GAO

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General Accounting Office
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General Government Division

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December 11, 1996

The Honorable John Glenn
Ranking Minority Member
Committee on Governmental Affairs
United States Senate

The Honorable Peter Hoekstra
Chairman, Subcommittee on Oversight
and Investigations
Committee on Economic and Educational
Opportunities
House of Representatives

The Honorable Amory Houghton, Jr.
House of Representatives

This letter responds to your requests that we provide you with detailed information about regulatory concerns that were raised during the development of a report you requested, Regulatory Burden: Measurement Challenges and Concerns Raised by Selected Companies (GAO/GGD-97-2, Nov. 18, 1996). As part of that review, we asked officials from 15 companies to identify which regulations they considered most problematic for their businesses. We then asked federal agencies to respond to each of the regulatory concerns the companies raised. Appendix II of the report presented abbreviated versions of 29 of the concerns and responses. You asked that we provide you with all of the company concerns and associated agency responses to those concerns that we received.

By obtaining and presenting agencies' responses to the companies' concerns, we attempted to present a balanced picture of the regulatory issues involved. However, it is important to note the limitations of this methodology and presentation sequence. The companies were able to set the agenda by specifying the topics to which the agencies were asked to respond. Also, although agencies could question or dispute the companies' concerns about regulatory issues, we did not give companies a comparable opportunity to respond to the agencies' assertions. Lastly, agencies had the final word regarding the companies' concerns, but this presentation sequence should not be interpreted to imply our agreement with the agencies' positions regarding these issues.

RESULTS IN BRIEF

The 15 companies provided descriptions of 125 specific regulatory concerns, and we obtained responses to each of those concerns from a total of 19 federal departments and agencies. We did not determine the validity of either the company concerns or the agency responses. The company concerns most commonly focused on the regulations or actions of the Environmental Protection Agency and the Occupational Safety and Health Administration, and a number of concerns involved more than one agency. The concerns touched on several common themes, including the high cost of regulatory compliance, the unreasonableness or inflexibility of certain regulations, excessive paperwork, the unclear nature of certain regulatory requirements, severe regulatory penalties, a "gotcha" enforcement approach, and poorly coordinated requirements among agencies and between governmental jurisdictions. The agency officials often agreed that corrective measures were needed to address the companies' concerns and said that they were taking or already had taken action to alleviate some of the problems that the companies cited (48 percent of the concerns). In many cases (48 percent of the concerns), officials from the regulatory agencies responding to the concerns believed that the companies mischaracterized, misstated, or misinterpreted the regulations involved. Finally, agency officials said that some of the companies' concerns were caused by statutory requirements underlying the regulations rather than regulatory requirements or procedures within the agencies' discretion (27 percent of the concerns).[1] Again, we did not obtain additional information from the companies following receipt of the agency responses or otherwise attempt to verify or resolve any differing positions between the companies and the agencies.

SCOPE AND METHODOLOGY

A complete discussion of the scope and methodology used in the overall review is presented in the above-cited report. In brief, we identified the companies to initially contact by obtaining nominations from business interest groups, using a list of companies that participated in a Small Business Administration forum on regulatory reform, and from newspaper and magazine articles in which companies mentioned federal regulations. Seventeen of the 51 companies we contacted agreed to participate in the study, and we interviewed officials from 15 of those 17 companies.[2] Ten of the 15 companies requested that we not disclose their

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[1]The percentages total to more than 100 percent because each concern could fall into more than one agency response category. For example, an agency could indicate that a concern is statutorily driven and that the agency is taking action to alleviate the problem.

[2]Two companies were not selected because of their remote geographic location or their similarity to other companies already selected.

identities, so we used generic descriptors instead of their names (e.g., "Bank A" or "a paper company"). One of the questions we asked company officials was which federal regulations they regarded as most problematic for their businesses. After the interviews we developed written summaries of the concerns they expressed, sent them to the companies for their review and correction, and obtained their written agreement that the summaries accurately portrayed the concerns they expressed. We then sent those summaries to the appropriate federal regulatory agencies for their review and comment.

We coded each of the company concerns according to recurring themes that we developed. To verify our coding, we had a staff reviewer select a random sample of the concerns and independently code them using our theme definitions. The independent reviewer agreed with our original determinations as to whether a theme was present in more than 90 percent of the cases. We also used a content analysis approach to code each of the agencies' responses to certain recurring themes that we developed. The agency response coding was also independently reviewed by a staff reviewer to ensure accuracy and consistency.

The enclosed company concerns are the summaries that were verified by the companies we contacted. The agency responses are presented as we received them from the agencies except for minor editorial clarifications and attributions. The concerns are generally organized by the regulatory agency mentioned in the concern, but some of the concerns are in a multi-agency section because they required responses from more than one agency. Also, concerns from more than one company about the same issue (e.g., the complexity of Occupational Safety and Health Administration regulations) are presented as one concern with one agency response. The company concerns were collected and verified between January and October 1995. The agency responses were originally collected in late 1995, but some of the responses were updated in August and September 1996 during the collection of agency comments on the above report. We did our work in Washington, D.C., and at company locations in accordance with generally accepted government auditing standards.

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We plan to provide copies of this letter and the enclosure to other interested parties upon request. If you have any questions or comments about this compilation, please call Mr. Curtis Copeland on (202) 512-8101.

Sincerely yours,

L. Nye Stevens

L. Nye Stevens
Director, Federal Management
and Workforce Issues

Enclosure

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ENCLOSURE

ABBREVIATIONS

ADA	Americans with Disabilities Act
ADEA	Age Discrimination in Employment Act
CAA	Clean Air Act
CDC	Centers for Disease Control and Prevention
CERCLA	Comprehensive Environmental Response, Compensation, and Liability Act
CERCLIS	Comprehensive Environmental Response, Compensation, and Liability Information System
CFR	Code of Federal Regulations
CITES	Convention of International Trade in Endangered Species
CLIA	Clinical Laboratory Improvement Act of 1967 and Amendments of 1988
CWA	Clean Water Act
DOL	Department of Labor
DOT	Department of Transportation
EEOC	Equal Employment Opportunity Commission
EPA	Environmental Protection Agency
EPC	Environmental Protection Commission
EPCRA	Emergency Planning and Community Right-to-Know Act
ERISA	Employee Retirement Income Security Act of 1974

ESOP	Employee Stock Ownership Plan
FAA	Federal Aviation Administration
FDA	Food and Drug Administration
FDIC	Federal Deposit Insurance Corporation
FEMA	Federal Emergency Management Agency
FFDCA	Federal Food, Drug, and Cosmetic Act
FHLMC	Federal Home Loan Mortgage Corporation
FIFRA	Federal Insecticide, Fungicide, and Rodenticide Act
FinCEN	Financial Crimes Enforcement Network
FMLA	Family and Medical Leave Act
FNMA	Federal National Mortgage Association
FRA	Federal Railroad Administration
FWS	Fish and Wildlife Service
HCFA	Health Care Financing Administration
HCS	Hazard Communication Standard
HMDA	Home Mortgage Disclosure Act
HMTA	Hazardous Materials Transportation Act
HUD	Department of Housing and Urban Development
IRS	Internal Revenue Service
MACT	Maximum Achievable Control Technology
MSDS	Material Safety Data Sheets
MWTA	Medical Waste Tracking Act
NFIP	National Flood Insurance Program
NPDES	National Pollutant Discharge Elimination System
OCC	Office of the Comptroller of the Currency
OEPA	Ohio Environmental Protection Agency
OFCCP	Office of Federal Contract Compliance Programs
OMB	Office of Management and Budget
OSHA	Occupational Safety and Health Administration
PBGC	Pension Benefit Guaranty Corporation
PEL	Permissible Exposure Limit
PESP	Pesticide Environmental Stewardship Program
PIT	Permits Improvement Team
POTW	Publicly Owned Treatment Works
PRP	Potentially Responsible Parties
PWBA	Pension and Welfare Benefits Administration
RCRA	Resource Conservation and Recovery Act
RESPA	Real Estate Settlement Procedures Act
RI/FS	Remedial Investigation and Feasibility Study
SEP	Supplemental Environmental Projects
SFHA	Special Flood Hazard Area
SPD	Stratosphere Protection Division
TRI	Toxics Release Inventory
VEVRAA	Vietnam Era Veterans Readjustment Assistance Act of 1974
VOC	Volatile Organic Compound

COMPANIES' CONCERNS WITH SINGLE AGENCY RESPONSES

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

Company Concern as Expressed to GAO

Bank B officials said that under the Home Mortgage Disclosure Act (HMDA or Regulation C) they are required to collect and report information on the home mortgages they originate or purchase; this information is used by regulatory agencies to identify discriminatory lending practices. The bank officials said they are concerned about how the information in these reports could be easily misinterpreted to indicate evidence of discriminatory lending practices where none really exists. For example, the bank officials said if a Regulation C report showed a 50-percent decline in the number of mortgage loans to minorities from one reporting period to the next, one could draw the impression that the bank is discriminating against minority loan applicants. However, they said the total number of minority loan applicants could have been a very low number to begin with, and showing the trend over time in percentages overstates the decline. The bank officials said they generally do not serve a large minority customer base; as a result, any changes in the number of loans they make to these applicants need to be looked at in the proper perspective. They said the regulators should take a closer look at the demographics of the community in which a bank is located before deciding it is discriminating against a group of people that may not exist in the community it serves.

Response GAO Received From the Federal Reserve Board

In examining for compliance with the fair lending regulations (the Equal Credit Opportunity Act, implemented by the Federal Reserve Board's Regulation B, and the Fair Housing Act), Federal Reserve Board examiners do not look merely at the numbers shown on HMDA statements. HMDA data can provide a useful starting point for assessing compliance, but Federal Reserve Board examiners do not use the data in isolation or rely strictly on statistical analyses to develop their findings. A lender's HMDA disclosures reveal little of an applicant's creditworthiness because those disclosures contain little of the applicant's financial information. Therefore, Federal Reserve Board examiners are required to review actual loan files to assess whether the lender is making credit decisions without regard to an applicant's race or national origin, or to other prohibited factors. Additionally, Federal Reserve Board examiners do indeed take a close look at the demographic make-up of the community served by the lender in their assessment, and they examine HMDA data and other data in that context. Finally, Federal Reserve

Board examiners also consider the lender's efforts to reach out to all neighborhoods in the community, including low- and moderate-income areas, in evaluating a lender's HMDA data and its performance under the Community Reinvestment Act.

Company Concern as Expressed to GAO

Bank B officials said daylight overdraft restrictions establish limits on how much a bank's account can be overdrawn at any time during the course of a day. However, the officials said that in its check clearing operations, the Federal Reserve Board has elected to charge banks for incoming cash letters at 11:00 a.m. and not give banks credit for their outgoing cash letters until approximately 1:00 p.m., thereby creating almost certain daylight overdraft to banks. Bank B officials believe the Federal Reserve Board should debit and credit a bank's account for incoming and outgoing cash letters at the same time.

Response GAO Received From the Federal Reserve Board

The Federal Reserve Board's policy on intraday posting of check transactions was developed to support more accurate measurement of daylight overdrafts prior to implementing charges for such overdrafts. These posting rules were developed under the guiding principles of minimizing the amount of intraday float generated by the posting rules, enabling depository institutions to control their use of intraday Federal Reserve Board's credit, reflecting the legal rights and obligations of parties to payments, and providing for competitive balance among payment service providers.

Following two requests for public comment, as well as a number of discussions with industry representatives, the Federal Reserve Board adopted check posting rules that provide for depository institutions to be debited for cash letters on the clock hour at least 1 hour following presentment and credited for cash letter deposits based upon the average Federal Reserve Board collection experience. Accordingly, some depository institutions are debited for cash letters presented before they receive credits for cash letter deposits, while the opposite is true for other institutions. In order to make cash letter debits and credits at the same time, while maintaining the objectives of reflecting the legal rights and obligations of the parties and minimizing intraday float, the Federal Reserve Board would have to post check transactions at the close of business. Posting at the close of business had been proposed in the first request for public comment and was widely criticized by commenters.

Company Concern as Expressed to GAO

Bank B officials said compliance with Regulation Z (which implements the Truth in Lending Act) is very costly and burdensome.[1] They said the regulation requires the bank to disclose the same information regarding bank practices (e.g., interest rates, loan terms) several times during a single transaction (e.g., 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.

Response GAO Received From the Federal Reserve Board

The purpose of the Truth in Lending Act is to provide consumers with information to enhance comparison shopping for consumer credit. 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.

Some of the information that consumers receive about credit transactions is clearly repetitive. However, the timing of these 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.

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[1]Under Regulation Z (12 C.F.R. 226), all creditors (except registered brokers) are to provide consumers with information on the terms and cost of consumer credit. The regulation applies to all extensions of credit involving a written agreement in which credit is used for personal, family, or household uses.

Company Concern as Expressed to GAO

Bank B officials believed the Community Reinvestment Act (Regulation BB), which was designed to encourage financial institutions to help meet the credit needs of the local communities in which they are chartered, is more appropriate for large banks than small banks. They said large banks' survival is not as dependent on the nearby communities, and therefore they need encouragement to reinvest in their local communities. Small banks, they said, depend on the surrounding community for their survival, and therefore they must tailor their services to meet the needs of these customers. Therefore, bank officials said the act's requirement that the bank map the delivery of its products and services for each of its branches is an unnecessary expense (several thousand dollars per year).

Response GAO Received From the Federal Reserve Board

The Community Reinvestment Act and Regulation BB apply to institutions of all sizes in order to ensure that all institutions meet the needs of their communities. The Federal Reserve Board and other banking agencies recently revised Regulation BB. In developing the new regulation, the banking agencies recognized that different performance tests should be applied to different institutions according to a covered institution's size, business strategies, and the varying needs of the community that the covered institution serves. The banking agencies designed a streamlined test to reduce burden on smaller institutions and to focus on lending performance by reviewing an institution's geographic distribution of loans. This analysis will be evaluated in the context of the institution's capacity to lend, local economic conditions, and lending opportunities in the area.

Company Concern as Expressed to GAO

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. 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.

Response GAO Received From
the Federal Reserve Board

Regulation CC implements the Expedited Funds Availability Act (12 U.S.C. 4001-4010), which places limits on the length of time depository institutions may place holds on deposits to transactions accounts. The act and 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.

To ensure compliance with the act and regulation, 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. In addition to providing customers with a general policy disclosure, depository institutions also incur the ongoing costs of providing exception hold notices and change-in-policy notices, as well as costs related to employee training.

Because the availability and disclosure provisions of Regulation CC are required by the act, statutory amendments would be necessary in order to relieve any of the burden on depository institutions associated with those provisions.

Company Concern as Expressed to GAO

An official of Bank A said the Truth in Savings Act (Regulation DD) requirements are costly and have not provided substantive benefits to either the bank or its customers.[2] He estimated that implementation of the requirements cost the bank $1,500 in labor costs during 1994. According to the bank official, before the act the bank provided savings account information to customers in several different documents. He said the act consolidated this information into one document, but this change provided no clear benefit to the customers using the information.

Response GAO Received From
the Federal Reserve Board

The Truth in Savings Act was enacted by Congress in 1991 to enhance consumer shopping among deposit accounts. Its purpose is

[2]The Truth in Savings Act requires that banks provide disclosures of terms, conditions, fees, and yields on their interest-bearing accounts so that consumers can make meaningful comparisons between different accounts.

to require all depository institutions to disclose information about the rates paid and fees charged in a uniform manner. The Federal Reserve Board'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.

Company Concern as Expressed to GAO

A Bank C official said that Regulation DD has been the most problematic regulation affecting the bank's deposit information and reporting systems. Specifically, the bank official cited the following problems with the regulation:

- **It required reprogramming of all of the bank's computer systems to produce savings yield information and new account statements, which cost the bank an estimated $3.8 million in its home state operations alone.**
- **It has failed in its intended purpose of providing customers with the information they need to shop for the best savings rates because the "annual percentage yield earned" rate that the bank must disclose does not include other factors that affect the actual rate of return.**
- **It 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, or do bonus programs because of the expensive and complex computer system changes that would be needed.**
- **It requires that every fee charged a customer's account must be separately described on the customer's statement. As a result, the bank had to create 15 new forms for its tellers to complete for each type of fee.**
- **It 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.**

Response GAO Received From
the Federal Reserve Board

Shortly after the Truth in Savings Act was enacted, the Board conducted a survey of institutions' start-up costs to implement the act. The survey revealed that data processing and systems changes were indeed the most expensive compliance costs for institutions, accounting for approximately 40 percent of total start-up compliance costs.

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 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.

The bank's second concern is that the annual percentage yield earned does not reflect all factors that may affect the actual rate of return. The annual percentage yield earned shows the relationship between the interest earned and the balance in the account for the statement period. The Federal Reserve Board considered three alternative definitions of the annual percentage yield earned in its proposed rulemaking. The one adopted was favored by most commenters, who agreed that the figure would reflect the "true" rate earned during the statement period--reflecting the impact of rate changes and the effect of minimum balance requirements. The Federal Reserve Board viewed this approach as providing the best information to consumers and imposing the least cost on institutions.

Bank C's third concern is that the bank's ability to offer customized accounts has been reduced due to the cost. The Federal Reserve Board did make a concerted effort to provide flexibility to institutions in order to minimize compliance costs and maximize the development of new products. The Truth in Savings Act requires disclosure of the fees that may be assessed against a consumer's account. And, 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.

Fourth, the bank says that it had to create 15 new forms for its tellers to complete due to the requirement to separately describe fees on the periodic statements. Banks must separately disclose on periodic statements any account-related fees that are

assessed. There is not, however, a requirement that bank personnel complete forms to accomplish this purpose.

The final issue raised by the bank is that it must provide disclosures of all the bank's services and fees each time a consumer opens, changes, or re-opens an account--even if the consumer previously received the same information. The statute generally requires institutions to provide complete account disclosures when an account is opened, and to provide consumers a notice of any change in terms. Disclosures are required if an account is "re-opened" only if the institution deemed the account closed at some point in time.

The Federal Reserve Board made several changes to the law's requirements for some accounts (particularly, "rollover" time accounts) to ensure that consumers are not overwhelmed with information, and to minimize compliance costs. For example, institutions are permitted under Regulation DD to provide limited disclosures for time accounts with a maturity of 1 year or less, rather than providing all account disclosures, as arguably required by the act. In addition, if a fee or other term is changed, an institution need only disclose the changed term--not all fees and terms that apply to the account.

Company Concern as Expressed to GAO

Bank B officials said 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 and simplifying the terminology on the forms.

Response GAO Received From the Federal Reserve Board

The Truth in Savings Act requires institutions to provide information about rates paid and fees charged for consumer deposit accounts (1) upon request, (2) before an account is opened, (3) before terms previously disclosed are adversely changed, (4) if periodic statements are sent, and (5) before automatically renewable ("rollover") time accounts mature. Promoting certain account terms in advertisements triggers the duty to disclose additional account terms.

In adopting Regulation DD, which implements the Truth in Savings Act, the Federal Reserve Board sought to facilitate compliance with the disclosure requirements in several respects. For example, 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. Because the number and timing of these disclosure provisions of Regulation DD are required by the Truth in Savings Act, statutory amendments would be necessary in order to further relieve the burdens associated with those provisions.

Pursuant to the Truth in Savings Act, the Federal Reserve Board has published model forms to facilitate compliance with the Act. Institutions that use model clauses and forms, properly applied, are deemed to comply with the law. Institutions are required to use two terms: the "annual percentage yield" and the "simple interest rate," as those terms are defined. Otherwise, institutions may use any terminology that clearly and conspicuously states the terms required to be disclosed. Institutions may modify the Federal Reserve Board's model clauses and forms, 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.

Company Concern as Expressed to GAO

Bank B officials said that the Federal Reserve Board does not always seriously consider their comments on proposed regulations. For example, the officials do not believe regulators considered their comments before finalizing two regulations (Regulation C and Regulation DD), and they said that the regulators finalized the requirements without addressing their concerns.

Response GAO Received From the Federal Reserve Board

In keeping with its policy on "Improving Board Regulations," the Federal Reserve Board seeks to minimize the burdens of its regulation and to encourage public participation in the rulemaking process. Comments from the public, including banking institutions, are always considered seriously by the Federal Reserve Board during the rulemaking process. Before a proposed regulation or change to a regulation is made final, it is published in the Federal Register in order to solicit public comment,[3] and those comments are analyzed and considered by staff in preparing the final rule. Public comments on the proposal are

[3]In addition, trade associations often alert their membership regarding items of particular interest.

summarized and published in the Federal Register as part of the material accompanying the final rule. Nonetheless, although all public comments are considered during the rulemaking process, not all concerns raised can necessarily be accommodated in the final regulation, often because of conflicts with statutory requirements and among comments.

DEPARTMENT OF HEALTH AND HUMAN SERVICES
FOOD AND DRUG ADMINISTRATION (FDA)

Company Concern as Expressed to GAO

Fish farm officials said the Federal Food, Drug, and Cosmetic Act (FFDCA) unreasonably restricts the items fish farms use to keep fish healthy. For example, they said the fish farm would like to add ice to the water when shipping fish for long distances to temporarily lower the fishes' metabolism, thereby making the fish live longer and require less maintenance. They said they would also like to add salt to the water of freshwater fish to kill parasites. However, the officials said ice and salt are technically considered "drugs" under FFDCA because they change the metabolism or structure of the animals. According to company officials, the approval process under FFDCA is expensive and exhaustive because each drug must be approved to target a specific pathogen in a specific species, with each approval potentially costing millions of dollars. With approvals needed to treat hundreds of species, according to company officials, the cost for approvals could exceed the monetary value of the aquaculture industry. They said neither ice nor salt has been approved as drugs for fish because no company is willing to spend the millions of dollars required to get FDA approval. Although FDA reportedly does not enforce the standards for ice and salt (because it recognizes that the rule doesn't make sense), the officials said the very presence of the rule has other implications. For example, they said state environmental rules require the company to use only approved drugs to get a permit under National Pollutant Discharge Elimination System (NPDES), and banks require businesses to sign clauses in loan agreements specifying that they will use only approved drugs. Therefore, they said, the use of ice and salt could jeopardize loans and environmental permits.

Response GAO Received From FDA

Several years ago, the American Fisheries Society asked FDA for a written opinion regarding the regulatory status of salt and ice for specified uses. According to the definition of "drugs" in FFDCA, FDA responded that the uses were, technically, drug uses, but that the agency has no interest in regulating these products as drugs. They are, however, included in a list of "low regulatory priority" aquaculture drugs.

FFDCA defines drugs, in part, as "...articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals..." The "intended for use" standard may be established in a variety of ways, including actual use patterns and oral or written statements regarding use.

ENCLOSURE I

This standard allows FDA to regulate the use of products that are not overtly promoted as drugs but that are used for drug purposes. FDA has regulatory discretion as to enforcement of the standard and has determined that there are a number of products that, although technically drugs, pose no threat of harm to the consumer and therefore should not be aggressively regulated. Ice and salt used as specified by the American Fisheries Society fall into that group.

Other products that are not normally regarded as drugs are not so benign when used as drugs, however. Although FDA has no plans to regulate the use of salt or ice in aquaculture, the principles that require FDA to consider ice and salt to be drugs under the specified conditions enable FDA to regulate products that present a real safety concern for the consumers. For example, some fish farmers have used copper sulfate and potassium permanganate for therapeutic purposes. These products may leave residues in tissue that could be harmful to humans. Both copper sulfate and potassium permanganate have a variety of nondrug uses, are readily available, and are generally sold without labeling or promotion for use as drugs, just as ice and salt are.

FDA is not aware of any documented cases in which this policy has created difficulty for an aquaculture producer. Furthermore, for many years, all other species groups have been allowed to use certain unapproved products that technically are drugs. FDA would not anticipate initiating a different policy for the aquaculture industry.

DEPARTMENT OF HEALTH AND HUMAN SERVICES
HEALTH CARE FINANCING ADMINISTRATION (HCFA)

Company Concern as Expressed to GAO

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 (approximately 1,500 last fiscal year) trying to keep their automated patient billing system up to date, the hospital officials said it is like "chasing a moving target." They said approximately 40 percent of the hospital's billings are Medicare- or Medicaid-related.

Response GAO Received From HCFA

The first issue raises concern regarding frequently changing Medicare and Medicaid billing rules for hospitals. In a number of situations, there are changes to hospital billing procedures due to enhancements or changes made by Congress. HCFA is aware of the work this places on hospital, and is responding by working closely to minimize the burden. One way HCFA is reducing the burden is by giving hospitals 90 days to make system changes to accommodate Medicare legislative changes. However, HCFA believes that legislative mandates do not always provide the amount of lead time HCFA would normally afford the providers to make changes. HCFA will continue to work closely with hospitals to minimize disruption and burden in their operations.

Company Concern as Expressed to GAO

Officials from the hospital said the annual Medicare cost report is extremely difficult to prepare even though it has less relative importance due to the implementation of prospective payment systems (predefined fixed payment). They said the report's information requirements place a considerable record-keeping burden on the hospital's health care providers. 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. Furthermore, they said the hospital pays an outside consultant $50,000 to $60,000 each year to aid in the completion of this report. Despite all of these efforts, they said the hospital has required an extension in the reporting deadline each year since 1967 in order to complete the report.

Response GAO Received From HCFA

The second issue concerns section 1886(f)(1) of the Social Security Act (the Act), which requires the Secretary of Health and Human Services to maintain a system of cost reporting for prospective payment system hospitals. In accordance with section 1815(a), 1833(e), and 1861(v)(1)(A) of the Act, providers of service participating in the Medicare program are required to submit annual information to achieve settlement of cost for health care services rendered to Medicare beneficiaries. Pursuant to the Act, 42 Code of Federal Regulations (C.F.R.) Section 412.52 requires all hospitals participating in the prospective payment systems to meet the record keeping and cost reporting requirements of section 413.20 and 413.24, which include submitting a cost report for each 12-month period. Besides determining program payment, the data submitted on the cost report support management of federal programs, e.g., data extraction in developing cost limits. In completing the annual cost report, the providers must report information that confirms information reported must conform to the requirements and principles set forth in 42 C.F.R., Part 412, 42 C.F.R., Part 413, and in the Provider Reimbursement Manual, Part 1. The overall record keeping and information collection burden associated with filing the hospital cost report has been reviewed by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.) and approved by OMB through August 31, 1996, under OMB No. 0938-0050.

Effective June 27, 1995, HCFA issued a final rule to extend by 2 months the time frame providers have to file cost reports. Providers must now file cost reports no later than 5 months after the close of the period covered by the report. This change in 42 C.F.R. section 413.24(f) was made to ensure that providers have an adequate amount of time to file complete and accurate cost reports. In view of the new due date policy set forth in this rule, HCFA believes that the additional 30-day extension for filing a certified cost report is no longer necessary.

Company Concern as Expressed to GAO

Hospital officials said that while the regulation of clinical laboratories under the Clinical Laboratory Improvement Amendment (CLIA) is good in concept, the implementation of the act's requirements has been too extreme, in that some regulations have become more onerous, without corresponding--or necessary--enhanced public safety. They said CLIA places small clinics under the same laboratory regulations as large clinical laboratories without concern for their capabilities or the effects of those requirements on patients. For example, they said CLIA requirements for strep throat exams are far more

elaborate than the hospital's previous procedures, which had adequately protected patients. Implementation of the new requirements reportedly would have increased the hospital's costs by $25,000 to $40,000 per year. As a result, they said the hospital no longer offers the test, creating a great inconvenience for patients.

Response GAO Received From HCFA

This issue concerns federal authority over hospitals that began with the passage of the Clinical Laboratory Improvement Act of 1967 (CLIA'67). Medicare laboratory requirements were phased in over the years for hospitals. The CLIA'67 and Medicare regulations of March 1990 brought hospitals under the same regulations as large interstate commercial laboratories, except for personnel requirements. The Clinical Laboratory Improvement Amendments of 1988 (CLIA'88) superseded CLIA'67 and mandated uniform quality standards for all clinical labs.

-- CLIA'88 provisions are based on the complexity of tests, not the type of lab where the testing occurs. Thus, labs performing similar tests must meet similar standards, whether located in a hospital, doctor's office, or other site. The more complex the test, the more stringent the standards. Waived tests--simple tests with small chance of error or risk--are exempt from virtually all CLIA'88 rules.

-- The majority of the tests (approximately 75 percent) are categorized as moderate complexity tests. For these tests, CLIA'88 requires quality control procedures using two levels of control materials each day of testing. Many of the "rapid strep tests" have built in two levels of controls; thus, no other controls are needed.

-- The types of deficiencies detected through initial CLIA'88 surveys can lead to erroneous test results, if uncorrected, resulting in unnecessary injuries and possibly deaths. Erroneous test results also produce higher health care costs.

-- Preliminary second survey data confirm that regulations and an educational approach to inspection and proficiency testing performance do result in improvement (see attached chart).

-- Laboratories can achieve compliance through accreditation by private accrediting organizations or by a CLIA exemption of laboratories in states with equivalent licensure laws. Approximately 20,000 accredited laboratories voluntarily

comply with equal standards of HCFA-approved private organizations, and 7,000 labs are located in exempt states.

-- The volume of lab testing, number of tests per patient, and expenditures for lab tests have increased since CLIA'88 was passed. In 1988, Medicare paid for 232 million lab tests compared to 403 million tests in 1993. In 1988, Medicare Part B enrollees received an average of 7 lab tests apiece, compared to 12 tests per patient in 1993. Medicare expenditures for lab tests have more than doubled since CLIA'88 was passed, rising from $2.8 billion in 1988 to $5.9 billion.

CLIA'88 supersedes CLIA'67 which had more stringent standards and which regulated most hospitals; therefore, significant additional costs should not be incurred to meet CLIA'88 standards.

ENCLOSURE I

CLIA SURVEYS TOTAL DEFICIENCIES CITED FIRST VS. SECOND CYCLE

	All laboratories		Physician office		Independent laboratories		Hospital laboratories	
Survey cycle	First	Second	First	Second	First	Second	First	Seconds
Number of conditions out	567	363	268	189	125	55	117	80
Total number of laboratories with conditions out	341	232	175	129	67	33	59	39
Number of standards out	26,102	13,479	11,673	5,713	4,872	222	5891	3515
Total number of laboratories with standards out	3,565	2,925	1,883	1,441	646	546	542	519
Total number of deficiencies	26,669	14,112	11,941	5,902	4,997	2,777	6008	3595
Total number of laboratories with deficiencies	3,579	2,935	1,886	1,449	650	547	545	519
Average number of deficiencies/lab	6.1	3.2	5.5	2.7	5.7	3.1	9.6	5.7
Number of labs surveyed*	4,347		2,186		883		626	

*Number of Laboratories with a first and second cycle survey.
Source: HCFA CLIA database (August 16, 1995).

DEPARTMENT OF THE INTERIOR
FISH AND WILDLIFE SERVICE (FWS)

Company Concern as Expressed to GAO

Fish farm officials said they lose sales because of the way in which the Convention on International Trade in Endangered Species (CITES) is implemented by FWS. The officials said although the fish farm does not trade in endangered species, about 5 percent of the farm's trade deals with fish caught in the wild, which are governed by CITES. They said if even one fish in a shipment is caught in the wild, the entire shipment is considered covered by CITES. Under CITES, the officials said, wild fish can be processed only through ports with a FWS agent authorized to approve the shipment. They said the Tampa airport is the airport closest to the fish farm with an authorized agent, but the fish farm would prefer to ship the fish out of the Orlando airport because it has more international flights and services and lower costs. However, the Orlando airport has no FWS agent to process the CITES paperwork. Therefore, in order to ship wild fish from Orlando, fish farm staff must reportedly drive the fish to Tampa, process the paperwork through the Tampa FWS office, and then have the fish delivered to Orlando where they can be shipped throughout the world. Because shipping through Tampa is costlier, time-consuming, and inconvenient, the officials said the fish farm sometimes loses sales. As a result, company officials said they would like to have fewer restrictions on the import and export of live tropical fish.

Response GAO Received From FWS

International trade under CITES applies only to those species that are listed in its appendices, whether the specimen is from the wild or from a captive environment. Relatively few fish species are included in the CITES appendices, and most are not native to the United States. The CITES Treaty, signed by the United States in July 1975, is implemented in the United States by the Endangered Species Act (16 U.S.C. 1538) and accompanying regulations found, in part, in Title 50 of the CFR, Parts 14 and 23. The Endangered Species Act, passed by the United States Congress in 1973, also lists species of plants and animals threatened with extinction. Species listed pursuant to the act are prohibited in any trade, whether interstate or international. These regulations require that all wildlife being imported or exported be declared to FWS and be shipped through a port designated for such purpose.

The requirement to ship through a designated port allows FWS to enforce laws created by the Endangered Species Act and by CITES ratification. It would be impossible for FWS to staff all U.S.

ports. In order to make the most efficient use of Service personnel trained to inspect and clear such shipments, a system has been established that represents the 12 most highly utilized United States ports. As in the case of Tampa, permits may be issued for use of other "nondesignated" ports to meet a particular importer's or exporter's needs. Tampa is not a designated port and is staffed to meet the needs of many importers and exporters who have expressed a need to use Tampa under a nondesignated port permit. Because of staffing limitations the Service is not able to place an official in Orlando to process paperwork for relatively few fish shipments. Also, because export of farm-raised fish does not normally pose a threat to wild resources, and in an effort to assist fish farmers, a policy has been issued that koi (carp) and goldfish are to be considered domesticated species if exported and therefore not subject to the provisions of 50 C.F.R. 14. Koi and goldfish being imported are not treated as domesticated species due to significant previous problems with protected species being smuggled in and declared as koi or goldfish. Specimens taken from the wild must comply with the reporting and designated port requirements for both import and export. The further removal of restrictions on the import and export of tropical fish would result in the Service's failure to meet statutory and treaty obligations.

Company Concern as Expressed to GAO

Fish farm officials said those involved in the federal policymaking process sometimes do not address the underlying cause of the problem. For example, Congress established the Aquatic Nuisance Species Task Force after the accidental introduction of nonindigenous zebra mussels into the Great Lakes when a ship dumped bilge water. The task force recommendations, which may result in legislation, suggested numerous actions businesses should be required to take in order to reduce the problems caused by aquatic nuisance species. However, 90 percent of these kinds of problems occur when government agencies intentionally introduce fish as game or food into waters. The officials also said that they spent significant time and resources reviewing the task force's draft reports and providing comments, but the task force virtually ignored the comments they received from industry until the final draft.

Response GAO Received From FWS

The company commenting on policymaking regarding accidental introductions of nonindigenous species is misinformed about Service activities under the Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990. The company's concern appears to be centered on Section 1207 of the act which requires

an Intentional Introductions Policy Review. The only regulatory authority contained in the act relates to ballast water control and implementation of the Aquatic Nuisance Species Program, which deals strictly with unintentionally introduced organisms (such as zebra mussels).

The Aquatic Nuisance Species Task Force provided recommendations in the Report to Congress, as required by Section 1207 of the act, on how to reduce the risk of adverse consequences of future intentional introductions. The Task Force's Report, the Intentional Introductions Policy Review, is an information document and does not make policy or establish regulations. Future legislation resulting from the Report will be addressed by Congress and interested potentially affected constituencies.

Controversy exists regarding the percentage of problems created by government versus those of industry. Government introduced many nonindigenous species to fill recreational voids in aquatic habitats. In most cases, the intended purpose did not create nuisance species problems. In contrast, most of the species introduced for aquaculture have found their way into natural aquatic systems. Data supports the fact that if a species is introduced for culture, it will eventually escape. This does not mean, however, that another nuisance species will be created.

Public review was an integral part of the development of the Intentional Introductions Policy Review. An interagency committee was established to conduct the review and prepare the Report to Congress. This review was conducted in consultation with state fish and wildlife agencies, other regional, state and local entities, potentially affected industries, and other interested parties. The sessions for planning and development were advertised as open to the public and public comments were always accepted. The Report to Congress on the findings, conclusions, and recommendations of the intentional introductions policy review was prepared and released for public review in August 1993. The public comment period closed on October 25, 1993, and 145 written comments were received from federal agencies, state agencies, professional societies, academicians, individuals engaged in aquaculture, tropical fish businesses, and aquarium hobbyists. All comments were thoroughly considered and incorporated, as appropriate, into the final report. Unfortunately, without knowing the name of the company it is impossible to provide a specific response to its individual concern. The public review process was fully utilized, and resulting comments brought a fresh perspective to the discussion. The final comments of the company seem to indicate that its concerns were eventually satisfied and its persistence paid off.

DEPARTMENT OF LABOR (DOL)
EMPLOYMENT STANDARDS ADMINISTRATION (ESA)

Company Concern as Expressed to GAO

Bank B officials said the Family and Medical Leave Act (FMLA) makes it difficult for an organization to (1) operate effectively when it is required to hold a job open for a person during an extended leave period (up to 12 weeks) and (2) hire someone to fill the position when the new hire knows he or she will be replaced as soon as the regular employee returns.

Response GAO Received From ESA

FMLA provides that eligible employees are entitled to up to 12 weeks of unpaid, job-protected leave for certain qualifying family and medical reasons. FMLA's guarantee of restoration to the same or an equivalent job upon return from leave is a key FMLA protection. Family and medical leave policies have been shown to encourage loyal and skilled employees to remain with the company by improving employee morale, reducing turnover, and saving on costs for recruitment, hiring, and training. These studies point out that costs for permanently replacing an employee are significantly greater than those of granting an employee's request for leave.

Companies have routinely developed strategies to handle the work of employees while they are on leave. Such strategies have included rerouting work to others in the department (least costly), sending work home to the employee on leave (time worked may not be counted against the 12-week FMLA leave allowance), hiring temporary replacements (most costly), and leaving nonessential work until the employee returns to work. Work studies support the finding that the costs of family and medical leave are minimal and beneficial to employers in reducing employee turnover and retaining a loyal and experienced workforce.

Uniform leave standards under FMLA help all businesses maintain a minimum floor of protection for their employees without jeopardizing or decreasing their competitiveness. FMLA is also cost effective on a broader level as well because when families fail it is often the public sector, and in turn, all taxpayers, that pay for the costs of weakened families that have been linked to many of the major social concerns we face today.

Company Concern as Expressed to GAO

A Minco official said developing affirmative action plans is time-consuming and complex due to numerous and changing

regulatory requirements. The official said the affirmative action plan requirements in Executive Order 11246, administered by DOL's Office of Federal Contracts Compliance Program (OFCCP), are the most problematic human resources regulations the company faces.[4] She said one problem is that it is difficult for businesses to stay aware of the changes in regulatory requirements; they cannot ask the "enforcers" for information without potentially calling their actions into question.

The Minco official also said that the process of developing an affirmative action plan is "a pain." She said the regulations require any federal contractor or subcontractor with 50 or more employees to prepare an affirmative action plan. She said businesses must also

-- identify how the plan will be implemented;

-- affirm and disseminate the policy;

-- identify who is responsible for the plan;

-- set goals and objectives by organizational unit;

-- develop and maintain a series of reports (e.g., a job applicant flow chart, a hiring log, a promotion log, a termination log, and documents for the EEO-1 report);

-- prepare the annual Veterans' 100 report; and

-- do an adverse impact analysis of applicant flow.

She said it takes 2 weeks straight (or 1 month off and on) for her and another staff member to properly prepare the annual plan. She also said that the availability analysis is so complicated that Minco had to hire a consultant because the company was not sure whether it was doing the analysis right.

The Minco official said the plan's regulations also require such analyses as

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[4]Executive Order 11246 prohibits discrimination against an employee or applicant for employment on the basis of race, color, religion, sex, or national origin by federal contractors and subcontractors. The order applies to contractors and subcontractors of any size who perform government contracts or federally assisted construction contracts that total at least $10,000 in a 12-month period (41 C.F.R. 60-1.1, 60-1.5). Nonconstruction contractors with 50 or more employees and contracts for greater than $50,000 have additional obligations.

-- **why the company's workforce does not mirror the labor market,**

-- **what hiring/promotion actions the company has taken or plans to take for each organizational unit to correct these "problem areas,"**

-- **what internal reporting and audit procedures the company will use to make a good faith effort to achieve their goals, and**

-- **how the company will provide affirmative action for Vietnam era veterans and persons with disabilities.**

She said that the plan, with all of its attachments, can run 100 pages. In addition to the plan, she said the company must do an adverse impact analysis for each of the analyses in the plan to determine whether women and minorities received their fair proportion of the company's employment actions.

Response GAO Received From ESA

The company is incorrect in its assertion that affirmative action plans are problematic due to changing regulatory requirements. OFCCP has not published any substantive changes to the Executive Order regulations since 1978. It should be pointed out, however, that OFCCP is in the process of revising its regulations by streamlining and simplifying the requirements for a written affirmative action plan.

The company also indicated that it feels that it cannot ask the "enforcers" for assistance in interpreting affirmative action requirements without calling its actions into question. In fact, reprisals are not taken for seeking information on developing an affirmative action plan. OFCCP continuously provides free technical assistance to all segments of the public from its national, regional, and district offices. OFCCP is currently developing supply and service and construction technical assistance guides to further help contractors develop an affirmative action plan and understand the regulatory requirements. OFCCP expects both guides to be available before the end of 1996. Also, OFCCP holds "grass roots meetings" with contractor representatives to discuss a variety of topics with which they are concerned. OFCCP offices also hold technical assistance seminars and industry liaison conferences to assist contractors to fulfill their nondiscrimination and affirmative action obligations.

Additionally, the company asserted that any federal contractor with 50 or more employees must prepare an affirmative action

plan. This is only partially correct. A company must also have a contract valued for $50,000 or more. Furthermore, the company need not develop a plan each year as stated. After the plan has been developed, it is merely updated yearly.

The company also mentions that the steps required to develop an affirmative action plan are difficult. Undeniably, developing an affirmative action plan requires effort, however, OFCCP does its best to assist companies in these efforts when they request assistance. Furthermore, OFCCP wishes to note that doing business with the government is optional and that when a company seeks to become a federal contractor it must adhere to all of the contractual obligations associated with the federal contract. Finally, the company official also indicated that it had to perform an adverse impact analysis to make sure that women and minorities received a fair proportion of the company's employment actions. It appears that the company does not understand that numerical goals do not create guarantees for specific groups, nor are they designed to achieve proportional representation. Rather, the goal-setting process in affirmative action planning is used to target and measure the effectiveness of affirmative action efforts to eradicate and prevent discrimination. Moreover, the numerical goals are realistically established on the basis of the availability of qualified applicants in the job market or qualified candidates in the employer's workforce.

For citations related to the discussion above, see Executive Order 11246; Title 41 C.F.R., Chapter 60.2; Title 41 C.F.R., Chapters 60-741.5 and 60-741.6; Section 503 of the Rehabilitation Act of 1973, as amended (Section 503); Title 41 C.F.R., Chapter 60-1.40; Title 41 C.F.R., Chapter 60-250, Vietnam Era Veterans Readjustment Assistance Act of 1974 (VEVRAA), as amended.

OFCCP routinely provides program information and technical assistance over the telephone and in writing to interested parties. Program materials, such as pamphlets and regulations, may be obtained from the national office by contacting the policy division of OFCCP at (202)219-9430. Assistance may also be obtained by contacting any of the 10 regional offices.

Company Concern as Expressed to GAO

One company voiced concern about meeting affirmative action requirements in an area with few minorities. Bank B officials said that the bank is required to comply with affirmative action requirements because it is an agent of the government (it handles treasury tax and loan payments) and because it employs more than 50 people. Officials said that some businesses (such as the bank) are not in a very ethnically diverse location and therefore have a more difficult time getting applicants from various ethnic

groups than businesses in more diverse areas. Furthermore, they said businesses have little to no control over who applies for employment. The officials also said the affirmative action regulatory and paperwork burden is the same for a relatively small company with 51 employees as it is for those with hundreds of employees. As a result, the bank officials said, the impact on the small company is greater. They estimated their incremental cost of complying with affirmative action regulations to be $3,500 in 1994.

Response GAO Received From ESA

The bank indicated concern about meeting affirmative action requirements in an area with few minorities. It appears that the bank does not understand that the Executive Order 11246 program is based upon goals that are not intended to achieve proportional representation. Affirmative action goals are to be used as a tool to aid in breaking down barriers to equal employment opportunity for women and minorities without impinging upon the rights and expectations of other members of the workforce. The company also indicated that it had little control concerning who applies for employment. ESA wishes to note that affirmative action also refers to recruitment that will have a broadening effect upon the population of applicants. Companies are not required to hire minorities in areas where no minorities exist. They are required to make a good faith effort to reach their goals, which are based upon the availability of minority and female workers. The availability of minorities or women for a job group means the percentage that minorities or women represent among persons in the relevant labor area and/or internal feeder pools having the requisite qualifications to perform the jobs.

Also, the bank asserted that any federal contractor with 50 or more employees must prepare an affirmative action plan. This is only partially correct. A company must also have a contract valued at $50,000 or more. Furthermore, the bank official asserted that smaller contractors have a greater burden than larger contractors in preparing an affirmative action plan. OFCCP is attempting to minimize burdens on smaller companies through a current initiative in which OFCCP is reviewing and revising all of its regulations with the goal of streamlining and clarifying the regulatory provisions. It is anticipated that these efforts will reduce paperwork burdens for all covered contractors and subcontractors.

For citations related to the discussion above, see Executive Order 11246; Title 41 C.F.R., Chapter 60.2; Title 41 C.F.R., Chapter 60-1.40; Title 41 C.F.R., Chapters 60-741.5 and 60-741.6, Section 503; and Title 41 C.F.R. 60-250, VEVRAA.

OFCCP routinely provides program information and technical assistance over the telephone and in writing to interested parties. Program materials, such as pamphlets and regulations, may be obtained from the national office by contacting the policy division of OFCCP at (202)219-9430. Assistance may also be obtained by contacting any of the 10 regional offices.

Company Concern as Expressed to GAO

Roadway officials said that many labor and employment regulations overlap or have conflicting elements. They also said that the regulations are often either very vague or very detailed and are not generally comprehensible with a moderate level of detail. Regulations implementing Executive Order 11246 are a classic example of unclear federal requirements that frustrate many companies.

Response GAO Received From ESA

The company expresses general discontent about DOL's regulations but does not cite any specific regulations except Executive Order 11246. OFCCP regional and district office directors give seminars explaining the technical aspects of the program on a regular basis. OFCCP staff also provide technical assistance when asked. Additionally, OFCCP is in the process of revising its regulations and is currently proceeding through the clearance process to publish revised rules, including those regulations implementing Executive Order 11246. Regulations implementing Section 503 are in the final clearance stage for publication. Where the provisions are similar, these regulations will be consistent with those implementing Title I of the Americans with Disabilities Act (ADA). Disability complaints filed against an employer are covered both under ADA and Section 503; thus, it is imperative that companies not be subjected to inconsistent requirements under the two laws.

For citations related to the discussion above, see Executive Order 11246; Title 41 C.F.R., Chapter 60-1 through 60-60; Title 41 C.F.R., Chapter 60-741; Title 1, ADA, 29 C.F.R. 1630.

OFCCP routinely provides program information and technical assistance over the telephone and in writing to interested parties. Program materials, such as pamphlets and regulations, may be obtained from the national office by contacting the policy division of OFCCP at (202)219-9430. Assistance may also be obtained by contacting any of the 10 regional offices.

Company Concern as Expressed to GAO

Officials from several companies said that some federal regulations are inappropriate, ambiguous, or unrealistic. For example, officials from the packaging manufacturer said that the federal government is getting involved in issues that should be left for businesses to decide (e.g., sexual harassment and FMLA issues). They said they do not want government intervention in these areas and believe that employees may use these regulations to take advantage of companies in the future.

Response GAO Received From ESA

OFCCP is currently reviewing and revising all of its regulations with the goal of streamlining and clarifying the regulatory provisions implementing Executive Order 11246; Section 503 of the Rehabilitation Act of 1973, as amended; and VEVRAA, 38 U.S.C. 4212. ESA expects that when these regulations are published, they will be more user-friendly for the public.

For citations related to the discussion above, see Title 41 C.F.R., Chapter 60-1 through 60-60; Title 41 C.F.R., Chapter 60-250, VEVRAA; Title 41 C.F.R., Chapter 60-741, Section 503.

OFCCP routinely provides program information and technical assistance over the telephone and in writing to interested parties. Program materials, such as pamphlets and regulations, may be obtained from the national office by contacting the policy division of OFCCP at (202)219-9430. Assistance may also be obtained by contacting any of the 10 regional offices.

DEPARTMENT OF LABOR
OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (OSHA)

Company Concern as Expressed to GAO

Officials from the paper company said that OSHA'S asbestos exposure rules are too prescriptive and compliance is expensive. The officials told GAO that they spend $10 million per year to remove asbestos from equipment--a cost they said could be cut in half if the procedures were less prescriptive. They said the asbestos rules treat all asbestos the same, even though 80 percent of the asbestos they deal with ("white asbestos") has not been proven to be hazardous. Company officials also said that the asbestos training required in new regulations (finalized in 1994 to take effect in July 1995) is "overkill." They said all of their maintenance people (e.g., pipefitters and mechanics) must have 2 hours of training per year on asbestos, which costs the company $800,000 per year in labor costs. They said the extensive training is not needed since the employees are only told to "stay away from it." They also said anyone who sweeps up materials (which, they said, is potentially everyone in their plants) must have the training, which costs another $3.3 million per year.

Response GAO Received From OSHA

In August 1994, OSHA published final standards to substantially improve protection for millions of workers exposed to asbestos on the job. The package, which included revised standards for worker protection against asbestos exposure in general industry and construction and a new standard for worker protection in shipyards, finalized a regulatory structure that will result in very significant reductions in deaths due to cancer from asbestos exposure and in costs to society. The rule continues and greatly enhances the protections that OSHA has provided in the past. The paper company contends that OSHA's asbestos rules are too prescriptive and compliance is expensive. Without specific information on the basis for the company's estimate of $10 million in annual costs for asbestos removal, OSHA cannot determine why the company's costs are so high. The OSHA standard does not require asbestos removal. However, where it is removed, the standard does prescribe reasonable requirements to ensure that workers are protected.

Further, although the asbestos construction standard is necessarily prescriptive with regard to the use of certain types of protective equipment, it does allow firms the flexibility to choose the least-cost removal technology suitable for their needs. Thus, OSHA believes that the standard strikes the right

balance between specificity where protection demands it and flexibility where choice is appropriate.

Most of the requirements of the standard were recommended to OSHA by qualified asbestos consultants, corporate safety officers, and other specialists in the field. Some methods offered as alternatives to the prescribed methods may not provide the same levels of protection and would therefore potentially violate OSHA's mandate under the act, as well as the court's directive to examine all means to reduce the significant risk that remained following the promulgation of the 1986 standard.

The final rule reaffirmed OSHA's position that chrysotile (white) asbestos is as dangerous as other forms of asbestos. During the rulemaking, OSHA evaluated the data concerning this issue and concluded that there was no scientific basis for the claim that chrysotile is less hazardous than other fiber types. OSHA believes that the evidence in the rulemaking record supports the finding of a similar potency for chrysotile and amphiboles with regard to lung cancer and asbestosis. The evidence submitted in support of the claim that chrysotile asbestos is less toxic than other asbestos fiber types is related primarily to mesothelioma. This evidence, however, is unpersuasive, and it provides an insufficient basis upon which to regulate that fiber type less stringently.

The standard includes requirements for signs, labels, and other forms of hazard communication so that employees working in areas where asbestos-containing materials are located know about the presence of asbestos and how to avoid contact. OSHA found during its rulemaking that sweeping of asbestos-containing dust and debris can result in significant exposure (e.g., school custodians have developed asbestos disease). Therefore, workers performing housekeeping duties in buildings containing asbestos must receive training to make them aware of where the material is and how to avoid exposure to this known carcinogen. The topics to be covered by this "awareness" training are delineated in the standard (e.g., methods of recognizing asbestos, health effects, operations that could result in exposure and applicable protective measures, respiratory protection, appropriate work practices, and medical surveillance), with specific requirements for each of the four classes of asbestos work. The standard requires that such training be provided prior to or at the time of initial assignment, with annual refresher training thereafter.

For example, 16 hours of training is required for workers who engage in repair and maintenance operations where asbestos-containing materials are likely to be disturbed (class III). This training must be the equivalent in curriculum and training method to the 16-hour Operations and Maintenance course developed by EPA

for maintenance and custodial workers who conduct activities that will result in the disturbance of asbestos-containing material, and must include "hands-on" training in the use of respiratory protection and work practices.

In contrast, only 2 hours of training are required for workers performing maintenance and custodial activities during which employees either contact or clean up waste and debris that contains asbestos-containing materials or presumed asbestos-containing materials (class IV). This training must be equivalent in curriculum and training method to the awareness training course developed by EPA for maintenance and custodial workers who work in buildings containing asbestos-containing materials. The training must include available information concerning the location of asbestos-containing or presumed asbestos-containing material, asbestos-containing flooring material, or flooring material where absence of asbestos has not been certified; and instruction in the recognition of damage, deterioration, and delamination of asbestos-containing building materials.

OSHA estimates that training costs for work performed by trades such as pipefitters and mechanics (based on 16 hours) will cost $340 per worker for initial training and $317 per worker for annual refresher training, with a minimal additional cost of less than $2 for clerical recordkeeping. Training costs for custodians (based on 2 hours) are estimated by OSHA to be $41 per worker for initial training and $39 per worker for annual refresher training, with a minimal additional cost of less than $2 for clerical recordkeeping.

It is important to note, however, that the effective date for the employee information and training requirements, along with most other provisions of the standard, was extended until October 1, 1995. This action was taken to ensure that employers and employees had sufficient time to understand the provisions of the standard and implement them effectively and to provide additional time for OSHA to disseminate various compliance assistance and training materials.

Company Concern as Expressed to GAO

Officials from the paper company said that OSHA's lead exposure standards (29 C.F.R. 1926) are highly prescriptive and expensive and do not distinguish between lead-intensive paint and those paints with only 0.0001 percent of lead. They said any maintenance person working on a valve who scrapes away any paint must first put on a respirator and other personal protective equipment. Before doing so, however, they said the employee must first obtain a doctor's permission and be "fit tested." The

officials said that this process costs the company about $1.25 million per year. In addition, they said lead training will cost another $400,000 per year. Instead of these prescriptive standards, the officials said OSHA should distinguish between long-term and short-term exposure. If a job requires only minor scraping of paint for 5 minutes, they said all of this effort is not needed.

Response GAO Received From OSHA

OSHA's Lead Standards for Construction (29 C.F.R. 1926.62) and for General Industry (1910.1025) were designed to reduce worker exposure to lead. When absorbed in the body in certain doses, lead can be toxic, causing various forms of health impairment by affecting the brain and other body systems.

The standards establish maximum limits for worker exposure to lead based on a permissible exposure limit (PEL) rather than the percentage content of lead in a given material because a PEL is directly related to employee exposure and additionally takes into consideration the duration and nature of the work being performed. The PEL for lead restricts an employee's airborne lead exposure to no more than 50 ug/m^3 averaged over an 8-hour period. If the initial employee exposure to lead is at or above 30 ug/m^3 as an 8-hour time weighted average, the employer is required to conduct compliance activities to reduce employee exposure.

The Lead in Construction standard cited by the paper company does not apply to routine maintenance activities not associated with construction work (OSHA Instruction CPL 2-2.58). Maintenance work involving scraping of paint on a valve in a paper company would be considered a maintenance activity not associated with construction work; thus, OSHA's General Industry Standard for lead would apply. Neither the General Industry Standard nor the Construction Standard, however, require the donning of respirators or other personal protection equipment or medical clearance while performing the task cited above unless exposures are above the PEL. Likewise, neither of OSHA's lead standards requires extensive training for workers unless they are exposed to lead concentrations greater than 30 ug/m^3 as an 8-hour time weighted average. If the employer has performed exposure monitoring demonstrating that "minor scraping of paint for 5 minutes" would not result in significant exposure to lead, an employer would not be required to provide respirators, personal protective equipment, or training to that maintenance worker.

If respirators are used, the lead standards do require that they fit the employee properly and provide adequate protection. However, a medical clearance by a physician is required only when

an employee demonstrates difficulty breathing when using a respirator. OSHA estimates that the cost of annual qualitative fit-testing is $10.30 per worker per year, and the cost of a respirator-related medical exam is $258. If these estimates are reasonably accurate, the paper company referred to in this question would have to be providing respirator fit tests and medical exams to over 4,500 employees in order to be spending $1.25 million per year on these requirements. Without additional information about the company, OSHA cannot comment on the company's costs for respirator fit tests and medical exams.

OSHA's lead training requirements are reasonably simple, and the majority of the required training can be given using materials provided in the standard's Appendices. Again, without additional information about the company, OSHA cannot comment on the company's training costs.

Although OSHA does not exempt short-term exposure from the lead standard, the application of the standard differs; for example, certain engineering controls and medical surveillance requirements apply when workers are exposed for more than 30 days per year. Moreover, the 8-hour time weighted average concept by definition means short-term exposures (to anything but enormously high concentrations) do not trigger the standard.

Company Concern as Expressed to GAO

Officials from the hospital said that OSHA's tuberculosis standards (29 C.F.R. 1960.16) are costly to implement and are not scientifically justifiable. The standards require that employees be fitted to wear a high-efficiency particulate arresting respirator during contact with patients suspected or confirmed to have tuberculosis. They said only one company has provided a respirator that has been certified as acceptable under the standards, and the equipment is very expensive. The masks are designed to be reusable, but the officials said this feature is difficult to implement in a hospital environment. Hospital officials estimated that compliance with the standards will cost $60,000 per year just for masks, compared with $7,000 per year spent on standard hospital masks before the rule change. They said OSHA is aiming for zero risk, but not at a reasonable level of cost. According to hospital officials, the hospital is liable for $70,000 in fines if it fails to comply with the standards, even though medical experts see no scientific basis for the strict standards.

Response GAO Received From OSHA

The recent heightened concern about transmission of tuberculosis has been prompted by a marked increase in the number of reported

tuberculosis cases; the emergence of multidrug-resistant tuberculosis (resistant to two or more of the first-line drugs used for treatment); and several recent outbreaks of tuberculosis, including multidrug-resistant tuberculosis, in health care facilities. To address these concerns and to emphasize the importance of implementing their recommendations, the Centers for Disease Control and Prevention (CDC) revised their "Guidelines for Preventing the Transmission of Mycobacterium Tuberculosis in Healthcare Facilities" in October 1994.

Although there is no OSHA standard for exposure to tuberculosis at the present time,[5] OSHA is currently developing a proposed standard for occupational exposure to tuberculosis. In developing this proposal, OSHA has maintained an extensive dialog with representatives of relevant trade associations, professional organizations, labor unions, and other groups, and OSHA will continue to work with stakeholders and the public throughout the formal rulemaking process.

In October 1993, OSHA issued mandatory guidelines that established an agencywide enforcement policy for protecting exposed workers against tuberculosis. OSHA's enforcement policy, based principally on the CDC guidelines, ensures a consistent and uniform approach to enforcement of applicable OSHA standards and the General Duty Clause[6] for occupational exposure to tuberculosis. Inspections for occupational exposure to tuberculosis are conducted only in response to employee complaints or as part of all industrial hygiene compliance inspections conducted in the five types of workplaces recognized by CDC as having workers with an increased risk of occupationally acquiring tuberculosis infection. Specifically, these workplaces are health care settings, correctional institutions, homeless shelters, long-term care facilities for the elderly, and drug treatment centers.

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[5]The citation given (29 C.F.R. 1960.16) is a general requirement that states that federal agencies are required to comply with all OSHA standards or with approved alternate standards that provide equivalent or greater protection for employees--it is not the cite for an OSHA tuberculosis standard.

[6]The General Duty Clause, section 5(a)(1) of the Occupational Safety and Health Act of 1970, obligates employers to provide safe and healthful workplaces. Application of the General Duty Clause is warranted since occupational exposure to tuberculosis is a serious and recognized hazard and feasible abatement methods exist.

CDC is nationally recognized for their expertise in disease prevention. In their guidelines, CDC states that there are certain situations in which use of respiratory protection will be necessary (e.g., entering an isolation room of an individual with suspected or confirmed infectious tuberculosis), and they set forth four performance criteria for respirators. Until recently, the minimum National Institute of Occupational Safety and Health -certified respirators that met these criteria were those with high-efficiency particulate air filters. Consequently, OSHA required high-efficiency particulate air filters respirators as the minimally acceptable respirator for use against tuberculosis. The National Institute of Occupational Safety and Health recently revised its respirator certification procedures, however, and has approved several new respirators that meet the CDC criteria for filter efficiency. The cost of these respirators is currently in the $1 to $3 range, significantly less than the cost of high-efficiency particulate air filters respirators. OSHA previously permitted high-efficiency particulate air filter respirators to be reused, provided the respirator's structural and functional integrity were maintained. Under its current enforcement activity, OSHA will continue to allow both high-efficiency particulate air filter respirators and the new respirators to be reused, an action that further reduces associated costs.

The commentor also alleges that OSHA is seeking a zero-risk standard. This allegation is almost always a mischaracterization of OSHA's regulatory programs, but it is a particularly inappropriate criticism in the case of tuberculosis. Most of OSHA's health standards for carcinogens permit post-regulatory risks to be as high as 1 per 1,000, as far away from "zero-risk" as any federal agency ever permits (EPA, for example, often regulates to reduce cancer risks to 1 per million or less). For tuberculosis, OSHA has accepted the CDC criteria, which allow respirators that permit 10-percent leakage through the face-seal (even after the respirators have been properly fit-tested). A standard that reduces the concentration of harmful organisms in the employee's breathing zone by a factor of only 10 cannot be fairly characterized as in any way a "zero-risk" effort.

It is OSHA's understanding that the hospital in question is a state hospital. Federal OSHA does not regulate public employers, so this hospital does not come under OSHA's jurisdiction. Judging by the hospital official's statement regarding a potential $70,000 fine for failure to comply with the standards, it must be located in a State Plan state. The policy for assessing monetary penalties against public sector employers in State Plan states is dependent on state law. Many State Plans have public sector penalty policies identical to the private sector, while others either do not assess monetary penalties

against public sector employers, or do so only in response to certain types of violations.

Company Concern as Expressed to GAO

Officials from a hospital said OSHA's standards for blood-borne pathogens substantially exceed the CDC universal precautions guidelines and significantly increased costs without apparent benefits. Hospital officials said OSHA's blood-borne pathogen standards are costly to the hospital and in some cases have caused employees to suffer skin problems. According to hospital officials, OSHA's standards, initiated in 1992, require hospital employees to wear gloves where there is potential or actual exposure to blood or other potentially infectious material. They said OSHA expanded CDC's universal precaution definition to encompass all areas of a hospital with potential for exposure, which the officials said significantly increased the use of personal protective equipment. Before the standards, the hospital followed guidelines from CDC on the use of gloves, which recommended the use of gloves only at certain times. The hospital officials said that the cost for gloves in just the hospital's housekeeping department increased from $4,000 to $60,000 per year. The hospital indicated that it purchases large quantities of nonsterile latex gloves because they are inexpensive and fit well. According to hospital officials, an unintended consequence of the regulation has been an outbreak of rashes and other skin problems due to latex allergies and sensitivities caused by employees' cumulative exposure to latex.

Response GAO Received From OSHA

The Bloodborne Pathogens standard (29 C.F.R. 1910.1030) is designed to protect workers from occupational exposure to the Hepatitis B Virus, the Human Immunodeficiency Virus, and other bloodborne pathogens that can cause serious and deadly disease. The standard, which was found to be economically feasible for hospitals,[7] is thoroughly supported by scientific evidence.

Developed in close cooperation with CDC, the standard is consistent with CDC's recommendation that all blood and certain other body fluids be considered potentially infectious and that rigorous infection control precautions be taken to minimize the risk of exposure. This approach is know as "Universal Precautions," and it is widely accepted as good medical practice.

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[7]Compliance costs for the hospital sector were estimated to represent less than 0.2 percent of revenues and less than 7 percent of profits for the typical hospital.

To demonstrate the consistency between the CDC recommendations and the OSHA requirements, a review of the documents themselves is helpful. Under their recommendations for Universal Precautions, CDC states:

> "All health-care workers should routinely use appropriate barrier precautions to prevent skin and mucous-membrane exposure when contact with blood or other body fluids of any patient is anticipated. Gloves should be worn for touching blood and body fluids, mucous membranes, or non-intact skin of all patients, for handling items or surfaces soiled with blood or body fluids, and for performing venipuncture and other vascular access procedures. Masks and protective eyewear or face shields should be worn during procedures that are likely to generate droplets of blood or other body fluids to prevent exposure of mucous membranes of the mouth, nose, and eyes. Gowns or aprons should be worn during procedures that are likely to generate splashes of blood or other body fluids."

By comparison, the general glove usage provision of the OSHA Bloodborne Pathogens standard states:

> "Gloves shall be worn when it can be reasonably anticipated that the employee may have hand contact with blood, other potentially infectious materials, mucous membranes, and non-intact skin; when performing vascular access procedures except as specified in paragraph (d)(3)(ix)(D); and when handling or touching contaminated items or surfaces."

The OSHA requirements for protective eyewear and clothing parallel the CDC recommendations. Both the CDC guidelines and the OSHA requirements base the use of personal protective equipment on anticipation of contact with blood or other potentially infectious materials. Neither document triggers personal protective equipment use according to particular areas of the hospital, particular types of employee, or particular times. Consequently, if a facility had been following the CDC guidelines for glove usage prior to promulgation of the Bloodborne Pathogens standard, it would most likely also be in compliance with the OSHA requirements.

According to OSHA's hospital survey, as well as public comment and testimony submitted in response to OSHA's proposed rule, compliance with respect to glove use was already at about 80 percent for the hospital sector prior to promulgation of the final rule. OSHA estimated that the average incremental cost per hospital for glove use for all potentially exposed employees was

about $10,950. However, the actual cost per facility would be dependent on the number of workers employed as well as current practice at that facility. Furthermore, data in the record suggested that glove use has been linked with a substantial reduction in risk for workers in some occupations.

It should also be noted that the Bloodborne Pathogens standard permits the use of utility gloves (often called "rubber" gloves) for tasks such as housekeeping. The standard, in agreement with CDC recommendations, permits utility gloves to be decontaminated and reused. However, the gloves must be discarded if they show signs of deterioration (e.g., cracked, discolored) or their ability to function as a barrier is compromised (e.g., punctured, torn). In addition to permitting reuse, the standard requires glove use only for tasks where housekeepers have reasonably anticipated contact with blood or other potentially infectious materials or surfaces/items contaminated with these substances. Given these facts, it is not clear why this hospital's housekeeping glove costs jumped so dramatically. It is possible that the requirements of the standard are being misinterpreted and the hospital is doing more than is required. OSHA has, however, conducted extensive outreach activities to help employers understand and meet their occupational safety and health obligations.

With regard to skin rashes and allergic reactions, OSHA does not specify that gloves be made of a particular material. Alternatives to latex gloves are available to address allergic reactions, including gloves made of vinyl or other elastomers, hypoallergenic gloves, glove liners, and powderless gloves. These alternatives are acceptable provided that they fit the employee and form an effective barrier to the passage of blood or other potentially infectious materials. According to public comment and testimony received during the rulemaking process, no significant increase in overall cost was associated with the use of alternatives to latex gloves.

Company Concern as Expressed to GAO

Officials from the paper company said that the pulp and paper standards (29 C.F.R. 1910.261), established before OSHA's creation in 1971, are outdated, ambiguous, and inflexible. They said these standards are written using dated terminology (20 to 30 years old) and do not recognize technology changes since that time. They also said that the standards are ambiguous in several respects. For example, the officials said the section on emergency stops (1910.261[k][1]) says machines must have devices that will stop paper machines "quickly," but the rule does not define what "quickly" means. According to the company, experts

do not agree on what "quickly" means, and there is no known way to stop these huge machines quickly enough to prevent an injury.

The paper company officials also said that parts of the standards conflict with other parts of section 1910, thereby leaving company officials confused as to what to do. They said enforcement of the standards is inconsistent. For example, they said enforcement of "guarding provisions" (intended to protect employees from injuries as they thread paper inside the machines) varies between regions, between area offices within a region, and even between compliance officers within an office. They also said compliance with the guarding provisions is very expensive; retrofitting their existing machines will cost $250,000 to $300,000 per machine. The paper company officials said their injury logs indicate that fewer than 1 percent of all injuries involve the lack of guards. Spending all of the time and attention on guards, they said, is far out-of-proportion to the benefits gained. The officials said they would be far better off spending the money on developing ways to keep people out of the paper-threading process entirely instead of spending the money on guards for the existing process that do virtually nothing to improve employee safety.

Response GAO Received From OSHA

In 1971, OSHA adopted safety and health standards for paper and pulp mills that were based on the national consensus standards that had been established in 1969 by the pulp and paper industry. OSHA recognizes the need to update these standards, which are codified at 29 C.F.R. 1910.261, to address new technology and ensure consistency with more recent OSHA standards; however, due to limited rulemaking resources, OSHA has not yet updated this standard. To maintain appropriate protection for workers in the pulp and paper industry, OSHA gives employers in this industry the option to comply with certain provisions of OSHA's machine guarding (29 C.F.R. 1910, Subpart O) and lockout/tagout (29 C.F.R. 1910.147) standards in lieu of the outdated provisions in 29 C.F.R. 1910.261 addressing these hazards.

OSHA is concerned with the allegation that there may be inconsistency among regional and area offices in enforcing OSHA standards. OSHA tries to minimize inconsistent enforcement through on-going training of its compliance officers on interpreting standards such as those for machine guarding. Employers can receive written interpretation letters from the area or National office regarding compliance with OSHA standards. If an employer brings to OSHA's attention an interpretation that is inconsistent with the standard's intent, OSHA will take appropriate corrective action.

The company's statement that retrofitting existing machines to comply with the standard is puzzling in light of the fact that OSHA's pulp and paper standards have been in effect for well over 20 years. It is unclear why any company would need to retrofit existing equipment unless the company has been out of compliance with the standard for years. Furthermore, in the pulp and paper industry, as in many other industries with similar operations, OSHA has consistently and repeatedly found that machine guards provide essential safety protections to workers and substantially reduce the risk of serious injuries. Moreover, although removing workers entirely from the paper-threading process, as suggested by the paper company, reduces the likelihood of worker injury during its operation, it does nothing to protect workers who perform maintenance and servicing duties from being injured by unguarded machinery.

OSHA is concerned that even after years of industry experience with the standards the paper company continues to experience difficulty complying with the pulp and paper standards. Through its enforcement process and policies, OSHA attempts to ensure that establishments are held only to compliance with consistent, sensible requirements. OSHA provides compliance assistance and guidance on its enforcement expectations through the area offices, National office, and consultation program. In addition, OSHA's variance process allows firms to develop and implement alternative methods of protecting employees if they can show that the alternative provides protection that is at least as protective as that required by the standards.

Company Concern as Expressed to GAO

A Minco official said that the company's biggest problem in the area of health/safety is paperwork. For example, she said that the company has to keep employee Material Safety Data Sheets (MSDS) training records "forever." She said that the retaining period requirement for the MSDS training records is a substantial burden for a small business.

Response GAO Received From OSHA

The Hazard Communication Standard (HCS) (29 C.F.R. 1910.1200) includes requirements for MSDSs and for employee training. Under the requirements of HCS, the data sheets themselves need be maintained only as long as the chemical is still in the workplace. No records are required for the employee training conducted under HCS. OSHA considered including requirements to document employee participation in training sessions but decided at the time that it would be more appropriate to evaluate training based on the outcome--that is, general employee knowledge about hazardous chemicals and protective measures--

rather than requiring employers to generate lists of employees attending training sessions. Thus, there is no burden associated with retention of "MSDS training records" because no such records are required by the rule.

Company Concern as Expressed to GAO

The Minco official and the official at a tank car company said MSDS forms do not uniformly present OSHA-required information. The Minco official said this makes it difficult for employees to quickly or easily determine what safety precautions to take with regard to a particular chemical.

The official of the tank car company said the lack of a standard format complicates tracking the chemicals and compounds used and calculating emissions performance.

Response GAO Received From OSHA

When HCS was promulgated, OSHA considered inclusion of a specific format for MSDS information. However, chemical manufacturers who are required to prepare and distribute MSDSs argued that the burden of revising existing forms to a new specific format would be substantial, and they supported performance-oriented requirements that would allow the use of existing forms to continue. The performance-oriented approach supported by industry was adopted by OSHA. Therefore, any format for MSDSs is acceptable, as long as the information conforms to the requirements of the standard. OSHA has provided a nonmandatory format (OSHA 174) for those chemical manufacturers and importers that choose to use it.

When the requirements of HCS were expanded to cover all types of industry, and community right-to-know provisions under EPA extended the use of MSDSs to emergency responders and other members of the public, there was considerable interest in the development of a more standardized format. As a result, the chemical industry itself, which formerly supported the performance-oriented approach, worked together with chemical users to prepare a recommended order of information for MSDSs. This was adopted in a voluntary industry consensus standard developed by the American National Standards Institute. Further actions were taken to internationally harmonize the approach to MSDSs to help ensure that MSDSs received with imported chemicals contain all the necessary information and to facilitate international trade in chemicals. The American National Standards Institute's order of information can now be used in Canada, is required in the European Communities, and is recommended by the International Labor Organization. Many U.S. chemical companies are gradually changing to the American

National Standards Institute's approach, and MSDSs are becoming more standardized in terms of format through this significant private sector initiative.

Further, OSHA plans to request that the National Advisory Committee on Occupational Safety and Health convene a working group to identify ways to improve hazard communication in the workplace. The committee will be asked to provide OSHA with recommendations in 6 months that will enable OSHA to focus on the most serious hazards, simplify MSDSs, reduce the amount of required paperwork, and improve the effectiveness of worker training.

Company Concern as Expressed to GAO

A Metro Machine official said MSDS information is often inaccurate. For example, he said that he called a chemical manufacturer to verify the information on the MSDS and was told different information. He said manufacturers prepare the OSHA-required MSDS, but they also sign waivers saying they will not stand by the information.

Relatedly, officials at Zaclon, a chemical manufacturing facility, said OSHA regulations that require preparation of MSDS information for each chemical are complex.

Response GAO Received From OSHA

Under HCS, chemical manufacturers and importers are responsible for developing or obtaining an accurate MSDS for each hazardous chemical they produce or import. OSHA recognizes, however, that there are some MSDSs that contain inaccurate information. When OSHA finds such MSDSs, the preparer is subject to citation under HCS. Waivers do not excuse the preparer from being liable for compliance with the OSHA requirements for accurate information. If chemical users believe that they have received an MSDS that is inaccurate or incomplete, OSHA can assist them in obtaining one that is appropriate.

HCS recognizes that chemical manufacturers are most knowledgeable about the products they distribute and thus that preparation of MSDSs must be their responsibility. The standard's requirements for MSDSs are based on industry requirements for these forms that existed at the time HCS was promulgated. They are complex to the extent that they cover complicated issues, such as evaluating data to determine the hazards posed by a chemical. But these are activities that the employer would have to undertake in any event to ensure that the product is used properly and to address potential product liability concerns. The standard basically standardizes and codifies the responsible employer's approach to

the safe handling of chemicals to ensure that the products can be used safely, and it requires that available information be transmitted to product users so that they can be protected.

Company Concern as Expressed to GAO

Roadway officials said local OSHA inspectors had expanded the requirement to provide employee training pursuant to the Employee Training Standard for Spill Response beyond the original intent of the requirements. The company officials believed they were in compliance with these standards by training the appropriate people in the dock area on spill response. However, the Roadway officials said OSHA inspectors at a terminal facility in Connecticut interpreted the standard to include everyone in the dock area--an interpretation the company viewed as unreasonable.

Response GAO Received From OSHA

Hazardous wastes, when not handled properly, can pose a significant safety and health risk. OSHA issued a final standard specifically designed to protect workers and help them handle hazardous wastes safely and effectively. The Hazardous Waste Operations and Emergency Response standard (29 C.F.R. 1910.120) covers workers employed in clean-up operations at uncontrolled hazardous waste sites and at EPA-licensed waste treatment, storage, and disposal facilities; as well as workers responding to emergencies involving hazardous materials (i.e., spills) without regard to the location of the hazard.

Section (q) of the standard, "emergency response to hazardous substance releases," applies to all workplaces that have a potential for emergencies resulting from hazardous substances. The standard provides employers the option of using their employees to respond to emergencies and meeting the requirements in section (q) or evacuating their employees from the hazardous area when an emergency occurs and providing an emergency action plan in accordance with 29 C.F.R. 1910.38(a).

Responses to nuisance spills and minor releases, which pose no emergency or threat to the safety and health of workers, and which can be handled safely by employees in the immediate area, are not considered an emergency incident under the standard. However, if workers, such as the dock workers described by the Roadway officials, are required to respond to spills that have the potential for becoming an emergency, then the requirements of the standard apply.

The employer must train emergency responders to respond in a safe and healthful manner. The specific level of training required is based on the responsibilities and duties expected of a worker

during an emergency response operation. Unfortunately, without additional information concerning the job duties and responsibilities of the workers, OSHA cannot respond to the Roadway officials' specific allegation. However, if the Roadway employees work in an area where there is potential for an uncontrolled release, they must have sufficient awareness training to recognize that an emergency situation exists and to initiate emergency response procedures by notifying the response team. This awareness level training can be integrated into the hazard communication program required by OSHA's Hazard Communication Standard (29 C.F.R. 1910.1200).

Company Concern as Expressed to GAO

An official from Metro Machine Corporation said OSHA should differentiate between corporate negligence and employee responsibility. He said OSHA currently holds companies, not individual employees, accountable for violations caused by employee negligence or willful removal of company-installed safety devices.

Response GAO Received From OSHA

The Occupational Safety and Health Act of 1970 places specific responsibilities for workplace safety and health on both employers and employees. These duties appear in Section 5 of the act, which states:

> (a) Each employer (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees; (2) shall comply with occupational safety and health standards promulgated under this Act.
>
> (b) Each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this Act which are applicable to his own actions and conduct.

The Occupational Safety and Health Act gives OSHA the authority to enforce safety and health standards and issue citations to employers for violations of the act. The Occupational Safety and Health Act does not, however, authorize OSHA to penalize individual employees for misconduct related to safety or health standards. [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, since the act's enforcement scheme is directed only against employers. OSHA's enforcement policy of holding companies liable for safety and health violations is therefore wholly consistent with the intent of the act.]

Since the early 1980s, OSHA's policy has been the following: when an OSHA compliance officer conducts an inspection and determines that employees are systematically refusing to comply with safety and health standards and rules, OSHA will excuse the employer from a violation. To be excused from the violation, 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.

Company Concern as Expressed to GAO

Officials of a tank car company said a state OSHA inspection in 1991 was unnecessary and vindictive and cost the company $100,000 for legal counsel and research to negotiate a final settlement of the inspection. Company officials said that the high fine was in reprisal for the company's requirement that the state OSHA obtain a warrant to conduct inspections. (The officials said they requested the warrant for the inspections due to previous frequent and disruptive OSHA inspections). They said that there was no reason for the inspection because the company's lost workday/injury rate is always below the industry average, and the company continually invests time and resources to ensure that the workplace is as safe as possible. Additionally, they said the inspection did not improve the company's existing accident prevention plan. Company officials said the state OSHA inspectors ultimately cited the company for 70 violations and fined the company $420,000. After extended negotiations between the company's legal representatives and state OSHA officials, the company reportedly settled with DOL for a fine of $50,000.

Response GAO Received From OSHA

Without more specific information regarding the incident cited by the tank car company officials, OSHA cannot make an informed assessment of the accuracy of the allegations. The fact that a particular firm's injury rate is below its industry average would not exempt it from a programmed inspection. Many OSHA State Plans use information supplied by OSHA for their targeting systems. These systems target firms in industries with lost workday rates above the national average. Because the railroad equipment industry (SIC 374) had a lost workday injury rate of

8.7 in 1990 compared with 3.9 for all of private industry and 5.3 for manufacturing, firms in that industry would have been targeted. The individual firms selected for inspection could have rates above or below their industry average. It is also possible that the company's inspection was in response to a workplace complaint or a report of an accident. Without an inquiry into the actual inspection in question, OSHA also cannot make any judgments regarding the appropriateness of the violations cited or the penalties proposed.

The issuance of citations and penalties "in reprisal" for an employer's refusal of entry to a compliance officer is, of course, contrary to all official federal and state policies. The tank car company officials do not indicate that they exercised their right to file a Complaint About State Program Administration against the State Plan. This right is clearly set forth on each State Plan's safety and health poster and is an important tool used by OSHA to monitor and evaluate state program operations. A Complaint About State Program Administration is a complaint made to OSHA by any person or group about some aspect of the State Plan's operation or administration. The complaint may relate to any state action, including a specific state inspection, or may involve more general overall criticism of the State Plan's administration or operations. Under this program procedures, OSHA Regional Office personnel coordinate the investigation of complaints and inform the state and the complainant of the results of the investigation and of any corrective action required.

Company Concern as Expressed to GAO

Multiplex officials said an OSHA requirement that the company replace existing electrical receptacle boxes was unreasonable and resulted in unnecessary costs to the company. According to the Multiplex officials, OSHA said the existing electrical receptacle boxes, which were used by the manufacturing industry for years without incident, were unacceptable but could not cite a specific OSHA standard for such boxes. Company officials said that to meet OSHA's requirements, the company had to purchase expensive ($6,600) outdoor receptacle boxes for use indoors.

Response GAO Received From OSHA

OSHA's Electrical Standards (29 C.F.R. 1910 Subpart S) serve to protect workers from exposure to energized electrical equipment, which could result in death or serious physical harm. As seen in the attached document, Multiplex Company, Inc., violated electrical standard 29 C.F.R. 1910.303(b)(2), which requires live parts of electrical equipment operating at 50 volts or more to be guarded against accidental contact. Specifically, Multiplex

Company, Inc., was cited for using a four-plex knock-out box as a pendant (acting as an extension cord dropped from the ceiling) to supply power down to multiple industrial machines. Knock-out boxes are not approved for this purpose under the certification requirements put out by nationally recognized testing laboratories, which identify the conditions in which electrical equipment is to be used. The standards require that knock-out boxes be mounted or otherwise protected from being knocked loose by personal or material handling. This is to prevent the box from becoming energized or exposing energized wire that would place workers at considerable risk of electrocution.

OSHA did not require Multiplex Company, Inc., to replace its knock-out boxes with expensive outdoor receptacle boxes. There are many ways the company could have chosen to abate its electrical hazards, such as finding other ways to power its industrial machines or using other receptacle boxes available for indoor use. However, OSHA allows the employer to determine which method is most suitable for its needs. OSHA commends Multiplex for addressing electrical hazards and protecting the safety of its employees.

Company Concern as Expressed to GAO

Officials from a hospital said that in many instances OSHA regulators do not sufficiently inform companies about upcoming regulatory changes and how to comply with them. They believe that OSHA's consulting function should be energized, which would concurrently move the agency posture into more of a collaborative mode--away from a "policing" posture that presumes violations until they are disproved by the company.

Response GAO Received From OSHA

OSHA clearly recognizes the importance of building cooperative relationships with the regulated community. OSHA has been working with stakeholders to identify the most pressing new priorities for agency action and has stepped up its efforts to involve business and labor in the entire regulatory process. This increased emphasis on interactions with stakeholders will enable the agency to succeed in its efforts to streamline and rationalize the body of regulations currently on the books and to build a set of common sense regulations. OSHA has also made a firm commitment to simplify access to workplace safety and health regulations and to increase and strengthen its efforts to provide compliance assistance to employers who want to protect their workers.

OSHA encourages employers to make use of the free consultation service available to help employers identify potential hazards at

their workplaces and improve their safety management systems. The program is targeted toward small businesses and is delivered by state governments using well-trained consultation staff. The program, offered free of charge in all states, is completely separate from the enforcement program, and participants cannot be cited during the consultation visit. In the last 5 years, OSHA has helped over 100,000 small and medium-sized businesses identify and correct over 800,000 hazards.

Recognizing that an informed safety and health community is better able to recognize and protect itself from workplace hazards, the agency has implemented a number of information-dissemination projects and plans to undertake new initiatives to improve the availability of safety and health data to the public. For example, OSHA is actively exploring ways to use computer technology to provide assistance to employers, including placing the text of rules on DOL's electronic bulletin board and Internet sites; expanding the information available on its CD-ROM, which is the number-one GPO sales item among all government-issued CD-ROMs; and developing additional interactive compliance tools, such as GOCAD (interactive software that assists employers with the medical surveillance provisions of the Cadmium standard) and the Asbestos Advisor.

Company Concern as Expressed to GAO

A hospital official expressed "mixed emotions" about OSHA and its procedures. He believes OSHA's studies are beneficial and their education efforts can be helpful. He also said OSHA's level of concern must reflect "the presence of a problem somewhere." However, he said he objects to the application of the same standards to all industries, because developing standards unique to individual industries would be less costly and would protect public safety more effectively.

The hospital official also said that OSHA's focus is on whether organizations have the right people and procedures in place, and instead it should be a broader focus--on whether the workplace is safe.

Response GAO Received From OSHA

OSHA regulates occupational safety and health hazards, not specific industries. Similar hazards are found in a wide variety of workplaces, and exposed workers in each industry deserve the protection provided by an OSHA standard regardless of the employer's industrial classification. Conducting industry-by-industry rulemaking for hazards would be an onerous task that would result in unequal protection for employees. Workers performing the exact same operation, facing identical risks,

would either be protected by, or exempted from, the standard depending on the industrial classification of their employers.

In developing standards, OSHA identifies and analyzes the impacts of the rule on those industry groups where the hazard is typically found, although not every establishment in the industry group is necessarily affected. Similarly, there may be other worksites, outside of those identified by OSHA, in which the hazard is found. OSHA believes that workplace safety and health standards should be observed wherever the hazard exists for workers, rather than being based on the industrial classification of the employer.

OSHA recognizes, however, its stakeholders' interest in obtaining industry-specific information about workplace safety and health requirements. OSHA has stepped up its efforts to tailor various compliance tools to the needs of specific industries. For example, to help stakeholders comply with the Bloodborne Pathogens standard, OSHA published a series of five booklets, including one of general application, and four for specific industries (acute care facilities, dentistry, emergency responders, and long-term care facilities). OSHA intends to expand on such efforts and is currently looking for ways to provide customized, industry-specific compilations of regulations. OSHA will work closely with stakeholders to find ways to meet its customers' needs without creating excessive duplication and redundancy in the codified regulations.

OSHA's efforts have made a real difference, often a difference between life and death, for millions of working people. OSHA recognizes, however, that at times in the past the agency focused too heavily on processes and activity, and not enough on safety and health. One of the key concepts embodied in the host of reform initiatives announced by the President on May 16 is a results-oriented shift in the agency's focus. The agency will no longer measure success by numbers of inspections but will look at the impact of inspections on job-related injuries and illnesses. OSHA is also changing the way it conducts inspections. In October 1994, OSHA initiated a new program of conducting Focused Inspections in the construction industry. This program allows OSHA to recognize the efforts of safety-conscious employers by conducting inspections in a more streamlined manner and focusing on the four leading causes of construction fatalities: falls, struck by objects, crushing, and electrocution. The agency is currently developing a compliance directive to expand the focused inspections initiative to general industry.

Company Concern as Expressed to GAO

A Multiplex official suggested that OSHA's policy of immediately imposing fines for violations places an emphasis on finding violations to justify enforcement actions rather than on working with the company to encourage compliance. He said many OSHA inspectors focus on finding something wrong because citing violations demonstrates what OSHA views as good job performance. The official recommended that OSHA notify a company of any violations identified during an inspection and allow 30 days for the company to come into compliance before assessing a fine.

Response GAO Received From OSHA

The Occupational Safety and Health Act provides for monetary penalties to be levied as an incentive for employers to comply voluntarily with OSHA standards; OSHA penalties are not intended to serve a punitive purpose. Many employers have complained, however, that OSHA inspectors care less about worker safety than they do about meeting perceived "quotas" for citations and penalties. Although OSHA has never used quotas, it has in the past used citations and penalties as performance measures. OSHA has now put a stop to that practice. OSHA's performance will now be measured by its success in making safety and health improvements.

Some employers also believe that OSHA's enforcement approach is too confrontational. To address this concern, OSHA is changing its fundamental operating model from one of command and control to one that provides employers with a real choice between cooperative partnerships and a traditional enforcement relationship. This change is designed to separate the good actors from the bad actors in the safety and health arena, and to treat them differently.

OSHA is currently revising its penalty structure, which already recognizes an employer's good faith in assessing fines for unsafe conditions. For example, OSHA is working on a new compliance directive that will increase the good faith penalty reduction for employers with effective safety and health programs that find and fix hazards. The level of reductions would depend on the degree of completeness and effectiveness of the overall safety and health program at the worksite.

Another new compliance directive will increase the current penalty reduction according to employer size, providing larger reductions in proposed penalties for small employers. In addition, penalties will be eliminated for other-than-serious violations for small and medium-sized employers if, during an inspection, OSHA does not find any willful, repeated, failure-to-

abate, high gravity serious, or recordkeeping violations that impair the employer's ability to maintain a safe and healthful workplace.

OSHA will also be expanding the "quick fix" program that it has pilot-tested successfully. The program provides an incentive to employers to abate hazards quickly by allowing them to receive a penalty reduction if the employer abates hazards immediately and permanently during the inspection. This policy encourages employers to increase employee protection immediately, while freeing OSHA employees from follow-up abatement inspections and paperwork.

Company Concern as Expressed to GAO

A Multiplex official said several OSHA training requirements are problematic because of their incremental cost. For example, he said the company's incremental training costs in 1994 were

-- **$6,800 for Hazardous Material Communications training (29 C.F.R. 1910.176);**

-- **$2,800 for forklift training (29 C.F.R. 1910.178);**

-- **$2,260 for "Lock-out/Tag-out" training (29 C.F.R. 1910.147); and**

-- **$3,280 for first-aid and CPR training (29 C.F.R. 1910.151).**

The Multiplex official also said that the OSHA requirement that the company have a safety committee is costly--approximately $16,000 in 1994--and unnecessary. He said the 20 people on the safety committee meet once a month, prepare an annual safety report, and conduct monthly safety tours of the facility. He said the company reviews safety-related issues as a normal business procedure, and a safety committee does not enhance this process. Finally, the official said the company incurs substantial costs, calculated at $8,690 in 1994, associated with staying informed about OSHA's regulatory requirements.

Response GAO Received From OSHA

Many OSHA standards explicitly require the employer to train employees in the safety and health aspects of their jobs. Other OSHA standards make it the employer's responsibility to limit certain job assignments to those employees who have the special training and knowledge necessary to perform specific duties. These requirements reflect OSHA's belief that training is an essential element of protecting workers from occupational injuries and illnesses. Training in the proper performance of a

job is time and money well spent, and the employer might regard it as an investment rather than an expense. An effective program of safety and health training for workers can result in fewer injuries and illnesses, better morale, and lower insurance premiums, among other benefits.

Unfortunately, without additional information concerning how the training cost estimates were developed, OSHA cannot evaluate the merit of the specific cost estimates provided by Multiplex. It appears, however, that Multiplex may be misinterpreting OSHA's training requirements. For example, under the Medical Services and First Aid standard (29 C.F.R. 1910.151), the employer is required to provide first aid training only if the worksite is not within close proximity to an infirmary, clinic, or hospital that can be used for treating injured employees. On the basis of Multiplex's estimated annual costs, the company may be training more employees than required by the standard. OSHA estimates the average training cost per employee to be $183, which includes the cost of a Red Cross 8-hour first aid training course, including CPR, as well as the cost of employee compensation. Furthermore, these training certificates are valid for 3 years from the time of the course; therefore, the training cost would not be incurred annually. Similarly, the training required by the Hazard Communication Standard (29 C.F.R. 1200), the Powered Industrial Trucks Standard (29 C.F.R. 1910.178), and the Lock-out/Tag-out Standard (29 C.F.R. 1910.147) is not required annually.

In addition, Multiplex attributes large costs associated with safety and health committees to an OSHA requirement. In fact, while federal OSHA thoroughly supports employee involvement in workplace safety and health, the agency does not require employers to establish safety and health committees. Multiplex may be referring to a state requirement or recommendation that companies establish joint labor-management safety and health committees. A number of states have found that mandated safety and health committees have improved workplace conditions. For example, the state of Oregon experienced significant improvements in workplace injury and fatality rates after adopting a committee requirement, and employers in the state have not been hampered by the requirements but have instead praised the success of the committee requirement.

Furthermore, Multiplex officials fail to consider the cost savings from reduced injuries and illnesses as a result of workplace safety and health training. For example, under the Lock-out/Tag-out rule, in 1989, one lost workday injury was estimated to cost employers $4,000 on average. For industry as a whole, the savings to employers from injuries prevented were estimated to almost completely offset the up-front costs of compliance with the standard. The savings to society are

substantially greater. Various independent groups, such as the National Safety Council, estimate the cost to society from an injured worker to be several times the above estimate (in 1991, the National Safety Council estimated the cost per death to be $0.7 million and the cost per disabling injury to be $23,000). By this measure, training requirements save society several times what employers initially expend.

With regard to Multiplex's concern about the burden of staying informed about OSHA's regulatory requirements, OSHA has undertaken a number of initiatives to improve the availability of safety and health information to the public and to step up its efforts to provide compliance assistance to employers and employees.

In addition, OSHA recently announced its plans to consolidate separate training and records maintenance provisions to ease the burden on employers of complying with the various training provisions located throughout OSHA's standards. To permit the consolidation and simplification of these individual provisions, OSHA is developing building block regulatory modules covering employee safety and health training and records maintenance. Stakeholder involvement will be an important aspect of these rulemaking initiatives, which will be developed as part of the rulemaking process already initiated by OSHA to develop the safety and health programs standard. Once completed, the training and records maintenance modules will become part of that standard.

Company Concern as Expressed to GAO

Officials from a tank car company said OSHA's Hazard Communication Program (29 C.F.R. 1910.1200) is problematic because it is very costly and, at a company like theirs that does not use many chemicals, generally does not address any real threats. They said the program requires the company to (1) maintain MSDS information at each location for all hazardous chemicals used and (2) train employees to ensure they understand potential chemical hazards and the proper use of safety equipment.

Response GAO Received From OSHA

The HCS ensures that employers and employees have ready access to information regarding the identities and hazards of the chemicals they are potentially exposed to in the workplace. Chemical exposure has been associated with causing adverse health effects, such as lung damage and cancer, and posing physical hazards, such as flammability. Knowledge acquired under the HCS allows employers to better design and implement programs to protect

employees from exposure to hazardous chemicals. Giving employees the "right-to-know" about these chemicals enables them to participate in and support protective measures in their workplace. Together, these actions aim at reducing the incidence of chemical source illnesses and injuries. It is not clear what the tank car company officials mean when they assert that they do not use many chemicals so the HCS "does not address any real threats." The fact that they use only a few chemicals does not mean that the chemicals do not pose hazards.

The HCS requires all workplaces with employees who are exposed to hazardous chemicals to have a written hazard communication program. The HCS is performance-oriented, giving employers the flexibility to adapt the rule to the needs of the workplace situation instead of imposing specific, rigid requirements. The officials are correct in stating that the standard requires that employers make copies of the MSDSs provided by manufacturers and importers for each hazardous chemical accessible to their employees during each workshift. These data sheets provide important information about a chemical's potential hazardous effects and ways of protecting against them. This information is integral to the design of an employer's hazard communication program and the employee's utilization of protective measures. The officials are also correct in stating that HCS requires employers to establish a training and information program for employees exposed to hazardous chemicals in their work area at the time of initial assignment and whenever a new hazard is introduced. Information and training play a critical role in alerting employees to the presence of the hazard, as well as familiarizing them with the information on the data sheets.

The cost of implementing HCS is predicated on the number of chemicals used and the number of employees potentially exposed to those chemicals. Thus, the fewer chemicals a company uses and the fewer employees exposed, the lower the compliance costs of the employer's hazard communication program. If the tank car company uses only a few chemicals, its HCS costs should be limited.

OSHA is committed to improving its current methods of hazard communication in the workplace. OSHA plans to request that the National Advisory Committee on Occupational Safety and Health convene a working group to identify ways to improve hazard communication in the workplace.

Company Concern as Expressed to GAO

Several companies voiced general concerns about OSHA regulations. Multiplex officials said OSHA requirements are usually problematic for the company and could be made less burdensome

through revision and reorganization. They also said OSHA regulations are some of the most costly regulatory requirements.

Zaclon officials said they are never certain whether the company is in compliance because the rules are so complex.

A Metro Machine official suggested that OSHA staff spend time in the field before they start writing regulations to better understand the industry and set realistic, appropriate goals.

In addition, a Minco official said that OSHA requirements are difficult to understand because they are written in a "foreign language" and are constantly changing. She said an environmental engineer is needed to understand OSHA requirements, but few small businesses can afford to hire such specialists. She also said that OSHA rules are not tailored to the needs and abilities of small businesses. She said that when she came to Minco the only chemical they used was alcohol, but the company had to comply with all of the same requirements as a major chemical company that used a variety of dangerous chemicals.

Response GAO Received From OSHA

OSHA recognize that its standards are often complex and written in technical and legal language. This is a real problem for many employers, especially small businesses. To address these and other issues, OSHA is changing its approach to regulations by identifying clear and sensible priorities to address the most pressing new workplace hazards and issues, focusing on key building block rules, eliminating or fixing out-of-date and confusing standards, and emphasizing interaction with business and labor in the development of new rules. As part of its effort to implement common sense regulations, OSHA will rewrite many of its standards in plain language to help make them understandable to real people and easier for employers to comply with.

In response to a presidential directive to each federal agency earlier this year, OSHA conducted a page-by-page review of the agency's existing regulations to identify and weed out duplicative, conflicting, or outdated standards. Many of the rules identified by OSHA's review team as needing to be revised and simplified are industry consensus standards that were adopted wholesale by OSHA in 1971 and left unchanged since then. Over the years, these specification standards have given rise to a large number of complaints and have been the source of considerable controversy.

OSHA's page-by-page review process was conducted with the input of stakeholders through a series of meetings held during May, and

discussions will continue as OSHA begins the implementation phase of this process.

OSHA agrees that it is valuable for OSHA staff to spend time in the field during the development of regulations. OSHA has conducted many site visits in the past and will continue to do so in developing new rules. The agency's increased emphasis on interactions with stakeholders will serve to enhance and highlight its extensive efforts to identify and analyze the characteristics of the affected workplaces and the costs, benefits, and other potential impacts associated with its regulations. Data on current practices are evaluated to determine the degree of existing compliance with regulatory requirements and to enable the agency to project costs and benefits accurately. OSHA's analysis of the impacts of a regulation includes a description of potential costs and benefits; technological and economic feasibility determinations; implications for specific populations, particularly industries or markets; and effects on employment, productivity, international trade, and the environment.

In keeping with administration policy, OSHA attempts to write its new regulations in performance-oriented language. This approach permits employers to select the least costly compliance approach that will meet the standard's health and safety objective as well as the needs of their particular workplace. Thus, small businesses may choose very different methods of complying with a particular requirement than large businesses.

Company Concern as Expressed to GAO

Hospital officials stated that federal agencies should research empirical data, perform cost/risk benefit analyses, and collaborate with interested parties (including providing underlying assumptions and data) before issuing draft regulations for comment. They also said that the goal of regulation should be to provide scientifically based performance standards that have reasonable goals and time frames and a vision of excellence in service of the broader goal of protecting the public.

Response GAO Received From OSHA

OSHA agrees with these commenters that federal agencies should research data and collaborate with interested parties before issuing its proposed rules. For nearly 15 years, OSHA has conducted significant risk analyses to support its occupational safety and health standards. OSHA also prepares economic analyses to demonstrate the economic and technological feasibility of a rule. These are required by statute and court decisions. However, the Supreme Court has specifically held that

cost-benefit analysis can not be used to set health standards under the Occupational Safety and Health Act. [Industrial Union Department v. American Petroleum Institute, 448 U.S. 607 (1980)] OSHA, pursuant to various executive orders, estimates both the costs and the benefits of its regulations. In order to prepare such analyses, OSHA collects extensive data; conducts surveys and literature searches; gathers information and solicits the views of industry and labor groups, academics, and other experts. When a proposed rule is published, a lengthy process of public involvement begins, including extensive time periods for review and comment and opportunities for experts and the public to participate in rulemaking hearings before an administrative law judge.

OSHA's proposed rule document includes, among other things, a description of the hazard; an explanation of the standard; a description of the industries to which the rule will apply; accident, injury, or illness information; an estimate of the costs and evaluation of the benefits of the rule; an analysis of the technological feasibility of the rule; and an analysis of the rule's effect on small firms. OSHA's preliminary risk assessments, which are published with a proposed health standard, present alternative analytical models and assumptions, describe the range of uncertainty bounding its best estimates of risk, and present comparative and substitution risks when appropriate.

Since its creation in 1970, OSHA has performed an invaluable service to millions of hardworking American families by protecting workers from specific hazards and making employers more safety conscious. OSHA's standards are scientifically sound and have made measurable results in the lives of millions of working men and women. For example, since OSHA strengthened trenching protections in 1990, trenching fatalities have declined by 35 percent. OSHA's lead standard saved thousands of smelting and battery plant workers from anemia, nerve disorders, seizures, brain damage, and even death from prolonged exposure to lead. OSHA's cotton dust standard has prevented tens of thousands of byssinosis cases. In December 1991, OSHA issued a rule to protect workers who are routinely exposed to blood or other infectious material from contracting HIV, Hepatitis B, and other bloodborne diseases. According to data provided by CDC, the number of health care workers infected with Hepatitis B has declined by 80 percent from an estimated 5,000 cases in 1992 to 1,012 cases in 1994. (1993 was the first full year that employers were complying with, and OSHA was enforcing, the bloodborne pathogens rule.) These are just a few examples of the benefits of sound regulatory measures that protect the nation's workforce from safety and health hazards.

Company Concern as Expressed to GAO

A Minco official said the ambiguity of certain regulations causes problems for the company. For example, she said a "reasonable" accommodation to one person under ADA may not be "reasonable" to another person. The official said regulatory issues left open to interpretation place a burden on businesses to figure out what they must do. As a result, she said businesses need consultants to understand what OSHA and other regulations require, but few small businesses can afford to hire such specialists.

Response GAO Received From OSHA

The ADA requirement that employers provide reasonable accommodation to individuals with disabilities includes such steps as job restructuring and modification of equipment, but it does not require employers to provide accommodations that impose a hardship on business operations. Enforcement of ADA falls outside the jurisdiction of OSHA.

However, with regard to the company's concern that interpreting OSHA regulations places a burden on business, OSHA recognizes the need to balance the desires of employers who prefer specification standards with those of employers who prefer performance-oriented standards, which allow them to use their professional judgment and expertise to implement the standard's requirements in their unique situations. To assist employers in meeting their obligation to protect worker health and safety, OSHA has undertaken a number of initiatives to provide employers with various compliance assistance tools. For example, a free consultation service is available in every state to help employers identify potential hazards at their workplaces, understand and implement the requirements of the applicable OSHA standards, and improve their safety management systems. The program is specifically targeted toward small businesses and it has helped over 100,000 small and medium-sized businesses identify and correct over 800,000 hazards in the past 5 years.

In addition to the free onsite consultation service, OSHA publishes a wide array of booklets, fact sheets, compliance directives, standards interpretations, and other publications to help employers understand and meet their workplace safety and health obligations. These informational materials are available in hard copy or CD-ROM format, and they are increasingly available through DOL's electronic bulletin board and via the Internet. OSHA is also exploring other ways to use computer technology to provide assistance to employers, including developing additional interactive compliance tools.

Company Concern as Expressed to GAO

Many of the companies GAO spoke with said the federal regulators they deal with are adversarial, not helpful. For example, an official of a tank car company said that dealing with regulations is becoming unmanageable because the company cannot determine what it has to do to comply with many regulations, and regulators are not helpful in clarifying compliance requirements. He also said that working with federal regulators is difficult because they immediately take a punitive stance, are adversarial, and focus on finding violations, not on whether the company meets the intent of the regulations. As a result, lawyers have to be more involved than they used to be.

In addition, officials from a paper company said that regulatory agencies should serve more as "consultants" than as "cops" looking to find violations. For example, OSHA would be more effective preventing injuries through cooperative effort in training and process improvements than through focusing on physical conditions (e.g., the angle of stairs) that are only vaguely related to the reduction of injuries.

Other examples include:

-- Fish farm officials said each agency needs liaisons to tell businesses what regulations they need to meet and to guide businesses through the regulatory maze. They said extensive and complicated regulations create a situation in which consultants and lawyers can essentially hold businesses "hostage."

-- A Minco official said that the company's experience with several regulators has been negative due to what she described as a "police mentality" of enforcement--the "gotcha" syndrome. She said it is "sad" when companies are "afraid of their government" and when companies begin to refer to their government as "them." She said this "us versus them" mentality must change to one in which the government is viewed as a source of assistance and information.

-- Zaclon officials said companies should be able to get advice from the regulators about compliance issues and given a chance to meet the requirements without being fined. They said regulations generally do not allow the inspectors enough flexibility in this regard.

Some companies cited attempts by business and government to share information and work together to improve compliance. For example, officials from a tank car company said that OSHA helped the

company determine compliance requirements for some OSHA regulations. They suggested that other regulatory agencies could use these review commissions to assist businesses in compliance with regulations.

Similarly, officials from the paper company said that voluntary partnership agreements between government and businesses are very effective in achieving change without the difficulties associated with regulations. For example, they said EPA's "33/50" program had a substantive impact on the elimination of 17 of the most hazardous chemicals. The company has reduced its use of these chemicals by 75 percent. Another example is the Voluntary Protection Program effort in OSHA, in which OSHA works with facilities to develop and improve programs to reduce injuries--which, they said should be the standard of success in any OSHA program.

Zaclon officials said the company uses a state safety consultant from the Ohio Bureau of Workers Compensation to clarify the requirements of health and safety regulations. The consultant's assistance is paid for by 1 percent of companies' state workers compensation insurance premiums. The intent of the program is to reduce claims by clarifying OSHA requirements.

Response GAO Received From OSHA

OSHA is committed to increasing safety and health in the workplace and easing the adversarial relationship between regulators and businesses through simplifying regulations and establishing cooperative partnerships with businesses. OSHA also acknowledges that its standards are often complex and difficult to interpret. As part of its effort to implement common sense regulations, OSHA will rewrite many of its standards in plain language to help make them understandable to real people. Furthermore, OSHA is changing its fundamental operating model from one of command and control to one that provides employers with a real choice between cooperative partnerships and a traditional enforcement relationship. This change is designed to separate the good actors from the bad actors in the safety and health area, and to treat them differently.

OSHA recognizes the value of cooperative partnerships in making workplaces safe and has several programs in place to work with and assist employers in a nonconfrontational setting. As mentioned by the paper company official, one such OSHA program is the Voluntary Protection Program. This program is designed to recognize and promote effective safety and health program management. Through the Voluntary Protection Program, cooperative relationships are established between management,

labor, and OSHA at workplaces that have implemented strong programs.

Another such voluntary cooperative program is OSHA's free onsite consultation service. This service, funded largely by OSHA, is delivered by state governments and is requested by employers. The service's highly trained, onsite safety and health consultants help employers recognize hazards in their workplaces; suggest approaches or options for solving a safety or health problem; identify sources of help available to the employer if further assistance is needed; provide a written report summarizing their findings; assist employers in developing or maintaining an effective safety and health program; offer training and education to employers and employees; and, under specified circumstances, recommend workplaces for recognition by OSHA and a 1-year exclusion from general schedule enforcement inspections. This service is confidential, and consultants do not issue citations or propose penalties for violations of federal or state OSHA standards.

Furthermore, OSHA offers a variety of information services, such as publications, audiovisual aids, technical advice, and public speakers. In addition, OSHA's Training Institute provides both basic and advanced safety and health courses for federal and state compliance officers; state consultants; federal agency personnel; and private sector employers, employees, and their representatives.

DEPARTMENT OF TRANSPORTATION (DOT)

Company Concern as Expressed to GAO

Officials from the paper company said DOT-required hazardous materials training is expensive and overly complicated, and enforcement of the rule is unreasonable. Under the regulations (49 C.F.R. 181) that took effect in January 1994, they said employees who deal with hazardous materials must be trained and tested, and the test results must be kept on file. The officials said this training costs the company $475,000 per year. They also said enforcement of the regulation has been arbitrary and capricious. For example, they said DOT inspectors came into one of their facilities and "quizzed" an employee at random. Because he did not answer the question to the DOT inspector's satisfaction, the company was cited for a violation of the regulation.

Response GAO Received From DOT

Regulatory Cites: 49 C.F.R. 172.700-172.704, 174.7, 175.20, 176.13, 177.800(c) and 177.816
Legislative Cites: 49 U.S.C. 5107

A report published by the Congressional Research Service, titled "Should DOT's Training Regulations Affecting Workers Handling, and Drivers Transporting, Hazardous Materials Be Strengthened," maintained that human error is the most probable cause of most transportation-related incidents and associated consequences, involving the release of hazardous materials. In 1990, the Hazardous Materials Transportation Uniform Safety Act was implemented, enhancing the Secretary's authority to protect the nation against risks to life and property that are inherent in the transportation of hazardous materials in commerce. The act specifically required the issuance of regulations requiring that hazmat employers provide training to their hazmat employees. The Hazardous Materials Regulations were revised May 15, 1992, to reflect those requirements. The Hazardous Materials Transportation Uniform Safety Act was recodified in 1994 as the Federal Hazardous Materials Transportation Law. Completion of initial training of hazmat employees was required by October 1, 1993. Recurrent training is required at least once every 2 years.

The purpose of the training requirements is to ensure that each hazmat employee has current knowledge of requirements in the Hazardous Materials Regulations applicable to the specific function performed by the employee. Each hazmat employer is responsible for ensuring that the level of training is adequate and appropriate to the hazmat employee's specific function. The

requirements for training in the Hazardous Materials Regulations provide maximum flexibility to the regulated community to use a variety of training sources. Training programs can be tailored to suit the needs of the hazmat employer. Additionally, training used to satisfy other federal or state requirements, such as those of OSHA, can be used to satisfy the requirements of the Hazardous Materials Regulations, to the extent they address the training requirements in the Hazardous Materials Regulations. Training records support a company's training and certification program and can be used to verify that appropriate training has been conducted.

Enforcement of the training requirement is intended to ensure that each hazmat employee is able to perform his or her functions in compliance with Hazardous Materials Regulations requirements. Random questioning of hazmat employees may provide an indication to an investigator as to whether or not appropriate training has been provided to a hazmat employee. DOT understands from additional information provided by GAO that the "quizzing" example cited involved the Federal Railroad Administration (FRA). FRA enforces the Hazardous Materials Regulations for railroads and those who ship by rail. A routine portion of every inspector's time is spent in educating clients about regulatory requirements. Not only does an FRA inspector initiate client instruction during the course of a compliance examination, FRA inspectors also conduct "formal" training sessions when requested by client companies.

The issue raised by GAO does not state the ultimate handling of the inspector's recommendation and from the data presented, it is not possible for DOT to determine what subsequent action, if any, occurred including whether the company was subsequently found to be in violation of the training regulations. The great majority of defects or discrepancies found by FRA inspectors do not progress into recommendations for civil penalty prosecution. Instead, they provide the basis for the kind of on-the-spot training session described and typically go no further than the learning experience and an immediate correction of the defect. When the noncomplying condition is serious, where harm has already been caused, when the company's general level of compliance is such that mere discussion is considered by the inspector to be ineffective, or when other violation "triggers" are present, the inspector will recommend action. All violation reports are reviewed at regional headquarters for adherence to inspection guidelines and at FRA's Office of Chief Counsel for legal sufficiency before civil penalties are sought. Throughout the process, the respondent has the option of presenting contrary facts and mitigating actions either informally or in a formal proceeding before an administrative hearing officer before a civil penalty order is issued.

Company Concern as Expressed to GAO

An official of a tank car company said the DOT requirement that all of the company's employees receive hazardous materials training is unreasonable because only 1 percent of the company's employees actually deals with hazardous materials. He also said the training is required every 2 years and costs the company approximately $40,000--an expense he said the company would not incur were it not for the requirement. The official said any new employees must also receive the training, which costs the company an additional $10,000. He also questioned the value of the training because it is primarily about how to complete shipping papers to meet DOT requirements.

Response GAO Received From DOT

Regulatory Cites: 49 C.F.R. 172.700 - 172.704, 174.7, 175.20, 176.13, 177.800(c) and 177.816
Legislative Cites: 49 U.S.C. 5107

The overall intent of the Hazardous Materials Regulations training requirement was explained in the previous response. As defined by the Hazardous Materials Regulations and federal hazardous materials transportation law, a hazmat employee is any person who is employed by a hazmat employer and who in the course of employment directly affects hazardous materials transportation safety. A company employee who does not perform a hazmat function or does not directly affect hazardous materials safety, such as classification, packaging, package marking/labeling, preparing shipping papers, operating a vehicle containing a hazardous material, or loading/unloading vehicles, is not subject to the training requirements.

Recurrent training is necessary to ensure that each hazmat employee is knowledgeable in the regulatory requirements directly affecting his or her hazmat function, up-to-date on any applicable regulatory changes, and advised of any new personal safety or protective equipment requirements or procedures. New hazmat employees must be trained in their hazmat transportation responsibilities to ensure the safe transportation of hazardous materials. The Hazardous Materials Regulations provides for a 90-day on-the-job training window. During this 90-day period while training is being conducted, a new hazmat employee may perform hazmat functions provided he or she is under the supervision of a trained hazmat employee.

The allegation that "hazmat training is primarily about how to complete shipping papers to meet DOT requirements" is incorrect. Hazmat employee training must include three categories: (1) general awareness/familiarization, (2) safety, and (3) function-

specific. General awareness/familiarization training is intended to raise a hazmat employee's awareness of the Hazardous Materials Regulations and the purpose and meaning of hazard communication requirements. Safety training is intended to provide information concerning the hazards presented by hazardous materials and procedures to protect the trainee and the public. Function-specific training is intended to provide job-specific training suitable for the function performed by the hazmat employee. For example, a hazmat employee who fills, marks, and labels packages of hazardous materials for transportation must receive specific training in that function but need not be trained in the preparation of shipping papers if he or she does not perform that function.

Company Concern as Expressed to GAO

Officials from the paper company said DOT information collection and retention requirements are unreasonable. They said DOT requires each of the company's several hundred facilities to submit information, such as drivers' logs, shipping papers, and time cards, to company headquarters so that it will be easier for DOT to review them. They said the company spends $200,000 annually complying with this requirement. The officials said the company has no need to maintain a central repository for these records and would not collect them were it not for the DOT requirement.

Response GAO Received From DOT

Regulatory Cites: 49 C.F.R. 382-399

Requirements to maintain records, such as driver's logs, driver's qualification files, and vehicle maintenance records, are part of the Federal Motor Carrier Safety Records, which are issued by the Federal Highway Administration's Office of Motor Carriers. Currently the Federal Motor Carrier Safety Records require that records required by sec. 390.31 be maintained at the motor carrier's principal place of business. The Federal Motor Carrier Safety Records do allow carriers to maintain records at terminal or regional offices upon approval of the Director, Regional Motor Carrier Safety Office. However, in an effort to provide regulatory relief to the motor carrier industry, the Office of Motor Carriers is proposing a regulatory change that would allow motor carriers to store, retrieve, and transfer records for inspection. This proposal is a part of the Office of Motor Carriers' "Zero-based Review" of the Federal Motor Carrier Safety Records. Regulatory changes to the Federal Motor Carrier Safety Records have already been made to the records retention requirements related to drug and alcohol testing records allowing motor carriers to make the records available within 2 business

days (49 C.F.R. 382.401). Also, in response to sec. 113 of the Hazardous Materials Transportation Act of 1994, the Office of Motor Carriers is developing a notice of proposed rulemaking that will clarify the types of records that must be maintained by a motor carrier and is considering proposing that carriers not be required to maintain records at a principal place of business, provided the records are available for inspection.

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION (FAA)

Company Concern as Expressed to GAO

Hospital officials said FAA instituted a costly rule change involving the shift lengths of helicopter pilots. After several helicopter crashes raised safety concerns, FAA limited pilots' shift length to 12 hours during a 24-hour period. Previously, pilots had been able to work 24-hour shifts as long as they had a minimum of 8 hours of rest during the 24-hour shift. The officials said that as a result of this rule change, the hospital had to hire two additional pilots at a cost of $100,000 per year. The officials questioned the net safety gains of this policy change, and the basis--if any--for the policy change.

Response GAO Received From FAA

Regulatory Cite: 14 C.F.R. 135.271

The duty time rules for hospital emergency medical evacuation service pilots as described in the regulation have not changed, and the hospital is not required to limit pilots to 12-hour shifts. A pilot on a hospital emergency medical evacuation service assignment must receive at least 8 hours of rest during any consecutive 24-hour period. The hospital emergency medical evacuation service assignment may not exceed 72 consecutive hours at the hospital. Upon completion of a hospital emergency medical evacuation service assignment, the pilot must be given a rest period of at least 12 consecutive hours for an assignment of less than 48 hours, and at least 16 hours for an assignment of more than 48 hours.

DEPARTMENT OF TRANSPORTATION
FEDERAL RAILROAD ADMINISTRATION (FRA)

Company Concern as Expressed to GAO

An official of a tank car company said FRA fails to ensure consistent application of safety appliance standards across the industry and its interpretations ignore the federal rulemaking process. He also said that FRA requirements are unreasonable and costly. For example, he said recent FRA interpretations of the Railroad Safety Appliance Standards (49 C.F.R. 231) require the company to use fasteners to attach certain safety appliances (e.g., hand brakes, operating platforms) to tank cars in addition to welding them to the cars. He said the industry standard for the past 20 years has been to only weld these safety appliances, an approach that has proven reliable and had been approved by FRA. The official also said their company is the only manufacturer consistently performing this additional procedure required by FRA interpretations because FRA has failed to communicate these interpretations to the rest of the industry. He said this has put the company at a competitive disadvantage. The official said this requirement adds an incremental cost of $260,000 per year to the construction of their tank cars. The official said FRA needs to use the federal rulemaking process so that the clarifications for these standards are public knowledge rather than private interpretations. He also said FRA needs to ensure consistent rulings among the FRA regional inspection offices.

Response GAO Received From FRA

Regulatory Cite: 49 C.F.R. Part 231 (For example, see § 231.1(h)(4).)
Legislative Cite: 49 U.S.C. § 20301 et seq.

FRA's longstanding interpretation of the safety appliance standards declares that all safety appliances must be attached with mechanical fasteners (e.g., "not less than ½" bolts . . . or rivets") and that weldments are not considered to be mechanical fasteners. Contrary to the manufacturer's stated position, it is not permissible, nor has it been "a twenty year industry practice" to weld these devices to railroad cars. The agency has taken a substantial number of exceptions to welded safety appliance supports/brackets and has required that corrective action be taken. The requirement for mechanical fasteners includes brackets/supports applied to the car structure solely for the purpose of securing safety appliances. An exception is made when safety appliances are attached to tank car tanks. In that instance, FRA will permit the continuous welding of brackets to pads that are also attached with a continuous weld. Safety

appliances or supports for safety appliances must then be mechanically fastened to the brackets; welding in addition to mechanical fasteners is permitted. FRA has also permitted the welding of support bars for end-platform assemblies and some permanent fixtures on locomotives to which safety appliances are mechanically secured.

In 1990, FRA set in motion an improvement to its "special" car inspection procedures. A special car inspection is not required by regulation. FRA performs these inspections in an effort to assure compliance with regulations and to eliminate or reduce the costs associated with deviations from the regulations. FRA also works with car builders concerning the safety appliance arrangement in the design of special cars. Car builders wishing FRA to review their equipment for compliance with the safety appliance rules (a special inspection) may request such a study by submitting their safety appliance arrangement drawings to FRA at least 60 days prior to construction of the car. The Office of Safety at FRA headquarters reviews the drawings and advises the builder whether or not a car, built as drawn, will comply with the safety appliance regulations. The builder then notifies FRA 30 days before the actual car is ready for inspection, FRA notifies the appropriate regional office, and the car is inspected, and the maker receives a written report with the results of the inspection.

On occasion problems have arisen due to drawings that are submitted by a car builder that do not provide complete information about dimensions, securement, and other details. Also, at the time that FRA performs a special inspection, some changes in design may have occurred that vary from the drawing submitted earlier. Furthermore, despite its outreach efforts, FRA has experienced incidents where an inspector has taken exception to a minor deviation of the safety appliance regulations or misinterpreted the regulations. FRA has attempted to handle these instances in as expeditious manner as possible to prevent any undue burden or cost to those involved.

As the safety appliance standards have not been significantly revised in more than 20 years, FRA agrees that it may be time to reexamine them. FRA will initiate such a rulemaking proceeding as soon as agency resources permit.

Company Concern as Expressed to GAO

An official from the tank car company said FRA Emergency Order No. 16 has been inappropriately applied to the company, and cost

the company an additional $3.2 million during 1992 and 1993.[8] According to the official, Emergency Order No. 16 required the inspection of all tank cars of a particular design because of repeated defect-related experiences. He said that although it was discovered that the problems could be traced to only one manufacturer of that tank car design, FRA still required that all manufacturers comply with the Emergency Order.

Response GAO Received From FRA

Regulatory Cite: 49 C.F.R. § 211.47 (See also Emergency Order No. 16, (57 FR 11900).)
Legislative Cite: 49 U.S.C. § 20104

A chronology of the events leading to the issuance of Emergency Order No. 16 and the actions taken by FRA subsequent to the Order clearly demonstrate that FRA's actions were appropriate.

Beginning early in 1990, FRA learned of at least 10 noncontinuous center sill tank cars ("stub sill cars") that had pulled apart, that is, experienced a complete failure, in the draft sill area. FRA, the Association of American Railroads, and the Railway Progress Institute, together with individual railroads, car builders, and shippers, worked diligently to discover the reason for the failures and how to prevent them. Several of the failures had happened in Canada, and Transport Canada and the Railway Association of Canada were also involved in the search for solutions. All agencies and participants cooperated to inaugurate an accelerated program of tank car inspections. By January 1992, more cars had failed and enough data had been gathered and analyzed to show that a significant percentage of stub sill tank cars had defects that could lead to sudden and complete failure of the draft assembly--that is, the coupler assembly, and that part of the car structure that holds the coupler, could break apart and fall off. Coupler failures so far had happened in yards, with no loss of the tank car's contents and no injuries. Failure at main line speeds, it was feared, could be disastrous.

At about this same time, and while FRA and Transport Canada were considering how best to carry out their safety mandates and industry groups debated the scope and timing of a stub sill tank car inspection program, on January 18, 1992, in Dragon, Mississippi, a stub sill tank car of a dual-diameter design came totally apart as the train was eased back on the main track from a siding. Dual-diameter cars are larger in the center section

[8]No cost incurred during 1994.

than over the wheels, thus the name. Nearly 30,000 gallons of liquefied petroleum gas, the entire contents, were released and a huge fireball erupted. Because the area was remote, there were no personal injuries, but the National Transportation Safety Board estimated property damage at about $400,000.

Three days later, on January 21, the Association of American Railroads issued an early warning letter with "Stop & Inspect" instructions for all cars built on the same Certificate of Construction. The early warning letter was soon expanded to cover all 115 cars built to the same design as the Dragon car. FRA wrote and telephoned owners of cars of the same design requesting them to remove the cars from service and inspect the welds radiating from the bottom centerline at the union between the transition sheet and the large- and small-diameter portions of the tank. The car that split at Dragon was discovered to have a preexisting circumferential crack in the large diameter weld. It was 21 inches long and at its deepest extended through 95 percent of the tank wall thickness. The crack surface was discovered to be extensively oxidized. It had been exposed to the atmosphere for considerable time.

Dual-diameter tank cars are among the older tank cars in the fleet and carry some of the most volatile and otherwise hazardous products transported in North America. They are frequently used for liquefied petroleum gas, anhydrous ammonia, and vinyl chloride. As in the case of the stub sill tank car fleet generally, repetitive vertical loadings were suspect as a factor in crack initiation and propagation. Unlike draft sill failures, which could happen without significant consequential damage, the failure of a circumferential weld in a tank car is a disaster no matter where it occurs. Even a brief review of past railroad accidents in which a single tank car carrying dangerous chemicals lost its contents demonstrates the dangers involved: multiple deaths, extensive property damage, and severe disruption of the public and private services in the community.

By March 28, 1992, 38 of the 115 Dragon cars had been inspected, and 22 of the 38 had defects analogous to the failed car's. FRA obtained the cooperation of owners of dual-diameter cars of other designs, who agreed to inspect 100 cars--in shops or destined there--to determine whether or not the Dragon defect was endemic or design-limited. The North American fleet contained some 5,000 to 5,500 dual-diameter tank cars, and their impact on the safe transportation of hazardous materials was considered so great that inspections without delay were necessary. If the Dragon car represented the state of the dual-diameter fleet, they all had to be taken out of service immediately. If the Dragon release stemmed from a design-specific feature, confidence needed to be

restored in dual-diameter cars as safe for railroad-borne hazardous materials.

On the basis of its preliminary investigation, the National Transportation Safety Board issued a recommendation to FRA in March regarding the urgent need to inspect a representative sample of dual-diameter tank cars. (National Transportation Safety Board Recommendation R-92-7) FRA agreed and noted that activities taken by several entities in the industry demonstrated a near "unanimity of purpose" among public and private sector interests.

Emergency Order No. 16 was issued April 4, 1992, ordering radiographic (X-ray) inspection of a statistically valid sample of each design of dual-diameter tank car within 60 days. National transportation safety agencies in both Canada and Mexico issued similar orders shortly thereafter. The order cited FRA's uncertainty about whether the Dragon cars were representative of all dual-diameter cars, but it also cited the general age of the dual-diameter fleet, the dangerous products they carry, and the potential for disaster if another catastrophic failure happened. Dual-diameter tank cars flowed into the shops, and on May 15, 1992, FRA issued Notice 2 of the emergency order. The agency noted a 30-percent completion of the sample fleet. Of 59 Dragon cars inspected, 48 were defective; limited samples of other design types showed indications, in their radiography, of crack-like defects. Only after intense analysis by experts in the fields of metallurgy and nondestructive testing was it determined that these defects would not initiate crack growth. As these issues surfaced and were resolved, FRA continued to enforce the order to ensure the highest level of safety. There was still no clear reason why the Dragon cars were bad. FRA noted that inspection points were becoming full and reduced to 20 percent the sample to be inspected in the first 60 days. Owners meeting that requirement were allowed to put cars awaiting inspection back into service. The entire inspection program was extended an additional 90 days, and ultrasound was authorized as an alternative to radiography for inspections.

By August 27, 1992, FRA had accumulated and analyzed significant data: 93 percent of the 100-car "volunteer" sample fleet had been completed, and FRA and industry, using the inspection data, had concluded that the crack phenomenon was due to a single design characteristic. On the Dragon cars alone the sill structure reinforcement plate did not extend beyond the large-diameter weld. Union Tank calculated that the various designs of extended reinforcing plate yielded 3.9 to 8.9 greater fatigue life. FRA also realized that the sampling method unduly burdened small fleets. Notice 3 was issued that day, relieving owners of design types with a population of less than 500 (except the

Dragon design) from further inspection once they had inspected 50 percent of that design type and found no structural flaws. The Emergency Order No. 16 had borne fruit in 5 months: the critical design feature was identified and confidence was restored in the other 5,000 cars of this type.

In response to specific points raised by GAO, FRA notes:

- "Emergency Order No. 16 required the inspection of all tank cars of a particular design." Emergency Order No. 16 never required more than a statistical sample to be inspected; when the data revealed that small fleets were disadvantaged, Notice 3 amended the sample size. Over all, about half of the dual-diameter cars were inspected.

- ". . . although it was discovered that the problems could be traced to only one manufacturer of the tank car design, FRA still required that all manufacturers comply . . . . " As early as the original order, FRA stated its uncertainty about whether the Dragon cars were representative and cited the public safety need to find out. Notice 2 reported no structural defects in other designs but no clear reason why the Dragon design was failing. Less than 5 months after the order was first issued, Notice 3 reported that the extended sill structure reinforcing plate appeared to be the key difference between a successful design and one that failed. FRA made a judgement call based on the potential harm to the American people. The decision to issue Emergency Order No. 16 was endorsed by tank car builders; the railroads; the AAR Tank Car Committee, including all of the shipper association member representatives: and the National Transportation Safety Board.

- [Emergency Order No. 16] ". . . cost the company an additional $3.2 million during 1992 and 1993." FRA is aware that Emergency Order 16-required inspections were not cheap; however, the judgement that dual-diameter cars had to be inspected was sound. FRA's actions to hold costs down are demonstrated by the deadline extension and "return to service" provision of Notice 2; by the authorization of ultrasound as an inspection method as soon as the protocol for its use was developed; and by the reduction in the total sample to be inspected, announced in Notice 3, as soon as the reason for the bad behavior of the Dragon cars was proved.

In December 1992, the National Transportation Safety Board classified recommendation R-92-7 "Closed-Acceptable Action" with the comment that FRA's response was "prompt and responsive." FRA believes that the record proves Emergency Order No. 16 was a good emergency order and was properly administered.

DEPARTMENT OF THE TREASURY
FINANCIAL CRIMES ENFORCEMENT NETWORK (FinCEN)

Company Concern as Expressed to GAO

Bank B officials considered the reporting requirements under the Bank Secrecy Act time consuming, of negligible value to law enforcement, and of no value to banks. Under this act, banks are required to report financial activity by individuals depositing $10,000 or more in cash daily. In many cases, they said, the reports track legitimate transactions involving businesses that handle large amounts of cash on a daily basis (e.g., gas stations) rather than identifying any potential criminal activity. The officials said that the reports are time-consuming to prepare and require about 60 lines of information. They said that for single cash transactions of $10,000 or more, the act requires the bank to complete the report while the depositor is still in the bank. Furthermore, the act requires that the bank review its total deposits for the day and report individuals with multiple transactions totaling $10,000 or more. The latter situation requires the bank to review transactions from all of its branches and follow up with the customer to complete the report.

While the intent of the act was to identify criminal activity, bank officials said they have seen little evidence of the federal government or law enforcement agencies using the information they provided on these forms. They said few prosecutions have occurred as the result of the bank's reporting these transactions. Bank officials said the reporting requirement should be changed, requiring banks to report only suspicious activity rather than all daily $10,000 cash transactions.

Response GAO Received From FinCEN

The Currency and Foreign Transactions Reporting Act (commonly known as the "Bank Secrecy Act"), Pub. L. 91-508, as amended, codified at 12 U.S.C. Section 1829b, 12 U.S.C. Sections 1951-1959, and 31 U.S.C. Sections 5311-5330, authorizes the Secretary of the Treasury, inter alia, to issue regulations requiring financial institutions to (i) keep records and file reports that are determined to have a high degree of usefulness in criminal, tax, and regulatory matters; (ii) implement anti-money laundering programs and compliance procedures; and (iii) report potentially suspicious transactions to the federal government. Regulations implementing Title II of the Bank Secrecy Act (codified at 31 U.S.C. Sections 5311-5330) appear at 31 C.F.R. Part 103.

The Bank Secrecy Act is the core of Treasury's program to combat financial crimes, including money laundering and tax evasion.

For the reasons stated below, FinCEN respectfully disagrees with Bank B officials' assertions that the reporting requirements of the Bank Secrecy Act are of negligible value to law enforcement. Moreover, FinCEN believes that recent efforts to streamline the regulatory reporting process more than adequately address the previous industry concerns of complexity and burdensome reporting. For example, Treasury (1) issued an interim regulation on April 24, 1996, that eliminates the requirement that banks report all transactions in excess of $10,000 between banks and certain classes of exempt persons, and (2) estimated the change would reduce filings by up to 2 million forms annually.

Bank B's fear that the Bank Secrecy Act data is insufficiently used is unfounded. Today there are over 90,000,000 records of financial information in Treasury's financial database. During last year alone, the database was queried over 1.9 million times. This number includes not only queries by federal law enforcement but also by state and local law enforcement throughout the 50 states in a new innovative program called "Project Gateway." This program provides each state with on-line access to the database for specific law enforcement needs. In general, the information reported to Treasury pursuant to the Bank Secrecy Act creates an invaluable paper trail for investigators to follow as they track criminals and their assets. It is used as a critical tool in criminal, tax and regulatory proceedings for building investigative leads, identifying individuals and organizations involved in illicit financial activity, and disclosing unreported income. Moreover, this information is a valuable investigative tool for most major crimes since there is likely to be a financial component in virtually every criminal case conducted for profit.

Although compliance with the reporting of currency transactions under the Bank Secrecy Act is generally high today, this was not always the case. In fact, the Bank Secrecy Act was enacted because of the large-scale misuse of the financial community by money launderers and other financial criminals. Thus, the information not only provides investigative leads to law enforcement and banking communities it has also severely curtailed the frequency of customers attempting to negotiate large and unexplained currency transactions. However, money launderers have developed more sophisticated schemes in the form of wire transfers, monetary instruments, collateralized loans to offshore shell corporations, and other methods of payment that may not involve currency. Discerning between legitimate and illicit activity in these instances is far more difficult.

FinCEN's agrees in part with the comments of Bank B that the most effective way to combat financial crime is to reduce routine

regulatory burdens and, with the assistance of the financial community, develop programs that look beyond currency to include all facets of financial activity vulnerable to money laundering. In the near future, FinCEN will issue a proposed regulation that will dramatically change the reporting obligations of banks to permit and facilitate exemption from reporting on the currency transactions of a broad range of commercial accounts, government agencies, and national and regional businesses in which regular, recurring currency activity is characteristic and customary. This should eliminate routine currency reporting of the kind mentioned by Bank B and reduce the number of annual filings by several millions.

As a first step, FinCEN has already reduced regulatory burden by revising the Currency Transaction Report, simplifying recordkeeping requirements for the purchase of monetary instruments, and withdrawing unnecessary proposed regulations that would have required mandatory aggregation and magnetic filing. Going forward, FinCEN is expanding the scope of the Bank Secrecy Act and creating a level playing field by requiring that securities broker dealers, casinos, check cashers, and money transmitters implement similar anti-money laundering programs.

FinCEN also realizes it must do more with the information it receives. Soon, guidelines on "Know Your Customer" programs will be issued that will provide better direction as to when, to whom, and what types of activity should be reported as suspicious. Currently, the Central Transaction Report data is being reviewed by Artificial Intelligence Systems at FinCEN and the Internal Revenue Service (IRS). By this fall, FinCEN, in partnership with the federal bank regulatory agencies, will have put in place a consistent and streamlined process for filing suspicious activity reports that will automate this information, ease the burden of filing multiple copies of suspicious activity reports, and provide greater historical and proactive use of the data. This approach will be mutually beneficial to the government and private industry by concentrating on quality rather than quantity.

With respect to two other points raised by Bank B, FinCEN notes the following clarifications. First, once a financial institution has obtained and verified certain basic identification information about a customer, the institution can rely upon this information and thus not require the customer to remain on site each time a reportable transaction is conducted. In addition, most banks employ software programs that facilitate the completion of the Central Transaction Report by linking this responsibility with other functions of the bank's automated information systems. Second, the Bank Secrecy Act regulations do not require banks to aggregate multiple transactions under

$10,000. Rather, multiple transactions must be reported only if the bank has knowledge that a customer's aggregate currency transactions exceed $10,000 in a day.

FinCEN believes that over the past year it has taken several important steps in securing a partnership with the financial services community to jointly identify further regulatory changes that will reduce existing burdens while enhancing Treasury's anti-money laundering controls.

DEPARTMENT OF TREASURY
INTERNAL REVENUE SERVICE (IRS)

Company Concern as Expressed to GAO

According to representatives of the fish farm, 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 identification of indirect expenses associated with such construction projects is time consuming and expensive. In the final analysis, they said, the company had to pay higher taxes because their deductions decreased and taxable income increased.

Response GAO Received From IRS

The fish farm representatives made two comments regarding application of the Uniform Capitalization Rules of section 263A to self-constructed assets. First, identification of the indirect costs required to be capitalized under section 263A is time-consuming and expensive. Second, because section 263A requires the taxpayer to capitalize expenses that were immediately deductible under prior law, capitalization results in a decrease in deductions and, therefore, an increase in taxable income.

Although identification of indirect costs may in fact be time consuming and expensive, the requirement to capitalize indirect costs allocable to the production of self-constructed assets was established by statute rather than by IRS regulations. The uniform capitalization rules were enacted by Congress 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. For further information as to pre-1987 law and the reasons for the enactment by Congress of the uniform capitalization rules, see H.R. Rep. No. 99-426, 99th Cong., 1st

Sess. 615 (1985); and S. Rep. No. 99-313, 99th Cong., 2nd Sess. 133 (1986).

IRS and Treasury have taken steps to minimize the burden of complying with these rules. In some cases, for example, taxpayers may use a simplified method to determine the additional section 263A costs that must be allocated to certain self-constructed assets that are used in the taxpayer's trade or business and not held for sale to customers. (Treasury Reg. section 1.263A-2(b). Because this simplified method does not apply to all types of self-constructed assets, this regulation should be reviewed by the fish farm representatives in order to determine the extent to which the method may be used by the taxpayer.

In summary, the requirement to capitalize indirect costs has been imposed by Congress. Congress clearly intended that section 263A would result in a decrease in the taxpayer's current deductions and a corresponding increase in taxable income.

Company Concern as Expressed to GAO

Officials from Multiplex Company, Inc. mentioned two problems related to the administration of their 401(k) thrift savings plan.[9] First, they said administration of the IRS-required nondiscrimination test[10] for the plan is costly (about $3,500 in 1994) and complex, and the requirements are constantly changing (thereby adding to the complexity). Furthermore, since IRS lowered the amount of money that can be contributed to the plan from $30,000 to approximately $9,000 per year, the officials believe the tests are of questionable value because it is less likely that higher income employees will dominate the plan. Second, they believe the IRS requirement that the company provide

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[9]401(k) savings plans are deferred compensation plans for employees provided by their employer. A 401(k) plan allows employee contributions of before-tax dollars to a retirement account. Taxes are deferred on the employee contributions to the plan. Participating employees also benefit from tax-free accumulation of 401(k) investment and may obtain additional benefits if the employer matches part of the employee contribution.

[10]Nondiscrimination tests are used to limit the contribution amount that highly compensated employees may elect to defer for a 401(k) savings plan in relation to other employees. The tests are required on an annual basis.

a separate audit of its 401(k) plan is an unnecessary expense. They said a large, accredited insurance company manages the company's savings plan along with numerous other companies' plans in one large fund, and the fund goes through a yearly, detailed audit certification. They said IRS should simply use the aggregated fund audit to satisfy the requirement rather than require a separate audit of the company's fund (which they said cost the company approximately $6,000).

Response GAO Received From IRS

The requirements of which the companies complain are imposed by statute. The "IRS-required nondiscrimination test" mentioned by Multiplex appears to refer to the actual deferral percentage test, which is required by section 401(k)(3) of the Internal Revenue Code. Similarly, the limit on deferrals under a 401(k) plan is imposed by section 402(g) of the Internal Revenue Code. It is thus incorrect to claim, as the company does, that the "IRS lowered the amount of money that can be contributed."

Finally, neither the Internal Revenue Code nor the regulations of the Internal Revenue Service require "a separate audit" of plans. The requirements for audited financial statements of employers' plans arise under Title I of Employee Retirement Income Security Act of 1974 (ERISA), which is administered by DOL.

Company Concern as Expressed to GAO

An official from Multiplex Company, Inc. said the regulations for Employee Stock Ownership Plans (ESOP) are costly and require administrative tasks of questionable value. He said the company spent about $7,000 more than it would have spent in 1994 to administer its ESOP because of the regulations. He also said that about half of the administrative tasks the regulations require him to perform are unnecessary.

Response GAO Received From IRS

ESOPs are a special type of qualified retirement plan, invested primarily in employer securities, that offer certain tax benefits beyond the substantial benefits offered by other qualified plans. ESOPs are also exempt from some of the prohibited transaction rules applicable to other qualified plans. For example, ESOPs may be leveraged and have been used to facilitate billions of dollars of corporate financing. Therefore, the law includes safeguards to ensure that ESOPs are not used exclusively to provide corporate benefits but also to benefit employees and beneficiaries. Although the official quoted in the draft report asserts that "half the administrative tasks the regulations require him to perform are unnecessary," the report does not say

which requirements he believes are unnecessary or why. Treasury and IRS have been involved in ongoing efforts to simplify and coordinate the administrative laws in the pension area. For example, with respect to ESOPs, Treasury and IRS recently issued a Revenue Ruling that eliminated a conflict between DOL and IRS over the voting requirements applicable to employer stock held by the plan.

Company Concern as Expressed to GAO

Bank A officials said frequent changes to the tax code are costly because the bank must hire consultants to assess the effect of the changes on bank operations. They said the bank spends approximately $8,000 per year for tax consulting and tax return preparation services. Bank officials said simplifying the tax code would alleviate their problem and reduce their tax-related expenses.

Response GAO Received From IRS

Bank A's officials made two comments. First, frequent changes to the tax code are costly. Second, simplifying the tax code would be beneficial.

With respect to the first point, the Treasury Department and IRS are quite sympathetic to taxpayer concern that frequent changes to the tax code increase the cost of compliance for taxpayers. Leslie B. Samuels, Assistant Secretary of the Treasury (Tax Policy), in his statement before the Subcommittee on Select Revenue Measures of the House Committee on Ways and Means (the Subcommittee), stated on September 21, 1993:

> "We would urge the Subcommittee...to consider the importance of stability in the tax law. An argument can be made that additional changes to the Internal Revenue Code should be minimized for a period of time sufficient to allow taxpayers and their advisers to absorb the significant changes that have just been made in the Omnibus Budget Reconciliation Act of 1993."

The Department of the Treasury and IRS are also in favor of simplifying the tax code. In his statement before the Subcommittee on June 22, 1993, Mr. Samuels said:

> "Complexity in the tax law raises serious compliance and administrative problems. These problems have grown over time and now deserve serious attention. Accordingly, we look forward to working with interested parties and Congress in developing simplification proposals..."

Although stability and simplicity in the tax law are clearly desirable, the competing concerns of deficit reduction, economic growth, equitable treatment of taxpayers, and improved compliance and enforcement of IRS' tax laws must also be considered. Moreover, taxpayers seeking favorable tax legislation are unfettered by a desire for stability or simplicity.

The Department of the Treasury and IRS have on many occasions helped reduce the burden of changes in the law by means of transitional provisions and regulations that create "safe harbors," i.e., statements that given tax results will apply if certain facts and circumstances are present to simplify the application of certain tax code provisions. For example, section 475 of the Internal Revenue Code requires dealers in securities (including most banks that regularly make loans to customers) to "mark-to-market" their inventory. The Department of the Treasury and IRS issued Temporary Treasury Regulation section 1.475(c)-1T(b) providing an exemption from section 475 for banks and other financial institutions that sell no more than a negligible portion (as defined in the regulations) of their loans.

Company Concern as Expressed to GAO

An official from a computer component testing facility said IRS sometimes has the wrong enforcement attitude. She said an IRS representative walked into their office at noon about 4 years ago and, without prior notification, demanded a check for $150,000 or she would "see that the doors were locked." The company official said she knew the company had paid its taxes and, after further investigation, she discovered that IRS had applied the company's taxes to the wrong account for several months. The company official said the IRS representative was "nasty" with both the receptionist and their accounting office staff. The official said a letter of apology from IRS after the error was discovered would have helped change the company's impression of IRS, but an apology has never come and the experience is still bitter.

Response GAO Received From IRS

An official from a computer component testing facility described an incident wherein IRS had applied the company's taxes to the wrong account for several months. Although the error eventually was corrected, an IRS representative behaved in a "nasty" manner.

On the basis of the facts presented, IRS does not approve of the employee's behavior. Current Internal Revenue Manual guidelines, policies, and procedures stress that professional courtesy should be extended to taxpayers at all times while collecting the proper

amount of tax due. Those standards were apparently not met in the circumstances described.

All IRS employees are expected to carry out their duties in a fair and equitable manner. Occasionally, as shown in this example, an employee fails to meet those expectations. If this failure is brought to the attention of an IRS manager, an employee could be subject to disciplinary action for such failure. In all cases, IRS insists that employees carry out their responsibilities in a professional and ethical manner with fairness to all taxpayers.

When the IRS makes an error in applying payments, such as in this example, its formal procedures require that a letter be issued advising the taxpayer of the corrective action and apologizing for the error and any inconvenience caused. Those procedures should have been followed under the circumstances described in this example, and IRS would like to apologize to the taxpayer for the failure of those procedures in this case.

Company Concern as Expressed to GAO

Officials from Multiplex Company, Inc. said IRS auditors conducting an audit in 1994 were not knowledgeable about business accounting practices or IRS rules. They also believed that the auditors had aggressive "gotcha" attitudes that indicated they were more interested in generating additional tax revenue than understanding the company's tax reports. Company officials did not believe the time IRS spent on the audit (about 18 months) justified the results for the government (no additional revenue was collected) or the expenses the company incurred to defend itself (approximately $20,000).

Response GAO Received From IRS

Multiplex officials said IRS auditors conducting an audit in 1994 were not knowledgeable about business accounting practices or IRS rules.

During the past several years, IRS has begun to focus its efforts on improving the processes and systems used to address noncompliance. A key objective is to develop a highly skilled front-line workforce. One of the programs designed to achieve that objective is the Market Segment Specialization Program. Market specialization is intended to accelerate the skill and occupational specialization of Examination personnel.

The Market Segment Specialization Program is based on regionally or locally developed projects focusing on particular market segments. A project identifies noncompliance areas within the

market segment, develops market-specific audit techniques, and trains IRS examiners to address noncompliance matters common to the market segment. The Market Segment Specialization Program focuses on the practical problems of auditing the market (including business practices unique to that market) and identifies particular facts that the examiner should look for to determine if an issue common in the market segment is present. One of the products of the Market Segment Specialization Program are Audit Techniques Handbooks. To date, Market Segment Specialization Program Audit Techniques Handbooks have been published for 18 markets, and 38 additional Handbooks are being drafted.

As the Market Segment Specialization Program is expanded to more markets and more examiners are involved in Market Segment Specialization Program, taxpayers' concern about examiners' knowledge of particular accounting practices should be lessened. Additionally, as examiners become more knowledgeable about the industries being examined, the amount of time taken to complete an examination should be reduced.

ENVIRONMENTAL PROTECTION AGENCY (EPA)

Company Concern as Expressed to GAO

Officials from the packaging manufacturer said that the Clean Air Act's (CAA) regulations are the most problematic for the company, with incremental costs of over $100,000 in 1994. The officials said that these costs have caused the company to shift resources away from revenue-producing activities and towards regulatory compliance functions that have little or no productive value and constrain company growth.

Response GAO Received From EPA

Packaging manufacturers can be major emitters of volatile organic compounds (VOC), a principal constituent in the formation of ground-level ozone (smog). Ozone is a pervasive pollutant that produces a variety of health effects, particularly affecting the respiratory systems of children, the elderly and infirm, and people with preexisting respiratory disease.

Since the packaging manufacturer was located in an area that was not meeting the national air quality standards for ground-level ozone, it was subject to limitations on its VOC emissions. The company had options for limiting these emissions (for example, it could have added a control device to its process, or it could have used less-polluting raw materials in its process). Although EPA cannot comment on the control cost incurred by the company without more information than was provided, EPA cannot agree that the control measures are unproductive. The reduced emissions do improve air quality and protect the health of the sensitive groups described above. Since the area in which the company is located has employed the VOC control measures, it is now meeting the national standard for ozone. Although it may be true in this case that the company's costs may not generate revenue, many firms have found that process improvements that prevent pollution in the first place (as opposed to controls introduced at the top of the stack) can yield efficiencies that greatly reduce the cost of clean air compliance.

Legal Citations
Statute: Clean Air Act
Regulation: 40 C.F.R. 52.520(c)76

Company Concern as Expressed to GAO

Officials from a glass company said CAA and its amendments are problematic for the company because of the delays associated with permitting complexity and the uncertainty associated with complex regulations that require case-by-case interpretation. For

example, they said the Prevention of Significant Deterioration permitting program under CAA is so complex that even the experts they hire do not agree as to what is required. They said the company wanted to build a factory in a "clean air" area but wound up having to comply with both "clean air" and "dirty air" requirements just to get the permit.

Response GAO Received From EPA

EPA agrees that the permitting process is frequently too complex and confusing. EPA will soon be proposing a regulatory reform package that will streamline the permitting process by reducing its complexity and providing more clarity and certainty to industry, states and the public. The proposed reform changes were drawn from extensive deliberations of EPA's CAA Advisory Committee, a body comprising representatives from industry, state/local air pollution control agency officials, and environmental groups.

It is difficult to understand or respond to the specific concerns raised in this case, because GAO was unable to provide EPA with specific details about the glass company. In a general sense, however, it is important to note that the major new source permitting requirements in "clean" areas are based on a case-by-case review of the pollution control options and a review of the industrial source's impact on air quality. In the vast majority of situations, states are responsible for these reviews and the ensuing decisions. In almost all cases, permits issued to new major sources do not need to meet requirements applicable in areas with "dirty" air, such as the use of the most stringent controls available or emission offsets.

Since each permit review is case-specific and therefore unique, there may be limited circumstances in which permitting requirements designed for "dirty" air are appropriately required for sources locating in a clean air area. For example, the emissions from a new facility emitting more than 250 tons/year of a given pollutant located in a clean area could contribute to an air quality violation in an adjacent area. Or they might cause the clean area to become dirty, or adversely affect a National Park or Wilderness area. In such cases, the industry's permit might incorporate strategies otherwise reserved for sources located in dirty areas. Again, without more specific information, it is difficult to respond to this specific example.

Legal Citations
Statute: CAA Parts C and D (sections 160, ff, 173)
Regulation: 40 C.F.R. 51.165-6, 52.21, Appendix S

Company Concern as Expressed to GAO

Paper company officials said Congress is the source of many of their regulatory problems. They said Congress tends to be too prescriptive in its legislation (e.g., CAA) because it does not believe agencies can develop regulations needed to reflect legislative intent. Company officials said Congress' tendency to be prescriptive and specific is driven even further by lobbyists on both sides of the issues. They said they believed that agencies would do a better job of writing sensible regulations if the legislation were not so constraining.

Response GAO Received From EPA

EPA continues to work with Congress and all other stakeholders to exercise common sense in the protection of public health and the environment. The Agency's current work with states, industry, and public interest groups under the Common Sense Initiative and Project XL are indicative of EPA's commitment to explore all opportunities within its statutory authority to employ cheaper, cleaner, smarter methods of environmental protection while fully upholding the law in every instance.

Company Concern as Expressed to GAO

Officials from the paper company told GAO that Title V of CAA is a problematic regulation because it regulates extremely low levels of emissions, and it is very expensive to prepare the required air permit applications. 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 at the company's fence line. Company officials said that the typical cost of a consultant to get a permit for a minor mill is $40,000 to $50,000 and $200,000 to $300,000 for larger facilities. They said the company will spend $10 million on Title V permits over a 3-year period. Furthermore, the officials did not believe that Title V will improve the air quality at all and that the money could be better spent on other pollution abatement.

Response GAO Received From EPA

The Title V operating permit program does not "regulate" emissions in the same sense that federal or state emission standards regulate emissions. Title V is administrative--it simply consolidates all the federal and state requirements that apply to a facility and helps ensure compliance with those requirements. The emission levels that trigger Title V coverage are specified in CAA. These levels range from 10 to 100 tons of emissions per year, depending on the pollutant and/or the

location of the emissions' source. Companies capable of emissions above these levels are called "major" sources under the act. There are approximately 34,000 major sources nationwide. At least 10 times as many industrial sources have lower emissions and are not currently subject to Title V requirements.

The company claims that it is required to get a Title V permit because of methanol emissions that at the fence line "are no more concentrated than the methanol in a person's breath," It is unclear on what technical basis the company might make such a statement. It is important to note that for hazardous air pollutants, 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. Many paper mills easily exceed these thresholds. Although specific information about the company and its emissions was not provided, the impression given by the vignette is that an amount of methanol too small to worry about is the only reason paper mills are subject to Title V. This is seriously misleading. 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. A typical mill also emits hundreds, if not thousands, of tons of other pollutants, including smog-producing hydrocarbons and particulate matter. Even if paper mills emitted no methanol at all, emissions of pollutants other than methanol would easily justify the need for them to obtain Title V permits.

The company also expressed concern about the expense of preparing permit applications. EPA agrees with these concerns and has taken steps to address this problem. Earlier this year, as states began receiving permit applications, EPA became aware of high costs and other burdens associated with some applications. In response, on July 10, 1995, EPA developed and widely distributed guidance specifically intended to reduce the cost and burden of permit applications. This guidance has been well received by industry and is now being implemented by the states. Discussions with industry indicate that this guidance is having an immediate effect and will substantially reduce the cost of permit applications.

Finally, the company believes that Title V will not improve air quality. EPA strongly disagrees. As a result of Title V permit requirements, companies are discovering and controlling emissions from boilers, storage tanks, etc. that would not otherwise have been controlled. Companies are discovering and fixing compliance problems. One state suggested that in about 85 percent of their applications the companies did not previously know all of the applicable requirements under the act. Other states report similar experiences. In other words, companies are discovering and controlling emissions from boilers, storage tanks, etc. that

would not have otherwise been controlled. As companies comply with Title V requirements, emissions will be reduced and air quality will improve. Moreover, the provisions of Title V that require companies to certify that they are in compliance, along with the provisions for improved monitoring, should significantly boost national compliance rates and result in cleaner air. It's important to note that these improvements in air quality as a result of Title V will be achieved at far less cost than if states had to adopt new, more stringent regulations to reduce air pollution.

Legal Citations
Statute: CAA sections 502,503
Regulation: 40 C.F.R. Part 70

Company Concern as Expressed to GAO

Zaclon officials said the company is currently exempt from Title V of CAA because its air discharges are below the levels that trigger coverage. However, the regulations are reportedly problematic for the company because of the continuous vigilance needed to stay below those limits and, thus, continue to be exempt. The regulations have also caused a reluctance by company officials to expand their business because of the potential that their emissions would increase and trigger Title V coverage.

Response GAO Received From EPA

The Title V permits program, along with other CAA requirements, apply to major industrial sources that have the ability to emit pollutants at rates greater than those specified by CAA. Conversely, if the emissions from sources are held below CAA thresholds, then the permit requirements do not apply. Zaclon, and any other source that emits air pollutants regulated under the act, has a responsibility to ensure that emissions stay below the levels that apply to them. The vast majority of sources track their emissions to ensure they remain below the emission thresholds in the act. However, once emissions are sufficiently great as to qualify a company as a Title V source, then it is appropriate for it to be subject to the same CAA requirements as any other source emitting major volumes of air pollutants.

As a rule, Title V does not require any additional emission control requirements. It is simply a program requiring a facility with major emissions to maintain a single permit that incorporates all its emissions limits. Industry officials annually certify compliance with the permit. This leads to improved compliance rates and cleaner air.

Legal Citations
Statute: CAA section 502, 503, 504
Regulation: 40 C.F.R. Part 70

Company Concern as Expressed to GAO

Officials from the paper company said that they object to the requirement under Title V that plant managers sign a statement, under penalty of imprisonment, that they are in compliance with all rules at the time to get a permit. They said that signing the statement can be very risky when dealing with regulated materials that may be released into the air in trace amounts and are difficult for the company to detect.

Response GAO Received From EPA

The operating permits provisions, known as Title V, were added to CAA in order to ensure better compliance with pollution control requirements by requiring individual sources to maintain a single permit that includes all of a company's federal and state air pollution requirements. This enables better accountability for compliance and results in a cleaner environment. Experience with the permit applications to date has indeed shown that compliance is being improved at many facilities. Under the permits program, the owner of a facility must certify that the facility is in compliance with the requirements of the permit. Better compliance at these facilities means more progress toward healthy air quality from compliance with existing regulations; without this progress, states would have to adopt additional regulations to meet air quality standards.

The paper company officials' description of the potential risk associated with signing Title V compliance statements is misleading. EPA has a variety of actions it can take, (e.g., issuing an administrative penalty order), depending upon the nature of the problem with the permit. Initiating criminal action would be rare and appropriate only in the most serious circumstances, for example, if someone were to knowingly falsify or omit pertinent information.

The paper company officials' concerns about detecting and certifying trace amounts of regulated materials are addressed by recent EPA guidance to ease implementation of the operating permits program. For example, where hazardous air pollutants are present in trace amounts, the guidance states that permit applicants do not need to quantify the amounts or attempt to collect more data unless required to do so by the state or local agency. The guidance also provides that in many cases a general description of emissions (such as simple identification of the significant pollutant or family of pollutants emitted by the

emission unit) should meet the Title V requirements. In cases where emissions estimates of hazardous air pollutants are required, the guidance allows use of information that is sufficient to support a reasonable belief of compliance, such as credible engineering projections, emissions test data, or emissions factors available in a number of EPA documents.

Legal Citations
Statute: CAA sections 503, 504
Regulation: 40 C.F.R. Part 70

Company Concern as Expressed to GAO

Officials from the tank car company said they consider CAA's requirement for VOC reports problematic for several reasons. First, the officials said the company should not be required to prepare the reports because their VOC emissions are lower than oil refineries and mining companies, which are exempt from this requirement. Second, they said the reporting standards are unnecessarily inflexible, as evidenced by the fact that the company is not allowed to average VOCs released. Third, the officials said the reports are expensive to produce; 1 employee spends all of his time preparing separate VOC reports for 13 facilities in 10 different states.

Response GAO Received From EPA

EPA asked GAO for further information about this facility because EPA believed that on its face the complaint did not make sense to them. Since GAO told EPA that the company did not want to provide additional information, EPA believes it is impossible to tell what "VOC reports" the company is referring to. GAO also told EPA that the complaint is referring to a state requirement that is being implemented through section 114 of CAA. Because EPA does not know what state is requiring the reports, or the nature of the reports, EPA is unable to respond in any meaningful way. In a general sense, many states have air pollution control requirements that are different or more stringent than federal requirements. That could be the case in this instance.

Company Concern as Expressed to GAO

Officials from the petrochemical company said that the benzene emissions standards under the National Emissions Standards for Hazardous Air Pollutants impose substantial costs on businesses, but the relatively small benefits are outweighed by unintended consequences. The officials said EPA estimated that employers' compliance costs would be $200 to $300 million, but they said petroleum refiners alone have spent $2 billion during the compliance period from August 1991 through December 1994. They

said the petrochemical company incurred significant capital expenditures to enclose refinery sewer and treatment systems, and the standard requires a tremendous amount of ongoing maintenance, inspection, and recordkeeping. Regarding benefits, the officials said that a conservative EPA risk model showed in 1989 that less than one case of leukemia would be prevented annually due to controls on refineries and chemical plants. However, they said that the danger of enclosing flammable mixtures of hydrocarbon gases has been shown to pose a greater risk than the calculated reduction in cancer risk. EPA's revised model reportedly shows no justification for the rule to exist.

Response GAO Received From EPA

This company raises several concerns. First, EPA disagrees with the petrochemical company's portrayal of the costs and benefits associated with this regulation. EPA issued a Regulatory Impact Analysis for the benzene waste air regulation that estimated the nationwide capital cost for the rule to be $250 million, with total annual cost estimated at $87 million. The petroleum refiners' compliance cost estimate of $2 billion was made prior to EPA's amendment of the rule in 1993 and so is not relevant to the rule currently in force. Even at the time the industry estimate greatly overstated costs attributable to the prior rule, since it was based on an extrapolation from a few facilities and improperly assumed the need to control many units that were already in compliance.

Many plants in fact incurred higher costs than EPA estimated because they coordinated compliance with this rule with requirements under two other environmental laws--the Resource Conservation and Recovery Act (RCRA) and the Clean Water Act (CWA). For example, many refineries replaced impoundments with tanks to comply with CWA discharge permit conditions and RCRA groundwater protection regulations. The cost of these coordinated actions substantially exceeded the cost attributable to the benzene waste rule alone.

Second, the 1989 EPA risk estimate referred to by the petrochemical company officials was based on the limited data that were available during development of the benzene waste regulation. Subsequent sampling by industry found much more benzene in waste emissions than EPA had estimated in 1989, substantially increasing risk reduction under the rule. Moreover, controlling benzene emissions provides additional benefits in that it significantly reduces emissions of at least nine other hazardous air pollutants, as well as VOC that are a key component of ground-level ozone (smog). Ground-level ozone causes respiratory and other problems in people living in many American cities. Due to the multimedia compliance approaches

taken by many facilities, additional benefits will accrue from reducing pollutant emissions to other media.

Third, with regard to the explosion hazard issue, the benzene waste rule would tend to decrease, not increase, this risk. Prior to the rule many systems were open to the atmosphere, a condition that renders flammable the mixtures of hydrocarbon gases in the vicinity. The rule requires enclosing the waste management operations. This means that air, a key component of flammable mixtures, is kept out of the system, tending to reduce the danger.

Finally, EPA does not agree that there is no justification for the rule. While industry modeling with EPA's revised Human Exposure Model and the 1989 data does show the risk of benzene exposure to be less than EPA estimates, it is not sufficiently different to affect a decision about whether the rule is justified. This is particularly so in light of the more recent data (discussed above) from industry sampling showing higher benzene content in waste.

Legal Citations
Statute: CAA section 112
Regulation: 40 C.F.R. 61.340, Subpart FF

Company Concern as Expressed to GAO

Officials from the packaging manufacturer said the process local environmental officials use to approve construction permits under CAA is very lengthy and expensive. They said the company applied for two construction permits to install two new pieces of equipment. They said the company obtained one permit within 2 months, but it has taken more than 1 year to obtain the second permit. They said the permit process stalled when state CAA regulations changed, requiring the company to pass more stringent tests for its emissions. They said testing costs have increased from about $10,000 under the old regulations to $30,000 under the new regulations. Company officials believe they should not have had to comply with the new regulations because they initiated the permit process under the old rules.

Response GAO Received From EPA

The packaging company says the permit process stalled when state regulations under CAA changed, requiring the company to pass more stringent tests for its emissions. However, in the state in question, a change in state CAA requirements would not cause a delay in permit issuance. If the state agency fails to meet the time lines specified in its rules, an applicant receives a permit

by default. The most frequent cause of delays in permit issuance is actually incomplete information provided by the applicant.

The local air pollution control agency involved in this circumstance believes that the packaging company may be referring to an operating permit that took approximately 11 months to issue due to incomplete application information provided by the company. The company initially would not perform the appropriate "capture efficiency" test they had accepted in the construction permit due to concerns regarding the cost of the test method. Once the test had been performed and the application was complete, the local agency issued the operating permit in less than 90 days. The company did not experience any interruption of production operations due to the delay in obtaining an operating permit. While the permit was in question, the local agency allowed the company to continue operating.

Part of the concern raised is the increase in cost for the test method required of the company. In 1990, EPA published a guidance document detailing new testing procedures to determine capture efficiency. This new method drew numerous complaints that it was too costly. EPA agreed to reexamine alternative methods for determining capture efficiency and undertook a joint study with industry. Pending the completion of the study, EPA allowed states to choose among methods contained in previous guidance, providing greater flexibility for determining alternative methods. The state in question chose to continue the capture efficiency guidance issued by EPA in 1990 because of its superior accuracy. EPA has since published the new test method based on the joint EPA-industry study, resulting in equivalent accuracy at a much lower cost. states are currently in the process of adopting the new method.

This example illustrates two principles. One is that the search for accurate, low-cost test methods is similar to any other scientific inquiry: progress is likely to be made in stages as new knowledge and experience promote technical innovation. EPA provides guidance to endorse the best proven methods at any given time and updates that guidance to support superior methods when they become available. Second, the search for better, cheaper methods works well when EPA and industry cooperate by sharing relevant information and experience in a process of open exchange. EPA's current work under the Common Sense Initiative and Project XL, which involves the Agency in extensive negotiations with industry, states, and public interest groups to devise cheaper, cleaner methods of environmental protection, are examples of the way EPA is applying this principle, not only to the development of test methods, but to broader policy areas as well.

Legal Citations
Statute: CAA
Regulation: 40 C.F.R. 52.520 (c) 76

Company Concern as Expressed to GAO

Officials from the packaging manufacturer believed that local officials responsible for enforcing EPA requirements have harassed the company and assessed fines that were excessive compared to the problems identified. For example, they said during a 1987 inspection of the company's facilities, examiners from the local Environmental Protection Commission (EPC) found a malfunctioning damper light on an incinerator used for burning isopropyl alcohol. They said that although the bulb was burned out, the inspector determined that the machine was still operating properly. Nevertheless, EPC fined the company $1,500 for this violation, which company officials believe was excessive since the inspection was on newly installed equipment.
In another instance, the packaging manufacturer officials said EPC examiners did not give the company the time permitted in the regulations for notifying the Commission of malfunctioning equipment before imposing substantial fines. According to company officials, an incinerator motor malfunctioned on the day the EPC staff visited the company for a routine inspection. Company officials said that their operating permit allowed them an 8-hour grace period in this kind of situation during which they were to contact EPC. Because EPC representatives were on site at the time the motor failed, company officials said they assumed that constituted notification. Two weeks after the inspection, however, the officials said the company received a letter from EPC fining them $50,000 for violating the notification requirement. According to company officials, they fought EPC over this fine, and EPC eventually admitted the fine should not have been assessed. However, on the advice of their attorney the company reportedly agreed to pay a significantly lower fine ($7,000) to keep peace with the regulator. Company officials added they have no idea how EPC decides how much the fines should be in any given situation. They suggested that environmental regulators do more cost-benefit analyses before establishing regulations and, when a regulator identifies noncompliance, before developing solutions and levying fines.

Response GAO Received From EPA

The issue raised here does not involve the U.S. EPA, but instead relates to enforcement actions by a local air quality agency. An EPA regional office contacted the state and county in question and asked them to respond. On August 25, 1995, the local air pollution control agency sent EPA a seven-page letter addressing

the issues raised by the company. The following paragraphs are excerpted from the letter addressing this specific complaint.

Excerpt from local air pollution control agency letter to EPA:

"(The firm) contends that our agency has 'harassed' the company and 'assessed fines that were excessive compared to the problems identified.' (The firm) cites two examples which we will address individually.

"Example 1: (The firm) refers to a 1987 inspection at its facility that resulted in enforcement action by our agency. Review of our files reveals that no enforcement actions resulted from inspections of the facility in 1987. Based on the information provided, we believe that the incident to which (the firm) refers resulted from an inspection conducted on May 19, 1988. The inspectors found that each flexographic printing press at the facility had two capture hoods ducting to a main duct to the incinerator. The incinerator was not used for 'burning isopropyl alcohol,' but was and is still used as the primary air pollution control device for VOC emissions from the operation. Contrary to the application they submitted and the permit they received, (the firm) had installed by-pass vents for each hood. On the day of the inspection, the inspectors found that both capture hoods for press #4 were in the by-pass mode, allowing the VOC emissions to by-pass the incinerator and vent directly to the atmosphere. In addition, the by-pass damper for press #2 was leaking.

"We initiated enforcement action for circumvention of an air pollution control device, and (the firm) agreed to settle the matter by Consent Order. The total penalty in this case, calculated in accordance with our penalty guidelines, was $1,000. (The firm) reimbursed us an additional $165 in enforcement costs, in accordance with local rule. In addition, (the firm) agreed to install an alarm mechanism to indicate to operators that the dampers were open. After signing the Consent Order, (the firm) submitted a plan that included the installation of an indicator lamp. Contrary to (the firm's) description of events, there was no damper light on the incinerator at the time of our inspection, and the enforcement action was not based on 'a malfunctioning damper light.'

"Example 2: The second example given by (the firm) relates to an enforcement action initiated in 1993. Several items were addressed in our initial notice to the company. (The firm) conducted a compliance test in the spring of 1993, and test results revealed that (the firm) emitted VOCs in excess of its permitted limits, as well as failing to achieve the capture and destruction efficiencies required of the incinerator. During an

unannounced follow-up inspection in June of the same year, we found that (the firm) was operating its presses, but the incinerator that controls VOC emissions from the presses was not operating.

"The original penalty calculation in this case was $54,000, but it was based on all of the above violations, not failure to notify. It should be noted that the original penalty amount was increased because of the facility's history of noncompliance; a circumvention violation (1988) and a destruction efficiency test failure (1989). At no time did anyone from this agency ever "admit the fine should not have been assessed." We do not assess nor collect penalties if at any time during the settlement process we receive information to indicate that a violation did not occur. All penalty calculations are based on our agency's penalty assessment guidelines, and we adhere to strict procedures in the application of those guidelines. The guidelines are referenced in our Memorandum of Agreement with EPA Region IV. Additionally, officials (of the firm) knew exactly how our penalties were calculated because we provided them with copies of our penalty calculations. A copy of the original calculation was provided to (the firm's) environmental consultant on September 1, 1993, and to (the firm's) attorney on September 6. At a September 29 settlement meeting, attended by officials (of the firm), the penalty calculation was discussed in detail. At that time, (the firm) proposed paying a modest cash penalty and supplementing it with an environmentally beneficial project.

"We used EPA policy regarding Supplemental Environmental Projects (SEP), with assistance from Region IV, to ensure that (the firm's) project would be consistent with nationwide policy. It is our understanding that the SEP policy was crafted to allow for greater flexibility in the enforcement process and to encourage environmental improvements. This is consistent with the Administrator's "Excellence in Leadership" program known commonly as Project XL. We worked cooperatively with (the firm) to ensure that the project would benefit the environment and that the company would be able to use its funds to improve its operation, rather than pay a cash penalty into our Pollution Recovery Fund. All terms of settlement, including the SEP, were included in a Consent Order signed by [the] President of (the firm). It is both ironic and unfortunate that our first venture into a settlement agreement that included a SEP, which we crafted cooperatively and amicably with (the firm), resulted in unfounded criticism of this nature."

Legal Citations
Statute: CAA
Regulation: 40 C.F.R. 52.520 (c)76

Company Concern as Expressed to GAO

A Metro Machine Corporation official said states interpret and implement certain federal regulations differently and also apply their own rules on top of these federal requirements, both of which cause problems for the company. According to the official, there seems to be a lot of confusion with CAA amendments of 1990 and their implementation. The official said CAA is so complicated that different states implement it differently. As a result, he was concerned that the act's requirements have not been applied consistently across states or within states. The official said the company experienced lengthy delays trying to obtain Title V permits in both Virginia and Pennsylvania (states in which the company operates) because the states do not seem to know how to implement the title. He suggested that EPA clarify CAA to ensure uniform state administration of the act and, therefore, a level playing field among companies.

Response GAO Received From EPA

CAA addresses a wide variety of air pollution problems, including urban air quality (smog, carbon monoxide, etc.), rural air quality, visibility degradation, automobile pollution, acid rain, destruction of the ozone layer, and toxic air pollutants (those that are known or suspected of causing cancer or other serious health effects, like birth defects or reproductive effects). There are a number of factors that make CAA complex: there are thousands of sources of pollution that contribute to the various problems (often one source of pollution, like refineries or power plants, can contribute to several problems); pollution from one city or state contributes to pollution problems in downwind cities and states; and the nature of air pollution problems varies significantly from city to city, meaning that local air pollution control strategies in Tulsa, for example, will differ significantly from those implemented in Los Angeles or Boston.

In many cases, CAA requires EPA to establish minimum national criteria that states or local agencies are required to meet. However, states and local areas are often able to set different or more stringent requirements. Many do; some do not. In any case, this state flexibility is a basic principle of CAA.

The Title V permits program cited in the example is a case in point. Before the 1990 amendments to CAA, more than 40 states and several local agencies had some form of operating permit programs. Some were very detailed and had been in place for many years. Some contained minimal requirements. Others addressed only new sources and had no program at all for plants already in operation. Title V of the 1990 amendments required EPA to establish minimum criteria that would apply nationally. In doing

so, EPA has held thousands of hours of discussions with states, local agencies, industry representatives, and environmental groups in an effort to design a program that is flexible enough for states to adopt their own programs, while still providing adequate national consistency. In developing the regulation and reviewing state programs, EPA has weighed these issues carefully and has tried to provide a level playing field for companies operating in different states.

Legal Citations
Statute: CAA sections 502, 503, 504
Regulation: 40 C.F.R. Part 70

Company Concern as Expressed to GAO

An official from Metro Machine Corporation said his company and others in the area are shut down when regional air pollution exceeds certain levels. However, he maintained that the region's periodic air quality problems are not primarily caused by industry but by automobile emissions. He said the problems generally occur during holiday periods (particularly Labor Day, Memorial Day, and the Fourth of July) when the company is usually closed or operating at a low capacity but auto traffic is heavy. The official also said that air quality results are skewed because monitors are located near heavily traveled tunnels and highways.

Response GAO Received From EPA

The company's characterization in the first sentence seems to suggest that they were "shut down" by some external authority -- not that they were voluntarily closed or operating at a low capacity due to the holidays. EPA has learned, however, that the latter situation actually pertained, that the company had made a business decision to cease or reduce its operations at a time that coincided with a local exceedance of air standards.

The issue being raised by Metro Machine relates to ground-level ozone or smog. The area in question does not meet national air quality standards for ground-level ozone, which is caused when emissions of VOC and nitrogen oxides combine in the presence of heat and sunlight.

In a typical city with smog problems, motor vehicles contribute about 30 percent of the VOC emissions, and off-road engines/vehicles contribute another 10 percent. The remainder of VOC emissions come from large and small industrial operations, solvent use, and other sources. In a typical city, utility and industrial boilers contribute about 30-40 percent of total nitrogen oxide emissions. These percentages vary from city to

city, but most cities have programs in place to address emissions from both mobile (e.g., cars) and stationary (e.g., factories) sources.

EPA has issued a number of national rules dramatically reducing motor vehicle-related emissions, including tighter tailpipe standards, cleaner fuel standards, fuel evaporation standards, and refueling standards. Controlling only the motor vehicle portion of the problem, however, does not usually solve the smog problem, and many cities implement local, state, or nationally required air pollution control programs to reduce emissions from factories, chemical plants, refineries, etc.

The monitors mentioned by the company near tunnels and highways are for a different air quality problem (carbon monoxide, not smog). Carbon monoxide monitors are strategically placed in heavy traffic areas to track carbon monoxide emissions where they tend to occur.

Legal Citations
Statute: CAA, section 181, ff.

Company Concern as Expressed to GAO

Multiplex officials said EPA's requirements to control ozone-depleting refrigerant gases pursuant to the Montreal Protocol are costly for the company. They estimated that the requirements cost the company $200,000 in 1991 and approximately $100,000 annually each subsequent year, mostly for engineering redesigns. They also said many of the costs the company incurred were unnecessary costs. For example, they said that in 1994 the company

--paid Underwriters Laboratories over $32,000 to recertify all of their products, even though the required refrigerant changeovers did not improve product efficiency or cause significant design changes;

--purchased a charging board (a device to put refrigerant in units) for $75,000 to handle all five different refrigerant gases EPA allowed to be used during the transition period, when they could have bought a $20,000 charging board to handle two gases if EPA had used the final standard in the beginning; and

--paid $65,000 for engineering modifications for what company officials considered "non-productive work" because the redesigns were only changes to the units so they could handle the intermediate and final standard refrigerant gases.

Multiplex officials also said the Montreal Protocol requirements do not recognize the company's resource restrictions because the federal government did not ensure that small- and medium-size companies had input into the shape of these requirements.

Response GAO Received From EPA

Costs cited by Multiplex result from the United States' agreement to participate in the international phaseout of chlorofluorocarbons and other ozone-depleting substances under the Montreal Protocol. Currently, over 150 nations, representing over 95 percent of the world's consumption of such substances, are parties to the Protocol. The United State's participation in the Protocol is estimated to result in 940,000 fewer skin cancer deaths and in over 58 million fewer cases of skin cancer in the U.S. alone.

The growing inability to obtain these ozone-depleting refrigerants influenced Multiplex to redesign its products. EPA is aware that manufacturers and owners of equipment that use these refrigerants may incur costs as a result of the international decision to phase out these chemicals. Consequently, many of the activities of EPA's Stratospheric Protection Division (SPD) are directed toward assisting companies like Multiplex to efficiently and economically convert equipment to use refrigerants that will continue to be available. In response to Multiplex's complaint in this GAO report, SPD has offered to advise Multiplex on its transition to substitute refrigerants.

It should be clear, however, that none of the Montreal Protocol, CAA, or EPA regulations specify what substitute refrigerants are to be used. EPA regulations, however, do require that any substitutes must reduce overall risks to human health and the environment. Beyond this, there are no federal requirements, or, as stated in the last paragraph of the vignette, "Montreal Protocol requirements." Under both the Protocol and EPA regulations, it is assumed that industry is best able to determine what substitutes are appropriate. Multiplex refers to costs the company would not have incurred "if EPA had used the final standard in the beginning," and Multiplex refers to "intermediate and final standard refrigerant gases." EPA has never established either an intermediate or a final standard, nor did EPA "allow to be used" different refrigerants during a "transition period."

More likely, Multiplex decided to convert to what are known in the industry as "service refrigerants"--low-ozone-depleting refrigerants that will be available until their phase-out 15 to 25 years from now. When those service refrigerants are phased

out, equipment will either have to be converted again to use non-ozone-depleting (NOD) refrigerants, or be replaced with new equipment that uses these NOD refrigerants. Multiplex's decision to convert to a service (or, as they call it, "intermediate") refrigerant, and later to an NOD refrigerant, however, was its own.

Multiplex also states that it had to pay Underwriters Laboratories to recertify all of its products. The cost cited evidently resulted from a marketplace demand for Underwriters Laboratories-certified products, not from any EPA requirement. The Underwriters Laboratories issued standards (UL 2170-2172) for conversion of products to use alternative refrigerants. If these standards are followed, Underwriters Laboratories approval can be maintained after conversion so that recertification is not required. Either the published Underwriters Laboratories standards do not apply to Multiplex's products, or Multiplex did not follow the Underwriters Laboratories standards in performing the redesign of their products.

Legal Citations
Regulations: 40 C.F.R. 80.10 et seq.

Company Concern as Expressed to GAO

Zaclon officials said that the process of obtaining a NPDES permit to operate their waste water treatment plant is costly and punitive. They said the company spent about $200,000 in 1993 for capital improvements to their treatment facility to meet new permit discharge limits, and the annual cost for the permit is about $9,500. Company officials also believe that the NPDES concept of "antidegradation" is punitive. Under antidegradation, they said that if a company voluntarily lowers its discharges it is subsequently held to these new lower discharge levels on future permit renewals. Any discharge above these lower levels, even if below the previously permitted levels, is considered a violation. The officials also said that this requirement discourages the company from expanding because any increase in company operations could increase discharges, which would violate the new lower standard they just met.

Response GAO Received From EPA

In order to understand the circumstances referenced in this and several of the vignettes describing CWA, it is necessary to have a basic knowledge of the structure of the program. In essence, CWA requires EPA and states (or Tribes) to establish effluent limitations as necessary to protect fish and wildlife, provide for recreation in and on the water, and prohibit the discharge of

toxic pollutants in toxic amounts. The basic mechanism for carrying out this mission for direct discharges is the NPDES permit. This permit includes limitations as necessary to meet the various technology-based requirements of the act and water quality standards, generally set by the states. A water quality standard consists of three components: 1) designation of a use that a water body is intended to support (e.g., fishing, swimming, or some lower-order function); 2) science-based criteria that define the concentrations of pollutants that cannot be exceeded in the water body in order to meet that use; and 3) antidegradation standards. NPDES permits are the enforceable agreements within which discharge limits are specified. States are responsible for issuing water quality standards for their own waters. EPA approves the standards set by each state and issues technical guidance to support each state's selection of water quality criteria. The technology-based requirements of the act can be set in either of two ways: 1) by EPA's Administrator in the form of Effluent Guidelines, which are national regulations, based on the best available technology, that frame minimum technological standards for pollution control to be met by each industry; or 2) by the permit writer on a case-by case basis.

In many cases, permits can be written based on the technical "floor" stated in the nationally applicable Effluent Guideline for each industry. This allows the water quality standard to be met while ensuring that each facility in the industry is contributing equally to the desired environmental objective. In cases where the water quality standard cannot be met through adherence to the technology "floor," however, the state designates the stream as "Water Quality Limited" and imposes stricter permit limits to ensure reasonable further progress toward meeting the water quality standard.

EPA is responsible for the issuance and enforcement of NPDES permits unless EPA authorizes a state to perform these functions through formal delegation of the program. At present, 40 states are carrying out all, or virtually all, field operations connected with NPDES permits, and it is the Agency's objective to authorize all states to carry out the program. While EPA has general responsibility to oversee state programs to ensure they are consistent with CWA, it is unusual at this time for EPA to intervene in individual state decisions under the act.

In the situation cited by Zaclon, Ohio EPA (OEPA) has an approved state program to issue NPDES permits allowing facilities to discharge to waters of the United States. Zaclon's permit has limits for toxic pollutants (e.g., metals, cyanide, and ammonia). However, since Zaclon is situated on the Cuyahoga River, which the state of Ohio has designated a Water Quality Limited stream, OEPA imposed limitations more stringent than those in the

national Effluent Guideline, since technology-based limits are not sufficient to protect water quality. In 1991 OEPA developed water quality-based limitations for Zaclon, which became effective in 1994. EPA does not have sufficient information to comment with any certainty on Zaclon's costs of $200,000. This may well be "in the ballpark" for a facility that waited until the last minute and absorbed all its capital improvement costs at once. However, many facilities in this industry chose to initiate process and technology changes earlier to comply with effluent guidelines in anticipation of impending water quality standards. Consequently they spread out their costs over a longer implementation schedule and, in some cases, undoubtedly began to reap the economic benefits of improved process efficiency.

Zaclon recently ceased discharging wastes into the Water Quality Limited stream and began instead to discharge its process waters to the local municipal sewage treatment plant. Zaclon is now subject to pretreatment standards, that is, the requirement to treat its waste stream prior to discharge so that it can be safely and effectively treated by the local sewer authority.

Zaclon believes it is constrained by the "antidegradation" provisions of CWA. Rather than "antidegradation," which carries a different meaning from that implied by the context, EPA believes that Zaclon officials are actually referring to "anti-backsliding" provisions. Anti-backsliding prohibits the relaxation of effluent limits, standards, or conditions contained in a permit upon reissuance, renewal, or modification of the permit unless certain criteria are met. Anti-backsliding is not a punitive policy of a regulatory agency, but rather an express CWA requirement (sections 303(d) and 402(o)). These provisions reflect the goals of section 101(a) to encourage reasonable further progress toward the zero discharge of pollutants. The anti-backsliding provisions may allow a plant to expand its operations, provided any resulting increase in discharges do not violate water quality standards. However, since Zaclon is now discharging to the municipal waste treatment plant, rather than to a Water Quality Limited stream, the issue may no longer be relevant.

Legal Citations

Statute: Clean Water Act (as amended by Water Quality Act of 1987, Pub. L. 100-4, February 4, 1987) Sections 101(a) (goals & policy); 301(a) (permit required for discharge); 301(b), 304(b) (technology-based effluent guidelines); 302 (water quality related effluent limitations); 303, 304(a) (water quality standards and criteria), 402 (NPDES permits); 307(b),(c),(d), 402(b) (pretreatment program).

Regulations: EPA Administered Permit Programs: NPDES; 40 C.F.R. Part 122. State Program Requirements; 40 C.F.R. Part 123. Criteria and Standards for NPDES, 40 C.F.R. Part 125. General Pretreatment Regulations for Existing and New Sources, 40 C.F.R. Part 403. Effluent Guidelines for the Organic Chemicals, Plastics and Synthetic Fibers Category, 40 C.F.R. Part 414.Effluent Guidelines for the Inorganic Chemicals Manufacturing Category, 40 C.F.R. Part 415.

Company Concern as Expressed to GAO

A tank car company official said the company could not understand why EPA required a federal NPDES permit, which was a duplication of the information filed with a state agency to obtain a state NPDES permit. He said the failure of EPA to honor a state permit, which required the same stringent standards, caused duplication of effort and of data submission. After 2 years of debate and the issuance of an EPA Administrative Order, EPA reportedly fined the company several hundred thousand dollars for not obtaining a federal permit. The company official also said EPA would not work with the company regarding this issue or consider the state permit as evidence of good faith. According to the company official, the company decided to "cut its losses" and just pay the fine, rather than pay for litigation.

Response GAO Received From EPA

EPA has learned from GAO that the subject facility is located in Evangeline Parish, Louisiana, and EPA believes it knows which firm is involved. At the time of the referenced action the facility was discharging directly to a small stream adjacent to its plant. Subsequently, and perhaps in response to the enforcement action, the plant has elected to discharge all its wastewater to the city of Ville Platte wastewater treatment plant.

Louisiana is one of the relatively few states that has not applied for and received EPA authorization to administer the NPDES permit program. Contrary to the company's statement, Louisiana does not have a permit system equivalent to the NPDES program. While it is true that the state issued a wastewater discharge permit to the facility, the permit did not accurately reflect the nature of the discharge, nor the actual operations on site, and so it was neither legally nor practically the equivalent of an NPDES permit.

Although a state may choose to separately regulate discharges to surface waters, it cannot issue permits enforceable under CWA unless the state has received authorization by EPA to operate an NPDES program. If a state has not received authorization, then a

federal NPDES permit is required to regulate point sources discharges despite concurrent regulation under a state permit program.

Circumstances such as those cited by this company illustrate why EPA strongly encourages states to obtain NPDES authorization as a way to reduce duplication of effort. The state of Louisiana has recently taken a renewed interest in obtaining NPDES authorization. It submitted a draft package for NPDES program assumption in January 1995, and significant progress has been made in the last few months. EPA is working closely with the state and expects to be able to approve a final package some time in 1996. By this time next year, Louisiana is expected to have a single permit system for water discharges covering both federal and state requirements.

Legal Citations
Statute: Clean Water Act, Sections 301(a) (permit required for discharge); 401 (state certification), 402 (NPDES permits).

Company Concern as Expressed to GAO

Zaclon officials believe CWA regulations should focus more on the quality of water at the point of final discharge rather than on the upstream processes. According to company officials, until recently, CWA regulations focused on the cleanliness of the water at the point it left the company's property. However, they said that recently, regulators have required separate limits and treatment facilities for the company's two different Standard Industrial Code operations. They said the company's current treatment facility combines the discharges from both operations before cleaning them. This combining process also has the effect of diluting the individual discharges, which they said is also not allowed under the current regulations. According to company officials, even the dilution that occurs from rain that falls in the open treatment facility tank violates the regulations.

Response GAO Received From EPA

CWA requires industries to meet effluent limitations in order to reduce or eliminate toxic pollutant discharges to the nation's waters. As discussed previously, Zaclon recently stopped discharging process wastewater (toxic due to zinc) to the Cuyahoga River. It now sends its discharge to a publicly owned treatment works (POTW) operated by the City of Cleveland. As a result, Zaclon is now an "indirect discharger" regulated under the National Pretreatment Program. Under this program, indirect dischargers are subject to local limits, developed by the POTW, which may be more stringent and more extensive than the national standards promulgated by EPA.

ENCLOSURE I

At times the rules that apply to a given industrial operation may appear numerous and complex. In most cases this complexity reflects the multiple activities taking place that must be controlled to protect public health and the environment. In the case of Zaclon, EPA's national General Pretreatment Regulations (40 C.F.R. Part 403) apply, as do certain national "categorical standards" issued under EPA's industrial effluent guidelines. Based on its industrial processes, Zaclon is subject to two of these categorical standards: one for Inorganic Chemicals Manufacturing (40 C.F.R. Part 415) and one for Organic Chemicals, Plastics and Synthetic Fibers (40 C.F.R. Part 414). To complicate matters, Zaclon has a tenant on its property, a metal finisher that is subject to Part 433 electroplating regulations, including a zinc limitation of 2.61 mg/l.

EPA's General Pretreatment Regulations specifically provide for the combination of waste streams from different industrial indirect discharger categories, as well as for subsequent downstream monitoring after the waste streams are combined. However, the regulations contain a formula that adjusts the permit requirements to account for the additional volume gained from combining waste streams. This ensures that the facility meets its obligation to treat the waste and remove contaminants prior to discharge. State and local pretreatment requirements may otherwise limit or prohibit such approaches and require monitoring upstream in the industrial processes.

State officials advise that Zaclon combines its own wastewaters with wastewaters from the tenant's metal finishing activity, and then again with contaminated storm water runoff from the whole facility, before the combined stream flows into the wastewater treatment works. The contaminated storm water is collected in a holding lagoon before it is used to dilute the process waters prior to treatment. The stormwater is troublesome for two reasons: 1) it carries contaminants previously deposited on the site by a prior owner over a century of operations involving such practices as outdoor sludge storage; and 2) its sheer volume overwhelms the other waste streams, impairing the treatment of contaminants from the less voluminous sources.

Zaclon's practice of diluting its waste streams prior to treatment is not allowable under EPA or local regulations. That is why Zaclon must monitor the pollution concentration in each stream prior to its combination with the others. The concern about dilution occurs because many standards are expressed in terms of the concentration of a pollutant (e.g., milligrams per liter) that must not be exceeded in the final discharge. If dilution were allowed to artificially reduce the concentration, it would enable the discharger to achieve compliance with little or no treatment or consequent environmental benefit. In such a

case, publicly owned treatment works would be exposed to pollutant overload, and environmental toxics might pass through the works inadequately treated.

Dilution of process waste streams that occurs when rain falls into the open treatment tank is not prohibited under EPA's regulations. Nevertheless, states approved by EPA to administer the Pretreatment Program, and local jurisdictions administering their own Pretreatment Programs, may impose any additional requirements they believe necessary to meet state water quality standards and to protect the operations of the POTW from unacceptable influent (incoming waste water). Indeed, CWA specifically provides for such autonomy. EPA presumes that principle is operating here.

Legal Citations
Statute: Clean Water Act, Sections 301(b), 304(b) (effluent guidelines); 402 (NPDES permits).
Regulations: EPA Administered Permit Programs: NPDES; Establishing limitations, standards, and other permit conditions, 40 C.F.R. 122.44. Calculating NPDES permit conditions, 40 C.F.R. 122.45. State Program Requirements; Requirements for permitting, 40 C.F.R. 123.25. Criteria and Standards for NPDES, 40 C.F.R. Part 125. General Pretreatment Regulations for Existing and New Sources, 40 C.F.R. 403.6. Effluent Guidelines for the Organic Chemicals, Plastics and Synthetic Fibers Category, 40 C.F.R. Part 414. Effluent Guidelines for the Inorganic Chemicals Manufacturing Category, 40 C.F.R. Part 415.

Company Concern as Expressed to GAO

A Metro Machine Corporation official said that EPA regulators set unreasonable, costly, and inappropriate goals because they do not understand the industries they are trying to regulate or the capabilities of existing technology. The official said the company agrees with EPA's environmental goals, but he said that regulators set regulations that are not relevant to the industry and set unrealistic requirements that are not attainable or verifiable with current treatment technology and measurement systems. For example, the official said the federally promulgated Water Quality Standards (40 C.F.R. Part 131 Subpart D) require that 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 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. He said EPA staff should spend time in the field and consider the practical side of attainment before they starting writing regulations. Doing so, he said, would allow EPA to better

understand the industries it regulates and set realistic, appropriate goals.

Response GAO Received From EPA

Metro Machine is located in Virginia, which is authorized to administer the NPDES program. The Virginia Water Control Board issued the NPDES permit that controls Metro's waste discharges to a Water Quality Limited stream. As discussed above, a Water Quality Limited stream is one for which the installation of the control technology specified in the applicable Effluent Guidelines will not suffice to meet its designated use (e.g. fishability or swimability). In such cases, CWA requires efforts beyond the minimum in order to ensure reasonable progress toward meeting the water quality standard. It is therefore understandable that the company considers the controls needed to meet its limits to be exceptionally rigorous. EPA agrees that the application of control technology to achieve incremental improvements at the far reach of the treatment scale can be extremely costly relative to initial efforts to control the first big slug of pollution. That is why EPA has encouraged firms to consider process changes that will prevent pollution in the first place, rather than remove it at the end of the process. EPA's Project XL is an ideal opportunity for industry to test alternative methods of pollution control without undue restriction from rigid procedural requirements.

In general, EPA agrees with the commentor that regulators should "spend time in the field and consider the practical side of attainment before they start writing regulations." This is a principal reason EPA encourages states to manage the NPDES permit program, because EPA believes state officials are closer to, and consequently more sensitive to, site-specific conditions that should reasonably inform their decisions.

In this case, Metro cites 40 C.F.R. Part 131, Subpart D, as imposing an unreasonable burden. The statement is confusing because this citation is the codification of a standard set by a Native American Tribe to be applied in certain areas of Arizona. It does not apply in the state of Virginia. Generally speaking, water quality standards are not set at levels "cleaner than rainwater." Of course, rainwater is not always and everywhere "clean." So there can be situations in some parts of the country where discharge effluents might be required to be cleaner than certain episodes of precipitation. This would occur where airborne pollutants (such as mercury or acidic contaminants) contribute to exceedance of the water quality standard. It is possible, too, that Metro officials are using the term "rainwater" to refer to contaminated runoff after a storm

incident, in which case the discharge limit would obviously be set at a cleaner level.

As a general consideration, it seems possible that the commentor does not understand that the state (or Native American Tribe), not EPA, sets the water quality standard that governs the designation of a stream as Water Quality Limited. Water quality criteria are assigned to meet the stream's designated uses. These criteria describe the impact of a pollutant on aquatic life and human health and are based on scientific considerations. CWA stipulates that analytical detection limits, available treatment technologies, and costs of treatment are not considered in the development of water quality criteria. This is because the impact of a pollutant on aquatic life or on human health is a fact unrelated to these considerations or, for that matter, to the nature of the industry producing the pollutant. Establishment of the scientific basis for these criteria is expensive and laborious, and EPA offers its nationally developed criteria as guidance to save redundant effort and support state decisions in the establishment of water quality standards.

In formulating its water quality standards, a state may adopt EPA-developed criteria, develop its own scientifically based water quality criteria, or develop site-specific criteria to reflect local water chemistry or the adaptability of resident aquatic species. As it happens, Virginia decided to adopt water quality criteria developed by EPA (for copper, zinc, and tributylin). Since CWA requires expansive public participation in the adoption of water quality standards, Metro, like any other member of the Virginia public, had the opportunity to participate in the process and may continue to advocate reconsideration of the water quality standard it believes the current one is inappropriate. In fact, EPA understands that the Commonwealth of Virginia may be reconsidering the criterion for tributylin at the time of this writing.

Legal Citations
Statute: Clean Water Act, Sections 302 (water quality related effluent limitations); 303 (water quality standards); 304(a) (water quality criteria).
Regulations: Water quality standards, Subpart D: Federally Promulgated Water quality standards; Toxics criteria for those states not complying with CWA section 303(c)(2)(B), 40 C.F.R. 131.36. 57 FR 60848, December 22, 1992 ("National Toxics Rule").

Company Concern as Expressed to GAO

Officials from the petrochemical company and the paper company said that EPA's Great Lakes Water Quality Initiative regulations, which set stringent waste water discharge limits, will be very costly for companies and municipalities. Officials from the petrochemical company said EPA estimated the initiative would cost complying organizations $100 million, but industry and municipal representatives estimate the compliance cost could be as high as $7 billion over the next 2 to 12 years. Company officials said the time frames depend on when a facility's NPDES permit is due for renewal and assume states establish new water quality standards by 1997. They said facilities have until March 23, 2007 (12 years) to phase out intake credits and mixing zones for "Bioaccumulative Chemicals of Concern." Officials from the paper company estimated the regulation would cost the company $47 million in one-time capital costs to bring their facilities in the region into compliance with the expected final state requirements resulting from the initiative, and it would cost another $14 million in operating costs and $13 million in user charges each year to meet all of the initiative's requirements.

Officials from the petrochemical company and paper company said that despite these costs the water in the Great Lakes will probably not become significantly cleaner because the initiative focuses on only a small percentage of the source of water pollution entering the lakes. Officials from the petrochemical company said significant environmental improvement requires focusing regulatory efforts on the primary sources of the problems. For example, they said EPA recognizes that almost 90 percent of water pollution is caused by general or "nonpoint" source discharges (e.g., agricultural and urban runoff and air deposition), not "point" sources such as industrial or municipal discharges. Eliminating all point discharges would still leave up to 90 percent of the pollution problem, so improvement efforts should focus on higher priority, primary sources. Petrochemical company officials said that although they recognize that EPA has a second-phase effort under way to address nonpoint sources, they argued that EPA should have taken the comprehensive approach first rather than continued ratcheting down on point sources for little environmental benefit. Furthermore, paper company officials said some of the standards go far beyond what is necessary. For example, they said the regulation requires the level of mercury in companies' water discharges to be lower than that found in fresh water in the area.

Response GAO Received From EPA

The cost estimate provided by the petrochemical company officials was developed by the Great Lakes Water Quality Coalition (the

Coalition), an association representing the industries and municipalities in the Great Lakes region. The Coalition's cost analysis is based on EPA's April 16, 1993, proposed rule, "Water Quality Guidance for the Great Lakes System" (58 FR 20802). EPA has identified numerous flaws in the assumptions and methods underlying this analysis, but it would be inappropriate to repeat them here. Since, in any case, the Coalition's claims are directed to the proposal, not the Final Guidance, they are no longer pertinent to the discussion. Facility-level estimates provided by the paper company are similar to other comments received on the proposal and appear also to be based on incorrect and/or superseded assumptions.

During the post-proposal process, EPA participated in over 40 meetings with over 1,000 stakeholder representatives. Many of these meetings were held with members of the petrochemical and paper industries, as well as members of the Coalition. Considering this, as well as the more than 26,000 pages of written comment from over 6,000 respondents, it is likely that there has been more public involvement in the development of the Great Lakes Water Quality Guidance than in any other action in EPA's history. All of the information and data provided during the post-proposal process were considered in preparing the final Water Quality Guidance for the Great Lakes System, which is significantly more cost-effective than the proposal (offering as much as an 80 percent reduction in compliance costs). The final rule, "Water Quality Guidance for the Great Lakes System" (hereinafter referred to as the Guidance), was published on March 23, 1995.

EPA's regulatory impact analysis for the Guidance contains a comparison of its estimated direct costs and benefits. The total annualized cost is estimated to range between $60 million (low end) and $380 million (high end), and will result in pollutant load reductions of between 6 million (low-end) and 8 million (high-end) toxic pounds-equivalent. Cost-effectiveness ranges from $10 to $49 per toxic-weighted pound of pollutant reduced, which is comparable with previous effluent limitations guidelines and standards. EPA believes that the most likely estimate of costs will be toward the low end of the cost range.

EPA also conducted a benefits analysis on the Guidance for three case study areas in different parts of the Great Lakes Basin. These studies showed monetized benefits commensurate with costs. The benefits include: improvements in human health, especially for sport anglers and those who eat fish due to economic need; improvements in recreational fishing; improvements in the quality of water-based recreation and the area ecology; and an increase in the commercial fishery harvest. In addition, an independent analysis conducted by DRI/McGraw-Hill concluded that the impact

on the region's economy of the costs posed by the Guidance would be "nearly imperceptible."

Officials from the petrochemical company and paper company further state that the Great Lakes will not become significantly cleaner because the Guidance is wrongly directed at point sources of pollution instead of nonpoint sources (e.g., air deposition, agricultural and urban runoff, etc.), which are the major sources of pollution in the Great Lakes. EPA maintains that the final Guidance does address nonpoint source pollution in the Great Lakes Basin. The criteria to protect aquatic life, human health, and wildlife in the Guidance apply to the waters of the Great Lakes System, regardless of the source (point or nonpoint) of pollutants to those waters. Other specific procedures of the Guidance also recognize nonpoint source contributions by establishing procedures to allocate the available load capacity of the receiving water among all sources of the pollutant, including nonpoint sources. In addition, any regulatory programs controlling nonpoint sources that require compliance with water quality standards are subject to the final Guidance. These programs are designed to address a range of problems associated with agricultural nonpoint sources; air deposition; contaminated sediments; hazardous waste sites; spills due to storage, handling or transport activities; wet-weather point source discharges; and pollution from land-use activities.

In addition, paper company officials say the water quality standards go far beyond what is necessary. For example, they believe the Guidance requires the level of mercury in companies' water discharges to be lower than that found in fresh water in the area. This is simply not true. The mercury target of 1,300 ppq is the same standard that has been used for years by the state of Michigan to protect public health and wildlife. This is actually less stringent then the mercury standard recommended by the eight Great Lakes States for use in the final Guidance. The final number is considered reasonable and attainable in Michigan, where 40 percent of the facilities in the Great Lakes Basin are located.

Legal Citations
Statute: Clean Water Act, Section 118(c)(2), as amended by Section 101 of the Great Lakes Critical Programs Act of 1990 (CPA), Pub. L. 101-596 (Nov. 16, 1990).
Regulations: Water Quality Guidance for the Great Lakes System, 40 C.F.R. Part 132 (60 FR 15366, March 23, 1995).

Company Concern as Expressed to GAO

Roadway officials said that provisions in the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)

make the purchase of certain properties protracted and costly. The officials said the company will not purchase "brownfield" properties (potentially contaminated properties that had previously been sites of industrial operations) because of the potential clean-up liability, thereby restricting the company's options and prolonging search efforts at a time when they need property for business expansion. A Roadway official also said that EPA refuses to narrowly define a "site" for purposes of CERCLA investigations, further restricting land purchase options. For example, he said EPA considers all contiguous properties once owned by a manufacturing company as the "site" for purposes of a remedial investigation and feasibility study, even though the waste disposal activities occurred only on certain parcels. In one case, Roadway officials said, the company has been named as the "potentially responsible party" for a site encompassing hundreds of acres even though Roadway owns only 4 acres (for which there is no record of industrial waste disposal). He said the costs of responding to requests for information and defending against claims from EPA for properties that are contiguous to a "brown field" site are disincentives to purchasing these properties, even though they contain no hazardous wastes.

Response GAO Received From EPA

While it may be quick to apportion large sites into contaminated or uncontaminated sections based on very preliminary information (such as known records of disposal), much more information must be developed about a site to inform such a decision. EPA regulations [40 C.F.R. 300.430 (d) (2)] provide that the "nature and extent of the threat presented by a release" will be determined by a remedial investigation and feasibility study (RI/FS) as more information on the site's contamination is developed. During the RI/FS process, the release may be found to be larger or smaller than was originally believed, as more is learned about the source and the migration of the contamination. However, it is generally impossible to discover the full extent of where the contamination "has come to be located" before all necessary studies and remedial work are completed at a site.

The RI/FS of the Record of Decision (which defines the remedy selected) indicates the areas of contamination at which the Agency is considering taking a response action, based on information known at that time. For example, EPA may evaluate (and list) a release over a 400-acre area, but the Record of Decision may select a remedy over no more than 100 of these acres. This information may be useful to a landowner seeking to sell the 300 acres. If further study (or the remedial construction itself) reveals that the contamination is located on or has spread to other areas, the Agency may be required to address those areas as well.

The commentor mentions the disadvantages currently associated with purchasing properties contiguous to a "brownfield." Brownfields are abandoned, idled, or underused industrial and commercial facilities where expansion or redevelopment is complicated by real or perceived environmental contamination. EPA's Brownfields Economic Redevelopment Initiative is designed to encourage economic redevelopment through environmental cleanup. This will help communities eliminate potential health risks, improve the standard of living, and help restore economic vitality to areas where these sites exist. To date, Brownfields sites have not been National Priority List sites.

As part of EPA's efforts to promote Brownfields redevelopment, EPA has encouraged redevelopment by appropriately reassuring prospective new owners or developers of potentially contaminated property that, in many cases, they may not have to face Superfund liability. Specifically, the recently issued publications, "Owners of Property Containing Contaminated Aquifers," "Prospective Purchaser" and "Land Use Guidances," are important tools for brownfields redevelopment.

In a further effort to encourage cities, states, and private investors to clean up and redevelop contaminated or formerly contaminated sites, EPA has entirely removed approximately 24,000 of the 40,000 listings of sites of concern from the Superfund tracking system known as the Comprehensive Environmental Response, Compensation and Liability Information System (CERCLIS). Thousands of these sites have been shown to have no contamination at all, while others are being addressed by state cleanup programs. These sites are candidates for redevelopment, but, as the Roadway officials note, potential developers have previously shied away from them simply because of the perceived stigma of their identification in CERCLIS. Removing the sites from CERCLIS should encourage redevelopment by removing such an unwarranted stigma from these economically promising urban locations.

Company Concern as Expressed to GAO

A Roadway official said that EPA's implementation of CERCLA with respect to identifying potentially responsible parties (PRP), apportioning liability for orphan shares,[11] and instituting and settling litigation is unreasonable, complex, and costly. For example, he said the company is involved in an on-going

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[11]Orphan shares are portions of cleanup costs for a Superfund site that an entity is responsible for but is unable to assume because it is no longer a viable entity (i.e., a bankrupt company).

negotiation of a settlement for a site on the National Priority List--EPA's list of Superfund sites. According to a company official, EPA involvement started 13 years ago, but the Agency has still not conducted a comprehensive investigation to generate a list of PRPs who sent waste, and the amount, to this site. The official said EPA is using a list for settlement allocation produced by a PRP group that includes Roadway.

However, he said the list is not comprehensive because the PRP group was organized on an ad hoc basis and does not include a number of parties that refused to cooperate with the group. Also, he said EPA expects the parties on this list to pay 100 percent of all cleanup costs for the site, even though they were responsible for only about 15 percent of the total waste sent to the site. According to the company official, this situation is made even more complex and protracted because of EPA's practice of suing only a small number of parties for cleanup costs, instead of all parties that are believed to be responsible. This, he said, guarantees additional and unnecessary litigation from third and fourth-party actions. Finally, he said, EPA's settlement with a party may not be final because EPA excludes cleanup costs that may occur subsequent to settlement. The official said that a party could pay an amount that is twice the original settlement amount to receive protection from these subsequent costs. Even though Roadway's involvement is slight or doubtful in some settlements, because of the litigation risk a company official said Roadway will pay this premium, which could be as much as $500,000.

Response GAO Received From EPA

EPA is aware of a number of concerns regarding searches for PRPs and has taken several actions to address these criticisms. As part of the Superfund administrative reform initiatives announced in early 1995, EPA is accelerating PRP searches in the enforcement process. Specifically, at as many as 13 sites the Agency is testing the feasibility of time frames proposed in the Superfund Reform Act of 1994 for completing PRP searches. EPA is also exploring the use of nine alternative techniques for conducting PRP searches. A few of the new techniques focus on soliciting information from early-identified PRPs and the public, including the use of radio or newspaper advertisements and specific questions in information request letters that solicit information about other PRPs. In addition, EPA held a national conference in March 1995 on PRP search procedures to solicit suggestions on ways to obtain and document high-quality evidence earlier in the process and to facilitate expedited settlements. Based on the 37 recommendations adduced and the results of the pilots, EPA will publish new PRP search guidance in fiscal year 1996.

In addition to improving the PRP search process, EPA has initiated two other administrative reforms to make the Superfund liability process faster and fairer to responsible parties. First, the expedited settlements initiative aims to quickly remove small waste contributors and financially troubled entities from the Superfund process by means of expeditious de minimis and "ability-to-pay" settlements. These early settlements will reduce PRP transaction costs and are intended to provide protection from third-party contribution suits. Second, EPA is pilot-testing the Superfund Reform Act's "fair share" liability allocation process at several Superfund sites. Under this process, a neutral third party will allocate liability shares to all identified PRPs at the site. The federal government is committed to offer settlements based on these allocations in all but the most extraordinary circumstances and to pay the "orphan share" determined by the allocator. Parties who choose not to settle based on the allocation will remain jointly and severally liable for the balance of cleanup costs.

Roadway states that it paid a "premium" to ensure its protection from future liability for a site at which it has been named a PRP. A premium payment is a risk apportionment device used by the Agency in certain settlement agreements. The premium consists of an additional amount of money paid by a PRP in excess of its share of the projected cost of a cleanup remedy. It is designed to offset the risk to the government of unexpected future costs by providing the PRP with a release from liability that is not usually available to settling parties (e.g., a covenant not to sue without the usual "reopeners"). This arrangement benefits the PRP by providing a final determination of the extent of its liability at a site. Without this arrangement, under the "joint and several liability" scheme of CERCLA, Roadway would continue to be liable indefinitely for any further contamination discovered at the site.

EPA recently also announced an administrative reform to increase the fairness of the Superfund liability allocation process by seeking in the first instance to name a larger number of liable parties in its cleanup orders than it does now.

Company Concern as Expressed to GAO

Officials from a glass company said that CERCLA is problematic because of its principle of joint and several liability, which they said elevates legal fees and enforcement costs. Another problem is retroactive liability, which they said also raises costs. They said EPA should replace the joint and several concept with an allocation concept based on PRP contribution. Also, company officials believe that since virtually all disposal in Superfund sites was legal at the time of disposal, retroactive

liability should be paid for by federal Superfund dollars. Finally, they said EPA should minimize or eliminate the indiscriminate use of subcontractors. In many cases, they said, the contracted effort is redundant and too costly due to poor oversight.

Response GAO Received From EPA

With respect to joint and several liability, the allocations process developed during the last Congress as part of the proposed Superfund Reauthorization Act would have addressed many of the concerns expressed about the fairness of the joint and several liability scheme of CERCLA.

- The reforms would have eliminated expensive and time-consuming litigation that currently determines liability at a site by instituting an expedited allocations process.

- This new process would have significantly reduced private party transaction costs and facilitated settlements by simplifying the allocation of cost shares of liability.

- Perhaps most importantly, under the legislative reforms proposed in the last Congress, EPA would pay the "orphan share" in settlements resulting from the allocation process. This means that PRPs who settle on the basis of their "allocated share" would not be required to pay the shares of parties identified as bankrupt or defunct.

During the past year, EPA has also worked to develop a number of reforms to the Superfund program that seek to administratively implement the changes the Agency supported in last year's reform legislation. Specifically, as discussed more fully in the previous response, EPA is piloting a nonbinding allocations process similar to that envisioned by the Superfund Reform Act at several sites nationally. As under the proposed legislative reforms, PRPs who settle on the basis of the allocation will not be required to pay for the orphan share.

The commentor argues against retroactive liability for legal waste disposal prior to the enactment of today's tough restrictions. EPA believes retroactive liability is an essential part of the Superfund liability scheme, and its elimination would have a number of severe adverse consequences. The "polluter pays" principle embodied in retroactive liability places the burden of cleanup where it rightfully belongs--on those who created or otherwise contributed to the problem. Moreover, the current liability system has resulted in a large volume of cost-effective cleanup activity carried out by private parties. Reversing that approach would result in a vast public works

program of lesser efficiency, financed primarily by persons who had nothing to do with causing the contamination (i.e., the taxpayers). In enacting Superfund, Congress elected to have parties associated with sites pay for or perform cleanups.

The commentor advises against the "indiscriminate" use of subcontractors. EPA is not sure what is meant by the term in this context. When the Agency issues work assignments, EPA does not instruct the contractor on whether to subcontract any or all of the work assigned. Rather, it is left up to the prime contractor to determine who among those qualified should perform the work. When a prime contractor decides to issue a subcontract, EPA has the right and duty to review the proposed subcontract and to concur or nonconcur in the decisions made by the prime contractor. EPA does not agree that the use of these providers is indiscriminate, however. As a general matter, subcontractors are a valuable and necessary part of the Superfund cleanup process. Most sites present engineering problems of such scope and complexity that it would be unrealistic to expect a single firm to be staffed and equipped to deal with every situation.

Company Concern as Expressed to GAO

A tank car company official said compliance with CERCLA requirements is expensive and exposes the company to unforeseen liability. Under CERCLA, they said the company can become liable for a past disposal practice even though the practice was legal at the time it was used. They also said that despite extensive efforts by the company ($20,000 in 1994) to find the best waste disposal site to minimize future liability, the company can become liable if the disposal site selected is later mismanaged. For example, they said the company was one of several companies that sent waste paint solvents to a privately owned disposal site. Two years after the company ceased sending its wastes there, the state closed down the disposal site because the owner had never properly disposed of the wastes. Because the site owner had no money, liability for the cleanup fell on the companies that used the site. The company officials said they were interested in contributing to the cleanup effort, but they thought the cumbersome cleanup process and threat of joint and several liability was leading to excessive transaction costs and management time and effort. They said the company opted to a buyout of liability for $360,000 in 1994.

Response GAO Received From EPA

EPA appreciates the dilemma experienced by the tank car company. At first consideration it does not seem fair to be held economically liable for the consequence of actions that were

considered legal and normal behavior at the time they were taken. If it were not for the current threat to public health and the environment created by these past practices, they would pass unremarked today. However, American society demands, and the law requires, that the damage done by these past practices be undone now. The current CERCLA liability scheme is based on the concept that the "polluter" should pay the cost of cleaning up his pollution. "Pollution" is simply the act of placing a harmful substance into the environment. Whether or not an action results in pollution does not turn on whether or not there is a law in effect governing this type of action.

It is important to remember that there were few, if any, laws specifically regulating disposal of hazardous substances before the enactment of CERCLA in 1980. In light of that, it would unavailing to base liability on whether or not someone complied with existing laws. Rather, it makes far more sense for those who created the problem to pay for cleaning it up. Making Superfund liability depend on a party's knowledge or the culpability of its conduct is also simply not practical. It would dramatically increase litigation and transaction costs in virtually every case and delay cleanups, potentially for years. The concept of "strict liability"--liability without regard to fault--is a fundamental principle of CERCLA and many other environmental protection laws in addition.

But the commentor's underlying point is valid, that Superfund administration should be as fair and expeditious as possible under the law. This is why EPA continues to advance the concepts and practices identified earlier as having been embodied in the Superfund Reauthorization Act proposed in the last Congress.

Company Concern as Expressed to GAO

An official from the tank car company said EPA regulatory requirements that make managers personally responsible for their companies' compliance with environmental standards are unreasonable. The official said that EPA's regulations for emergency planning and notification under CERCLA state that a manager who fails to provide local officials with the required notice regarding a release of hazardous substances can be fined up to $25,000 or imprisoned for up to 2 years or both. He said that if these personal responsibility requirements are continued or expanded, it will be difficult to find anyone willing to manage a manufacturing business.

Response GAO Received From EPA

This statement regarding personal liability is inaccurate with regard to civil administrative penalties but true with regard to

criminal actions. It is EPA's policy to issue civil administrative complaints to the owners of firms (e.g., partnerships or corporations), rather than the individuals who operate firms. Thus, for purposes of assessing civil administrative penalties, the scenario described by the tank car company is inaccurate. Managers are not "personally responsible for their companies' compliance with environmental standards."

Criminal matters are another thing. Managers, like all other individuals, are held responsible for their own violations when there is a criminal element to the action. The Emergency Planning and Community Right-to-Know Act (EPCRA) considers the responsibility to inform a community about an environmental release of a hazardous substance a fundamental duty to protect public safety. Under §325(b)(4) of EPCRA, any person who knowingly and willfully fails to provide the required notice may be imprisoned for not more than 2 years and fined up to $250,000. Similarly under CERCLA 103(d)(2), any person in charge of a vessel or a facility who fails to give notice to the National Response Center of the release of a reportable quantity of a hazardous substance as soon as he/she has knowledge of such a release, may be imprisoned for not more than 3 years and fined up to $250,000. The "person" committing these criminal acts (as defined by law) could include a company manager. This notice requirement is necessary to ensure that risk from the hazardous substance to the public health and the environment are minimized.

Company Concern as Expressed to GAO

A Metro Machine Corporation official said section 313 of EPCRA is a "paperwork nightmare." He said EPCRA requires him to complete forms cataloging, by weight and percentage, each individual chemical found in all of the products the company uses. For example, he said the regulation requires that each chemical in each can of paint must be cataloged and then multiplied by the number of cans used to calculate the total amount of the chemical used. Furthermore, he said he must complete nine more forms if the company uses more than 10,000 pounds of a chemical annually. He said in 1994 he spent between 240 and 360 hours completing EPCRA forms for three company facilities. The official also said that all of this activity is of little or no real value because the manufacturer-provided MSDS information he uses on the contents of products is often inaccurate. Therefore, he said EPA should question the accuracy of its summary report and, ultimately, the usefulness of the EPCRA requirements.

Response GAO Received From EPA

Section 313 of EPCRA is part of the statutory structure guaranteeing the "Community Right to Know" about hazardous and

toxic chemicals being used in their vicinity. EPCRA section 313 requires reporting of releases and other waste management activities for a finite list of toxic chemicals. The purpose of EPCRA section 313 is not to require facilities to track and report, by weight and percentages all the chemicals that are contained in products. For 1993, Metro Machine had to report on only three chemicals to the Toxics Release Inventory.

For each reportable chemical (i.e., a substance identified on the list and for which the amount on hand meets the threshold requirement) a facility must complete a Form R, which is nine pages long. For 1993 Metro Machine filed a total of three reports. EPA estimates that on average it takes 53 hours to compile information, perform calculations, prepare the Form R, and maintain records. EPA notes that Metro Machine estimates that filling out Form R required between 240 and 360 hours. EPA is concerned that the company spent about twice the time that EPA had estimated and expected. EPA would like to help this company and other respondents reduce the time they spend, or to revise EPA's estimates of respondent burden to more accurately reflect actual experience.

Under EPCRA, facilities are not required to report releases for all chemicals and in all concentrations that may be found in any given product mixture. In order to decrease burden, EPA has instituted a de minimis exemption for mixtures. A facility is not required to track or report releases for chemicals if they consist of less than 1 percent of a mixture (or, alternatively, 0.1 percent if the chemical meets the definition of an OSHA carcinogen), unless the facility is manufacturing the mixture. Of course, knowing the concentration of a toxic chemical in a mixture is the key to this exemption.

EPA regulations require that suppliers of listed toxic chemicals provide to their customers a written notice (incorporated into or attached to the MSDS) that describes their chemical products. This includes the toxic chemical name, Chemical Abstracts Registry number, and weight percent of the toxic chemical in the mixture or trade name product. These notices are intended to inform receiving facilities about the amounts and types of toxic chemicals they are using. It is this information that Metro Machine has found to be "often inaccurate."

EPA recognizes that the reliability of MSDS data may vary from supplier to supplier. Facilities need to provide their best estimate, but the way they arrive at that number can vary from facility to facility. Respondents may choose to use laboratory results, engineering estimates, or other appropriate means of determination, including MSDS information. Whenever a facility feels that the information available about the amount of toxic

chemical in a mixture is inaccurate, incomplete, or outdated, EPA encourages facilities to contact the supplier of the mixture in order to get more accurate information.

EPA is aware that some MSDS notices specify only the minimum, maximum, or range of concentration for a listed toxic chemical in the mixture. If a supplier provides a facility with such a concentration range on the MSDS sheet, the facility can use the mid-point of the range for the purposes of its calculations. Perhaps this method would facilitate Metro Machine's estimation of the concentration of toxic constituents in the paint it employs in its business.

Company Concern as Expressed to GAO

Tank car company officials said the "Form R" reports require companies to report on chemicals used in manufacturing even where there are very low-level, if any, releases of chemicals and even where the releases are otherwise permitted and tracked elsewhere. The obligation to track very low levels of chemical and compound release in turn requires extensive, costly ($18,000 in 1994), and unnecessary calculations. The officials also said that the manufacturer-provided MSDS information used to complete the report has no standard format, which complicates tracking the chemical and compounds used and makes calculating emissions difficult.

Response GAO Received From EPA

EPA amended the EPCRA section 313 reporting requirements in December 1994 to address low release situations. As a result, starting with reporting year 1995, if a facility meets the EPCRA reporting criteria and has less than 500 pounds of an annual reportable amount of the listed toxic chemical, the facility may submit a certification in lieu of a Form R. These modifications reduce the reporting elements from nine pages to two and decrease the estimated burden for complying with EPCRA section 313 reporting requirements from an average of 53 hours to an average of 27 hours. The associated cost to facilities decreases from an average of $2,800 to $1,800 per chemical. EPA estimates that 20,000 Form Rs may be affected by this alternate reporting option.

Company Concern as Expressed to GAO

Multiplex officials said EPA paperwork and reporting requirements on the company's use of hazardous materials are extremely costly and, in some cases, duplicative. A company official estimated it cost Multiplex over $13,000 to prepare documents such as Form R reports, which are required by section 313 of EPCRA, and the

Metropolitan Sewer District permit applications that are required by the state of Missouri under an EPA mandate. He also said that the Form R report submitted to EPA and a "Tier II" report submitted to the state environmental agency contain the same information.

Response GAO Received From EPA

Over the past few years EPA has considered a number of options for reducing reporting burdens and for reinventing its approach to managing information. EPA is currently looking at ways to consolidate environmental reports by moving beyond single media information collection to a more comprehensive approach. For example, EPA is looking at replacing the multitude of reporting forms currently required for all the different types of pollution discharged from a single facility, with a "one-stop" reporting system for the collection of routine emissions and transfer data. EPA believes that this new, comprehensive approach to information collection and management will help to eliminate duplicative reporting while providing an information collection and management approach that will be significantly more efficient for EPA and its state partners. It will also substantially improve public access to environmental data, empowering citizens and industries to take a comprehensive approach to sustainable ecosystems and environment protection, as well as substantially reducing reporting burdens.

With regard to reporting under EPCRA section 313, EPA has completed a number of actions that significantly reduce the reporting burden associated with the Form R report, and is currently pursuing additional streamlining activities. For instance, starting with reporting year 1995, if a facility meets the EPCRA reporting criteria and has less than 500 pounds of an annual reportable amount of the listed toxic chemical, the facility may submit a certification statement in lieu of a Form R. These modifications reduce the reporting elements from nine pages to two. Based on the data on the Form R filed by the above facility (Multiplex) for the 1993 reporting year, it appears that the facility may be able to take advantage of the alternate threshold reporting, which will reduce its EPCRA Section 313 reporting burden.

Company Concern as Expressed to GAO

A tank car company official said RCRA's standards are not specific, and EPA is inappropriately interpreting its requirements. Company officials said EPA sent the company a warning letter, based on a previous inspection, that it was violating a RCRA requirement by treating hazardous waste without a permit. The manufacturer was reportedly cleaning tank cars of

waste Liquified Petroleum Gas by burning off the waste. Company officials considered the tank cars "RCRA empty" and said RCRA standards permit cleaning empty tank cars by burning off wastes without a permit. However, they said EPA considers a container empty under RCRA when the pressure "approaches atmospheric." Company officials said the regulations EPA cited (40 C.F.R. 261.7(b)(2)) do not specify what "approaching atmospheric" means, and EPA has not provided clarification after repeated requests by company officials.

The official from the tank car company also said the Hazardous Waste Shipment and Waste Minimization reports required by RCRA (40 C.F.R. 262.41(a)) duplicate other information and are costly to produce (over $3,000 spent in 1994). The official said EPA requires the reports to be filed biennially with the EPA Regional Administrator even though almost all of the information is already available to EPA on the shipment manifests for hazardous wastes (that each company is required to keep). He said the only piece of information that the report requests that is currently not on the manifest could be incorporated into the manifest without a problem.

Finally, he said one-half of the company's expenditures to comply with RCRA are for transporting the waste to the few EPA-sanctioned disposal sites, all of which are some distance from the facility. He said the lack of nearby disposal sites is caused by EPA's stringent permit approval process; he said it takes a large amount of time and money for a company obtain a permit.

Response GAO Received From EPA

In most instances' regulation less than 40 C.F.R. 261.7(b)(2) is implemented as part of the base RCRA program by the states, rather than the federal EPA. Because each state may implement the RCRA program differently, the tank car company should be communicating with the relevant state agency with specific questions about implementation. If the tank car company operates in a state not yet authorized to carry out the RCRA program, or if the company simply wishes to know EPA's interpretation of the federal regulations, EPA would encourage the company to contact the appropriate EPA Regional office. EPA's RCRA Hotline, at 800-424-9346, could also assist the company.

In general, the Agency considers a container that has held a compressed gas to be empty if it has been opened to atmospheric pressure (45 FR 78524, 78526, November 25, 1880, and 47 FR 36092, August 18, 1982). If a container has been opened to the atmosphere for enough time to meet the common sense meaning of that phrase, or to no longer "contain" a gas under pressure, EPA

would expect the pressure in the container to be equal to atmospheric. Without a more specific description of the facts of the situation, it is difficult to assess what further clarification the firm seeks and impossible to judge the merits of the warning letter. Unfortunately, GAO was unable to tell EPA anything more about the circumstances. However, additional facts could be relevant. For example, if the tank cars had held other liquids or solids that were hazardous wastes (e.g., sludges), the cars would not be considered empty unless they had met the criteria for "empty" that are specific to those wastes. Whatever the residual substance was that needed to be "burnt off" may be the basis for the alleged violation, not the liquefied petroleum gas.

The company is concerned about reporting burden under RCRA (40 C.F.R. 262.41(a)). As part of EPA's effort to substantially reduce paperwork burden, the Office of Solid Waste has under way the Waste Information Needs initiative, which is reexamining data needs and developing improved data gathering systems for the RCRA hazardous waste management program. EPA appreciates the company's concern about redundancy of data required on the biennial report and the manifest and is working to reduce the reporting burden and improve the usefulness of data that are collected. As part of the administration's regulatory reform initiative, the Office of Solid Waste is working with states to revise the manifest system and to revise or replace the biennial report, with the objective of eliminating duplicative and overlapping reporting burdens. The option for a certification, rather than detailed reporting on waste minimization, is one of the factors currently under consideration.

With regard to the commentor's point on the lack of conveniently located disposal sites, EPA understands that the RCRA permit process can be resource-intensive and prolonged. In response to this and other concerns about permitting throughout environmental programs, EPA has initiated a project, implemented by an advisory group known as the Permits Improvement Team (PIT), to reform its environmental permitting processes. PIT's goals include improving the certainty and timeliness of permit decisions, finding effective new ways to streamline administration of its permit programs, and identifying alternative approaches to individual facility permitting. The Office of Solid Waste is an active participant on PIT and will be looking at opportunities to implement PIT's recommendations to improve the RCRA permitting program. It must be noted, however, that with respect to the siting of new hazardous waste disposal facilities, public acceptance continues to be a major influence on the speed and decisiveness of the process. While the safety and reliability of waste disposal methods have continued to improve, public resistance to a disposal site in the neighborhood remains high.

While this has progressively raised the cost and difficulty of transporting and disposing of hazardous wastes to established sites, it has also induced generators and storers of these wastes to adopt innovative practices to avoid the production of such wastes whenever possible.

Company Concern as Expressed to GAO

Multiplex officials said the company formerly disposed of a small amount of hazardous waste acids it produced by giving them to a plating company. They said the plating company used the waste acids in its production process, essentially recycling the waste at no cost to Multiplex. However, to continue this process, company officials said new EPA regulations (40 C.F.R. 272.1300) would require the plater, in order to continue this process, to obtain a pretreatment license at an estimated cost of $35,000. Therefore, according to Multiplex officials, the plater decided to stop accepting the waste acids at the plating company, and instead Multiplex was forced to send the waste to a disposal company (at a cost of $3,000 per year).

Response GAO Received From EPA

Under EPA regulations the term "pretreatment" generally refers to treatment of wastewater prior to its indirect discharge to a publicly owned treatment works. Presumably this is not the activity Multiplex means in this context, since its reference is to RCRA waste treatment standards. The State of Missouri has authorization to implement the hazardous waste program in lieu of the federal EPA, and 40 C.F.R. 272.1300 sets forth the provisions of the state's hazardous waste program. EPA assumes, therefore, that the waste acid in question has hazardous characteristics and is subject to Missouri's hazardous waste regulations. In that case "pretreatment license" is most likely used here as a descriptive term for a permit to treat the waste prior to its reuse.

RCRA's definition of solid waste specifies certain secondary materials that are wastes (including, for example, sludges from a waste treatment plant and garbage). In addition to these specific cases, the statute includes the phrase "and other discarded materials." Based on this language and decisions handed down by the courts interpreting RCRA jurisdiction, EPA is required to establish through regulation whether secondary materials being recycled are hazardous wastes.

Under the federal regulations (40 C.F.R. part 261), with only a few common-sense exceptions, a secondary material that is reused directly as a substitute for a commercial chemical product or as an ingredient in an industrial process would not be regulated as

a hazardous waste. Thus, if the plating company were directly reusing the waste acid, federal regulations would not require it to obtain a hazardous waste management permit. If, however, the plating company were treating (reclaiming or regenerating) the waste acid before using it, the material would be regulated as a hazardous waste, and under federal regulation a permit might be required for its management. In either case, as noted above, the state of Missouri might impose its own restrictions on these practices.

EPA recognizes that the distinction between direct reuse and treatment prior to reuse sometimes causes confusion. Nevertheless, it is an important element of RCRA's "cradle to grave" management of hazardous waste because it discourages the unscrupulous from mounting "sham" recycling operations to avoid public safety controls on waste treatment and disposal. Unfortunately, these valuable requirements can sometimes have the unwanted effect of thwarting legitimate recycling. In keeping with EPA's reinvention efforts, the Office of Solid Waste is currently working on a project, which EPA calls the Definition of Solid Waste, to revise the regulations governing recycled hazardous wastes. The goals of this project are to ensure that recycling is not unnecessarily inhibited by regulatory requirements and to ensure that human health and the environment are protected from the risks posed by recycling. EPA expects to propose revised regulations for recycled wastes in 1996.

Company Concern as Expressed to GAO

According to officials from the paper company, RCRA regulations regarding fluorescent tubes make it difficult to dispose of the tubes at the same time that another part of EPA (the Green Lights program) is encouraging their use. They said the regulations require the company to develop a plan to dispose of these tubes only because the company has other hazardous materials; individual consumers or other businesses without other hazardous materials do not have to develop a plan. They also said that the rules require the fluorescent tubes to either be disposed of in a hazardous waste landfill or be recycled. However, they said recycling can require the tubes to be sent more than 1,000 miles to a recycling center, making disposal more expensive than their original cost. Finally, they said EPA's enforcement of the regulation is too severe. They said the company was recently cited for not closing and taping a cardboard box that contained spent tubes.

Response GAO Received From EPA

EPA has found that used fluorescent lamps usually meet the definition of hazardous waste because they contain mercury, which

is one of the toxic constituents that in sufficient quantity may create a hazard. These lamps are also highly energy-efficient, offering a great opportunity to reduce energy use and reduce pollution arising from energy production (e.g., coal mining, burning). EPA recognizes that its policies on fluorescent lamps may be perceived as inconsistent, but they are shaped to achieve two important goals: to encourage the use of energy-efficient lighting systems and to minimize risks from improper handling of potentially hazardous waste.

For a number of reasons many people have expressed concern that current hazardous waste rules may not be appropriate for mercury-containing lamps. In an effort to develop a cost-effective and environmentally sound management strategy for mercury-containing lamps, EPA published a proposed rule on July 27, 1994 (59 FR 38288). The proposal presented two options for managing these wastes: 1) exclude them from regulation as hazardous waste if they are disposed of in municipal solid waste landfills that meet certain standards (burning in municipal waste combustors would be prohibited), and 2) define them as "universal wastes." The recently promulgated universal waste management system contains streamlined requirements for the management of special wastes, such as batteries, certain canceled pesticides, and thermostats. The rule also affords states the flexibility to add additional wastes to their own universal waste programs. A number of states are considering adding fluorescent lamps to their programs when they adopt the universal waste rule. EPA has received more than 300 comments on the proposed rule and will continue to evaluate the technical issues raised.

The paper company's point about some entities (those with relatively high volumes of hazardous wastes) being required to handle fluorescent lamps as hazardous, while others need not, is true. The hazardous waste program is designed to ensure that large volumes of hazardous waste are managed properly, while not imposing the burden of hazardous waste compliance on persons generating only small volumes. Since persons generating volumes of hazardous waste above a certain threshold must already manage hazardous wastes properly under RCRA, EPA requires them to include their handling of fluorescent lamps as part of their overall effort. Those generating only small volumes must comply with state solid waste requirements instead.

Finally, the paper official says the company was recently cited for not closing and taping a cardboard box that contained spent tubes, presumably fluorescent lamps containing mercury. 40 C.F.R. part 264.72(a) requires that a container holding hazardous waste must be closed during storage, except when it is necessary to add or remove waste. Because the company is not identified, EPA cannot address the specifics of the case, but in general the

ENCLOSURE I

requirements do require that containers be closed, though not specifying what techniques must be used to close a container.

Company Concern as Expressed to GAO

Zaclon officials said the company is appealing an $81,000 fine for failure to respond on time to an EPA request for information related to RCRA. Company officials said a letter EPA sent to the company requesting the information was mistakenly filed away by a former company employee. They said the letter was not discovered until EPA imposed the fine 18 months later without any follow-up or other communication regarding the original request. Company officials said they are also disturbed that the fine was imposed on them because of a procedural matter (failing to file information), not for noncompliance with something that had a real environmental impact.

Response GAO Received From EPA

Initially, it is important to clarify some aspects of this description. Zaclon is not appealing an $81,000 fine. Although the initial complaint proposed a penalty of approximately $81,000, after initial discussions with the company the proposed penalty was reduced. A hearing was conducted in the fall of 1994 and an Initial Decision by the Administrative Law Judge is pending. The penalty sought in the hearing was $37,600. In addition, the violation at issue did not involve an information request. Zaclon was sent a notification of its regulatory obligation to either file a RCRA permit application for a hazardous waste pile at a facility the company had acquired from DuPont Corporation, or submit a demonstration of equivalency, indicating that the waste pile had been "clean closed" (closed in an environmentally protective manner as required in the hazardous waste regulations; see 40 C.F.R. part 264.110-115). The obligation to either obtain a permit or demonstrate environmentally protective closure of a hazardous waste pile is not a "procedural matter," but a substantive requirement necessary to ensure that hazardous waste management units are designed and operated so as to prevent releases of hazardous constituents to the environment.

It is true that there was no communication between EPA and the company on this matter between the notification and the filing of the enforcement action. EPA notified the company of its obligation by means of a certified letter and the company does not deny having received it. Frankly, It is most unusual for a company to lose such a document. While it might be desirable for the enforcement authority to initiate further contact after such a communication, limitations on resources and the pressure of other work sometimes preclude this opportunity. In addition,

without necessary reference to the present circumstances, there are instances in which a company's record of recalcitrance on environmental matters would predictably render such a gesture unproductive. In any case, RCRA is a "strict liability" statute; companies have a positive obligation to comply even if EPA does not issue reminders of their responsibility. Issues of good faith are important factors in such situations, but they are appropriately considered in the penalty calculation and do not affect liability for a violation.

EPA's overriding interest is to promote environmental compliance. Tough enforcement is sometimes a necessary means but, in some cases, not the most effective method to achieve this goal. EPA has recently opened Compliance Assistance Centers across the country that will advise facilities on their environmental responsibilities and help them come into compliance without resorting to enforcement action. EPA expects that such constructive assistance, backed by the availability of appropriate enforcement, will promote better understanding and compliance with environmental regulations.

Company Concern as Expressed to GAO

According to officials from the hospital, the Medical Waste Act has been very expensive to implement. They said disposal of wastes defined as "hazardous" cost $0.38 per pound, whereas disposal of other solid wastes cost $0.05 per pound. Hospital officials said that disposal of infectious materials and medical waste only began to be considered hazardous after the "garbage barge" incident in the 1980s.[12] In their view, precautions previously used for medical waste disposal, which had been developed to protect public safety, were effective. They believe there was insufficient scientific evidence to list this material as hazardous waste. Hospital officials also said infectious wastes that used to be autoclaved and dumped in landfills must now be burned. They said that now there is concern over the emissions generated by the smokestacks, despite the fact that the hospital is in compliance with federal emissions regulations, which theoretically would ensure that hospital emissions would not be environmentally harmful. Hospital officials said the

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[12]The "garbage barge" incident refers to 3,186 tons of trash (including hospital waste) that was shipped to and rejected by six states and three countries during a 2-month period in 1987. The trash, which originated in Islip, New York, was ultimately returned to New York State and incinerated. According to the Wall Street Journal (Jan. 19, 1995), publicity surrounding the barge "quickly became an ominous symbol of a nation buried in garbage."

focus on perceived risks has shifted, promulgating additional regulations, resulting in further price escalation.

Response GAO Received From EPA

In 1980, EPA published final hazardous waste regulations under RCRA but did not include infectious waste in the definition of hazardous waste due to a lack of evidence that infectious waste posed a serious hazard to human health or the environment. In 1988, the Medical Waste Tracking Act (MWTA) was passed. Under MWTA, medical waste was again not defined as a hazardous waste but was identified for special handling under Subtitle J of RCRA for a trial period that ended in 1991. There are no existing federal obligations on generators of medical waste under the Medical Waste Tracking Act. The only federal requirements are those that may arise under RCRA if medical wastes are otherwise hazardous wastes (such as spent solvents) or rules developed under traditional EPA statutes, such as incinerator air pollution controls pursuant to CAA.

MWTA required EPA to establish a 2-year Demonstration Program for cradle-to-grave tracking and management of medical waste. The Federal Demonstration Program was in place in New York, New Jersey, Rhode Island, Connecticut and Puerto Rico from June 1989 to June 1991. During this same period, other federal agencies, including OSHA and DOT, also reexamined their policies regarding various aspects of medical waste management and developed regulations. EPA's Demonstration Program ended June 22, 1991, and federal medical waste regulations expired on that date.

The hospital official also stated that autoclaved waste must now be burned prior to landfilling. Although MWTA is no longer in effect, under the Demonstration Program medical waste was required to be properly packaged and labeled or treated prior to disposal. Treatment was defined as "any method, technique, or process designed to change the biological character or composition of any regulated medical waste so as to reduce or eliminate its potential for causing disease." Autoclaving would meet the treatment requirement; thus, additional treatment would not have been necessary. State programs, which now govern medical waste management, may have definitions and requirements for treatment and disposal that are different from those established under MWTA. Approximately 48 states have medical waste regulatory programs; the remaining states regulate medical waste as solid waste. Many states modeled their programs after the Demonstration Program, and many have revisited their programs since the Demonstration Program ended. Thus, the requirement the hospital official is concerned about may exist as a state regulation.

The hospital official raised the issue of air emissions from medical waste incinerators. Under CAA Amendments of 1990, EPA was required to develop emission standards for medical waste incinerators. On February 2, 1995, as required by CAA Amendments, EPA proposed a New Source Performance Standard and Emission Guidelines for Medical Waste Incinerators. The Office of Air and Radiation has received comments and held discussions with industry, including the health care community, in order to finalize this rulemaking in April 1996.

Company Concern as Expressed to GAO

A Metro Machine Corporation official said states interpret and implement certain federal regulations differently and also apply their own rules on top of these federal requirements, both of which cause problems for the company. For example, the official said that different states have different requirements governing the transport of hazardous materials across state lines. As a result, he said drivers on interstate shipments must follow different paperwork requirements, sealing specifications, and other standards.

Response GAO Received From EPA

For companies operating in more than one state, EPA is aware that tensions may arise caused by variations in environmental programs as implemented by different states. Specifically with respect to interstate transportation, the amount of variability allowed in state programs is actually limited by the Hazardous Materials Transportation Act (HMTA).

HMTA preempts any state or local requirement that is not "substantively the same" as a provision in the act or DOT's hazardous materials regulation. The five covered areas are quite explicit and address classification of hazardous materials, packing and repacking, marking and placarding, preparation and use of shipping papers, design of containers, and other matters. DOT has developed standards and procedures under HMTA for receiving petitions and making preemption determinations under these HMTA authorities (49 C.F.R. Part 107 Subpart C). Because of DOT's special expertise in regulating transportation of hazardous materials, it is EPA's policy to defer to the DOT preemption process when issues are encountered about a state regulation possibly impeding interstate transportation of hazardous wastes.

EPA strives to increase consistency in state programs through frequent communication with state agencies about new regulations, policies, and interpretations and by assisting states with any questions they may have about federal environmental programs.

EPA also sponsors and participates in numerous forums designed to maximize communication among state agencies. An example of one such forum was EPA's recent Regulatory Negotiation to devise a uniform Hazardous Waste Manifest. EPA convened a committee under the Federal Advisory Committee Act that included representatives of DOT; numerous states; generators and transporters of hazardous waste; treatment, storage and disposal facilities; and public interest groups. EPA is now preparing the product of that negotiation for publication as its proposed rule to establish a single set of information to be kept on board hazardous waste transport vehicles, obviating the need for multiple manifests to satisfy the requirements of different states en route.

Company Concern as Expressed to GAO

Officials from the fish farm said EPA's pesticide (re)registration program limits the resources they need to keep fish healthy. They said EPA requires many tests to approve the specific use of a pesticide, and the pesticides' labels list all EPA-approved uses. The labels reportedly expire every 9 years and must be renewed based on tests of the pesticides' impacts on humans, animals, and the environment. The officials said pesticide manufacturers have not sought renewal of their registrations for certain uses when sales do not justify the cost of the tests. For example, the manufacturer of the insecticide Mazoten reportedly did not seek to renew the aquatic use of the product because of the expense. The fish farm officials said Dilox, which is chemically identical to Mazoten, is a safe organic phosphate that has never posed safety concerns. However, due to the test costs, the officials said the manufacturer did not seek EPA approval to use Dilox in aquaculture. They said it is currently illegal to use either Mazoten or Dilox pesticide in aquaculture--not because of safety concerns, but because in both cases it is too expensive for manufacturers to obtain EPA approval.

According to the fish farm official, certain federal regulations are barriers to aquaculture and cause the loss of business opportunity. Although the worldwide demand for fish is increasing, he said some American hatcheries are going out of business because of regulations such as those governing the use of pesticides. Therefore, despite technological advantages, he said American fish production lags behind production in some third-world countries. As a result of these problems, he said some American companies are moving their operations out of the country to avoid regulations.

Response GAO Received From EPA

Under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) [7 U.S.C. 136 et seq.], EPA must determine that the use of pesticides does not cause unreasonable adverse effects on humans or the environment. Although the commentor is mistaken in the belief that pesticide labels must be renewed every 9 years, in 1988 Congress required [FIFRA section 4, 7 U.S.C. 136a-1] that EPA 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. The costs for conducting safety testing may cause many pesticide manufacturers to reassess the market potential for their pesticides, with many choosing to limit the data they develop to those uses that provide an acceptable return on investment.

In the case presented by the fish farm officials, the pesticide in question did not meet the current standards for demonstrated safety, and the maker was required to conduct further studies. The manufacturer chose not to develop new data needed to approve the safe use of this pesticide in different aquatic environments. Without these data, EPA cannot establish under the law that this use of Mazoten is free of human and environmental safety concerns.

The review of health and safety data for all pesticides mandated by Congress in 1988 has reduced the number of products and active ingredients approved by EPA by about 50 percent. The majority of these products were no longer actively marketed by the pesticide manufacturers, so removing these pesticides from the list of approved uses had little effect on the availability of products to control pests. As pointed out above, some pesticide makers have chosen to voluntarily withdraw their products from the marketplace rather than pay for safety testing. Some of these pesticides simply did not generate enough sales to justify the costs of testing. Unfortunately, some of the products that were voluntarily withdrawn affected settings where pest control is important but very small volumes are purchased. In such instances the cost of testing outweighs the potential for profit. The full scope of the loss of minor uses is not yet known, but the Agency is concerned about the loss of pesticides for uses that are essential.

Consistent with EPA's Common Sense Initiative, EPA is helping retain important minor uses by (1) working closely with the

Department of Agriculture to identify important minor food uses and begin working on the required safety testing or to investigate if other pesticides can be used where necessary, (2) granting data waivers for low volume/minor use products whenever possible, (3) revising regulations to facilitate crop groupings, (4) encouraging third party registrations in which grower groups or others assume liability for the product, (5) providing fee waivers or reductions and expedited processing, (6) coordinating with agricultural users and the pesticide industry, and (7) considering possible legislative changes. Congress is considering legislation to provide some relief for minor uses.

Company Concern as Expressed to GAO

Officials from the petrochemical company said EPA recently finalized rules that unnecessarily restrict how refineries manage oil recovered from their refining operations. They said these rules treat oil returned to the refinery from associated chemical plants as wastes that cannot be reused. According to company officials, before the rules, companies used recovered oil as a raw material input into the refining process and produced products from it. Company officials believe refineries should be free to use recovered oil to produce petroleum products without interference from EPA.

Response GAO Received From EPA

Actually, EPA's recovered oil rule, which was published on July 28, 1994, (59 FR 38536) excludes from RCRA hazardous waste regulations any recovered oil that is generated by normal petroleum refining operations and reinserted into the refining process. This exclusion, however, does not apply to recovered oil generated from organic chemical industry operations (except in cases where petrochemical and petroleum refining operations share a common wastewater treatment system). This stipulation is based on the concern that additional toxic constituents (e.g., chlorinated compounds) may be present in petrochemical processing residuals that are not found in residual hydrocarbons from petroleum refining.

EPA is aware that some petrochemical plants recover oil from their chemical process streams for subsequent use in the petroleum refining process. In the Petroleum Refining Hazardous Waste Listing Determination, signed October 31, 1995, EPA proposes a specific approach to expanding the recovered oil exclusion for petroleum refining operations to include recovered oil from co-located and/or commonly owned organic chemical plants. The proposal also requests comment on whether and on what basis the recovered oil exclusion should be expanded.

Company Concern as Expressed to GAO

According to officials from the petrochemical company, the cost of EPA's proposed refinery Maximum Achievable Control Technology (MACT) rule will exceed the expected benefits, and EPA ignored its own cost-benefit analysis when crafting the proposal. They said EPA estimated that the proposed rule, which is designed to control air toxins from petroleum refineries, would prevent one-half of one cancer case per year at a cost of $207 million. They also said EPA estimated that approximately seven U.S. refineries would have to close. Furthermore, they said EPA reinterpreted the "MACT floor" in 1994 to make the rule even less cost-effective, imposing what they termed "Los Angeles-style regulations" nationwide.

Response GAO Received From EPA

EPA disagrees with the petrochemical company's characterizations of the costs and benefits of this regulation. Even given the limited ability to place a specific dollar value on most of the benefits, the benefits of this rule exceed the costs.

EPA designs MACT rules to reduce hazardous air pollutant emissions according to CAA's requirement to impose emission controls that are found on the best performing facilities currently in operation. In the case of the proposed MACT rule for refineries, the major quantifiable benefit is the dollar value of reduction of acute health effects resulting from reductions in volatile organic emissions in ozone nonattainment areas. In fact, this benefit alone outweighs the cost of the rule. (Unfortunately, EPA is unable to quantify the additional chronic health benefits of reduced ozone exposure that would accrue in both attainment and nonattainment areas).

The rule will also substantially curb emissions of 11 toxic compounds, thus reducing risk to people living near the refineries. Several of these toxic compounds are carcinogens, and others have been associated with respiratory and reproductive effects. EPA's analysis indicates that over 4.5 million people living around refineries have an individual risk greater than 1 in 1 million from exposure to emissions of benzene, a known human carcinogen. In addition to the direct health effects benefits, the rule provides ecological benefits that include improved visibility and reduced vegetation damage, including damage to agriculture. EPA acknowledges the limits of benefit/cost analysis in its capability to monetize most of these benefits. However, a reasonable analysis of such benefits leads EPA to conclude that the monetized benefits of the rule clearly exceed the cost.

The $207 million cost estimate reported by the company represents a one-time national capital investment to comply with the proposed rule. The total annual cost of the proposal is $110 million. Since the proposed rule was issued, EPA has worked closely with industry to identify ways of reducing the cost without sacrificing environmental protection. As a result of these efforts, the total annual cost of the final rule has been reduced to $79 million.

It is unlikely that any refineries will close as a direct result of the rule. Changes made to the proposed rule will reduce the economic impact to small refiners, a handful of which were those projected to be at highest risk of closure. In addition, EPA has extended compliance dates to the maximum allowed by the law in order to spread out the cost impacts. Moreover, some small refineries may be exempt from all requirements of the rule through the "potential to emit" provisions of the act.

Regarding EPA's interpretation of the "MACT Floor" in 1994, EPA did not base MACT floors on the most stringent rules in a state or local jurisdiction such as Los Angeles County. The floors were determined from data submitted by industry nationwide in response to EPA questionnaires. They were clearly defined in terms of technologies and operating practices that were demonstrated to be the best available, as required by CAA, based on a national survey.

Legal Citations
Statute: CAA, section 112;
Regulation: 60 FR 43244 (Aug. 18, 1995)

Company Concern as Expressed to GAO

Officials from the paper company said that several rules in process now have the potential to substantially increase the regulatory burden. In particular, they cited the proposed EPA "cluster rules" that seek to integrate air, land, and water pollution efforts in the paper industry. While sound in concept, they said that the way EPA is proposing to implement this concept will be extremely expensive and ineffective. The company estimates its costs will be about $1.5 billion over the next 3 years if the rule is promulgated as presently designed. Although EPA met with and received comments from industry representatives, company officials said they have only recently begun to seriously consider the comments. Industry officials have proposed an alternative that company officials said would accomplish the same objective as EPA's cluster rules but at one-half the expense.

Response GAO Received From EPA

EPA is now evaluating comments on its cluster rules as part of its normal notice and comment rulemaking process and has not yet issued its final actions. Under the cluster approach, EPA is attempting for the first time to coordinate multiple rulemakings under separate statutes that affect the same industry, in this case the pulp and paper industry. Over the past 3 years, EPA has held hundreds of hours of discussion with officials from the pulp and paper industry on this rulemaking and continues to take their comments very seriously.

The estimated costs of the proposed pulp and paper cluster rules are based on estimates for combinations of technologies to control both wastewater discharges and air emissions. Industry estimates that the industrywide compliance cost for the rules as proposed would reach $11.5 billion. EPA's estimate of the compliance costs and resulting economic impacts are less than half that. Regardless of which estimate one accepts, these costs are large, and EPA is giving them serious attention in adjusting the rules prior to promulgation.

While EPA agrees with the company that the control costs to implement a multimedia standard for such a vast and complex industry are high, EPA does not agree that the controls EPA has proposed would be ineffective. Even though EPA was unable to put a dollar value on many of the benefits, EPA's assessment of the costs and benefits of the proposed cluster rule indicate that the costs are comparable to just the quantifiable portion of the benefits. The benefits of the cluster rules as proposed would include reduced releases to water and air of several hundred thousand tons per year of chlorinated and nonchlorinated pollutants, including decreases in environmental dioxins and reductions in human health risks (measured in terms of cancer and other long-term effects), impairment of wildlife, crop damage, smog formation, and foul odors.

EPA's cluster rules are undergoing comment review and analysis. EPA is rethinking its proposals and revising many of the supporting analyses--engineering, economic, benefits, etc.--based on the comments received. Although EPA has made substantial progress, many engineering and analytical tasks still need to be to completed before the final rules are published.

The industry refers to an alternative proposal that deals primarily with best available technology water discharge limitations. It is fair to mention that although EPA met with industry several times during the development of the proposed water rule, the industry offered its alternative just prior to the court-ordered deadline by which the Agency was required to

issue its proposal. At that time the industry did not supply sufficient supporting data to allow full analysis of its alternative as a basis for regulatory proposal. However, EPA outlined the industry alternative in its proposal and solicited comments on its potential effectiveness. Since publication of the proposal, the industry has submitted additional data to support its alternative, and EPA is fully evaluating all information to develop the final rule.

EPA agrees that the industry alternative for best available technology is a worthy suggestion in the context of this rulemaking. Although substantial detailed analysis remains to be completed, EPA is giving serious consideration to adopting the industry's recommendation as the technology basis for standards governing the bleached papergrade kraft and soda subcategory.

In addition, EPA has been involved in executive-level discussions with representatives of the pulp and paper industry with regard to the air emission standards included in the cluster rules. As a result of these discussions, EPA believes that it is close to reaching agreement with industry in this area as well.

Company Concern as Expressed to GAO

Officials from the petrochemical company said that EPA's enforcement of environmental regulations is unnecessarily harsh. They said enforcement actions can be initiated even when companies self-report deficiencies found through internal auditing practices. They also said a minute deviation from a stringent emission level can subject a facility to enforcement action even if the process is in compliance 99.9 percent of the time and no degradation of public health or the environment exists. Finally, they said the cost of noncompliance with even minor reporting or recordkeeping requirements can be quite significant, especially when compounded over a period of time or across regulations.

Response GAO Received From EPA

EPA believes they needed additional information about the company to fully respond to this concern. In general, however, EPA recognizes the importance of internal auditing and has taken steps to encourage it. On April 3, 1995, EPA published in the Federal Register a "Voluntary Environmental Self-Policing and Self-Disclosure Interim Policy Statement," which set forth EPA's guidelines for substantially reducing penalties in all enforcement arenas when violations are self-disclosed and

corrected.[13] This interim policy was developed after extensive public input. Additional comments were received in response to the interim policy and are being considered for the final policy. In short, EPA will reduce or eliminate the "gravity" component of a penalty when the self-disclosure meets certain conditions, and there is no criminal conduct or imminent and substantial endangerment involved. However, to ensure a "level field" for those companies that comply, no penalty reduction is appropriate when the violation involves significant economic benefit to the violator.

With respect to the comment that "the cost of noncompliance with even minor reporting or recordkeeping requirements can be quite significant," EPA assesses penalties in accordance with explicit policies that begin with a lower range and increase with the seriousness of the violation. In most cases, higher penalties are sought for violations that affect human health or harm the environment (e.g., emissions) than for violations that affect EPA's ability to monitor compliance (e.g., notification, recordkeeping, reporting). However, EPA views the latter as significant, since failure to notify EPA or file reports can be associated with more serious violations. EPA's penalty policies generally provide penalty reductions for such matters as good faith efforts to comply, ability to pay, and other factors as justice may require.

The importance of environmental reporting should not be underestimated. Since self-compliance is fundamental to EPA's system of environmental protection, it would be counterproductive (not to mention prohibitively expensive) for regulators to inspect each facility on a regular basis. Under these conditions, self-maintained records, reports, and notifications are the only realistic means to ensure compliance. Such evidence of compliance is essential not only to promote appropriate conduct under the law, but also to reassure competitors within an industry that each of its members is paying its fair share to protect the environment for everyone. Nevertheless, while EPA considers environmental recordkeeping a good and necessary thing, EPA agrees with the commentor's implication that it is possible to have "too much of a good thing." For that reason EPA is currently reviewing all of its information requirements with the goal of reducing public reporting burden by 25 percent, or 20 million hours.

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[13]On December 22, 1995, EPA published Self-Policing Incentives: Discovery, Disclosure, Correction and Prevention of Violations

Company Concern as Expressed to GAO

In the environmental area, officials from a glass company said the federal government should stop enforcing violations of policy and should eliminate enforcement actions and penalties focused on administrative violations. For example, the officials said that EPA (through the Department of Justice) included in a lawsuit filed against the company a complaint that the company had not notified EPA of the fact that it had changed its manufacturing processes. According to company officials, EPA said it was EPA's policy that companies should notify it, but this was not in any regulation. The officials said the environment was not harmed in any way, it was just an administrative policy.

Response GAO Received From EPA

GAO was unable to provide additional information about this company's case. Therefore, EPA believes it cannot address the company's complaint that EPA took action to enforce a policy. It is possible that the glass company is referring to provisions under CAA that make it allowable under certain conditions (such as under New Source Performance Standards) for a source to substitute process changes that reduce emissions in place of add-on technological controls. So long as the change does not increase emissions, the source is not required to inform the regulatory authority of the process modification. The New Source Performance Standards rules for Glass Manufacturing Plants are codified at 40 C.F.R. Part 60, Subpart CC.

It is important to note that when EPA files an enforcement action, it cites the specific regulatory violation(s) on which the complaint is based. Neither EPA, nor the Department of Justice, which prosecutes federal environmental cases on behalf of the government, cites violations of "policies" because policies do not have the force of law and cannot be enforced. That is what makes this vignette so difficult to interpret.

Company Concern as Expressed to GAO

Officials from the paper company said that voluntary partnership agreements between government and businesses are very effective in achieving change without the difficulties associated with regulations. For example, they said EPA's "33/50" program had a substantive impact on the elimination of 17 of the most hazardous chemicals. The company reportedly has reduced its use of these chemicals by 75 percent.

Response GAO Received From EPA

EPA agrees that voluntary partnership agreements between government and businesses can often be very effective in achieving change and often uses voluntary agreements as an effective alternative or supplement to regulations. Over the past few years, the Agency has shifted its emphasis from command-and-control to building partnerships for achieving environmental results in a cooperative manner. EPA believes that by working together, EPA can minimize existing regulatory burdens and find newer and better ways to carry out EPA's mission of protecting the public's health and the environment.

As indicated by the commentor, the 33/50 voluntary program has indeed been a very effective means for achieving significant reductions in releases and transfers of the 17 selected high-priority toxic chemicals. The baseline for the 33/50 program is the 1988 Toxics Release Inventory (TRI) data.[14] Based on the 1993 TRI data, total reductions in releases and transfers of these 17 chemicals since 1988 have reached 46 percent (685 million pounds). The success of the 33/50 program is due in large part to the fact that there were data available that could be used to establish goals and set a baseline for measuring the progress of these reductions.

The 33/50 voluntary program is just one of many partnerships or voluntary initiatives under way throughout EPA. Several examples of such partnerships were provided in EPA's June 15, 1995 Report to the President entitled The Presidential Regulatory Reform Initiative. Several additional partnerships have also been initiated as a result of the President's reinventing government initiative, including the Pesticide Environmental Stewardship Program (PESP). PESP is a project where representatives of agricultural crop producers or other pesticide user groups meet voluntarily with Agency staff to formulate ways to reduce the use of hazardous chemical pesticides. PESP partners in the program now represent approximately 31,000 growers and 15,000 other pesticide users (e.g., lawn and garden or golf course pesticide companies). In addition, a recent partnership in the Office of

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[14]The TRI data are submitted annually to EPA and states under the requirements of Section 313 of EPCRA of 1986. This allows facilities to measure annual progress, compare year to year reductions, and set reduction priorities. Unlike other EPA regulations, the TRI program is not prescriptive, it is an information collection and dissemination program that is augmented by the 33/50 voluntary program. Without the data reported under the TRI program, facilities would not be able to quantify their reductions.

Pesticide Programs is supporting an educational campaign, initiated by an industry partner, to increase the use of pheromones instead of more toxic chemicals.

EPA looks forward to continuing to build partnerships to explore newer, cheaper, and better ways for protecting human health and the environment.

Company Concern as Expressed to GAO

Multiplex officials said various environmental regulatory requirements are duplicated at the federal and state levels. For example, they said the Metropolitan Sewer District performs an EPA-required analysis of the company's sewer effluent (40 C.F.R. 403), the cost of which is charged to Multiplex. In addition, company officials believe the Sewer District requires Multiplex to conduct the same tests, again at their cost.

Response GAO Received From EPA

Enforcement of national pretreatment program requirements relies on both self-monitoring by industrial users and periodic monitoring and inspections by POTWs. EPA's General Pretreatment Regulations at 40 C.F.R. 403.8(f)(2) establish procedures for POTWs to follow in implementing an approved pretreatment program. These procedures require POTWs to collect adequate information (i.e., "identify the character and volume of pollutants contributed to the POTW by industrial users"), including at least one sample per year from industrial users. They do not address the cost of sample collection and analysis, and there is no federal prohibition against POTWs charging industrial facilities for the cost of sample collection and analysis.

The Pretreatment Regulations also require industrial users to periodically report on the quality of their effluents. The regulations require a minimum of semiannual sampling, although POTW may require more frequent sampling. The regulations specifically state that POTW may perform the sampling for the industrial users. As discussed above, the decision on covering the cost of sampling and monitoring is left to local law or to agreement between the industrial users and POTW.

In policy memoranda to states and POTWs, EPA has encouraged POTWs to test "split samples" from industrial users. In such instances the POTW analyzes a portion of the same sample being analyzed by the industrial users to verify the industrial users' reported results. It is possible that the situation described in the Multiplex complaint involves just such a split sample, and Multiplex may be incurring charges for both its own analysis and that performed independently by the POTW. Decisions on whether

to require split samples and recoup analytic expenses rest with the POTW, but the costs in such situations do not reflect duplication of effort, but rather a legitimate check to ensure environmental compliance. It is not unreasonable for the POTW to pass along the cost of these tests to the regulated party.

Legal Citations
Statute: Clean Water Act, Sections 307(b),(c),(d), 402(b) (pretreatment program); 308 (inspections and monitoring).
Regulations: General Pretreatment Regulations for Existing and New Sources, 40 C.F.R. 403.8(f).

Company Concern as Expressed to GAO

Officials from the glass company said one of their major regulatory problems is state regulations (either issued independently or at the urging of federal agencies such as EPA) that vary from one state to another. They said it is far more costly to track and comply with 50 different regulations than with a single federal regulation in a given area. In some cases, they said, an entire business may be impacted by the need to comply with one state's regulations. For example, they said California's Safe Drinking Water and Toxics Enforcement Act (Proposition 65) requires warning labels on all products shipped to California that "expose" citizens of California to any of over 300 chemicals, regardless how trivial the alleged exposure. As a result, a company must either have special labels for California or must change all of its product labels to meet the California standard, according to company officials. Furthermore, they said there is a "bounty hunter" provision in the act that permits any citizen to file suit under the act. If so, the burden of proof is on the company to prove that they are not in violation--a standard that they said seems to be contrary to American legal traditions. They said that the objectives of both business and consumers would be best served by federal preemption of product labeling regulations along with a program to ensure public confidence that federal regulations are adequate, fair, and based on sound science. Another alternative they proposed would be for states to develop standardized requirements and filing deadlines on their own.

They said the lack of uniformity among the various states in which the company operates creates a real burden on the company. For example, they said the company must devote significant resources (labor hours, computer systems, consultant costs) to deal with various state departments of revenue/taxation, state insurance commissions, state unemployment departments, and state health departments--each with differing rules, regulations, and reporting requirements.

The officials said multinational businesses are best served by internationally harmonized standards, which eliminate redundant compliance costs and provide a level playing field for all competitors. For example, the pharmaceutical industry reportedly is working to develop worldwide product safety testing requirements, which will reduce the time and cost of making new medical products available and decrease the number of animals used in bioassays to comply with the testing requirements of multiple nations. Officials believe similar efforts are being made by lead crystal and ceramic tableware industries to arrive at internationally harmonized standards for lead and cadmium leachability from their products.

Response GAO Received From EPA

While the result can be perplexing to businesses--particularly to those that operate in more than one state--the right of states to establish their own laws has philosophic and legal underpinnings embodied in the Constitution. When Congress has specifically debated whether federal environmental requirements should supersede any state requirements or whether they should be the "minimum floor" or "maximum ceiling," the position that states should be allowed to establish stronger requirements has prevailed in most cases. Congress can change this approach as it reauthorizes EPA's laws, but until that time, states often have the option to adopt the federal requirements or to develop their own equivalent or more stringent requirements.

Nevertheless, EPA has taken strides toward harmonizing requirements, between states and the federal level, as well as internationally, and often encourages states to coordinate requirements or practice reciprocity among themselves. For example, EPA has a number of pesticide programs designed to harmonize state laws and regulations pertaining to pesticide manufacturing, sales, and use. The Pesticide State Liaison works closely with the State FIFRA Issues Research and Evaluation Group, the Association of American Pesticide Control Officials, and the Association of State and Territorial Health Organizations to deal with mutual regulatory problems and seek uniformity in their administration of pesticide programs. Through these organizations, states share knowledge, experience, and expertise with each other and federal agencies. In another area, responding to complaints from transporters of hazardous waste about the multiplicity of individual state requirements, EPA sponsored a Regulatory Negotiation to develop a uniform national manifest that will meet not only federal information requirements, but also those of every state through which a shipment of hazardous waste might pass.

ENCLOSURE I

EPA has also been active with the U.S. Trade Representative to help ensure that environmental requirements are harmonized internationally so that U.S. goods and services may be freely marketed internationally. Through its involvement with the Organization for European Cooperation and Development and other international associations, EPA maintains a vigorous effort to ensure consistency between its actions and those of international environmental authorities.

The issue raised by the commenter is clearly one of imposing scope, especially as it pertains at the international level. EPA recognizes its limitations in working out agreements that will be uniformly accepted around the world. EPA encourages representatives of the private sector in their efforts to form voluntary international standards organizations that can work toward international harmonization at a practical level without the complications implied by the official participation of numerous national governments.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC)

Company Concern as Expressed to GAO

An official from Bank A said EEOC's record retention standard is inconsistent with how EEOC pursues cases. He said EEOC requires that former employees' personnel files be retained for only 1 year after leaving a company, but on several occasions EEOC staff have questioned bank officials about employees who left several years ago. The 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." He said EEOC is likely to rule in a former employee's favor by default if the employer does not have the documentation to support its position.

Response GAO Received From EEOC

EEOC record retention standards strike a balance between the needs of EEOC to ensure that employers retain employee personnel records for a sufficient period of time to conduct an investigation if a discrimination charge is filed, and the needs of employers not to be unnecessarily burdened by having to retain employee personnel records for indefinite or inordinate periods of time. EEOC's regulation only establishes a floor. Employers can, if they believe it is good business practice, keep the records for longer periods. The specific requirements are tied to the filing periods of each statute. The recordkeeping regulations for Title VII/ADA (29 C.F.R. § 1602.14) require that personnel records be kept for 1 year because these charges can be filed up to 300 days after the alleged discrimination. Equal Pay Act lawsuits must be filed within either 2 or 3 years of the alleged discrimination; their recordkeeping requirements (29 C.F.R. § 1620.32) contain 2 and 3 year record retention periods. Finally, the Age Discrimination in Employment Act (ADEA) has 1 and 3 year retention requirements. The bank official is correct that the Title VII/ADA regulations require that personnel records generally be kept for 1 year, although the time periods under the ADEA and Equal Pay Act are longer. Moreover, 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. Without more information about "Bank A," EEOC is not able to provide a more specific response.

Company Concern as Expressed to GAO

Roadway officials said a recent EEOC request for company employment records has been costly and confusing for the company and has been conducted by EEOC staff in an adversarial manner. They said EEOC asked Roadway to provide all company records on the hiring and promotion of African-Americans and women in 10 specific states and gave the company only 14 days to comply with this request. Roadway officials said EEOC had not previously requested this type of information from any company and will not disclose what prompted the request or why Roadway was targeted. In addition, they said EEOC should have solicited Roadway or other companies comments on the cost of complying with this type of information request. Roadway officials estimated compliance with the request will ultimately cost the company $2 million.

Response GAO Received From EEOC

Roadway's complaint stems from a Commissioner's charge filed by former EEOC Commissioner R. Gaull Silberman against Roadway Express, Inc. (Roadway) in November 1994. By statute, an EEOC Commissioner may file a charge of discrimination where there are allegations that an employer has engaged in an unlawful employment practice. EEOC is required to investigate the charge to determine whether there is reasonable cause to believe that it is true.

The charge at issue alleged that Roadway engaged in a "pattern and practice" of race and sex discrimination by failing to promote Blacks into managerial and sales jobs and by refusing to hire women into operative and laborer positions. Commissioner Silberman's charge also alleged that Roadway has failed to provide a work environment free of racial and sexual harassment. The charge was based on information presented to the Commission by civil rights organizations as well as individuals. It was also based on an assessment of the significant increase in individual discrimination charges filed against Roadway. When Commissioner Silberman signed the charge, approximately 54 individual charges of discrimination were pending against Roadway in EEOC offices across the country. Contrary to Roadway's suggestion that it has not been informed regarding what prompted the data request, it has been furnished with a copy of the Commissioner charge.

EEOC's investigation has been narrowly tailored. For example, EEOC's data request covers facilities in only 10 states, although members of the public have presented evidence that unlawful discrimination may infect Roadway's entire national system. Moreover, contrary to Roadway's representation, EEOC has not asked it "to provide all company records on the hiring and

promotion of Blacks and women in 10 specific states." Rather, EEOC has requested employment data only for the range of jobs relevant to the claims of discrimination.

EEOC agrees that Roadway initially should have been given more than 14 days to respond to the request. In the normal course, employers are given between 30 and 60 days to provide requested information, and EEOC typically agrees to extensions if the employers need more time. In assessing Roadway's complaint regarding the time frame, however, it is critical to point out that, in fact, Roadway has been given much more time. EEOC's initial data request was filed in November, 1994. At the time of this response--September 1995--Roadway has yet to provide most of the information requested in a form usable by EEOC. Nonetheless, EEOC is continuing to work with Roadway to obtain the necessary information and has not yet sought enforcement of its request. In this regard it is important to clarify that although EEOC has administrative enforcement authority, it does not itself have the authority to compel the production of documents; it must seek a court order to do so.

Finally, EEOC has received no information supporting Roadway's allegation regarding the cost of complying with the data request and is therefore unable to respond in any particularized form to this claim. EEOC would point out, however, that the request at issue is typical of requests for information that EEOC issues in cases with serious allegations of broad-based discrimination. Over the years, many scores of employers have responded to such requests without incident or allegations of similar expense.

Company Concern as Expressed to GAO

Minco officials said the federal government should provide the information about regulatory requirements that they currently have to purchase from other sources. For example, they said that the company now spends $1,200 per year for information from Commerce Clearing House on EEO regulatory developments. If EEOC provided the company with comparable information, they said the company would not have to incur that expense.

Response GAO Received From EEOC

No employer needs to spend this kind of money to keep abreast of the applicable law. In fact, all necessary EEOC information is either available free or at a minimal cost. EEOC regulations are contained in Title 29 of the CFR (Part 1600, et seq.), which can be purchased for about $25 from the U.S. Government Printing Office. Federal depository libraries (currently about 1,400 public and academic libraries throughout the country) maintain current sets of the U.S. Code, CFR, and the Federal Register,

which provide up-to-date EEOC laws and regulations. In addition, EEOC regulatory materials contained in the CFR are available for public inspection at the EEOC Headquarters Library and at all 50 EEOC field offices across the nation. The full text of the U.S. Code and the CFR is also available on the Internet (many public libraries now offer free Internet access).

Sub-regulatory EEOC documents, such as policy statements that provide interpretations and guidance for employers on complying with EEOC-enforced laws, are available free through EEOC's Publications Distribution Center by calling toll-free 1-800-669-3362, TDD 1-800-800-3302, or EEOC Headquarters at 202/663-4900. Their issuance is routinely announced through news releases that are distributed electronically and by mail to media and affected agency stakeholders across the country.

Documents pertaining to EEOC internal operations and procedures, as well as listings and analyses of EEO-related court cases, are sold commercially. The operational information, while it certainly may be of interest to employers, is not necessary for compliance with the laws enforced by EEOC. The publication and sale of equal employment opportunity caselaw developments is consistent with that of caselaw developments in other areas of the law.

While current agency budget constraints preclude EEOC from making internal, operational documents such as its Compliance Manual available to the public without cost, EEOC is actively exploring the possibility of making available on the Internet its fact sheets, press releases, annual report, and other public information documents.

FEDERAL DEPOSIT INSURANCE CORPORATION (FDIC)

Company Concern as Expressed to GAO

Bank A officials said that although they believed the FDIC requirement to have a contingency plan is a worthwhile goal, the guidelines for the development of such a plan, as they relate to small banks, make it difficult to prepare.[15] The officials said the guidelines are excessively detailed, requiring detailed testing, and appear unreasonable for a small bank such as Bank A.

Response GAO Received From FDIC

The charge placed on a bank's board of directors to adopt a contingency plan regarding information processing is set forth in a policy statement adopted by the Federal Financial Institutions Examination Council. It is not mandated by statute or regulation. The statement refers to guidelines for management's consideration. The implementation of a contingency plan is intended to ensure a financial institution is able to recover from a disruption to its operations or a break in service from its data processing server. The policy statement sets forth several areas for management to consider when developing a contingency plan and sets no requirements. The listing of items and factors to consider is not designed to serve as a mandated list of items that always must be addressed in every plan but to serve as a flexible tool to encourage management to address those areas that are applicable to the institution. A plan developed by a small institution need not be as detailed as one for a larger, more complex facility. Each institution is urged to adopt a plan that meets its needs and addresses those risks and concerns unique to it. Without such a plan in place, a natural or other disaster could cause devastating disruptions to the institution's operations and customer services, resulting in unrecoverable losses, both financial and reputational. In sum, the bank in question should consult with its regulator on this matter because the intent of the agency policy is to remind bankers to do only what is appropriate for prudent management oversight.

Company Concern as Expressed to GAO

Bank B officials said that regulations implementing the Financial Institution Reform, Recovery, and Enforcement Act of 1989

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[15]A contingency plan is a document that establishes strategies to minimize disruptions of banking services, minimize financial loss, and ensure a timely resumption of operations in the event of disaster.

(FIRREA)[16] require them to obtain unreasonable and costly real estate appraisals. Bank officials said construction loans for multiphased projects are appraised at the time of the loan, but the real estate appraisal regulations under this act state that the appraisal is valid only for a specified period of time. They said that if the land was not developed before this period expired, the land must be reappraised for the bank to release construction funds to the builder. Therefore, the bank officials said that builders are required to go through the mortgage lending and appraisal processes several times during the construction of one project. They also said that this iterative process is costly for the bank, the builder, and ultimately the buyers in the development. The officials recommended that the regulations allow provide banks more flexibility in providing these loans.

Response GAO Received From FDIC

Lending institutions frequently reappraise properties during development and construction of large and complex projects due to the need to have current and detailed information about the feasibility, value, and costs of a project during the development period. But the reappraisals are driven by the informational needs of the lender to make informed credit decisions and to properly monitor the loans and are not required by any regulations.

Real estate appraisal regulations (for FDIC, see 12 C.F.R. Part 323) require appraisals only when there is a real estate related transaction. The original loan commitment would be the "transaction," not the individual disbursements on a loan. Even if there is a new loan, for example, a land development loan that is renewed to provide construction financing, a new formal appraisal would not necessarily be required by the appraisal regulations. The appraisal regulations generally allow appropriate evaluations of real estate collateral in lieu of an appraisal for loan renewals and refinancings if no new monies are advanced. If new funds are advanced over reasonable closing costs, an institution would be expected to obtain a new appraisal for the renewal of an existing transaction if there is a material change in market conditions or the physical aspects of the property that threatens the institution's real estate collateral protection.

Bank B is incorrect regarding the useful life of an appraisal, whether in a multiphase or a single-phase project. FDIC does not

[16]Public Law 101-73.

require a regulated institution to get a new appraisal so long as an existing appraisal is valid, nor does it limit the useful life of an appraisal to a specified time period. An institution can use an existing appraisal or evaluation to support a subsequent transaction, so long as the existing estimate of value remains valid and the institution so indicates in its files. Criteria for determining whether an existing appraisal or evaluation remains valid will vary depending upon the condition of the property and the marketplace and on the nature of any subsequent transaction. To properly assess the bank's comment, one would want to know whether the initial appraisal was for the undeveloped land only or if it included the prospective construction. Factors that could cause changes to originally reported values include the passage of time; the volatility of the local market; the availability of financing; the inventory of competing properties; improvements to, or lack of maintenance of, the subject property or competing surrounding properties; changes in zoning; or environmental contamination. An institution's files should indicate the information sources and analyses used to conclude that an existing appraisal remains valid for subsequent transactions.

FEDERAL EMERGENCY MANAGEMENT AGENCY (FEMA)

Company Concern as Expressed to GAO

A Bank C official said that the Flood Disaster Protection Act of 1973, as amended by the Flood Reform Act of 1994, presents several problems for the bank. The regulations state that if a building on the property is in the floodplain, the purchaser must buy flood insurance in order for the bank to approve the loan. However, the bank official said FEMA's floodplain maps they are required to use show only general floodplain boundaries without sufficient detail to locate a specific property. Because of these problems, the official said the bank had to spend almost $5 million since 1993 to a vendor to overlay tax maps on the FEMA maps to more precisely locate borrowers' properties. They also said errors caused by imprecise maps can adversely affect the loan's approval and/or can expose the bank to lawsuits. For example:

-- **If the bank uses the FEMA map and the borrower disagrees with the determination, the applicant may appeal the floodplain classification to FEMA. The applicant must obtain a survey at a cost from $300 to $1,000 and submit it to FEMA as part of an application for a "letter of map amendment." On average, it takes FEMA 45 to 60 days to make a determination--further delaying loan approval.**

-- **If, because of imprecise FEMA maps, the bank inaccurately determines that the property is not in a floodplain and did not require flood insurance and the mortgaged property is damaged in a flood, the first legal recourse homeowners are likely to take is to sue the lender.**

The official said these problems would be at least partially resolved if FEMA had accurate maps or used maps created by the U.S. Geocoding system that clearly show where the floodplains are. The bank official also suggested that the regulations would be unnecessary if a portion of local property taxes was based on the flood hazard risk; counties would collect the taxes and pay FEMA for flood insurance. This approach, the official said, would provide insurance coverage to all property in a floodplain, not just property that changes ownership.

Response GAO Received From FEMA

The regulations state that if a building on the property is in the floodplain, the purchaser must buy flood insurance in order for the bank to approve the loan. Under the Flood Disaster Protection Act of 1973, flood insurance is required for insurable structures located in designated Special Flood Hazard Areas

(SFHAs) as a condition of receipt of federal or federally related financial assistance. SFHA is the land area that would be inundated by the flood that has a 1-percent chance of being equaled or exceeded in any given year (base flood). The purpose of the flood insurance is to protect federal funds by insuring against known and identified flood risks.

Insurance is required in the amount of the value of the structure, the outstanding balance of the loan, or the amount of coverage available, whichever is lowest. Separate coverage is available for building contents but its purchase is optional in most cases. Individuals who own their homes outright or obtain funding from other sources are not required to purchase flood insurance.

If the purchaser does not purchase flood insurance, the lender can do so under the Mortgage Portfolio Protection Program and escrow the costs to the borrower. This program ensures that money at risk is appropriately protected.

"... the Federal Emergency Management Agency's (FEMA) floodplain maps they are required to use show only general floodplain boundaries without sufficient detail to locate a specific property."

The purpose of the National Flood Insurance Program maps (NFIP maps) produced by FEMA is to provide flood hazard information. These maps are used by community officials for floodplain management purposes, by lenders and borrowers for flood insurance purposes, and by other users for flood risk assessment. FEMA focused on the accurate portrayal of flood hazards, recognizing that other maps are available that show property and complete street information. Thus, NFIP maps should be used in conjunction with these other maps to determine the relationship between a structure or lot and the designated floodplain.

Although it was cost-prohibitive for FEMA to map full street coverage, lot locations, and structure locations, recent technological advances in digital mapping make possible enhanced flexibility regarding flood map information. FEMA is developing digital flood maps that can be overlaid with other digital maps to allow data integration, including queries regarding flood-prone status.

"... the [bank] official said the bank had to spend almost $5 million since 1993 to a vendor to overlay tax maps on the FEMA maps to more precisely locate borrowers' properties."

In general, most properties are clearly in or clearly out of the floodplain. The type of overlay to which the official refers

should be necessary only in the case of properties that lie along the boundaries of the floodplain. Furthermore, many lenders choose to pass the cost of flood determinations on to the individual borrower at the time of the loan closing.

"... errors caused by imprecise maps can adversely affect the loan's approval and/or can expose the bank to lawsuits. For example, if the bank uses the FEMA map and the borrower disagrees with the determination, the applicant may appeal the floodplain classification to FEMA. The applicant must obtain a survey at a cost from $300 to $1,000, and submit it to FEMA as part of an application for a "letter of map amendment." On average, it takes FEMA 45 to 60 days to make a determination—further delaying loan approval."

Flood insurance is required for only those structures located within a *designated* SFHA. Thus, errors in determining whether flood insurance is required are most likely due to misreading the published maps, not from errors in the maps themselves. The National Flood Insurance Reform Act of 1994 required FEMA to develop a standard form for flood hazard determinations; the standard form is intended to ensure that all considerations are addressed and that the correct determination is made. Furthermore, if a lender uses a third party to make its flood hazard determinations, the third party must guarantee its work. These requirements should improve the accuracy of flood hazard determinations.

The National Flood Insurance Reform Act of 1994 also specified that FEMA develop procedures such that if the flood hazard determination is disputed, the borrower and lender may jointly request that FEMA review the determination. These procedures will be contained at 44 C.F.R. 65.17, once finalized. FEMA will respond within 45 days to such requests. Rather than delaying the loan approval, the lender may choose to require flood insurance. If the structure is later determined not to be in an SFHA, the insurance premium can be refunded.

Those who believe that NFIP map erroneously includes their home or property within SFHA may submit certain property elevation and location data and request a Letter of Map Amendment under 44 C.F.R. 70 or a Letter of Map Revision Based on Fill under 44 C.F.R. 65.5. These letters officially revise the NFIP map to remove a structure, a lot, or a group of structures or lots from SFHA. Typically, elevation information is required for FEMA to issue a Letter of Map Amendment or Map Revision Based on Fill. If this elevation information is not already readily available, a survey may be required. Letters of Map Amendments and Map Revisions Based on Fill typically take approximately 30 days to

process for single residential lots; multiple-lot requests take longer.

Owners of property who receive a Letter of Map Amendment or Letter of Map Revision Based on Fill are eligible for a full refund of the premium for the current policy year if no claim under the policy has been paid or is pending, and if the lending institution agrees to waive the flood insurance coverage requirement (44 C.F.R. 62.5). This refund policy should preclude any delays in the loan approval process.

"If, because of imprecise FEMA maps, the bank inaccurately determines that the property is not in a floodplain and did not require flood insurance and the mortgaged property is damaged in a flood, the first legal recourse homeowners are likely to take is to sue the lender."

Again, flood insurance is required for structures located in a *designated* SFHA; therefore, incorrect determinations are likely based on map interpretation errors rather than inaccurate floodplain designations. In the case of map interpretation errors, FEMA assumes that private flood determination companies are adequately bonded and insured, thus protecting the interests of the lenders who contract with them to provide flood determinations. Furthermore, if a lender makes a reasonable judgment, based on the information available, that a property is not in a designated floodplain, this does not preclude the borrower from buying flood insurance.

While FEMA designates major flood hazards, being located outside a designated SFHA is not a guarantee that a structure will never flood. Recognizing this risk, some lenders require flood insurance even for a structure located outside the SFHA. Flood insurance is considerably cheaper for structures outside the SFHA.

"The official said these problems would be at least partially resolved if FEMA had accurate maps or used maps created by the U.S. Geocoding system that clearly show where the floodplains are."

Again, because flood insurance is required only for structures located in a *designated* SFHA, the accuracy of the map itself does not drive the insurance process. Nevertheless, FEMA strives for map accuracy. FEMA uses the best available information to analyze and map flood hazards and has developed processes for revising maps when new or more detailed data become available (44 C.F.R. 65 and 44 C.F.R. 70). These processes ensure that the data presented on the maps and in the associated technical reports are up-to-date and that the existing flood hazards are

accurately depicted. Through these processes, FEMA is able to acquire data from federal agencies, communities, private-sector engineering firms, and private citizens to keep the maps up-to-date and accurate.

In addition, FEMA is developing a nationwide map update priority system that is designed to ensure that the accuracy of each community's flood insurance rate map is assessed at least once every 5 years. To develop this system, FEMA convened a task force composed of FEMA staff, state floodplain managers, local officials, and support contractors. Full implementation of the recommendations of that task force is contingent on additional NFIP funding being made available to address all mapping needs. However, FEMA is using the task force recommendations to assist in establishing future program initiatives that will ensure optimal use of the limited local, state, and federal resources allocated to NFIP.

FEMA is unaware of any U.S. Geocoding System that shows floodplains. However, FEMA is developing digital floodplain maps that are compatible with the Standard Data Transfer System standards required by Executive Order 12906. FEMA is producing an ever-greater number of maps using digital technology, and all its digital map products are geographically referenced. The printed copy of maps produced using digital technology shows latitude and longitude.

"The bank official also suggested that the regulations would be unnecessary if a portion of local property taxes was based on the flood hazard risk; counties would collect the taxes and pay FEMA for flood insurance."

The intent of NFIP is to place the financial responsibility of flood protection on citizens whose properties are most vulnerable to damage or destruction from flooding. Transferring the function of determining the flood insurance coverage requirement to local communities would increase the cost to taxpayers in their jurisdictions. In addition, this system would not render regulations governing development in flood-prone areas and NFIP's flood insurance coverage requirements unnecessary. Since it is the lender who places federally backed funding at risk, it is the lender who must ensure that appropriate flood insurance coverage is obtained.

PENSION BENEFIT GUARANTEE CORPORATION (PBGC)

Company Concern as Expressed to GAO

Multiplex officials said increased premium costs paid to PBGC to guarantee their employees' pension is costly for the company (over $2,600 in 1994). They said the mandated premium has gone from $2.60 per participant in 1982 to $19.00 per participant in 1994, but they said it was unclear what additional benefits have accrued to the company or its employees from this increasing expense. The officials did not see any benefit from Multiplex or its employees being in this program and plan to terminate the company's participation in the PBGC program and rely solely on the company's 401(k) plan in the future.

Response GAO Received From PBGC

The insurance premiums charged by PBGC are statutorily established and set by Congress in Section 4006 of ERISA.

PBGC recognizes the concerns raised by plan sponsors about continued increases in the flat rate premium charged to all companies sponsoring plans covered under the agency's pension insurance program. For this reason the agency recommended and supported the variable rate premium structure established by Congress as part of the Pension Protection Act of 1987 and as amended by the Retirement Protection Act of 1994. Under this structure, underfunded plans pay a variable rate premium based on the amount of their underfunding in addition to the flat rate premium. The variable rate premium structure more fairly allocates the premium burden by charging more to those companies sponsoring underfunded pension plans that represent a greater risk to the defined benefit pension system. PBGC has not recommended an increase in the flat rate premium since 1987.

U.S. SENTENCING COMMISSION

Company Concern as Expressed to GAO

A Roadway official said that the application of Federal Sentencing Guidelines in the punishment of criminal regulatory provisions is unreasonable and causes companies to initiate costly countermeasures. The official said many regulations carry both civil and criminal penalties for noncompliance, and that the U.S. Sentencing Commission's decision to apply uniform standards to these criminal provisions was an error. He said that fines under the standards can be in the billions of dollars and the companies can be put on probation for years. Rather than apply a "cookie-cutter" approach to establishing criminal penalties in an area without a large body of experience (only 5 prosecutions in the past 10 years), the official said judges should have the flexibility to fix penalties for criminal violations of regulations based on all relevant circumstances.

As a result, the official said, corporations are establishing training programs and other compliance measures in an attempt to insulate themselves from these "crushing" penalties. He said the compliance program described in the guidelines is extraordinarily detailed and is extremely costly for companies to implement ($300,000 for Roadway in 1994). He also said such programs are of dubious effectiveness because some small fraction of a company's employees will ignore any training and engage in criminal behavior anyway.

Response GAO Received From the U.S. Sentencing Commission

Chapter Eight of the U.S. Sentencing Commission Guidelines Manual became effective November 1, 1991. It contains guidelines instructing federal district courts in the sentencing of organizations convicted of federal criminal offenses. These guidelines contain provisions for the structuring of fines and the imposition of restitution and probation. The U.S. Sentencing Commission developed Chapter Eight after 5 years of analysis and effort. The Commission maintained close contact with the enforcement and the business communities during its development of Chapter Eight and provided public comment periods and public hearings through which interested parties could evaluate and contribute to the developing draft.

Fines under Chapter Eight are generally a function of two factors: (1) the seriousness of the offense and (2) the culpability of the organization. Serious offenses committed by highly culpable organizations can result in extremely high fines. On the other hand, offenses committed by the least culpable

organizations can result in nominal fines. Seriousness generally is measured by the loss to the victim or the gain to the defendant from the offense, whichever is greater. The measure of culpability includes several factors (e.g., the participation of high-level personnel in the offense and the extent to which the organization accepted responsibility and cooperated with law enforcement in the investigation of the offense). An additional factor mentioned by Roadway is whether the organization had "an effective program to prevent and detect violations of law," i.e., a compliance program (U.S. Sentencing Guidelines § 8C2.5(f). The presence of a qualifying compliance program can reduce the fine range to which the organization would otherwise be exposed.

The program required for fine mitigation under the guidelines is not "extraordinarily detailed," as Roadway claims. Rather, Chapter Eight broadly describes an effective program as one in which the organization has "exercised due diligence in seeking to prevent and detect criminal conduct by its employees and other agents." Chapter Eight subsequently outlines seven types of steps the organization must have taken to demonstrate due diligence. (U.S. Sentencing Guidelines § 8A1.2, comment. (n.3(k).)

These seven types of steps are the minimum an organization must undertake to receive a reduction in its culpability score. However, the Commission did not adopt a "cookie-cutter" approach; each organization is free to tailor its compliance efforts to its needs. Indeed, in evaluating whether a particular program meets the described requirements, the court is instructed to consider the nature of the industry in which the organization is engaged, its prior history, and the size and resources of the organization. The organization's efforts and expenditures need be no more than is reasonable given those considerations.

The consideration of an organization's compliance efforts in sentencing for a criminal offense is an important innovation that did not exist before Chapter Eight became effective. Before that time, there was no express sentence credit for a company's compliance efforts and no attempt to distinguish between "good citizen" corporations--those organizations making every effort to do the right thing--and those organizations that deliberately elevated the "bottom line" above compliance with the law. The Commission's reduction for an effective program to prevent and detect violations of law is a tool for the sentencing court to make this distinction where it counts--in the penalty for an incident of criminal misconduct.

Guidelines for the sentencing of organizational defendants are not regulations of general applicability. They apply *only* to organizations that have been criminally convicted of federal

felonies or Class A misdemeanors. (The Sentencing Commissions data indicate that approximately 300 organizations are sentenced in the federal system each year--not five over the last 10 years as Roadway has apparently asserted). Chapter Eight does not impose a requirement that all organizations implement compliance plans to a particular set of Commission specifications. Rather, in the event of a criminal prosecution, Chapter Eight provides mitigation for those "good citizen" corporations that have made reasonably diligent efforts to comply with the law.

The U.S. Sentencing Commission is not an adjudicative body, nor does it have any enforcement authority with respect to the application of the sentencing guidelines. Nevertheless, as a public service, the agency provides a hotline for prosecutors and defense attorneys (this hotline can be reached at (202) 273-4527), and for court personnel (this hotline can be reached at (202) 273-4545). These hotlines are staffed by the Commission's legal and training staffs to provide general assistance in applying the sentencing guidelines. Information provided through this hotline is not necessarily the official position of the Commission, nor is it binding upon the court or the parties to the case.

CONCERNS WITH MULTI-AGENCY RESPONSES

FEDERAL RESERVE BOARD, FEDERAL DEPOSIT INSURANCE CORPORATION, AND THE OFFICE OF THE COMPTROLLER OF THE CURRENCY

Company Concern as Expressed to GAO

Bank A officials said regulators need to tailor paperwork and other requirements to the size of the bank and the risks involved. For example, they said, a regulation's uniform paperwork requirements may have a greater effect on a small bank than on a large bank with greater resources on which to draw. They also said that some banks are greater risk takers than others, and those that engage in riskier financial practices should have to comply with stricter regulatory requirements.

Response GAO Received From the Federal Reserve Board

The Feral Reserve Board believes it is sensitive to the issue of appropriate regulation of institutions of various sizes and activities and tries to minimize unnecessary regulatory burden. For example, the primary data collection report, the call report, distinguishes among banking institutions by asset size and activities. Generally, larger institutions must provide more detailed information than smaller institutions, and only institutions that are involved in a particular activity complete the schedules related to that activity. Also, some data is collected only annually, rather than quarterly, for institutions with assets less than $100 million. Similarly, the proposed Supervisory Framework for Measuring and Assessing Banks' Interest Rate Risk Exposure provides for an exemption from additional reporting for smaller, well-managed institutions that are less likely to be significantly exposed to interest rate risk.

Response GAO Received From FDIC

FDIC believes regulators do tailor paperwork and other requirements to the size of the institution and risks involved, although there are obvious limits as to how far this sound principle can be applied; that is, how many gradations or categories can and should be created as a practical and substantive matter for any particular purpose. For example, under Part 363 of IRS regulations, institutions with assets under $500 million are not subject to requirements for annual independent audits and reporting. Call report requirements are progressively more complex and detailed for institutions with assets over $100 million, or over $300 million, and those with foreign branches. FDIC is currently developing regulations on interest-rate risk that will exempt smaller institutions and

focus on institutions with material interest rate risk. The entire regulatory scheme posited by section 38 of the FBI Act dealing with prompt corrective action and carried forward by the agencies in their respective implementing regulations contemplates progressively more rigorous restrictions on banks as they become riskier. Through the comment process, the agencies look to the regulated institutions to help FDIC consider variations in requirements based on size or risk. Bankers are encouraged to seriously consider these invitations for comment.

Response GAO Received From the Office of the Comptroller of the Currency (OCC)

OCC believes it is actively engaged in a variety of new initiatives to tailor its regulatory requirements to bank size and risk involved in particular activities. By virtue of their size and the complexity of the types of activities in which they engage, larger institutions pose relatively greater risk than do smaller institutions. For each of the largest national banks, OCC develops an individual risk profile based on all of the risks the bank takes on. OCC then tries to determine whether the risks are appropriate for the individual institution, given its resources, and whether controls the institution has in place are appropriate to the risks. The larger national banks continue to be evaluated against more detailed operational and managerial standards, which require more intensive and intrusive supervision. In contrast, stable, small, community-oriented national banks engaged in traditional banking activities tend to have a common risk profile, which allows OCC to supervise them in a less intrusive manner. In consideration of differences in size and risk, OCC implemented streamlined noncomplex bank examination procedures to examine noncomplex national banks against a common standard of performance. The procedures, implemented last fall, significantly reduce the information such banks are required to gather for an examination. This is one important step that OCC has taken toward tailoring requirements to bank size and risk involved.

Similarly, OCC said its Regulation Review Project considers bank size, condition, and scope of operation in streamlining regulatory requirements.

Company Concern as Expressed to GAO

Bank A officials said bank regulators should only require 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.

Response GAO Received From the Federal Reserve Board

The data collected from banking institutions by the Federal Reserve Board can contribute to many supervisory and policy functions, including safety and soundness, deposit insurance assessments, analyzing applications, and monitoring the involvement and potential risk exposure of individual banks and the industry as a whole to certain activities. The content of reports is reviewed periodically in order to determine the ongoing need for the data. For example, the Federal Reserve Board and other agencies had been aware of industry concerns regarding data related to the Bank Secrecy Act. As the result of an interagency effort to reduce reporting burdens, on June 28, 1995, the banking agencies jointly issued proposed rules to simplify the process for reporting suspected crimes and suspicious financial transactions. The proposed rules would reduce the number of reports that banking institutions must file and provide for the submission of reports to a central location.

Response GAO Received From FDIC

All reporting requirements that FDIC imposes on institutions must be reviewed and approved by OMB under the Paperwork Reduction Act. This review and approval process requires FDIC to justify the need for the report and explain how the report will be used. FDIC is not aware of any report that it requires banks to complete that the government does not use.

FDIC said some bank reporting requirements are specifically mandated by statute, and FDIC may find that certain of these requirements are 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, FDIC makes recommendations for legislative changes to eliminate burdensome reporting requirements. Banks are also urged to express their opinion on specific reports they consider unused.

Response GAO Received From OCC

OCC recognizes the costs associated with reporting requirements and is taking steps to eliminate duplicative or unhelpful reports, if the required reports are not used. For example, in implementing the streamlined examination procedures for noncomplex community banks, OCC greatly reduced the amount of material that national banks were required to furnish for an examination by identifying information that was essential and would definitely be used by examiners. As a result, examiners now request 35 standard items rather than as many as 200 non-

standard items. In addition, OCC's standards for communication in bank supervisory activities provides that before the start of any examination of a national bank, the examination team will review information provided by the bank. Similarly, in conducting follow-up activities, examiners will respond to information received from national banks within 30 days.

Company Concern as Expressed to GAO

Bank B officials said it is difficult to identify and stay up-to-date with all of the federal regulations with which they must comply because regulations are frequently changed, eliminated, or added. They said trade associations (e.g., the American Bankers Association) help keep them current on regulatory issues.

Response GAO Received From the Federal Reserve Board

Banking is a dynamic industry where markets have evolved rapidly and, particularly in recent years, congressional leaders have made statutory changes that have required regulatory changes or new regulations. "Pace of change" was identified as a source of regulatory burden in the Study of Regulatory Burden conducted by the banking agencies under the Federal Financial Institutions Examination Council in 1992; the banking agencies are aware of this concern and try to limit or consolidate changes. For example, since 1992 the call report is changed only once per year. However, legislation often imposes deadlines for the implementation of required regulatory changes, and market circumstances may need to be addressed in a timely manner. The Federal Reserve Board tries to work with the trade associations to keep the industry informed of regulatory changes or concerns. In addition, the Federal Reserve Board Regulatory Service (updated monthly) is available at nominal cost in both electronic and traditional paper formats, and the Federal Reserve Board Banks maintain mailing lists for announcements, requests for comment, and regulatory changes.

Response GAO Received From FDIC

FDIC recognizes the difficulty of keeping up-to-date with all of the federal regulations that affect banks. Most of these implement statutory mandates. To assist in this regard, FDIC notifies the institutions it regulates of regulatory changes through Financial Institution Letters that are mailed to the Chief Executive Officer of all FDIC-supervised institutions. Each institution is also provided with a loose-leaf service of laws and regulations. This service is updated on a regular basis. FDIC examination manuals are made available to any FDIC

supervised institution on request. These manuals include examination procedures with accompanying narrative.

Trade associations are also very helpful in keeping their members informed of changing rules. The regulators cooperate with the associations in developing seminars and training materials. Quite often, however, it is difficult to comply with laws and regulations without adequate legal counsel.

Response GAO Received From OCC

In addition to publishing its regulations in the Federal Register and CFR, OCC has a system of bulletins and advisory letters that advise national banks about regulations that OCC is issuing or enforcing. To help make it easier for national banks to keep up with changes, OCC instituted an automated OCC Information Line that enables banks to request documents from OCC 24 hours a day by telephone or fax machine. The Information Line includes documents that OCC issues explaining new regulations and new areas of concern to OCC. OCC also uses speaking engagements and outreach meetings extensively to discuss regulatory issues and initiatives with national banks and customer and community groups.

Company Concern as Expressed to GAO

Bank B officials said it is often difficult to understand what the regulations require employers to do because they are often written using complex terms that are subject to multiple interpretations. The officials also said they have experienced problems getting assistance from federal regulators in a timely manner and obtaining a definitive answer to questions. In some cases, the officials said they made their best attempt to comply with the regulations as they interpreted them, but they relied on the results of regulators' compliance reviews to show them what actions they should have taken. Unfortunately, they said, some regulators have more of a "gotcha" attitude than a helpful attitude.

Response GAO Received From the Federal Reserve Board

The Federal Reserve Board strives to write its regulations clearly and has a program to review regulations periodically in order to update and improve them. In most regulations, definitions are provided in a separate section of the regulation, and staff interpretations, opinions, and commentary are provided along with the regulation and related statutes in the Federal Reserve Board Regulatory Service, which is published by the Federal Reserve Board and can be obtained in both electronic and

traditional paper formats from the Publications Services Section of the Division of Support Services. The Federal Reserve Board Regulatory Service is updated monthly and has been extensively cross-referenced by means of a subject index, citation indexes, and finding tables. Guidance is also provided through communications such as policy statements and letters. In addition, written and telephone inquiries relating to Federal Reserve Board regulations may be directed to Board staff. Finally, the Federal Reserve Board System has developed a number of seminars for new regulations and is an active participant in trade associations' training and education programs.

Response GAO Received From FDIC

The volume and nature of the regulations do lead to complexity and misunderstanding. In recognizing this, FDIC is making progress towards its organizational goal of providing constructive assistance to banks where possible. FDIC's Division of Compliance and Consumer Affairs is redesigning its examination process in an effort to ease the burden of examinations on financial institutions and to provide greater communication and clarity during examinations. The Division of Compliance and Consumer Affairs is working with examiners and institutions in communicating this message. For example, the Division recently conducted a survey of a cross-section of FDIC-supervised institutions recently examined for compliance. The purpose of the survey was to solicit the industry's view as to how FDIC's compliance examination process might be improved. The survey responses are providing a benchmark against which to measure the success of FDIC's planned changes. Measuring the impact of the changes will be the basis for a second survey of a similar cross-section of institutions a year from now. FDIC's Division of Supervision is surveying the banks FDIC examines regarding the efficiency of the examination and the adequacy of the examination staff. Pursuant to section 303 of the Riegle Community Development and Regulatory Improvement Act of 1994, FDIC is engaged in a total review of all of its regulations and policy statements to streamline and clarify them wherever possible. FDIC has recently established the Office of Ombudsman, which, among other things, is available to assist any institution that is not receiving adequate responses from agency departments. Finally, FDIC is very aware of anecdotes describing a "gotcha" attitude by examiners. FDIC is addressing this directly by presentations to examiners, emphasizing that their job is to help bankers understand and implement the laws and rules. Examinations are an effective tool to help bankers understand new requirements, and examiners are being instructed that a slavish dedication to unearthing a list of merely technical violations is not as worthwhile as helping bankers establish good systems and controls.

Response GAO Received From OCC

OCC does not regulate employment practices; however, OCC does recognize that a source of regulatory cost is the failure of regulations to provide clear guidance. Thus, an important component of OCC's Regulation Review Program is revising OCC's regulations, where appropriate, to improve clarity and better communicate the standards the rules are intended to embody. Rules are being rewritten so that a reasonably knowledgeable person can understand them. If there are questions about a regulation or bank supervision, OCC is committed to responding in a timely manner in accordance with a series of customer service standards that are being implemented. For example, OCC's standards for communication in bank supervisory activities provide that national bank examiners with ongoing responsibility for supervising a bank respond to information received from the bank within 30 days of receipt. In situations where national banks feel that they have been victims of a gotcha attitude or disagree with bank examination findings, they may also appeal to OCC's ombudsman for independent resolution without fear of retribution. In 1994, the ombudsman prepared an annual report that included lessons learned for bank supervision from the resolution of appeals by bankers. The lessons generally related to how to improve communication with bankers.

Company Concern as Expressed to GAO

Bank B officials offered several suggestions on how to reduce the burden of federal regulations:

-- **Reduce the total number of regulations that apply to banks. In particular, eliminate outdated and impractical regulations.**

-- **When proposing new regulations, regulators should spend time with consumers to determine what benefit, if any, consumers will get from the regulations.**

-- **Have regulators provide guidance and support for implementing the regulations that private industry can count on.**

-- **Level the playing field. All organizations offering banking and financial services should comply with the same regulations.**

-- **Limit applicability of regulations to the few "bad apples" that precipitated the regulations rather than burdening the entire industry.**

Response GAO Received From the Federal Reserve Board

Awareness of the need to reduce regulatory burden on the banking industry is not new at the Federal Reserve Board. The Federal Reserve Board has long believed that significant reductions can be made in regulatory burden by eliminating requirements that are redundant or have outlived their usefulness. Since 1978 the Board has maintained a formal program of regulatory review and simplification of existing regulations, and as new regulations are considered, the Federal Reserve Board tries to minimize the burdens imposed on those that must comply. Proposed regulations are published to solicit public comment before they are made final, and the Board and staff consult with the Consumer Advisory Council and industry groups on a regular basis.

The Federal Reserve Board is quite sympathetic to the above concerns raised by Bank B officials; however, if regulatory burden is to be reduced significantly, legislative changes will be needed. Federal Reserve Board regulations generally are either required by statute or are necessary to explain or implement a statute. The Federal Reserve Board has testified before Congress on numerous occasions on the need to change statutes so that regulatory burden can be lifted.

Response GAO Received From FDIC

FDIC, as well as the other federal regulatory agencies, is currently reviewing all rules, regulations, and policy statements for streamlining or deletion, if appropriate, including whether or not all regulations should be applicable to all institutions. This effort was mandated by the Riegle Community Development and Regulatory Improvement Act of 1994. However, very few regulations are unique to FDIC and, therefore, most cannot be eliminated by FDIC alone or without legislative action.

FDIC is able to "stay in tune" with the concerns and views of the consumer through the FDIC Hotline and a large volume of consumer correspondence and telephone inquiries. FDIC often responds to proposed regulations based on this day-to-day experience and information. However, this may not be sufficient and FDIC recognizes it. Therefore, FDIC is establishing a formal outreach program to communicate with communities regarding consumer protection, credit availability, and sources of information.

FDIC is working towards greater guidance and support for financial institutions. Future guidance will be provided in the form of seminars (such as the recent Deposit Insurance Seminars held across the country); improved communication between examiners and the institution prior to the examiners' exit; and

increased training for examiners to result in clearer and consistent examination findings, regulatory interpretations, and recommended corrective actions.

Applicability of laws is largely determined by congressional statute. Regulatory agencies are limited accordingly, especially as to the issues that must be regulated and whom the regulations apply to.

For equitable application and enforcement, laws and regulations must apply to the entire industry. However, the "bad apples" are, in addition, subject to regulatory enforcement actions and increased surveillance.

Response GAO Received From OCC

Many of Bank B's suggestions are consistent with OCC's goals and, as much as possible, are being implemented. For example, in connection with its Regulation Review Program, OCC is systematically eliminating outdated and impractical regulations.

OCC has an active outreach program with banks and bank customers that includes written communications, meetings, and seminars. Special initiatives are undertaken, as appropriate, to address new issues or requirements. For example, before they were subject to a formal examination, national banks were given the opportunity to informally submit their sales literature to OCC for feedback on their compliance with new OCC guidance on sales of nondeposit investment products. A series of public hearings to solicit suggestions and comments from bankers and the general public were a fundamental part of the process of developing revisions to regulations implementing the Community Reinvestment Act.

To level the playing field for banks and other organizations that offer bank services, OCC is supporting appropriate legislative changes. In addition, OCC is actively seeking ways to "standardize" regulations for all financial service providers. For example, OCC entered into an agreement with the Securities and Exchange Commission earlier this year to jointly examine national bank advisors to mutual funds. Under the agreement, a national bank advisor will be subject to a single OCC-Securities and Exchange Commission examination rather than two separate reviews that would apply different sets of rules.

OCC is undergoing a fundamental shift to a risk-based system of regulation and supervision and is working to reflect differences in risk among banks and bank activities in its regulations. For example, under a proposed regulatory change, well-managed, well-

capitalized national banks will be able to take advantage of streamlined corporate applications and processing.

FEDERAL DEPOSIT INSURANCE CORPORATION AND
OFFICE OF THE COMPTROLLER OF THE CURRENCY

Company Concern as Expressed to GAO

An official from Bank A said 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. She also said that the bank must prepare and keep on file a large amount of backup information for the call reports because OCC and FDIC periodically review that information. Finally, the official expressed concern that the report's information requirements keep changing, which she said makes it difficult for the bank to plan ahead.

Response GAO Received From FDIC

Under Section 7(a) of the Federal Deposit Insurance Act, each FDIC-insured depository institution must submit quarterly "reports of condition," also known as "call reports," to the appropriate federal banking agency. In general, the bank call report consists of a balance sheet; income statement; 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. 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 call report for banks with foreign offices is the most detailed, while the report for small banks is the least detailed.

FDIC said the reporting requirements for the call report are subject to the review and approval of OMB under the Paperwork Reduction Act. The three federal banking agencies that collect bank call reports estimate that the amount of time it takes to complete a call report varies from 15 to 225 hours per quarter, depending on an individual bank's circumstances. For all banks, the estimated average amount of completion time per quarter is 31.6 hours. The reasonableness of these agency estimates was confirmed in a September 1992 survey about the call report that FDIC mailed to all banks. Completion of the survey was voluntary and the responses were processed by the Bank Administration Institute, a professional service organization. The Institute received responses from more than 50 percent of the 12,000 banks to which the survey was sent.

FDIC said the content of the bank call report is reviewed annually by the banking agencies under the auspices of the Federal Financial Institutions Examination Council. New items are added to the call report in response to statutory requirements, new accounting standards, and changes occurring in the banking industry and banking activities. Existing items are deleted when they are no longer considered sufficiently useful. A 1992 Council policy statement concerning the frequency and timing of changes in regulatory reporting requirements indicates, in general, that the banking agencies will announce before the end of each year all reporting changes that will take effect in the following year. This policy ensures that banks are notified about impending changes at least 90 days before they must complete the revised call report forms so that they can plan accordingly. Banks were advised about the call report changes being implemented as of March 31, 1995, on November 1, 1994.

The call reports are prepared for the most part from the bank's own accounting records. FDIC asks that workpapers backing up a call report be retained until at least the next examination of the bank when the accuracy of reports are subject to review. A nationally chartered bank may be subject to both OCC and FDIC review only because, in an effort at efficiency, FDIC processes the submitted reports for OCC in a combined FDIC and OCC computer system. FDIC's review in such a case would be to ensure accuracy of the initial input. OCC inquiries would be in regard to using and interpreting the output.

Response GAO Received From OCC

All banks are required to file call reports, including banks supervised by the Federal Reserve Board. Call reports to the Comptroller of the Currency are required by statute, 12 U.S.C. 161(a). Call reports provide financial information for public disclosure and are used by regulators to evaluate the safety and soundness of the banking system. They provide essential bank data that enables a proper assessment of a bank's condition and are a critical element of the supervisory process. Banks transmit their reports to FDIC for centralized processing. The backup information that banks must keep provides an important confirmation of the data reported. Examiners rely on banks' workpapers to verify the accuracy of the reports.

Changes to the information collected in call reports must be approved in advance by all of the federal bank regulators. Events that make call report changes necessary include changes in statute, regulation, accounting rules, technology, and the nature of the business of banking. For example, the regulators recently made changes to provide more detailed information about banks'

off-balance sheet activities due to uncertainties about the risks and rewards associated with substantial growth in derivatives.

FEDERAL RESERVE BOARD, OFFICE OF THE COMPTROLLER OF THE CURRENCY, FEDERAL DEPOSIT INSURANCE CORPORATION, AND FEDERAL EMERGENCY MANAGEMENT ADMINISTRATION

Company Concern as Expressed to GAO

Bank B officials said some bank regulations give nonbanks (e.g., an investment brokerage firm) an unfair competitive edge in the marketplace. For example, 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 the Bank B, bank officials said about a quarter of the air time 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 their products and services.

The Bank C official also 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 a loan without having to acquire flood insurance.

Response GAO Received From the Federal Reserve Board

The provision on disclosure of investment risk to which the bank refers is not part of a regulation, it is included in an interagency policy statement on retail sales of nondeposit investment products that was adopted jointly by the Federal Reserve Board, FDIC, OCC, and the Office of Thrift Supervision. The policy statement states that customers should be informed that nondeposit investment products are not insured by FDIC; are not deposits or other obligations of the institution and are not guaranteed by the institution; and are subject to investment risks, including possible loss of principal. Under the policy statement, these disclosures should be included during sales presentations, when an investment account is opened, and in any advertising and promotional materials.

The purpose of the policy statement is to address potential customer confusion with respect to sales by banks of investment products, such as mutual funds, that are not insured and are not obligations of the depository institution. The guidance provided by the interagency statement is aimed at ensuring that banks that sell nondeposit investment products clearly differentiate these products from insured deposits. Such a requirement has no application to broker/dealers that are not banks or bank

affiliates, as customers of such broker/dealers are unlikely to confuse products sold by those broker/dealers with insured deposits.

The Flood Disaster Protection Act of 1973 created a significant disparity between the treatment of mortgage banks and of depository institutions with respect to flood insurance purchase requirements. Under the 1973 act, the federal banking agencies were directed 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.

The disparity in treatment between depository institutions and mortgage banks has been reduced, although not eliminated, as a result of amendments made by the National Flood Insurance Reform Act of 1994.[17] Under the 1994 act, the Federal National Mortgage Association (FNMA or Fannie Mae) and the Federal Home Loan Mortgage Corporation (FHLMC or Freddie Mac) are required to adopt procedures to ensure that loans made after September 23, 1995, that are purchased by FNMA and FHLMC are covered by flood insurance where the property securing the loan is located in a flood hazard area. Where a mortgage bank sells loans to FNMA or FHLMC, the purchase of flood insurance therefor will be required under the same circumstances as for lenders that are depository institutions. Board staff also understand that in order to be sold in the secondary market to purchasers other than FNMA and FHLMC, mortgage loans generally must meet FNMA and FHLMC underwriting standards, which now include flood insurance coverage requirements. As most mortgage banks do not hold the loans they originate, in practice, flood insurance purchase requirements will apply to a substantial portion of the loans made by mortgage banks.

Some differences in treatment between mortgages banks and depository institutions remain. For example, mortgage banks are not subject to borrower notification requirements concerning property located in a flood hazard zone. (2 U.S.C. § 4104a.) Additionally, the 1994 act added several new requirements applicable to depository institutions that are not applicable to mortgage banks, including additional borrower notice requirements and requirements for escrow of flood insurance premiums under certain circumstances.

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[17]Title V of the Riegle Community Development and Regulatory Improvements Act of 1994, P.L. 103-325.

Response GAO Received From OCC

The examples of competitive inequality cited by Banks B and C are due to the fact that banks and nonbanks operate under different statutory schemes. OCC would support statutory changes that contribute to leveling the playing field among financial service providers. To address other such inequalities, OCC, for example, is reviewing the effectiveness of alternative regulatory approaches by evaluating how banks' nonbank competitors are regulated. OCC also is working with the Securities and Exchange Commission to obtain more consistent regulation among all providers of financial services. For example, OCC and the Securities and Exchange Commission recently agreed to conduct joint examinations of national bank investment advisors to mutual funds. OCC also is working with the securities regulators in setting appropriate disclosure standards for banks and nonbanks offering mutual funds to the public.

Response GAO Received From FDIC

Financial institutions that are members of FDIC have a substantial competitive advantage in comparison with financial firms whose products do not have the federal guarantee. This competitive advantage is mitigated somewhat by certain responsibilities born by the FDIC-insured depository institution. Among those responsibilities is the obligation to keep customers informed concerning which products offered are insured and which products are not insured by FDIC.

FDIC by regulation requires that insured depository institutions advertise their insured status when soliciting deposits. Customers have become familiar with the advertising slogan "member FDIC," but some customers may have become lackadaisical in their approach to products sold in a bank, assuming that all such products are FDIC insured.

When banks began selling nondeposit investment products in general, and mutual funds in particular, many customers were surprised to find that the product that they had just purchased in their financial institution was not insured. In order to minimize this customer confusion as well as to ensure that banks do not become subject to contingent liabilities that could jeopardize their safety, the four federal financial institution regulators issued an "Interagency Statement on the Sale of Nondeposit Investment Products." This policy statement, among other things, encouraged depository institutions to disclose in connection with the recommendation or sale of a nondeposit investment product that the product is

- not insured by FDIC;

- not a deposit or other obligation of, or guaranteed by, the depository institution; and

- subject to investment risks, including possible loss of the principal amount invested.

Advertisements and other promotional materials should contain the minimum disclosures.

The federal financial institution regulators are aware that certain advertising media may necessitate the modification of these disclosures. For instance, disclosures need not be provided in radio broadcasts of 30 seconds or less, on electronic signs, and on signs that are used only as location indicators. In addition, the regulators are considering abbreviated disclosures for such media as television broadcasts, billboards, signs, and posters.

FDIC does not have any requirements for the disclosure of rates and terms with respect to the advertising of nondeposit investment products. Banks are subject to the antifraud provisions of the federal securities laws to the same extent as an investment brokerage firm.

Applicability of the flood insurance laws is determined by congressional statute, notably sections 1306 and 1364 of the National Flood Insurance Act of 1968, and section 2(b)(4) of the Flood Disaster Protection Act of 1973. Since the law is designed to save the government from large payments to borrowers in the event of disaster, and not necessarily to protect the lender, some consideration to reviewing the applicability of the law may be appropriate.

Response GAO Received From FEMA

Mandatory flood insurance coverage requirements apply only to federally backed mortgages or financial assistance obtained from a federal or federally regulated lender where the security for the loan is a structure located in an identified SFHA. However, even in the case of unregulated lenders, if they sell mortgages to government entities or the secondary market, like FNMA or FHLMC, they will be required to have flood insurance on the property.

FEDERAL RESERVE BOARD AND DEPARTMENT
OF HOUSING AND URBAN DEVELOPMENT

Company Concern as Expressed to GAO

A Bank C official said that the Real Estate Settlement Procedures Act (RESPA or Regulation X), which is administered by the Department of Housing and Urban Development (HUD), requires extensive disclosure documents that 1) are not easily understood by or relevant to customers' concerns, 2) are expensive and time consuming for the bank to provide, and 3) create potential liability for the bank. 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 affected and were of interest to the customer. The other 8 pages consist of such forms as the Servicing Disclosure Statement and the Controlled Business Arrangement Disclosure--documents the official said were of little concern to the customer.

Response GAO Received From
the Federal Reserve Board

HUD has sole rulewriting authority for RESPA. The Federal Reserve Board's involvement with RESPA and Regulation X, its implementing regulation, is limited to examining state member banks for compliance. Since HUD is the rulewriter for RESPA, the Federal Reserve Board offers no view on whether the regulatory burden associated with RESPA is derived from statutory requirements or requirements adopted by HUD for policy reasons.

Response GAO Received From HUD

The disclosure requirements to which the complainant refers are established by Congress in RESPA, 12 U.S.C. 2601 et seq. The requirements, as more fully discussed below, consist of a Good Faith Estimate of Settlement Costs; an information booklet delivered to all first lien purchase money borrowers (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, a disclosure of the relationship and that the borrower has the option to choose other providers (except for appraisers, credit reporting agencies, and lender's counsel) is required. At settlement, the settlement agent is required to provide a standardized accounting of the transaction, familiarly known as the HUD-1, or HUD-1A. Each of these disclosure documents is required by specific provisions of the RESPA statute.

INTERNAL REVENUE SERVICE, DEPARTMENT OF LABOR, AND PENSION BENEFIT GUARANTY CORPORATION

Company Concern as Expressed to GAO

Officials from Bank A and a fish farm each cited problems with ERISA regulations.[18] The officials from Bank A said they have difficulty staying current with and understanding ERISA's changing and increasingly complex requirements. The fish farm officials said they want to start a pension plan for their employees, but they have not done so because ERISA's numerous and detailed reporting and recordkeeping requirements make the plan cost-prohibitive.

Also, officials from a glass manufacturer said that the numerous, complex, and ever-changing pension rules and regulations are extremely burdensome on the company. Also, the sizable penalties associated with "mistakes" (e.g., not filing the IRS/DOL required Form 5500 on time) necessitates that the company incur large labor and consulting costs to ensure legal compliance in this area.

Response GAO Received From IRS

IRS believes this concern fails to distinguish between the complexity and burden that results from the statutes governing retirement plans and the effect of regulations promulgated by IRS and Treasury. In the 21 years since ERISA was enacted, the relevant statutes have been amended frequently and have become increasingly complex. Much of this complexity arises from specific policy considerations applicable to retirement plans. In particular, employers desire to retain the flexibility to structure plans that satisfy the particular needs of their workforce. The desire for greater flexibility often creates a need for multiple sets of rules. Also, for each of the many types of tax-favored retirement plans, the laws must prevent tax shelter abuses and ensure that the plans provide benefits to nonhighly compensated employees that are comparable to those provided to highly compensated employees.[19]

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[18]ERISA establishes uniform standards for employee pension and welfare benefit plans, including minimum participation, accrual, and vesting requirements; fiduciary responsibilities; and reporting and disclosure requirements.

[19]See, for example, Private Pensions: 1986 Law Will Improve Benefit Equity in Many Small Employers' Plans (GAO/HRD-91-58, (continued...)

IRS believes complexity is also increased by the desire to grandfather past options when changing the law. Moreover, when faced with complex statutes, employers often desire detailed regulatory guidance that provides a roadmap of how to comply with the statutes.

Furthermore, IRS believes that because of the substantial tax subsidy provided to qualified retirement plans, additional complexity has resulted from legislative changes motivated by considerations more generally focused on overall tax and revenue issues and less specifically on retirement. The companies' concerns about the complexity of the statutes governing retirement plans are properly addressed to Congress, not the Service or other administrative agencies.

Within the constraints imposed by the need to implement complex and frequently changing statutes, IRS has acted to reduce the burdens on employers who adopt and maintain tax-qualified retirement plans for their employees. For example, IRS has developed pattern plan programs designed particularly to meet the needs of small employers, such as the Master and Prototype, Regional Prototype, and Volume Submitter programs. Under the prototype programs, employers may adopt standardized plans and are then assured that the form of the plan complies with the requirements for tax qualification without having to request that the Service individually determine that the plan is tax-qualified.

Also, in order to reduce the compliance burden, IRS said some of the regulations governing tax-qualified plans include safe harbors that allow employers to design their plans to automatically satisfy the relevant requirements. Furthermore, when there are changes in the law or regulations, the Service, to the extent practicable, publishes model plan amendments and streamlined application procedures to lessen the costs of amending plans.[20] The Service also provides a simplified

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[19](...continued)
),in which GAO concluded that the Tax Reform Act of 1986, which made many complex amendments to the laws governing tax-qualified retirement plans, improved benefit equity between men and women.

[20]For example, in Revenue Procedure 95-34, 1995-29 I.R.B. 7, the Service provided a model amendment and a streamlined procedure for the definition of highly compensated employee and, in Revenue Procedure 92-41, 1992-1 C.B. 870, the Service provided a model amendment and streamlined procedure for the definition of compensation.

application form for an employer to use to request a Service review of minor plan amendments.

To reduce the reporting burdens on employers maintaining retirement plans for their employees, IRS, DOL, and PBGC jointly developed the Form 5500 Series to consolidate the reporting obligations under the Code and Titles I and IV of ERISA. In addition, these three agencies are in the process of significantly simplifying and shortening the Form 5500 and developing software that will allow plans to file the form automatically, using a self-editing program. (IRS also notes that many of the reporting and recordkeeping requirements about which the fish farm officials complained are imposed by Title I of ERISA, not the Internal Revenue Code, and are properly addressed by DOL).

IRS and Treasury have also been responsive to employer requests for simplification of the rules governing plan operation. For example, until recently, a participant receiving a distribution that is subject to the qualified joint and survivor annuity requirements of section 417 of the Internal Revenue Code could not receive the distribution until at least 30 days had elapsed from the date the participant was provided with a notice explaining his or her rights. In response to requests from employers, IRS and Treasury recently issued proposed regulations that permit participants to waive most of this period.

In order to achieve more fundamental simplification, the administration has released a pension simplification proposal that includes both legislative and administrative changes.[21] Among the legislative proposals is a new, simplified plan, known as the National Employee's Savings Trust, that will enable small employers to provide tax-favored retirement benefits for their employees under either of two alternate formulas without being subjected to any of the nondiscrimination or top-heavy rules, or any of the employer reporting requirements currently applicable to tax-qualified plans.

Response GAO Received
From DOL/Pension and Welfare
Benefits Administration

ERISA is a comprehensive statute governing private-sector employee pension and welfare benefit plans. The provisions of ERISA are administered by three federal agencies--DOL's Pension

[21]According to IRS officials in September 1996, many of these proposals were enacted in the Small Business Job Protection Act of 1996.

and Welfare Benefits Administration (PWBA), IRS, and PBGC. Each agency has defined regulatory and enforcement responsibilities. In general, PWBA is charged with administering the provisions of Title I of ERISA (ERISA §1 et seq., 29 U.S.C. §1001 et seq.); IRS is charged with administering the tax provisions of Title II of ERISA (Internal Revenue Code §401 et seq.); and PBGC is charged with administering the plan termination insurance provisions of Title IV of ERISA (ERISA §4001 et seq., 29 U.S.C. §1301 et seq.).

Under Title I of ERISA, PWBA is principally responsible for administering Part 1 (the reporting and disclosure provisions), Part 4 (the fiduciary responsibility provisions), Part 5 (the administration and enforcement provisions), and portions of Part 6 (the continuation coverage and other standards applicable to group health plans). With the exception of the qualified domestic relations order provisions and the suspension of benefits provisions, interpretive and regulatory responsibility for the participation, vesting, benefit accrual, and funding provisions of Parts 2 and 3 of Title I were transferred to IRS pursuant to Reorganization Plan No. 4 of 1978.

PWBA believes that while there have been a number of statutory changes to the Internal Revenue Code and Title IV of ERISA affecting pension plans, there have been few statutory changes to those provisions of Title I of ERISA within the jurisdiction of PWBA. The most notable changes to Title I resulted in the addition of the continuation of health care coverage provisions (Consolidated Omnibus Budget Reconciliation Act, or COBRA), the qualified domestic relations order provisions, provisions permitting the assessment of civil penalties for refusals or failures to file annual reports, qualified medical child support order provisions, and provisions governing the coverage of adopted children under group health plans.

In June, the President announced a number of pension simplification proposals that, if enacted, would, among other things, simplify a number of the rules currently governing pension plans, in addition to permitting the establishment of a new simplified pension plan (National Employee's Savings Trust) by small employers. A copy of the President's proposal will be separately furnished.

Title I of ERISA imposes specific annual reporting obligations on administrators of employee benefit plans (ERISA sections 101(b)(3) and (4), 103, 104(a)(1)(A).) Title I of ERISA also requires administrators to retain for a period of 6 years those records necessary to verify, explain, or clarify the reported information (ERISA section 107). Title IV of ERISA and the Internal Revenue Code also impose annual reporting obligations on administrators and sponsors of employee benefit plans. In an

effort to reduce the reporting burdens on employee benefit plans, the Department, PBGC, and IRS developed the Form 5500 Series to enable plan administrators to satisfy their annual reporting obligations under Title I of ERISA, Title IV of ERISA and the Internal Revenue Code by filing a single annual report form.

PWBA believes that whether and to what extent information is required to be reported on the Form 5500 Series depends on the type of plan (i.e., whether the plan is a pension or welfare plan); the size of the plan (i.e., whether the plan has fewer than 100 participants or 100 or more participants); and how the benefits are funded (i.e., through a trust, insurance, or from the general assets of the employer). For example, a welfare plan with fewer than 100 participants, the benefits of which are fully insured or paid solely from the employer's general assets or a combination thereof, are exempt from the annual reporting requirements (29 C.F.R. §2520.104-20). Welfare and pension plans that have fewer than 100 participants and provide benefits through a trust file an abbreviate Form 5500-C every third year, with a registration-type statement, the Form 5500-R, filed in the 2 intervening years. Plans with fewer than 100 participants also are exempt from the requirement to engage a qualified independent accountant as part of the annual reporting process. The Form 5500 is filed by plans with 100 or more participants. The extent to which the Form 5500 has to be completed varies on the type of plan (pension or welfare) and how benefits are provided (insured, trust, etc.). PWBA refers you to the Form 5500 Instructions for a complete description of who is required to file what.

PWBA believes that while a number of a number of exemptions and alternative methods of compliance have been established by regulation, particularly for small plans, the agencies continue to be sensitive to burdens imposed on the plan sponsors and plans. In this regard, the agencies, as part of the President's simplification proposals, have undertaken a comprehensive review of the Forms in an effort to simplify and streamline the annual reporting process. PWBA anticipates that revised forms will be available for public comment by the end of the year.

Response GAO Received From PBGC

PBGC's regulatory responsibilities extend only to the pension benefit guarantee program under Title IV of ERISA. PBGC has no role in pension regulations affecting vesting, minimum funding, and nondiscrimination, nor in most other pension regulations.

PBGC's regulations generally provide procedural guidance and attempt to minimize burden. For example, in implementing the changes required by the Retirement Protection Act of 1994, PBGC

has emphasized simplicity and has given special consideration to small business issues.

With respect to penalties, PBGC said it announced in July 1995 a revised policy for the late filing of information that plan sponsors are required to report. The revised policy calls for lower penalties for most plans, especially for plans sponsored by small businesses, and for violations that are speedily corrected.

PBGC recognizes the problems associated with the complexity of current pension regulations. To address this issue PBGC actively participated in developing the Administration's Pension Simplification Plan, announced in June 1995. A key provision of the Administration's proposal is the National Employee's Savings Trust, which would allow small employers, including tax-exempt organizations and governments, to establish pension plans with no employer filing and testing requirements (no annual employer reporting, complex testing, "top heavy rules", or IRS determination letters). The Trust would both simplify and significantly reduce the cost of pension plan administration for small employers.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
AND DEPARTMENT OF LABOR

Company Concern as Expressed to GAO

Officials from a glass company said that ADA and FMLA are very complex and, as a result, corporations are unsure how to operationalize policy that does not violate the regulations. They said each case must therefore be handled individually, which raises costs. For example, they said one of their employees wanted to take FMLA leave to care for his partner's parents. They said it took the company 1 week to determine whether the employee could take such leave or not because it was not clear how nontraditional living arrangements should be handled. Company officials said resource management and recordkeeping costs associated with these regulations are also costly. They said about 15 percent of the company's employee selection and staffing costs are attributable to ADA and FMLA. They also said that poor performing employees can use ADA and FMLA to avoid job commitment.

Also, Roadway officials said FMLA's requirements are vague, and it is unclear how companies are to comply with the act. They also said that some of FMLA's goals are similar to ADA goals, but they are not aware of any guidance regarding the interrelationships of the two acts.

Response GAO Received From EEOC

EEOC closely coordinated with DOL throughout the FMLA rulemaking process, and the final FMLA rule identifies various ADA/FMLA overlap issues and gives examples of how to comply with both laws. EEOC staff is presently developing additional guidance to answer common questions about how to comply with ADA when FMLA also applies.

Regarding the question of administrative burdens, ADA added only minimal recordkeeping obligations to those long in place under Title VII and ADEA and did not impose any new reporting requirements pertaining to employment. While FMLA is administered by DOL and not EEOC, EEOC would point out that a recent study demonstrates that FMLA does not result in costly recordkeeping, resource management, or personnel obligations. Only 4 percent of the employers in the study reported major new administrative costs, with 27 percent reporting no new costs and 51 percent reporting only minor new costs.[22] Only 2 percent of

[22]The Conference Board, Family and Medical Leave, Volume 4, Number 4 Work-Family Roundtable at 5 (1994).

the surveyed employers reported major new costs regarding hiring and training, with 65 percent reporting no new costs and 28 percent reporting only minor new costs. Of course, even these costs must be weighed against the substantial benefits of allowing employees to meet their familial responsibilities or survive a personal health crisis without jeopardizing their employment.

With regard to the employer that spent a week trying to determine whether its employee was entitled to FMLA leave to care for his partner's parents, the law, in fact, provides a clear answer. Both the FMLA rule (29 C.F.R. §825.113(b)) and the Interpretive Appendix to the ADA rule (29 C.F.R. §1630.8), establish that employees are not entitled to leave in this circumstance.

Finally, ADA's antidiscrimination requirements are in no way a shield for poor performers. All employees may be held accountable for their performance, regardless of disability, under the law.

Response GAO Received From DOL

DOL believes FMLA and ADA are not similar enactments. These laws contain differing employee protections that serve distinctly different purposes under concepts that must be analyzed separately. (However, on July 22, 1996, OSHA published proposed regulations to eliminate duplicate or redundant standards from its rules.) FMLA does not modify or affect any federal or state law prohibiting discrimination on the basis of race, religion, color, national origin, sex, age, or disability, which would include ADA. (29 U.S.C. 2651.) FMLA regulations (29 C.F.R. 825.702) discuss the relationship between FMLA and ADA and include examples of how these two laws may interact. Where an employee with a serious health condition under FMLA is also a qualified individual with a disability under ADA, the employer should apply FMLA and ADA simultaneously and in a manner that ensures compliance with the superior employee protection provisions of each law. Satisfying any or all FMLA requirements, including granting an employee 12 weeks of leave and restoring the employee to the same or equivalent job, does not relieve an employer of any potential ADA obligations to that employee in cases of overlapping jurisdiction. Designating an absence as FMLA leave does not block an employee's greater rights provided by ADA.

Medical records created for purposes of FMLA and ADA must be maintained in accordance with ADA's confidentiality rules on medical information. FMLA's recordkeeping provisions were developed in consultation with EEOC to minimize burden and to ensure that employers would not have to create two separate files

under FMLA and ADA for maintaining covered confidential medical records. (29 C.F.R. 825.500(g).)

Many of FMLA's other recordkeeping provisions are otherwise required by other laws or would be kept as a customary prudent business practice. (29 C.F.R. 825.500.) Records to be kept include basic payroll and identifying employee data (also required for minimum wage and tax laws), dates of FMLA leave taken by eligible employees, employee/employer notices requesting/designating FMLA leave, premium payments of employee benefits, and any disputes regarding FMLA leave use.

The record of hearings on family and medical leave prior to enactment of FMLA indicate the powerful productive advantages of stable workplace relationships, and a direct correlation exists between stability in the family and productivity in the workplace. When workers can count on durable links to their workplace they are able to make their own full commitments to their jobs. (29 C.F.R. 825.101.) The suggestion that poor performing employees can use FMLA to avoid job commitment is not consistent with the established record under FMLA, nor is it consistent with FMLA's implementing regulations. An employee has no greater right to reinstatement or to other benefits of employment than if the employee had worked continuously during the FMLA leave period. (29 C.F.R. 825.216.)

FMLA is not a "safe harbor" for the employee who violates otherwise legitimate company policies. An eligible employee may have FMLA leave delayed for not complying with FMLA's advance notice (if leave was foreseeable) or medical certification requirements. (29 C.F.R. 825.312.) An employer may ask an employee on FMLA leave to report periodically on the employee's status and intent to return to work. (29 C.F.R. 825.309.) An employee who fraudulently obtains FMLA leave from an employer is not protected by FMLA's job restoration or maintenance of health benefits provisions. (29 C.F.R. 825.312(g).)

In addition, to obtain public input and assist in the development of FMLA's regulations (29 C.F.R. Part 825), DOL published a notice of proposed rulemaking in the Federal Register that invited the public to comment on a variety of questions and issues. Altogether, based upon the initial comment period from March 10 to 31, 1993, and the follow-up comment period from August 5, 1993, through December 3, 1993, approximately 1,300 comments were received from employers, trade and professional associations, advocacy organizations, labor unions, state and local governments, law firms and employee benefit firms, academic institutions, financial institutions, medical institutions, governments, Members of Congress, and others, all of which were carefully considered in the development of the regulations.

DOL also prepared a lengthy preamble to accompany these regulations in an attempt to be fully responsive to the numerous comments received and to clarify FMLA requirements. These regulations, which are produced in a "user-friendly" question and answer format, have been designed to be accessible, understandable, and usable by a person not familiar with FMLA. Questions have also been answered in a way that permits FMLA to be implemented as intended and without unnecessary litigation. To make the regulations easier for the public to use, an index at the end of the regulations (29 C.F.R. 825.800) identifies key FMLA terms with relevant citations.

For example, using the company's example of determining whether FMLA leave may be given for a leave of absence based on "nontraditional living arrangements," the company could have used the index. The statute (29 U.S.C. 2612(a)(1)(C) and the regulations (29 C.F.R. 825.112) identify the reasons for which an eligible employee may take FMLA leave and provide that leave must be granted to care for a "spouse, son or daughter, or parent of the employee" with a serious health condition. The index includes these terms with relevant citations. The regulations (29 C.F.R. 825.113) define "parent" as the biological parent or an individual who stands or stood in loco parentis (a "parent in-law" is not included). "Spouse" means a husband or wife as defined or recognized under state law for purposes of marriage where the employee resides, including common law marriage where it is recognized. In this example, leave to care for the partner or the partner's parents would not qualify as FMLA leave.

In addition, the regulations (29 C.F.R. 825.702) include a thorough discussion on the interrelationship of FMLA and ADA with specific examples of how the two laws may interact where there are situations of simultaneous coverage. DOL also encourages individuals needing further information on ADA to contact their nearest EEOC office. (29 C.F.R. 825.702(g).)

Company Concern as Expressed to GAO

A Minco official said FMLA requires employees to submit medical documentation to employers that may conflict with privacy protection requirements under ADA. For example, they said employees are required to provide employers with medical documentation to support FMLA leave requests. However, they said that the documentation required by FMLA may reveal information about a specific medical condition that ADA requires be kept from employers.

Response GAO Received From EEOC

There is no conflict between the FMLA provision allowing employers to ask for certification that an employee has a serious health condition and ADA restrictions on disability-related inquiries of employees. When an employee requests leave under FMLA for a serious health condition, employers will not violate ADA by asking for the information specified in the FMLA certification form. An employer is entitled to know why an employee, who otherwise should be at work, is requesting time off.

Response GAO Received From DOL/ESA

The purpose of FMLA's medical certification provisions (29 U.S.C. 2613) is to allow employers to obtain information from a health care provider to verify that an employee, or the employee's family member, has a serious health condition and the likely periods of absence by the employee. The regulatory medical certification provisions were developed in consultation with EEOC to ensure consistency with ADA's provisions. For privacy reasons and to be consistent with ADA, all information on the form must relate to the medical condition for which the employee is taking FMLA leave. The final regulations (29 C.F.R. 825.306 and revised Certification of Health Care Provider Optional Form WH-380) clarify the types of information that may be furnished, generally limited to the medical facts relating to the serious health condition that makes the employee unable to work or a family member unable to perform regular daily activities, rather than a diagnosis of the medical condition. Records and documents relating to medical certifications, recertifications, or medical histories of employees or their family members under FMLA must be kept as confidential medical records with the same privacy protection requirements that are applied under ADA. (29 C.F.R. 825.500(g).)

Company Concern as Expressed to GAO

Officials said the hospital has actively complied with federal and state affirmative action requirements in its minority recruitment efforts and programs. Because of the population characteristics of the state, which is populated by relatively few minorities, the hospital's recruitment efforts require a substantial investment of resources (an estimated $200,000 in fiscal year 1994) that does not always meet with a corresponding rate of success. Continuation of these costly efforts is essential in order to comply with federal and state regulations and to avoid potential audit sanctions.

Response GAO Received From EEOC

The concerns expressed by this employer do not stem from any EEOC requirements or practices. Neither the statutes nor regulations enforced by EEOC require affirmative action, nor does EEOC audit employers or impose audit sanctions.

Response GAO Received From DOL/OFCCP

The company indicated that it spent $200,000 on its affirmative action plan and did not have a corresponding rate of success. The company may wish to review its recruitment practices. Suggested techniques to improve recruitment and increase the minority or female applicant flow are outlined in the regulations at 41 C.F.R. Part 60-2.24(e). One such technique includes forming relationships with minority and female interest groups or establishing a co-op program with historically black colleges and women's colleges.

For citations related to the discussion above, see Executive Order 11246; Title 41 C.F.R., Chapter 60.2; Title 41 C.F.R., Chapters 60-741.5 and 60-741.6, Section 503; Title 41 C.F.R., Chapters 60-250.5 and 60-250.6, VEVRAA.

DEPARTMENT OF LABOR AND
INTERNAL REVENUE SERVICE (IRS)

Company Concern as Expressed to GAO

Officials at both Minco and a fish farm said the combined requirements under FMLA and COBRA of 1985 were problematic for their companies.[23] They said FMLA requires employers to maintain the health insurance of employees on leave. According to Minco officials, employees are supposed to pay their share of health insurance to the company; but if an employee does not pay the premium, the employer is expected to pay the full premium and then seek reimbursement from the employee.

Officials from the fish farm said FMLA is not a problem to conform to except in situations of abuse. The officials cited 2 instances where they determined that employees were eligible to receive benefits under FMLA, but it soon became clear that the individuals did not intend to return to work. Fish farm officials said they paid benefits (and kept positions open) for people who in fact had quit without notice. They said no one at DOL or the company's insurer could tell them how to handle the situation when an employee plans to quit and is not entitled to receive further benefits. Then, they said no one has the answers.

Also, officials at both companies said that if an employee terminates employment (after the employer has paid as much as 12 weeks of health insurance), the employer often finds it difficult to obtain reimbursement from the employee. Therefore, the employer must ultimately bear the full cost of the insurance. To collect from the employee, Minco officials said, the company would have to take the employee to court--an action that may prove even more costly in the long run.Officials from the fish farm said that these problems with the act are a disincentive for businesses--particularly small businesses--to pay for employees' health insurance.

Response GAO Received From DOL/PWBA

Issues involving the application of FMLA should be directed to the Wage and Hour Division of DOL/ESA, which has regulatory and

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[23]COBRA (29 U.S.C 1161 et seq.) requires employer-sponsored group health plans to allow employees, who would lose coverage as a result of certain events, to continue coverage at their own expense for up to 18 months. COBRA does not apply to employers who normally employed fewer than 20 employees on a typical business day during the preceding calendar year.

interpretive jurisdiction over that act. The issues raised by the interviewed company involving the application of the COBRA continuation coverage provisions should be directed to the Office of Chief Counsel, IRS. While Title I of ERISA was amended to include the continuation coverage provisions (Part 6 of Title I, §601 et seq.), the Department's regulatory and interpretive jurisdiction is limited to the application of the notification provisions, and all other provisions are within the jurisdiction of IRS. It should be noted, however, that the Department does attempt to assist plan participants and beneficiaries who have questions concerning the COBRA continuation provisions and their rights thereunder, although guidance in this area is based on regulations, interpretations, and other guidance issued by IRS.

Response GAO Received From DOL/ESA

FMLA (29 U.S.C. 2614(c)) and regulations (29 C.F.R. 825.209 through 825.213) require employers to maintain an "eligible" employee's coverage under any group health plan during any period of FMLA leave on the same conditions as coverage would have been provided if the employee had worked continuously during the leave. This means that if an employer normally pays a portion of an employee's group health plan premiums prior to the employee taking FMLA leave, the employer must continue to pay its share of the premiums at the same rate during the FMLA leave. The employer has the right to collect the employee's portion of group health plan premiums during a period of FMLA leave, or at the conclusion of FMLA leave, but only at the same rate that the employee would normally pay while working. The employer should provide the employee with advance notice in writing of the terms and conditions under which payment will be made and consequences of failure to make timely payments.

If the employee fails to return to work following a period of unpaid FMLA leave and the reason is not due to the serious health condition of the employee or family member or other circumstances beyond the employee's control, the employer may recover its share of group health insurance premiums paid during the leave. (29 C.F.R. 825.213.) To the extent that recovery of group health insurance premiums is allowed, the employer may recover the costs through deduction from any sums due to the employee, such as unpaid wages, vacation pay, profit sharing, etc., provided such deductions do not otherwise violate applicable federal or state wage payment or other laws. Another method of recovery would be to establish a repayment schedule of partial payments stretched over extended pay periods to account for individual employees' needs and compensation arrangements. As a last resort, employers may initiate legal action against the employee as recoverable premiums are a debt owed by the nonreturning employee to the employer.

FMLA regulates group health coverage for periods of qualifying FMLA leave. However, once FMLA leave has ended and/or the employee's employment relationship with the employer has ended, employers may have other obligations under COBRA to continue group health insurance coverage. Leave taken under FMLA does not constitute a qualifying event under COBRA. COBRA allows an employee to continue health plan benefits for certain additional periods at the employee's expense and not to exceed 102 percent of the applicable premium. (See 29 U.S.C. 1161 - 1168.) To respond to employers' concerns regarding how the requirements under FMLA affect their obligations under COBRA, IRS published Notice 94-103 (see Appendix E at the end of the FMLA regulations published in the Federal Register on January 6, 1995). This notice provides guidance on the COBRA continuation of coverage requirements of section 4980B of the Internal Revenue Code that may arise once FMLA leave has ended.

To avoid situations where an employee either quits without notice while on FMLA leave or intends not to return to work at the conclusion of FMLA leave, employers have the option to require employees to report periodically during the leave period on their status and intent to return to work. The employer's policy regarding such reports must be nondiscriminatory and given to the employee in writing at the time the leave is designated as FMLA leave. (See 29 C.F.R. 825.301(b) and 825.309.) Where an employee has given unequivocal notice that he or she intends not to return to work, the employee's rights under FMLA cease with respect to job restoration and maintenance of group health insurance benefits. (See 29 C.F.R. 825.312(e) and 825.209(f).)

Response GAO Received From IRS

While the company officials said the combined requirements under COBRA and FMLA were problematic, all of their concerns appear to relate solely to the FMLA requirements. As noted in DOL's reply, the agency with jurisdiction over those requirements is the Wage and Hour Division of DOL/ESA.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
AND DEPARTMENT OF JUSTICE

Company Concern as Expressed to GAO

Officials from 7 of the 15 companies GAO visited said ADA regulatory requirements are vague and costly and/or expose the companies to potential legal liability.[24] Minco officials said ADA is "a lawsuit ready to happen." Roadway officials said the company spent $750,000 during 1994 attempting to comply with ADA requirements, but the company is still not sure whether all of these expenses were necessary or whether the company should have spent the money on other kinds of modifications. Roadway officials suggested that federal regulators clarify ADA requirements regarding physical accommodations, better define the nature of covered disabilities, and identify ways to minimize abuse.

In addition, officials from a hospital said it is difficult to know how much renovation of their facilities is necessary to achieve ADA compliance. They said a recent consultant study identified 19 areas of the hospital (e.g., entrances, ramps, and bathrooms) that may need upgrading to comply with ADA requirements. However, they said it is still not entirely clear what needs to be done for ADA compliance. For example, they said it is not clear whether every entrance must be upgraded to ADA standards or whether a subset of all entrances would be sufficient. Hospital officials said it would cost the hospital $4.46 million if every element the consultant identified was upgraded.

Finally, officials at a fish farm said they are reluctant to get a permit to construct a new building because they may have to make ADA-required changes and additions that they consider impractical and unnecessary. They said they may have to put in handicapped parking and a wheelchair access ramp, even though the fish farm is not open to the public and has limited parking space.

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[24]ADA (42 U.S.C. 12101 et seq.) prohibits employment discrimination (and discrimination in other areas) against individuals with disabilities and requires employers to make "reasonable accommodations" for disabilities, unless doing so could cause undue hardship to the employer. Workplace Regulation: Volume II (GAO/HEHS-94-138, June 30, 1994, p. 34)

Response GAO Received From EEOC

The specific concerns expressed in this question regarding the renovation and construction of facilities, parking and a wheelchair access ramp principally implicate issues under Title III of ADA, which is enforced by the Department of Justice. That section of the law provides accessibility requirements for public accommodations.

Insofar as concerns are raised regarding compliance with the requirements of Title I of ADA, which prohibits employment discrimination and is enforced by EEOC, straightforward guidance about ADA principles is available from EEOC. For example, EEOC has issued regulations concerning ADA responsibilities, an interpretive appendix to the regulations, an easy-to-use technical assistance manual that provides a detailed discussion and many examples of a variety of ADA issues, and question and answer booklets and fact sheets. EEOC has recently issued detailed guidance defining the nature of covered disabilities and is considering additional policy documents, including final guidance on pre-employment disability-related inquiries and medical examinations.[25] Also, EEOC staff routinely provide training and technical assistance.

While many businesses have expressed concerns about the costs of ADA, recent studies show that the cost of compliance is, in fact, quite limited. For example, a study commissioned by Sears Roebuck and Co. reveals that of the 436 reasonable accommodations provided by Sears between 1978 and 1992, 69 percent cost nothing, 28 percent cost less than $1,000, and only 3 percent cost more than $1,000.[26]

Finally, it is important to keep in mind that the employment title of ADA has only been fully in effect for 1 year, and has applied to employers of 25 or more employees for only 3 years. There is an inevitable "shake out" period for any new law during

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[25]See 29 C.F.R. §§ 1630.2(o), 1630.9 & Appendices; "EEOC Technical Assistance Manual on the Employment Provisions (Title I) of the ADA," Chapter 3; Pamphlet: "The Americans with Disabilities Act Questions and Answers"; Pamphlet: "The Americans with Disabilities Act: Your Responsibilities as an Employer"; Fact Sheet: "Facts About the Americans with Disabilities Act"; Fact Sheet: "Facts About Disability-Related Tax Provisions."

[26]Blanck, Peter David, Communicating the ADA, Transcending Compliance: A Case Report on Sears, Roebuck and Co. at 12 (1994).

which questions about its applicability and precise meaning must be answered. Already, agency guidance and court decisions have answered many questions and resolved many ambiguities, and most fears about the costs of compliance with the employment provisions have been shown to be unfounded.

Response GAO Received From the Department of Justice

Many of these concerns appear to be related to the employment provisions under title I of ADA, which is enforced by EEOC. In some cases, it may be necessary to remove barriers as part of providing "reasonable accommodation" to a qualified employee or prospective employee as required by Title I of ADA because disabilities and job situations vary greatly, and what is "reasonable" will also vary. Furthermore, companies are not required to make accommodations that would constitute an "undue hardship." According to a 1995 report by the National Council on Disability, entitled The Americans with Disabilities Act: Creating equal access to the American Dream:

> The law itself requires that covered entities incur the costs of "reasonable accommodations" to make their facilities, programs, and services accessible to individuals with disabilities unless such accommodations pose an "undue hardship" on the entity. Given this two-part test, there is obviously room for discussion regarding both what is "reasonable" and what constitutes an "undue hardship." Thus, there is no concrete requirement that covered entities must absolutely make every accommodation requested by every individual with a disability. Furthermore, it has been found that reasonable accommodations often do not require a great deal of expense. For example, the Job Accommodation Network sponsored by the President's Committee on Employment of People with Disabilities reports that based on its national data bank, using the average (mean) cumulative figures, for every dollar (a company) spent to make an accommodation, the company got $15.34.[27] In addition, a recent study based on the experience of Sears, Roebuck and Company in making reasonable accommodations reported that the average accommodation cost the company $121.00. The study also reported that 69 percent of accommodations cost nothing, 28 percent cost less than $1,000, and only 3

[27]Job Accommodation Network. (1994). Accommodation benefit/cost data. Morgantown, WV.

percent exceeded $1,000.[28] These data are in general agreement with the overall data reported by the President's Committee on Employment of People with Disabilities. Thus, the idea that compliance with the ADA will cause great financial burdens to covered entities is not supported by either the provisions of the law itself or by practical experience to date in implementing the law.

For more information, and a more complete response to employment concerns, the Department of Justice suggests that GAO contact EEOC.

Concerns by other officials that ADA was a "lawsuit ready to happen" are unfounded. Experience over the past 5 years has shown that ADA has resulted in a surprisingly small number of lawsuits--only about 650 suits under Title II and Title III nationwide in 5 years. That's a very small number of lawsuits compared to the 6 million businesses; 666,000 public and private employers; and 80,000 units of state and local government that must comply.

When Congress wrote the ADA legislation, it adopted a flexible approach for providing opportunity, promise, and dignity for 49 million Americans with disabilities. ADA's requirements for existing facilities take into consideration the cost of providing accessibility to the goods and services that are offered.

In response to concerns about the renovation costs to achieve compliance expressed by a hospital and by Roadway, ADA has requirements that are based on common sense. Title III of ADA recognizes that removing barriers in existing structures is more costly than making new construction accessible. The law requires that public accommodations (e.g., stores, banks, hotels, and restaurants) remove architectural barriers in existing facilities *only* when it is "readily achievable," i.e., it can be done "without much difficulty or expense." Inexpensive, easy steps to take include ramping one step, installing a bathroom grab bar, lowering a paper towel dispenser, rearranging furniture, installing offset hinges to widen a doorway, or painting new lines to create an accessible parking space. Each public accommodation must determine if barrier removal is readily achievable and this, by necessity, requires a case-by-case judgment.

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[28]Blanck, P., Communicating the Americans with Disabilities Act - Transcending Compliance: A case report on Sears, Roebuck, and Co., Washington, DC: Annenberg Washington Program (1994).

The readily achievable obligation to remove barriers in existing facilities does not extend to areas of a facility that are used exclusively by employees. Facilities such as factories, warehouses, and office buildings that do not contain places of public accommodation are considered "commercial facilities" and are *not* required to remove barriers in existing facilities. They are, however, covered by ADA's requirements for accessible design in new construction or alterations so accessibility can be built in during construction.

Measures taken to remove barriers should comply with the alteration provisions of the ADA Standards for Accessible Design (Standards). These provisions contain requirements for accessible elements and spaces, including the number of accessible entrances. Under the alterations provisions of the Standards, only one public entrance would have to be accessible if that entrance provided access to all goods and services offered by the facility. The facility would not have to make all entrances accessible.

To provide additional guidance, the Department's title III regulation, 28 C.F.R. Part 36, §36.304, contains the requirements for barrier removal and provides a list of 21 examples of modifications that may be readily achievable. These include installing ramps, making curb cuts in sidewalks and at entrances, repositioning telephones, adding raised markings on elevator control buttons, installing visual alarms, widening doors, installing offset hinges to widen doorways, insulating lavatory pipes under sinks, repositioning a paper towel dispenser, installing a full-length mirror, rearranging toilet partitions to increase maneuvering space, or installing an accessible toilet stall. The list is not exhaustive and is intended to be illustrative. Each of these modifications will be readily achievable in many instances, but not in all. Whether or not any of these measures is readily achievable will have to be determined on a case-by-case basis in light of the nature and cost of the barrier removal and the resources available. The Department of Justice also provides technical assistance, free of charge, to assist entities covered by title II and title III of ADA in applying provisions in their own unique situations.

Although officials at a fish farm expressed reluctance to build a new building because of ADA requirements, it is unlikely that requirements of ADA Standards for Accessible Design impose impractical and unnecessary requirements for new construction or for alterations. The Standards have been developed to be compatible with most state and local accessibility codes. Many state and local building codes require installation of certain elements, and spaces for public safety reasons. Most of the requirements of the Standards are triggered when a feature,

element or space is provided. For example, ADA does not require that parking be provided at a facility but if parking for visitors, employees or customers is provided, then accessible parking must also be available. Where less than 25 parking spaces are installed, then only 1 accessible parking space is required. The total number of required accessible parking spaces increases as more parking spaces are provided.

Concerns that accessible buildings always require a ramp are not really valid. Ramps are generally not required to provide access to buildings and facilities. In many cases it is possible to avoid installation of ramps in new construction by locating buildings and facilities to minimize the difference in elevation between a parking area and the accessible facility entrance and using a walkway to connect the two. By doing this, extra costs for a ramp can be avoided and a more usable accessible entrance may be provided.

The Standards also contain an important provision that applies to areas used only by employees as work areas. Although public and common use areas must be accessible, work areas do not need to be fully accessible. The only requirement for work areas is that they are designed and constructed so that individuals with disabilities can approach, enter, and exit the work area.

Furthermore, the Standards have been shown to provide a basic level of accessibility and add very little additional cost when considered during the initial design of a new facility. The regulatory impact analysis[29] indicated that designing and building in compliance with ADA's accessibility requirements, on the average, adds less than 2 percent to the overall cost of a new building.

The Department of Justice provides a toll-free ADA Information Line to answer questions that businesses, state, and local government agencies and individuals have about complying with ADA. The Information Line operates from 10 AM to 6 PM, Monday through Friday except for Thursday, when the Information Line is available from 1 PM to 6 PM. The line is also available 24 hours a day to order Department of Justice materials on ADA. The telephone numbers for the ADA Information Line are 1-800-514-0301 (voice) and 1-800-514-0383 (TDD). The Department of Justice also operates a computer bulletin board that can be used to download information about ADA. The bulletin board can be reached at

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[29]The Regulatory Impact Analysis of the ADA Accessibility Guidelines was prepared by the Architectural and Transportation Barriers Compliance Board.

202-514-6193. This information can also be accessed from the Internet (telenet fedworld.gov Gateway D, choice 1 #9).

Congress also amended the Internal Revenue Code to include tax incentives for businesses that incur expenses in removing barriers or increasing accessibility for people with disabilities.

The "Tax Deduction to Remove Architectural and Transportation Barriers to People with Disabilities and Elderly Individuals" (Title 26, Internal Revenue Code, Section 190) allows a deduction for "qualified architectural and transportation barrier removal expenses" not to exceed $15,000 for any taxable year.

The "Disabled Access Tax Credit" (Title 26, Internal Revenue Code, Section 44) is available to eligible small businesses with 30 or fewer employees or $1 million or less in gross annual receipts. This provision allows a tax credit of 50 percent of eligible access expenditures that exceed $250 but do not exceed $10,250 made for the purpose of complying with ADA during the tax year. More information on these tax provisions may be obtained from IRS.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, DEPARTMENT OF JUSTICE, AND DEPARTMENT OF LABOR

Company Concern as Expressed to GAO

Officials from several companies said that some federal regulations are inappropriate, ambiguous, or unrealistic. For example, officials from a packaging manufacturer said that the federal government is getting involved in issues that should be left for businesses to decide (e.g., sexual harassment and FMLA issues). They said they do not want government intervention in these areas and believe that employees may use these regulations to take advantage of companies in the future. According to a fish farm official, federal regulations often are not developed to address an existing problem but rather are developed to address a potential problem. A Multiplex official stated that regulatory requirements can become obsolete or inappropriate, causing businesses to incur unnecessary compliance costs.

A Minco official said the ambiguity of certain regulations causes problems for the company. For example, she said a "reasonable" accommodation to one person under ADA may not be "reasonable" to another person. The official said regulatory issues left open to interpretation place a burden on businesses to figure out what they must do. As a result, she said businesses need consultants to understand what OSHA and other regulations require, but few small businesses can afford to hire such specialists.

A number of proposals were offered to address these situations. Some companies said federal agencies should review existing regulations for their relevance. A Multiplex official said there should be regular monitoring of a federal requirement to ensure that its original intent is retained and that it is still current within a changing environment. Officials from the tank car company said government and regulatory agencies should assess the implementation of regulations after a certain period to determine if there are problems affecting companies' ability to comply or that increase the cost to comply. According to a fish farm official, some laws may have good intentions, but they result in dire, unforeseen consequences.

Officials from several companies said that federal agencies should do cost-benefit analyses before issuing new regulations. Officials from the tank car company said cost-benefit analyses can address the issue of "bad" science for some regulations and can result in implementing regulations only if they have proven benefits. Officials from a paper company said some type of risk analysis and cost-benefit study should be done so that the regulations the government issues are more in line with the risks involved. Officials from a packaging manufacturer suggested that

the federal government modify the regulation process to include analysis of the financial and resource impact of the process on businesses. Bank B officials said federal regulations should benefit the regulated organization or the customer, and the cost to comply with the regulations should not outweigh the benefits. A Multiplex official stated that if Congress expects a company to spend time and money to comply with federal requirements, Congress needs to determine the benefit in having the federal requirements. Hospital officials stated that federal agencies should research empirical data, perform cost/risk benefit analyses, and collaborate with interested parties (including providing underlying assumptions and data) before issuing draft regulations for comment. They also said that the goal of regulation should be to provide scientifically based performance standards that have reasonable goals and time frames and a vision of excellence, in service of the broader goal of protecting the public.

However, a Zaclon official said he had a hard time envisioning how sound cost-benefit analyses could work and suggested that rather than require complex analyses of costs, risks, and benefits of a regulation, each regulation should have a sunset date and be reviewed to determine whether it is achieving its original intent before it is reauthorized.

Response GAO Received From EEOC

Employment discrimination persists as a serious problem, and the federal laws prohibiting such discrimination continue to be vitally important to ensuring equal opportunity in the workplace. Regarding the cited company official's view that the federal government should not get involved in issues regarding sexual harassment, EEOC disagrees. As EEOC and the courts have repeatedly recognized, sexual harassment is a particularly pernicious form of discrimination that is properly prohibited under federal law. As the Supreme Court has ruled:

> "Sexual harassment . . . is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets." Meritor Savings Bank v. Vinson, 477 U.S. 57, 67 (1986).

No one should be subject to such treatment as a condition of employment.

EEOC has provided a wealth of guidance on an employer's obligations under ADA, including reasonable accommodation requirements and the undue hardship defense. These include an interpretive appendix to the regulations, an easy-to-use technical assistance manual, and question and answer booklets and fact sheets. See 29 C.F.R. §§ 1630.2(o), 1630.9 & Appendices; "EEOC Technical Assistance Manual on the Employment Provisions (Title I) of the ADA, " Chapter 3; Pamphlet: "The Americans with Disabilities Act Questions and Answers"; Pamphlet: "The Americans with Disabilities Act: Your Responsibilities as an Employer"; Fact Sheet: "Facts About the Americans with Disabilities Act"; Fact Sheet: "Facts About Disability-Related Tax Provisions". Many EEOC documents are available free through EEOC's Publications Division Center by calling toll-free 1-800-669-3362, TDD 1-800-800-3302, or EEOC Headquarters at 202/663-4900.

In addition, an employer can turn to a number of other sources for advice concerning appropriate reasonable accommodations. For example, an employer can call the Job Accommodation Network (1-800-526-7234), an arm of the President's Committee on Employment of People with Disabilities, for assistance in determining reasonable accommodation in a particular case.

In most cases, an appropriate reasonable accommodation can be made without difficulty and at little or no cost. An accommodation may be something as simple as putting a desk on blocks for someone using a wheelchair, providing periodic breaks so that an employee with diabetes can take medication, or providing a stool for someone with a leg impairment. A recent study shows that of the accommodations Sears, Roebuck provided between 1978 and 1992, 69 percent cost nothing, 28 percent cost less than $1,000, and only 3 percent cost more than $1,000. See "Communicating the ADA, Transcending Compliance: A Case Report on Sears, Roebuck and Co." at 12. In addition, for each dollar spent on reasonable accommodation, an employer receives an average of $30.30 in benefits. See Job Accommodation Network Quarterly Report (3/31/95) at 14.

Response GAO Received From the Department of Justice

Many of the concerns raised here are not specifically related to ADA. When Congress wrote the ADA legislation, it adopted a flexible approach for providing opportunity, promise, and dignity for 49 million Americans with disabilities. ADA's requirements for existing facilities take into consideration the cost of providing accessibility to the goods and services that are offered.

The fish farm official's belief that federal regulations are developed to address "potential problems" does not apply to ADA. ADA was enacted after extensive Congressional hearings and public debate. Each requirement of ADA was issued to address specific problems of discrimination experienced by people with disabilities. These requirements were based on extensive testimony before Congress and in hearings held in each of the states. When the title III regulations were developed by the Department of Justice, the proposed requirements were first discussed in public hearings and public comments were solicited. Substantive refinements were made to the draft regulations based on the hearings and on a large number of written comments.

ADA has provisions that guard against the obsolescence referred to by the Multiplex official. As a newly enacted law, ADA is not obsolete and is not likely to become so. To guard against possible obsolescence or the law becoming inappropriate, requirements for accessibility and other nondiscrimination provisions will continue to be reviewed and will be updated as needed. The Department of Justice issues interpretations on changing conditions that may affect title II and title III of ADA and provides technical assistance to the public to promote understanding of any changes. ADA was written to provide the flexibility to avoid unnecessary compliance costs in the future.

The Minco official is correct that the regulations have general requirements that may sometimes be difficult to interpret. However, businesses need not hire consultants to comply with ADA. ADA is a relatively new law and businesses that have questions about compliance can call the Department of Justice's and EEOC's toll-free information lines. Questions about "reasonable accommodation" and title I (employment) should be directed to EEOC through its toll-free telephone line at 1-800-669-4000 (voice) or 1-800-669-6820 (TDD) or call the Job Accommodation Network funded by the President's Committee on Employment of People with Disabilities at 1-800-526-7234 (voice or TDD).

The Department of Justice's toll-free ADA Information Line answers questions that businesses, state and local government agencies, and individuals have about complying with ADA. The Information Line operates from 10 AM to 6 PM, Monday through Friday except for Thursday, when the Information Line is available from 1 PM to 6 PM. The line is also available 24 hours a day to order Department of Justice materials on ADA. The telephone numbers for the ADA Information Line are: 1-800-514-0301 (voice) and 1-800-514-0383 (TDD). The Department of Justice also operates a computer bulletin board that can be used to download information about ADA. The bulletin board can be reached at 202-514-6193. This information can also be

accessed from the Internet (telenet fedworld.gov Gateway D, choice 1 #9).

Response GAO Received From DOL/OSHA

OSHA is charged with ensuring safe and healthful working conditions for America's workers by promulgating workplace safety and health standards and ensuring compliance by inspecting places of employment. OSHA also provides consultation, training, education, and information for employers and employees to promote voluntary compliance in achieving safe and healthful workplaces.

Issues such as sexual harassment and family and medical leave are beyond OSHA's jurisdiction.

Response Received From DOL/ESA

These comments infer that most businesses would adopt appropriate workplace policies that responsively address the minimum needs of all of their workers in the absence of any government intervention. This view is not consistent with the record developed in connection with enactment of FMLA, as reflected in Committee Reports accompanying the bill that became FMLA of 1993. This view also disregards the many benefits achieved by FMLA, for both employers and employees.

Until FMLA was passed, the United States was the only industrialized nation with no provisions for family leave. The record of hearings leading to enactment of FMLA indicated the powerful productive advantages of stable workplace relationships and the comparatively small costs of ensuring those relationships would not be dissolved when workers faced pressing family health obligations or their own serious illnesses. FMLA now protects workers from having to choose between the job they need and caring for their family members or their own health emergencies.

FMLA was predicated on two overarching concerns--the needs of the American workforce and the development of high-performance work organizations. Efforts to enact federal family and medical leave legislation arose in part from several socio-economic trends, including the growing participation of women in the work force, the growth of single-parent families, and the growth in households with two working parents, among other factors. Increasingly, America's children and elderly are dependent upon family members who spend many hours at work. When a family emergency arises, requiring workers to attend to a seriously ill child or parent, or to a newly born infant, or to their own serious illness, workers need reassurance that they will not be asked to choose between continuing their employment and meeting their personal and family obligations or tending to vital needs

at home. FMLA allows employees to balance the demands of their workplace with the needs of their families, promotes the stability and economic security of families, and promotes national interests in preserving family integrity.

Also, for the past 2 years the law has been in effect, the evidence suggests that it has been a success and a benefit to the workers of America, achieved at comparatively little cost to businesses. The expectation that the law would prompt widespread abuse of leave privileges has not materialized. Nor has a huge government bureaucracy been needed to handle the relatively few complaints that have mostly all been resolved through education and informational outreach. The Commission on Family and Medical Leave, charged under the law to study the effects of existing and proposed policies on family and medical leave and to report its findings to Congress, has been gathering information and testimony in public hearings. It seems clear that family and medical leave policies are cost-effective to employers and for the nation as a whole, in that they increase productivity and decrease employee turnover, thereby eliminating the expense of permanently replacing trained and experienced employees. And, at the bottom line, these family-friendly policies have helped many people get through some very difficult personal and family crises without having to confront the fear of losing their jobs.

When it comes to enforcing minimum basic labor standards and decency, legislative decisions by the U.S. Congress over the years reflect the view that the federal government does play an appropriate role, as demonstrated by successive enactments concerning minimum wages and maximum hours of work, child labor prohibitions, Social Security, pensions and welfare protections, safety and health, and labor-management relations, for example. FMLA is based on the same underlying principles. It responsively addresses important societal interests in assisting families through fair workplace policies, by establishing a minimum labor standard for job-protected, unpaid leave.

OFCCP is currently reviewing and revising all of its regulations with the goal of streamlining and clarifying the regulatory provisions implementing Executive Order 11246, Section 503 of the Rehabilitation Act of 1973, as amended, and VEVRAA, 38 U.S.C. 4212. ESA expects that when these regulations are published, they will be more user friendly for the public.

For citations related to the discussion above, see Title 41 C.F.R., Chapter 60-1 through 60-60; Title 41 C.F.R., Chapter 60-250, VEVRAA; Title 41 C.F.R., Chapter 60-741, Section 503.

OFCCP routinely provides program information and technical assistance over the telephone and in writing to interested

parties. Program materials, such as pamphlets and regulations, may be obtained from the national office by contacting the policy division of OFCCP at (202)219-9430. Assistance may also be obtained by contacting any of the 10 regional offices.

ENVIRONMENTAL PROTECTION AGENCY AND
OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION

Company Concern as Expressed to GAO

Officials from a glass manufacturer said that the federal government's carcinogen policies and regulations (e.g., as implemented by EPA and other agencies) fail to take into consideration the results of medical research during the past 30 years. They said current policies are frequently based on the hypothesis that cancer can result from exposure to a single molecule of a carcinogen--an hypothesis that has not been supported by research in the 30 years since it was proposed. They said the basic problem is the underlying legislation, not the regulations themselves or the regulators.

Response GAO Received From EPA

Although, theoretically, a single molecule of a carcinogen may trigger the process of cancer, this "single molecule" theory is not actually applied in EPA risk assessments. EPA regulations establish health-based standards that tolerate exposures to at least ten billion molecules per day (and often many times more than that)--not simply to a single molecule. Since the original publication of EPA's current Guidelines for Carcinogen Risk Assessment in 1986, there have been significant gains in understanding how cancer is caused. In response to this better understanding of carcinogenesis, EPA plans to propose new guidelines for cancer risk assessment. These revised guidelines are more flexible and sophisticated than the documents they will replace, particularly since they recognize variations in the ways cancer can be caused. The new guidelines emphasize the need to understand how a particular chemical substances may cause cancer when describing the likelihood of harm and estimating the magnitude of risk.

Finally, environmental legislation does not specify how to determine risk, it only states that pollutants should not present a threat or unreasonable hazard to human health. Risk assessment, while complex, data-intensive, and subject to uncertainties, is primarily an application of science that ought not to be rigidly codified in law or regulation. By its nature, it must remain flexible to adapt its theory and methods to new scientific learning over time.

Response GAO Received From DOL/OSHA

OSHA disagrees with the statement made by the glass manufacturing officials regarding carcinogen policies and regulations. The agency's carcinogen policy and regulations do reflect the current

mainstream of scientific opinion on carcinogenesis and regulatory science policy. For example, while it is true that OSHA and other agencies use the linearized multistage model of carcinogenesis because it is the best supported and has a sound biological basis, it is not true that this model requires acceptance of the "hypothesis that cancer can result from exposure to a single molecule of a carcinogen." Instead, the linearized multistage model, as used by federal agencies, merely implies that the *additional* probability of contracting cancer is proportional to the amount of additional exposure beyond the natural background exposures inevitably present in the environment. In practice, all this model implies is that if OSHA can *observe* that a dose X causes excess cancer in (say) 10 percent (0.1) of the animals or humans exposed, then a dose such as X/1,000 would cause cancer in 0.01 percent (0.1/1,000) of animals or humans. "The dose makes the poison," and that's what the linearized multistage model has at its foundation.

In reality, the incremental exposure allowed under OSHA standards is vastly greater than exposure to a small number of molecules. For example, under the benzene standard, OSHA predicts that permissible exposure to 1 part per million benzene in ambient air for a working lifetime may cause cancer in approximately 10 of every 1,000 workers so exposed. At this level, a worker would inhale approximately 2.5×10^{27} (almost 3,000 trillion) molecules of benzene in his or her lifetime. To say that this number of molecules is in any way related to the "one molecule can't hurt anyone" school of thought is clearly misguided.

Finally, the linearized multistage model, which predicts that excess risk is approximately a linear function of excess exposure (at least when predicted risk is in the range of 1 per million or higher), has in fact been <u>strongly</u> supported by research in the 30 years since it was proposed. The only two major studies where thousands of test animals have been observed at a range of doses sufficient to observe or refute linearity at low doses (the "ED_{01}" study of Littlefield et al. in 1979 and the "mega-rat" study of Peto et al. in 1991) both demonstrated linear-low-dose behavior for some or all of the tumor types observed. Low-dose linearity has also been documented in humans exposed to the Hiroshima and Nagasaki explosions in the largest epidemiological study ever conducted (confirmed by five successive committees of the National Academy of Sciences). The arsenic worker epidemiology studies also demonstrate clear linearity down to the lowest levels studied (48 FR 1864, January 14, 1983).

Agencies such as OSHA are continually on the lookout for "new science"--we are integrating pharmacokinetic information into OSHA's analyses when appropriate, for example, and have and will always consider data that suggest that the linear model may not

be appropriate for a particular substance--but the evidence to date clearly shows that "medical research during the past 30 years" supports, rather than refutes, use of the linearized multistage model of carcinogenesis, both on scientific and on reasonable science policy grounds.

Company Concern as Expressed to GAO

An official from the petrochemical company said that EPA is proposing regulations governing exposure to lead-based paint that overlap OSHA standards. He said EPA's proposed regulations were issued in response to the 1992 "Residential Lead-Based Paint Hazard Reeducation Act," and its training requirements were supposed to focus on workers involved in the removal of lead-based paint from federal housing, public buildings, and other structures. He said the same act required OSHA to develop a lead standard applicable to construction and maintenance activities, and OSHA issued interim standards in 1993 requiring employee training, personal protective equipment, and exposure assessments. However, the petrochemical company official said EPA expanded the scope of its authority to include industrial operations, and in so doing adds requirements that are redundant to those of OSHA. The official said that the training and certification requirements in EPA's proposed rule would cost the petrochemical company an additional $9 million.

Response GAO Received From EPA

In order to completely evaluate the issues raised by commenters to the proposed regulation, including the potential overlap or conflict with OSHA regulations, EPA is reconsidering the portion of the proposed regulation concerning the "industrial" sector.

In addition, EPA's discussions between EPA Assistant Administrator Dr. Lynn Goldman and OSHA Administrator Joe Dear have resulted in an EPA-OSHA dialogue on lead and asbestos. The purpose of the dialogue is to identify potential overlap and/or conflict between EPA and OSHA regulations, to identify policy, regulatory and/or statutory options for resolving any potential overlap and/or conflict, and to propose an implementation plan to avoid overlap and conflict in the promulgation of new regulations, such as those mandated by the "Residential Lead-Based Paint Hazard Reduction Act of 1992."

Response GAO Received From DOL/OSHA

OSHA staff have been working closely with EPA staff over the last 6 months to minimize the potential for overlap and duplication between the existing OSHA rule and the pending EPA rule, particularly in the area of safety and health training for lead

workers. The two agencies have held routine discussions and have met several times on this issue. OSHA has reviewed and commented on all of the evolving drafts of the EPA rule. This interagency activity has provided EPA with a clear understanding of the extent and nature of OSHA's training requirements for lead construction workers. As a result, EPA has indicated that the final standard will be designed to exclude any safety and health training requirements for workers already covered by OSHA.

Company Concern as Expressed to GAO

Several companies discussed the need to focus on outcomes rather than process. For example, a Zaclon official said regulations should be oriented on the results expected of the businesses, not specific procedures.

Officials from a paper company said that the government should focus on outcomes, not process. They said federal regulators should specify what outcomes they are trying to achieve and leave it to industry to come up a plan for achieving those goals. OSHA's process safety standards do this now; however, the OSHA compliance guideline became prescriptive. The downside of this approach in this area is that it is difficult to tell whether a company is in compliance when the measurement of outcomes is difficult (e.g., the measurement of "nonevents").

Officials from the petrochemical company said government should move away from the current "specification-based" regulatory process and toward a new approach in which government and business jointly establish performance-based environmental, health, and safety standards. They said government and business should both be accountable for achieving measurable, quantifiable objectives. Goals would be accomplished in a stepwise fashion, improving cost effectiveness by allowing parties to learn from what works. They said government and business should work cooperatively and share the burden for obtaining information and demonstrating results. A peer review procedure could be used to maintain the quality and integrity of the process. Over time, they said, the process would force industry and regulators toward low-cost, high-impact solutions with proven effectiveness. Market-based incentives could be widely used, as there are currently few incentives for business to remedy the environmental impact of its operations. The new paradigm would allow those closest to a problem to solve it in the most cost-effective manner.

Response GAO Received From EPA

EPA said although performance-based standards have been implemented by EPA as long ago as the 1970s, this approach has

recently been given renewed emphasis through the effort to reinvent environmental regulation. Specifically, Project XL has been implemented as a pilot project to give responsible companies and other regulated parties the flexibility to replace the requirements of their current regulatory systems with their own alternative strategies to achieve more cost-effective environmental results. The process by which proposals may be submitted to EPA was outlined in the Federal Register on May 23, 1995. EPA has set a goal of implementing 50 pilot projects by the end of 1996.

Each XL Project will involve the granting of regulatory flexibility in exchange for an enforceable commitment by the regulated entity to achieve better environmental results than would have been attained through full compliance with standard command-and-control regulations. Market-based incentives, such as tradable permit approaches, are excellent candidates for such a regulatory system. Individual projects will be managed by the unit of government best suited to address the project's issues. state and tribal regulatory agencies must be full partners in each project. Stakeholder involvement is also important to EPA, and projects developed with local governments, environmental groups, and citizens' organizations will be viewed particularly favorably.

Response GAO Received From DOL/OSHA

As part of the agency's new approach to regulations, OSHA is committed to eliminating or fixing out-of date or confusing standards, identifying clear and sensible priorities for new rules, focusing on the key building block rules, and emphasizing interaction with business and labor throughout the process. A key component of building a set of common sense regulations involves the development of performance-oriented standards in cooperation with stakeholders. Performance language, such as that used in OSHA's Process Safety Management standard, provides employers with the flexibility to select the most cost-effective compliance approach that best meets the needs of their particular workplace. In this way, both the employer and OSHA can focus on the desired outcome, improved worker safety and health, and learn from the best practices within industries. To balance the needs of all employers, including those who prefer specification standards, and to provide needed compliance interpretations, OSHA often provides nonmandatory appendices and other compliance assistance tools to help employers interpret and implement the performance requirements of the standard.

This results-oriented shift in the agency's focus goes beyond standards-setting to include the agency's enforcement approach as well. In the past, agency performance measures focused too

heavily on processes and activity and not enough on safety and health outcomes. The new OSHA will measure performance based on the impact of its actions on workplace injuries and illnesses rather on the number of inspections, citations, or penalties.

Company Concern as Expressed to GAO

Officials from a paper company said that OSHA's process safety standards (29 C.F.R. 1910.119) are problematic for a variety of reasons. First, they said regulations for process safety standards may be enforced by both OSHA and EPA, and sometimes the agencies' enforcement differs. For example, they said that OSHA excludes certain chemicals from exposure limits that EPA does not exclude. Second, they said the process safety standards program does not always make sense in terms of the elements it includes or the way it is enforced. For example, they said that the process safety standards program does not distinguish between a level of exposure above a minimum threshold. A company that has 1 ton of chlorine is covered by the same standards as a company with 100 tons of chlorine.

They also said that EPA's proposed risk management program requires consideration of a "worst case scenario" in which all safeguards fail simultaneously. According to company officials, companies are required to plan for and discuss this scenario with local officials even though, in some instances, the scenario could not possibly occur.

The paper company officials also cited other problems with the process safety standards program. They said the complexity of the standards makes it "a challenge" to know whether a facility is in compliance. The officials noted that there are 14 specific elements in the process safety standards program covering such areas as operating procedures, process hazard analysis, and incident investigations. They also said that the process safety standards documentation and paperwork requirements are voluminous, and the training and personnel costs are extensive.

The officials said that in a small facility, one person's full-time job is ensuring compliance; in a larger facility, they said two full-time and up to four part-time workers are required. In addition, corporate audit staff are reportedly required since the standards require self-audits every 3 years. Company officials said, in total, the company expects to spend about $8.5 million and the equivalent of 170 full-time staff years to achieve process safety standards compliance. Company officials expect to spend an additional $2 million per year in training and oversight costs to remain in compliance. The officials said that if they had the flexibility to do what is really needed the company could cut its costs in half.

Response GAO Received From EPA

Under CAA, as amended in 1990, OSHA and EPA separately must promulgate regulations to prevent accidental chemical releases. OSHA promulgated its process safety management standard (29 C.F.R. 1910.119) to protect workers from the consequences of accidental releases. Industry and safety professionals agree that the best way to prevent accidental chemical releases is through a comprehensive management system that integrates all the elements necessary for the continuing safe operation of a facility; in other words, good process safety management. EPA's proposed accidental release prevention program requirements to protect the public and the environment under CAA section 112(r) build on the OSHA process safety management standard. EPA and OSHA are committed to full integration of their respective activities in order to administer a single accident prevention program, with OSHA protecting employees exposed to the workplace environment and EPA protecting the general public exposed to the ambient environment. From time to time the divergent stipulations of the two statutes may force different standards or tactics by the two agencies, but both OSHA and EPA are determined to minimize the practical impact of these unavoidable discrepancies.

With respect to the paper company's comment about EPA requiring that they consider "worse case scenarios" in planning their response strategies, EPA believes comprehensive emergency planning should be conducted around more likely release scenarios. Nevertheless, CAA also calls for development of a worst case release scenario that will be shared with the public and local emergency planners near the facility. In response to public comments, EPA proposed to modify this worst case approach in its supplemental notice, issued March 13, 1995, in which passive safeguards would be included in the assessment. EPA believes that an important purpose of these scenarios is to stimulate dialogue between the source and the public about the use of appropriate process safety management systems to prevent accidents.

EPA is aware of the concerns expressed by industry that compliance with the OSHA safety management requirements may be challenging and costly. EPA understands from the industry and from OSHA, however, that most facilities already undertake most of the elements of process safety management as part of good management practices. The key ingredient often missing is good documentation, which is essential to process safety management success. The American Institute of Chemical Engineers Center for Chemical Process Safety has developed a series of Guides to help facilities develop good process safety management programs. These Guides can help facilities effectively and efficiently

shape their programs. Under EPA's proposed regulations, EPA believes most companies do have the flexibility to do it right--the goal should be sound management systems and integration of safety into day-to-day operations--under the process safety management framework. Although the costs may be substantial, particularly for large, complex facilities, the rewards of good process safety management include fewer unanticipated shutdowns, greater productivity, less waste, and increased worker and public safety.

Response GAO Received From DOL/OSHA

OSHA and EPA worked closely together during the development of OSHA's process safety management standard and have been collaborating during the development of EPA's Risk Management Programs rule, which is not yet final nor being enforced. When EPA's standard becomes effective, each agency will enforce only its own process safety-related standard, not the other agency's standard. In fact, OSHA and EPA are currently negotiating a targeting system that would explicitly avoid any duplication in inspections.

The two regulations have different lists of hazardous substances because they are designed for different purposes. OSHA's process safety management rule is designed solely to protect workers; therefore, OSHA's list of Highly Hazardous Chemicals, Toxics and Reactives (substances that trigger requirements of the process safety management rule) is a list of the substances that are or would be most dangerous to workers inside the facility. EPA's rule, on the other hand, is designed to protect the environment and the surrounding community from the effects of a catastrophic release or explosion. Therefore, its list of Regulated Substances includes those that pose the greatest threat to the air, the water, the soil, wildlife, and people outside the plant gates. The two lists overlap but are not identical, due to the different properties of chemicals, such as flammability, corrosiveness, reactivity, etc.

Process safety management requirements are the same for different quantities of hazardous substances because they are triggered by exceedance of a threshold value, i.e., an amount of the substance that could potentially lead to a catastrophic release. Because process safety management is designed to prevent catastrophic events, its requirements kick in whenever the potential for a catastrophic release exists. A *catastrophic release* is defined in the standard as "a major uncontrolled emission, fire, or explosion, involving one or more highly hazardous chemicals, that presents a serious danger to employees in the workplace." If 1 ton of chlorine is enough to create the potential for a catastrophic release, then the employer must attempt to prevent

ENCLOSURE II

and make contingency plans for such an occurrence. Naturally, the level of effort needed to comply with the process safety management rule will be relative to the number of highly hazardous substances and the amount of each an employer has on-site. An employer with only 1 ton of chlorine will have substantially less planning to do than an employer with 100 tons of chlorine, because the consequences of the release of 100 tons of chlorine are more far-reaching and serious than the consequences of the release of 1 ton.

Costs for complying with the process safety management standard will depend on the size of the facility, the number and quantity of highly hazardous substances on-site, and the extent to which the facility was already attempting to prevent accidental releases. For companies that were already providing training and/or conducting self-audits, the additional costs will be minimal. For companies without existing process safety management measures, the costs will be higher. However, during the rulemaking OSHA and many commenters from industry maintained that the benefits of a process safety management program will eventually far exceed costs for affected companies. OSHA's economic analysis of the impact of the rule quantified benefits in four areas: 1) improved productivity, 2) reduced incidence of lost production, 3) reduced incidence of worker replacement, and 4) reduced cases of property damage. Companies that are dedicating staff to process safety management programs at the levels cited by the paper company have achieved excellent results in terms of reduced injuries, reduced workers compensation claims, greater productivity, and more consistent product quality.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION
AND DEPARTMENT OF TRANSPORTATION

Company Concern as Expressed to GAO

Officials from a paper company said that DOT and OSHA regulations defining corrosive materials conflict. They said DOT defines a corrosive material using a patch test on the skin of albino rabbits, whereas OSHA defines a material as "corrosive" using a chemical pH test. They said that different agencies' using different standards is confusing, making it difficult to know which standard to follow. They also said they believe that it is easier and more accurate to use the chemical test.

Response GAO Received From DOL/OSHA

OSHA's definition of "corrosive" does not conflict with DOT's definition. OSHA's hazard communication standard requires chemical manufacturers and importers to identify chemicals that cause significant health hazards, including those chemicals considered to be "corrosive" (employers are not required to evaluate chemicals unless they choose to reject the evaluation performed by the chemical manufacturer or importer). Appendix A of the standard defines "corrosive" as follows:

> CORROSIVE: A chemical that causes visible destruction of, or irreversible alterations in living tissue by chemical action at the site of contact. For example, a chemical is considered to be corrosive if, when tested on the intact skin of albino rabbits by the method described by the U.S. Department of Transportation in Appendix A to 49 C.F.R. part 173, it destroys or changes irreversibly the structure of the tissue at the site of contact following an exposure period of four hours.

Thus, OSHA uses DOT's rabbit skin assay as a way of determining corrosiveness.

OSHA does not require pH testing to determine corrosivity, nor does it preclude its use. Instead, the HCS requires only that "available scientific evidence" be used to identify chemical hazards; such evidence may include results from tests conducted by the manufacturer and any published human, animal, or *in vitro* studies. Acids and alkalis that would be considered corrosive under a pH test would most likely be considered corrosive under the above definition as well.

Currently, OSHA and other U.S. federal agencies (e.g., DOT and EPA) are working through the United Nations to establish global

hazard classification of materials with other industrialized nations. The United Nations anticipates completing this project within the next 5 years.

Response GAO Received From DOT

A close examination of the regulations will show that there is no conflict between the OSHA and Hazardous Materials Regulations definitions of corrosive. However, the Hazardous Materials Regulations contains guidance for nonaqueous substances and materials that are corrosive to steel and aluminum shipping containers. OSHA regulations at 29 C.F.R. 1910.1200 Appendix A define corrosive that is corrosive to human skin with the same basic definition found in the Hazardous Materials Regulations for at least the past 50 years. The definition indicates that corrosive "...means a liquid or solid that causes visible destruction or irreversible alterations to human skin tissue at the site of contact." The OSHA definition goes on to state: "For example, a chemical is considered to be corrosive if, when tested on the intact skin of albino rabbits by the method described in the U.S. Department of Transportation in Appendix A to 49 C.F.R. Part 173. . . "

The definition of a corrosive material in the Hazardous Materials Regulations is consistent with international criteria for hazardous materials transportation. The use of pH in determining whether a material is corrosive is useful only for aqueous materials (i.e., those containing water). In a recent final rule, the definition of a corrosive material was revised to adopt the Organization for Economic Cooperation and Development's guidelines for determining corrosion. According to this rule, a material in an aqueous solution with a pH of 2 or less or 12 or more may be considered corrosive. However, a pH value is meaningless for nonaqueous materials, and pH may not provide an adequate indication as to whether an aqueous solution is corrosive to steel or aluminum, which is also a criterion of the Hazardous Materials Regulations to ensure package integrity. In these situations, a simple chemical test is used to evaluate corrosivity to aluminum and steel. DOT is also the first federal agency to issue exemptions authorizing the use of in vitro testing to determine corrosivity for nonaqueous (or aqueous) materials, in place of animal testing.

Regulatory Cites: 49 C.F.R. 173.136, 29 C.F.R. 1910.1200 Apx A
Legislative Cites: 49 U.S.C. 5103

ENVIRONMENTAL PROTECTION AGENCY,
OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION,
AND DEPARTMENT OF TRANSPORTATION

Company Concern as Expressed to GAO

Officials from several companies commented on the complexity of federal regulations. For example, a Zaclon official said regulations are too specific and suggested that the regulations should be written more generally to allow flexibility of application. In some cases, even the regulators reportedly cannot understand these regulations. A Metro Machine Corporation official said he does not call several regulators (OSHA, DOT, or certain areas within EPA) because they are not knowledgeable about their regulations. For example, he said he contacted DOT trucking officials to determine if there are size specifications for hazardous waste labels on drums containing hazardous wastes. He said DOT officials referred him to EPA who then referred him back to DOT. He said he ultimately dropped the issue and did what he thought was correct because he could not get an answer from the regulators. He also estimated that 9 out of 10 times when he contacts EPA and DOT about any regulatory issue they are unable to provide him an answer.

Response GAO Received From EPA

EPA is concerned that Metro Machine Corporation has had such difficulty getting answers from EPA about environmental regulations. Regarding the specific question concerning label sizes for hazardous waste, EPA is aware that there is more potential for confusion in areas where programs implemented by different agencies may apply, because staff from different agencies are not always familiar with each other's programs. In this case, for example, assuming Metro Machine Corporation is a hazardous waste generator, EPA requires that tanks and containers used to store hazardous waste on site be labeled or marked clearly with the words "Hazardous Waste," but does not specify the size for the label. For containers of hazardous waste in transport, however, EPA's regulations simply reference DOT's regulations for labeling and packaging for transportation of hazardous materials. Depending on the type of hazardous materials being transported, DOT specifies labels and label sizes in 49 C.F.R. 172 Subpart E. Thus, EPA staff referred Metro Machine Corporation to DOT for specific information on how DOT regulations might apply. EPA presumes that DOT staff, not realizing that EPA does not have separate standards for labeling and packaging in transport, may have referred Metro Machine Corporation back to EPA. DOT does have a hazardous materials information line (202-366-4488) that would be able to help Metro Machine Corporation determine how DOT regulations are applicable.

In general, EPA understands that this type of situation can be frustrating and, as discussed above, is working to make improvements to clarify regulations in this area. EPA will attempt to make it more clear that DOT regulations govern labeling, packaging, marking, and placarding of hazardous waste during transport.

Generally, EPA is working hard to improve its service to its customers, which certainly includes providing answers to the regulated community about its regulations. A number of programs have instituted hotlines to answer customer questions. For example, the Office of Solid Waste provides a nationwide, toll-free hotline that distributes documents, answers questions about the hazardous waste regulations, Superfund, and the Community-Right-to-Know program, and it refers callers to other sources if it cannot answer a question. The Hotline responded to over 200,000 questions during 1994 and received very high ratings in a customer satisfaction survey conducted in 1993/94.

EPA is also working to improve other forms of communication, such as its publications and information centers, to make them more user-friendly and easy to access. These services should provide accurate and timely information to the regulated community and the public. EPA is also investigating ways of providing a centralized information service that could quickly and correctly refer questions to the appropriate parts of EPA. It is certainly true that probably no EPA staff member is fully knowledgeable about all areas of EPA's own regulations, let alone those of other agencies. But EPA expects its people to ensure that questions they cannot answer themselves are referred to knowledgeable staff either within EPA or elsewhere in the federal government.

Response GAO Received From DOL/OSHA

OSHA is committed to improving its regulatory approach and has undertaken a number of initiatives designed to streamline and rationalize the body of regulations on OSHA's books. Such reforms will provide needed flexibility and clarity for employer and workers. For example, many OSHA rules that are most criticized for complexity and verbosity date from voluntary industry standards that were adopted wholesale at the time the agency was created in 1971. OSHA has already used focus group methods to assess problems with the readability and format of its rules and will continue to improve in this area.

To develop standards that make sense, OSHA has established a four-point regulatory strategy: identify clear and sensible priorities, focus on key building block rules, eliminate or fix

out-of-date or confusing standards, and emphasize interactions with business and labor throughout the process. OSHA is also implementing a number of initiatives to simplify access to workplace safety and health regulations and to increase and strengthen OSHA's efforts to provide compliance assistance to employers who want to protect their workers.

OSHA's enforcement staff, and all those in customer service roles, are chosen for their knowledge and experience in the occupational safety and health field. Compliance officers are thoroughly trained in OSHA standards and in the recognition of safety and health hazards. Nonetheless, OSHA has heard allegations such as those made by some of the employers cited in this report. In order to determine in a more scientific manner how employers feel about OSHA, the agency, for the first time in its history, contracted with a private research group in 1994 to conduct a survey of employers who had been inspected by Federal OSHA in fiscal year 1993. The survey gathered information from employers about their recent inspection, focusing particularly on how the inspector conducted the site visit and what impact, if any, the inspection had on safety and health at their workplaces.

Based on the survey results, most employers and employees agreed that the OSHA inspection pointed out safety and health problems that needed correction, that management and employees were more aware of the importance of safety and health after the inspection, and that their workplaces are now safer as a result of the inspection. Many survey respondents took the opportunity to provide additional comments concerning ways in which the OSHA compliance officer was particularly helpful to them. For example, one respondent commented that the OSHA compliance officer "...established a non-adversarial rapport with the people involved in the inspection...[and that she served as] an additional source of information to make the workplace safer." Another respondent commented that the compliance officer "offered suggestions and answered all my questions and led me through the process to a good conclusion. He also answered my phone calls when I had a question." Additional respondents noted that they feel comfortable calling the OSHA office with questions and receive helpful responses and advice in response. While the survey results are encouraging, OSHA will continue to make every effort to ensure that the compliance officers and other employees are knowledgeable and responsive to the public.

Response GAO Received From DOT

DOT goes to great lengths to disseminate accurate information regarding its regulations. DOT's numerous outreach efforts use many forums, including seminars, toll-free information numbers, and computer bulletin boards. The staff providing these services is well informed and knowledgeable. It is not possible to determine from GAO's description whether the industry official contacted the most appropriate office or individual with his question, or whether the question and answer were precisely conveyed. However, the Hazardous Materials Regulations are a complex set of highly technical regulations with precise terminology. The Hazardous Materials Regulations requirements specify the types of markings and DOT hazard warning labels that are required to be displayed on packages of hazardous materials. Based on the information presented in the scenario, it does not appear that the "label" in question was the hazard warning label required by the Hazardous Materials Regulations. It appears that this official had a question regarding the EPA waste marking requirements. EPA requires generators of hazardous waste to provide certain information on packages containing hazardous wastes. The content and form of information that must be marked on containers of less than 110 gallon capacity are specified in EPA regulations governing hazardous wastes (40 C.F.R. 262.32).

The Research and Special Programs Administration's Office of Hazardous Materials Safety has on-going programs designed to foster the understanding of and compliance with Hazardous Materials Regulations requirements. The Office of Hazardous Materials Safety periodically conducts hazardous materials seminars to provide training in the Hazardous Materials Regulations, routinely participates in industry meetings and seminars to provide instruction and clarification of the Hazardous Materials Regulations, and develops training materials to foster uniform understanding of the Hazardous Materials Regulations. The Office of Hazardous Materials Safety cosponsors with FEMA the Hazardous Materials Information Exchange. The Exchange is a computerized bulletin board designed especially for distributing and exchanging hazardous materials information. The Exchange provides a centralized database for sharing information pertaining to hazardous materials emergency management, training, resources, technical assistance, and regulations. Additionally, the Office of Hazardous Materials Safety has established a Hazardous Materials Information Center, staffed by regulatory specialists, to assist individuals with compliance questions about Hazardous Materials Regulations. Recently, the Office of Hazardous Materials Safety established an 800 number (1-800-HMR-4922) to further enhance the ability of industry to obtain information. Callers are directed through an automated menu of available options.

Callers needing assistance relating to the Hazardous Materials Regulations will be forwarded to a regulations specialist in the Hazardous Materials Information Center after selecting the correct menu item. Callers also may leave voice mail messages; all calls are returned within 24 hours. Callers may also request copies of training information and materials or request copies of recent Federal Register publications by selecting the appropriate menu option. The Hazardous Materials Information Center responded to approximately 30,000 telephone requests for information in 1994.

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