ESTABLISHMENT AND MAINTENANCE OF PRICE REGULATIONS—A STUDY IN ADMINISTRATION OF A STATUTE

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The legal problems that confronted the Administrator of the Office of Price Administration in establishing and maintaining regulations during the statutory life of the agency¹ were many and diverse. They may roughly be divided into four categories, based upon the time when the particular problems were first acutely presented to the Administrator:² (1) Problems in connection with establishing a regulation in the first instance during wartime or the emergency period thereafter; (2) those concerned with the maintenance of prices during the wartime period; (3) the problems of the transition period (between V-E Day and June 30, 1946); (4) and finally the problems of the last year of price control, *i. e.*, the new problems presented by the Price Control Extension Act of 1946.³ It is the purpose of this article to deal with each of these in turn.⁴

I. ESTABLISHING A REGULATION

The Emergency Price Control Act of 1942 set forth several general principles for the guidance of the Price Administrator in determining whether to bring a commodity or group of commodities under control, and if so, at what level. In the judgment of the Price Administrator, the price of the commodity must have risen or have been threatening to rise "to an extent or in a manner inconsistent with the purposes of this Act"; the prices established were required to be "generally fair and equitable"; they had to effectuate the purposes of the Act; and "so far as practicable," the Administrator was required to "ascertain and give due consideration to the prices prevailing between October 1 and October 15, 1941," with the direction to make adjust-

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1. Established by the Emergency Price Control Act of 1942, 56 STAT. 23, 50 U. S. C. App., §§ 901-946 (Supp. 1942). Throughout this article the Emergency Price Control Act will be referred to as the "Act."

2. It should be kept in mind throughout that a problem once having arisen usually recurred throughout the life of the agency.

3. 60 STAT. 664, 50 U. S. C. A. App. 901a (1946).

4. Problems arising during the period prior to the statute under the predecessor of the Office of Price Administration (Office of Price Administration and Civilian Supply) are outside the scope of this article.

ments for various relevant factors of general applicability such as "speculative fluctuations, general increases or decreases in costs of production . . . general increases or decreases in profits earned by sellers of the commodity . . . during and subsequent to the year ended October 1, 1941. . . ." ⁵ In addition the Act established special additional standards for agricultural commodities ⁶ and for products processed from agricultural commodities.⁷

In most instances, the first determination, *i. e.*, that prices had risen or were threatening to rise "to an extent or in a manner inconsistent with the purposes of this Act," presented no problem. The economic situation was such that it was clear that once the price of a commodity started to rise, nothing was likely to prevent continued increases short of the establishment of maximum prices.

In one notable instance, however, compliance with the statutory requirement, although easily possible, required greater explanation since the compliance was less obvious. This was in connection with the issuance of the General Maximum Price Regulation in April, 1942.⁸ In the early days of price control—statutory and pre-statutory—it was hoped that selective control at some levels would be sufficient to stem inflation.⁹ It was hoped primarily that controls at the retail level could be avoided because of the obvious administrative difficulties both in establishing retail regulations and in enforcing them. But shortly after the passage of the Act, it became apparent that nothing short of almost overall control within the statutory limits would be effective in holding down prices then being forced up by the well known wartime inflationary pressures.¹⁰ Since immediate action was necessary, the most expeditious solution was the issuance of an overall regulation covering at all levels of production and distribution the vast majority of commodities at that time still uncontrolled [there were at that time only about 150 regulations] and covering at previously uncontrolled levels many commodities already controlled at one or more levels.

Obviously it could not be ascertained that prices of each commodity at all levels to be controlled had actually risen. The alternative was a finding, easily justified by the circumstances,¹¹ that "the prices of

5. § 2(a).

6. § 3(a).

7. § 3(c).

8. 7 FED. REG. 3153 (1942).

9. FIRST QUARTERLY REPORT OF THE OFFICE OF PRICE ADMINISTRATION, submitted on July 27, 1942, pp. 20, 24, and 30; *Statement of Considerations for General Maximum Price Regulation*, OPA Service, 11:115.

10. *Statement of Considerations for General Maximum Price Regulation*, OPA Service, 11:115.

11. The validity of the issuance of the General Maximum Price Regulation was raised in *Philadelphia Coke Co. v. Bowles*, 139 F. 2d 349 (E. C. A. 1943). The court there pointed out that the Administrator had authority to issue a universal price regu-

commodities and services generally are rising and threatening further to rise,"¹² and that they present a "grave threat to . . . the stability of the national economy."¹³

After the issuance of the General Maximum Price Regulation, the problem of prices rising or threatening to rise was reduced to insignificance; regulations issued thereafter mainly established new prices for, or new methods of pricing, commodities already covered by the General Maximum Price Regulation. Almost solely in the case of agricultural commodities which were, in the main, excluded from the General Maximum Price Regulation,¹⁴ was the problem acutely presented thereafter.

The next consideration, that of general fairness and equity, while extremely significant, did not present too many problems at the outset. Overall standards of general fairness and equity were early developed and were applied throughout the life of the agency. These standards established minimum requirements which had to be met in every instance. But, as explained in a memorandum submitted to both the House¹⁵ and Senate¹⁶ Banking and Currency Committees in the course of their hearings on the renewal of the Price Control Act in 1944, the effectuation of the purposes of the Act rarely required that the maximum price first established for a commodity be at or near minimum levels of general fairness and equity. Furthermore, the prices in effect during the October 1-15, 1941 period, or during any other representative period,¹⁷ normally exceeded the minimum price that could be established. In view of the desirability, in the interest of a stable price structure, of permitting some cushion in prices which would permit the absorption of future cost increases, only prices somewhat above the minimum levels could, at that time, have carried out the purposes of the Act.¹⁸ Accordingly the question of setting prices so low as to be not generally fair and equitable was scarcely then a problem.

As originally enacted, the Act set up additional standards, very limiting in nature,¹⁹ to be met in setting prices for agricultural com-

lation when prices in general threatened to rise in a manner inconsistent with the purposes of the Act. At the time of the issuance of the General Maximum Price Regulation such a situation existed and the fact that the complainant's product posed no individual threat was immaterial.

12. *Statement of Considerations*, *supra* note 10, at 11:116.

13. *Id.* at 11:111.

14. § 9(a) (1).

15. *Hearings before the Committee on Banking and Currency on H. R. 4376*, 78th Cong., 2d Sess. 1997 (1944).

16. *Hearings before the Committee on Banking and Currency on S. 1764*, 78th Cong., 2d Sess. 1426 (1944).

17. Suggested as a guide by § 1(a) of the Act.

18. *Hearings*, *supra* note 15, at 1997-8.

19. SECOND QUARTERLY REPORT OF THE OFFICE OF PRICE ADMINISTRATION, submitted November 28, 1942, pp. 5, 11.

modities and processed agricultural commodities. These concerned the level of prices. For an agricultural commodity, the price established had to be no lower than the highest of the following: (1) 110% of parity or of the comparable price;²⁰ (2) the prevailing market price on October 1, 1941; (3) the prevailing market price on December 15, 1941; or, (4) the average price during July 1, 1919 to June 30, 1929.²¹ For processed agricultural commodities, the price established was required at least to reflect to producers of the agricultural commodity the minimum permissible maximum price for the agricultural commodity.²² These standards were so restrictive that relatively few maximum prices (in view of the necessity for total coverage) were established thereunder,²³ although many other commodities should have been controlled at prices below the then permissible levels to bring them into line with the levels of prices set by other regulations, notably the General Maximum Price Regulation.²⁴

In April, 1942, the President recognized the dangers involved and requested Congress to amend the Act to establish more liberal standards.²⁵ Finally, the Stabilization Act of 1942²⁶ was passed, establishing more satisfactory substitute standards. These provided, in general, that the maximum price for an agricultural commodity must not be lower than the higher of the parity (or comparable) price, or the highest price received by producers between January 1, 1942 and September 15, 1942. The Administrator was, however, given discretion in certain instances to go below the January 1-September 15 price if the price established reflected parity. For processed agricultural commodities, the maximum price was required at least to reflect the maximum price to producers of the raw material and an equitable margin for processing.

These modified standards permitted the establishment of maximum prices for a vastly increased number of agricultural commodities and processed agricultural commodities at prices more nearly in line with the prices established for other products, and immediately resulted in

20. For a variety of reasons, such as because the product was not commercially produced in the base period, parity prices cannot be determined for some agricultural commodities. As to some such commodities, the Secretary of Agriculture publishes a "comparable" price which, in general, is the Secretary's informed guess as to what the parity price would be if it were calculable.

21. § 3(a).

22. § 3(c).

23. Only 60% of agricultural commodities were covered at the retail level prior to the change in the statute. THIRD QUARTERLY REPORT OF THE OFFICE OF PRICE ADMINISTRATION, submitted January 19, 1943, 2.

24. SECOND QUARTERLY REPORT, *supra* note 19, at 5 and 25.

25. Presidential message to Congress, April 27, 1942. See FIRST QUARTERLY REPORT, *supra* note 9, at 35.

26. 56 STAT. 765, § 2, 50 U. S. C. APP. § 962 (Supp. 1942).

the extension of retail food price coverage so that 90% of such prices were shortly thereafter under control.²⁷

II. MAINTAINING REGULATIONS DURING THE WARTIME PERIOD

Examination of the actions of the Price Administrator during the war indicates that that period may properly be referred to as the agency's "freeze" period. Generally, the policy of the agency, following the issuance of the General Maximum Price Regulation, was to permit price increases on the basis of very limited and strictly applied standards. Increases fell into two main categories: (A) Those that were required in order to meet the minimum requirements of the law, *i. e.*, those required either to maintain generally fair and equitable prices or to meet the requirements of certain special provisions of the Act subsequently added; (B) and those that were discretionary with the Administrator.

A. *Legally Required Increases*

1. *On the basis of overriding standards*

As indicated above, the Act set forth in general terms the purposes that were to be fostered by, the criteria that were to be used, and the general standards that were to be met in establishing maximum price regulations or orders under the Act. The specific and detailed application of these standards and criteria were left to the discretion of the Price Administrator.²⁸ A study of the problems involved led the Administrator to the conclusion that cost absorption to the maximum extent possible was the only feasible principle to follow in administering the Act. To assist in determining the "maximum extent possible," two specific pricing guides for every day use were formulated. These two guides were commonly referred to as the "industry earnings" and the "product" standards, and may be described as follows: The industry earnings standard provided that a maximum price was to be deemed generally fair and equitable if it permitted that portion of the industry responsible for the major part of industry output to earn profits, before federal income and excess profits taxes and adjusted for changes in net worth, at least equal to the profits earned during a representative peacetime period. The product standard was a secondary test used in conjunction with the industry earnings test only in the case of a multiple product industry, *i. e.*, an industry which produced or manufactured

27. THIRD QUARTERLY REPORT, *supra* note 23, at 2.

28. *Bowles v. Willingham*, 321 U. S. 503 (1944); *Lockerty v. Phillips*, 319 U. S. 182 (1943); and *Yakus v. United States*, 321 U. S. 414 (1944); all upheld the constitutionality of the Act over objections of undue delegation of legislative power to an administrative agency.

more than one major item. It provided that a maximum price for a commodity produced by a multiple product industry would be considered generally fair and equitable if it not only met the requirements of the industry earnings test but also, except where it had been the industry's practice to sell the commodity below cost, permitted the highest-cost firms which were not included in the industry's high cost marginal fringe²⁹ to recover out-of-pocket costs on the product.³⁰ In many instances an industry as a whole would show a favorable position with reference to profits while a large part of that industry would be incurring an actual out-of-pocket loss on a particular commodity it was producing. The Administrator never took the position that any price for a particular product was fair, no matter how low, merely because overall peacetime earnings were equalled. Obviously the Administrator could not "maintain a ceiling price of one cent for a loaf of bread merely because bakers . . . (were) doing well on pies, cakes and cookies. The product standard recognized this. It was developed precisely for the purpose of giving firm assurance that no such extreme variations from normal or appropriate price relationships would occur, or, if they occurred, be maintained."³¹ These two tests were deemed to assure, in general, that prices were generally fair and equitable, although special circumstances sometimes made other variants necessary.³²

Although many other standards, usually embodying basic principles other than that of cost absorption, were urged upon the Administrator by persons affected by the Act³³ as well as by individual members of Congress,³⁴ the adoption of these two tests appears well founded. In Section 2 (a) of the Act the Administrator was directed to establish

29. The exclusion of the high cost marginal fringe frequently presented a difficult administrative problem. As explained to the Senate Committee on Banking and Currency: "We (the OPA) can seldom draw a sharp line to distinguish the so-called 'high-cost marginal sellers' from their competitors. What we are obliged to do is to meet the out-of-pocket costs of the industry generally. We do not consider ourselves obliged by the standard to meet out-of-pocket costs which do not appear to be representative of the industry's experience." *Hearings before the Committee on Banking and Currency on S. J. Res. 30, 79th Cong., 1st Sess.*, at 109 (1945).

30. Out-of-pocket costs were generally, for ease of administration, taken as synonymous with factory costs. *Hearings, supra* note 29, at 109.

31. *Hearings, supra* note 16, at 1410.

32. *Hearings, supra* note 29, at 109. See *Heinz v. Bowles*, 149 F. 2d 277 (E. C. A. 1945), *amended on rehearing*, 150 F. 2d 546 (E. C. A. 1945).

33. Protestants frequently urged before the Emergency Court of Appeals that cost increases should result in price increases: *U. S. Gypsum Co. v. Brown*, 137 F. 2d 360 (E. C. A. 1943), *cert. denied*, 320 U. S. 775 (1943); *Chatlos v. Brown*, 136 F. 2d 490 (E. C. A. 1943); *Lakemore v. Brown*, 137 F. 2d 355 (E. C. A. 1943); *Spaeth v. Brown*, 137 F. 2d 669 (E. C. A. 1943); *Philadelphia Coke Co. v. Bowles*, 139 F. 2d 349 (E. C. A. 1943); *Madison Park Corp. v. Bowles*, 140 F. 2d 316 (E. C. A. 1943); *Interwoven Stocking Co. v. Bowles*, 141 F. 2d 696 (E. C. A. 1944). In each case protestant's claim was dismissed.

34. See, for example, colloquy between Mr. Brownlee (Deputy Administrator of the OPA) and Senator Taft, *Hearings, supra* note 16, 188-9.

prices at the level "prevailing between October 1 and October 15, 1941." However, he was further directed to make "adjustments for such relevant factors as he may determine and deem to be of *general* applicability, including the following: Speculative fluctuations, general increases or decreases in costs of production, distribution, and transportation, and *general increases or decreases in profits earned by sellers of the commodity or commodities*, during and subsequent to the year ended October 1, 1941." (Emphasis supplied). The implication is clear that any overall test designed to insure compliance with this portion of the Act—a portion which may well be deemed the heart of the Act insofar as pricing standards were concerned—had to be a test that looked to factors that applied to an industry as a whole, (rather than to factors affecting individual members of an industry but having no important bearing on the overall picture) and further had to be a test that was based on overall industry profits.

The legislative history of the original price control Act also supported the adoption of the industry earnings standard. The Senate Committee on Banking and Currency, in its report on a bill which contained language the same as that later found in Section 2 (a) of the Act said:

" . . . The bill does not guarantee a profit to each individual seller. It requires instead that . . . prices be generally fair and equitable as applied to the sellers responsible for the major part of the output of the commodity. As to such sellers it is the effect of the maximum price upon their overall operations as business units that must be considered."³⁵

Another very potent argument in support of the soundness of the Administrator's interpretation of the Act is the fact that the industry earnings standard was well suited to effectuation of the purposes of the Act. Undoubtedly the prime purposes of the Act, at least in the wartime period of price control, were those first enumerated: "to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents."³⁶ Under this standard, increases in prices which must otherwise have taken place because of the operation of speculative factors or because of increased demand and diminished supply were prevented, while increases in prices due to war-induced increases in costs were minimized by the principle of the industry earnings standard of absorption of increased costs up to the level where normal peacetime profits of the industry would be impaired.³⁷

35. SEN. REP. NO. 931, 77th Cong., 2d Sess. 15 (1942).

36. § 1(a).

37. The alternative most vigorously urged by those outside the agency was that proposed by Sen. Taft during the Senate Banking and Currency Committee Hearings

There were at least two important affirmations of the propriety of these pricing tests: The Emergency Court of Appeals upheld their validity, and Congress clearly indicated its approval of the administrative interpretation of the Act. The question of the validity of measuring prices in a multiple product industry against the industry earnings and product standards was presented to the Emergency Court of Appeals for the first time in *Gillespie-Rogers-Pyatt Co. Inc., et al v. Bowles*.³⁸

The court pointed out that it was settled by the decisions of that court that the mere showing of a cost increase in connection with a particular commodity did not alone entitle the industry to an increase in maximum price. Furthermore, it agreed with the Administrator that the industry earnings standard was valid when applied to a multiple product industry in conjunction with the application of the product standard to the products dealt in by the industry. In support of its position, the court pointed to the language of the Act. It also stressed the important factor that the use of the two standards accorded with normal business practices. The court said:

"It is a phenomenon of our peacetime economy that a multiple-product industry which earns satisfactory profits on its over-all operations frequently finds it necessary or desirable to sell one or more items of its line of commodities at cost or even at a loss. The Act does not compel changes in practices of this sort."³⁹

Congress indicated its approval of the administrative interpretation in 1944, when the Act was renewed without change in the pertinent language. During the course of the hearings on the bill to renew the Emergency Price Control Act and the Stabilization Extension Act, the standards used by the Administrator were carefully explained to both the Senate and House Committees.⁴⁰ Reference was made to the standards in the report of the Senate Committee on Banking and Currency.⁴¹ Furthermore, the matter came up in the debates on the floor of the Senate.⁴²

One further determination had to be made before the standards could be applied, namely, the selection of a representative peacetime period against which to measure current profits. In most instances, the years 1936-1939 were used, although this period was not con-

to amend the Emergency Price Control Act, *viz.*, that increases in costs should result in increases in prices.

38. 144 F. 2d 361 (E. C. A. 1944).

39. *Id.* at 364.

40. *Hearings*, *supra* note 15, at 55-62; *supra* note 16, at 77-96.

41. SEN. REP. No. 922, 78th Cong., 2d Sess., Supp. Statement at 45-7 (1944).

42. See remarks of Sen. Taft, 90 Cong. Rec. 5683-6 (June 9, 1944).

sidered representative in every instance.⁴³ On occasion one or more of these years was dropped out and at times another year was added where, for reasons peculiar to the particular industry, another period was considered more representative of normal peacetime experience.⁴⁴ The Act itself left the choice of the period to the discretion of the Administrator.⁴⁵

2. *On the basis of changes made in the Act*

A variety of specific changes in regulations were required because of Congressional amendments to the Act.

a. *Amendment of 1943.* The first of these, and one that stirred up a great deal of controversy, was the addition of Section 2 (j) to the Act, generally referred to as the "Taft" amendment.⁴⁶ This section limited the authority of the administrator in regard to: (1) restricting trade and brand names, (2) requiring grade labeling, and (3) fixing maximum prices based on standards and specifications..

OPA regulations had not, prior to the adoption of this section of the Act, made any attempt to eliminate or restrict the use of established trade or brand names. Accordingly no changes in regulations were required because of this portion of the amendment.⁴⁷

But the Administrator had previously undertaken, early in 1943, to include in the regulations applicable to many commodities the requirement that grade and quality information be given to buyers. Therefore, compliance with paragraph 2 of section 2 (j) did require some changes in regulations. The flat prohibition against requiring grade labeling was interpreted by the Administrator to apply only to goods sold to the normal, non-commercial consumer; only to markings on the goods themselves or to tags attached to the goods; and only to non-descriptive labels which contained an express judgment as to the comparative value of the commodity for a special purpose.⁴⁸ This left open the possibility of substituting for former grade labeling requirements, requirements of placing the grade on the invoice or bill of sale, or of descriptive labeling,

43. *Hearings, supra* note 16, at 1425.

44. *Ibid.*

45. Many considerations supported the selection of the years 1936-1939. They were the years picked by Congress as a normal peacetime period for excess profits tax purposes. They predate the war boom years and they were, for most industries, representative. If a later period had been used, it would have favored those industries which were first favorably affected by defense activities and would have discriminated against those first unfavorably affected. See *Hearings, supra* note 16, at 1425-8.

46. Added by § 5(a). 57 STAT. 566 (1943), 50 U. S. C. 902 (Supp. 1945).

47. The amendment was, in all likelihood, prompted by the fact that the OPA was, at that time, considering steps to curb evasive practices through the changing of brand names. (Memorandum from Henry M. Hart, Jr., Associate General Counsel of OPA to Prentiss M. Brown, Administrator, July 16, 1943.)

48. Memorandum of July 16, 1943, *supra* note 47.

or of ceiling price labeling, where ceiling prices were established on the basis of described grades. In most instances requiring changes because of this portion of the Taft amendment, one of these alternatives was adopted.⁴⁹ In some instances, however, no one or more of these alternatives was suitable and therefore the grade labeling requirement was eliminated without substitution.⁵⁰

The third and fourth clauses of section 2 (j), dealing with maximum prices based on specifications and standards raised the question of whether clauses 3 and 4 were to be read alternatively so as to permit maximum pricing on the basis of standards and specifications if the requirements of either one of those clauses were complied with, or conjunctively so as to permit such maximum pricing only if the requirements of both were met. The history of the legislation indicated that the former interpretation was the correct one and the Administrator was so advised by counsel.⁵¹ This interpretation was adopted by the Circuit Court of Appeals of the United States for the Third Circuit in *U. S. v. Pepper Bros.*⁵² and by the Emergency Court of Appeals in *Avon Western Corp. v. Bowles*⁵³ and in *Thomas Paper Stock Co. v. Bowles*.⁵⁴ The interpretation, as contained in the latter case, was affirmed by the Supreme Court.⁵⁵

b. *Amendments of the Stabilization Extension Act of 1944.* When the Emergency Price Control Act of 1942 and the Stabilization act were extended by the Stabilization Extension Act of 1944,⁵⁶ several basic changes in the provisions of the acts were included.

1. *Section 3 of the Stabilization Act.* Among these changes was that provided by an amendment, popularly known as the "Bankhead" amendment, to section 3 of the Stabilization Act. That amendment provided:

"On and after the date of the enactment of this paragraph, it shall be unlawful to establish or maintain, any maximum price

49. Examples of regulations substituting requirement of grade on invoice or bill of sale: Kraft wrapping paper, MPR 182, Amendment 8, 8 FED. REG. 10761 (1943); Peanuts and peanut butter, RMPR. 335, Amendment 2, 8 FED. REG. 10987 (1943). Example of regulations substituting descriptive labels: Anti-freeze, MPR 170, Amendment 6, 8 FED. REG. 11437 (1943); Example of regulation substituting ceiling price labelling: Utility shirts, RMPR 304, 8 FED. REG. 11063 (1943).

50. See, e. g., Bed linens, RPS 89, Amendment 11, 8 FED. REG. 11245 (1943); Rubber heels, MPR 200, Amendment 11, 8 FED. REG. 10980 (1943).

51. Memorandum of July 16, 1943, *supra* note 47. See also statement of the President in signing the bill, referred to in the SEVENTH QUARTERLY REPORT OF THE OFFICE OF PRICE ADMINISTRATION, submitted February 15, 1944, at 19.

52. 142 F. 2d 340, 343 (C. C. A. 3d 1944).

53. 145 F. 2d 473 (E. C. A. 1944).

54. 148 F. 2d 831 (E. C. A. 1945).

55. *Thomas Paper Stock Co. v. Porter*, 328 U. S. 50 (1946).

56. 58 STAT. 632, 50 U. S. C. 902 (Supp. 1945).

for any agricultural commodity or any commodity processed or manufactured in whole or substantial part from any agricultural commodity which will reflect to the producers of such agricultural commodity a price below the highest applicable price standard (*applied separately to each major item in the case of products made in whole or major part from cotton or cotton yarn*) of this Act.”⁵⁷ (Emphasis supplied).

Prior to this amendment, the pricing standard to assure the reflection of parity to the grower had been applied to the industry as a whole rather than separately to each major item of cotton products. To assure immediate compliance with the amendment, the Administrator issued an adjustable pricing order which permitted producers of certain cotton products (those for which the Administrator contemplated that increases would be necessary) to agree to deliver those products at prices which could be adjusted upward after the time of delivery.⁵⁸

The order took care of the emergency situation; within a week, the Administrator issued the first of the adjusted prices.⁵⁹ Other adjustments of a similar nature followed in short order.⁶⁰ All of the early adjustments were labeled “interim” adjustments since, as was pointed out in the Statement of Considerations accompanying Amendment 20 to Revised Price Schedule 35, “the Office of Price Administration has not attempted to reach a final determination as to the lowest ceiling which would comply with the statute. Instead, it has tentatively adopted a working rule which will assure that ceiling prices are safely above the statutory minimum.”⁶¹

The working rule which was adopted for computing a maximum price for a major item made reference to the following four factors; a landed-mill parity equivalent for the cotton used in the basic item of the major item; a weighted average of mill conversion costs; a margin, representative of the average profit in cents per yard enjoyed by producers of the major item in a normal peace-time period, normally 1936-1939; and an amount equivalent, in cost of cotton in the cloth, to 2 points in the parity index or $\frac{1}{4}$ cent per pound of raw cotton.⁶² This was known as the “major item net worth” formula.

57. *Id.* § 201(a).

58. Supp. Ord. 92, 9 FED. REG. 7502 (1944).

59. RPS 35, Amendment 20, 9 FED. REG. 7700 (1944), effective June 30, 1944.

60. *E. g.*, RPS 35, Amendments 21 and 23, 9 FED. REG. 9278 and 9 FED. REG. 10088 (1944); RPS 7, Amendment 14, 9 FED. REG. 10636 (1944); RPS 89, Amendment 13, 9 FED. REG. 9616 (1944).

61. OPA SERVICE, CONSUMER GOODS DESK BOOK, 3349.

62. Although the Administrator announced that he felt that without the last factor prices would be more than adequate to meet the new standard, for purposes of computing a tentative price the two point allowance was thought warranted. It was looked upon not as a margin of safety for any single element in the price, but rather as a

One of the main reasons that the price increases first issued were considered tentative was due to the lack of up to date cost information. After the completion of a cost survey, it became possible to issue "definitive" prices which represented, at the time,⁶³ prices which accorded with the new pricing requirements of the Act. The first of these was issued five months after the "Bankhead" amendment became effective.⁶⁴

The formula used in setting "definitive" prices not only was applied in the light of new data as to costs, but it also varied in one major respect⁶⁵ from that used earlier. In lieu of a margin representative of the average profit in cents per yard enjoyed in 1936-1939, the new formula used as a profit factor an amount intended to yield the same return on net worth as producers enjoyed from the major item in 1936-1939.⁶⁶ It was contemplated that this change would restrict, legally, the amount of the increase and would also more closely accord with standards used for other commodities.⁶⁷

Not long after "definitive" prices giving effect to the changes necessitated by the "Bankhead" amendment were established for a great many major items, extensive wage increases in many textile mills were authorized by the War Labor Board and it appeared likely that many other mills would shortly be paying the same increases. This brought to the fore the question whether the "major item net worth formula" outlined above had to be applied in determining whether the maximum price for a major item *continued* to meet the standards of the Act or whether it would be sufficient, after making an initial adjustment on that basis, to revert to the usual industry earnings standard or some other modification of that standard, less inflationary than the major item standard, for purposes of *maintaining* (rather than *establishing*) prices under the "Bankhead" amendment.

After due consideration the Administrator first determined that he would be satisfying the standards of the Act if he completed setting "definitive" prices on the basis previously outlined and thereafter increased prices for new increases in costs only when required by the industry earnings standard, provided that, as to any major item, the

tolerance of general applicability. *Statement of Considerations Accompanying Amendment 21 to RPS 35*, OPA SERVICE, CONSUMER GOODS DESK BOOK, 3350.

63. As explained in a footnote to *Statement of Considerations Accompanying Amendment 25 to MPR 118*, OPA SERVICE, CONSUMER GOODS DESK BOOK at 3779, "definitive" does not mean not subject to adjustment when necessary.

64. MPR 118, Amendment 25, 9 FED. REG. 14211 (1944).

65. It should be noted that the "parity cushion" of $\frac{3}{4}\text{¢}$ per pound was maintained in the permanent formula.

66. *Statement of Considerations*, *supra* note 63.

67. For an extended discussion of these problems, see memorandum on "Policy Issues in Pricing of Major Cotton Textile Products," appended to *Statement of Considerations*, *supra* note 63, at 3780.

ceiling price covered at least the industry's total costs of making and selling the product, (including general administrative overhead and selling expenses), which, in itself, is a standard considerably more liberal than the product standard applied in other industries.⁶⁸

The announcement of this standard, however, aroused considerable Congressional opposition, and the Administrator was informed that the Committee on Banking and Currency felt that it would not satisfy the purposes of the amendment.⁶⁹ Accordingly, late in June 1945, the Administrator announced that after further consideration, he was abandoning his previously announced policy regarding maintaining prices under the "Bankhead" amendment and would use thereafter his major item net worth standard in maintaining as well as in establishing prices.

Under the newly readopted standard, the Administrator contemplated that, as to certain items, price rises due to increased labor costs would be inevitable. To prevent a production slowdown pending final announcement of the adjustments, recourse was once more had to the adjustable pricing order permitting certain producers to enter into contracts which provided for limited adjustments in prices after the increases were announced.⁷⁰ However, within a short time, substantial extension had to be provided⁷¹ because the flow of goods to market had almost stopped.⁷² The industry was aware that, on the basis required by Congress, the increases would be considerable, and it was unwilling, in the interim period, to forego any profit, however unwarranted and out of line with profits in other industries. By late August, 1945, the first of the new increases were announced.⁷³

2. Highest Price Line Limitation. Section 2 (k) of the Emergency Price Control Act was added by the 1944 extension.⁷⁴ It provided:

68. *Hearings*, *supra* note 29, at 597.

69. *Statement of Considerations Accompanying Supp. Ord. 114*, OPA SERVICE, GENERAL DESK BOOK, 9295.

70. *Supp. Ord. 114*, 10 FED. REG. 7528 (1945).

71. *Rev. Supp. Ord. 114*, 10 FED. REG. 9875 (1945).

72. *Statement of Considerations Accompanying Rev. Supp. Ord. 114*, OPA SERVICE, *supra* note 69, at 9298.

73. *Supp. Ord. 131*, 10 FED. REG. 11296 (1945). The prices under this order were higher because the parity price of cotton had advanced between June 1944 and July 1945, and because of increased labor costs. In establishing these prices, the Administrator adopted a method little used in the Textile field prior thereto, *i. e.*, a two band system of pricing. In order to establish prices that met the requirements of the amendment without giving some producers a more unwarranted windfall than legally and administratively necessary, the Administrator felt compelled to compute the weighted average conversion costs separately for those mills paying increased wages and for those mills not paying those increases.

74. Section 102 of the Stabilization Extension Act of 1944, *supra* note 56.

"No regulation, order, or price schedule issued under this Act shall, after the effective date of this subsection, require any seller of goods at retail to limit his sales with reference to any highest price line offered for sale by him at any prior time."

Prior to the amendment, several regulations contained such limitations, *i. e.*, "highest price line" limitations, for both retail and pre-retail sales;⁷⁵ such regulations prohibited a seller from selling any commodity or special class of a commodity at a price higher than the maximum price at which he had sold that commodity or special class of commodity during a specified base period. Such limitations had been imposed in order to halt the inflationary practice of "trading up," *i. e.*, the movement of sellers into higher price lines of merchandise and the dropping of lower price lines. This "trading up" was particularly troublesome in the apparel fields where higher costs frequently did not result in a more durable or useful article. The Emergency Court of Appeals subsequently affirmed the validity of the Administrator's limitation.⁷⁶

After the addition of Section 2 (k) to the Act, the limitation placed on the Administrator's powers was only on his ability to impose a "highest price line" limitation on sales at retail. The language of the Act is clear on that point and the Emergency Court of Appeals so held. To carry out the purpose of the amended Act, Supplementary Order 93 was issued.⁷⁷ This order deleted such limitations on retail prices from all regulations and orders which at that time contained them. That was the only action legally required of the Administrator, although in certain instances highest price line limitations at other levels were also deleted because of administrative difficulty of enforcement where a correlative limitation was not permitted at the retail level.⁷⁸

3. *Crop Disaster Requirement.* Another change in the pricing standards was that necessitated by the addition of Section 3 (g) to the Emergency Price Control Act,⁷⁹ which provided for adjustments in the maximum prices for fresh fruits and vegetables to make allowance for

"substantial reductions in merchantable crop yields, unusual increases in costs of production, and other factors which result from

75. *E. g.*, Women's Fur Garments, MPR 178; Men's and Boys' Tailored Clothing, MPR 177.

76. See *Montgomery Ward & Co., Inc. v. Bowles*, 147 F. 2d 858, 861 (E. C. A. 1945); *Ebling Brewing Co., Inc. v. Porter*, 156 F. 2d 1012 (E. C. A. 1945); *cert. denied*, 67 Sup. Ct. 297 (1946).

77. 9 FED. REG. 7574 (1944).

78. See, *e. g.*, *Statement of Considerations Accompanying Revised Maximum Price Regulation (RMPP)* 330, OPA SERVICE, *supra* note 61, at 28331.

79. Added by § 103(b) of the Stabilization Extension Act of 1944, *supra* note 56.

hazards occurring in connection with the production and marketing of such commodity.”

In view of the legislative history of this amendment, the Administrator announced that he interpreted it to require growers to be given the opportunity to recoup losses much as they would be able to do in a normal peace-time market. At the same time it was pointed out that the Administrator had attempted so to act prior to the amendment.⁸⁰

Amendments to Revised Maximum Price Regulation 271⁸¹ and to Maximum Price Regulation 426⁸² are mute but vivid evidence of the effect of this amendment on growers' prices. Most of the adjustments were increases for lowered merchantable crop yield. Such factors as drought,⁸³ codling moths,⁸⁴ unseasonably cold weather,⁸⁵ hurricane,⁸⁶ blight,⁸⁷ all had to be considered. But bad weather could not only decrease crop yield, but might also be the cause of “unusual increases in costs of production” by increasing labor or shipping expenses,⁸⁸ or of other decreases in the value of the resulting crop such as by lowering the quality.⁸⁹ In such cases increases to compensate were required, or other action was essential.⁹⁰

The adjustments required by this section were extremely numerous, so much so, in fact, that in October of 1944, a change also had to be made in the method computing the price of intermediate sellers. Previously they had computed their prices once weekly. But because, as the Administrator explained, it was necessary frequently to adjust growers prices on short notice, intermediate sellers were thereafter permitted to compute maximum prices on each lot.⁹¹

c. Amendments made by the 1945 Extension. The act extending the Emergency Price Control Act and the Stabilization Act until June 30, 1946⁹² required only two changes in the pricing standards. Sec-

80. Opinion of the Administrator accompanying order denying protest: S. A. Gerard Co., No. 1271-8-P (Dec. 28, 1945), OPA Service, 3 Oct. & Dec. 706, 708 (1945).

81. Amendment 18, 9 FED. REG. 7771 (1944), effective July 15, 1944, was the first to provide a necessary increase.

82. Amendment 44, 9 FED. REG. 9090 (1944), effective July 27, 1944, was the first under this regulation.

83. RMPR 271, Amendment 19, 9 FED. REG. 9356 (1944).

84. MPR 426, Amendment 56, 9 FED. REG. 11350 (1944).

85. MPR 426, Amendment 79, 10 FED. REG. 460 (1945).

86. MPR 426, Amendment 89, 10 FED. REG. 2188 (1945).

87. RMPR 271, Amendment 31, 10 FED. REG. 2969 (1945).

88. MPR 426, Amendment 180, 11 FED. REG. 5737 (1946); MPR 426, Amendment 44, 9 FED. REG. 9090 (1944).

89. MPR 426, Amendment 73, 9 FED. REG. 13995 (1944); MPR 426, Amendment 44, 9 FED. REG. 9090 (1944).

90. Administrative difficulties sometimes made an increase impracticable. In such a case, to comply with the law, the Administrator could suspend price control on the commodity, as was done in the case of cabbages in early September 1944. MPR 426, Amendment 56, 9 FED. REG. 11350 (1944).

91. RMPR 271, Amendment 25, 9 FED. REG. 12270 (1944).

92. 59 STAT. 306 (1945), 50 U. S. C. §§ 901-946 (Supp. 1946).

tion 4 of the 1945 extension⁹³ required the Administrator to permit a seller who normally made a uniform charge for c. o. d. mail deliveries to add to his maximum price the amount of any increase in postal rates, a minor matter.

Section 7 of the 1945 extension,⁹⁴ popularly referred to as the Barkley-Bates amendment, provided for a new standard in establishing maximum prices in the meat processing industry. The story of this industry under the Act has been told elsewhere.⁹⁵

B. DISCRETIONARY ACTIONS

The main type of discretionary action taken by the OPA was a discretionary increase in a maximum price, *i. e.*, an increase in excess of that required because of the minimum standards. Less frequent types of discretionary actions were certain decreases in prices which, while technically "required" by the Act and the Executive Orders, actually were discretionary with the Administrator, as a practical matter.

The Emergency Price Control Act, the Stabilization Act, and two Executive Orders, 9250⁹⁶ and 9328⁹⁷ each had a bearing on the powers of the Administrator to take various discretionary actions. As indicated previously, the original Act laid down certain mandatory requirements to be developed and applied by the Administrator in establishing and maintaining maximum prices. Under the original Act, the Administrator might properly have found, either initially or upon application for a price increase, that it would effectuate the purposes of the Act to establish maximum prices for a commodity at a level higher than the minimum which could be defended upon protest as generally fair and equitable. Upon making such a finding he had a discretionary authority to establish maximum prices at the higher level. And in some instances the Administrator actually exercised that power.⁹⁸

Executive Order 9250,⁹⁹ issued under the Stabilization Act, placed new limitations upon the discretionary authority of the Price Administrator to permit price increases on commodities affecting the cost of living, although it theoretically left untouched the Administrator's dis-

93. 59 STAT. 307 (1945), 50 U. S. C. § 902(n) (Supp. 1946) was added to the Emergency Price Control Act of 1942.

94. A further proviso was added to § 3 of the Stabilization Act of 1942 by 59 STAT. 309, 50 U. S. C. § 963 (Supp. 1946).

95. Nathanson and Hyman, *Judicial Review of Price Control: The Battle of Meat Regulations*, 42 ILL. L. REV. 584 (1947).

96. 7 FED. REG. 7871 (1942).

97. 8 FED. REG. 4681 (1943).

98. *See, e. g.*, MPR 167, Amendment 2, 7 FED. REG. 7403 (1942).

99. *See* note 96 *supra*. The Price Administrator's authority to carry out the policies of the Stabilization Act insofar as they affected prices was made subject to the policy directives of the Director of Economic Stabilization.

cretionary power where the cost of living would not be affected.¹⁰⁰ As to cost of living commodities, price increases above the minimum required by law were confined to cases in which the increases were found necessary either to correct gross inequities or to aid in the effective prosecution of the war. The guiding policy of all departments and agencies of the government was the stabilization of the cost of living at September 15, 1942 levels. Under these standards the Administrator granted some, but not many, increases.¹⁰¹

Executive Order 9328, issued April 8, 1943, set up even more rigorous standards. That order directed the Price Administrator to "authorize no further increases in ceiling prices except to the minimum extent required by law." An exception was found later in the order, however, which provided:

"Nothing herein, however, shall be construed to prevent . . . the Price Administrator, subject to the general policy directives of the Economic Stabilization Director, from making such readjustments in price relationships appropriate for various commodities . . . provided that such action does not increase the cost of living."

Thus after April 8, 1943, the Price Administrator was left with power to grant an increase in price above minimum levels only if such an increase would aid in the effective prosecution of the war or would correct a gross inequity, and only if such action did not affect the cost of living. If a proposed increase did not meet the latter requirement, but did fall within the former category, it could become effective only after approval by the Director of Economic Stabilization. This limited discretionary power set-up was maintained all during the continuance of the war; it was formally changed only by the issuance of Executive Order 9599,¹⁰² in August 1945.

1. *Increases Without Approval of the Director of Economic Stabilization*

Whenever the Administrator found that a proposed increase would not increase the cost of living, he could proceed without OES (Office of Economic Stabilization) approval.¹⁰³ One large category of cases

100. Theoretically, at least, the Administrator had complete discretion to increase prices not affecting the cost of living. In fact, however, that unlimited power was not used; the same standards were applied to cost of living and non-cost of living commodities, in order to avoid the charge of discrimination. *Hearings, supra* note 15, at 1995.

101. *See, e. g.*, MPR 280, Amendment 11, 8 FED. REG. 1885 (1943); MPR 285, Amendment 2, 8 FED. REG. 3050 (1943); MPR 11, 8 FED. REG. 361 (1943).

102. 10 FED. REG. 10155 (1945). The changes made by this order will be discussed under Section III *infra*.

103. Implicit in the entire discussion of necessity for OES approval or lack thereof, is the assumption that the proposed increase, in the Price Administrator's opinion, meets the other requirements of the Act and order.

where that was done was where the commodity did not affect the cost of living, such as a commodity used solely for military purposes or sold only to war procurement agencies.¹⁰⁴

The other main category of cases was where the commodity *affected* the cost of living, but where the particular price increase action, for one of many reasons, did not *increase* the cost of living. For example, where an increase at one level of distribution did not necessitate an increase in the retailer's price, the cost of living was not increased. Thus an increase in raw material cost which was to be absorbed by the manufacturer¹⁰⁵ or processor,¹⁰⁶ or an increase in the cost of consumer goods which was to be absorbed by distributors¹⁰⁷ did not increase the cost of living. During this period, *i. e.*, during the prosecution of the war, a large proportion of the increases permitted without OES approval were made on the basis of absorption somewhere before goods reached the consumer.

In other situations, an increase was not deemed to increase the cost of living although it was an increase in the price of consumer goods. The increase may have been deemed infinitesimal;¹⁰⁸ or it may have been part of a readjustment of prices taking the form of an increase in one case accompanied by a decrease in another related price.¹⁰⁹

One of the most interesting reconciliations used by the Administrator involved the granting of increases for low priced merchandise. The Administrator had reason to believe, in many instances, that unless an increase were granted either to a particular seller¹¹⁰ or for a particular low priced product,¹¹¹ the seller would go out of business or he would cease making the inexpensive product. In such a case, if the consumer would have had to buy from another seller having a higher price for the same product, or if the commodity which could have been substituted would have cost more without giving proportionately increased value, the Administrator reasoned that the grant-

104. *See, e. g.*, MPR 537, Amendment 1, 10 FED. REG. 412 (1945); MPR 118, Amendment 26, 9 FED. REG. 14383 (1944); MPR 443, 8 FED. REG. 10759 (1943); RPS 7, Amendment 10, 8 FED. REG. 5755 (1943).

105. *E. g.*, MPR 231, Amendment 3, 9 FED. REG. 7710 (1944).

106. *E. g.*, MPR 573, 10 FED. REG. 1148 (1945); MPR 531, Amendment 4, 10 FED. REG. 117 (1945); MPR 357, Amendment 1, 9 FED. REG. 1905 (1944).

107. *E. g.*, RMPR 289, Amendment 22, 10 FED. REG. 2928 (1945); MPR 496, Amendment 8, 10 FED. REG. 2160 (1945).

108. *E. g.*, MPR 33, Amendment 5, 8 FED. REG. 13497 (1943). This involved an increase in the price of bag closing twine.

109. *E. g.*, RPS 60, Amendment 12, 9 FED. REG. 10707 (1944); MPR 11, Amendment 7, 8 FED. REG. 8937 (1943).

110. *E. g.*, Supp. Reg. 14C, Amendment 7, 10 FED. REG. 9010 (1945); Supp. Reg. 15, Amendment 40, 10 FED. REG. 6766 (1945); MPR 391, Amendment 5, 10 FED. REG. 4542 (1945).

111. *E. g.*, RMPR 289, Amendment 29, 10 FED. REG. 6232 (1945); RMPR 301, 10 FED. REG. 4150 (1945); RMPR 300, 10 FED. REG. 4140 (1945); Food Products Reg. (FPR) 1, Amendment 2 to Supp. 3, 10 FED. REG. 3554 (1945).

ing of the increase would not increase the cost of living since without the increase the consumer would have to pay at least as much or more for another product or to another seller.¹¹² Reference was had to this rationale normally only where it was desirable to maintain production of the commodity affected.

2. Increases Under the "Supply Standard"—With OES Approval

In November 1943, the Director of Economic Stabilization issued a general directive outlining the conditions under which price increases beyond the minimum required by law and which increased the cost of living would be approved.¹¹³ It had to be shown that:

(1) The War Production Board had established production controls, normally on the lower priced items, which required the manufacture of specified items.

(2) The War Production Board had found that ceiling prices constituted a serious impediment to effectuation of production programs to meet civilian needs.

(3) The price increase did not afford more than total cost, except that if the overall operations were not extremely profitable, a small profit could be allowed.

This program was made necessary because in many instances a multiple product industry whose overall profit position was good (judged by the standards set up for determining general fairness and equity) or even a single-line industry which made both low and high priced lines, found it more profitable to discontinue less profitable or loss items (normally the lower priced items) and turn its productive capacity over to more profitable items (normally higher priced items). Demand being large, such action was frequently possible.¹¹⁴

In the administration of this policy, the textile,¹¹⁵ apparel,¹¹⁶ and consumer goods¹¹⁷ industries were those mainly affected. The normal

112. Compare related reasoning: RMPR 271, Amendment 37, 10 FED. REG. 5457 (1945); MPR 425, Amendment 4, 8 FED. REG. 16293 (1943); MPR 306, Amendment 16, 8 FED. REG. 12791 (1943).

113. The directive was contained in a letter to the Price Administrator, dated November 16, 1943. The program outlined in the letter is found in the *Statement of Considerations Accompanying RPS 89, Amendment 12*, OPA SERVICE, CONSUMER GOODS DESK BOOK, 3539-40.

114. Other attempts to minimize such action, *i. e.*, concentration on higher priced items, were Maximum Average Price Regulations, Supp. Ord. 108, 110, and 113, 10 FED. REG. 4336, 5404, and 6762 (1945). These orders required, in general, that the average selling price of all commodities, or groups of commodities, sold not exceed a base period average selling price.

115. *E. g.*, Supp. Ord. 86, 9 FED. REG. 3734 (1944); Supp. Ord. 86, Amendment 2, 10 FED. REG. 9430 (1945); RPS 89, Amendment 12, 9 FED. REG. 1717 (1944).

116. *E. g.*, Supp. Ord. 99, Amendment 1, 10 FED. REG. 199 (1945); Supp. Ord. 99, Amendment 2, 10 FED. REG. 2080 (1945); Supp. Ord. 86, Amendment 1, 10 FED. REG. 1607 (1945); MPR 578, 10 FED. REG. 2388 (1945); RMPR 304, Amendment 1, 10 FED. REG. 5039 (1945).

117. *E. g.*, MPR 188, Order A-2, Amendment 20, 9 FED. REG. 14394 (1944).

procedure, under this so-called "supply standard," was to allow total unit cost or 102% of such cost, depending upon the profit situation of the individuals concerned.¹¹⁸

III. THE TRANSITION PERIOD

The transition period, *i. e.*, the period during which industry was converting from a wartime to a peacetime basis, overlaps in part the period just discussed, *i. e.*, the wartime period. For some purposes, the transition period may be said to begin early in May 1945, *i. e.*, after V-E Day. It was at that time that the Administrator announced the new transition objectives and proposed means of obtaining them.¹¹⁹ He also set forth, at that time, what he conceived to be the special price control problems of the transition period: (1) Problems of encouraging necessary production by industries that had been making peacetime commodities throughout the war; (2) problems of encouraging production by industries that had converted entirely or almost entirely to war goods; (3) problems of encouraging low end production by all manufacturers *i. e.*, production of low rather than high price lines of an item; and (4) problems of decontrol.

The policies to be pursued during the transition period were formalized in Executive Order 9599;¹²⁰ the Administrator was to set about adjusting prices so that they would not interfere with the effective transition to a peacetime economy. He also was to attempt to see that, insofar as possible, these increases did not cause increases at later levels of production and distribution.

During this period,¹²¹ three major standards, two of them new, were applied in determining whether a discretionary increase over and above any required by the minimum standards of the act should be granted. These were:

- (1) the transition product standard
- (2) the reconversion standard
- (3) the supply standard.

118. Supp. Ord. 86, 9 FED. REG. 3734 (1944).

119. OPA Release No. 5566, May 11, 1945. Plans had been made as early as the 3rd quarter of 1944. See ELEVENTH QUARTERLY REPORT OF THE OFFICE OF PRICE ADMINISTRATION 5-7 (February 5, 1945).

120. 10 FED. REG. 10155 (1945).

121. Several executive orders made changes in the legal standards applicable during this period. See Exec. Order 9599, 10 FED. REG. 10155 (1945) (returned to Administrator powers over price increases previously transferred to Economic Stabilization Director); Exec. Order 9651, 10 FED. REG. 13487 (1945) (provided a six-month test period wherein an increase unapproved by the appropriate wage stabilization agency could not be considered by OPA in determining whether a price increase should be made); Exec. Order 9697, 11 FED. REG. 1691 (1946) (required Administrator to adjust price ceilings where an industry was found to be in hardship due to wage increases, and consider future earnings prospects).

Along with all of these, a policy of cost absorption by distributors, to the fullest extent possible, was applied.

A. *The Transition Product Standard*

During the war, the OPA had used two standards for determining the extent to which increases in ceiling prices should be granted for particular products where the overall industry position was good: the product and supply standards.¹²² These standards continued in use in the transition period, although the product standard was used to an ever decreasing extent.¹²³ In order to relax somewhat the strict wartime standards in an effort to encourage production, the transition product standard was evolved.

Under the transition product standard, the ceiling price or prices of a particular product produced by a multi-product manufacturing industry were raised to the extent necessary to return to the industry, on the average, the total costs of making and selling the product.¹²⁴ The early actions wherein this new standard was used were cases where the product on which the adjustment was granted was important for the peacetime economy¹²⁵ and normally where the consumer of the product would have had to substitute a more expensive item,¹²⁶ but where it was not found, obviously because it could not be, that the essentiality of the product was such that it met the stringent requirements of the supply standard. The reasonableness of the extension is readily apparent in such cases. Later the standard was extended and developed further until it became accepted as a substitute for the product standard in almost all situations.¹²⁷

In order to keep as many manufacturers as possible in business during the transition period, a standard for individual adjustments far more liberal than that used during the war was developed.¹²⁸ In September 1945, Supp. Ord. 133 was issued.¹²⁹ It provided that manufacturers could qualify for adjustment if their overall operations had been conducted at a loss during the most recent accounting period, or where a projection of operations showed, on the basis of known

122. *Supra*, pp. 507-510.

123. SEVENTEENTH QUARTERLY REPORT OF THE OFFICE OF PRICE ADMINISTRATION, 11 (July 17, 1946).

124. See, e. g., MPR 244, Amendment 10, 10 FED. REG. 11710 (1945); Supp. Reg. 14G, Amendment 3, 10 FED. REG. 15377 (1945); Supp. Reg. 14G, Amendment 4, 11 FED. REG. 3259 (1946); MPR 149, Amendment 26, 11 FED. REG. 3530 (1945).

125. RPS 32, Amendments 22 and 23, 10 FED. REG. 9102, 12262 (1945); Supp. Reg. 14G, Amendments 3 and 4, 10 FED. REG. 15377 (1945), 11 FED. REG. 3259 (1946).

126. MPR 244, Amendment 10, 10 FED. REG. 11710 (1945); RPS 40, Amendment 6, 10 FED. REG. 12650 (1945); MPR 413, Amendment 4, 10 FED. REG. 12689 (1945).

127. See SEVENTEENTH QUARTERLY REPORT, *supra* note 123, at 11-12.

128. During the war, the provisions for individual hardship adjustments normally permitted increases only where the individual's production was essential to the wartime economy.

129. 10 FED. REG. 11658 (1945).

costs, that the manufacturer would immediately be operating his overall business at a loss.¹³⁰

B. *The Reconversion Standard*

Inasmuch as the transition period was a time when many manufacturers were resuming and enlarging production of civilian goods, it was necessary to adopt a price policy which would, at once facilitate reconversion, thereby fostering employment and the expansion of civilian production, and at the same time prevent unnecessary price increases.¹³¹ The previously established bases for determining the necessity for and the size of an adjustment were not feasible in such cases. Normally, an adjustment was based upon ascertainable cost figures of recent operating experience. As to reconverting manufacturers, however, no statistics were available upon which a justifiable revision of prices could be based. Accordingly, as explained in a press release,¹³² the Administrator had a choice: estimating the increase necessary to correctly adjust established maximum prices, making no adjustment until the industry could submit current cost figures, or developing a special formula for reconverting industries designed to meet the special problems involved.

The agency ruled out the first two alternatives as unworkable and set out to develop criteria whereby it could be determined, in advance of actual operating experience, whether adjustments were necessary in order not to deter reconversion. The purposes to be achieved were explained, by the Administrator, as follows:

"The standards of adjustment . . . should be directed to achieving a price for the applicant which would assure him the prospect of profitable production once the temporary dislocations which accompany the return under war conditions to the manufacture and sale of a discontinued or curtailed product had come to an end. The standards should not, however, attempt to cover the temporary cost increases. . . ." ¹³³

The original formal outline of the reconversion formula was set forth in Amendment 67 to Maximum Price Regulation 188.¹³⁴ It closely followed the policy previously outlined and was approved by

130. Supp. Ord. 133, Amendment 2, 11 FED. REG. 3528 (1946).

131. From time to time before the end of the war in Europe the agency had been faced with isolated instances of goods returning to production. However, no distinction was made between setting a price for a reconversion article and setting a price for any other article. See, MPR 188, Order 1298, 9 FED. REG. 2311 (1944); RSR 14, Amendments 157 and 165, 9 FED. REG. 9620, 10050 (1944); MPR 188, Order 2525 and Amendment 1 to that Order, 9 FED. REG. 12306 (1944) and 10 FED. REG. 2460 (1944).

132. OPA Release No. 5566, May 11, 1945.

133. *Statement of Considerations Accompanying Supp. Ord. 119*, OPA SERVICE, *supra* note 69, at 9345.

134. 10 FED. REG. 10972 (1945).

the Economic Stabilization Director.¹³⁵ The new standard overcame the objections to estimating operating costs, while nonetheless permitting adjustments. Stated generally, it provided for determining the size of material and labor increases since a base period (normally Oct. 1941) and for adjusting the base period prices to reflect those increases as well as the industry average profit during the 1936-1939 period.¹³⁶ The formula also provided a method of treating reconverting manufacturers in accord with the treatment accorded industries which had remained in production of civilian goods.¹³⁷

Certain principles were basic to the formula:

(1) It was based on the assumption that volume production of reconversion goods would be attained in a short period of time. It was specifically provided that if sufficient volume was not attained, the amount of the adjustment would be reconsidered.¹³⁸

(2) In order to avoid temporarily inflated material costs, only changes in the level of material prices were considered.¹³⁹ Thus temporary increases due to changes in suppliers or increased freight costs were avoided.

(3) Because it was felt that many factors which increased the price of an hour's labor during wartime, such as overtime, multiple shift premiums, increased vacations, and upgrading were due to the manpower shortage of the wartime period, only changes in the basic wage rate schedules were taken into account. The latter changes did, of course, account for the major component of the increase in the price of an hour's labor during the reconversion period.

(4) A profit factor equal to the average industry percentage of profit in a representative peacetime period was included in the adjustment. In the case of industry wide adjustments, the actual average was used. When individual adjustments were concerned, such as under Supplementary Orders 118¹⁴⁰ and 119,¹⁴¹ variations were provided; on the whole, however, they provided for the industry average. In the main the period 1936-1939 was considered a representative

135. Directive 78, 10 FED. REG. 11074 (1945).

136. The actual mechanics of the formula, in most instances, involved the establishment of an industry increase factor which was applied either to base period prices or to last established ceiling prices.

137. *Statement of Considerations Accompanying Amendment 67 to MPR*, OPA SERVICE, *supra* note 69.

138. *Ibid.*

139. *Ibid.*

140. Under Supp. Ord. 118, 10 FED. REG. 9011 (1945) manufacturers were authorized to take their own average 1936-1939 profit margins if they wished. *Statement of Considerations Accompanying Supp. Ord. 118*, OPA SERVICE, *supra* note 69, at 9335.

141. Under Supp. Ord. 119, 10 FED. REG. 9014 (1945), which dealt with individual adjustments for another category of small manufacturers, the profit factor was equal to one-half the industry average profit over cost in 1936-1939.

period, and preferable to 1941 "in part because price increases and the rapid expansion in volume combined in that year to inflate profit margins and in part because . . . the Office has utilized the 1936-1939 period as the normal base for its industry earnings standard."¹⁴² The fact that the same base period was used for the formula and for the industry earnings standard does not indicate that the profit basis was in all other respects similar. As was carefully pointed out,¹⁴³ "since the profit element in the formula is a percentage of cost or expressed alternatively, a percentage of sales, it does not confine manufacturers to the aggregate dollar profits or rate of return on investment earned on the average in 1936-1939. If the margin allowed is actually realized, aggregate dollar profits will substantially exceed those earned in 1936-1939 whenever the dollar volume of sales exceeds that of 1936-1939."

(5) From the foregoing, it can be seen that the formula did not attempt to take into account all of the factors which had affected production costs since 1941. It ignored some factors that increased costs, but similarly ignored others which decreased costs, such as the unprecedented ease of selling and the effect of technological progress which most industries were bound to experience.¹⁴⁴

The reconversion pricing formula contemplated one industry-wide adjustment wherever possible. In general such adjustments did form the base of the structure,¹⁴⁵ with revision, where necessary, also on an industry wide basis.¹⁴⁶ In certain circumstances, however, it was contemplated that individual adjustments for the whole industry would be the only method administratively possible. For example, where an industry was dominated by one or more large, highly integrated firms, individual adjustments were deemed necessary. In such a case, an average of the materials' cost increase experience of both the integrated and the non-integrated firms was likely to have proven an unsatisfactory guide to the pricing needs of both groups.¹⁴⁷

Even before the formal outlines of the overall reconversion pricing formula were announced, it was recognized that special provision for

142. *Statement of Considerations*, *supra* note 137.

143. *Ibid.*

144. *Ibid.*

145. Typical of the industry-wide adjustments were the following: MPR 188, Orders 1-6 under Sec. 1499.159(e), 10 FED. REG. 11329, 12787, 13704 (1945); MPR 599, 10 FED. REG. 13522 (1945).

146. In some instances later experience showed the need for additional adjustment upward. For example: RMPR 136, Order 572, Amendment 2, 11 FED. REG. 4633 (1946).

147. Perhaps the most notable use of individual adjustments on an industry-wide basis occurred in connection with the automobile industry: MPR 594, 10 FED. REG. 11296 (1945).

individual hardship cases would have to be provided.¹⁴⁸ Supplementary Orders 118 and 119 were issued to establish the overall framework for such individual adjustments. These two orders followed the general policies, adapted to the particular needs they were designed to meet.¹⁴⁹

Experience gained through using the formula, and later changes in conditions suggested various relatively minor modifications of the formula. For example, the Price Administrator was directed,¹⁵⁰ in determining maximum prices under the reconversion pricing formula, to disregard any increase in legal prices of materials authorized or occurring after Nov. 27, 1945, and any approved increases in wage or salary rates made after that date.¹⁵¹ An exception was made of course, where the Price Administrator found that the reflection of such increases was necessary to maintain generally fair and equitable prices, or to prevent hardships impeding reconversion. But, as the Administrator pointed out:

"Since the reconversion pricing formula provides for adjusting ceilings above the minimum level required by law, exceptions to the directive can be based only on the prevention of hardship impeding reconversion."¹⁵²

However, when in the early part of 1946, wage increases were obtained in many industries following the settlement of the steel strike, the Administrator was directed by Executive Order 9697 to increase ceilings in industries having recently approved wage increases, to the extent necessary to allow the realization of the 1936-1939 rate of profit during the ensuing twelve months. However, an exception was made for industries operating at a temporarily low volume. The Executive Order directed the Administrator to develop special standards in such cases. Such special standards had, in effect, been in existence prior to the issuance of the order, pursuant to the terms of Directive 88. In issuing Amendment 3 to Revised Order 4 to Maximum Price Regulation 594,¹⁵³ the Administrator announced that, in his opinion, the existing reconversion pricing standards complied with the order.¹⁵⁴ In short, the Administrator planned to continue to permit

148. *Statement of Considerations Accompanying Supp. Ord. 119*, *supra* note 133.

149. See notes 140, 141.

150. Directive No. 88, Office of Stabilization Director, OWMR, 10 FED. REG. 14574 (1945).

151. Unapproved increases were, by Exec. Ord. 9599, to be disregarded in any event.

152. *Statement of Considerations Accompanying Rev. Supp. Ord. 119*, OPA SERVICE, *supra* note 133, at 9348E.

153. 11 FED. REG. 3495 (1946).

154. *Statement of Considerations Accompanying Amendment 3 to Rev. Ord. 4 to MPR 594*, OPA SERVICE, METALS AND MACHINERY DESK BOOK, at 81752.

increases above the reconversion formula adjustments in cases where such increases were necessary to maintain generally fair and equitable prices or to prevent hardships impeding reconversion. It was contemplated that in most instances an increase in labor costs without a corresponding increase in maximum price would impose a hardship impeding reconversion and therefore in most instances increases were granted.¹⁵⁵ In certain special cases, however, it was felt that increases could be avoided.¹⁵⁶

C. *The Supply Standard—Maintenance of Low-End Production*

In an inflationary market, there is substantial inducement to manufacturers to concentrate their production on higher priced (normally higher margin) items and to discontinue lower priced articles. Such actions necessarily increase the cost of living. To stem such concentration on higher priced items during the transition period, the Administrator developed and applied a modification of the supply standard.¹⁵⁷ The aim was to promote balance in the "product mix" of manufacturers.¹⁵⁸ Some price actions made the taking of reconversion price increases contingent upon the maintenance of normal proportions of low-end production,¹⁵⁹ while others gave higher percentage increases for low-end products.¹⁶⁰ In at least one instance a manufacturer was denied the right to use the reconversion factor to increase his price until he indicated that proper proportions of low-end goods would be produced.¹⁶¹

D. *Absorption at Distributive Levels*

Since the announced policy of the Administrator was to have peacetime goods return to the market at their 1942 retail prices,¹⁶² and since manufacturers had to be granted adjustments over their 1941-2

155. Increases were granted, *e. g.*: MPR 594, Rev. Ord. 4, Amendment 3, etc., 11 FED. REG. 3495 *et seq.* (1946); 11 FED. REG. 10691 (1946); 11 FED. REG. 4814-25 (1946); MPR 598, Amendment 9, 11 FED. REG. 4386 (1946).

156. In announcing the overall policy, it was stated: "For example, prospects of an early rate of production substantially in excess of 1941 production would negative the possibility of hardship in many cases and make it unnecessary to increase existing ceilings to reflect increases in costs. In other cases such special conditions as the existence of large inventories of lower cost materials or the anticipation of wide-spread model change would be factors to be considered in determining the time and amount of increases in maximum prices." *Statement of Considerations*, *supra* note 154.

157. Discussed, *supra*, p. 521.

158. See *Statement of Considerations Accompanying Supp. Ord. 119*, *supra* note 133.

159. See, *e. g.*, MPR 86, 10 FED. REG. 12528 (1945) (low-end model output of household washing machines and ironers had to be produced in same proportion as in July 1940-June 1941 to entitle manufacturer to reconversion increase).

160. MPR 599, 10 FED. REG. 13522 (1945) (radios); MPR 188, Order 4800, 11 FED. REG. 206 (1946) (household furniture); 3d RMPR 213, 11 FED. REG. 394 (1946) (metal beds).

161. MPR 86, Order 5, 10 FED. REG. 12469 (1945), permission granted by MPR 86, Order 6, 10 FED. REG. 13417 (1945).

162. OPA Release No. 5566, May 11, 1945.

selling prices, some system of cost absorption by distributors had to be maintained. The Executive Order which formalized the reconversion policies, so directed.¹⁶³ Within the limits of the overall price standards, every effort was made to comply with this directive.

The already developed standards of cost absorption—developed for application to the distributive trades long before reconversion standards were applied—were carried over to reconversion pricing. These standards determined whether and to what extent an increase authorized by an industry-wide price action in the maximum prices of the manufacturers of an article, might be reflected in increases in maximum prices of distributors of that article¹⁶⁴ Absorption was required down to, but not beyond, the point where the ceiling price covered the seller's total cost.¹⁶⁵ If absorbing the manufacturer's increase forced a distributor to sell below his total cost, he was permitted to increase his maximum price to the point where it did cover total cost.¹⁶⁶

In the case of distributors whose sales consisted solely or mainly of the product whose cost to them had been increased, an absorption down to the expense ratio would be illegally burdensome. In such cases, or where the product constituted a large proportion of his sales, a dealer was obliged to absorb the cost increase only to the point where he was left with the average base period dollar margin over cost.¹⁶⁷

Where more than one distributor was involved between the manufacturer and the consumer, provision was made for the apportionment of the absorption between them on an equitable basis.¹⁶⁸

E. Decontrol of Commodities

Implicit in the Administrator's authority to impose maximum prices under section 2 of the Act was his authority to withdraw them individually or in groups as the need that justified their imposition

163. Exec. Ord. 9599, 10 FED. REG. 10155 (1945).

164. As originally applied, complete absorption, where possible, was required. However, it later appeared that the administrative difficulties involved and the burden upon the distributive trade in requiring absorption of individual manufacturer adjustments no longer justified the policy of absorption in such cases, Supp. Ord. 153, 11 FED. REG. 32486 (1946).

165. If the sales of the product did not constitute a substantial part of the total sales of the distributors, the distributors had to absorb cost increases down to the rate of expenses to sales of the retail outlet. See also THIRTEENTH QUARTERLY REPORT OF THE OFFICE OF PRICE ADMINISTRATION, submitted July 21, 1945, pp. 19-21. For examples see MPR 591, Order 48, Amendment 8, 11 FED. REG. 1258 (1946) (manufacturers' new price increases were passed through in exact dollar amount to preserve distributors' percentage margin, which already equalled expense ratio); MPR 149, Order 56, 11 FED. REG. 1649 (1946) (rubber mats and matting).

166. Supp. Ord. 145, 11 FED. REG. 1040 (1946) provided an automatic method of calculating whether an increase might be added.

167. *E. g.*, MPR 188, § 1499.159(e), Order 10, 11 FED. REG. 4059 (1946).

168. The absorption was normally divided between several distributors in the same proportion as the dollar markup of each dealer bore to the total dollar markup at retail over manufacturer's price. MPR 86, 10 FED. REG. 12528 (1945); MPR 188, Amendment 70, 10 FED. REG. 13551 (1945).

ceased to exist. This was confirmed by the statement in Executive Order 9599 that one of the guiding policies of Government agencies during the transition from war to peace was "to move as rapidly as possible without endangering the stability of the economy toward the removal of price, wage, production and other controls and toward the restoration of collective bargaining and the free market." But even before Executive Order 9599 was issued, the Administrator had taken the first steps toward large scale decontrol by submitting to the Director of Economic Stabilization a program for decontrol. This program, approved in Directive 68,¹⁶⁹ provided for suspension and then exemption of all commodities where such action was not likely to increase the price above the then existing level.¹⁷⁰ The fact that the market price was then below the ceiling was only one of many factors to be considered. Among the most important of the others was the possibility of increased demand after removal of control.¹⁷¹ The Directive also provided for the exemption of all commodities not important to the cost of living or to business costs if their continued control imposed an undue administrative burden, even though prices would rise above the previous maximums, but only if exemption would present no threat of diversion of needed materials, facilities, or manpower.

Supplementary Orders 126,¹⁷² 129,¹⁷³ and 132¹⁷⁴ were attempts at systematic and easily understandable actions of decontrol. Each covered one major field of control, *i. e.*, (1) consumer goods; (2) machines, parts, industrial materials and services; and, (3) foods, grains and cereals, feeds, tobacco and tobacco products, agricultural chemicals, insecticides, and beverages. As new commodities could be added to the lists of those already decontrolled or suspended, amendments to the orders were issued. By July, 1946 when the decontrol standards were markedly relaxed by the Price Control Extension Act of 1946,¹⁷⁵ a total of more than 100 amendments to the three orders had been issued, covering an infinite number of commodities.

169. 10 FED. REG. 9388 (1945).

170. *Statement of Considerations Accompanying Supp. Ord. 126*, OPA SERVICE, CONSUMER GOODS DESK BOOK, 9591.

171. *Ibid.* "In determining probable future demand such such factors as, (1) the effect of withdrawal of any regulations by war supply agencies which have had the effect of limiting demand, (2) potential export demand as world markets widen, (3) new uses for the article if they are likely to be important in the near future, and (4) fluctuations in demand resulting from the uneven impact of cutbacks in war production and any temporary delays in the reconversion process, will all be given weight. The fact that a price has fallen below the ceiling does not, of itself, indicate a stable balance of demand and supply at that price."

172. 10 FED. REG. 10200 (1945).

173. 10 FED. REG. 11291 (1945).

174. 10 FED. REG. 11512 (1945).

175. Pub. L. 548, 79th Cong., 2d Sess. (July 25, 1946).

IV. THE LAST YEAR

The Price Control Extension Act of 1946,¹⁷⁶ which became effective after a period of three and one half weeks during which no controls had been extant, made many changes in the standards to be applied by the Administrator. It may almost categorically be said that every major transition period policy pursued by the Administrator in an attempt to hold prices as low as possible and achieve an equitable balance between the need for price increases as an incentive to greater production and the necessity for holding prices within reasonable levels to prevent inflation met with disapproval by Congress, in part or in whole. In most instances the disapproval took the form of an amendment to the statute which required a change in such standards or policies.

The new attitude of Congress is best evidenced by the shift in emphasis required of the Administrator and made specific by the 1946 extension. A new section was added defining the "Purposes and policies in the transition period."¹⁷⁷ Therein Congress affirmed that "rapid attainment of production equal to demand is one of the necessary and urgent objectives for the prevention of inflation and for the achievement of a reasonable stability in the general level of prices" and subsequently stated that "adequate prices are necessary stimulants to the production thus desired." The objective was to make it worth the producer's while to produce by raising his profits above what was previously considered equitable and hope that the law of supply and demand would take care of the consumer.

A. *Adjustment Standard*

The most pervasive change required by the new act commonly referred to as the "Taft" amendment, was that provided for by Section 11 of the Extension Act.¹⁷⁸ This Section added a standard for an industry-wide adjustment which provided that the lower of the following be met: (1) The average dollar price of the product in 1940 plus the average increase in costs of production since 1940, or (2) the average current total costs plus the industry's average over-all percentage profit on sales in 1940. In multiple product industries, the two methods of computation might result in considerably different prices since the first contemplated the use of the industry's average margin on the particular product, applied dollar-wise, whereas the second contemplated the industry's average margin on all products, applied percentage-wise. In all industries, multiple product or single

176. *Ibid.*

177. § 1A of the Act.

178. Adding § 6 to the Act.

line, either standard almost necessarily required, subject to the provisos discussed below, an increase in some maximum prices.

Three provisos to this section prevented it from being a complete substitute for the minimum standards of fairness and equity, at least for manufacturers, producers and processors.

(1) Adjustments were required on the basis of this standard only after petition therefor by an industry advisory committee and after the submission by that committee of "comprehensive evidence with respect to costs and prices."

(2) The standard need have been applied only to a "product" which was defined as "any major item, or any article different in character from other products of the industry."

(3) The adjustment need not have been made during any period with respect to which it appeared that "a substantial expansion in the production or use of the product would not be practicable or would be practicable only by reducing the production of at least equally needed products." In such a case, the only requirement was that maximum prices of the product on the average equal its average current total cost plus a reasonable profit.

In September 1946, the Administrator issued Supplementary Order 183¹⁷⁹ in which he provided the procedure to be followed by industry advisory committees in applying for increases; and the order also provided the standards the committees were required to meet. The Administrator therein asserted that he would consider it necessary for a committee to show that a 15% increase in production would be practicable before he would consider a requested adjustment pursuant to either of the two main standards. Little action was taken under this section, however. Undoubtedly many industry committees were busily preparing petitions when decontrol of all commodities except rent, sugar and rice made such petitions unnecessary.

B. Distributors' Markups

As indicated above, the Administrator made frequent use of the policy of requiring distributors to absorb part or all of an increase granted to a manufacturer, if such absorption left the distributor in a generally fair and equitable position. However, under Section 10 (t) of the 1946 Act,¹⁸⁰ continued attempts to require absorption were outlawed, and, in fact, where absorption had been ordered between March 31 and July 1, 1946, regulations had to be amended so as no longer to require it.

179. 11 FED. REG. 10519 (1946).

180. Adding paragraph (t) to section 2 of the Emergency Price Control Act.

Pursuant to this section many actions setting distributors' prices, where the manufacturer-supplier had been granted an increase between April 1 and July 1, 1946, had to be adjusted.¹⁸¹ In many others, involving increases at the manufacturing level and made after July 25, 1946, the Administrator had to permit a full percentage pass-through of the increase to the ultimate consumer.¹⁸²

Other provisions of the 1946 act affecting distributors' markups, although worded in general terms, were the handiwork of special lobbying groups, designed to give special treatment to certain groups. The resulting amendments affected primarily automobile, farm machinery and refrigerator distributors.¹⁸³

C. Wool and Cotton Products

Section 14 of the 1946 Extension was designed to prevent the Administrator from pursuing another one of the policies he had adopted to prevent unnecessary increases. The Administrator, in administering the "Bankhead" Amendment of the 1944 Extension,¹⁸⁴ had, without Congressional challenge, and quite correctly in view of the language and purpose of section 3 of the Stabilization Act, interpreted that Amendment to require the price for cotton products to reflect only parity, even if the actual cost, *i. e.*, market price, of cotton was above parity.

The 1946 Extension specifically required the use of current costs or parity, whichever was higher. At the same time, the Extension Act adopted the skeleton of the rest of the formula that the Administrator had devised: cost, plus weighted average of mill conversion costs, plus a reasonable profit. However, in defining reasonable profit, the Extension Act emasculated the formula by changing the base period to 1939-1941 and requiring the use of average unit profit instead of industry profit ratio to net worth. As thus amended, the coverage of the section was extended to wool and wool products in addition to cotton and cotton products. These changes, like the distributor pro-

181. Between early August and November 1946, approximately 100 actions in this category were taken raising distributor prices to comply with the requirements. A wide range of important cost of living and cost of housing (construction) commodities were included. *See, e. g.*, Supp. Ord. 172, 11 FED. REG. 8674 (1946) (building and construction materials).

182. More than 100 actions were taken in this connection, including, again, many affecting basic consumer goods and construction materials. *See, e. g.*, Supp. Reg. 14C, Amendment 19, 11 FED. REG. 8449 (1946) (corn products). Note that subsection (t) does not permit merely a dollar and cent pass-through. The effect of the increase is cumulative, with each distributor adding the dollar and cent increase to his price plus his own percentage of that increase.

183. Subsections (q) (r) and (s) of section 10 of the 1946 Act, which added subsections (q) (r) and (s) to § 2 of the Emergency Price Control Act.

184. Discussed, *supra*, p. 512.

visions, required a flood of price adjustments upward.¹⁸⁵ And the mill adjustments merely started a spiral. As indicated in the early statement of considerations, the cotton fabric increase was to be passed on by textile manufacturers to apparel distributors who, of course, under the provisions of the Extension Act, passed it on—percentage-wise—to the consumer.

D. *Miscellaneous Pricing Provisions*

The Price Control Extension Act of 1946 was a veritable "log roll" of special interest amendments. Maintenance of low end production was emasculated by one such amendment.¹⁸⁶

Many groups received special consideration of one sort or another including hotels, fish and sea food dealers, nylon hosiery manufacturers, service establishments, restaurants, logs and lumber dealers, importers and producers of new commodities.¹⁸⁷

E. *Decontrol*

With respect to dencontrol, too, Congress evidenced a desire for greater speed. The standards adopted by the Administrator required no change, but Congress made it clear that it felt that they were too rigidly applied.

Section 3 of the Extension Act¹⁸⁸ added many new procedural provisions relating to decontrol,¹⁸⁹ including the establishment of a Price Decontrol Board, as well as new substantive requirements.

Decontrol followed swiftly after these amendments. No longer were the limitations, theretofore heeded, as to what was a meeting of supply and demand, applicable. The mandate was explicit to remove when supply "is in approximate balance with the demand." The Administrator obviously was also still empowered to decontrol where the administrative burden was disproportionate to the gain.

The decontrol of meat and meat products on October 15, 1946,¹⁹⁰ pursuant to a Presidential directive so to do, was made on the basis of standards that did not appear in the Act: political needs. At a politically critical moment meat almost completely disappeared from the

185. The first of the increases came shortly, on August 14, 1946. Supp. Ord. 131, Amendments 30 and 31, 11 FED. REG. 8530, 8865 (1946).

186. § 10(p) of the 1946 extension and 2(p) of the Emergency Price Control Act.

187. §§ 2(6) (I), (J), (K), (U), (V), and (X) of the Act.

188. § 1A of the Emergency Price Control Act.

189. Among the novel provisions of the section were those which provided an additional one month holiday from control for certain products with the proviso as to some that no reconrol was possible without the consent of the Secretary of Agriculture and the Price Decontrol Board, and as to others, that the Price Decontrol Board might order that they be not reconrolled at the end of the "holiday." §§ 1A(e) (7) and 1A(e) (8) (A).

190. Supp. Ord. 132, Amendment 64, 11 FED. REG. 12093 (1946).

market. As a result of the decontrol of meat, all commodities were decontrolled four weeks later. On November 10, again after a Presidential directive, the Administrator issued Supplementary Order 193 which exempted from control all commodities except rent, sugar, syrups, molasses, and rice.¹⁹¹

CONCLUSION

The price control program, from start to finish, required constant vigilance. When the legal standards were not being changed, the economic conditions were. It was a constant battle to maintain legality and, at the same time, to carry out the purposes of the Act. In view of the magnitude of the chore, and of the circumstances under which price control was established and maintained, the results were truly remarkable. The instances in which the Administrator was reversed by the Emergency Court of Appeals, whose job it was to pass on the validity of administrative actions,¹⁹² were extremely few.¹⁹³

While there undoubtedly were many instances where individuals were certain that the Administrator's actions were illegal, the real test lies in the fact that few of his actions were overruled by the courts which reviewed them. At the same time, stabilization was maintained to a degree almost unbelievable in view of all the circumstances under which the program functioned. The alarming rise in prices that has occurred since the demise of the OPA is convincing, even dramatic, evidence of the effectiveness of the job done by the agency.

191. 11 FED. REG. 13464 (1946).

192. § 204(a) of the Emergency Price Control Act.

193. From January 1942 through May 31, 1947, 409 complaints were filed with the Emergency Court of Appeals. In only 60 cases were the decisions adverse to the Administrator in whole or in part. TWENTY-SECOND QUARTERLY REPORT OF THE OFFICE OF PRICE ADMINISTRATION (May 31, 1947).