developed a less burdensome regulatory approach that would have satisfied the requirements of the Truth in Savings Act. To do so we would need to know whether it was "necessary or proper" for FRB to exclude other types of accounts from the periodic statement requirements. Making that determination would have required extensive time and resource commitments that were beyond the scope of this review.

Statutory Purpose

According to 12 U.S.C. 4301(b), the purpose of the Truth in Savings Act is "to require the clear and uniform disclosure of (1) the rates of interest which are payable on deposit accounts by depository institutions; and (2) the fees that are assessable against deposit accounts, so that consumers can make a meaningful comparison between the competing claims of depository institutions with regard to deposit accounts."

Concern 7

Company Concern

Bank A officials said bank regulators should require only reports that the regulators will use. They said it is very frustrating to spend the time and resources needed to complete required reports and not know if the regulators actually use them.

Agency Response

Officials from FDIC said that some bank reporting requirements are specifically mandated by statute. However, they also recognized that some of these requirements might be unduly burdensome for banks compared to the value of the information to FDIC as it seeks to discharge its responsibilities as an insurer and bank supervisor. In such situations, the officials said that FDIC makes recommendations for legislative changes to

eliminate burdensome reporting requirements. They also said banks are urged to express their opinions on specific reports they consider unused.

Amount of Discretion Permitted by Statute in Drafting Regulatory Requirements

The issue that we focused on in this concern is FDIC's assertion that some bank reporting requirements are specifically required by statute. We did not examine whether the reports are actually used by bank regulators.[3]

We believe that FDIC had some discretion in developing regulations governing bank reporting requirements. Some of the relevant statutes did not give FDIC rulemaking discretion, but other statutes gave the agency at least some discretion to impose reporting requirements.

FDIC officials said that as of March 31, 1998, the agency had 58 active "information collections" that had been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act.[4] Of these, the officials said that 54 were statutorily mandated. We reviewed the statutory provisions underlying many of the 54 information collections and concluded that some of those provisions gave FDIC no discretion in drafting its regulations.[5] For example, 12 U.S.C. 1972(2)(G)(i) requires certain bank executive officers and principal shareholders to submit a written report to the board of directors for any year during which they have an outstanding extension of credit. The statute describes in detail the information required in this report. Therefore, FDIC had no discretion in drafting its regulations regarding whether the report was required, what information the report must contain, or the timing of the report. However, other statutory provisions gave FDIC considerable discretion in establishing reporting requirements. For example, 12 U.S.C. 1817(i) requires insurance of trust funds, and it permits FDIC's Board of Directors to "prescribe such regulations as may be necessary (emphasis added) to clarify the insurance coverage under this subsection and to prescribe the manner of reporting and depositing such trust funds."

[3] In our December 1996 report (GAO/GGD-97-26R), two other banking agencies responded to this concern about the usefulness of bank reports. Officials from FRB said there was an interagency effort to review the content of reports to determine the ongoing need for the data. Similarly, officials at the Office of the Comptroller of the Currency said they were taking steps to eliminate duplicative or unhelpful reports, if the required reports were not used.

[4] Under the Paperwork Reduction Act, agencies must obtain OMB approval before collecting or sponsoring the collection of information from nonfederal entities. FDIC officials said that they could not determine what information collection requirements were in place at the time that we did our earlier review in 1995.

[5] We did not review the statutory provisions underlying all 54 of the collections because of time and resource constraints and because doing so would not have altered our conclusion that FDIC had some rulemaking discretion.

Whether Regulatory Provisions Are Within the Authority Granted by Statute

We reviewed the relevant regulatory provisions for many of the information collections that FDIC said were statutorily mandated and concluded that of those we reviewed, the regulatory provisions were within the authority granted by the statutes. In those cases in which the underlying statutes gave the agency discretion to develop regulations, any regulations in this area that the agency developed would be within the authority granted by the statute. For example, in the above illustration in which the statute gave FDIC the authority to prescribe the manner of reporting on trust funds, any regulations specifying the reporting requirements would be within the authority of the statute. In those cases that we reviewed in which the underlying statute gave the agency no discretion, the regulatory language closely mirrored the language in the corresponding statute or specifically referenced the statutory requirements. For example, in the above illustration concerning reports from banks' executive officers and principal shareholders, the language in FDIC's regulations is essentially the same as the language in 12 U.S.C. 1972(2)(G)(i).

Whether Less Burdensome Regulatory Approach Was Available

We could not determine whether FDIC could have eliminated or developed less burdensome regulatory approaches without doing an in-depth analysis of each of the agency's nonstatutory reporting requirements and how FDIC uses the information collected. Such an analysis would have required extensive time and resource commitments that were beyond the scope of this assignment.

Statutory Purpose

The statutes underlying the 54 information collections that FDIC said were statutorily mandated often did not contain statements of purpose.

Concern 8

Company Concern

A Bank C official said that the Real Estate Settlement Procedures Act (RESPA or Regulation X), which is administered by HUD, requires extensive disclosure documents that are not easily understood by customers or relevant to their concerns. For example, the bank official said the loan package for a no-fee, no-point home equity loan contains about 10 pages of federally required paperwork, only 2 pages of which (dealing with the settlement statement of the loan) directly affect and are of interest to the customer. The official said the other eight pages consist of forms that are of little concern to the customer, such as the Servicing Disclosure Statement and the Controlled Business Arrangement Disclosure.

Agency Response

HUD officials said that Congress established the RESPA disclosure requirements (12 U.S.C. 2601 et seq.) to which the bank official referred. They said those requirements consist of a Good Faith Estimate of Settlement Costs; an information booklet delivered to all home purchasers; and, in the case of first lien loans, a disclosure of the lender's mortgage servicing practices. In the event the lender is referring the borrower to one or more of its affiliated companies to provide settlement services, they said RESPA requires disclosure of their relationship and that the borrower has the option to choose other providers (except for appraisers, credit reporting agencies, and lender's counsel). At settlement, they said the statute requires the settlement agent to provide the borrower with a standardized accounting of the transaction, familiarly known as the HUD-1 or HUD-1A.

Amount of Discretion Permitted by Statute in Drafting Regulatory Requirements

The issue that we focused on in this concern is HUD's assertion that RESPA establishes the disclosure requirements that the bank official found burdensome.

We believe that RESPA gave HUD some discretion in drafting regulations regarding the disclosure requirements at issue in this concern. The documents that lenders are required to disclose and many of the specific elements in those documents are explicitly required in the statute. For example, 12 U.S.C. 2605 says that the lender of a federally related mortgage loan must disclose to the applicant whether the servicing of the loan may be assigned, sold, or transferred to any other person at any time while the loan is outstanding. Also, 12 U.S.C. 2603(a) states that HUD must develop and prescribe a standard real estate settlement form (with regional variations, as necessary) for use in all transactions in the United States that involve federally related mortgaged loans. The statute also says that the form must clearly itemize all charges imposed upon the borrower and the seller in connection with the settlement; and it must indicate whether any title insurance premium included in such charges covers or insures the lender's, borrower's, or both parties' interest in the property.

Another provision of RESPA (12 U.S.C. 2604) requires HUD to prepare and distribute informational booklets and also requires lenders to provide a copy of the booklet to each person from whom they receive, or for whom they prepare, a written application to finance a mortgage for a residential property. The statute says that the booklet must be delivered or placed in the mail not later than 3 business days after the lender receives the application. Therefore, HUD had no discretion with regard to these requirements.

However, other parts of RESPA gave HUD discretion in how it could write its regulations. For example, 12 U.S.C. 2604 says that the above-mentioned informational booklets "shall be in such form and detail as the Secretary may prescribe . . . ." Therefore, HUD had considerable discretion regarding the format in which the information had to be presented and had the authority to require additional information in the booklet beyond what was stipulated in the statute.

Whether Regulatory Provisions Are Within the Authority Granted by Statute

We believe that the HUD regulatory provisions related to the above-mentioned RESPA disclosure requirements are within the authority granted to the agency by the statute. Several of these regulatory provisions paraphrase the wording in the associated statutory requirements. For example, the language in 24 C.F.R. 3500.6(a) and (1) mirrors the language in RESPA regarding the lender's responsibility to provide the information booklet and when the booklet must be provided. Also, 24 C.F.R. 3500.7(a) mirrors the language in the statute regarding the lender's responsibility to provide good faith estimates. Other regulatory provisions do not mirror the statutory language but appear to be substantively the same as the statutory provisions. For example, 24 C.F.R. 3500.21(b)(1) says that lenders must disclose to each person who applies for a loan whether the servicing of the loan may be assigned, sold, or transferred to any other person at any time while the loan is outstanding. Section 3500.8(a) of the regulation says that unless specifically exempted, the HUD-1 or HUD-1A settlement statement must be used in every settlement involving federally related mortgage loans in which there is a borrower. Section 3500.15(b) states that affiliated business arrangements are not violations of 12 U.S.C. 2607 as long as certain conditions are met. The conditions set out in the regulation are substantively the same as those in 12 U.S.C. 2607(c); affiliated business arrangements or agreements are not prohibited as long as (A) the person making the referral has provided a written disclosure on the existence of such an arrangement to the person referred, (B) such person is not required to use any particular provider of settlement services, and (C) the only thing of value that is received from the arrangement (other than payments, such as fees or salaries) is a return on the ownership interest or franchise relationship.

Whether Less Burdensome Regulatory Approach Was Available

We could not determine whether HUD could have developed less burdensome disclosure requirements while still meeting the underlying requirements of RESPA. To make that determination we would have had to conduct a detailed examination of HUD's disclosure requirements that were not statutorily mandated and determine whether HUD could have eliminated them or used an alternative approach that regulated entities would have perceived as less burdensome. Such an examination of each

nonstatutory requirement would have demanded extensive time and resource commitments that were beyond the scope of this assignment.

Statutory Purpose

According to 12 U.S.C. 2601, the purpose of RESPA is to (1) simplify and improve the disclosures applicable to the transactions under these acts including the timing of the disclosures; and (2) provide a single format for the disclosures that will satisfy the requirements of each of the acts with respect to the transactions.

Concern 9

Company Concern

An official from Bank A said that FDIC requires banks to complete call reports, a quarterly statistical summary of bank operations, that are very detailed (28 pages for the bank) and require a significant amount of time for bank employees to complete. She said one employee spends 1 week during each quarter preparing the report.

Agency Response

FDIC officials said that Section 7(a) of the Federal Deposit Insurance Act requires each FDIC-insured depository institution to submit quarterly "reports of condition," also known as "call reports," to the appropriate federal banking agency. The officials said that bank call reports generally consist of a balance sheet; an income statement; a statement of changes in equity capital; and supporting schedules that provide additional information on specific categories of assets and liabilities, off-balance sheet items, past due and nonaccrual assets, loan charge-offs and recoveries, and risk-based capital. FDIC officials said that the call report also includes the information used by FDIC to calculate each institution's premiums for deposit insurance. An individual bank files one of four versions of the call report, depending upon whether it has foreign offices and on its size in total assets. The officials said the call report for banks with foreign offices is the most detailed, and the report for small banks is the least detailed.

Officials from OCC and FRB also commented on this concern. They said that 12 U.S.C. 161(a) and 12 U.S.C. 324 require all banks to file call reports. They said call reports provide financial information for public disclosure, and regulators use them to evaluate the safety and soundness of the banking system. The officials said the reports enable them to make a proper assessment of a bank's condition and are a critical element of the supervisory process.

Amount of Discretion Permitted by Statute in Drafting Regulatory Requirements

The issue that we focused on in this concern is the agencies' assertion that the call reports at issue in the concern are statutorily required.

We believe that the various statutes that require or authorize the banking agencies to collect information through the call reports gave the agencies some discretion in drafting the relevant regulatory provisions. Some of the provisions in the relevant statutes, such as in the Federal Deposit Insurance Act and the Federal Deposit Insurance Corporation Improvement Act of 1991, are very specific and therefore gave the banking agencies no discretion in how the regulatory provisions could be drafted. For example, 12 U.S.C. 1817(a) requires each institution to submit reports of conditions four times each year, stipulates that the reports include the total amount of the institution's liability for deposits, and specifies that time and savings deposits and demand deposits be listed separately.

Other provisions in the statutes gave the banking agencies at least some rulemaking discretion. For example, 12 U.S.C. 1817(a) requires financial institutions to submit call reports four times each year and specifies that two of those reports must be submitted between January and June and two between July and December. However, the statute allows the banking agencies to determine exactly when these reports must be filed. Also, 12 U.S.C. 161(a) says that financial institutions must file call reports with OCC in accordance with the Federal Deposit Insurance Act (codified at 12 U.S.C. 1811 et seq.). That act (12 U.S.C. 1817(a)(1)), in turn, says that certain banks (e.g., insured state nonmember banks) must submit those reports in such form and containing such information as FDIC may require. Therefore, although the relevant statutes require call reports to include some specific types of information, the statutes also give agencies the flexibility to require other information that they deem necessary and to specify the format of the reports.

Whether Regulatory Provisions Are Within the Authority Granted by Statute

We believe that the regulatory provisions implementing these statutory requirements (codified at 12 C.F.R. 304.4(a)) are within the authority granted by the relevant statutes. The regulation (1) requires that the call reports be prepared in accordance with instructions from the Federal Financial Institutions Examination Council; (2) lists a number of items that must be reported in, or taken into account during the preparation of, the call reports; and (3) requires that the reports be submitted on March 31, June 30, September 30, and December 31 of each year. These provisions are consistent with specific requirements in the statute (e.g., that the reports be submitted four times each year) or fall within the general rulemaking authority granted by the statutes.

Whether Less Burdensome Regulatory Approach Was Available

We could not determine whether FDIC, OCC, and FRB could have developed less burdensome call report requirements while still meeting the requirements of the relevant statutes. In order to make such a determination, we would need to do a detailed review of each of the nonstatutory data elements of the call reports. This type of detailed analysis would require significant time and resource commitments that were beyond the scope of this review.

Statutory Purpose

The Federal Deposit Insurance Act and the Federal Deposit Insurance Corporation Improvement Act of 1991 do not contain statements of purpose.

Concern 10

Company Concern

An official from Bank A said that the information requirements for the call report keep changing, which she said makes it difficult for the bank to plan ahead.

Agency Response

Officials from OCC, FDIC, and FRB said the events that make call report changes necessary include changes in statutes, regulations, accounting rules, technology, and the nature of the business of banking. They said existing items are deleted when they are no longer considered sufficiently useful.

Amount of Discretion Permitted by Statute in Drafting Regulatory Requirements

The issue that we focused on in this concern is the agencies' assertion that changes in the call report requirements are, at times, required by changes in statutes.

We believe that the relevant statutes gave OCC, FDIC, and FRB some discretion in how frequently they have made changes to the regulations requiring information in the call reports. In general, the banking agencies are required to review and make changes to the information required in the call reports that they believe are necessary. According to 12 U.S.C. 4805(c), each federal banking agency must review the information required by the schedules supplementing the core information on the call reports and "eliminate requirements that are not warranted for reasons of safety and soundness or other public purposes."

However, to determine the extent to which specific changes to the reporting requirements were driven by statutory changes, we reviewed the annual Revisions to the Reports of Condition and Income for 1993, 1994, and 1995—the 3-year period immediately prior to our 1996 study. During that period, the agencies added, deleted, or modified a total of 280 items

from the call report requirements. Of these 280 changes, OCC officials said that 44 (16 percent) were driven by statutory requirements in the Federal Deposit Insurance Corporation Improvement Act of 1991 (FDICIA). We reviewed the statutory provisions in FDICIA that OCC officials said mandated the 44 changes to the call report requirements to determine how much discretion the statute permitted the banking agencies to make those changes. We concluded that the agencies had some discretion in what they could require with regard to 37 of the 44 changes. The statute often required agencies to collect general types of information, but left to the agencies' discretion the specific information that banks were required to submit and/or whether the information had to be in the call reports. For example, 1 of the changes that OCC officials said resulted in the addition of 30 items to the call reports in 1993 involved the collection of information on loans to small businesses and small farms. Section 122 of FDICIA states that the agency must annually collect information on small business and small farm lending in the call reports and provides suggestions of the type of information that may be collected. Therefore, the statute gave the banking agencies no discretion about collecting this information and specifically required that the call reports serve as the reporting mechanism. However, the statute gave the agencies discretion regarding the specific information that banks had to report. In the remaining 7 of the 44 changes, we believe the banking agencies had no discretion with regard to changing the call report requirements. For example, in one of the seven changes, the statute required the agencies to collect information on all assets and liabilities in all banking reports. Therefore, the information had to be collected and had to be in all banking reports, including the call reports.

Whether Regulatory Provisions Are Within Authority Granted by Statute

We believe the banking agencies' actions to change the call reports' requirements were within the authority granted by the statutes. All of the changes that the agencies made to the call report requirements appeared to be either specifically required by FDICIA or were within the discretion that the statutes gave the agencies to make such changes.

Whether Less Burdensome Regulatory Approach Was Available

We could not determine whether FDIC, OCC, or FRB could have avoided making changes to the call report requirements while still meeting the requirements of the underlying statutes. In order to make such a determination, we would need to do a detailed review of each change to the call reports that was not specifically required by statute. This type of detailed analysis would require significant time and resource commitments that were beyond the scope of this review.

Statutory Purpose

FDICIA does not contain a statement of purpose.

Concern 11

Company Concern

The officials from Bank A and the glass company raised concerns about staying current with and understanding the changing and increasingly complex regulatory requirements related to ERISA.

Agency Response

IRS officials said the companies' concerns fail to distinguish between the complexity of and burden that results from the statutes governing retirement plans and the effect of regulations promulgated by IRS and the Department of the Treasury. The officials said the relevant statutes have been amended frequently since ERISA was enacted, and have become increasingly complex. They said the companies' concerns about the complexity of the statutes governing retirement plans are properly addressed to Congress, not IRS or other administrative agencies.

Amount of Discretion Permitted by Statute in Drafting Regulatory Requirements

The issue that we focused on in this concern is IRS' assertion that the complexity and frequent changes in ERISA regulations are traceable to changes in the statute.

We believe that IRS had some discretion with regard to how ERISA regulations could be drafted and how frequently those regulatory requirements could be changed. To determine the extent to which specific changes to ERISA regulatory requirements were driven by statutory changes, we asked IRS to identify all of the changes it had made in the relevant regulations between January 1994 and December 1995—the 2-year period prior to the issuance of our December 1996 report.[6] IRS officials identified 37 such regulatory changes, 24 of which were based on amendments made to ERISA by 4 different statutes. For example, the Tax Reform Act of 1986 amended ERISA provisions (codified at 26 U.S.C. 414(r)) relating to pension plans of employers operating separate lines of business. Subparagraph (2) of 26 U.S.C. 414(r) states that an employer should be treated as operating separate lines of business if, among other things, it meets "guidelines prescribed by the Secretary or the employer receives a determination from the Secretary that such line of business may be treated as separate." Therefore, we believe that IRS had discretion in how it drafted regulations implementing these amendments. IRS made 15 changes to regulatory provisions in 26 C.F.R. 1.410 and 1.414 to interpret the separate line of business provisions.

[6] We focused on published changes to the CFR, not revenue rulings or notices that also affect companies' ERISA responsibilities.

Also, statutory provisions in the Omnibus Budget Reconciliation Act of 1993 changed the compensation limit of an employee in a qualified trust and amended the formula for increasing the cost-of-living adjustment. The provision (codified at 26 U.S.C. 401(a)(17)) imposed a $150,000 limit on the amount of annual compensation of each employee in a qualified trust. It also required the Secretary of the Treasury to annually adjust the $150,000 limit for increases in the cost-of-living at the same time and in the same manner as adjustments are made pursuant to another subsection. However, the provision stipulated that a different base period be used and that any increase that is not a multiple of $10,000 must be rounded to the next lowest multiple of $10,000. We concluded that IRS had no discretion in how it drafted its implementing regulations for these provisions. IRS drafted a regulatory provision that reflects the statutorily prescribed adjustment process and the statutory change in the $150,000 limit.

Whether Regulatory Provisions Are Within the Authority Granted by Statute

We believe that IRS' ERISA regulations are within the authority granted by statute. The regulations did not appear to exceed the amount of rulemaking authority provided by the statutes. In each instance in which the relevant statutory provision gave IRS latitude in how its regulation could be written, the regulations appeared substantively consistent with the statutory intent and within the agency's authority. In each instance in which the relevant statutory provision gave IRS no discretion in how its regulations could be changed, the regulations mirrored the statutory provisions. For example, the IRS regulation on the ERISA annual compensation limit (26 C.F.R. 1.401(a)(17)-1) states that the annual compensation limit is $150,000 and that the limit is adjusted for changes in the cost of living at the same time and in the same manner as in another subsection. The regulation also mirrors the statutory requirements regarding the base period to be used to calculate the annual adjustments and the rounding of adjustments to the nearest $10,000.

Whether Less Burdensome Regulatory Approach Was Available

We could not determine whether IRS could have developed less burdensome regulations that would have met the requirements of the underlying statutes. To do so we would have had to initiate a separate analysis of each provision for which IRS had rulemaking discretion—analyses that would have required extensive time and resource commitments that were beyond the scope of this assignment.

Statutory Purpose

Many of the statutes amending ERISA did not contain a statement of purpose.

Concern 12

Company Concern

Officials from the fish farm said that pesticide manufacturers were either not renewing the aquatic use of certain pesticides or were not seeking EPA approval of the products for use in aquaculture because of the expense associated with EPA's reregistration program.

Agency Response

EPA officials said that the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) (codified at 7 U.S.C. 136 et seq.) requires EPA to determine that the use of pesticides does not cause unreasonable adverse effects on humans or the environment. In 1988, Congress required (FIFRA section 4, 7 U.S.C. 136a-1) EPA to certify that all pesticides meet current testing standards for safety, including products that were first approved many years ago. These older pesticides were originally approved when the data requirements were less stringent and the associated costs of testing for safety were substantially less than they are today. Since much of the data on older pesticides may not meet current standards, the cost of conducting studies to support approval for use today may be substantial.

Amount of Discretion Permitted in the Statute in Drafting Regulatory Requirements

The issue that we focused on in this concern is EPA's assertion that the cost associated with the requirement that pesticide manufacturers reregister pesticides is traceable to FIFRA. Although the requirement in question has a direct effect only on manufacturers of covered pesticides, the fish farm is affected secondarily by the decision of manufacturers to not seek reregistration of the pesticides because of the cost of reregistration.

We believe that FIFRA gave EPA some discretion regarding the requirements that manufacturers must satisfy in the pesticide reregistration process. In some areas, EPA appears to have had little discretion. For example, 7 U.S.C. 136a-1 states that the Administrator of EPA must reregister "each registered pesticide containing any active ingredient contained in any pesticide first registered before November 1, 1984." This section describes in some detail the approach EPA is to use in the reregistration process. For example, the statute requires the reregistration to be carried out in five separate phases and requires those seeking reregistration of a covered pesticide to submit a summary of each study the registrant considers adequate to meet the requirements of the statute, as well as the data underlying each such study. However, the statute gives the Administrator discretion regarding the specific data that manufacturers must submit. The statute (7 U.S.C. 136a-1(d)(3)) requires each registrant to submit all data required by regulations "issued by the Administrator under section 136a of this title . . . ." Section 136a requires

the Administrator to publish guidelines specifying the kinds of information that will be required to support the registration of a pesticide. Although the statute provides general standards that the Administrator must consider when establishing data requirements for "minor uses" (e.g., considering "the impact of the cost of meeting the requirements on the incentives for any potential registrant to undertake the development of the required data"), the Administrator appears to have considerable discretion in establishing registration (and therefore reregistration) data requirements. These requirements can have a direct impact on the expense incurred by manufacturers in the reregistration process.

Whether Regulatory Provisions Are Within the Authority Granted by the Statute

An EPA official said there are no EPA regulations requiring reregistration of pesticides first registered before November 1, 1984. He said that the statute was so specific in delineating this requirement that they did not believe it was necessary to draft regulations that would mirror the statutory language. However, 40 C.F.R. Part 152 delineates the regulatory requirements for registration of pesticides under section 3 of FIFRA, including the data requirements that are referenced in the reregistration requirements of section 4 of the statute.[7] Because FIFRA gave the EPA Administrator considerable discretion in establishing those data requirements, we concluded that the data requirements in the regulation pertinent to the reregistration process are within the authority granted by the statute.

Whether Less Burdensome Regulatory Approach Was Available

We could not determine whether EPA could have developed less burdensome data requirements that would have accomplished the underlying requirements of FIFRA. To do so, we would have had to examine each data requirement and determine whether the information was necessary to prevent unreasonable adverse effects on the environment. Conducting such an analysis would have required extensive time and resource commitments that were beyond the scope of this assignment.

Statutory Purpose

FIFRA does not contain a statement of purpose.

[7] The regulation (40 C.F.R. 152.1) says that Part 152 "sets forth procedures, requirements and criteria concerning the registration and reregistration of pesticide products under FIFRA sec. 3 . . . ." (Emphasis added.) However, the reregistration requirements are in section 4 of FIFRA, not section 3.

Concerns For Which Agencies Appeared to Have Broad Rulemaking Discretion

One of the objectives of our review was to determine, for each of 27 company concerns, the amount of discretion the underlying statutes gave rulemaking agencies in drafting the regulatory requirements that the agencies said were attributable to the underlying statutes. The agencies that issued those requirements indicated in two of our 1996 reports that the concerns could, at least in part, be traced to statutory requirements underlying their regulations.[1] In this review we concluded that the statutory provisions underlying 2 of the 27 concerns gave the rulemaking agencies broad discretion in how the related regulatory requirements could be drafted. We coded statutory provisions as allowing agencies “broad discretion” if the provisions contained few specific requirements or imposed few to no constraints on whether, and if so how, an agency’s regulations could be drafted.

This appendix provides our detailed analysis of these two company concerns. Specifically, for each such concern it provides the following information: (1) the portion of the concern in our 1996 reports that the agency or agencies indicated was statutorily based, (2) the portion of the agency response in our 1996 reports that indicated the concern was statutorily based, (3) our analysis of the amount of rulemaking discretion the relevant statutory provisions gave the agencies (the first objective of our review), (4) our analysis of whether the regulatory requirements at issue in the concern were within the authority granted by the underlying statutes (the second objective of our review), (5) our analysis of whether the rulemaking agencies could have developed regulatory approaches that would have been less burdensome to the regulated entities while accomplishing the underlying statutory objectives (the third objective of our review), and (6) the main purpose of the underlying statutes (where such purpose statements were available). Appendix I of this report contains a detailed discussion of our scope and methodology.

Concern 1

Company Concern

An official from Bank A said EEOC’s record retention standard is inconsistent with how EEOC pursues cases. He said EEOC requires the retention of personnel files for former employees for only 1 year after employees leave a company. The bank official said that if the bank had followed the EEOC guidelines and kept employees' files for only 1 year, it would have had a "major problem" on the several occasions when EEOC staff questioned bank officials about employees who had left several years ago.

[1] GAO/GGD-97-2 (Nov. 18, 1996); and GAO/GGD-97-26R (Dec. 11, 1996).

Agency Response

According to EEOC, the specific record retention standards in its regulations are tied to the periods in each statute during which discrimination complaints can be filed. For example, Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act (ADA) recordkeeping regulations (29 C.F.R. 1602.14) require that personnel records be kept for 1 year because charges can be filed up to 300 days after the alleged discrimination. Similarly, the Age Discrimination in Employment Act (ADEA) requires that employers retain employment records for a period of 1 year from the effective date of the personnel actions to which they relate because ADEA charges can be filed up to 300 days after the alleged age discrimination. However, ADEA recordkeeping regulations (29 C.F.R. 1627.3) also require employers to keep basic payroll information for 3 years because the Commission can investigate suspected age discrimination based on an untimely charge or even absent a charge. Finally, Equal Pay Act lawsuits must be filed within either 2 or 3 years of the alleged discrimination, so the related regulations (29 C.F.R. 1620.32) contain 2 and 3 year record retention periods.

EEOC officials said that under all of the statutes, when a claim of discrimination is pending, the employer is required to preserve all relevant personnel records until final disposition of the charge or action. If the bank has complied with these requirements, destruction of records in the normal course of business when there is no pending charge of discrimination would not violate the law or give rise to an adverse inference.

Amount of Discretion Permitted by Statute in Drafting Regulatory Requirements

The issue that we focused on in this concern is EEOC's assertion that its record retention requirements are tied to the filing periods in various civil rights statutes.

We believe that the statutes underlying EEOC's record retention requirements give the agency broad discretion in drafting the regulations concerning those requirements. The statutory provisions do not specify how long employers must retain records and give EEOC broad authority to establish retention periods. For example, Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e-8(c)) requires every employer, employment agency, and labor organization subject to this subchapter to "(1) make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed, (2) preserve such records for such periods, and (3) make <u>such reports therefrom as the Commission shall prescribe by regulation or order</u> . . . ." (Emphasis added.) ADA (42 U.S.C. 12117(a)), ADEA (29 U.S.C. 626(a)), and the Equal Pay Act (29 U.S.C. 211(c)) give similarly broad discretion to the

Commission to impose recordkeeping requirements. For example, according to the Equal Pay Act,

"every employer subject to any provision of this chapter or of any order issued under this chapter shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make <u>such reports therefrom to the Administrator as he shall prescribe by regulation or order</u> as necessary or appropriate for the enforcement of the provisions of this chapter or the regulations or orders thereunder." (Emphasis added.)

Whether Regulatory Provisions Are Within the Authority Granted by the Statute

We believe that EEOC's regulatory recordkeeping requirements are within the broad authority granted by the relevant statutes. For example, EEOC's recordkeeping regulations for Title VII of the Civil Rights Act of 1964 and ADA (29 C.F.R. 1602.14) state that

"[a]ny personnel or employment record made or kept by an employer...shall be preserved by the employer for a period of one year from the date of the making of the record or the personnel action involved, whichever occurs later. . . [w]here a charge of discrimination has been filed, or an action brought by the Commission or the Attorney General, against an employer under title VII or the ADA, the respondent employer shall preserve all personnel records relevant to the charge or action until final disposition of the charge or the action."

Because the civil rights statutes do not specify how long employers must retain records, and because those statutes permit EEOC to require that records be kept for such periods as the Commission may prescribe, we believe that EEOC's recordkeeping requirements fall within the broad discretion permitted in the statutes.

Whether Less Burdensome Regulatory Approach Was Available

We could not determine whether EEOC could have developed recordkeeping requirements that would have been less burdensome to regulated entities than those that it developed while still accomplishing the underlying statutory objectives. In a sense, EEOC's recordkeeping requirements appear to be the least burdensome approach in that they closely relate to the filing periods in the antidiscrimination laws that EEOC cited. For example, under Title VII, ADA, and ADEA employees have up to 300 days to file a discrimination charge. The relevant record retention regulation states that records must be retained for 365 days. Filing periods under the Equal Pay Act range from 2 to 3 years, and the record retention requirements in EEOC's regulations mirror those periods.

EEOC could have used its rulemaking discretion to establish uniform record retention requirements (e.g., 5 or 10 years) for all of the statutes instead of the variable periods for the different statutes. This approach could have helped eliminate what the company viewed as an inconsistency

between the requirements and the way EEOC pursues cases. However, it is not clear whether regulated entities would view a record retention requirement that is longer than the current requirement as being less burdensome. To determine how regulated entities would have viewed such a requirement (and therefore whether EEOC could have developed a less burdensome regulatory approach), we would have had to conduct an in depth review of those entities' views regarding record retention. Such a review would have required time and resource commitments that were beyond the scope of this assignment.

Statutory Purpose

According to 42 U.S.C. 12101(b), the purpose of ADA is

> " (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities; (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities; (3) to ensure that the [f]ederal [g]overnment plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and (4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities."

According to 29 U.S.C. 621, the purpose of ADEA is "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment."

Although it is not codified, section 2 of the Equal Pay Act is a declaration of purpose and states:

> " [t]he Congress hereby finds that the existence in industries engaged in commerce or in the production of goods for commerce of wage differentials based on sex—(1) depresses wages and living standards for employees necessary for their health and efficiency; (2) prevents the maximum utilization of the available labor resources; (3) tends to cause labor disputes, thereby burdening, affecting, and obstructing commerce; (4) burdens commerce and the free flow of goods in commerce; and (5) constitutes an unfair method of competition."

Title VII of the Civil Rights Act of 1964 contained no statement of purpose.

Concern 2

Company Concern

Bank B officials said some bank regulations give nonbanks (e.g., investment brokerage firms) an unfair competitive edge in the marketplace. For example, they said one regulation requires banks to

disclose the risks faced by consumers with certain investment products, although investment firms are not required to make similar disclosures. In a recent 60 second media advertisement for Bank B, the bank officials said about a quarter of the airtime they bought had to be spent publicizing regulatory issues (e.g., rates and term disclosures). They said a nonbank could have spent the same advertising time simply selling its products and services.

Agency Response

In our December 1996 report, OCC officials said that the examples of competitive inequality cited by Bank B are due to the fact that banks and nonbanks operate under different statutory schemes. During this review, OCC officials said banks operate as federally insured financial institutions and nonbanks do not. Therefore, they said it is appropriate for banking agencies to adopt additional disclosure requirements that address the unique features of the banking industry.

OCC officials noted that the different disclosures provided by banks stem not from a regulation but from a policy statement, issued jointly by OCC and the other banking agencies in 1994, that provides guidance to the industry concerning practices that are consistent with safe and sound banking practices. Issuing the policy statement was an exercise of the authority of the OCC and other banking agencies to determine what constitutes safe and sound banking practices pursuant to 12 U.S.C. 1818. OCC officials also said that because banks offer both insured and uninsured investment products, it is important that banks inform consumers whether a given product is insured. Failure to do so could constitute an unsafe and unsound banking practice, resulting in liability to the bank or, at a minimum, damage to the bank's reputation. OCC officials noted that OCC and other banking agencies issued the policy statement in question to alert banks about the potential problems in this area and to suggest practices—including providing the disclosures noted by Bank B officials—that can help banks avoid these problems.

OCC officials concluded that it is appropriate to continue tailoring the disclosures provided to purchasers of investment products according to whether there is a significant risk of confusion over whether a product is insured.

Amount of Discretion Permitted by Statute in Drafting Regulatory Requirements

The issue that we focused on in this concern is OCC's assertion that differences in "statutory schemes" between banks and nonbanks require differences in their disclosure requirements.

We believe that the statutes underlying the interagency policy statement gave the banking agencies broad discretion in developing the disclosure requirements. OCC officials indicated that the banking agencies issued the policy statement under their authority in 12 U.S.C. 1818 to determine whether a given practice is consistent with safe and sound banking. Given the scope of this authority and because the disclosure requirements in the policy statement appear related to the agency's authority, we concluded that the statutes gave OCC and the other the banking agencies broad discretion to issue the policy statement requiring the disclosures at issue in this concern. Also, because OCC's and the other banking agencies' statutory authority does not extend to nonbanks, the policy statement does not apply to those institutions.

Whether Regulatory Provisions Are Within the Authority Granted by the Statute

We believe that the interagency policy statement requiring certain types of disclosures for nondeposit investment products is within the broad rulemaking authority granted to OCC and the other banking agencies by the underlying statutes. For example, the policy statement requires, among other things, that insured depository institutions disclose that certain products (1) are not insured by FDIC; (2) are not a "deposit or other obligation of, or guaranteed by, the depository institution;" and (3) are subject to investment risk, including possible loss of the principal amount invested. The policy statement also says that the disclosures should be provided to customers during any sales presentation and in advertisements and other promotional materials. Because the underlying statutes give OCC and the other banking agencies the authority to take the actions that they believe are necessary to remedy or prevent unsafe and unsound banking practices, we believe the policy statement is within OCC's statutory authority.

Whether Less Burdensome Regulatory Approach Was Available

We could not determine whether OCC and the other banking agencies could have developed disclosure requirements that would have been less burdensome to regulated entities while still accomplishing the underlying purpose of the statutes. To do so we would have had to conduct a detailed review of each disclosure requirement and determine how important it was to consumers in understanding which products are insured and which are not. Such a review would require significant time and resource commitments that were beyond the scope of this review.

Statutory Purpose

The above-cited statutory provisions do not contain a statement of purpose.

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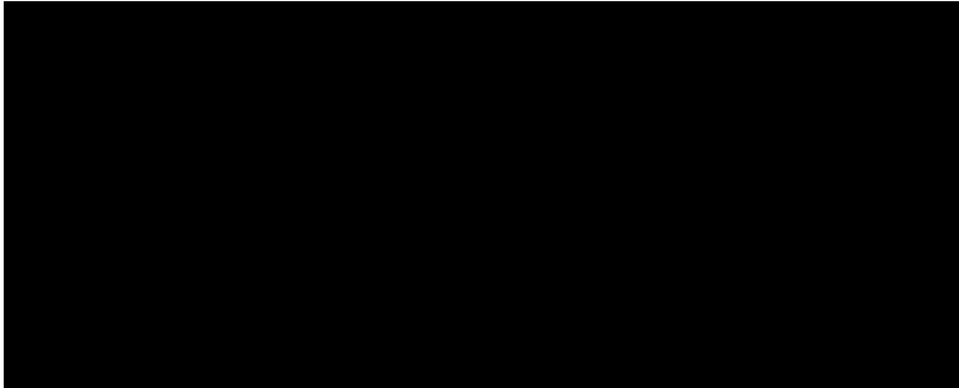

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