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In This Issue

New House Rules Will Increase Deficit, Underfund National Priorities

Whenever a party takes control of one or both houses of Congress, it exercises its prerogative to implement a flurry of new rules and practices. This is generally unremarkable, though in 2011, with the House of Representatives returning to Republican control, the changes are stirring up controversy. Despite claiming to fight for fiscal responsibility and transparency, by tweaking a handful of rules, the Republican majority will end up delivering the opposite.

Whether it's warping Pay-As-You-Go into Cut-As-You-Go, giving unprecedented power to the Budget Committee chairman, exempting certain bills from rules for expediency's sake, or making it easier to underfund transportation projects, the new House rules are aimed at cutting federal spending and reducing taxes without consideration of what effects these fiscal policies will have on the federal budget deficit and our national priorities.

Deficit-Limiting PAYGO Turned on Its Head

One important budgetary rule in Congress that has slowed deficit-increasing legislation is the Pay-As-You-Go (PAYGO) rule. PAYGO requires that increases in mandatory spending (spending that does not require annual reauthorization, like Medicare and Social Security) or decreases in revenue must be "paid for." That is, mandatory spending increases or tax cuts have to be offset with equal mandatory spending cuts or tax increases so that the proposed legislation is deficit neutral. It is important to note that the $1.4 trillion in discretionary spending that funds the functions of the federal government and an assortment of programs is not bound by PAYGO rules.

PAYGO currently exists as both a law and a rule in the House. The House cannot unilaterally abolish PAYGO, but it can change the process by which it enacts spending and tax bills. The now-defunct rule, which the Democratic-led 110th Congress implemented after a Republican-led Congress let the original PAYGO provision expire in 2002, read:

> [I]t shall not be in order to consider any bill ... if the provisions of such measure affecting direct spending and revenues have the net effect of increasing the deficit or reducing the surplus.

Under that PAYGO rule, if a bill widened the deficit either through increases in mandatory spending or decreases in tax revenue and did not pay for this change with either higher taxes or lower spending somewhere else, the bill was considered "out of order." The bill would then be subject to a "point of order," which, if raised, could kill it. While a simple majority could override this point of order, it placed a hurdle in front of Congress and forced it to acknowledge that a bill violating the waived point of order would increase the federal budget deficit.

The new House rule significantly changes PAYGO, placing the emphasis on spending cuts as opposed to reducing the federal budget deficit. Instead of stymieing legislation if it increases the deficit, "Cut-As-You-Go (Cut-Go)" only looks at the level of mandatory spending, saying:

> ...it shall not be in order to consider a bill ... if the provisions of such measure have the net effect of increasing mandatory spending."

Cut-Go uses similar language to PAYGO and has a similar-sounding name, but the differences are crucial. With Cut-Go, tax cuts are exempted from PAYGO rules in the House. Under the new rules, tax cuts do not need to be offset with spending cuts or revenue increases elsewhere in the budget, meaning tax cuts can be "deficit-financed." This exemption guts half of the accountability inherent in PAYGO, as House lawmakers are now free to vote for unpaid-for tax cuts without acknowledging that they add to the deficit.

At the same time, because Cut-Go applies only to spending levels and not the bottom line, spending increases can no longer by paid for by revenue changes; the Cut-Go rule approved by the House has essentially set a new high-water mark for mandatory spending. The House cannot vote for an increase in mandatory spending without specifically voting to set aside the rule.

Additionally, while the House has freed itself from the tax-related strictures of PAYGO, the Senate has retained its PAYGO rules. The potential for legislative gridlock has now been significantly increased, as the House will likely send the Senate deficit-spurring tax cuts that will require the Senate to overcome a 60-vote hurdle triggered by its PAYGO rules.

Adding to the complexity and the problems created by the House Cut-Go rule is the fact that PAYGO also exists as a law. No matter what the new House rule allows, deficits induced by Congress must either be declared as the result of an emergency – a frequent occurrence – or they will result in automatic, across-the-board spending cuts to designated mandatory spending programs, including Medicare. Tax cuts that are not required to be offset by the House are automatically offset by mandatory spending cuts by law, allowing Congress to avoid the politically painful act of voting on fiscally responsible offsets.

Ryan's Rule

Another potentially harmful rule allows the chair of the House Budget Committee, Rep. Paul Ryan (R-WI), to single-handedly set spending levels for fiscal year (FY) 2011. Usually, spending limits and revenue targets, including allocations of spending to committees, are set in the congressional budget resolution, which the Budget Committee and the full House consider and vote on. However, under the new House rules, Ryan can set these levels by simply submitting them for publication in the *Congressional Record*. Indeed, Congress will consider this "the completion of congressional action on [an FY 2011] concurrent resolution."

While there is nothing preventing the new Republican House from working with the Democratic Senate to write and adopt an FY 2011 budget resolution, the rule more easily allows the GOP to fulfill its midterm campaign promise to reduce federal spending to "pre-bailout, pre-recovery" FY 2008 levels. It is important to note, though, that these cuts will only come from domestic non-security discretionary spending – representing less than a quarter of total federal spending – and leaves all mandatory (i.e., entitlement programs), defense, and Homeland Security spending untouched.

The larger implication of this rule is that if the House successfully implements these spending cuts over likely Senate opposition, all future budgets will begin from this new, much lower floor. These lower spending levels could seriously hinder implementation of improved food safety and financial reforms, not to mention existing programs that provide a safety net to low- and middle-income families – all the more critical in this high-unemployment economy.

Exempting Legislation from Budget Estimates

A separate House rule provides the chair of the Budget Committee with new powers to adjust estimates of the budgetary impacts of certain legislation. This allows Ryan to simply ignore the budgetary effects of specific, inconvenient deficit-increasing legislation. For instance, the new rules specifically empower Ryan to exempt from budget enforcement rules the fiscal effects of repealing the Affordable Care Act (ACA), the recently enacted health care reform law.

According to the nonpartisan Congressional Budget Office (CBO), repealing ACA will cost nearly $230 billion over the next ten years. That estimate does not include the loss of savings in the out years, which CBO estimated to be nearly a trillion dollars when the president signed ACA into law last March. Additionally, CBO found that some 32 million Americans would forgo health insurance coverage if Congress repeals ACA. Ironically, repealing health care insurance reform will actually lead to increased spending, something congressional Republicans have been hammering the last two years.

The new rules also provide Ryan with the power to ignore budgetary impacts for further extending or making permanent the Bush tax cuts, including further weakening of the estate tax and implementation of potential legislation to provide "small businesses" with a deduction equal to 20 percent of gross income.

The Center on Budget and Policy Priorities (CBPP) points out that this new legislation is likely to define "small businesses" "very expansively," to the point even of covering "a vast swath of firms and wealthy individuals" who are not part of most Americans' definition of a "small business."

Building Few Bridges to Anywhere

One of the provisions of the new House rules could significantly reduce infrastructure spending during the 112th Congress. The rule eliminates the requirement that appropriators fund highway and transit projects at the levels set by the authorization for surface transportation.

Under the old rule, instituted by former Transportation and Infrastructure Chair Bud Shuster (R-PA), House members could bring a point of order against any appropriations bill that spent less than the totals authorized in the surface transportation authorization bill, a reversal of how spending power is usually allocated between authorizers and appropriators on Capitol Hill.

The idea was to "decouple" surface transportation spending from the annual appropriations process. Before institution of the infrastructure point of order, legislators sometimes allowed surpluses to build in the Highway Trust Fund – financed largely by the gas tax – so they could count them against the overall federal deficit.

In recent years, though, lawmakers have authorized more funds than the trust fund had left in it, requiring large infusions of money from the general fund, usually to the tune of billions of dollars. Hence, there was a call for the new rule that allows appropriators to set spending below authorization levels. The problem is that the rule does not create a floor for transportation spending; it does not state that appropriators *have* to spend all the money in the Highway Trust Fund.

The new rule is reviving fears among infrastructure proponents that lawmakers, at the very least, will again allow money to accumulate in the fund to count against future deficits, or, at the worst, cut transportation funding to decrease deficits. This could have significant ramifications for the nation's infrastructure, which the American Society of Civil Engineers has graded as a "D."

Locking In Spending Cuts

A new spending cut "lockbox" rule that applies to floor amendments makes cuts to appropriations bills easier and provides for a special account in which to collect those cuts. The idea is to make it easier to reduce the overall size of spending bills, but the rule also limits the ability of the House to shift spending from one program to another.

When the House Budget Committee sets overall spending levels, spending bills that exceed those limits are subject to a point of order intended to hinder their passage. However, under previous House rules, appropriators could chose to cut spending in one area and move it to another, which would keep the overall spending level below the Budget Committee cap. Under the new rules, this maneuver would be prevented and it would be harder for House appropriators to cut where they see fit in order to boost funding for another program they deem more effective.

In the end, these rules only apply to how the House conducts its business. While they may make it easier for the new Republican majority in the House to cut spending in their own bills, they will still have to negotiate with the Democratically controlled Senate. It will be up to the two houses to come to an agreement on final spending levels, regardless of the rules each used to arrive at their starting positions, and send bills to the president that he deems acceptable. Nevertheless, the changes to the House rules do show how the new majority sees them: instead of bringing to the House a system that forces its members to make politically difficult choices for the sake of fiscal discipline, the new rules are designed to improve the chances that their ideological agenda – reducing federal revenue and slashing spending – gets written into law.

In WikiLeaks' Wake, Administration Tightens Information Security

A new memo from the White House Office of Management and Budget (OMB) details a new requirement for all federal agencies to assess aspects of their information security in the wake of a series of embarrassing disclosures by WikiLeaks. The memo directs agencies to consider 11 pages of questions relating to information security procedures, including whether employees are required to report contacts with journalists. Transparency advocates have criticized some aspects of OMB's strategy as potentially damaging to open government.

The memo comes in the context of other government actions to investigate and prosecute those involved with the WikiLeaks disclosures. Bradley Manning, an Army intelligence analyst suspected of leaking documents to the site, was arrested in June 2010 and has yet to stand trial. In December 2010, the Justice Department subpoenaed information from several Twitter accounts associated with WikiLeaks. In addition, in December 2010, OMB directed federal employees not to view the leaked classified documents, and the Air Force blocked access to sites that published the documents, including *The New York Times*.

The memo, issued Jan. 3, contains more than 100 questions developed by the National Archives and Records Administration's Information Security Oversight Office (ISOO) and the Director of National Intelligence (DNI). The memo builds upon a Nov. 28, 2010, OMB memo asking agencies to begin evaluating their procedures for safeguarding classified information. Agencies are directed to complete their initial assessments by Jan. 28. The memo indicates that ISOO and DNI may also conduct on-site inspections of agency compliance.

The questions ask agencies that handle classified information to describe their information security practices, including oversight, counterintelligence, training, personnel security, and technical measures. For instance, many of the questions relate to the use of removable media with classified systems; Manning is reported to have copied classified documents onto a rewritable CD.

Other questions, however, are more controversial. Agencies are asked to describe their efforts to detect "insider threats," including using psychiatrists to measure employees' happiness and grumpiness as a means to gauge their "trustworthiness." The Federation of American Scientists' Steven Aftergood called the memo "paranoia, not security." Aftergood also criticized the question relating to contact with journalists:

> This question seems out of place since there is no existing government-wide security requirement to report "contacts with the media." Rather, this is a security policy that is unique to some intelligence agencies, and is not to be found in any other military or civilian agencies. Its presence here seems to reflect the new "evolutionary pressure" on the government to adopt the stricter security policies of intelligence.

Such a requirement could be viewed as at odds with the administration's December 2010 scientific integrity memo, which called for freer communication between government scientists and the media, as well as the Open Government Directive that calls for more transparency throughout the executive branch.

Missing the Point?

Other transparency advocates criticized the administration's effort for focusing on the wrong issues. The National Security Archive's Tom Blanton said the review should address overclassification, noting, "I really don't see the kind of systemic reform that would protect the real secrets and push everything out into the public domain."

None of the questions attached to the memo explore the issue of overclassification or the possibility of improving information security by reducing the amount of information requiring stronger protections. Overclassification has long been an acknowledged problem for government, and even during the George W. Bush administration, which utilized government secrecy more than most administrations, officials estimated that as much as half the information being classified did not justify the marking.

Congress has also started to respond to the WikiLeaks issue. House Oversight and Government Reform Committee Chairman Darrell Issa (R-CA) is expected to investigate the administration's response to WikiLeaks. During the lame-duck session of the previous Congress, Sen. Joe

Lieberman (I-CT) introduced the Securing Human Intelligence and Enforcing Lawful Dissemination Act (SHIELD Act) that would make it a federal crime for anyone to publish the name of a U.S. intelligence source. The bill was introduced so late in the session (Dec. 2, 2010) that no action beyond referring it to the Judiciary Committee occurred. The bill has not yet been reintroduced in the 112th Congress.

It is unclear whether the internal agency assessments will be combined and used to craft a unified, government-wide policy response to the WikiLeaks issue or if agencies will be given responsibility to improve those areas deemed to need attention.

Protecting the Public or Big Business? Battle Lines are Drawn

As the 112th Congress convenes, a renewed battle over the role of government in protecting the public is being waged. The battle reflects the decades-old myth that regulations are "job-killers" and that government must either sacrifice jobs to provide public safety or sacrifice lives, health, and environmental quality to protect jobs.

Attacks on Public Protections

Before and since the 2010 midterm elections, opponents of government action have proposed rollbacks of public protections or obstacles to additional protections. For example:

- In July 2010, the Business Roundtable, a coalition of top corporate executives, submitted to the White House a list of laws and regulations that it believes are hurting businesses and that it wants rolled back. The U.S. Chamber of Commerce penned at the same time an open letter to President Obama proposing similar rollbacks. The groups' targets included financial reform, health care laws, greenhouse gas emissions rules, worker health and safety policy, food and auto safety legislation, government contractor responsibility measures, and oil spill prevention rules.
- In July 2010, then-House Minority Leader John Boehner (R-OH) endorsed a one-year moratorium on most new regulations. A moratorium "sends a wonderful signal to the private sector that they'll have some breathing room," he said.
- Boehner was one of 69 co-sponsors of H.R. 3765, the Regulations From the Executive in Need of Scrutiny Act of 2009 (REINS Act), a bill that would require Congress to vote on and approve every new agency rule estimated to have an economic impact (either costs or benefits) of $100 million or more. The act would prohibit agencies from enforcing rules that do not garner congressional approval. This bill is likely to be reintroduced in the new session.
- In September 2010, House Republicans issued "A Pledge to America," which, among other things: 1) proposed to halt new regulations unless Congress approves each one; 2) pledged to impose a prescribed end date for all federal programs (known as "sunsets"); and 3) called for cutting federal spending back to Fiscal Year 2008 levels, which would cut the budgets of federal agencies. (Read OMB Watch's analysis of the Pledge.)

- In December 2010, the soon-to-be-chair of the House Oversight and Government Reform Committee, Rep. Darrell Issa (R-CA), sent letters to more than 150 businesses, business groups, and think tanks requesting that these groups identify existing regulations and regulations under development that they believe hinder job growth.
- In a Jan. 6 *Greenwire* article (subscription required), Sen. Rand Paul (R-KY) said that he would introduce legislation requiring all federal regulations to expire in six months unless Congress votes to approve the rules. "If the EPA writes a regulation, it expires in six months, unless Congress votes on it and approves it," Paul said in the article.
- On Jan. 7, Rep. Don Young (R-AK) introduced a bill (H.R. 213) that would impose a moratorium of up to two years on all new regulations, making only limited exceptions for emergencies and other issues.

Anti-Regulatory Forces Target EPA's Climate Change Rules

Those acting at the behest of corporate special interests are going after a variety of America's public protections, and environmental regulations are drawing some of the most blatant attacks. For example, the U.S. Environmental Protection Agency's (EPA) greenhouse gas (GHG) emissions rules are a favorite target of anti-regulatory forces on K Street and in Congress. The agency is legally required to promulgate rules as a result of the U. S. Supreme Court's 2007 decision in *Massachusetts v. EPA*, which held that greenhouse gases should be regulated under the Clean Air Act if EPA found them to be a danger to public health or welfare. EPA made the endangerment finding in December 2009.

EPA has crafted rules to control emissions from mobile sources (vehicles) and is in the process of setting standards for large stationary sources (power plants, oil refineries, and factories, for example), according to an agency press release. Congress has failed to enact climate change legislation, leaving the Obama administration no choice but to seek controls of emissions through regulations.

Congressional proposals to limit EPA's ability to act are being introduced and use a variety of strategies to handcuff the agency. For example, Sen. Jay Rockefeller (D-WV) proposed last session a bill, S. 3072, to suspend for two years EPA's ability to promulgate greenhouse gas emissions rules on stationary sources. In a Jan. 6 press release, Rockefeller promised to reintroduce his bill in the 112th Congress. Rep. Shelley Moore Capito (R-WV) introduced a similar measure on Jan. 6, H.R. 199 (text not yet available online).

On Jan. 5, Rep. Ted Poe (R-TX) introduced a bill, H.R. 153 (text not yet available online), that would prohibit EPA from spending money on regulations that limit greenhouse gases. House members are expected to use the appropriations process to defund specific agency actions, as Poe's bill proposes, and to cut budgets for federal agencies (not just EPA) as proposed in the Pledge. Budget cuts place agencies in the difficult position of having to choose among regulatory options mandated by Congress and enforcement programs, leaving some problems unaddressed and major violators held unaccountable.

Also on Jan. 5, Rep. Marsha Blackburn (R-TN), introduced H.R. 97 (text not yet available online), which would amend the Clean Air Act so that it could not be used as the legal authority under which EPA regulates greenhouse gases.

Jackson, Boxer Defend EPA's Actions; General Public, Small Business Owners Support Climate Change Policies

Defenders of the administration's efforts to regulate greenhouse gas emissions have promised to fight for the EPA’s authority. For example, EPA Administrator Lisa Jackson said in the press release, "We are following through on our commitment to proceed in a measured and careful way to reduce GHG pollution that threatens the health and welfare of Americans, and contributes to climate change ... These standards will help American companies attract private investment to the clean energy upgrades that make our companies more competitive and create good jobs here at home."

On Jan. 6, Sen. Barbara Boxer (D-CA), chair of the Senate Committee on Environment and Public Works, gave a press conference in which she strongly supported environmental laws and promised to vigorously defend the EPA against attacks. According to Boxer's prepared remarks, she said, "Let me send a clear message to Chairman Upton [Rep. Fred Upton (R-MI)], the new Chairman of the Energy and Commerce Committee. I congratulate him on his new position. And I want to tell him that I will use every tool available to me as Chairman of this Committee and as Senator from California to oppose any legislative effort that threatens the health, or safety, or well-being of the people of America. That includes his desire to stop the Environmental Protection Agency from carrying out its responsibilities under the Clean Air Act."

Several 2010 polls show that the American public supports environmental policies including GHG emissions limits. Even polls of small business owners indicate support for climate and energy legislation.

Rules to Watch for in 2011

Federal agencies have released their rulemaking agendas for 2011, providing the public with a roadmap of the health, safety, and environmental safeguards it can anticipate in the new year.

Each spring and fall, the executive branch publishes the *Unified Agenda of Regulatory and Deregulatory Actions*, commonly called the *Unified Agenda*. The agenda includes the individual rulemaking agendas for all executive branch agencies, including independent commissions. Agencies post online brief descriptions of their rules and projected timetables for milestones and completion.

The fall version of the *Unified Agenda* is supposed to be released in October. However, the 2010 version was not released until Dec. 20. No explanation was given for the delay. Below are descriptions of select rulemakings covered in the agendas of major health, safety, and environmental agencies.

EPA

The rulemaking agenda of the U.S. Environmental Protection Agency (EPA) continues to emphasize the fight against climate change. The agency will continue to write rules to limit greenhouse gas emissions from stationary sources like coal-fired power plants and oil refineries. Under a 2010 greenhouse gas rule, certain sources began requesting permits at the beginning of 2011.

EPA is also in the midst of two joint rulemakings with the National Highway Traffic Safety Administration (NHTSA) to cut greenhouse gas emissions from vehicles. The agencies expect to finalize in August a rule cutting emissions from heavy-duty vehicles and are in the early stages of developing fuel efficiency standards for passenger vehicles manufactured for model years 2017 and beyond. In 2010, the agencies finalized standards for model years beginning in 2012 that set miles per gallon requirements of up to 34.1 mpg by 2016.

EPA projects it will finalize in July the Clean Air Transport Rule, a regulation aimed at emissions that cross state lines and impact downwind states. EPA estimates the rule could prevent as many as 36,000 premature deaths every year.

EPA also expects that it will propose adding to its chemicals of concern list certain phthalates, compounds often found in soft plastics, as well as bisphenol-A, found in hard plastics and the lining of food containers. The agency had hoped to propose adding the chemicals to the list by September 2010, according to the last *Unified Agenda* (April 2010), but the notice has been held up at the White House Office of Information and Regulatory Affairs (OIRA) since May 2010. OIRA, the clearinghouse for all significant rules and notices, is supposed to spend no more than 120 days reviewing agency drafts.

EPA now lists its pending regulation of coal ash as a "long-term action." EPA decided to regulate coal ash, a byproduct of coal combustion that can contain arsenic, lead, chromium, and other heavy metals, after an impoundment in Tennessee failed in December 2008, releasing 5.4 million cubic yards of coal ash. Reports have linked exposure to the toxic components in coal ash to cancer and other health problems.

After a lengthy and tumultuous interagency review, EPA proposed coal ash rules in May 2010. The rulemaking has been the subject of intense debate. Environmentalists want the agency to regulate coal ash as a hazardous waste, while industry groups want coal ash to be treated like common waste, which would lead to fewer restrictions. EPA now lists the date of final action as "to be determined," suggesting the agency may be uncertain as to its course of action in the face of political and industry pressure.

OSHA and MSHA

The Occupational Safety and Health Administration (OSHA) will continue to emphasize the Department of Labor's "Plan/Prevent/Protect" initiative, first announced when the last *Unified Agenda* was released in April 2010. OSHA is developing two rules implementing

Plan/Prevent/Protect. The first would require employers to plan, implement, and maintain injury and illness prevention programs to reduce occupational risks. The other would create an infection control program to protect workers from infectious diseases. During a Jan. 5 web event marking the release of the current agenda, OSHA called the injury and illness prevention rule its "highest regulatory priority." Both rules are in the earliest stages of development.

OSHA expects to make progress in 2011 on two long-delayed rulemakings. OSHA says it will publish in April a proposed rule to address the risks of crystalline silica. The substance is a known carcinogen, and workers exposed to it can develop sometimes fatal illnesses. OSHA's crystalline silica rulemaking first appeared in the *Unified Agenda* in 1997. OSHA also plans to publish in November a final rule protecting workers operating in confined spaces. It has appeared on the *Unified Agenda* since the 1990s.

OSHA still expects to finalize a rule restoring the musculoskeletal disorder reporting column to the form employers fill out when a worker is injured. OSHA hopes the form change will provide the agency with more reliable information on musculoskeletal injuries. OSHA had expected to finalize a rule in July 2010. The agency submitted the rule to OIRA on July 14, 2010, but the White House has yet to approve it. The *Unified Agenda* projects final publication in February.

Other OSHA standards continue to develop slowly. The agency does not expect to propose in the near future standards for beryllium or diacetyl, two dangerous chemicals, despite the fact that the rulemakings have appeared in versions of the *Unified Agenda* for years. The current agenda also lacks a proposed rule for combustible dust, a hazard that led to 119 deaths and 718 injuries between 1980 and 2005, according to the U.S. Chemical Safety Board.

The Mine Safety and Health Administration (MSHA) says that it will publish in January new rules for its Pattern of Violations (POV) program. The program came under scrutiny in the wake of the April 2010 explosion at the Upper Big Branch mine in West Virginia that killed 29 miners. Although the Upper Big Branch mine operators and its owner, Massey Energy, had a clear history of safety and health violations, MSHA had been unable to place the mine on its POV list, a move that triggers increased oversight of a mine. Companies can avoid being listed in the program by appealing violations. MSHA has never placed a mine on the POV list in the program's 32-year history.

The *Unified Agenda* does not project a date for the completion of an MSHA rule to reduce the risk of black lung disease. In October 2010, MSHA proposed cutting in half the exposure standard for coal dust, the cause of black lung. MSHA estimates the new standard would prevent thousands of illnesses and hundreds of deaths over the lifetimes of miners.

FDA and FSIS

Food safety efforts at the Food and Drug Administration (FDA) are centered on the labeling of food products. Among other items, the agency expects to propose two rules in March: one setting nutrition labeling requirements for food sold in vending machines and another for standard menu items at chain restaurants.

The U.S. Department of Agriculture's Food Safety and Inspection Service (FSIS), the regulator of meat and poultry products, continues to struggle to set up a safety inspection program for catfish. The *Unified Agenda* projects a proposed rule creating the program in December 2010 – a date the agency has obviously missed. The agency was under a statutory deadline to create the program by December 2009, but the implementing rule has been held by OIRA since November 2009.

On the medical product front, FDA expects to finalize in October tighter standards for direct-to-consumer advertising of drug products on TV and radio. FDA is also planning an August final rule changing the way pharmaceutical companies report potential safety problems after a drug is on the market. The postmarketing rulemaking comes on the heels of a similar rule, finalized in 2010, that changed premarketing reporting requirements.

FDA will also continue to implement the Family Smoking Prevention and Tobacco Control Act, signed into law in 2009. The law granted the FDA regulatory authority over cigarettes and other tobacco products. In 2011, FDA will develop standards for cigars and finalize new, graphic warning labels "depicting the negative health consequences of smoking" cigarettes.

CPSC and NHTSA

The Consumer Product Safety Commission (CPSC) continues to write rules implementing the Consumer Product Safety Improvement Act, the landmark 2008 law that overhauled product safety and placed a renewed emphasis on children's product safety. Among other items, CPSC expects to make progress in 2011 on the law's requirements that certain products pass third-party safety tests. CPSC is currently developing rules for third-party testing of toys and of children's products containing phthalates, exposure to which has been linked to reproductive and developmental abnormalities.

NHTSA will soon propose revisions to its standards for acceleration control systems in passenger vehicles, according to the *Unified Agenda*. NHTSA says the revision is necessary because most carmakers have shifted from mechanical throttle controls to electronic or computerized controls. It is unclear whether the rule will address the problems highlighted in the recall of millions of Toyota vehicles in 2009 and 2010. Many of those vehicles were recalled after reported incidents of sudden, uncontrolled acceleration. NHTSA is still investigating the defect.

NHTSA is also mulling a proposed rule that would require new cars to be equipped with rear cameras that allow drivers to maintain a more complete view of the space behind them. The standard would help reduce the number of accidents in which drivers inadvertently back into people, other vehicles, or other objects, according to NHTSA.

Other NHTSA rules include a standard for new vehicles intended to reduce the risk of occupants being ejected during a crash and a requirement that commercial motorcoaches, such as tour buses, be equipped with seatbelts. A final ejection mitigation rule is expected in January 2011, and a final seatbelt rule is expected in January 2012.

The entire Fall 2010 *Unified Agenda* is available at www.reginfo.gov/public/do/eAgendaMain. The next *Unified Agenda* is due to be published in April.

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In This Issue

Balanced Budget Amendment Would Impede Economic Recoveries

Over the past 30 fiscal years, the federal government has run a surplus only three times. In the past three years, the government has seen deficits totaling almost $3.5 trillion, and the Congressional Budget Office's (CBO) baseline prediction shows deficits for at least the next decade. With such a history and with the recent rise of the Tea Party and its fiscally conservative contingent in Congress, it is unsurprising that balanced budget amendments to the Constitution are once again finding their way to the national agenda. While forcing Congress to balance the books through a constitutional mandate may be appealing to many fiscal hawks, a balanced budget amendment could impede economic recoveries following Wall Street meltdowns and other calamities.

A simple balanced budget amendment requires that at the end of the fiscal year, federal revenues match or exceed federal spending. With statutory Pay-As-You-Go (PAYGO) on the books – requiring offsets for any new mandatory spending or tax cuts – a balanced budget amendment seems like the next logical and fiscally responsible step.

Balanced budget amendments were last seriously considered in the mid- to late-1990s when budget deficits were also dominating the political discourse. Indeed, amendments came close to passing twice, once in the 104th Congress and once in the 105th Congress, driven by then-ascendant Republican majorities. Both times, though, the amendment failed to achieve the necessary two-thirds majority in the Senate by only one vote (the House easily passed the amendment in the 104th Congress).

Now, with a Republican House again agitating for what it deems fiscal responsibility, proponents are making another push. Likewise, after the 2010 election, the Senate Republican caucus unanimously approved a resolution calling for a balanced budget amendment, and Sens. Orrin Hatch (R-UT) and John Cornyn (R-TX) recently began circulating a letter asking for cosigners to a Senate version of the amendment.

Passing such an amendment, though, would hinder the government's capacity for combating economic downturns. A strong majority of economists believe that the government plays an important role in moderating the ups and downs of the business cycle, primarily through increasing aggregate demand; that is, putting enough purchasing power into the economy to get businesses to hire workers to meet the new demand. Federal spending also plays another key role: it helps cushion the blow of a faltering economy through "automatic stabilizers."

According to the Tax Policy Center, "automatic stabilizers are features of the tax and spending systems that, by design, offset fluctuations in economic activity without direct intervention by policymakers." In other words, automatic stabilizers are features of the federal budget that automatically adjust in real time when economic tragedy strikes. Examples include programs like unemployment insurance and food stamps, which do not have set enrollment levels and thus see higher usage when the economy dips. Similarly, various tax provisions, such as the Earned Income Tax Credit, function in the same way, but through the tax code.

Automatic stabilizers not only translate into benefits for those hardest hit by recessions, they also have an effect on the greater economy. Thanks to an economic phenomenon known as the multiplier effect, each dollar spent on these programs, either through lower taxes or more benefits, rebounds throughout the nation's economy, greatly increasing the dollar's impact. One study found that the automatic stabilizers in the tax code "offset perhaps as much as 8 percent of initial shocks to GDP [Gross Domestic Product]."

However, this spending, which Congress does not specifically offset, automatically increases the deficit. While automatic stabilizers adjust as the economy starts faltering, it would be difficult for legislators to act as fast if a balanced budget amendment required lower spending or higher taxes to offset the stabilizers. More importantly, though, offsetting the cost of the automatic stabilizers defeats their whole purpose: they pump money into the economy just when it needs it. By raising taxes or cutting spending, the government would be giving out money with one hand while taking it back with the other, reducing the stabilizers' effectiveness.

A balanced budget amendment would create a constitutional mandate for such offsets, effectively preventing the government from acting quickly to help modulate GDP fluctuations.

Indeed, the practical requirements of a balanced budget amendment might have a wide-ranging effect on the federal budget and could require spending caps or enrollment maximums on mandatory spending programs and tax provisions. Of course, a balanced budget amendment would make actual stimulus bills such as the American Recovery and Reinvestment Act (Recovery Act), which are often deficit-financed, all but impossible to pass.

Many of the balanced budget amendments currently before Congress come with other provisions that would hamper the federal government's operations. The most drastic of the proposals is House Joint Resolution 1, which, in addition to requiring a balanced budget every year, would also set a limit on spending levels, cap the debt ceiling, and require a super-majority vote for increasing revenues. None of these provisions are necessary for balancing the budget, but they would make it difficult for the government to react to changing fiscal situations. The resolution currently has 98 sponsors in the House.

Balanced budget amendments face other practical problems, as well. First, it is difficult to predict revenue and outlays accurately for the coming fiscal year, again thanks to budget items like automatic stabilizers that rise and fall with economic fortunes. Looking at the federal budget estimates from 1983 to 2005, the Tax Policy Center noted that "the average absolute error in the five-year revenue projection of the Congressional Budget Office (CBO) caused by changes in the economic and technical assumptions was 1.6 percent of GDP, which would be $219 billion at the 2007 level of GDP." With errors like that ($219 billion would be equal to the 2007 budgets of the Departments of Transportation, Education, Health and Human Services, and Homeland Security), Congress could unintentionally violate the amendment after the fact, such as when a year's unexpectedly low revenues do not cover unforeseen costs.

But there is another issue: which entity would enforce a balanced budget amendment? The balanced budget amendments being considered are all enforced through future legislation, but even that raises a whole host of questions. Would the executive branch be responsible for keeping budgets balanced, say through sequestration? What if the president refused to act? Would the judicial system have to get involved every time Congress passed an unbalanced budget? Would anyone even have standing to bring a lawsuit? Balanced budget amendments exist in a legal gray area of the fiscal world.

Ultimately, while balanced budget amendments have significant support in Congress, it may be impossible to add such an amendment to the Constitution. The current economic slump has shown how important the federal government is in filling fiscal gaps in state budgets, and governors and state legislatures have not missed that lesson, despite remarks by some to the contrary. With stimulus efforts like the Recovery Act playing a large role in helping the states weather the recession, state leaders know how crucial federal economic stabilizers are. With any constitutional amendment requiring ratification by three-fourths of the states, this could prove to be a hard sell.

DOD Getting a Better Handle on Contractor Numbers

The Department of Defense (DOD) and the branches of the armed forces utilize hundreds of thousands of contractors to perform a multitude of support functions each year. This includes everything from management and information technology (IT) support to intelligence work and weapons maintenance. Until 2008, neither the Pentagon nor the military branches knew exactly how many contractors they employed, nor were they required to find out. A new Government Accountability Office (GAO) report sheds some light on the Pentagon's congressionally mandated efforts to tally its contractors, along with whether DOD is using the information to make better personnel decisions.

While contractors can offer the federal government flexibility, overuse of contractors can transfer important government responsibilities into private hands, creating conflict-of-interest issues. Moreover, a culture of dependency can arise because the government loses the capability to perform certain tasks without the aid or outright assumption of the function by a contractor. Rules exist to help prevent contractors from performing "inherently governmental" functions, but due to their vague wording – and a less-than-effective recent update – enforcement depends greatly on the executive branch.

In one of his first executive actions, President Obama called for greater transparency and efficiency within the government contracting process. In April 2009, Secretary of Defense Robert Gates reinforced this goal by announcing a plan to reduce the Pentagon's reliance on contractors by bringing several functions "in house." The plan entailed cutting 33,000 service support contractors by 2015, replacing them with 39,000 new full-time government employees. This is in contrast to the growth in DOD contracting seen in recent years, as spending on contractor services more than doubled between 2001 and 2009.

To make the best decisions possible, though, the Pentagon needs to know exactly how many contractors are under hire and what functions they are performing. In 2008, Congress required the Pentagon to begin just such an annual exercise. Then, in the FY 2010 National Defense Authorization Act, Congress directed GAO to review the survey.

The most recent finding, while affirming the distressing fact that Defense Department contractors are performing inherently governmental functions, shows that the Pentagon and the military branches are doing a better job at collecting data on contractors. This allows the agencies to gain a better picture of the contracting landscape and to make informed personnel decisions. These personnel decisions are important, as GAO found that DOD and the military branches employed roughly 766,000 service contractors in FY 2009; because of limited information, they could not accurately estimate the total number of contractors performing inherently governmental tasks.

Of course, not all of the military departments utilize the same approach to reviewing the number of contractors under hire or the activities they perform, which affects each department's ability to use the information to make better workforce decisions. The Army takes a centralized approach, incorporating contractor-reported data, including direct labor hours, from its

Contractor Manpower Reporting Application (CMRA), to identifying contractors and the tasks they perform. The Air Force and Navy, on the other hand, use a more decentralized method that relies on major commands to collect the numbers and information and then feed them up to the departments. According to GAO, the Army's approach is more effective at reaching an accurate number while also properly identifying functions the department should in-source.

The latest review found that of the Army's approximately 262,000 service contractors employed during FY 2009, some 2,300 contractors performed inherently governmental functions and close to another 46,000 contractors executed tasks closely associated with inherently governmental functions. Most significantly, close to 1,900 contractors provided "unauthorized personal services," or tasks that the military should not have even bid out in the first place, no matter what. Numbers for the Air Force and Navy were not available due to the departments' defective data collection abilities.

No matter how accurate the Pentagon's information, though, a lack of funding to convert contractors to civil service employees will thwart any in-sourcing effort. Indeed, just over a year after announcing his department's effort, Gates announced that the Pentagon – though only the Pentagon and not the military branches – would halt its in-sourcing effort because of anticipated budget crunches. According to Gates, "We weren't seeing the savings we had hoped from in-sourcing." While the secretary did not provide specifics, it seems that the positions the Defense Department was not required to in-source, yet did so anyway, did not provide significant savings. It should be noted, however, that bringing a function in-house usually does cost less over the long run.

According to *Government Executive*, as of June 2010, DOD has created more than 16,500 civilian positions due to in-sourcing contracted services. According to a Defense Department employee, the agency brought more than half of the positions in-house because it determined the work to be inherently governmental or closely associated with an inherently governmental task. Moreover, the employee estimated that the Pentagon would add another 12,000 new civilian positions in FY 2011 despite the budget fears.

GAO recommends that the Pentagon provide the military branches with clear guidelines on how to collect contractor data and asses the various functions they perform under their command. This should help DOD make more informed manpower decisions in the future and may prevent the government from becoming further dependent on contractors to perform functions that only government employees should undertake.

Corporate Secrecy at Issue in Supreme Court Case

The U.S. Supreme Court heard oral arguments on Jan. 19 in a case that could have far-reaching ramifications for public access to corporate-related information. AT&T, fighting to prevent disclosure of Federal Communications Commission (FCC) files investigating the company, has argued that releasing the documents under the Freedom of Information Act (FOIA) would damage the company's privacy. This argument comes despite the fact that the expectation of privacy has long been recognized only as an individual right, not a corporate one.

A decision in the company's favor in *Federal Communications Commission v. AT&T, Inc.* would erect a major new obstacle to public access to information about federal interaction with corporations, including regulatory compliance and criminal investigations. Transparency advocates and privacy experts have asked the Court to overturn a lower court decision in favor of AT&T.

The Case

In August 2004, SBC Communications admitted improperly charging for services under an FCC program to subsidize phone and Internet access for schools and libraries. (In 2005, SBC merged with AT&T.) SBC returned the money and paid an additional $500,000 to the government under the terms of a consent decree adopted in December 2004, in exchange for the FCC closing its investigation into the matter.

In April 2005, Comptel, a trade association whose members include AT&T competitors such as Sprint and Verizon, submitted a FOIA request for the FCC's investigation file. SBC opposed the request on the grounds that the records were exempt from release under FOIA's "personal privacy" provision. In August 2005, the FCC decided to release the records because "generally, businesses do not possess 'personal privacy' interests." SBC appealed the agency's decision.

In September 2008, the FCC decided against SBC's appeal, noting FCC and judicial precedents that FOIA's personal privacy exemption would not apply to SBC in its corporate capacity. "We do not believe that protecting a corporation from 'embarrassment' falls within the purposes of Exemption 7(C)," the decision stated. AT&T filed suit to prevent the disclosure.

In September 2009, the Third Circuit Court of Appeals sided with AT&T, ruling that corporations could use FOIA's personal privacy exemption because "'personal' is the adjectival form of 'person,' and FOIA defines 'person' to include a corporation ... Corporations, like human beings, face public embarrassment, harassment, and stigma." In April 2010, the government asked the Supreme Court to hear the case, and the Court accepted in September 2010.

In November and December 2010, the government and AT&T filed their briefs in the case, along with Comptel and several *amici curiae*. "The court of appeals' decision is itself a singular outlier in an otherwise uniform body of more than 35 years of decisional law and commentary," the government argued in its brief. "A corporation itself can no more be embarrassed, harassed, or stigmatized than a stone."

Potential Effects

Siding with AT&T would "erode the public's right to know," according to Sandra F. Chance, executive director of the University of Florida's Brechner Center for Freedom of Information.

"This is unacceptable, especially when the documents in dispute concern taxpayer funds paid to AT&T."

"Broad new swaths of previously public records will be hidden from view" if the court rules for AT&T, writes Rebecca Jeschke of the Electronic Frontier Foundation, which generally supports individuals' privacy claims. "It's not hard to imagine how documents on the BP oil spill, or coal mine explosions, or the misdeeds of Bernie Madoff's investment firm might be significantly harder to find if AT&T's misguided arguments prevail."

A.C. Ranasinghe writes for the Sunlight Foundation that "federal agencies already have difficulty complying with FOIA requests in a timely fashion whenever business entities object to disclosure. Extending the privacy exemption to corporations may make businesses more able to resist or significantly delay public disclosure."

"Corporations across the country would gain a new weapon to deny public records and to hinder reporters' abilities to investigate not only corporate activities but also to monitor the federal regulators who police those corporations," said Hagit Limor, president of the Society of Professional Journalists.

Oral Argument

Reports from the oral argument seemed unfavorable to AT&T's case. "It might be an understatement to say the Supreme Court on Wednesday seemed skeptical that corporations have 'personal privacy' rights," wrote *The Washington Post*. "The justices did not seem ready to affirm the lower court ruling for AT&T," wrote *USA Today*. *The New York Times* described "widespread skepticism."

Grammar and word origins played a considerable role in the arguments. Assistant Solicitor General Anthony A. Yang, arguing for the government, stated that "'person' is used in certain legal contexts to refer to artificial persons and corporations and the like, 'personal' is not." Chief Justice John Roberts noted several instances "where the adjective was very different from the root noun," including "craft" and "crafty," "squirrel" and "squirrelly," "pastor" and "pastoral."

The case also featured a sort of role reversal. As the *Wall Street Journal* noted, "Usually in Freedom of Information Act cases, the government is on the opposite side, fighting to withhold documents from the public." However, Yang explicitly declined to endorse the Court's frequently held view that all exemptions to FOIA are to be interpreted narrowly. In December, Yang argued in a separate case for a broad interpretation of a different FOIA exemption.

Other Corporate Secrecy Issues

The week of Jan. 17 marked the one-year anniversary of the Supreme Court's decision in *Citizens United v. Federal Election Commission*, which permitted new forms of corporate spending to influence elections, for which few disclosure requirements currently exist. Though the Court upheld the long-standing but controversial notion that corporations are "persons" entitled to certain rights under the Constitution, the majority opinion also noted that disclosure regimes were permitted, seemingly pushing back against the idea that corporations are entitled to "personal privacy" rights.

The DISCLOSE Act, which attempted to institute stronger transparency for corporate spending in elections, passed the House but was unable to overcome a Republican filibuster in the Senate, keeping in place the cloak of secrecy and the potential for corruption that surrounds corporate campaign spending.

In addition, a proposal in 2010 to post federal contracts online faced opposition from corporations. Corporations have also used claims of "confidential business information" to prevent disclosure of dangerous chemicals.

Obama's Regulatory Reforms Protect the Status Quo

On Jan. 18, President Obama issued a long-awaited executive order on the regulatory process and two related presidential memoranda. The order and the memos are aimed at reaffirming the existing regulatory process rather than significantly reforming it. The most impactful of the three documents is likely to be the memo on regulatory compliance, which stems from the administration's commitment to greater government accountability.

In a Jan. 30, 2009, memo, Obama sought to reform the regulatory process, stating that the principles set out in Executive Order 12866 (E.O. 12866), "Regulatory Planning and Review," "should be revisited." E.O. 12866 is the 1993 presidential order that defines much of the structure by which agencies produce regulations.

The president's 2009 memo asked agencies to develop within 100 days recommendations for a new order. In an unprecedented step, the administration solicited public comments on the development of the order, and it received comments from approximately 160 different organizations and individuals. Nearly two years later, the new executive order reaffirms the principles contained in E.O. 12866 and adds some positive new elements. The order does little, however, to change the existing burdensome regulatory process and could potentially distract agencies with time-consuming reviews of regulations, depending on how the administration implements the order. It is unclear whether any of this is the result of Obama's 2009 memo or the recommendation and public comment process that followed.

Besides reaffirming key elements of E.O. 12866, the new order emphasizes three concepts. First, the order states that "regulations shall be based, to the extent feasible and consistent with law, on the open exchange of information and perspectives among State, local, and tribal officials, experts in relevant disciplines, affected stakeholders in the private sector, and the public as a whole."

This focus on public participation tracks efforts within the administration to improve electronic rulemaking by encouraging agencies to have an "open exchange of information" and to create more complete rulemaking dockets. This section urges agencies to provide "timely online access to the rulemaking docket on Regulations.gov, including relevant scientific and technical findings" in "open formats" that can be easily searched and downloaded.

Second, the order emphasizes the administration's focus on scientific integrity in the rulemaking process, an issue not addressed by E.O. 12866. Section 5 of the order states, "Consistent with the President's Memorandum for the Heads of Executive Departments and Agencies, 'Scientific Integrity' (March 9, 2009), and its implementing guidance, each agency shall ensure the objectivity of any scientific and technological information and processes used to support the agency's regulatory actions."

In addition to the March memo, the Office of Science and Technology Policy issued a memo to executive branch agencies touting the importance of science in policy development and identifying three issues in need of agency attention: federal scientists' right to communicate their work to the media and the public; scientific and technical advice developed and presented by federal advisory committees; and professional development of federal scientists and engineers. Scientific integrity issues became an important focus of this administration because of the extensive political interference in scientific and technical issues exerted by the Bush administration.

Third, the Obama order contains a section called "Retrospective Analyses of Existing Rules," which directs agencies to consider how to best review rules "that may be outmoded, ineffective, insufficient, or excessively burdensome." This section requires agencies to submit to the Office of Information and Regulatory Affairs (OIRA) preliminary plans by which agencies will periodically review existing rules. Agencies already conduct reviews of some rules as requirements or needs exist.

E.O. 12866 has similar language, which required a "program" within 90 days, while the new E.O. asks for only a "preliminary plan" within 120 days. The new order urges agencies to release the results of the retroactive analyses; E.O. 12866 was silent on the topic of disclosure of reviews.

Obama's memo entitled "Regulatory Flexibility, Small Business, and Job Creation" accepts the long-held position of corporations and conservatives that regulations impose unnecessary burdens on small businesses. This assumption was reflected in the Regulatory Flexibility Act (RFA), enacted in 1980. The law requires agencies to conduct an assessment of a proposed regulation's impact on small entities.

While the memo provides little in the way of new requirements, it does say that agencies are "to reduce regulatory burdens on small businesses..." There is no emphasis on balancing these burdens with the benefits generated by public protections, and the approach is inconsistent with the balancing of costs and benefits, which the administration has been advocating for the last two years. Moreover, the memo states that regulatory flexibility analyses that agencies conduct under the RFA are intended to ensure that proposed and final rules "are less likely to be based on intuition and guesswork." In making such a statement, the memo repeats a false notion perpetuated by anti-regulatory forces. In fact, public protections are usually developed in a painstaking fashion based on fact, science, interagency review, and extensive public comment periods.

The second memo released by the president as part of his regulatory reform strategy is about regulatory compliance. The memo builds on the government accountability agenda of the administration by focusing on disclosure of regulatory data by agencies. It directs agencies to develop within 120 days plans to disclose regulatory compliance and enforcement activities in online, searchable formats. This disclosure is intended to allow the public and the Office of Management and Budget (OMB) to more easily assess which agencies are most effectively enforcing compliance and reducing overlapping enforcement efforts. If fully implemented, the emphasis on transparency should allow the public to hold the administration accountable for its enforcement actions.

Viewed as a whole, the reform policies issued by the administration do little to achieve the transformation of the regulatory process that Obama called for when he ordered E.O. 12866 to be revisited. Rather than defend the work of his administration in providing health, safety, and environmental protections, the policies leave in place a process designed to delay and stifle agencies' abilities to produce timely and responsive policies to address the serious problems facing the nation.

Obama Continues Post-Spill Reforms to Better Police Drilling

The Obama administration continued revamping offshore oil drilling regulation by recently announcing the next step in its plans to reorganize the Department of the Interior – creating a new agency to oversee drilling safety.

Reorganizing the Interior Department has been a high priority for the Obama administration in the wake of the BP-Deepwater Horizon oil spill and its aftermath, which exposed major loopholes and conflicts of interest in the process for approving and monitoring offshore drilling. President Obama's commission investigating the spill also called for a bureaucratic overhaul.

In the administration's latest move, Interior Secretary Ken Salazar announced Jan. 19 that he would split the department's Bureau of Ocean Energy Management, Regulation and Enforcement (BOEMRE) in two, tasking one agency with reviewing drilling plans for their environmental and economic impacts and the other with making decisions on permits and conducting on-site inspections. BOEMRE, which will disband once the bifurcation is complete, is one of the successors to the Minerals Management Service (MMS), the now-defunct agency that came under fire in the wake of the April 20, 2010, spill. Salazar said the reorganization will be completed by Oct. 1.

Salazar also announced the creation of the Offshore Energy Safety Advisory Committee comprised of researchers, industry representatives, and federal employees that will advise the secretary on drilling precautions.

The BP-Deepwater Horizon oil spill disaster underscored the perils of poor regulation. MMS was responsible for both resource management and protection and revenue maximization from the exploitation of those resources. As a result, regulators often found themselves siding with industry, from which they acquired a significant portion of the agency's revenue, on matters of resource and environmental management. Inspectors were powerless at best and compliant at worst during safety inspections, permitting unsafe conditions and practices such as those existing on the Deepwater Horizon rig.

The Obama administration has been attempting to remedy the situation ever since. In May 2010, Salazar announced the end of MMS, replacing it with BOEMRE and the Office of Natural Resource Revenue. The split was intended to erect a stronger barrier between revenue and environmental decisions. The two offshoots of BOEMRE will be named the Bureau of Ocean Energy Management and the Bureau of Safety and Environmental Enforcement.

Environmentalists reacted positively to the Jan. 19 announcement. Regan Nelson of the Natural Resources Defense Council called the reorganization a "good first step" but also added, "The department, though, needs to go further to ensure that safety and environmental concerns are insulated from the kind of political pressure that has compromised this crucial mission in the past."

The oil and gas industry criticized Salazar's announcement, saying that the reorganization will result in delays to drilling permit approvals, according to the *Houston Chronicle*. The administration lifted a moratorium on deepwater offshore drilling imposed after the BP spill but has yet to approve new drilling projects pending safety reviews, irritating industry officials.

The reorganization does not go as far as Obama's oil spill commission recommended. The commission, which released its final report on the BP-Deepwater Horizon disaster and its recommendations for reforming federal policy, called for a more independent regulatory structure. Specifically, the commission called for the new safety agency to be headed by an official appointed to a five-year term and subject to Senate confirmation. The commission also recommended that Congress pass a new law better defining Interior's offshore drilling oversight responsibilities.

Because Salazar has called for the reorganization to be completed by Oct. 1, the first day of fiscal year 2012, Obama's next budget plan should reflect the organizational change. Less certain is whether Obama's budget, scheduled for release in mid-February, will include additional resources for the new agencies. The commission report repeatedly comments that Interior's drilling oversight functions have been underfunded, and the commission recommended a new funding structure in which industry user fees account for a greater share of the department's budget. However, in the prevailing tight fiscal environment, Obama is likely to exercise caution in proposing new spending.

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In This Issue

FY 2011 Budget Fight Ahead

The major piece of unfinished business from the last session of Congress is the fiscal year (FY) 2011 budget. Even though FY 2011 started on Oct. 1, 2010, the federal government still does not have a budget and has been funded through a series of temporary continuing resolutions (CR) since last fall. It remains to be seen if both the Senate and hard-line fiscal conservatives in the House will sign off on a budget for the remainder of the fiscal year, once again raising the specter of a government shutdown.

The Republican-controlled House is currently working on creating a budget for FY 2011, the broad outlines of which were released the week of Jan. 31. The plan calls for an increase of $8 billion in security-related spending and cuts of $44 billion from non-security discretionary spending.

In the short-term, the calendar does not look good for timely action on the budget. The current CR expires on March 4. House leadership has promised a vote on an FY 2011 budget during the week of Feb. 14 to coincide with the release of the president's budget proposal. However, the Senate will be in recess the following week, meaning the upper chamber will only have a week to react to the House's budget. This is probably not enough time for Senate leadership to hammer out a counterproposal that can garner the necessary 60 votes. Therefore, in all likelihood, Congress will be forced to pass another short-term CR, covering another couple weeks, to give itself more time to agree on a compromise.

What such a compromise will look like, however, is more ambiguous. It is not clear if the Senate will agree to any cuts the House makes or how deep senators would be willing to cut. The debate over earmarks may prove to be an insightful lesson for how spending decisions might be made.

Senate Democrats have strongly opposed elimination of earmarks from the FY 2011 budget even as congressional Republicans have lately highlighted the earmarks issue, agreeing amongst themselves in 2010 to forgo earmarks. Also, the president pledged in his State of Union address to veto spending bills with earmarks in them. Shortly after that, Senate Democrats agreed to no earmarks in spending bills.

In announcing the Senate Democrats' decision, Senate Appropriations Committee Chairman Daniel Inouye (D-HI), a long-time supporter of earmarks, said "the handwriting is clearly on the wall," acknowledging that the current political climate has turned against earmarks. With Republicans asserting that the recent election showed that Americans demand spending cuts, some Senate Democrats might decide that the writing is on the wall when it comes to overall spending, as well, particularly if the president sides with Republicans on the issue.

On the other hand, the agreement to ban earmarks could simply have been political cover for wavering Senate Democrats – earmarks account for a small amount of money in the context of the overall budget. With the 2012 election coming up, Democrats may choose to start drawing distinctions between the two parties, and the FY 2011 budget may be a good place to start. The president has already been calling for investments in certain types of areas such as education and infrastructure, which runs counter to the steep cuts the Republicans are calling for. Liberals both in and out of Congress are already arguing that cutting federal spending now would only hurt the fledgling economic recovery and will intensely oppose any effort to cut spending.

Perhaps foreshadowing the battle to come, *The Hill* recently quoted Senate Majority Leader Harry Reid (D-NV) as saying that the Republicans' budget plan was "more draconian than we originally anticipated" and "unworkable," strong language for a politician looking for compromise. Similarly, President Obama's budget director, Jack Lew, submitted an op-ed to *The New York Times* saying that the "easy cuts are behind us," signaling Obama's intention to pressure the Senate to instead back his five-year budget freeze.

On the other side of the Capitol, House Republicans have problems of their own. While House leadership is backing the new spending plan, which cuts about $35 billion from the FY 2010 budget, some rank and file members are less than thrilled with it. "Anything short of our pledge to cut $100 billion from FY 2011 will be getting off on the wrong foot," said Rep. Jeff Flake (R-AZ), voicing the concerns of conservative Republicans. "We're going to have to do much better and cut much more." Even some establishment conservative groups, such as the Heritage Foundation's political action arm, are saying that the leadership's budget proposal left money "on the table."

In order for there to be any kind of a compromise between the House and the Senate, House leadership must be able to control its caucus. However, the vote on the House budget plan scheduled for the week of Feb. 14 will include an open amendment process, and according to *CQ* (subscription required), the Republican Study Committee, representing the party's conservative bloc, "will push for an additional $42 billion in cuts beyond the non-security spending reductions sought by House leaders." If House leaders fail to beat back amendments like that one, negotiations with the Senate will likely be much harder.

If budget negotiations between the House and the Senate fail, the chance of a government shutdown becomes that much greater. It is entirely possible that the House will send the Senate large spending cuts, and the Senate will refuse to make anything beyond modest, targeted discretionary cuts. In such a situation, neither side will be willing to back down or meet in the middle, and if they cannot agree on a stop-gap solution, a government shutdown could occur as time runs out on the current CR.

Both sides are already trying to blame the other for any future shutdown. "Too many Republicans seem to want to force a government shutdown," said Sen. Chuck Schumer (D-NY), the number-three Democrat in the Senate. "The only people talking about shutting down the government are a handful of Senate Democrats," fired back Senate Minority Leader Mitch McConnell (R-KY). Regardless of blame, if lawmakers can't agree on spending levels in the next 25 days, a shutdown might very well be in the nation's future.

Drinking Chrome – New Studies Expose Threats to Tap Water

A new health study found drinking water in 31 out of 35 U.S. cities contaminated by a dangerous form of chromium known as hexavalent chromium. Another study found that hexavalent chromium, a known carcinogen when inhaled and a suspected carcinogen when ingested, often contaminates water leaching from coal ash impoundments. The revelations expose the need for greater monitoring of public drinking water and stronger protections against contamination.

The recent studies by environmental and public health groups shed new light on the extent of drinking water contamination in America and the potential sources of that contamination. The Environmental Working Group (EWG) commissioned water sampling and testing for hexavalent chromium, also known as chromium-6. The results, published in the report *Chromium-6 in U.S. Tap Water*, found that more than 26 million people are serviced by the water utilities in the 31 cities where chromium-6 was detected. However, the report represents a one-time "snapshot" of the water quality in 35 cities, and without regular monitoring, the full threat to public health is unknown.

Chromium is found in many forms, and the two most prevalent forms are trivalent chromium (chromium-3) and chromium-6. In small amounts, chromium-3 is a vital nutrient needed for healthy human metabolism, but chromium-6 is a known carcinogen and dangerous even in small amounts. Chromium-6 was the toxin contaminating the drinking water of Hinkley, CA, the case made famous by the 2000 film *Erin Brockovich*. California is currently the only state that requires water utilities to test for hexavalent chromium.

California environmental officials recently revised a proposed "public health goal" for chromium-6 in drinking water. The state's environmental agency originally proposed a goal of 0.06 parts per billion (ppb) of hexavalent chromium in tap water. That figure was lowered to 0.02 ppb to better protect vulnerable populations such as children. However, the EWG report states that California's water testing methods cannot detect levels of hexavalent chromium in amounts below 1 ppb, 16 times higher than what the state considers the maximum safe level.

According to the EWG report, drinking water can be contaminated by hexavalent chromium released by steel and pulp mills, as well as metal-plating and leather-tanning facilities. However, researchers from Earthjustice, Physicians for Social Responsibility, and the Environmental Integrity Project contributed to a report released last week linking numerous cases of chromium-6 groundwater contamination to pollution from coal ash impoundments. Coal ash, a major byproduct of burning coal for energy, is often disposed of in huge landfills or surface impoundments. One such site, a coal ash impoundment operated by the Tennessee Valley Authority (TVA), collapsed in December 2008. The resulting spill at the Kingston Fossil Plant sent more than one billion gallons of toxic sludge flowing into the nearby community and the Emory River.

The report, *EPA's Blind Spot: Hexavalent Chromium in Coal Ash*, draws on U.S. Environmental Protection Agency (EPA) reports and other studies to identify 28 coal ash dump sites in 17 states that have contaminated groundwater with chromium at levels far above the public health goal proposed by the state of California. According to the report's authors, the contaminated coal ash dump sites "are likely the tip of the iceberg," and EPA regulators are operating with a "blind spot" that misses this significant source of water contamination.

The report also uncovered a study by an electric utility industry group, Electric Power Research Institute (EPRI), that found that 97 to 100 percent of the chromium leaching from coal ash impoundments is the deadly chromium-6. This industry study tested water at 29 coal ash landfills and ponds, finding chromium-6 at 15 coal ash dump sites at levels hundreds of times greater than the proposed California goal. However, the locations of these dumps are unknown, identified only by a number.

The report cautions that "the high levels of hexavalent chromium at the sites may pose a danger to those living near the landfills." The report warns that at these contaminated sites, "there may be little attempt to monitor [the contamination's] migration offsite to protect well users from harmful exposure to hexavalent chromium or other toxic metals commonly found in coal ash leachate."

According to the National Toxicology Program (NTP), "Hexavalent chromium compounds have been shown to cause lung cancer in humans when inhaled." In addition, the NTP states that "hexavalent chromium can also cause cancer in animals when administered orally." The EPA listed chromium-6 as a priority for evaluation under its Integrated Risk Information System

(IRIS), and the agency released a draft toxicological review in 2010 stating that chromium-6 in drinking water is "likely to be carcinogenic to humans."

In January 2011, the EPA recommended that water utilities nationwide test for chromium-6. According to EPA, "Systems that perform the enhanced monitoring will be able to better inform their consumers about any presence of chromium-6 in their drinking water." Currently, EPA only requires public water utilities to test for *total* chromium, which lumps the essential nutrient chromium-3 with the carcinogenic chromium-6. EPA's drinking water standard for total chromium, set back in 1991, is 100 ppb, or 5,000 times higher than California's recent proposed goal for chromium-6 in drinking water. There are no federal regulations requiring water utilities to monitor drinking water for hexavalent chromium, and chromium in leachate from coal ash dumps also is mostly unmonitored.

At a recent Senate oversight hearing on the safety of drinking water, Sen. Frank Lautenberg (D-NJ) announced plans to introduce legislation to require greater monitoring and disclosure of pollutants in drinking water. According to the senator, the public "has no idea that they might be drinking water laden with unregulated contaminants like chromium six, gasoline additives or other toxics." Lautenberg's planned Drinking Water Right to Know Act would allow EPA "to require a targeted increase in monitoring for unregulated pollutants that could be hazardous." The bill would also require EPA "to make information on contaminants in drinking water more readily available online and in simple English."

According to Lautenberg, "More information on contaminants will empower citizens and help government make better decisions on pollutants in the water supply."

Environmental advocates are calling for strong federal regulation of the disposal of coal ash to prevent water contamination, as well as setting a legal limit for chromium-6 in drinking water and requiring water utilities to regularly test for the contaminant. Coal ash disposal proposals have met with fierce industry opposition. TVA, for example, was allowed to comment on EPA's coal ash proposal before it was made available for general public comment, and evidence indicates that EPA may have weakened its original proposal in the face of strong pushback from industry interests and entities within government itself.

Congress Works to Improve Legislative Transparency

At the outset of the 112th Congress, both the House and Senate have adopted new rules to increase the transparency of their activities. The Senate will end its practice of "secret holds," where one senator could anonymously forestall proceedings on a bill. Meanwhile, the House adopted a variety of transparency reforms, including posting bills online for three days before voting on them and disclosing more information about committee actions.

Changes in the House

The House rules package, which passed Jan. 5 along party lines, includes several transparency provisions. The reforms come among other changes not related to transparency, such as several changes to spending procedures and the names and composition of some committees.

The new rules fulfill two promises made in the *Pledge to America*, the House Republicans' pre-election policy document. The rules' "Read the Bill" provision requires legislation that has not gone through the normal committee process to be available to members (which may include electronic availability) for at least three legislative days before being considered on the floor. However, as the Sunlight Foundation noted, "the rules do not explicitly mandate online public availability."

In addition, the new rules require each introduced bill to be accompanied by a public statement citing the legislation's authority under the Constitution. Previously, this statement was only required when bills were reported from committee. As noted in OMB Watch's analysis of the original proposal in the Pledge, it remains unclear how these statements will be used and who will resolve any disagreements that may arise.

The rules also contain several changes to committee procedures to give greater notice to the public about activities. For instance, committee meetings must now be publicly announced at least three days in advance, subject to exemptions. Legislation to be marked up by a committee must be publicly available 24 hours before the committee meets, and the text of any amendments to be adopted during the markup must be published within 24 hours after the meeting. Additionally, the record of committee votes must be published electronically within 48 hours. The new rules also eliminate an exemption that allowed the Rules Committee not to disclose its voting records.

"Truth-in-testimony" forms for non-governmental witnesses in committee hearings must be posted online within a day after the hearing. Earlier rules required witnesses to submit these forms, which disclose how much federal funding the witnesses receive, but did not specify that they must be posted online.

Each committee is now required to post its rules online. Committees are also required to issue a report on their activities twice a year, rather than every other year under the previous rules. "To the maximum extent practicable," committees must provide public audio and video recordings of their meetings and hearings. However, the rule does not specify deadlines or that the recordings must be available online.

The Committee on House Administration is newly assigned specific responsibility to "establish and maintain standards for making documents publicly available in electronic form by the House and its committees."

In a nod to the changing media landscape, the new rules eliminate references to specific news outlets for admission to the House floor or committee meetings and hearings. Moreover, the rules lift the blanket ban on using computers or mobile phones on the House floor. Instead, only devices that "impair decorum" are banned.

The rules also retain the Office of Congressional Ethics, an independent ethics review board. Speculation had swirled that Republicans might eliminate the office since most Republicans voted against creating it in 2008.

The Sunlight Foundation said it was "delighted" with how many of its proposals were adopted in the new rules. Citizens for Responsibility and Ethics in Washington added, "For transparency and open government geeks, there are a few good nuggets to be happy about."

Changes in the Senate

The Senate adopted a rules change to end the use of secret holds, where one senator could anonymously forestall proceedings on a bill or nomination. Only four senators voted against the change: Jim DeMint (R-SC), John Ensign (R-NV), Mike Lee (R-UT), and Rand Paul (R-KY).

The vote came as part of an agreement on several aspects of Senate reform, where both parties agreed to streamline procedures and reduce obstructionism. *The Washington Post* called the deal "the most significant change in the chamber's rules in 35 years."

Under the new rule, senators are required to publish their holds in the Senate Calendar and *Congressional Record* within two legislative days. The previous rule, adopted in 2007, required disclosure within six legislative days but could be withdrawn without publication at any time before the sixth day. This allowed senators to cooperate and place rolling holds, each lasting less than six days, and avoid the publication requirement. The new rule should reduce the opportunity to place rolling holds.

The previous rule also had no enforcement mechanism, which Senate reformers had criticized. Under the new rule, if Senator A claims to object on behalf of another anonymous senator, Senator A automatically will have the hold printed in his or her name if the anonymous senator does not reveal him or herself.

"The transparency and accountability in this resolution will ensure that the public's business will be done in public," said Sen. Ron Wyden (D-OR), who sponsored the rule. "Congratulations to the Senate for ending this terrible practice," wrote the Sunlight Foundation.

Other changes

After the November elections, Rep. David Dreier (R-CA), now chair of the House Rules Committee, sent a letter to the House Chief Administrative Officer requesting that cameras be installed in the committee's room, one of three committee rooms previously lacking them. The committee has since begun posting video of its meetings.

Speaker of the House John Boehner (R-OH), in a recent letter, supported expanding access to the Capitol grounds for photojournalists. But in a separate letter, Boehner denied C-SPAN's request to add independent cameras on the House floor.

Anti-regulatory Forces Launch Full Assault on Public Protections

Corporate lobbyists and their allies in Congress have launched a systematic, coordinated effort to attack the federal government's efforts to boost innovation and protect public health, worker safety, and environmental quality. The attacks appear to have the Obama administration backpedalling on its agenda to provide meaningful health and safety standards to the American people.

During most of the time President Obama has been in office, corporate special interests have been complaining about the administration's attempt to govern more proactively. As Congress passed major reforms like health care and financial regulation packages and the 2010 midterm elections approached, anti-government opponents prepared strategies to attack the role of government. (See the Jan. 11 issue of *The Watcher* for a summary of strategies.) The sections below describe the actions taken or planned to implement these strategies.

Congressional Oversight Hearings

On Jan. 26, the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce held a hearing on "The Views of the Administration on Regulatory Reform." The only witness was the Administrator of the Office of Information and Regulatory Affairs (OIRA), Cass Sunstein, who defended the Obama administration and its regulatory reform efforts.

The chair of the subcommittee, Rep. Cliff Stearns (R-FL), accused the administration of permitting "an onslaught of federal regulations" that have added significant costs to businesses in a slumping economy. Sunstein defended the pace of public protections coming from the administration. He said, "Actually, the number of regulations issued over the past two years is approximately the same as the number of regulations issued in the last two years of the Bush administration," according to a *Congressional Quarterly* article (subscription required).

Also on Jan. 26, the Committee on Education and the Workforce held a hearing on the "State of the American Workforce." The chair of the committee, Rep. John Kline (R-MN), in his opening remarks, expressed "strong concern with administration proposals and policies that are having a chilling effect on America's job creators." One target of the chair's wrath is the 2010 health care act.

Opponents of government intervention in the economy – for example, Virginia Gov. Bob McDonnell (R) and Dyke Messinger, testifying on behalf of the National Association of Manufacturers (NAM) – focused on reducing taxes and the costs of regulations as the two most important factors leading to new job creation. Neither focused on the benefits of public protections.

Heather Bushey, an economist at the Center for American Progress, painted a picture of a more complex economy crippled by "mismanagement ... in the 2000s." She stressed the need for greater investment in U.S. infrastructure and keeping jobs in this country when making trade policy decisions. She also noted, "Even though corporate America is flush with cash, investment is at the lowest level in more than five decades. So far in this business cycle, from December 2007 to September 2010, business investment has averaged 9.8 percent of gross domestic product, the lowest average for any business cycle since the late 1950s."

Additional hearings with anti-government themes are scheduled:

- On Feb. 8, the House Rules Committee plans a hearing on a resolution "Directing certain standing committees to inventory and review existing, pending, and proposed regulations and orders from agencies of the Federal Government, particularly with respect to their effect on jobs and economic growth." This resolution is expected to move to the House floor on Feb. 10 and will require major House committees to identify regulations that are "harming job creation," likely teeing up a broader assault on public protections.
- On Feb. 9, the House Energy and Commerce Committee will hold a hearing on a bill to strip the authority of the U.S. Environmental Protection Agency (EPA) to regulate greenhouse gases.
- On Feb. 10, the House Oversight and Government Reform Committee will hold a hearing on "Regulatory Impediments To Job Creation."
- Also on Feb. 10, the House Judiciary Committee will conduct a hearing on the "'Regulatory Flexibility Improvements Act of 2011' – Unleashing Small Businesses to Create Jobs."
- On Feb. 15, a House Oversight and Government Reform subcommittee will hold a hearing on "Regulatory Issues as it Pertains to Unfunded Mandates."

In addition to these and other specific hearings, the chair of the Oversight and Government Reform Committee, Rep. Darrell Issa (R-CA), sent letters to roughly 170 companies and trade associations requesting lists of regulations impacting job creation that should be reformed or eliminated. Issa also posted the same request on a business-oriented website. On Feb. 7, Issa announced he received more than 200 responses to his request. It is unclear how the committee intends to use the information, though many expect Issa to use the responses to put further pressure on the Obama administration.

Proposed Legislation Targeting Regulations

Anti-regulatory lawmakers have begun following through on their campaign promises to attack not only individual regulations, but the entire rulemaking process.

The most significant piece of legislation to date is the Regulations from the Executive In Need of Scrutiny (REINS) Act, H.R. 10. This bill would require Congress to vote on and approve every new agency rule with an estimated economic impact (either cost or benefit) of $100 million or more or any rule with a "significant effect" on prices, competitiveness, productivity, or other economic factors. The act would prohibit agencies from implementing rules that do not garner congressional approval.

The REINS Act would cover nearly every aspect of government operations and service. Not only would health, safety, and environmental protections be required to face a fast-tracked vote in Congress before they could be implemented, but so would many rules covering civil rights, Medicaid, Head Start, tax provisions, and even subsidies to industry. This would strip away the current buffer between congressional politicking and technical rulemaking, allowing lobbyists to spread their money around and politicize rulemaking.

By designating this bill within the first 10 bills of the session, the House leadership has signaled that the REINS Act will be one of its top priorities. In addition, the legislative calendar has begun to fill with other bills that seek to undermine the rulemaking process, including:

- The Regulation Audit Revive Economy Act (H.R. 213), which would impose a moratorium of up to two years on all new regulations, making only limited exceptions for emergencies and other issues.
- The Congressional Office of Regulatory Analysis Creation and Sunset and Review Act (H.R. 214), which would create the Congressional Office of Regulatory Analysis and require agencies to review all significant rules to consider whether they should be revised or eliminated.
- The 10th Amendment Regulatory Reform Act (H.R. 455), which would create special standing for state officials to challenge the constitutionality of any rule under consideration.

EPA's regulatory authority is another clear target of House Republicans, particularly related to EPA's efforts to regulate greenhouse gas (GHG) emissions. A few samples of these anti-EPA proposals include:

- The Free Industry Act (H.R. 97), which would amend the Clean Air Act (CAA) to prevent it from being used as legal authority to regulate greenhouse gases.
- The Protect America's Energy and Manufacturing Jobs Act (H.R. 199 and S. 231), which would suspend for two years EPA's authority to regulate stationary source emissions.
- A bill prohibiting any agency from regulating GHGs until China, India, and Russia have enacted similar regulations.
- The Ensuring Affordable Energy Act (H.R. 153), which would prohibit the EPA from funding a cap-and-trade program or issuing any new stationary source emission regulations.
- The Defending America's Affordable Energy and Jobs Act (S. 228), which would amend the CAA to exclude greenhouse gases from EPA regulation and prevent the agency from taking climate change into account when considering any regulation.

The Obama Administration's Rulemaking Slowdown

Obama has shown that he, too, is willing to bow to anti-regulatory interests. In a Jan. 18 *Wall Street Journal* op-ed, Obama adopted the conservative mantra that regulations impair job creation and innovation. The op-ed also announced a new executive order on regulation that instructs agencies to review existing regulations and impressed upon agencies the need to place regulatory decisions in a job-creation context.

Rhetorically, Obama shifted during his State of the Union address. He reiterated points in his executive order but assured Americans, "I will not hesitate to create or enforce commonsense safeguards to protect the American people." Obama connected regulation to health and safety by saying, "It's why our food is safe to eat, our water is safe to drink, and our air is safe to breathe. It's why we have speed limits and child labor laws."

Since Obama signed the new executive order, however, several agencies have pulled back on planned regulatory actions. Whether politically motivated or not, each move strengthens the perception that the administration may be sacrificing regulation to curry favor with the business community and conservative lawmakers.

The most striking example of the administration's hesitancy toward regulation came Jan. 25 when the Occupational Safety and Health Administration (OSHA) announced it would reconsider a rule on musculoskeletal injuries that had been nearing completion. The rule would restore a musculoskeletal column to the form employers fill out when a worker is injured. This minor requirement for employers would be a boon to OSHA, which would then have additional information on such injuries. However, industry opposes the rule and lobbied against a draft final version while it was under review at OIRA, typically the last major step before final publication.

In a statement, OSHA head David Michaels acknowledged, "Work-related musculoskeletal disorders remain the leading cause of workplace injury and illness in this country," but added, "However, it is clear that the proposal has raised concern among small businesses, so OSHA is facilitating an active dialogue between the agency and the small business community."

The industry lobbyists that met with OIRA and OSHA were not from small businesses, but rather Washington-based trade groups including the U.S. Chamber of Commerce (the Chamber), the National Association of Home Builders, Associated Builders and Contractors, Inc., and NAM. In a statement, NAM Vice President of Human Resources Policy Joe Trauger called the musculoskeletal column "unnecessary."

Trauger referred to an earlier announcement that OSHA had withdrawn a "proposed interpretation" on occupational noise standards when he said, "This is another positive sign that the Agency is listening to the concerns of employers about the economic impact of costly and burdensome requirements." OSHA said it needed to perform more public outreach and is concerned about potential costs. Industry had publicly objected to the proposal and applauded its withdrawal. "OSHA spokeswoman Diana Petterson said the noise standards decision was 'completely unrelated' to Obama's order," according to the Associated Press.

On Jan. 18, the Employment and Training Administration (ETA) announced new wage standards for foreign guest workers. ETA says the rule, by setting wage floors, will help foreign guest workers while at the same time making U.S. workers more competitive in the job market. However, ETA delayed implementation of the rule until 2012, angering labor unions. "Delaying the new wage process until 2012 gives too great a concession to the Chamber of Commerce and other business groups that profit from employing low-paid foreign guest workers," AFL-CIO President Richard Trumka said in a statement. Like OSHA, ETA is a part of the Department of Labor.

On Jan. 31, the Consumer Product Safety Commission (CPSC) again delayed a requirement that children's product manufacturers test their products to ensure they do not contain harmful levels of lead. Since Congress approved the requirement in 2008's Consumer Product Safety Improvement Act, industry has complained about the costs of the testing, which must be conducted by an accredited third party. CPSC's commissioners have voted three times to delay implementation. The commission's Jan. 31, 4-1 vote extended the deadline until Dec. 31, 2011, and will be the final stay of enforcement, according to CPSC head Inez Tenenbaum.

Taken together, these examples portend a shift in the administration's regulatory strategy. A September 2010 OMB Watch report analyzing the Obama administration record on rulemaking in its first 18 months found that agencies had poured energy into their rulemaking agendas and had made significant progress on a variety of health, safety, and environmental issues. Obama's record stood in stark contrast to that of President Bush, who preferred a hands-off approach and more collaboration with industry, the report found.

It seems as if the Obama administration is trying to find a clear message on regulatory issues. Obama spoke at the Chamber on Feb. 7, where he reiterated points made in the *Wall Street Journal* op-ed and emphasized actions the administration has taken to reduce requirements on business. However, Obama countered those points by stating, "[E]ven as we work to eliminate burdensome regulations, America's businesses have a responsibility to recognize that there are some safeguards and standards that are necessary to protect the American people from harm or exploitation," and, "[T]he perils of too much regulation are matched by the dangers of too little."

Obama continued with a strong defense of regulation. He provided some historical context with examples where industry claimed the sky was falling, such as with seatbelts in cars and the creation of the Food and Drug Administration, and he stated that in fact, "companies adapt and standards often spark competition and innovation." Citing other examples, Obama concluded, "So regulations didn't destroy the industry; it enhanced it and it made our lives better." He then called on industry to create jobs by spending some of the corporate profits that have swelled from an annualized pace of $995 billion to nearly $2 trillion.

Yet on the same day that Obama was defending regulation at the Chamber, Sunstein of OIRA posted a blog entry heavy on capitulating to corporate special interests and light on promoting public protections.

The Case for Greater Public Protections

The jobs-versus-regulations myth has been perpetuated by corporations and their political allies for at least three decades, yet the U.S economy has experienced both tremendous growth and economic declines unrelated to government intervention during that time. There is little evidence to support the canard that regulations cost jobs. In addition, the current regulatory process, with its biased approach to calculating costs and benefits in favor of business, shows that the benefits of public protections far outstrip the costs as reported in OIRA's annual costs and benefits reports to Congress.

Businesses often urge federal agencies to set national standards to protect against disparate state standards and/or competition from international companies. In a recent *Bloomberg Government Insider* article, author David Lynch illustrates numerous examples of businesses supporting government intervention. On food safety, underground storage tanks, emission control systems, seat belts, air bags, and climate change, businesses benefit when the government creates standards that protect public health, safety, and environmental quality.

Lynch cites a representative of the Grocery Manufacturers Association that called the landmark food safety bill passed in 2010 "a present under the tree" because its clients lost millions of dollars after contaminated food led to multiple recalls and reduced consumer confidence in food products, even those products unaffected by the recalls. The new standards in the law "will be worth the trouble if they calm shoppers and prevent costly recalls," according to the article.

At the Energy and Commerce Committee hearing described above, ranking member Henry Waxman (D-CA) noted that nine corporate heads of energy and manufacturing companies supported comprehensive energy legislation. "What these CEOS [*sic*] were telling us is that they needed more energy and carbon regulation – not less – so they would know the rules and plan and invest for the future," Waxman said in his hearing statement.

Ironically, even the Chamber's chief lobbyist R. Bruce Josten debunks the jobs vs. public protections myth, according to the *Bloomberg* article, when he admits, "Everyone thinks the business community hates regulations. Not only is that not true, it couldn't be further from the truth."

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The Watcher

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In This Issue

The Heavy-Handed House Spending Bill

In the early hours of Feb. 19, the House passed a continuing resolution (CR) that is intended to keep government running for the remainder of the fiscal year. The bill contains not only drastic spending cuts, but would also implement a series of funding restrictions that would block the federal government from carrying out certain policies. While President Obama has said he will veto the legislation if it reaches his desk, it sets an unconstructive tone for Congress with provisions that would adversely impact people in need, undermine job growth, and seriously impair the ability of government to protect the public.

Funding for the operations of the federal government runs out on March 4, when the current CR expires. Without congressional action, many government functions, such as operation of the National Parks, would cease until new funding is approved. Providing funding for the rest of the fiscal year, which started Oct. 1, 2010, the House CR contains some $65 billion in cuts from the previous year's (FY 2010) non-security discretionary spending, an almost 14 percent reduction. The cuts would affect almost every major federal agency (except the Defense Department, which would see a modest increase), resulting in net spending cuts of roughly $61 billion.

Without holding any hearings on their cuts, Republicans quickly assembled a bill that would reduce funding for hundreds of important federal programs, in a bid to reach a target of $100 billion in cuts (from the baseline of Obama's FY 2011 budget request, which was never enacted). Initially, House Republican leadership introduced a version of the CR with about $74 billion in cuts, but leadership was forced to capitulate to House Republican freshmen who demanded an additional $26 billion in cuts, living up to a pledge to cut spending to FY 2008 levels.

The Transportation Department budget would be subjected to particularly egregious cuts. High-speed rail funding would be completely eliminated, as would two Federal Highway Administration programs. In all, eight Transportation Department programs would see their budgets go to zero. The Department of Agriculture would lose funding for 17 programs, and 24 programs would be cut from the Department of Interior.

The Center for National and Community Service (home of AmeriCorps) would see an almost 90 percent cut, with the intent of eliminating AmeriCorps; public housing capital funds would get cut by 42 percent; Pell Grants by 15 percent; the Centers for Disease Control and Prevention by 20 percent; and international disaster assistance would be cut almost in half. Even funding for the proposed Eisenhower Memorial near the National Mall would be reduced under the Republican proposal. Meanwhile, the Defense Department budget would see an almost two percent bump.

The magnitude of the cuts is masked by the fact that all of them would be enacted over the remaining seven months of the fiscal year. With such little time left in the year, the effect of the budget cuts is effectively doubled; instead of having a full year to absorb the budget reductions, agencies would have only half a year to cram in the cuts. Because of this, the Center on Budget and Policy Priorities suggests that the CR would have the effect of a 24 percent cut for non-security discretionary spending.

It is also striking that the House bill would concentrate significant cuts in discretionary spending, when most budget experts acknowledge that the nation's serious long-term budget problems stem from a combination of health care costs and inadequate revenue. Discretionary spending is the smallest share of federal spending, yet is taking the largest cuts under this plan. Moreover, the cuts are targeted to only about half of discretionary spending since defense spending would be increased.

All of the spending reductions would mean drastic changes in the way the federal government protects the public, provides a vital safety net for families hit by the recession, and invests in the economy. Additionally, reductions in federal spending of this magnitude would cripple the nascent recovery. Not only would the federal government have to drastically reduce payments to contractors, but furloughs of federal employees would also be likely. Economists estimate that as many as a million jobs could be lost because of the Republican budget. Passing such a budget would certainly have a pernicious effect on the economy.

In addition to the budget cuts, the House Republican spending bill also includes a great number of policy provisions that would prevent the federal government from carrying out existing programs and policies. Some of these “riders” were included in the original proposal released on Friday, Feb. 11. Some of these provisions include:

- Barring the U.S. Environmental Protection Agency from creating rules addressing greenhouse gases from stationary sources
- Stopping the Nuclear Regulatory Commission from terminating the Nevada-based Yucca Mountain license review without due cause
- Prohibiting the Bureau of Land Management from implementing Department of Interior Secretarial Order 3310, which was issued in December 2010 and creates a new Wild Lands classification for public lands
- Restricting Recovery Act funds for signs and other announcements that indicate Recovery Act funds were used in a program or project
- Limiting speech and activities under international family planning grants
- Limiting the amount of funding the Federal Reserve may give to the fledgling Bureau of Consumer Financial Protection to help it enforce the new financial reform law.

During debate on the CR, lawmakers added some 45 additional restrictions to how federal funds can be used. Nine separate amendments prohibit the federal government from spending any money to enact health care reform, one amendment expands a prohibition in the base bill to prohibit use of funds for the health care and climate change “czars” to include all White House "czars," one restricts funding to the Federal Communications Commission for enacting net neutrality rules, one stops payment on legal fees to citizens and groups who sue the government, another prohibits any federal funding to Planned Parenthood, and one denies funding for the Presidential Election Campaign fund, effectively killing public financing for presidential elections.

There are some extremely specific restrictions imposed through these amendments. (Some of these are discussed in greater detail in another *Watcher* article about environmental riders.) For example, one amendment would prohibit EPA from implementing or enforcing a Sept. 9, 2010, rule that limits the levels of mercury in cement. Another would restrict funds to move forward with a rule that would eliminate surface mining operations within 100 feet of a stream.

Many of these restrictions have been requested by industries that would benefit from them. Most of these policy provisions, which do not save the government any money, are back-door efforts to pass controversial laws under the guise of spending reductions. Without holding any hearings and passing policy provisions in the dead of night, House Republicans contradicted their claims of embracing openness and transparency in the legislative process.

Few of these provisions are likely to be included in the Senate version of the CR. However, the upper chamber could decide to keep a handful of the Republican budget items in an effort to reach a compromise with the House, putting many vital government programs at risk and hindering the ability of the executive branch to protect the public and help those in need.

President Obama Calls for More IRS Funding in 2012 Budget

Following the freeze-but-invest theme of his fiscal year (FY) 2012 budget, President Obama is calling for the Internal Revenue Service (IRS) to receive a boost compared to the agency's FY 2010 budget. Increased investments in tax enforcement and information technology (IT) could help make the currently complex tax code fairer while streamlining bureaucracy. Additionally, these improvements would likely raise more revenue for the government and make the agency more user-friendly. The Republican-controlled House, however, will likely stand in the way of the budget request, putting the IRS's future funding in question and potentially jeopardizing these reforms.

Of the $13.3 billion requested for the IRS in the president's FY 2012 budget, roughly $6 billion would go toward enforcement activities, an increase of $463 million over FY 2010 levels. Of note, $936 million of the $6 billion enforcement request would come from moving IRS funds around internally, which could help to make the budget increase more palatable to a Congress that appears intent on cutting spending. As the budget request notes, the move could also decrease future deficits.

Hoping to better deter taxpayers inclined to evade their responsibilities while also vigorously pursuing those who do, the IRS's enforcement activities have received steady budget increases under the Obama administration. Economists and federal tax analysts generally agree that for every dollar invested in enforcement actions, the federal government nets three to four dollars in additional revenue.

The IRS estimates that the approximately $460 million in additional enforcement funds would net $1.3 billion per year, once the new employees hired to track down tax evaders settle in by 2014. The agency also estimates that investments in tax evasion enforcement could have an effect on deterrence and thus increase revenues beyond the direct impact; the agency conservatively estimates this revenue effect to be a factor of about three.

These increases in revenue would not only decrease the tax gap, which is the difference between what individuals and businesses owe the government and what they actually pay on a timely basis, but they would also help reduce the projected $1.6 trillion federal budget deficit. The last estimate of the average gross tax gap (which used 2001 numbers updated in 2007) was $345 billion, but some have recently placed the figure as high as $500 billion. Reducing the tax gap is important to improving the integrity of the tax system and ensuring fairness.

The FY 2012 budget request would also provide roughly $333 million for the Business Systems Modernization Program (BSMP). The IRS is using BSMP, which is a fund authorized by Congress, to update many of its IT capabilities. In fact, to purchase IT capital assets, the agency must submit a detailed plan to Capitol Hill providing cost estimates, timelines, and expectations. There is also a requirement for the Government Accountability Office (GAO) to review and approve the final product.

Most recently, the IRS revamped its Business Master File Case Creation Nonfiler Identification Process (BMF CCNIP). The long-winded acronym is simply a program that uses third-party information and IRS account data "to select potential business nonfiler cases for pursuit based on the likelihood of securing returns and revenue."

With the requested FY 2012 funds, the agency would like to expand and improve its core taxpayer account database, CADE 2, which allows taxpayers to pay their taxes online and expedites refunds to them. The IRS would also invest an additional $33 million, funded through moving $321 million internally to operations support, to improve the IRS.gov website. Despite failing the last time it attempted to revamp its website, the IRS argues that the project will succeed under BSMP, allowing taxpayers to more easily access important tax information and services online.

Strategic investments in tax enforcement and IT resources are not only important to decreasing the tax gap and improving taxpayer service, but to addressing the IRS's only two high-risk program areas. Recently, the GAO released its 2011 high-risk series report that lets Congress and the administration know which government operations require more scrutiny or resources. Importantly, "the enforcement of tax laws" and "IRS business systems modernization" are on this year's list.

If recent events on Capitol Hill are any indicator, however, Congress is not likely to completely honor the president's request for greater funding of either the tax enforcement or systems modernization initiatives. In the very early hours of Feb. 19, the Republican-controlled House passed a continuing resolution (CR) to fund the government for rest of FY 2011 that cut more than $61 billion from FY 2010 levels. Those cuts include a $603 million reduction to the IRS's budget over the next six months, $285 million of which comes from the tax enforcement budget and $227 million from the agency's operations support budget.

If House Republicans refuse to fund the IRS even at FY 2010 levels, there is no chance they are going to consider the president's higher FY 2012 request. In addition to a budget request that would increase tax enforcement and IT capabilities, the FY 2012 IRS request includes important increases in funds for taxpayer services, which provide help to taxpayers through outreach, and funds to implement the Affordable Care Act – a measure anathema to the majority of congressional Republicans.

What Does the President's Budget Mean for Transparency?

The president's budget request for fiscal year 2012, released on Feb. 14, is the opening bid in a months-long process to decide how much the federal government will spend on everything from the Navy to open government efforts. The administration's budget proposal is difficult to analyze in terms of open government commitments because it doesn't include line-item categories for transparency activities. However, it does provide some clues about increases and cuts.

Freedom of information isn't free. To the contrary, transparency advocates have long argued that government often fails to adequately budget for open government initiatives. Without the right human and technical resources, even the best transparency policy will fall victim to poor implementation.

Requesting Adequate Resources

In November 2008, a coalition of transparency advocates published *Moving Toward a 21st Century Right-To-Know Agenda: Recommendations to President-elect Obama and Congress*. The report recognized that "often, there are inadequate resources for disclosure, whether to implement FOIA or for tackling e-government initiatives. Sufficient money, staff, skills, or incentives are not provided to create and sustain a 21st century right-to-know environment."

The report recommended that the president set aside sufficient funds for FOIA and e-government implementation, among other measures. The administration has made some movement in this direction: Attorney General Eric Holder's March 2009 FOIA memo directed agency Chief FOIA Officers to recommend "adjustments to agency practices, personnel, and funding as may be necessary." In addition, a March 2010 memo by then-White House Chief of Staff Rahm Emanuel and White House Counsel Bob Bauer directed agencies to "assess whether you are devoting adequate resources to responding to FOIA requests."

Challenge of Analysis

Despite the directives, change is hard to see in the budget documents. The president's budget does not summarize government-wide expenses or initiatives relating to FOIA or open government, nor do any of the administration's 22 "fact sheets on key issues." Additionally, the budget's detailed appendix does not detail FOIA or open government spending in each agency.

Even in the agencies' exhaustive budget justifications to Congress, transparency spending is unevenly reported. Many agencies do not detail their spending on FOIA implementation, instead grouping it with other responsibilities such as public relations. Likewise, initiatives to proactively post documents or data online are frequently buried within aggregate information technology spending.

Funding for FOIA

There are some budget changes that derive from the Obama administration’s emphasis on open government. The Justice Department's budget justification includes an additional $467,000 to hire five new staff in its Office of Information Policy, in response to increased FOIA requests and the Open Government Directive.

The National Archives and Records Administration's (NARA) budget document indicates no change in the budget for the Office of Government Information Services (OGIS), the government's FOIA ombudsman. This stationary funding level comes despite a June 2010 Senate report that recommended doubling the office's budget.

However, it is important to remember that more spending does not necessarily mean more openness. For instance, the State Department's budget justification includes $166,000 in new FOIA funding. The money will be used to hire an additional attorney – not to process FOIA requests or to ensure compliance, but to increase defense against FOIA litigation.

Expanded Environmental Information

The U.S. Environmental Protection Agency's (EPA) budget justification repeatedly mentions plans to improve information dissemination. This includes data related to topics such as air toxics, greenhouse gases, drinking water systems, and toxic chemicals.

EPA also plans to move to electronic reporting of compliance data, with the goal of eliminating paper-based reporting. According to the document, the transition to electronic reporting could "substantially reduce the costs of collecting, sharing, and analyzing compliance information." EPA intends to use an approach similar to the e-file system for federal income taxes, where reporting software is provided by the private sector rather than the agency.

Changes to E-Government Funding

The budget also proposes a new $60 million Information Technology fund to be managed by the Office of Management and Budget (OMB), with the ability to transfer funds to agencies. According to OMB's budget justification, the fund would be used "to establish a coherent Federal strategy for centralized, efficient provision of IT services and infrastructure across the Government." Some of those services, though likely not all, might enhance transparency.

Cuts to Archival Programs

NARA's Electronic Records Archives (ERA), a program to preserve and provide access to electronic records, will be launched sooner than previously planned, which allows the agency to eliminate the $37 million previously budgeted for further development. The accelerated deployment resulted from the TechStat accountability program managed by OMB, part of Chief Information Officer Vivek Kundra's IT management reforms. ERA has been plagued with problems: a recent Government Accountability Office report estimated that cost overruns could total up to $1.4 billion over the program's lifetime.

Several archival programs that support access to non-federal records will also see cuts. Reductions include:

- $22 million cut from the National Endowment for the Humanities (a 13 percent decrease)
- $39 million cut from the Institute of Museum and Library Services (14 percent)
- $8 million cut from the National Historical Publications and Records Commission (62 percent)
- $30 million cut, the entire budget, from Save America's Treasures and Preserve America grants at the National Park Service

Bottom Line

The inconsistent reporting of information activities in the federal budget and agency justifications make it next to impossible to gauge the overall funding of government transparency with any accuracy. The Obama administration has made open government a high policy priority, and there are some indications that the rhetoric is translating into additional resources. Perhaps future budget documents will allow for a greater analysis of the administration's allocations around these issues.

EPA Making Good on Chemical Transparency, But More Is Needed

The U.S. Environmental Protection Agency (EPA) is disclosing more information about hazardous chemicals while challenging industry claims that information should be concealed as trade secrets. With major reforms of the nation's chemical law held up in Congress, public health advocates are pushing EPA to take more aggressive action to make chemical health and safety information available to the public.

On Feb. 10, the EPA announced that it would no longer protect the identities of 14 chemicals, which manufacturers had claimed were trade secrets. The chemicals are identified in health and safety studies submitted to the EPA by the companies. Since the chemicals are associated with submitted studies, EPA concluded that the companies cannot legitimately claim the identities as confidential business information (CBI). The agency's action is the result of policy changes adopted in 2010 to increase transparency within the agency's chemical regulatory program.

Under the Toxic Substances Control Act (TSCA), the nation's primary law regulating chemicals, manufacturers must immediately report to EPA when they find evidence that a chemical substance "presents a substantial risk of injury to health or the environment." Considering that health and safety studies frequently uncover new information about previously unknown chemical hazards, there is great public demand for timely access to this information. EPA has determined that the identity of a chemical associated with such a health and safety study cannot be concealed as CBI, except under very narrow circumstances.

EPA sent letters to five chemical manufacturers announcing the agency's determination that the chemical identities were not entitled to confidential treatment. In making this determination, EPA merely exercised legal authority that it has long had but seldom exercised. The agency's rules allow it to challenge CBI claims, especially when they involve chemical health and safety information or if the information is already publicly available. EPA cited both of these reasons for its recent decision to reject the CBI claims.

This recent action is the result of several changes EPA has made to disclose more chemical information to the public. In January 2010, EPA announced a new practice of rejecting CBI claims for the identities of chemicals found in health and safety studies when the chemical name is already disclosed in the public portion of the TSCA Inventory, a list of all chemical substances in commerce.

In March 2010, EPA provided free public access to the TSCA Inventory, which previously had only been available for a fee. In May, the EPA began reviewing all CBI claims for chemical identities associated with health and safety studies. That same month, EPA added chemical information to its Envirofacts online public database.

Public health advocates have long complained that EPA was withholding crucial chemical information that was needed to evaluate the health and safety of chemicals. EPA estimates that there are more than 84,000 chemicals in commerce in the U.S., and the identities of more than 17,000 chemicals are protected as CBI. Very few of the chemicals in use today have been sufficiently tested for their impact on human or environmental health. EPA's CBI policies have often prevented health advocates and scientists from linking a specific chemical to its potential health hazards. For example, a safety study submitted by a manufacturer to EPA might show evidence that a particular chemical substance causes harm in lab rats, but the identity of the substance is not disclosed.

EPA's new policies aim to reduce such secrecy. According to the head of EPA's chemicals office, Steve Owens, "The public deserves access to critical health and safety information on chemicals, but if the name of the chemical is kept secret in the health and safety report, the information is of no real value to people."

Under TSCA and other statutes, companies that submit information to EPA may claim the information to be CBI and therefore should not be publicly disclosed. Chemical companies must immediately provide notice to EPA if they learn that a chemical presents a substantial risk of injury to health or the environment. EPA's press release states that, "The reports are made available on EPA's website, but when the identity of the chemical has been claimed confidential by a company, the name of the chemical has been removed from the copy of the report that is made public."

According to the agency, as a result of its new procedures, "EPA is moving to declassify many chemical identities so they are no longer secret." EPA has long had the authority to review all CBI claims, but the Government Accountability Office found in 2009 that very few claims – about 14 per year – are ever challenged by the agency.

The steps EPA has taken to date demonstrate that the agency currently possesses sufficient legal authority to improve public access to chemical health and safety information, especially by putting limits on what companies can claim to be trade secrets. Although public interest advocates have been pushing hard for Congress to strengthen EPA's chemical regulatory authority, it is clear that there are steps EPA can take with its existing authority to improve chemical transparency. Public interest groups are seeking a number of changes to EPA procedures to reduce the amount of illegitimate CBI claims and to promote transparency.

Among these changes, advocates are requesting that EPA require chemical manufacturers to justify requests for secrecy when the information is submitted to the agency. Such upfront substantiation of the need for secrecy reduces the burden on agency staff to evaluate CBI claims. This practice also is a disincentive against excessive use of CBI claims. Transparency advocates also seek required fees to be paid by submitters of CBI in order to cover administrative costs and reduce illegitimate claims. Additionally, advocates are encouraging the use of fines and penalties against companies that illegitimately request CBI protections, such as for a chemical identity that is already publicly disclosed. It is submitters' responsibility to be familiar with requirements for claiming CBI and to evaluate all CBI claims thoroughly for compliance before the information is submitted to the agency.

Public health advocates also want to ensure that vital information is always available to certain people, such as workers risking exposure to chemicals and health professionals such as emergency medical technicians, nurses, and doctors. For instance, medical personnel must have complete access to the identity of chemicals in products – including CBI – to which their patients may have been exposed in order to accurately assess and treat signs and symptoms, care for injuries, and protect themselves.

EPA has promised to continue evaluating company trade secrets claims and disclosing information it determines is not CBI. In addition, the agency plans to continue increasing the transparency of the chemicals program through an online chemical data access tool, which allows searches of the agency's chemical health and safety information.

Environmental and Public Health Safeguards Under Siege in House Spending Bill

The House-passed fiscal year 2011 spending bill would stop the U.S. Environmental Protection Agency (EPA) from limiting greenhouse gases from certain sources, halt standards for air and water pollution, and set other conditions on the agency that will complicate its efforts to protect the environment and public health. Other health and safety agencies are also targeted in the bill.

House Republicans have attached several riders to a spending bill that would fund the government for the remainder of fiscal year (FY) 2011. These provisions attack EPA's authority, including its ability to regulate climate-altering carbon pollution. A continuing resolution that is currently funding the government is set to expire March 4, and Congress must extend or replace it to avert a government shutdown. The House passed a replacement bill, H.R. 1, on Feb. 19. FY 2011 began Oct. 1, 2010. (See a related article from this issue of *The Watcher* for more on the continuing resolution.)

Conservative lawmakers and opponents of public protections have been trying for months to undercut EPA greenhouse gas limits, especially those covering major stationary sources such as coal-fired power plants and oil refineries. The original House spending bill included a provision prohibiting the EPA from implementing those standards and from writing any new ones, and a similar but broader amendment was also attached.

The bill also sets restrictions on the study of carbon pollution and climate change. One amendment to the bill would stop the Obama administration's plan to establish a Climate Service at the Department of Commerce, and another would end U.S. funding of the Nobel Prize-winning United Nations Intergovernmental Panel on Climate Change.

The legislation would also prohibit the EPA from using funds to complete several high-profile standards for air pollutants other than greenhouse gases, including standards that would cut mercury pollution from cement kilns and set new limits on particulate matter.

An amendment by Rep. David McKinley (R-WV) would restrict EPA's options under a proposed rule dealing with toxic coal ash. EPA proposed a rule that gives options for addressing coal ash, including designation as a hazardous waste. The rule drew controversy when the White House reviewed it in 2010. McKinley's amendment would prohibit EPA from designating coal ash as hazardous waste, which is exactly what industry wants. The spending bill would also prevent the EPA from enforcing water pollution standards in the Chesapeake Bay.

EPA is not the only environmental agency targeted in the continuing resolution. An amendment successfully attached to the bill would prohibit the Forest Service from implementing its Travel Management Rule, which determines trail and road openings and closures in national forests. The bill would also require the Fish and Wildlife Service to remove certain populations of the gray wolf from the endangered species list.

The legislation also defends mountaintop mining, a practice long disdained by environmentalists for its destructive impact. One amendment to the bill would prohibit the Department of the Interior from restoring a buffer zone around streams located near mined areas, a protection removed during the Bush administration. Another would prohibit the EPA from denying mountaintop mining permits under its Clean Water Act authority.

Beyond environmental issues, the bill prohibits other regulatory activity intended to protect consumers, including the creation of a Consumer Product Safety Commission database that allows the public to report hazardous products and read the reports of other consumers. The database is required under 2008 product safety legislation that passed both the House and the Senate with broad bipartisan support.

Other prohibited regulatory activity includes Federal Communications Commission rules on net neutrality and Department of Education standards to ensure for-profit colleges are serving students' interests. The bill also includes amendments that would stop the Obama administration from spending money to implement any aspect of the health care reform law passed in 2010.

The new continuing resolution would also make dramatic budget cuts at major health, safety, and environmental agencies, including the EPA, which would see a cut of approximately $3 billion – almost 30 percent of its current budget – including a major cut to the agency's greenhouse gas registry program.

The Occupational Safety and Health Administration (OSHA) would be hit particularly hard. The House bill would strip OSHA of $99 million, about 20 percent of the agency's budget. The cut would likely lead to a drastic reduction in safety inspections and investigations into workplace injuries and fatalities.

The bill would return funding at the U.S. Department of Agriculture (USDA) Food Safety and Inspection Service to 2008 levels, when it employed 235 fewer inspectors and other staffers than it does now. The $88 million cut has raised concerns that meat packing and processing facilities could be unintentionally affected. Under federal law, facilities cannot process or package meat without USDA approval. Without a sufficient inspectorate, slaughterhouses may have to reduce production, putting private-sector employees out of work and raising meat prices for consumers. This, in turn, could disrupt key parts of the economy. The USDA estimated that the budget cut would cause roughly $11 billion in economic losses.

The impact of the spending cuts for any agency would actually be greater than the percentages indicate. Because agencies have been operating for nearly five months under larger budgets, the cuts would have to be applied over the remaining seven months.

Senate leaders have criticized the cuts in the House bill and would prefer a short-term extension of the current continuing resolution in order to negotiate a compromise. President Obama has threatened to veto a spending bill such as the one passed by the House. All sides have said they want to avoid a government shutdown, but there are few signs that congressional leaders are willing to compromise.

The Clean Air Act and the Jobs vs. Regulations Myth

In response to a congressional request, the U.S. Environmental Protection Agency (EPA) recently prepared a white paper on the effects of the Clean Air Act (CAA) on jobs and the economy. The paper summarizes the empirical evidence on the economic costs and benefits of the act since 1970. The evidence illustrates the many benefits of the CAA and the small impact of pollution controls on employment.

EPA produced the white paper in response to a request from Reps. Henry Waxman (D-CA) and Bobby Rush (D-IL), members of the House Committee on Energy and Commerce. In their letter to EPA Administrator Lisa Jackson, they requested "your best information regarding the effects of the Clean Air Act on job creation and economic growth." Both EPA and the CAA are under attack from corporations and their allies in Congress who want to limit the agency's authority to regulate under the law.

The EPA's review of the empirical evidence of the CAA includes both the benefits that result from implementation of the act and the costs imposed on regulated entities. The white paper discusses studies conducted by EPA, as well as many studies conducted independently by the Office of Management and Budget (OMB) and a range of scholars and organizations.

As has been the case for decades, significant rules promulgated by agencies under mandates from Congress almost always result in economic benefits exceeding costs. This cost-benefit analysis has been a key part of the federal regulatory process. In the case of the CAA, the white paper concludes that:

- The public health protections that have resulted from the act have produced "tremendous economic benefits"
- The standards implementing the act have created jobs in some sectors of the economy that offset job losses by regulated entities
- Because pollution abatement costs are such a small part of overall manufacturing costs, they have a very small impact on plant location decisions and employment

In assessing the economics of protecting public health, the white paper draws on past studies by EPA and others that show the economic benefits of preventing lost productivity, sick days, and deaths from respiratory illnesses, asthma, and bronchitis, for example. "In addition to healthier and more productive workers, lower air pollution translates into lower health care expenditures," according to the paper. Collectively, these benefits total trillions of dollars.

Investments in pollution abatement create jobs in labor-intensive production of control technologies and have helped U.S. companies compete internationally, according to the paper. One study cited concluded that even heavily regulated industries like refining and pulp and paper industries gained jobs as a result of environmental spending.

EPA's paper contradicts the widespread notion that pollution abatement costs are a huge burden on manufacturing. Citing surveys of manufacturers, the paper reports abatement costs are less than one percent of total manufacturing costs and that these costs consistently represent less than 0.3 percent of the nation's gross domestic product (a measure of the nation's overall economic activity).

Both EPA's white paper and Jackson's letter to Waxman and Rush illustrate the support that exists for clean air standards in the business community and among labor groups. For example, the white paper reports that in December 2010, 14 business organizations representing 60,000 businesses sent a letter to Congress and President Obama supporting EPA's clean air mission. The companies strongly supported the agency and expressed concern over the delay in issuing an updated ozone rule.

The economic and public health benefits cited by these businesses and illustrated in economic analyses undercut the myth accepted on Capitol Hill that all businesses oppose public protections because they kill jobs and harm profits. Yet Republicans in the House have moved to restrict EPA's ability to regulate under the Clean Air Act. They do not provide data demonstrating adverse impacts on jobs or the economy. Instead, they rely on wish lists from companies and trade associations, such as those solicited by Rep. Darrell Issa, chair of the House Oversight and Government Reform Committee. In light of the evidence of the benefits that society gains from laws like the Clean Air Act, Congress could better spend its time debating how to strengthen public health and safety, not actively working to undercut these protections.

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In This Issue

Two-Week Continuing Resolution Shows No Path Forward on Funding

The federal government is currently operating under a two-week continuing resolution, the details of which are not widely known. This marks the current fiscal year's fifth continuing resolution (CR). There is little expectation of compromise on the budget for the remainder of the fiscal year, leaving funding for agencies and government programs in limbo.

As has been true for other budget discussions during fiscal year (FY) 2011, there has been little talk about what Congress actually cut in the recently enacted two-week CR, which trims some $4 billion from the FY 2010 budget. Because of its speedy trip through the House and the Senate, Congress held no hearings on the cuts in the CR, meaning the public has little, if any, idea of what specific programs were cut or why.

Not everyone is happy with the lack of debate. On March 4, *CQ quoted* Sen. Tom Harkin (D-IA) as saying, "How many people know that CR ... cuts out all federal literacy programs in this country? We just wiped them all out."

The cuts in the current CR, which expires on March 18, mostly come from non-security discretionary spending. Of that amount, $2.8 billion is from eliminating some earmarks from the FY 2010 budget, reducing spending from some 50 different accounts. While frequently viewed as waste, the loss of these earmarks will likely be felt across the country. They impact funding for any entity that would receive money in a non-competitive bid, including nonprofits such as Special Olympics, the East Harlem Council for Human Services, and a particular YWCA.

Education Week noted that many national education programs, such as Teach for America, Arts in Education, and the National Writing Project, receive funding through federal earmarks and could face budget crunches with the loss in funding. Even some lawmakers were confused as to what exactly constituted an earmark, with a group of senators writing Senate leadership on March 1 asking if these education programs were considered earmarks.

The remaining $1.2 billion in cuts come from eliminating funding for eight programs President Obama proposed to eliminate or consolidate in his FY 2012 budget. These cuts also target education programs, such as Striving Readers and Even Start, representing some $316 million in federal spending. The bill also cuts $650 million in highway spending. While some of these programs were deemed duplicative, it's unlikely their funding will be transferred to other existing programs, as Obama had been planning.

Interestingly, since the CR only lasts for two weeks, the cuts are not permanent, and these eliminated programs could see their funding restored. The next CR could simply replace the funding for the programs, undoing any damage caused by the current CR. However, with members of both parties considering the $4 billion in cuts as a floor, any agreement, either short-term or long-term, will likely include the cuts featured in this CR.

In the longer term, the current CR might make further compromise more difficult. Its earmark and program cuts represent the "low-hanging" fruit for budget cuts. Congress already agreed to eliminate earmarks for this year's budget, making it easy for both sides to add them to the cuts in the CR. And for Senate Democrats, who are looking for painless cuts, simply signing off on Obama's cuts is easier than trying to come up with alternatives.

Indeed, both sides are already sparring over the next CR, which is required to keep government from shutting down on March 19. On Tuesday, March 8, the Senate is expected to hold two votes to try to gauge the relative strength of support for two alternative long-term CRs. The first vote is on the House's year-long CR (H.R. 1), which cuts $61 billion from FY 2010 levels, and the second is on a year-long CR authored by Senate Democrats. The second bill represents Democrats' attempt at compromise, taking the $4 billion already agreed to in the current CR and adding another $6 billion on top of that.

However, Democrats are also using their bill to draw a line in the sand, saying they will not cut more discretionary spending for FY 2011. At the same time, Republicans in both houses are rejecting the Democrats' compromise bill as not containing enough spending cuts. As a result, both bills are expected to fail their test votes, leaving the two sides back at square one with a week and a half to find a compromise both parties can agree on.

Commentary: GAO Duplicative Programs Report Shows Need for More than Spending Cuts

The Government Accountability Office's (GAO) recent report on duplicative federal programs has caused quite a stir in Washington. Conservative lawmakers have latched on to the report as "proof" of the need to cut billions of dollars of federal spending. Whether Congress should make such cuts is debatable, but the tome-like report includes much more than an extensive list of duplicative federal programs. It also provides a list of potential cost savings that involve continued prodding and oversight from Congress and some that may even require additional spending to help reduce waste, fraud, and abuse.

The GAO report encompasses the entire federal government, but for the sake of brevity, let's use the Internal Revenue Service (IRS) as an example. The GAO report does not include any IRS measures under its list of duplicative programs, at least directly, but it does include quite a few recommendations for the agency under the "Other Cost Savings and Revenue Enhancers" section. These recommendations are all geared toward improving the efficiency and effectiveness of IRS tax collection but can nonetheless be broken down into two categories: areas where Congress needs to continue vigorous oversight and areas where Congress needs to pony up some cash.

Every year, taxpayers fail to provide Uncle Sam with the full amount of taxes due. This is called the tax gap, and at last estimate, it stood at $345 billion (some estimate that it could be as high as $500 billion). The IRS attempts to narrow the gap each year through preventative measures like education and tax preparation assistance and after the fact through tax enforcement initiatives to collect money owed. Much of the IRS's tax enforcement work relies on the availability and use of taxpayer data.

Recognizing the limitations the IRS currently faces without adequate data, GAO recommends that the agency collect more information on everything from mortgage interest and real estate deductions, including forgiven mortgage debt, to sole proprietorships and S corporations. The increased data collection places a higher burden on taxpayers and businesses, though GAO finds that many of these would be minimal seeing that the IRS already collects information on each of these activities. With the recent ascension of Republicans in the House and their aversion to the word "regulation," though, some of these recommendations may find active resistance in Congress rather than the support that is needed.

The other category of recommendations – those that will require increased investment by Congress – range from increasing the use of electronic taxpayer filing to increasing IRS efficiencies with data use. GAO finds that for every return filed electronically, the IRS saves $3.10 compared to the submission of a paper return. And while 71 percent of all returns are now filed electronically, there is still room for increased efficiency.

One area of improvement, according to GAO, is reform of the IRS's electronic filing rejection service. When a taxpayer files a tax return with an error, the IRS simply responds with a notice, often with a vague error code. Frustrated taxpayers then often mail in a paper return with the same errors, leaving it to the IRS to process, identify, and correct the issue. Reforming the rejection service, though, will require IRS resources to study, test, and implement a solution, all of which requires more, not less, funding. Moreover, on a broader level, one could argue that if more taxpayers are going to use electronic filing – saving the government, and therefore taxpayers, money – they will need access to the Internet, making the case for increased investments in national broadband coverage.

The IRS has requested $13.3 billion for fiscal year (FY) 2012, a $1.2 billion increase over the agency's enacted FY 2010 budget. House Republicans, however, are unlikely to grant that request, as they are currently attempting to cut $603 million from the IRS's current budget. Much of the IRS's requested FY 2012 budget increase will go toward increasing the agency's ability to narrow the tax gap through better tax enforcement and information technology (IT) enhancements.

Unfortunately, the GAO report is shaping up to be just another cudgel congressional Republicans will use to beat down government spending; indeed, a small group of Republican senators has seized on the document, demanding elimination of the duplicative programs outlined before the Senate authorizes more spending.

This is disappointing because there is much more to this report, and if Congress dug a little deeper, they could push the federal government to increase its efficiency and effectiveness through more than inarticulate spending cuts. Streamlining government is a good thing, and there is, no doubt, waste, fraud, and abuse in government spending, but in many cases, it's going to take an investment of funds to help eradicate inefficiency.

Celebrate Open Government during Sunshine Week

From March 13-19, Americans will commemorate the importance of open government during Sunshine Week. Organized by the American Society of Newspaper Editors and a coalition of groups including OMB Watch, Sunshine Week is observed annually to coincide with the birthday of James Madison, the Founding Father known for his emphasis on checks and balances in government.

Transparency advocates and journalists nationwide will conduct activities to call attention to the benefits of access to information. Activities will include several public events in Washington, DC, and around the country, congressional hearings, film screenings, newspaper editorials and reporting, awards, and public proclamations.

Events

Sunshine Week 2011 will kick off on Monday, March 14, with the Collaboration on Government Secrecy's Fourth Annual Freedom of Information Day Celebration. The day-long conference will feature discussions on Freedom of Information Act (FOIA) implementation and transparency activities in Congress. The Collaboration will also present Alan B. Morrison, founding director of the Public Citizen Litigation Group, with the 2011 Robert Vaughn FOIA Legend Award.

Also on the 14th, the Advisory Committee on Transparency will host a discussion on improving lobbying disclosure.

On March 15, the Senate Judiciary Committee will hold a hearing titled "The Freedom of Information Act: Ensuring Transparency and Accountability in the Digital Age." The committee will first hear testimony from administration officials Miriam Nisbet, Director of the Office of Government Information Services, and Melanie Pustay, Director of the Office of Information Policy. The committee will then get an outside perspective from a panel featuring Sarah Cohen, professor of journalism at Duke University; John Podesta, president of the Center for American Progress; and Thomas Fitton, president of Judicial Watch.

The Project On Government Oversight continues its Whistleblower Film Series on the 15th with a reception and public screening of *The Big Uneasy* in Silver Spring, MD. The film is a documentary about the flooding of New Orleans during Hurricane Katrina.

On March 16, the First Amendment Center will host the 13th annual National Freedom of Information Day Conference, in partnership with OMB Watch and several other organizations. In addition to presentations and discussions, the American Library Association will announce the recipients of its annual James Madison Award, and the National Freedom of Information Act Hall of Fame will announce its latest inductees.

On March 18, OpenTheGovernment.org will host a discussion on "The Road Forward on Open Government" that will explore the policy and technological issues associated with President Obama's openness efforts. The event's first panel, on the policy aspects of the administration's Open Government Initiative, features Gary D. Bass, executive director of OMB Watch, along with administration officials Steven Croley, Special Assistant to the President for Justice and Regulatory Policy, and David Ferriero, Archivist of the United States. The second panel will focus on using technology to deliver information and engage the public and will feature perspectives from Jennifer LaFleur, director of Computer Assisted Reporting at ProPublica; Tom Lee, director of Sunlight Labs at Sunlight Foundation; and Sheila Krumholz, executive director of the Center for Responsive Politics.

Several of the events will be webcast for those unable to attend in person.

Other Activities

Sunshine Week has also released Ray of Sunshine, an online quiz about open government that will enable people to learn about government transparency in a fun and engaging way. Sunshine Week will also name the winners of its Local Heroes contest, an award to recognize citizens from across America who have helped to improve open government in their communities.

As occurs every Sunshine Week, several organizations are expected to release reports on government transparency, and legislators may keep with tradition and introduce new bills or resolutions to support government openness.

Offshore Drilling Poised to Expand, but Transparency Still Lags

As the Obama administration increases approvals of deepwater oil drilling permits in the Gulf of Mexico, environmental advocates have seen little meaningful increase in the transparency of the permitting process. A lack of transparency in the regulatory process was identified as a contributing factor in BP's Deepwater Horizon oil spill disaster and the highly criticized response effort.

The Bureau of Ocean Energy Management, Regulation, and Enforcement (BOEMRE) announced on Feb. 28 the approval of the first deepwater oil drilling permit since the BP disaster that released an estimated five million barrels of oil into the Gulf of Mexico. A temporary ban on exploratory offshore oil drilling in water depths greater than 500 feet was lifted on Oct. 12, 2010. The new permit is for a well operated by Noble Energy of Houston, TX, and co-owned by BP. According to BOEMRE Director Michael R. Bromwich, "This permit was issued for one simple reason: the operator successfully demonstrated that it can drill its deepwater well safely and that it is capable of containing a subsea blowout if it were to occur."

Regardless of Bromwich’s assurances about the safety of the newly approved drilling, BOEMRE does not publicly disclose drillers' safety programs or their plans for preventing or containing an underwater blowout. Without access to these records, the public is left to simply trust governmental and drilling industry assertions that future operations will be safer than those on the Deepwater Horizon and that the spill containment capacity will be more effective.

In the press release announcing the new permit approval, BOEMRE states, "Noble Energy contracted with the Helix Well Containment Group (Helix) to use its capping stack to stop the flow of oil should a well control event occur. The capabilities of the capping stack meet the requirements that are specific to the characteristics of the proposed well." However, BOEMRE will not publicly disclose information on the capping stack or related information for other approved drilling permits. Moreover, BOEMRE will not release pending permit applications and associated information. Environmental advocates worry that such secrecy prevents needed scrutiny of the agency's review of offshore drilling permits.

According to Bromwich, "We expect further deepwater permits to be approved in coming weeks and months based on the same process that led to the approval of this permit." Interior Secretary Ken Salazar recently informed a Senate panel, "There are other deepwater permits that are pending and the ones that will go out the door will hopefully be the templates that will allow us to move forward with an additional, significant number of deepwater permits."

BOEMRE's website does provide aggregated information on offshore oil drilling permits. The site shows the total number of pending or approved permits but provides no information on the safety features or contingency plans for individual wells.

BOEMRE's process for managing the publicly owned oil and gas resources off the nation's coast generally is divided into three stages. First, the agency drafts a five-year oil and gas leasing program describing the size, timing, and location of planned leasing activity. In the second stage, BOEMRE solicits proposals from industry for specific areas outlined in the five-year program to lease. Then the leases are auctioned off to the highest bidder. The last stage is the permitting process for drilling individual wells. Environmental reviews and public participation are key features throughout the drafting of the five-year program and identifying which tracts to lease. However, environmental advocates complain that the permitting process does not include the same level of transparency.

According to BOEMRE, "A lessee must file an Application for Permit to Drill (APD) before drilling can begin on a lease. The agency often attaches lease-specific conditions of approval to these permits to address matters such as administrative, technical, and environmental issues. In all cases, these are specific requirements depending on the conditions in the area." The oil drillers are also required to submit Oil Spill Response Plans to BOEMRE for approval. The conditions attached to permits and the spill response plans are not available on the agency website.

The public has access to limited amounts of data regarding offshore drilling. Information regarding the newly approved Noble Energy drilling permit is available through a searchable database on BOEMRE's website. The agency's database only provides access to a summary of the permit for each well and does not link to any supporting documents or to environmental analyses of the impacts of the drilling in the specific region. There is no opportunity for the public to see what types of technological requirements or standards a drilling operator has committed to implement. Information on environmental reviews of oil and gas leases is available in a separate location, and there is no clear way to identify what environmental analysis documents pertain to the particular permit.

BOEMRE has taken steps to use electronic reporting by industry. According the agency's website, "Working jointly with industry representatives and other regulatory agencies, BOEMRE is testing solutions that provide both a standard regulatory reporting format and a more direct interface with our databases." The public, however, is unable to take advantage of the improved information collection. Much of the information regarding pending and approved drilling permits is considered "proprietary" and is not disclosed.

Without adequate disclosure of key permit information, environmental advocates worry that plans to prevent or manage emergencies on oil rigs may be insufficient or missing entirely. During the BP Deepwater Horizon crisis, BOEMRE's predecessor, the Minerals Management Service (MMS) – along with the oil industry – was criticized for approving an inadequate and erroneous emergency response plan submitted by BP. An Associated Press analysis identified numerous errors in the plan, such as listing walruses, sea otters, and seals as local wildlife, when there are no such animals in the Gulf of Mexico.

Advocates are also concerned that without access to permit information, a regulatory agency such as BOEMRE cannot be held accountable by the public.

Since the BP oil spill, the Obama administration has taken steps to reform the bureaucracy that oversees the oil and gas extraction industry. Secretary Salazar reorganized MMS, creating BOEMRE and separating the conflicting roles of enforcing safety regulations and maximizing revenues from offshore operations. In August 2010, the Obama administration announced plans to improve the environmental review of the offshore oil drilling permitting process. The Department of the Interior announced that BOEMRE "will restrict its use of categorical exclusions for offshore oil and gas development to activities involving limited environmental risk."

The president also issued a regulatory compliance memo on Jan. 18 that calls for disclosure of "information concerning ... regulatory compliance and enforcement activities..." Obama noted in the memo, "Greater disclosure of regulatory compliance information fosters fair and consistent enforcement of important regulatory obligations. Such disclosure is a critical step in encouraging the public to hold the Government and regulated entities accountable." What is unknown is whether permit data, such as for offshore drilling, will be disclosed under the memo.

Regulation a Boon for the Economy, Reports Show

Amid a tide of Republican complaints over regulations' impact on economic growth, two new government reports show that the economic benefits of rules outstrip compliance costs by billions of dollars every year.

An annual report released March 1 by the White House Office of Management and Budget (OMB) finds that the annual benefits of major rules finalized in fiscal years 2001 through 2010 ranged from $136 billion to $651 billion, while compliance costs amounted to somewhere between $44 billion and $62 billion per year.

OMB prepares the report by aggregating agencies' cost-benefit analyses – notoriously inaccurate tools that ignore benefits that don't have easily attachable price tags, such as environmental preservation, and awkwardly account for others whose values surpass mere economics, such as lives saved and injuries or illnesses avoided. Cost-benefit analyses also typically misrepresent compliance costs by assuming a static business model and ignoring innovations that allow regulated entities to operate more efficiently while complying with government requirements.

While the specific numbers and vast dollar ranges presented in the OMB report are imperfect, the report highlights the value of regulation and undermines the notion that government standards that impose requirements on businesses and other entities hurt the economy.

Among the beneficial rules contributing to the lopsided ledger are several U.S. Environmental Protection Agency (EPA) air quality standards. "It should be clear that the rules with the highest benefits and the highest costs, by far, come from the Environmental Protection Agency and in particular its Office of Air," the report states. "More specifically, EPA rules account for 60 to 85 percent of the monetized benefits and 47 to 54 percent of the monetized costs."

EPA's effort to reduce human exposure to fine particulate matter is perhaps the most economically significant, according to the report. The agency's Clean Air Fine Particle Implementation rule generates benefits between $19 billion and $167 billion per year while imposing compliance costs of $7.3 billion per year, the report says.

The monetary benefits of environmental, health, and safety regulations often stem from health care cost savings, increases in worker productivity, and lives saved. When preparing a cost-benefit analysis, agencies assign a value, typically between $5 million and $10 million, to a human life.

The OMB report is the draft version of the 14th annual *Report to Congress on the Benefits and Costs of Federal Regulations*. A final version of the report is expected later in 2011.

EPA released a report March 1 that draws similar conclusions. The agency found that rules written under the Clean Air Act yielded significant annual benefits. In 2010, those benefits totaled approximately $1.3 trillion; compliance costs that year were approximately $53 billion. The value of annual benefits could reach an estimated $2 trillion in 2020, the report says. Specifically, the report examines rules written as a result of the 1990 Clean Air Act amendments. It compares current and projected conditions against a baseline that assumes only 1970s Clean Air Act controls to be in effect.

"In 2010 alone, the reductions in fine particle and ozone pollution from the 1990 Clean Air Act amendments prevented more than: 160,000 cases of premature mortality; 130,000 heart attacks; 13 million lost work days; 1.7 million asthma attacks," EPA says. "These benefits lead to a more productive workforce, and enable consumers and businesses to spend less on health care – all of which help strengthen the economy."

Clean air advocates are holding up the EPA report as proof that the agency serves the public's best interest and that its detractors are misguided. "By limiting our exposure to air pollution, the Clean Air Act has not only saved lives but also vastly reduced cases of heart attacks, asthma attacks, bronchitis and other illnesses, thus cutting our medical bills – a huge drag on the economy," John Walke, clean air director at the Natural Resources Defense Council, said in a statement. "The study also exposes big industry's decades-long habit of crying wolf whenever the government has sought to strengthen health protections."

The report comes on the heels of an agency white paper showing that EPA clean air standards have created new jobs, particularly in the environmental technologies industry.

Despite the evidence, Congress continues to consider options restricting EPA's ability to protect the public under the Clean Air Act. The House-passed spending bill that would have funded the government for the remainder of the fiscal year contains at least 80 non-budget policy riders, many of which target the EPA's regulatory authority. The bill would prohibit the EPA from spending money to work on standards that would cut mercury pollution from cement kilns and set new limits on particulate matter. The bill would also forbid the agency from curbing climate-altering carbon pollution under the Clean Air Act. The bill has not passed in the Senate.

Consumer Products Reporting Database Under Attack

Corporations and their political allies are targeting a public database that allows consumers to file complaints about unsafe products with the Consumer Product Safety Commission (CPSC). Republicans in the House are trying to prevent the agency from spending money to implement the reporting site by blocking approximately $3 million in funding.

The CPSC plans to launch its Consumer Product Safety Information Database, at SaferProducts.gov, on March 11. Online reporting forms will allow consumers to report unsafe products to the agency and will allow businesses to review and respond to the reports. The site will also allow consumers to gather information by searching for specific products such as children's toys.

The 2008 Consumer Product Safety Improvement Act (CPSIA) required CPSC to create a publicly accessible, searchable database where consumers could find product incident reports and better inform themselves about the quality and reliability of a wide range of consumer products. The site is currently in its "soft launch" phase in which CPSC is testing its internal applications and procedures, according to the SaferProducts.gov website.

The major attack in Congress came from Rep. Mike Pompeo (R-KS), who proposed an amendment to H.R. 1, the spending bill passed Feb. 19 by the House for the remainder of fiscal year 2011. The amendment passed and would prevent the agency from spending any funds on the database, thus killing the launch if the bill becomes law.

Manufacturers and business associations like the National Association of Manufacturers have targeted the database for fear that inaccurate data will be reported by consumers and, as a result, profits could be hurt. In CPSC's testing of the site during the soft launch, however, "of the 900 complaints that were logged, four were determined to be inaccurate," according to a March 3 BNA article (subscription required).

The attack on the database is only the tip of the iceberg in the fight against CPSC's implementation of the CPSIA, according to a Feb. 21 *New York Times* article. The broadside against CPSC – one of many agencies under fire in the spending bill – is part of a broader attack on regulations and government's role in protecting the public by these same corporate special interests and politicians.

H.R. 1 was set aside as Congress passed another stopgap spending bill that runs through March 18. However, the House and Senate are already working on another spending measure that would continue until the end of the fiscal year. It is likely that the CPSC rider will be part of the bill developed by the House, but it is not likely to be supported by Senate Democrats. BNA reports that Sen. Jay Rockefeller (D-WV) called the effort to block funding for the database a "bad idea" and said the action would deny consumers valuable information.

Some of the benefits of the database include:

- The database will enable CPSC to recognize trends in product safety hazards.
- The database will provide potentially life-saving public information about unsafe products. CPSC is currently required to contact manufacturers about a potentially unsafe product before it releases information publicly; this process often results in delays in getting information to consumers.
- The database has built-in safeguards to limit the release of inaccurate or misleading information about products, including a period for businesses to review consumer complaints before they are posted publicly.
- In compliance with the CPSIA, the CPSC has spent considerable effort and resources preparing the database. To stop it from being implemented is inefficient and wastes the resources already expended.

Open government groups are also strongly opposing the attempt to kill the database. The groups are lobbying the Senate to prevent passage of any spending bill that defunds the database.

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In This Issue

Commentary: Congress's Backward Budgeting

Some in Congress are treating a recently released Government Accountability Office (GAO) report on duplicative federal programs as a recipe book for budget cutting. However, GAO's recommendations for fixes are more nuanced, and the report ultimately underscores the value of implementing effective program measurement tools and carefully calibrating federal spending to ensure that national priorities are addressed.

According to GAO's report, *Opportunities to Reduce Potential Duplication in Government Programs, Save Tax Dollars and Enhance Revenue*, addressing the issues raised would save billions of taxpayer dollars. The report served as the basis for a hearing by the House Oversight Committee to attack "wasteful" spending, and an amendment introduced by Sen. John Cornyn (R-TX) would use the report to rush program-ending legislation through Congress (see related article in this week's *Watcher*). Cornyn proposed the amendment during debate over an unrelated small business bill.

Although the backdrop for the report is the federal budget deficit and the need to find opportunities to improve the nation's fiscal situation, the report's recommendations should be seen as only a small part of the deficit picture. Defunding or completely ending some of the identified programs, while wholly compatible with good governance, would negligibly address our short- and long-term budget challenges.

The executive branch has already laid out its plans to address these issues. In his fiscal year 2012 budget request, President Obama identified 211 programs that his administration believes should be targeted for termination or reduction because they are wasteful or redundant. Should his proposal be adopted, it would yield $33 billion in savings. However, that $33 billion represents less than one percent of all federal spending and about two percent of the projected federal budget deficit.

To maximize taxpayer value, Congress and the president should be thinking about what's needed, what's not, and how best to identify programs as such. Our tax dollars support the programs and agencies that, when fully funded, reduce the chances that people will be sickened by contaminated food; ensure that cribs won't collapse and cause serious injury or death; make sure cars stop when drivers apply the brakes; sanction employers who cheat their employees out of earned pay; prevent oil spills; keep planes from falling out of the sky; and stop terrorist attacks.

While it's true that some federal programs attempt to address identical needs, eliminating any of them must be done with great care. If two programs exist that deliver the same services, eliminating one means expanding the other to ensure that the level of service provided to each population of need is maintained. The cost savings should be seen in the reduction of overhead and not in the wholesale dissolution of the operations of a duplicative program.

Nor should it be the case that two programs with seemingly overlapping missions be merged into a single program. For example, the Department of Health and Human Services (HHS) and the Department of Housing and Urban Development (HUD) both administer programs aimed at addressing homelessness. One HHS program targets people with mental health and substance abuse issues, while another is designed for homeless youths. HUD administers programs to assist homeless veterans, people with HIV/AIDS, and people with disabilities. The type of services that would help each of these communities varies, but the GAO report does not address this issue. Instead, the report highlights the problems that this apparent overlap causes for providers and beneficiaries both. In discussing homelessness programs, GAO notes that "[program] fragmentation can create difficulties for people in accessing services as well as administrative burdens for providers who must navigate various application requirements, selection criteria, and reporting requirements." This is an indication of need for better coordination among agencies and leaves open the question of whether there would be any gain – financial or otherwise – from ending or combining some of these programs.

The degree to which federal program missions overlap or are duplicative can be explained by two related phenomena. First, Congress, the executive branch, and the public have no way to trace federal spending from cradle to grave, from agency request to congressional approval to program execution. In short, there is no comprehensive map of federal spending. Instead, information is scattered across federal agency websites, the Library of Congress's THOMAS legislation database, the White House website, and various other sources. It is no wonder that Congress would create duplicate programs, as authorizing committees simply cannot query "homelessness" to obtain a list of the efforts currently being carried out by the executive branch.

Second, it is clear that Congress and the executive branch lack the tools necessary to perform effective program evaluation that could be applied to informing funding decisions. In the section discussing programs intended to address homelessness, the GAO's report notes that:

> Fragmentation of programs across federal agencies has also resulted in differing methods for collecting data on those experiencing homelessness. In part because of the lack of comprehensive data collection requirements, the data have limited usefulness. Complete and accurate data are essential for understanding and meeting the needs of those who are experiencing homelessness and to prevent homelessness from occurring.

Federal agencies should have access to relevant, high-quality program data when submitting their budget requests to Congress. Congress should also have access to the same data to help guide its funding deliberations. Outside stakeholders – those who are affected by program funding, involved in service delivery, and concerned taxpayers – should also have access to the same information so they can participate in the process. Without relevant facts to answer the crucial questions on program effectiveness, Congress, program managers, and outside stakeholders have limited ability get more value from every dollar spent.

Unfortunately, spending decisions are too often driven by a desire to give the appearance of addressing "the deficit problem." Rather than starting with the budget deficit, Congress and the president should be primarily concerned with the jobs deficit, the public protections deficit, the social safety net deficit, the infrastructure deficit, and the economic investment deficit. Congress and the administration should first consider whether the needs of the nation are currently being met, rationally assess the programs that are designed to meet those needs, and then allocate funding based on which programs most effectively meet those needs. Once this baseline level of necessary services is established, Congress and the president should design a system to fairly collect revenues to fully fund these programs.

Doing the opposite, that is, setting deficit targets and cutting spending to meet those targets, is just a backward method of budgeting that simply doesn't get the job done in a way that benefits the nation.

Cloaked in Good Government Garb, Sunset Commission Would Fast Track Spending Cuts

On March 16, Sen. John Cornyn (R-TX) proposed a controversial amendment to a small business reauthorization bill. The amendment would create a so-called "sunset commission," which is designed to identify and eliminate federal programs deemed unnecessary. The commission, billed as a "good government" measure by proponents, would likely operate behind closed doors, usurping the traditional oversight role of key congressional committees and potentially eliminating important programs.

Cornyn's commission is relatively simple. A panel of eight members, four from each house equally divided along party lines, would operate using a two-step process. First, at least once every ten years, it would create a review schedule, which would essentially tell Congress which agencies and programs the commission would review. Second, the commission would evaluate each item on the review schedule according to certain criteria to determine if it should be terminated, reduced, consolidated, or continued. The commission's recommendations would then be sent to Congress as a legislative package. If Congress does not reauthorize the agencies and programs in question within two years, the commission's recommendations would automatically be carried out.

To decide which programs would be reviewed, the Cornyn amendment provides enormous latitude. At least 25 percent of the items (in dollar terms) in the "Commission Schedule and Review" must come from a Congressional Budget Office (CBO) report on unauthorized and expiring appropriations and at least 25 percent must come from a Government Accountability Office (GAO) report on duplicative programs. The rest of the items can be composed of any other agencies or programs the commission chooses.

By law, CBO must compile an annual list of all unauthorized appropriations and expiring authorizations, which can include agencies, programs, or activities. Normally, congressional rules only allow appropriations for programs that have been authorized, but this is not always the case. In January, the CBO found some $767 billion worth of authorized appropriations that will expire on or before the end of the 2011 fiscal year, $725 billion of which comes from the National Defense Authorization Act.

The GAO is tasked with annually highlighting federal programs and agencies that have "duplicative goals or activities." The first annual duplicative programs report was released in early March.

Simply because a program is labeled "duplicative" or "unauthorized" does not necessarily mean the commission will automatically recommend the program for elimination, reduction, or consolidation. The commission will evaluate each program according to ten criteria set forth in the amendment:

A. The effectiveness and the efficiency of the program or agency.
B. The achievement of performance goals (as defined under section 1115(g)(4) of title 31, United States Code).
C. The management of the financial and personnel issues of the program or agency.
D. Whether the program or agency has fulfilled the legislative intent surrounding its creation, taking into account any change in legislative intent during the existence of the program or agency.

E. Ways the agency or program could be less burdensome but still efficient in protecting the public.
F. Whether reorganization, consolidation, abolishment, expansion, or transfer of agencies or programs would better enable the Federal Government to accomplish its missions and goals.
G. The promptness and effectiveness of an agency in handling complaints and requests made under section 552 of title 5, United States Code (commonly referred to as the Freedom of Information Act).
H. The extent that the agency encourages and uses public participation when making rules and decisions.
I. The record of the agency in complying with requirements for equal employment opportunity, the rights and privacy of individuals, and purchasing products from historically underutilized businesses.
J. The extent to which the program or agency duplicates or conflicts with other Federal agencies, State or local government, or the private sector and if consolidation or streamlining into a single agency or program is feasible.

However, there is no clear guidance in the amendment on how these criteria are defined or how they should be applied. A program could theoretically pass muster if it fails all of them or be eliminated even if it meets all of the criteria.

Both the Commission Review and Schedule and the commission's recommendations are fast-tracked through the House and the Senate. The review schedule and recommendations are introduced into relevant committees and must be reported out within 30 days. Action on the review schedule is swift: debate is limited to ten hours, and no amendments are allowed. The recommendations can only be debated for 50 hours before votes are held, although amendments are allowed both in committee and on the floor.

The fast-track and automatic termination provisions indicate that the commission would have tremendous power. Although Congress regularly creates temporary committees or commissions, such as the Congressional Oversight Panel that helped perform TARP oversight, rarely do these bodies have as much power as the proposed sunset commission. Eight members of Congress would have power usually reserved to whole committees in both houses, and Congress as a whole would be left with just a single set of recommendations in one bill, potentially involving hundreds of programs related to education, the environment, workers, housing, nutrition, transportation, and other vital issues and constituencies.

Another significant problem with the sunset commission is the opacity in which it would operate. The commission is not required to take any input from the public or to hold open deliberations. The commission's decision making process could occur entirely behind closed doors, and the public would never know the rationale behind decisions to eliminate or consolidate important federal programs. The only time the public would have any input on the commission's recommendations would be when those recommendations are up for a vote on the House and Senate floors.

The lack of transparency in the commission's deliberations is a serious issue, since the commission could theoretically include every agency and program listed in the CBO and GAO reports, as well as any other agencies or programs, in its review schedule. That could include almost 700 agencies and programs (close to six hundred programs up for reauthorization or whose authorization has already expired, almost one hundred duplicative programs) that Congress would then have to affirm within two years of receiving the commission's recommendations, a tall order for a body that only manages to pass a handful of contentious bills in any given year. Many of these programs would likely be terminated, reduced, or consolidated simply because Congress would not be willing or able to get around to voting on them.

Another concern is that the commission could be susceptible to political manipulation because the language that lays out the composition of the commission is vague. The amendment states that the Senate Majority Leader and the Speaker of the House shall each choose four members from their respective chambers. It does not, however, specify that minority members must be included in the selection process, only that no more than two members from each chamber can be from the same party. While in theory this means that Democrats and Republicans would each have four members on the commission, it leaves open the possibility that two members of a nominally different, yet politically aligned, party could join the majority party's members on the commission.

For example, Senate Majority Leader Harry Reid (D-NV) could choose two Democrats and the chamber's two independents, Sens. Bernie Sanders (I-VT) and Joe Lieberman (I-CT), who caucus with the Democrats and regularly vote with them. Under that scenario, the composition of the commission would be six *de facto* Democrats and two Republicans, giving the Democrats a huge advantage on a powerful commission. That situation could easily be reversed, with House Republicans stacking the commission with hard-core conservatives (assuming a handful of House members become independents and retain their conservative ideologies).

Some also contend that a sunset commission is simply unnecessary. Congress already has the power to reorganize government agencies and programs when it determines the need to do so, and the legislative branch revisits programs' effectiveness and continued existence each year through the oversight and appropriations processes.

Non-Competed Contracts Down Slightly in FY 2010

In February, the Inspector General (IG) of the Department of Homeland Security (DHS) completed an audit examining the agency's use of non-competed contracts in fiscal year (FY) 2010. The audit finds DHS significantly reduced its use of these risky contracting vehicles, lowering both the total real contracting dollars spent and the percentage of contracting dollars spent on sole-source contracts. An examination of other federal agencies' non-competed contract spending reveals a similar, though less dramatic, trend.

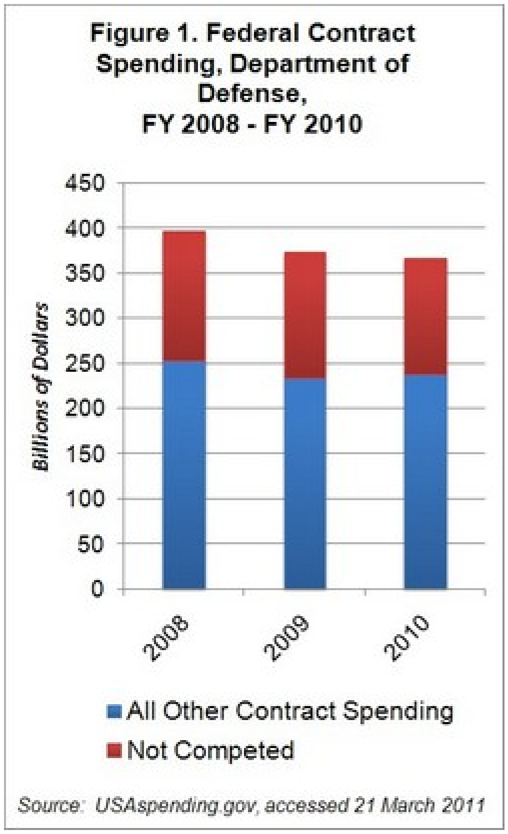
A March 7 *Government Executive* article trumpeted the IG audit, announcing, "DHS awards fewest noncompetitive contracts ever." The piece went on to relay that the agency obligated $1.3 billion in non-competed contracts in FY 2010, making up roughly 10 percent of DHS's contract spending. This total is down from $3.4 billion in FY 2009 and $3.5 billion in FY 2008, which made up 24 and 25 percent of the agency's yearly contract spending, respectively.

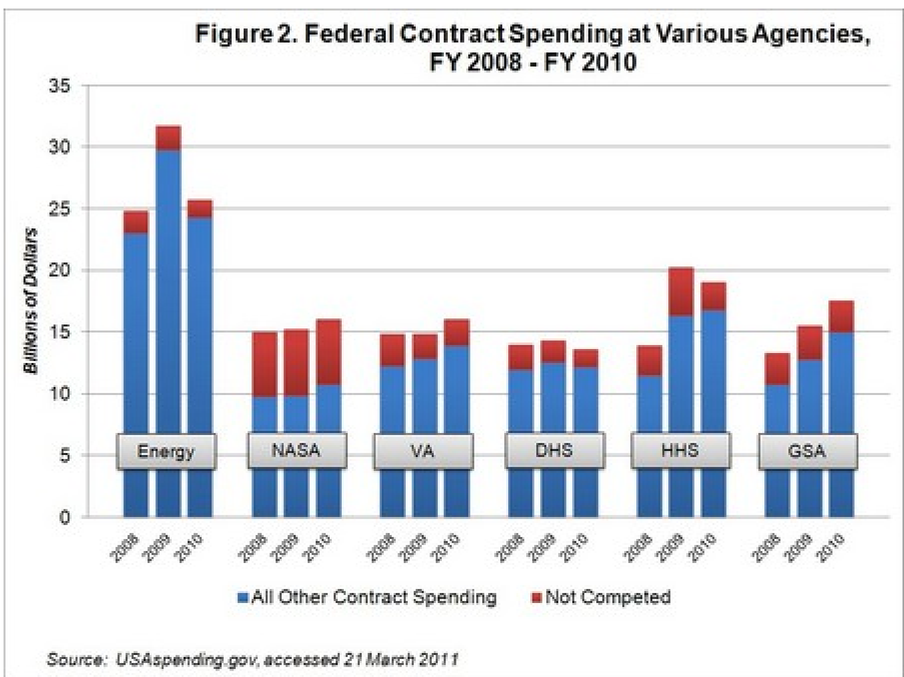
DHS IG personnel made use of the federal government's Federal Procurement Data System (FPDS) to aggregate their totals, but one can make a rough approximation of the results through USAspending.gov, which uses data from FPDS.

A small group of federal agencies spends the vast majority of federal contracting dollars each year and is a good representation of how the government spends taxpayer funds on contracting. The Department of Defense (DOD) is the largest spender in this group, making up approximately 70 percent of the government's yearly contract obligations.

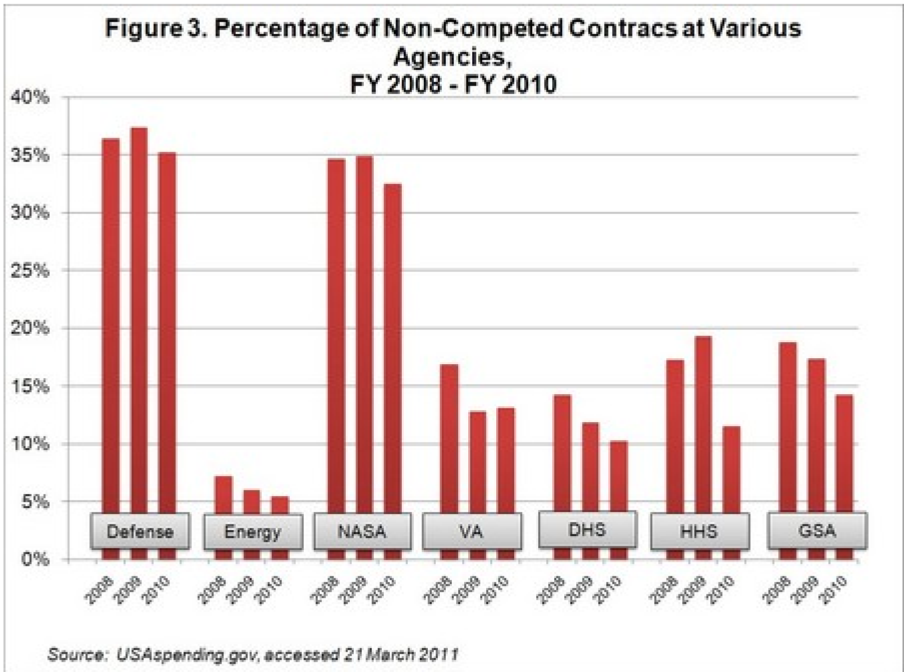
Together, the Departments of Energy, Veterans Affairs (VA), and Health and Human Services (HHS), along with the National Aeronautics and Space Administration (NASA), the General Services Administration (GSA), and DHS, make up another 20 percent, on average, each year. The other 10 percent of the government's contract dollars are spread over dozens of other departments and programs.

Looking at the seven agencies listed above, and combining only those contract totals listed under "not competed" and "not available for competition" in USAspending.gov, a rough pattern of reduced use of sole-source contracts similar to DHS's experience emerges.





Figures 1 and 2 show total contracting dollars and total non-competed contracting dollars spent by the seven agencies over the course of FY 2008 to FY 2010. Figure 3 shows those non-competed contracting dollars as a percent of total contracting dollars spent over that same period.



As can be seen in Figure 3, non-competed contract awards are decreasing as a percentage of total contract spending, yet they remain high at DOD and NASA, with both agencies averaging in the mid-thirties.

Some agencies, however, have seen significant reductions similar to DHS: HHS (Fig. 3) reduced sole-source contract totals from 17 percent of all contract spending in FY 2008 to 11 percent in FY 2010, and GSA (Fig. 3) reduced non-competed contract totals from 19 percent to 14 percent over the same period. Similarly, the VA (Fig. 3) saw a four percent reduction between FY 2008 and FY 2010. The Department of Energy, which is perennially the second leading spender of federal contracting dollars (Fig. 2), witnessed a less significant reduction, with non-competed contract spending reduced by only about two percent (Fig. 3).

When the Obama administration released its original contracting reform memorandum back in March 2009, the president specifically targeted the use of non-competed contracts:

> Excessive reliance by executive agencies on sole-source contracts ... creates a risk that taxpayer funds will be spent on contracts that are wasteful, inefficient, subject to misuse, or otherwise not well designed to serve the needs of the Federal Government [*sic*] or the interests of the American taxpayer.

The Office of Management and Budget (OMB) followed up with several sets of guidance released in July and October 2009. The July guidance instructed agencies to carry out two immediate tasks: reduce contract spending by seven percent by the end of FY 2011 and reduce the total use of high-risk contract vehicles, such as non-competed contracts, but also including cost-reimbursement, time-and-materials (T&M), and labor-hour (LH) contracts, by 10 percent in FY 2010. The October guidance provided broad guidelines for federal agencies that would allow them to continue the reductions sought in July.

Based on USAspending.gov data, most federal agencies are moving in the right direction. Even as many agencies' budgets have increased over the last three fiscal years, department heads have generally been able to keep the share of sole-source contract spending low, and some have even been able to decrease it as total contract spending grew. Only time will tell if these non-competed contracting figures continue to go down and whether the Obama administration can stick to its promise of reforming federal contracting and reducing taxpayer dollars used in risky contracting vehicles.

Congress Seeks to Reveal Toxic Drilling Chemicals

Congressional Democrats have reintroduced legislation that would disclose the hazardous chemicals used in drilling for natural gas. Cases of potential water contamination have been increasing as the nation experiences a boom in gas drilling and use of drilling chemicals. Secrecy surrounding the identities of the chemicals, many of which are known to be hazardous, has hampered efforts to protect public and environmental health.

On March 15, Rep. Diana DeGette (D-CO) and 31 cosponsors introduced the Fracturing Responsibility and Awareness of Chemicals Act (FRAC Act) in the House. On the same day, Sen. Bob Casey (D-PA) and seven cosponsors introduced a similar bill in the Senate. Hydraulic fracturing, or fracking, is a widely used process where water and chemicals are injected into wells at extremely high pressures to fracture underground rock formations and release trapped natural gas.

The FRAC Act amends the Safe Drinking Water Act (SDWA), the 1974 law that sets health and safety standards for the nation's drinking water and oversees state and municipal water regulators. The bill removes the oil and gas industry's exemption from regulation under the SDWA – a loophole created by 2005's Energy Policy Act – and requires disclosure of the chemicals used in fracking fluids.

According to Rep. Jared Polis (D-CO), a cosponsor of the bill, "The FRAC Act is a simple, common sense way to answer the serious concerns that accompany the rapid growth of drilling across the country. Our bill restores a basic, national safety-net that will ensure transparency within the industry and safeguard our communities. If there is truly nothing to worry about, then this bill will lay the public's concern to rest through science and sunlight."

Environmental advocates have compiled numerous cases of likely water contamination caused by hydraulic fracturing. A 2010 report by the environmental group Riverkeeper identified hundreds of cases of adverse environmental impacts linked to gas drilling. The report found impacts resulting not just from hydraulic fracturing, but also from "changes in land use, roadbuilding, water withdrawals, improper cementing and casing of wells, over-pressurized wells, gas migration from new and abandoned wells, the inability of wastewater treatment plants to treat flowback and produced water, underground injection of brine wastewater, improper erosion and sediment controls, truck traffic, compressor stations, as well as accidents and spills."

A recent documentary film, *Gasland*, which tracked the expansion of drilling and the connected rise in instances of water contamination and other health impacts, was nominated for an Academy Award.

Despite these documented impacts, the oil and gas industry consistently points to a lack of evidence that fracking contaminates groundwater or poses a public health threat. According to environmental groups, secrecy surrounding drilling operations, along with government failures to investigate possible contaminations – either due to the regulatory loophole granted to the industry or agency intransigence – keeps the public in the dark as to the nature and extent of health impacts.

Polis said, "There is a growing discrepancy between the natural gas industry's claim that nothing ever goes wrong and the drumbeat of investigations and personal tragedies which demonstrate a very different reality."

The FRAC Act contains important provisions that would meet many of the demands of environmental and public health advocates. However, drilling watchdogs stress that hydraulic fracturing is just one process among many in the development of fossil fuels that uses secret and harmful chemicals. From the exploration to the extraction, transportation, and processing of gas and oil at refineries, toxic chemicals pose a threat to public health and workers through leaks, spills, emissions, explosions, and other accidents. The disclosure of what chemicals are being used in each stage is necessary to monitor the health impacts of oil and gas development.

Advocates for this disclosure point out that it is very difficult to make definitive linkages between instances of water contamination and specific drilling operations when the public does not know what chemicals to test for or what chemicals have been used in the operations.

The FRAC Act would require drillers to disclose either to the U.S. Environmental Protection Agency (EPA) or to state regulators the specific chemical identities of the substances used in hydraulic fracturing. Drillers would be required to report before fracking commences, allowing the public to know what is planned, and after fracking concludes, allowing the public to see what actually went into the ground.

Under the bill, fracking chemicals would be identified in a number of ways, including the Chemical Abstracts Service number (CAS), a unique identifier that clearly identifies each substance. Drillers would not be able to merely disclose a product's trade name, which often fails to identify what chemicals are in a product.

The oil and gas industry has led opposition to the reforms called for in the FRAC Act, claiming that the chemicals used in the fracturing process should be considered trade secrets and not disclosed to the public (this excuse was also used to delay disclosure of the identities of dispersants used on the BP oil spill in the Gulf of Mexico in 2010). However, the FRAC Act does not require the disclosure of specific, proprietary chemical formulas except in the case of a medical emergency, where health professionals need to know the information in order to treat victims of exposure to the chemicals.

Many groups working to protect environmental and public health also want drillers to report on the chemical constituents of any wastes produced by oil and gas development activities, along with information about where the waste is disposed. This data is essential to any attempt to investigate potential contamination of water, air, and soil. Additionally, advocates have called for drilling companies to provide notices in local newspapers and direct mailings to residents and businesses in areas potentially impacted by their activities.

According to environmental advocates, greater transparency in the oil and gas industry will allow citizens to monitor industry activities and hold drillers accountable for harmful impacts. They point to numerous instances of excessive industry influence over federal and state regulators as evidence of the need for an informed public to defend against industry abuses and inadequate government regulation.

Another of the bill's cosponsors, Rep. Maurice Hinchey (D-NY), stated: "We need to know exactly what chemicals are being injected into the ground and we must ensure that the industry is not exempt from basic environmental safeguards like the Safe Drinking Water Act. The FRAC Act is an important first step toward protecting people from the risks of hydraulic fracturing."

The House version of the FRAC Act is now in the Energy and Commerce Committee. Strong anti-regulatory sentiment among committee Republicans presents an enormous challenge to further progress on this bill. The Senate version has been referred to the Environment and Public Works Committee.

Sunshine Week Brings Bevy of Transparency Announcements

America celebrated Sunshine Week 2011 between March 13-19. The White House and federal agencies announced several new transparency initiatives during the week, and Congress held hearings to examine government openness and introduced new transparency legislation. The open government community also released new reports examining transparency efforts within government.

New Websites

The Department of Justice's (DOJ) Office of Information Policy (OIP) announced the launch of FOIA.gov, a new website for the public to learn about the Freedom of Information Act (FOIA) and to explore data on agencies' FOIA performance. The agency had committed to developing the website as part of its Open Government Plan issued in April 2010.

The White House also launched a new Good Government portal, highlighting its efforts on transparency and accountability. During the week, the White House also posted several times on its blog to discuss its ongoing transparency initiatives.

The National Archives and Records Administration's (NARA) Office of Government Information Services (OGIS) launched a blog and released its first annual report. The Public Interest

Declassification Board also launched a new blog, which is publishing a series of papers for public comment. Data.gov, one of the administration's prime disclosure mechanisms, launched the Law community, which organizes and presents documents, such as agency decisions, to the public.

New Disclosures and Commitments

In addition to new websites and features, Sunshine Week saw some policy changes that commit the executive branch to new disclosures and other activities to support openness. As part of an effort to improve proactive disclosure of information and encourage greater accountability, the White House announced that agencies will post their staff directories online, as well as their congressional testimony and reports to Congress.

The White House also announced that OIP and OGIS would host a series of "Requester Roundtables," bringing together agencies and the public to discuss FOIA implementation. The goal of the meetings is to increase dialog between government agencies and those using government information to help set priorities, identify problems and find solutions. The first roundtable was held on March 21 at DOJ.

The Office of Personnel Management created a new job title for FOIA professionals and is exploring creating a new occupational series for FOIA-related staff. By creating the new titles, the administration hopes to create professional careers within agencies that will allow employees to progress while staying committed to disclosure and openness activities. In addition, the General Services Administration will update its government-wide contracts for services to assist agencies with FOIA processing.

Congressional Activity

The Senate Judiciary and House Oversight committees held hearings on FOIA.

Led by ranking member Rep. Elijah Cummings (D-MD), the Democratic members of the House Oversight committee introduced a bill, H.R. 1144, which contains several transparency provisions that passed the House in the 111th Congress. The Senate also saw transparency legislation introduced. Sens. Patrick Leahy (D-VT) and John Cornyn (R-TX) reintroduced Faster FOIA legislation, which seeks to reduce the backlog of FOIA requests throughout the federal government.

Reports

OMB Watch published an analysis of the government's FY 2010 FOIA reports. The analysis found that several openness indicators have improved, some for the first time in years, yet most remain worse than their average during the George W. Bush administration. The analysis concluded that though the Obama administration is making progress, the process remains far from complete.

OMB Watch also published a detailed assessment of the Obama administration's progress on implementing the open government community's 2008 transparency recommendations. The assessment explains the activities of the administration and Congress on the issues addressed in the wide-ranging recommendations and offers some insights on those actions. The report concludes that the administration has made significant strides in just two years but that much more remains to be done to create an open and accountable government

The National Security Archive released its annual FOIA audit showing that significantly more agencies were aware of and acting on the Obama administration's transparency policies than in 2009. However, several agencies still could not show any activities undertaken to implement the Obama administration's new policies.

OpenTheGovernment.org released an audit that shows that most agencies do not provide online access to key accountability information. Between Data.gov and the required open government plans, many agencies have made significant progress in providing data related to their specific mission or area of focus, but the report highlights the reality that most agencies have overlooked disclosure about basic government activities such as contracting.

Awards

The National Freedom of Information Act Hall of Fame inducted its five latest members, including OMB Watch's Sean Moulton. The FOIA Hall of Fame was established to honor those individuals who have helped establish, defend, and utilize the legal basis for our right to know.

The American Library Association (ALA) presented its 2011 James Madison Award to Patrice McDermott, director of OpenTheGovernment.org. The James Madison Award was established by the ALA in 1986 to honor individuals or groups who have championed, protected, and promoted public access to government information on the national level. OMB Watch is a member of the OpenTheGovernment.org coalition, and McDermott is a former OMB Watch staff member.

The American Society of News Editors announced the winners of its Local Heroes contest, recognizing achievements in improving state and local transparency.

Corporate Money Fuels Attack on Public Protections

An ongoing attack on the nation's regulatory safety net is being led by lawmakers with deep financial ties to the corporations and lobbying groups that often complain about federal standards, campaign finance data show.

The energy industry and other big polluters donated millions of dollars to the campaigns of top congressional Republicans in advance of the current legislative assault on the U.S. Environmental Protection Agency (EPA) and other environmental regulators. Other anti-regulatory interests have also donated large sums to campaign war chests, potentially influencing lawmakers' willingness to target other consumer, education, and health agencies.

In 2009 and 2010, Rep. Fred Upton (R-MI), chair of the influential House Energy and Commerce Committee, received more than $259,000 in contributions from electric and gas utilities and the oil and gas industry, according to data provided by the Center for Responsive Politics (CRP), available at maplight.org.

Upton is sponsoring a bill that would strip the EPA of its authority to regulate carbon pollution under the Clean Air Act. The bill is supported by many in the energy industry who are fearful of new and pending EPA standards that will require them to curb greenhouse gas emissions. Upton's committee voted to approve the bill on March 15.

The Energy and Commerce Committee also approved legislation that would undo a new Federal Communications Commission (FCC) standard intended to preserve a free and open Internet. The FCC's net neutrality rule would prevent carriers from interfering with the speed or ease with which customers access web content. Major service providers AT&T, Comcast, Time Warner Cable, and Verizon Communications, companies that could benefit financially if the net neutrality rule is lifted, donated $46,000 to Upton in 2009 and 2010, according to CRP data. Overall, these four companies and their employees donated more than $1 million to committee members in 2009 and 2010.

Investigations have shown that congressional criticism of the Department of Education over pending standards for for-profit colleges can be linked to campaign contributions from the for-profit college industry. Both *ProPublica* and *The Huffington Post* have detailed how campaign contributions have coincided with efforts by House members to convince the department not to go forward with the standards.

Rep. John Kline (R-MN), chair of the House Education and the Workforce Committee, has held four hearings in 2011 in which he and other panel members have criticized education regulations. According to CRP data, Kline received $61,400 from education interest groups, including significant contributions from Education Management Corporation and Apollo Group, owners of the University of Phoenix.

The attack on public protections, which has been waged largely from the House side of Capitol Hill, began in earnest in December 2010 when incoming chair of the House Oversight and Government Reform Committee, Rep. Darrell Issa (R-CA), asked corporate lobbyists to build a hit list of existing and proposed regulations that they wanted the new Congress to halt or undo. Issa received more than 100 responses from industries objecting to a variety of health, safety, environmental, and financial requirements.

Since the 112th Congress has convened, House committees have held scores of hearings on regulatory policy, regularly conducting ten or more in a single week. House Republicans have also introduced numerous bills designed to restrain agencies from setting standards that protect the public, including the Regulations from the Executive in Need of Scrutiny (REINS) Act, introduced by Rep. Geoff Davis (R-KY), which would require congressional approval of all major rules.

Congress Pushes to Strip EPA Authority to Regulate Greenhouse Gases

Congressional leaders are acting on several proposals to strip the U.S. Environmental Protection Agency (EPA) of its authority to regulate greenhouse gas emissions (GHGs). A House committee has passed one piece of legislation, and the Senate is expected to vote on a similar measure when it reconvenes in late March.

On March 15, the House Committee on Energy and Commerce approved H.R. 910, the Energy Tax Prevention Act of 2011, sponsored by Rep. Fred Upton (R-MI), committee chair. The bill now goes to the House floor for a vote (as yet unscheduled).

Upton's bill strips EPA of authority under the Clean Air Act (CAA) to "promulgate any regulation concerning, take action relating to, or take into consideration the emission of a greenhouse gas to address climate change." The bill also repeals several rules and actions, including EPA's endangerment finding (a scientific assessment required under the CAA that identifies GHGs as pollutants), an October 2009 rule requiring GHG reporting by polluters, and permitting requirements applied to states. The bill leaves states free to regulate or deregulate GHGs but severs those actions from federal law, overturning the long-standing framework of federal-state relations used to implement the CAA.

The agency is legally required to promulgate rules as a result of the U. S. Supreme Court's 2007 decision in *Massachusetts v. EPA*, which held that greenhouse gases should be regulated under the Clean Air Act if EPA found them to be a danger to public health or welfare. EPA made the endangerment finding in December 2009 after the Bush administration failed to act on the Court's decision.

Sen. James Inhofe (R-OK) introduced a companion bill to H.R. 910. Inhofe's bill, S. 482, has been referred to the Committee on Environment and Public Works, chaired by Sen. Barbara Boxer (D-CA), a strong supporter of EPA and a proponent of addressing climate change. No committee action on Inhofe's bill is scheduled.

Perhaps recognizing that S. 482 is likely to die in committee, Senate Minority Leader Mitch McConnell (R-KY) is trying to force a vote on the issue by means of an amendment to legislation reauthorizing parts of a small business bill that was recently debated on the Senate floor. McConnell's amendment, SA 183, is a repackaging of Inhofe's proposal. The Senate has not voted on the amendment, but votes are expected before the spring recess in April.

According to a March 15 article on CQ.com (subscription required), McConnell blamed EPA's rules and actions targeted in the Upton and Inhofe proposals as part of the reason for higher gas prices. This is a claim Upton has also made in an effort to generate support for his bill, according to the article. Those claims, however, were debunked in the article, which reports that experts claim Mideast instability is a key factor in rising crude oil prices.

The Inhofe/McConnell proposal has some Democratic support in the Senate. Sen. Joe Manchin (D-WV) is a cosponsor of Inhofe's bill, for example, and the proposal may gain the votes of other Democratic senators. Even so, it is unlikely that the amendment will garner the 60 votes necessary to pass. Even Manchin's colleague, Sen. Jay Rockefeller (D-WV), opposes the bill. Rockefeller was quoted by CQ as saying the Inhofe proposal represents a "complete emasculation" of EPA.

Rockefeller put forward his own proposal, S. 231, that would delay for two additional years any EPA regulation of stationary sources like power plants and oil refineries. He introduced the same bill in the last congressional session, but it was never acted on. S. 231 has also been referred to Boxer's committee.

These attacks on EPA are only some of the anti-regulatory broadsides that have been launched thus far in 2011. These assaults on public protections threaten workplace safety, public health and safety, and the environment. EPA has been the most frequent target of these attacks. Ironically, Congress has failed to enact climate change legislation in any form, leaving the agency no choice but to seek controls of emissions through regulations as required by the CAA and the Supreme Court.

Voters oppose legislation that would limit the EPA's authority to set greenhouse gas emissions standards, polling indicates. According to a poll released by the American Lung Association, "64 percent oppose [c]ongressional efforts to stop the EPA from updating standards on carbon dioxide" and 69 percent believe that EPA scientists, not Congress, should make decisions regarding clean air standards. 60 percent of voters support the EPA's efforts to limit GHGs, the poll found.

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In This Issue

The Long, Downhill Road to a 2011 Budget

Appropriations for fiscal year (FY) 2011 are now six months late. The fiscal year began on Oct. 1, 2010, but the nation is not much closer to having a budget than it was back then. As Congress comes face-to-face with the expiration of the current stop-gap spending bill, the budget's downward march may have stopped, but the possibility of a government shutdown still lingers.

The FY 2011 budget season began all the way back in February 2010 when President Obama released his yearly budget proposal. The big news then was that his budget included a three-year freeze, and although his proposal represented a $39 billion budget increase relative to FY 2010, some argued that increase was too small. The president's budget had a more lasting effect as a high-water mark. Since then, no politically feasible proposal has gone above the president's budget, and all have proposed at least some amount of cuts.

After the release of the president's budget proposal, all eyes turned to Congress, which, according to the law that sets the budget process, is supposed to pass a budget resolution in short order. This document establishes the upper boundaries of the year's budget and allocates funding levels to the appropriations subcommittees, which then create the yearly appropriations bills. A budget resolution is an integral part of the budget process and is supposed to be passed by both houses by April 15.

However, by March 2010, it was becoming clear that Congress would have a tough time passing a budget resolution. The main culprit was the House. The then-Democratic House had just finished the health care reform bill, and its more moderate members, particularly the Blue Dog faction, were watching their support wane back home. The last thing they wanted to do, according to press reports at the time, was vote through a "record breaking" budget with large deficits (thanks to inflation, every year usually sees a "record breaking" budget). Since Congress can vote through appropriations bills without a budget resolution, the House appeared inclined to not pass one.

The House's ambivalence echoed loudly in the Senate. That chamber reportedly refused to consider a budget resolution unless the House moved first. If the House would not pass a budget resolution, the thinking went, moderate Democratic senators would have no incentive to take a politically tough vote on a budget resolution containing a large deficit. Instead, holding individual votes on each of the twelve appropriations bills that make up the yearly budget seemed like a better alternative, since twelve votes on smaller bills would be easier than one big vote.

As a result, the Senate ended up passing a resolution only through its Budget Committee in April 2010. There was no floor action on the resolution. The House never even considered a resolution in committee and instead ended up passing a "budget enforcement resolution," a toothless, one-year budget resolution, in July 2010, which did not address long-term deficit issues. Both the House and the Senate resolutions contained cuts of around $7 billion, relative to the president's budget proposal. Overall, the resolutions would have resulted in an increase of about $30 billion compared to the FY 2010 budget.

With no budget resolution agreed to by Congress, uncertainty reigned on Capitol Hill. It was unclear how big of a budget Congress would be willing to consider. Into this void stepped two members of Congress: Rep. Pete Sessions (R-TX) and Sen. Claire McCaskill (D-MO). In March 2010, the two joined forces to create their own version of a budget resolution. Their proposal set top-line numbers for FYs 2011, 2012, and 2013, which were enforced by strict discretionary spending caps, and set very low limits for the amount of emergency spending in any given fiscal year. The Sessions-McCaskill proposal was $34 billion less than the president's request (representing a slight increase over FY 2010 levels), cuts far deeper than the ones the House and Senate were debating at the time, and groups like OMB Watch fought vociferously to make sure it did not become law. After contentious floor debate, the proposal narrowly failed in the Senate, losing by only a handful of votes.

With the demise of Sessions-McCaskill and the House and Senate reluctant to pass a budget resolution, Congress was left without a credible budget plan, and the entire process came to a standstill. Both houses worked sporadically on the appropriations bills but made little progress.

By the close of the last fiscal year in September 2010, Congress had not passed any appropriations bills for this fiscal year, and there was no end to the process in sight. Instead, Congress resorted to passing a series of continuing resolutions (CRs) to fund the government at FY 2010 levels.

Everything changed in November 2010 with the election of a new Republican House. Republicans claimed they were elected with a mandate to cut spending and vowed to block any spending proposals that did not include drastic cuts. Earlier in the year, House Republicans had released a campaign manifesto, "A Pledge to America," which called for a return to pre-stimulus, pre-bailout budget levels and an immediate $100 billion cut in the FY 2011 budget. Even the previously controversial Sessions-McCaskill proposal was deemed insufficiently bold.

Despite the Republicans' rhetoric, Democrats still controlled both houses of Congress for another two months, leaving some hope that they could pass a FY 2011 budget in a lame-duck session. Democrats tried to rally support for an omnibus package, combining all twelve appropriations bills into one giant bill, but they failed to win over any Republicans. Any deal needed Republican support to clear the Senate, and Senate Republican leadership decided they would rather wait for the new Congress, when they would control the House and have a larger minority in the Senate, than finish the FY 2011 budget in 2010.

This decision would drag the budget process out another four months. In February, the new Republican House leaders previewed their budget plan for the rest of the fiscal year, which cut $35 billion from the president's original request. Senate Majority Leader Harry Reid ridiculed the number, calling it "unworkable." House freshmen balked at the plan, saying that the Pledge called for $100 billion in cuts and that the House Republicans needed to stick to their campaign promises. Facing a revolt from the rank and file, House leadership scrambled to find new cuts, and early on a Saturday morning, they released a revised budget plan, H.R. 1. Without holding any hearings on potential changes, the House bill would cut $100 billion from the president's FY 2011 budget proposal, representing a $61 billion cut from FY 2010, a level House leadership claimed met the promise contained in the Pledge.

H.R. 1 easily passed the House over strident Democratic opposition but met overwhelming opposition in the Senate. The Senate responded with a seven-month CR, crafted by Senate Appropriations Chair Daniel Inouye (D-HI). That CR contained far fewer cuts than H.R. 1 but continued the steady path downward from the president's budget request. Attempting to meet Republicans half-way between H.R. 1 and the president's request, Inouye's proposal cut $51 billion, a $12 billion decrease from FY 2010 levels. Despite this gesture, Inouye's proposal failed to pass the Senate, falling by an even larger margin that H.R. 1.

With both H.R. 1 and the Senate's seven-month CR dead, prospects for some kind of a compromise are slim. Congress has continued to pass short-term CRs, making significant cuts each time. As the clock keeps ticking, and with the fiscal year almost half-way over, House, Senate, and White House negotiators have continued meeting but have failed to produce a viable compromise. Recent reports are citing a growing consensus around roughly $33 billion in cuts from the FY 2010 budget, or $73 billion below the president's request, with Democrats unwilling to cut any more than that.

However, it remains to be seen if House conservatives will accept such a compromise. Representatives such as Mike Pence (R-IN) are now calling for a government shutdown unless Senate Democrats capitulate to his party's demands, saying any compromise below the level of cuts in H.R. 1 would be betraying the Pledge to America. With the current CR ending on April 8 and some members of Congress vowing to vote against any more CRs, a government shutdown is a stark possibility.

The president met with congressional leaders today (April 5) to try to work out a deal. Even as the president convened the budget meeting, Boehner instructed his House colleagues to prepare for a government shutdown. The meeting concluded without a deal in place, but the situation remains fluid as of press time. Check OMB Watch's blog, *The Fine Print*, for late-breaking updates on the FY 2011 budget negotiations.

FY 2011 Budget Proposals (in billions)			
Proposal	**Total Amount**	**Difference from Obama FY 2011 Request**	**Difference from FY 2010 Enacted**
FY 2010 Enacted	$1,090	-$39	$0
Obama FY 2011 Request, Feb. 2010	$1,128	$0	+$39
Sessions-McCaskill, March 2010	$1,094	-$34	+$4
House Budget Enforcement Resolution, July 2010	$1,121	-$7	+$31
Senate Budget Resolution, April 2010	$1,122	-$6	+$32
House H.R. 1, Feb. 2011	$1,029	-$100	-$61
Senate Seven-Month CR, March 2011	$1,077	-$51	-$12

Improper Payments Provide Opportunity, Challenge to Administration

In fiscal year (FY) 2010, the federal government disbursed a little more than $125 billion in improper payments to the public, up from roughly $110 billion in FY 2009. Though total improper payment dollars have increased, the federal government is getting better at preventing these wasteful disbursements. Indeed, most federal agencies are only now finalizing implementation of the Obama administration's improper payments reduction effort, which began in late 2009.

Improper payments occur when the government sends a check to the wrong person, sends the wrong amount of money to the right person, or sends the right amount of money to the right person but that person ends up using the funds in an improper manner.

The administration took its first crack at addressing improper payments in November 2009 with an executive order (E.O.), attempting to increase transparency and provide agencies with better incentives and more accountability to help the government get a better handle on the scope of the problem. The initiative built on reforms started in 2002 that required federal agencies to account for the root causes of payment errors in programs susceptible to significant improper payments.

The E.O., along with guidance released in March 2010 directing federal agencies how to implement the new plan, called for "several new public disclosure requirements" that would increase the accountability of federal agencies for any lack of progress on reducing improper payments.

One result of the E.O. and guidance has been the Payment Accuracy website. Similar to other accountability-based, data-driven Obama administration websites, like the IT Dashboard and Recovery.gov, Payment Accuracy provides the public with a one-stop shop for information on the federal government's efforts to reduce improper payments.

One of the interesting aspects of the Payment Accuracy website is the inclusion of the names of two individuals at the program and agency levels chosen to be accountable for each of the 14 current high-error programs, meaning those that reported roughly $750 million or more in improper payments in 2009. This mirrors the Obama administration’s effort to increase accountability by publishing the identities of a program's senior accountable officials through its IT Dashboard. Some, however, have questioned whether these efforts are enough to increase accountability within Washington's notoriously impenetrable layers of bureaucracy.

Publishing the names of those accountable for high-risk programs is a requirement enacted under the Improper Payments Elimination and Recovery Act (IPERA), passed by Congress in July 2010. According to an official at the Government Accountability Office (GAO), "There are some attractive 'carrots' for agencies included in" IPERA:

> For example, agencies can use up to 25 percent of recovered funds for improving financial management; up to 25 percent for the program or fund linked to the overpayment; and up to 5 percent for inspector general activities. So, agencies can keep as much as 55 percent of the recaptured money, and the rest is returned to the general treasury.

With debates heating up in Congress over government spending, improper payments may play an outsized role in future budget negotiations. Indeed, GAO highlighted the federal government's proclivity to send checks to the wrong people in its recent and hugely popular report on duplicative programs.

Conservatives have picked up the improper payments issue, just like other similar potential savings in government, as a reason why Congress needs to reduce government spending. They tend to question why Congress should lavish the federal government with further funds when it already wastes over $100 billion. But this argument misses the point that many of these agencies need money to implement the administration's anti-fraud measures like fighting improper payments.

One of GAO's recommendations is for the administration to continue pushing its initiative, which shows that the watchdog understands the importance of breaking through the federal government's bureaucracy to enact real change.

That breakthrough will require Congress to fully grant the administration's funding requests for fraud-fighting measures, such as the Do Not Pay List. Created by a presidential memorandum in June 2010, the Do Not Pay List provides government employees with a consolidated database of people and organizations that are ineligible to receive government funds.

Though GAO warns, "[I]t is too soon to determine whether the ... [the administration's current initiative] will achieve [its] goals," there is vast potential for the government to continue reducing improper payments. Those efforts will only succeed if funds are available for implementation and if the level of determination from the White House holds steady.

Transparency at Risk in Budget Debate

Penny-pinching fever has engulfed Washington, with both parties eager to root out perceived wasteful spending. Several proposals look for savings in the government's information dissemination programs. While some of the proposals are carefully targeted reductions, others would slash funding indiscriminately with damaging consequences to some innovative transparency projects and programs.

Congress Proposes Cuts to E-Government

H.R. 1, the House-passed continuing resolution (CR) for the remainder of fiscal year (FY) 2011, slashes the budget for the Electronic Government Fund from $34 million to $2 million, a 94 percent reduction. The fund, which is managed by the General Services Administration (GSA), pays for transparency programs including USAspending.gov, the IT Dashboard, Data.gov, Challenge.gov, and Performance.gov, a site that is currently under construction.

The Senate rejected H.R. 1 as well as a Democratic-backed alternative that would have reduced the Electronic Government Fund by the same amount. Congress is scrambling to agree on a compromise before the previous CR expires on April 8 (see a related article in this week's *Watcher*).

The fund grew to its current level at the beginning of the Obama administration, in the FY 2010 budget, at the administration's request. The goals of the new initiatives seem to justify the increased funding. Indeed, a recent OMB Watch report identified e-government as a strength of the Obama administration's transparency accomplishments and noted several GSA projects in particular. President Obama's budget request for FY 2012 maintains the fund at its current $34 million level.

However, the cuts in H.R. 1 reduce funding to a level even lower than the pre-Obama years. Congress appropriated $3 million for the fund in FY 2008.

In July 2010, a Senate subcommittee approved $20 million for the fund for FY 2011, a substantial reduction that was still far less drastic than current proposals. However, the full Senate never voted on the bill. The equivalent House subcommittee did not report a bill.

The cuts in H.R. 1 are so steep that agencies are reportedly making contingency plans to shutter the sites if the CR is passed at the levels in the House bill. In a time of heightened concern about federal spending, it would be ironic for budget cuts to turn off the very websites that let Americans see how their tax dollars are spent.

As the deadline for budget action draws near, House Republicans have floated a different, shorter-term CR. H.R. 1363 proposes to provide $17 million for the Electronic Government Fund through the end of the fiscal year, which is roughly equivalent to the current level of funding. It remains to be seen if this CR will pass the House, if the allocation for the fund will remain at the proposed level, or if the Senate will take up a similar measure. Reports near press time indicated that the White House has rejected H.R. 1363.

Other Damage in H.R. 1

In addition, H.R. 1 sharply cuts the U.S. Environmental Protection Agency's (EPA) greenhouse gas reporting program, which will collect and make available data on the pollution that drives climate change.

H.R. 1 also includes a litany of unpopular policy riders, which attach conditions and policy changes to the bill. One of the riders prohibits funding for an online database of consumer product safety complaints developed by the Consumer Product Safety Commission.

Print Savings

While there are a host of cuts moving forward related to online information services, a variety of proposals have also been advanced to reduce spending on government printing. In January, the House unanimously passed H.R. 292, the Stop the OverPrinting Act. The bill would prohibit the Government Printing Office (GPO) from printing copies of bills and resolutions for members of Congress. A Senate version is pending.

Under current practice, GPO prints at least five copies of a proposed bill or resolution for each original sponsor, adding to an estimated 2.8 million copies in 2010, according to a press release by House Speaker John Boehner (R-OH). Hundreds of copies of each bill and resolution would continue to be printed and would be distributed through congressional document rooms. The bill would save a significant amount of the $7 million GPO is anticipated to spend on congressional printing in 2011, according to a press release by Sen. Tom Coburn (R-OK).

In February, the Administrative Committee of the Federal Register issued a notice amending the regulations for the *United States Government Manual*. Under the new rules, print copies of the manual will no longer be distributed free of charge to federal agencies, and it will no longer be mandatory to print copies of the manual in lieu of the electronic version. GPO may continue to print copies of the manual based on demand, and agencies requesting a print copy will have to pay for it. In FY 2010, nearly 9,000 copies of the manual were distributed to government agencies at a cost of nearly $89,000, according to records provided by the National Archives and Records Administration.

H.R. 235, S. 239, and S. 477 all contain language that would require the Office of Management and Budget (OMB) to develop a 10-year strategy to phase out unnecessary printing of government publications and take measures to reduce printing by government employees. H.R. 235 and S. 477 contain additional language to require each government publication to identify the number of copies printed and the cost of doing so.

Some legislative proposals target specific agencies or documents for printing reductions. H.R. 1246, by Rep. Allen West (R-FL), would reduce the Defense Department's printing budget by ten percent. S. 674 would end the printing of the *Congressional Record* except for a limited number of archival copies.

President Obama's FY 2012 budget proposes to reduce printing costs in several ways. The administration's government-wide efficiency initiative is targeting printing costs as an area for savings by eliminating some printing and making other printing more efficient. For instance, the 2010 SAVE Award-winning idea would end the print distribution of the *Federal Register* to federal employees, saving $4 million annually.

The administration's budget also includes several areas where agencies propose to reduce costs or improve services by shifting to electronic reporting or service delivery in lieu of paper. These include expanding electronic reporting at EPA and the Labor Department, implementing a new paperless claims processing system at the Department of Veterans Affairs, and increasing paperless transactions at the Treasury Department.

Other proposals are more rash. S. 162, by Sen. Rand Paul (R-KY), would eliminate the entire GPO budget, which was $94 million in FY 2010.

Seal Trumps Speech in False Claims Act Case

The U.S. Court of Appeals for the Fourth Circuit recently ruled against three public interest groups that sought to limit the government's ability to gag whistleblowers who file complaints under the False Claims Act (FCA). The ruling upheld a lower court decision to dismiss the suit.

The American Civil Liberties Union (ACLU) filed suit against the government on behalf of the Government Accountability Project (GAP) and OMB Watch. In *ACLU v. Holder*, the plaintiffs contended that the extended use of the FCA seal had violated the First Amendment as well as separation of powers. The plaintiffs sought to limit the government's ability to restrict the speech of whistleblowers related to their complaints.

The FCA is a tremendous tool that encourages whistleblowers to step forward with information on waste, fraud, and abuse in government programs. Under the FCA, whistleblowers may receive a percentage of the money saved by the government if their complaints are successful.

The law allows the government to seal cases for 60 days from the time complaints are filed to allow the Department of Justice to investigate and decide whether or not to proceed. However, in practice, these seals can last much longer, dragging out from months into years, during which time whistleblowers often feel they cannot discuss the problem or pursue other means of addressing the issue despite the uncertainty of government action.

The intended purpose of the seal is to protect whistleblowers from retaliation by providing them with anonymity until the complaint moves forward, and in many cases, that is still how the seal functions. But in some cases, whistleblowers are less concerned with anonymity and are eager to discuss the problems they have uncovered with members of Congress and the media. In those cases, the seal can act as a gag on a complainant.

The Fourth Circuit ruled 2-1 to dismiss the suit and maintain the government's authority to apply the FCA seal as it had been prior to the suit. The majority opinion found that the seal provision was narrowly tailored in three ways:

- First, that the seal is only supposed to last for 60 days
- Second, that a court gets to review the seal if the government chooses to extend it beyond the initial 60-day period
- Third, that the seal only limits whistleblowers from discussing the FCA complaint but not the underlying fraud

The third point, that "[n]othing in the FCA prevents the *qui tam* relator from disclosing the existence of the fraud" is close to the point that the plaintiffs sought to clarify with the lawsuit. However, the ruling also noted, "The FCA's seal provisions, however, only preclude a *qui tam* relator who wants to use the FCA to recover money from discussing the FCA complaint for a brief period of time." The concern is that whistleblowers using the FCA in hopes of recovering funds will find it difficult to discuss the underlying fraud without running the risk of discussing some aspect of the complaint. Rather than run the risk of invalidating their complaint, whistleblowers will discuss nothing about the underlying issues while the seal is in place.

The dissenting opinion by Judge Roger Gregory, however, found that transparency served an important purpose in holding the government accountable in its implementation of the FCA. Gregory wrote:

> The freedom to speak about FCA complaints bolsters the public role of relators and pressures the government to rigorously enforce the FCA—or to expeditiously decline to intervene. It also reduces the risk that the government will under-enforce the FCA for political reasons, such as against campaign donors. Indeed, there is reason to believe that speech about FCA under-enforcement remains important.

Gregory goes on to note that in reality, the government has interpreted the scope of the seal more broadly then limiting whistleblowers from discussing the specific complaint and agreed that the seal could limit the speech of those wishing to discuss the underlying issues. Gregory stated, "I am hard-pressed to see how any relator could still speak about fraud without violating the seal provisions or being chilled," and concluded that the government could threaten criminal charges against anyone who disclosed the basic facts of the fraud in an FCA complaint.

The plaintiffs have 45 days to decide if they will appeal the circuit court's ruling.

One Year Later, Massey Still Puts Miners at Risk

One year after an explosion killed 29 miners at the Upper Big Branch mine in West Virginia, the Mine Safety and Health Administration (MSHA) continues to cite the mine's owner, Massey Energy, for significant safety and health hazards at the company's other mines.

In February, MSHA reported that its inspectors had cited four Massey mines with 81 violations, 42 of which the agency considers "significant and substantial" – a designation reserved for especially dangerous violations. MSHA also found 85 violations at three other mines and one quarry not owned by Massey. MSHA chose the eight operations for "impact inspections" based on "their poor compliance history or particular compliance concerns."

The February impact inspections are the latest in MSHA's effort to more closely scrutinize high-risk mines in the wake of the April 5, 2010, explosion at the Upper Big Branch mine. The disaster once again thrust the issue of mine safety and MSHA, the federal agency responsible for protecting miners, into the spotlight.

After the blast, Massey Energy was also in the spotlight. The company had a long history of mine safety and health violations, but it often avoided additional scrutiny by contesting MSHA citations. Don Blankenship, then the CEO of Massey, was a controversial figure in the mining community. In July 2010, he said that, had Massey further resisted MSHA regulation, the explosion at Upper Big Branch may have been prevented.

Federal prosecutors have indicted Massey's head of security, Hughie Elbert Stover, for attempting to block the investigation into the disaster. Stover is accused of lying to the Federal Bureau of Investigation (FBI) and MSHA, as well as destruction of evidence. Additionally, several families of the miners and at least one miner who survived the accident have sued Massey.

MSHA's investigation into the Upper Big Branch disaster is ongoing. The agency plans to hold a public briefing on its investigation on June 29.

The disaster was the most deadly mining accident in the U.S. in 40 years. "As the anniversary of this tragedy so vividly reminds us, we in the mining community must continue to work tirelessly to ensure that miners go to work and return home safe and healthy to family and friends, every shift of every day," MSHA head Joe Main said in a statement. "That is the promise we make to miners and their families. That is the mandate of MSHA." To mark the one-year anniversary of the explosion, Massey Energy announced a one-day production stoppage and safety stand down at its underground coal production sites and a company-wide moment of silence on April 5.

Main says new legislation is necessary to protect miners. Speaking March 31 before the Senate Health, Education, Labor and Pensions Committee, Main called on Congress to provide MSHA with more flexibility to issue injunctions when it believes miners are in imminent danger, to make it easier for MSHA to seek criminal prosecution against the worst violators, and to strengthen whistleblower protections for miners.

During the hearing, MSHA's Pattern of Violations (POV) program was once again criticized. MSHA can add mines to its POV list, triggering additional monitoring and enforcement actions, but MSHA has never added a mine to the POV list in the program's 32-year history, according to the Department of Labor Office of the Inspector General. The Labor Department's Assistant Inspector General, Elliot Lewis, testified about the problems with the program and pointed out that "MSHA did not implement regulations for administering its POV authority until 1990." Main also said that new legislation should strengthen the POV program.

Committee Chair Sen. Tom Harkin (D-IA) and Ranking Member Mike Enzi (R-WY) both expressed interest in reforming the agency to better protect miners. In 2010, mine safety legislation was introduced in both chambers but never became law. Consistent with Main's recommendations, the bill would have raised penalties, reformed the POV program, and strengthened whistleblower protections, among other things.

However, passage of mine safety legislation is unlikely, as House Republicans have consistently balked at the idea of the government imposing new requirements on business. Legislation may also encounter resistance in the Senate. Sen. Rand Paul (R-KY), a member of the health panel and a founder of the Senate's Tea Party caucus, has expressed skepticism over mine safety regulation. During the hearing, Paul said, "There is a point or a balancing act between when a regulation becomes burdensome enough that our energy production is stifled." In 2010, then-candidate Paul responded to a question about the Upper Big Branch disaster by saying "accidents happen."

Regulating Political Advertisements: Looking Beyond the FEC

Over the past several election cycles, the statement that “I’m John Smith, and I approved this message” has become a ubiquitous part of the political lexicon. If the Media Access Project has its way, however, a whole new series of disclosures will become just as familiar to the American public.

On March 22, the Media Access Project (MAP) filed a Petition for Rulemaking with the Federal Communications Commission (FCC) that seeks to change the regulations for political advertisements – an area traditionally overseen by the Federal Election Commission (FEC). If adopted, the proposal would be an expansion of the FCC’s power to regulate in the political arena, a clear effort to avoid the deadlocked FEC. The FCC regulates communications technologies and, in recent decades, the Internet.

Until 2008, the FEC had operated with a surprising degree of efficiency, considering the challenges inherent in its setup. No more than half of the commission’s six members can be drawn from the same political party, and the agency may act only on a supermajority vote. Nevertheless, as a 2009 *Washington Post* editorial put it, "deadlocks have tended to arise sporadically, and in ideologically or politically charged cases, not in run-of-the-mill enforcement actions."

Before 2008, the FEC was able to reach a decision more than 98 percent of the time, according to an editorial in *Roll Call*. However, over the past two years, this collegiality has begun to break down: the agency deadlocked 16 percent of the time in 2009 and 11 percent of the time in 2010. A March 10 *New York Times* editorial lays out two of the most recent examples: on March 4, the FEC was unable to approve its professional staff's two recommendations for enforcement actions against state political parties (the Kansas Republican Party and the Georgia Democratic Party) that had clearly violated campaign finance laws.

The entrenchment seems to be about more than partisanship. According to a letter sent to President Obama by a number of campaign finance groups on March 15, half the current commissioners are "ideologically opposed to the campaign finance laws." One year after the *Citizens United v. FEC* decision, the FEC has failed to approve either of two proposed rules which would have started the process of putting the U.S. Supreme Court’s decision into law. This paralysis is beginning to have real consequences: it now appears likely that the 2012 campaigns will be conducted without any guidance interpreting *Citizens United*.

FCC as an Alternative

The Media Access Project – which is led by a former FCC commissioner – has petitioned the FCC to impose new disclosure requirements on political advertisements. MAP proposes that broadcasters be required to:

- Disclose the identity of all donors contributing at least 25 percent of the funding for a political advertisement
- Maintain a list of all donors contributing at least 10 percent of the ad's funding
- Obtain sworn statements from political advertisers about their largest sources of funding

The FCC, which is comprised of three Democratic and two Republican commissioners, is expected to be receptive to the proposal. Two Democratic commissioners have already announced that they will support the measure, while the Republicans are expected to oppose it. The chairman, Julius Genachowski, who has declined to publicly comment on the petition, was a major bundler for Obama's 2008 campaign.

Not unexpectedly, groups who have opposed other proposals to increase campaign finance disclosures have raised concerns about MAP's petition. They also raise practical considerations about the petition: that it would create different rules for broadcast advertisements than other kinds (for example, direct mail or online advertisements) and that groups that receive non-targeted donations would be required to arbitrarily select which of their donors to identify in any particular ad.

There are, of course, very real concerns about encouraging the FCC to depart from its current practice of deferring to the FEC to regulate campaign advertisements. However, the petition makes one thing clear: advocates for better disclosure of political spending are seeking creative solutions to the gridlock that currently paralyzes the FEC.

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In This Issue

FY 2011 Wrapped Up, Still More Bumps on the Budget Road Ahead

Even though the fiscal year (FY) 2011 budget battles are over, Congress is still deeply mired in fiscal work. News about "the budget" continues to flood the airwaves, along with breathless reporting about the impending debt ceiling crisis as federal debt levels reach their statutory limits. Incredibly large numbers are part of each new report, leaving many to wonder what's in the offing for fiscal policy in the coming months.

The FY 2012 Budget

Although President Obama released a long-term budget plan during the week of April 11, his official budget request for FY 2012 remains the one he released in February. The February budget sets out the president's policy priorities for the next fiscal year, although Congress often ignores it and only uses it as a benchmark for the legislative branch's own budget plans.

The policy highlights of Obama's FY 2012 budget are focused on a spate of high-profile spending cuts, including steep reductions to the Low Income Home Energy Assistance Program (LIHEAP) and a five-year non-security discretionary spending freeze. His overall spending levels reflected these cuts, and he called for only $3.729 trillion in spending, almost $100 billion less than what the Office of Management and Budget (OMB) predicted for FY 2011 levels (before the final continuing resolution was passed), with $456 billion going to non-defense discretionary items, a $50 billion decrease from FY 2011 estimates.

The FY 2012 budget battle became heated with the release of the House Budget Resolution, authored by House Budget Committee Chair Paul Ryan (R-WI). With a staggering $6 trillion in cuts over the next decade compared to Obama's budget, Ryan's proposal immediately grabbed headlines, most notably for its plans to turn Medicare into a voucher program and to convert Medicaid into a block grant to the states, resulting in $771 billion in cuts (over ten years) to the health care programs for low-income, elderly, and disabled Americans.

Despite all the flash surrounding its release, Ryan's proposal simply sets the top-line numbers of the budget, leaving many questions as to which non-defense discretionary programs would be subject to the $4 trillion in spending cuts (over ten years) called for in the budget resolution. The proposal sets a ceiling for spending and a floor for revenue for the next ten years. Any bills that violate either the ceiling or the floor are subject to a point of order in both houses of Congress, blocking the bill's passage (although points of order can be waived). However, since revenue and mandatory spending levels are written into law and do not have to be voted on every year, the budget resolution is most important for setting discretionary spending levels, which are then carried out through the yearly appropriations process.

Looking at the FY 2012 numbers, Ryan's budget remains substantially different from Obama's. With $3.529 trillion in total spending, Ryan cuts about $200 billion relative to Obama's 2012 budget. But the cuts are lopsidedly focused on only two areas: a handful of mandatory programs (including the Supplemental Nutrition Assistance Program (formerly Food Stamps) and higher education spending) and non-defense discretionary spending. The funding levels for these areas are slashed deeply, accounting for 88 percent of the savings in his FY 2012 budget. Everything else either sees relatively small cuts, or, in the case of Social Security and defense, sees no cuts compared to the president's budget.

Ryan's plan was adopted by the House in a 235-193 vote and has spurred a flurry of other plans. Both the House Budget Committee Democrats and the House Progressive Caucus released their own budget plans, and there are several budget resolutions being drafted in the Senate.

The President's Budget Speech

More importantly, Obama rebutted Ryan's plan by releasing his own long-term budget plan in a widely covered speech only days after Ryan unveiled his budget resolution. Obama's plan, too, has impressive sounding numbers, with the president calling for $4 trillion in deficit reduction over twelve years: $2 trillion from spending cuts, $1 trillion from tax reform, and $1 trillion from saved interest payments on the national debt.

However, Obama's plan contains few specifics. Unlike his February budget or Ryan's budget resolution, it does not include top-line numbers for FY 2012 or the following years. Since his plan was basically a speech, it represents the principles Obama wants to see enacted over the next decade. He said he wants to "keep annual domestic spending low," "find additional savings in our defense budget," "further reduce health care spending," and "reduce spending in the tax code." Additionally, there's a "debt failsafe," where, "[i]f, by 2014, our debt is not projected to fall as a share of the economy, then my plan will require us to come together and make up the additional savings with more spending cuts and more spending reductions in the tax code."

Obama did draw some stark, specific differences with the Ryan budget plan. First, Obama said any long-term budget reform required a mix of spending cuts and revenue increases; Ryan did not address revenue increases. Obama once again said he does not want to renew the upper-income Bush tax cuts, a proposal that seems to be widely supported in polls and would raise about $1 trillion. He also called for reforming the tax system, eliminating many tax loopholes, deductions, and credits.

Second, Obama drew a line in the sand on Medicare. While he called for reforms to lower costs, he strongly opposed shifting from a benefits program to an insurance program where individuals would receive vouchers to buy coverage, as proposed by Ryan.

Third, unlike Ryan's plan, Obama's would protect most low-income programs. The president argued that the country should not balance the budget on the backs of those most in need. Finally, Obama said he doesn't want to touch Social Security.

Republicans were taken aback by Obama's speech. They seemed to expect an olive branch in light of the recent compromises to complete the stop-gap spending bill for the current fiscal year. Instead, the rhetoric angered some Republicans, who immediately denounced the idea of increasing revenue to pay for deficit reduction.

Progressives seemed to be equally surprised by the speech. They wanted the president to focus on job creation instead of deficit reduction. However, within the context of a deficit reduction speech, many were pleased that the president identified key priorities to preserve.

It is clear that there are considerable differences between House Republicans and the president. About the only item there seems to be agreement on is no increase in non-security discretionary spending in the FY 2012 budget. Republicans now want Obama to specify what programs would be cut in the discretionary budget. Some congressional Republicans are even calling for Obama to release a new, official FY 2012 budget in light of his speech, but it is unlikely that he will do so.

The Debate on the Debt Ceiling and Implications for the Budget

The collision between Ryan's policy proposals and Obama's new long-term budget plan may take place as part of the debt ceiling debate. With federal borrowing rapidly approaching the $14.294 trillion debt limit, Republicans are demanding concessions in exchange for voting to raise the ceiling. According to the Treasury Department, the debt limit is likely to be exceeded by May 16. Treasury can use various maneuvers to delay default until around July 8.

There are many proposals for what Republicans may demand for raising the debt ceiling, including a balanced budget amendment or, more recently, Sessions-McCaskill-style spending caps, a proposal that was shot down multiple times in the last Congress. Obama may push for his debt failsafe as an alternative, but it isn't clear if that would be enough for Republicans who are seeking strict spending controls.

The Obama administration has said the vote on the debt ceiling should be separate from the debate on deficit reduction. Obama created a new deficit reduction panel, to be hosted by Vice President Joe Biden, that will meet on May 5 and involve House and Senate leaders. The goal of the panel will be to continue discussions about a legislative framework for long-term budget issues.

It remains unclear whether Republicans are willing to separate deficit reduction from the debt ceiling issue. Sen. Marco Rubio (R-FL), a Tea Party favorite, may have sent a strong signal when he said he would not vote for a debit ceiling increase unless it had "a plan for fundamental tax reform, an overhaul of our regulatory structure, a cut to discretionary spending, a balanced-budget amendment, and reforms to save Social Security, Medicare, and Medicaid."

Reports Detail Agency Efforts to Improve FOIA Implementation

New reports from federal agencies' chief FOIA officers reveal efforts to improve the performance of the Freedom of Information Act (FOIA) system. The reports show that many agencies have taken steps to improve their FOIA performance over the last year but that many challenges persist despite these advances.

Background

Agencies have long been required to submit annual FOIA reports quantifying each agency's performance on FOIA implementation. These reports contain data on the number of requests received and processed, the number of requests backlogged, the number of requests denied, the grounds for denial, and the cost of FOIA activities. Government and advocates then use these data to identify improvements and trouble spots, as in an OMB Watch analysis released during Sunshine Week in March.

In contrast, the chief FOIA officer reports explain the specific actions that agencies have taken to improve their FOIA performance. Agencies were directed to prepare the chief FOIA officer reports by Attorney General Eric Holder's March 2009 FOIA memorandum.

The reports focus on aspects of policy changed or emphasized by the Obama administration. For the 2011 reports, agencies were asked to describe what they have done to:

- Implement the presumption of openness;
- Efficiently respond to requests;
- Increase proactive disclosures;
- Improve the use of technology; and
- Reduce backlogs.

Agencies were also asked to spotlight a particular success story from their FOIA work.

Agencies submitted their first FOIA officer reports in March 2010. The Department of Justice (DOJ) posted a summary of the reports in July 2010.

Several agencies are currently not included on the DOJ list of 2011 reports. However, a report may be available on a non-included agency's website, as is the case with the Department of Commerce.

The Contents of the Reports

Several agencies reported updating their FOIA policies to support greater openness. For instance, the Department of Defense (DOD) is revising its guidance and expects to publish it later in 2011. The Department of Education (ED) published new FOIA regulations effective July 2010. The Department of Veterans Affairs (VA) recently issued a policy on making discretionary releases where an exemption could apply based on the likelihood of foreseeable harm.

Some agencies reported broader efforts to reform their FOIA performance. For instance, the U.S. Environmental Protection Agency (EPA) started a FOIA workgroup to review its policy. The VA is assembling a FOIA Backlog Working Group to examine its backlog.

Resourcing was a mixed story across the agencies. Some reports included information on the hiring of additional personnel. The Department of Energy (DOE) reported that "while budget is a continuing challenge, some offices have hired additional staff to process requests." The Consumer Product Safety Commission (CPSC) reviewed its staffing levels, and as a result, it hired several additional FOIA employees and contractors. Additionally, several components of the VA hired additional staff or contractors.

Other agency reports noted problems with understaffing. For instance, one component of the VA identified the need for additional staff but is unable to hire at this time due to budgetary constraints. ED suffered a reduction in staffing, which it named as a cause of the increase in the department's backlog; the department is in the process of returning to its previous staffing level. Some components of DOD reported being understaffed and have noted problems with high turnover and the burden of frequently training new staff.

Several agencies reported some success in closing their oldest requests. DOE closed five of its ten oldest pending cases, including the single oldest request, which dated back to 2000. ED closed seven of its ten oldest requests.

The reports also provided agencies an opportunity to explain the data reported in their annual reports, which vary widely in length. For instance, DOD reduced its overall backlog by 31 percent, while some DOD components reduced their backlogs by 90 percent or more. Meanwhile, the VA's backlog increased by two percent, despite receiving 42 percent fewer requests. The department noted, "We are currently unable to determine the root causes for the increase in the FOIA backlog in FY 2010." At the same time, of requests processed, the VA increased the percentage granted both in full and in part, to a combined 65 percent, up from 40 percent the prior year. In addition, the average time needed to process a request at the VA dropped from 36 days to 14. Additionally, ED credited its review process for reducing the use of Exemptions 2 and 5 by 40 and 38 percent, respectively.

Several agencies reported making use of information technology to facilitate the FOIA process. DOE established an online form for FOIA requests and began utilizing more of the capabilities of its processing software, such as electronic redaction. CPSC is systematically scanning its records into an electronic filing system and has also reviewed its processing software and will purchase the latest updates. DOD is developing a tool to automatically collect data on FOIA performance from its numerous components.

Some agencies used the reports to tout new online tools. CPSC highlighted its recently launched Consumer Product Safety Information Database at SaferProducts.gov. EPA noted that its MyPropertyInfo tool, launched in June 2010, has reduced the number of requests on specific properties prior to real estate transactions.

Regulations Do Not Hinder U.S. Job Market, Paper Finds

Regulations designed to protect consumers, workers, and the environment do not have a negative impact on the job market and, in some cases, actually spur job creation, according to new research from the Economic Policy Institute (EPI).

The EPI paper, *Regulation, Employment, and the Economy: Fears of job loss are overblown*, shows that recent criticism surrounding regulations' impact on jobs is misguided and not reflective of economic data. During the 112th Congress, lawmakers and industry lobbyists have made targeting federal rules a high priority and have frequently characterized regulations as "job killers." However, economic studies provide no evidence that regulation impedes job creation or leads to significant unemployment.

Most of the studies examining the economy-wide impacts of regulations have focused on the impact of environmental regulations. These studies "have consistently failed to find significant negative employment effects," according to the paper.

Studies examining the impacts of specific regulations on specific industries show that some regulations have a net positive effect on some industries and have cost jobs in other industries. Overall, "the preponderance of studies of various industries suggests that regulations have had a close to neutral effect or a moderately positive effect on employment levels," according to the EPI paper.

Since 2007, government data on "extended mass job layoffs" indicate that "only a very tiny fraction of such job layoffs (about 0.3 percent of the 1.5 million such layoffs each year) were attributed by employers to government regulations/intervention," the paper says. "Similarly, a study that reviewed job layoffs due to environmental regulations in previous decades found that such regulations caused much less than one percent of extended mass layoffs." By comparison, extreme weather-related events have caused more extended mass job layoffs than government regulation, according to the data.

The paper's authors, John Irons and Isaac Shapiro, also examined the effects of deregulation on the job market. "In particular, a wave of deregulation and the belief that financial markets can 'self-regulate' played a major role in the collapse of the housing bubble and the ensuing financial and economic crisis. Eight million jobs were lost in the Great Recession."

The paper also finds that under-regulation played a role in the BP Deepwater Horizon oil spill disaster and its aftermath, which, in addition to its environmental and human toll, continues to have a significant negative impact on the Gulf region's economy and job market.

The EPI paper, released April 12, is timely, as government regulation has become a hot-button issue in Washington. Lawmakers are increasingly complaining about the Obama administration's regulatory record, especially at health and environmental agencies such as the U.S. Environmental Protection Agency (EPA). Several bills have been introduced that would alter the regulatory process in order to make it more difficult for agencies to set public protection standards.

House committees have held dozens of hearings – with titles such as "Regulatory Impediments to Job Creation" and "EPA's Greenhouse Gas Regulations and Their Effect on American Jobs" – focusing on the regulatory process or individual regulations, often placing them in a jobs or economic context. Opponents of regulation rarely discuss the benefits of public protections, despite the fact that studies show that regulation can help the economy in addition to saving lives, expanding public welfare and opportunity, and preserving the environment.

The EPI paper examines those studies, including two recent reports, one by the White House Office of Management and Budget (OMB) and the other by the EPA, both of which show that the economic benefits of regulation far outweigh the costs of compliance. "[R]egulations have generally and consistently struck a reasonable balance, with their benefits to health, safety, and well-being far exceeding their costs," the paper says.

Few studies on the economics of regulations show them hurting the economy overall, and those studies that do exist can suffer from methodological shortcomings. One such study, prepared for the Small Business Administration (SBA) Office of Advocacy, says that regulations' annual cost to the economy is $1.75 trillion. However, the study is flawed for several reasons, according to the EPI paper. For example, the SBA study does not take into account the benefits of regulation, and the study's results have not yet been replicated, among other problems.

The EPI paper also finds that "debates over regulations have often relied on exaggerated estimates of the compliance costs they will produce." For instance, several studies by Resources for the Future concluded that the government's cost estimates tended to be overstated. In cases where cost estimates were found to be higher than estimates of actual compliance costs, they were at least 25 percent higher than the estimates supplied for the proposed rule, according to the EPI paper.

"Overall, the picture that emerges from this review is a positive one," the EPI paper concludes. "For decades, regulations have generally and consistently struck a reasonable balance, with their benefits to health, safety, and well-being far exceeding their costs."

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In This Issue

Commentary: Playing Chicken with the Debt Ceiling

Though it may be difficult to believe, Congress's budget trials and tribulations continue. While members of both parties are sorting through the details of April's fiscal year (FY) 2011 spending deal and sparring over the FY 2012 budget, the deadline to raise the nation's debt ceiling is fast approaching. Though the consequences of failing to increase the debt ceiling would be serious, some members of Congress have decided that they would rather play a game of "chicken" than address the issue in a responsible way.

In early August, the Department of the Treasury says, the federal government will hit the so-called "debt ceiling." Rather than quickly approve what should be a no-brainer, giving the Treasury authority to continue borrowing to finance spending decisions already agreed to by previous Congresses, some in Congress are letting the clock wind down as they argue over what conditions should accompany such a vote.

If Congress does not vote to raise the ceiling, the government will no longer be able to borrow money. And with the government borrowing 40 cents of every dollar it spends, the ability to borrow is essential to keeping the government operating.

Even more critical, however, is that without this borrowing ability, the federal government will default on its debt, throwing the world financial markets into turmoil. It would cause "catastrophic damage to the economy, potentially much more harmful than the effects of the financial crisis of 2008 and 2009," Treasury Secretary Timothy Geithner has warned.

Most Republicans and Democrats recognize that increasing the debt ceiling is one of a few "must-pass" pieces of legislation and are now making demands in return for their votes. What was once considered a simple part of making government work has turned into a politically loaded showdown with huge economic consequences.

Geithner has repeatedly called for a clean bill to increase the debt ceiling, but President Obama himself acknowledged that he will probably have to give in to some Republican demands. Compounding the failure of leadership, Senate Majority Leader Harry Reid (D-NV) first echoed the call for a clean bill but then softened his stance and endorsed deficit caps as a budget reform proposal "to prove that we're willing to do something about the debt."

In addition, some so-called budget hawks are demanding that a debt ceiling vote be tied to deficit reduction, while others are calling for significant budget cuts, spending caps, or a balanced budget amendment.

It seems strange to need a vote to raise the debt ceiling in the first place, much less a piece of legislation larded with other policy measures. After all, Congress has already decided to spend the money in question. Former Federal Reserve Chairman Alan Greenspan pondered this situation in an April appearance on *Meet the Press*:

> Why do we have a debt limit in the first place? We appropriate funds, we have tax law, and one reasonably adept at arithmetic can calculate what the debt change is going to be.... The Congress and the president have signed legislation predetermining what that number is. Why we need suspenders and belts is something I've never understood.

Indeed, in April, the House overwhelmingly approved a FY 2012 budget resolution that would add billions of dollars to the federal debt. Raising the debt ceiling is an unavoidable consequence of allowing the federal government to borrow money, money that Congress has already agreed to spend beyond the revenues it has agreed to collect. Failure to raise the debt ceiling would be Congress's "most asinine act," according to mega-investor Warren Buffett.

The consequences for not increasing the debt ceiling are grave. Right now, U.S. debt is considered the safest investment anyone can make; it is deemed to be risk-free. This is because investors trust the federal government to always pay off its debts. It's a reasonable trust because America has not defaulted on its debts in recent history and currently has more than sufficient means to continue to pay it off. However, if Congress refuses to raise the debt ceiling and the government cannot borrow to continue staying current on the debts already incurred, investors will likely find another country (like Germany) in which to relocate their money. This will greatly devalue U.S. debt, sending large ripples throughout the world economy. In a letter to its clients, economic analysis firm IHS Global Insight noted that "[f]ailing to service or redeem debt would lead to damage cascading though financial markets, as debt-holders would be unable to meet their own obligations..."

Additionally, the domestic economy, which is built on a bedrock of U.S. debt with low interest, could be thrown into chaos, as everything from home mortgage interest rates to credit card rates adjust to take into account the fact that U.S. debt is no longer the gold standard of risk-free lending. Federal Reserve Chairman Ben Bernanke testified before the Senate that default "would be extremely dangerous and [a] likely recovery-ending event." In the letter cited above, IHS analysts commented that "[i]t is hard to think of a bigger self-inflicted wound for a $10 trillion debtor than failing to service that debt."

In other words, not raising the debt ceiling should not be a policy option – not even as a threat.

Congress's dithering is already impacting the nation. In order to give the legislative branch more time before the debt ceiling is reached, Treasury has ceased selling special bonds to state and local governments that help them finance their operations. As Geithner detailed in a letter to Congress, the move "is not without costs; it will deprive state and local governments of an important tool to manage their outstanding debt expenses." The costs will only grow as we get closer to early August.

Commentary: Draft Executive Order on Contractor Disclosure of Political Contributions Is Important Accountability Tool

In late April, a draft executive order (E.O.) that had been circulating among federal agencies was leaked to the press. The draft order calls for potential federal contractors to disclose their political spending, and it has generated both support and harsh criticism.

In spite of the clamor emanating from conservatives and the business community, the draft E.O. is, according to some advocates (including OMB Watch), an important first step toward curbing the harmful effects of the deluge of corporate money that has begun flowing into our political system since the *Citizens United v. Federal Election Commission* case was decided by the U.S. Supreme Court in 2010. The draft E.O. is also a significant down payment on the president's campaign promise to address the growing influence of special interests in Washington.

As written, the draft E.O. would require "any entity bidding for a government contract to disclose political contributions to federal candidates or parties made within the past two years that, in aggregate, exceed $5,000." The disclosure would "include contributions made by the entity's directors and officers as well as its affiliates and subsidiaries." Disclosure would also include contributions made to third parties, including trade associations and 501(c)(4) organizations, that intend to use those funds to make independent expenditures in support of or opposition to candidates or to engage in electioneering communications, such as paid political ads. This is the first time third-party contributions would be publicly disclosed.

The disclosed information would be available through a searchable, downloadable database on Data.gov. Those that win federal contracts must certify that they have disclosed the information as a condition of receiving the award. The E.O. calls on the Federal Acquisition Regulatory (FAR) Council to develop rules to implement the E.O. by the end of 2011. Thus, the new disclosure requirements would apply to contract solicitations that occur before the next election cycle.

Conservative politicians and private industry trade groups, such as the U.S. Chamber of Commerce and the Professional Services Council (PSC), pounced on the leaked document, decrying what they claim is the draft order's partisan flavor. In what represents the standard refutation of the proposed E.O., 27 Republican senators sent a letter to President Obama on Apr. 26 urging him not to issue the order, which they contend "would make political considerations a part of every federal contract offer."

The letter makes three arguments. First, it states that the requirement that a potential contractor, including a company's directors, officers, affiliates, or subsidiaries, must furnish information about political activities to federal agencies would "have a chilling effect" on free speech. Second, the letter asserts that the requirement to submit this information directly to federal agencies would create "the appearance that contract award decisions could be predicated on – or influenced by – political contributions or considerations." Lastly, because the draft E.O. shares some similarities with the failed DISCLOSE Act, the senators claim that the order "may be an effort to circumvent Congress." Additionally, the letter raises a number of other operational questions, such as why the disclosure requirement looks back over a two-year period.

On the first point, there is nothing in the draft E.O. that would "chill" free speech. Detractors would like to paint this as the Obama administration attempting to pick political winners and losers through selective disclosure of political contributions. That argument, however, requires one to assume the president is acting in bad faith and using transparency as a shield. The charge withers when examined within the context of the Obama administration's efforts on government transparency.

In addition, corporations often act politically through their boards of directors, officers, affiliates, and subsidiaries, so it is not outrageous to ask for disclosure of their political contributions. And while free speech is an activity protected by the First Amendment, which implies some modicum of privacy, the Federal Election Commission (FEC) already requires disclosure of individuals' contributions when they exceed $200.

Critics are also peddling a false dichotomy when they make a related argument about the draft E.O. applying to the business community – an ostensibly pro-Republican lot – but not unions, an ostensibly pro-Democratic lot. First, the Internal Revenue Service (IRS) considers unions to be corporations under the tax code. Second, like any other potential contractor, a union would have to disclose its political contributions if it bid on a federal contract. Several unions currently bid for federal contracts.

More to the point, there is nothing in the E.O. that suggests that procurement officers are to use information about political contributions in determining who wins contracts. Final regulations can be clear that will not happen.

Furthermore, if an entity does not wish to disclose its political contributions, it need not apply for a federal contract. But what do potential contractors have to hide? Are they ashamed of their direct and/or indirect political contributions? Given the numerous pay-to-play scandals over the years, it would seem that disclosure makes sense here as long as the rules are very clear that procurement officers are not to use political contributions as criteria in selecting awardees.

Thus, charges that the "force-feeding [of political contribution] information to government contracting officers, who would otherwise never consider such factors in a source selection ... [would] inject politics into the source selection process" are unfounded and run counter to the public interest.

The third charge about making an end-run around Congress is a backhanded way of saying that President Obama is staying true to his belief that disclosure of corporate campaign spending is essential to democracy, as he acts within the bounds of the executive branch to do so. Indeed, there is nothing improper or illegal about the administration addressing the deluge of corporate money that the *Citizens United* decision allowed to start flowing into the political process.

In effect, this order would place a reasonable requirement on those wishing to do business with the federal government. The government already makes those wishing to receive taxpayer dollars comply with a number of requirements, from how they can and cannot use the money, to environmental and labor standards. A requirement to disclose political contributions may be no more burdensome than those requirements.

However, the fleshing out of the draft E.O. through federal regulations will be important because specifics are going to matter. One could imagine both burdensome and relatively burden-free requirements to impose on potential federal contractors about the reporting of their political spending.

The draft E.O. leaves determinations of who exactly would have to disclose and how they would have to disclose to the FAR Council, made up of top officials at the Office of Federal Procurement Policy (OFPP), the Department of Defense (DOD), the National Aeronautics and Space Administration (NASA), and the General Services Administration (GSA).

Many within the good government community have questions about the draft E.O., namely regarding vague wording, lack of enforcement mechanisms, and the potential ability to circumvent the order. For example, when the FAR Council sits down to work out the implementation of the E.O., how will it define "affiliates" and "subsidiaries"? These affiliates and subsidiaries will have to be "within [the company's] control." How will the council define that?

What will the enforcement mechanisms be? There are already requirements for lobbyists to fill out disclosure forms whenever they meet with an executive branch official, yet these forms often go unreported because there is no enforcement of the requirement. How will the FAR Council prevent the same thing from happening here?

As for third-party groups and circumvention of the order, it is unclear how far the requirement to disclose indirect political contributions would go. What happens when Company X provides funds to a third-party group and the latter does not use the money to engage in political activities but turns around and provides those funds to another third party that does?

The FAR Council will have many issues to grapple with if President Obama signs this draft E.O. Notwithstanding those questions, if you assume that political contributions are currently influencing the federal contracting process – which does not require a huge leap of faith – then this proposed order is necessary to shed light on the issue. It is reasonable for the government to ensure that the contracting process is free from corruption and undue influence by requiring at least a degree of disclosure by those who are showering political dollars upon it.

Senators Seek Medicare Transparency

A long-running dispute about access to Medicare claims data could be resolved by bills pending in the Senate. Proponents assert the measures could combat fraud and abuse in one of the federal government's most expensive programs and might also help improve health outcomes and consumer decision making.

Medicare is expected to spend $562 billion in fiscal year 2011, according to Congressional Budget Office (CBO) projections. Most estimates of waste, fraud, and abuse in Medicare range from $30 billion to $60 billion. By comparison, the entire budget for the Department of Homeland Security in FY 2011 is $42 billion. Moreover, Medicare expenses are anticipated to grow an average of 5.6 percent annually over the next decade.

History

In 1977, the U.S. Department of Health, Education, and Welfare – now the Department of Health and Human Services (HHS) – announced plans to release data on reimbursements paid to all providers of Medicare services. The Florida Medical Association and a group of Medicare providers sued to prevent the department from releasing the data and in 1979 persuaded the U.S. District Court for the Middle District of Florida to enjoin the department from doing so. The court ruled that releasing the information would have invaded the doctors' privacy.

In 2007, the U.S. District Court for the District of Columbia required HHS to release similar information. However, the U.S. Court of Appeals for the DC Circuit overturned the ruling, and the U.S. Supreme Court declined to review the case.

Almost all attempts to access the data through Freedom of Information Act (FOIA) requests have failed. However, in 2010, the Center for Public Integrity (CPI) and the *Wall Street Journal* settled a FOIA request for the data. As part of the settlement, the *Journal* and CPI received a randomly selected five percent of the data, on the condition that they not disclose the identities of the Medicare providers involved. The *Journal* used the information as the basis for a series of articles investigating potential fraud in Medicare payments. In January, the *Journal* filed a motion to intervene in the original 1979 case, asking the district court to drop the injunction and permit fuller information to be released.

The Patient Protection and Affordable Care Act, which was signed into law March 2010, included a provision (Sec. 10332) that requires HHS to make some of the data available to certain users for performance reporting beginning in 2012. However, the provision placed conditions on the release and restricted the data from being used against a Medicare provider in court or administrative proceedings.

Bills in Congress

In March, Sen. Chuck Grassley (R-IA) introduced the Strengthening Program Integrity and Accountability in Health Care Act. One provision of the bill would require HHS to make Medicare payment data available online. Grassley noted that USAspending.gov "lists almost all Federal spending, but it doesn't include Medicare payments made to physicians. That means virtually every other government program, including even some defense spending, is more transparent" than Medicare.

In April, Grassley and Sen. Ron Wyden (D-OR) introduced the Medicare Data Access for Transparency and Accountability Act, which expands on the provision in the earlier Grassley bill. The Medicare DATA Act specifies that the database must be searchable and free to the public. In addition, the bill clarifies that releasing the information does not qualify as an invasion of privacy.

Subsequently, Sens. Dick Durbin (D-IL) and John Cornyn (R-TX) introduced bills that would make the data available in a more limited fashion. Durbin's S. 856 would make summary data available to the public online and allow certain users to access the complete data with certain conditions. Cornyn's S. 848 would allow access for researchers, states, and certain other users, from whom the public would be allowed to request reports based on the data, with certain conditions.

All four bills have been referred to the Senate Committee on Finance, of which both Grassley and Wyden are members. None of the bills has been scheduled for mark-up.

Administration's Release of Health Data

The Obama administration has also taken a number of steps to reduce fraud and to make health care data, including Medicare data, more accessible.

- In April 2010, HHS launched Data.Medicare.Gov.
- The same month, HHS released its Open Government Plan, which included a number of initiatives to open data to the public.
- In February, HHS launched Health.Data.gov.
- Also in February, the HHS inspector general launched a list of most-wanted health care fraudsters.
- In April, HHS launched a new tool to compare data on patient quality between hospitals.

States Lead the Way on Contract Disclosure

Citizens have a right to know whether their tax dollars are being spent wisely. Unfortunately, the terms of government contracts are not routinely disclosed. A recent audit of ten federal agencies found that none of the agencies comprehensively posted contract information online. States, on the other hand, have begun innovating on contract disclosure.

Several federal agencies recently backed away from a proposal to make contract information available on the Internet, leaving public access to these contracts within the confines of the Freedom of Information Act (FOIA) process. However, posting government contracts online is not an impossible task. Indeed, several state governments post contracts online as part of their approach to procurement disclosure.

Why contracts?

Increasingly, the federal government provides services through contracts with private firms. According to data on USAspending.gov, federal spending on contracts more than doubled from $263.4 billion in 2002 to $537 billion in 2010. Yet information on contract competition, terms, and performance are only partially disclosed through a hodgepodge of systems including FedBizOpps.gov, USAspending.gov, and the Federal Awardee Performance and Integrity Information System (FAPIIS).

Some statistics indicate that many users are unsatisfied with the sporadic information available through related government websites and are turning to FOIA. For instance, in 2010, over 20 percent of FOIA requests to the Office of the Secretary of Defense and Joint Staff included requests for contracts. (Notably, the same office has begun routinely posting all FOIA responses on its website, making those contracts disclosed available to the wider public.) In September 2010, 29 percent of open FOIA requests at the General Services Administration (GSA) included contract requests. Better access to contract information has been a frequent request from the open government community; for instance, OMB Watch called for online contract disclosure in recent congressional testimony.

State Contracts Websites

Currently, at least 41 states offer the full text of at least some contracts online, according to research conducted by OMB Watch with assistance from Good Jobs First. While several state procurement disclosure systems are notably inferior to the federal system in various ways, particularly usability, some states have taken measures beyond those of the federal government.

For instance, Delaware's contracting website allows users to look up contracts by item or service and review the full awarded contract, as well as addendum history and information on the bidding process, including who submitted bids. The site provides a level of detail on specific contract awards that many federal agencies are unwilling to provide because of claims of confidential business information. It should also be noted that Delaware provides this central site as a service the public, as well as to state agencies. State employees needing a product can look up the relevant contract and initiate a purchase order through the system.

In some cases, firms that contract with the federal government also have contracts with state governments, and the full text of those contracts is available online. For example, in the New York contract system, users can view the full contract between Science Applications International Corporation (SAIC) and the State of New York. The same transaction is listed in USAspending.gov, but only basic information about the contract – amount, recipient, location, etc. – is available. That disclosure of full contracts can be so common at the state level undercuts the federal argument that this level of transparency is impractical to pursue.

One state-level innovation of particular interest is the disclosure of all bids, rather than just a successful bid. The Ohio contract website has a "bid tabulation" function that lists all of the bids for some state contracts. The bid history allows the state to prove that it got the best deal available. The public should care about quality as well as price, but absent competitive price information, it is impossible to know when to ask questions about quality.

State Approach and Attitude

Preliminary research indicates that these state contracting websites were often initially developed for the internal purpose of improving procurement and eventually transitioned to providing public accountability for the process. For instance, Servando Patlán, Procurement Reform Policy Manager of the Washington Department of General Administration, reported to OMB Watch that Washington's highly functional procurement website had been developed in such a manner. "When we re-bid the contracts, having the current contract posted helps potential vendors to see how competitive the current contract is and how competitive they need to be to compete against the current contract holder," he said.

Patlán also noted that some of the limitations on posting information are driven more by format issues than by concerns of confidential business information. "The solicitation document, the proposal documents, the standard terms and conditions and special terms and conditions, insurance and bonds information" are not included, he said, because they "are still mostly managed in paper form." These documents are publically available, but to get access, "interested parties may call to make an appointment to have the documents pulled from the file room and put into a viewing room in our office for review," said Patlán.

Like Washington, Oklahoma's site from the Department of Central Services started as a way to streamline internal operations and has evolved over its twelve-year existence into a means for public disclosure. Sara Cowden, Director of Special Projects, explained to OMB Watch the purpose of the website: "We work for the public, they should see what we are doing." Every "state-level" contract is posted online in its entirety for agencies, the business community, and the public to see. On the effect of contract disclosure on businesses, Cowden stated, "State agencies appreciate a central location to go for their purchase needs. Vendors appreciate the visibility afforded by the posting of state awarded contracts, as they may in turn generate their business opportunities with other government entities."

It is not clear why at the state level, disclosure of contracts could be seen as a benefit to businesses, but at the federal level, the same transparency is considered potentially damaging.

Conclusion

Despite the advances in federal government transparency, there are many promising innovations not yet pursued at the federal level. The success states have shown with their contracting websites proves that the federal government could implement such transparency while addressing agencies' and contractors' concerns.

Push to Cut Oversight of Businesses Roils Senate

Sen. Olympia Snowe (R-ME) is pushing legislation that would make it more difficult for government agencies to set health, safety, environmental, and economic standards that protect the American people. Snowe is using the debate over her bill to reinforce untrue stereotypes about regulation's impact on the economy.

Snowe is pushing her bill, the Small Business Regulatory Freedom Act (S. 474), co-sponsored with Sen. Tom Coburn (R-OK), as an amendment to an unrelated bill (S. 493) that provides financial aid and other help to small businesses. She is doing so in such a vehement manner that her actions are threatening to derail the underlying bill altogether. Senate Majority Leader Harry Reid (D-NV) has said he will not allow a vote on the Snowe-Coburn bill as an amendment to the small business aid bill.

In a testy exchange on the Senate floor April 14, Reid said that the Snowe-Coburn bill was not germane to the small business aid bill and that her insistence on including it as an amendment would jeopardize passage of the bill when the Senate resumed debate the week of May 2. "I am disappointed my friend from Maine is killing this legislation," Reid said. Reid also pointed out that the Snowe-Coburn bill has not been the subject of a committee hearing. Snowe responded, "I am just surprised that there is a new standard here because we have passed numerous pieces of legislation on the floor of the Senate that may not be subject to a specific hearing."

The row stems from Snowe's insistence that business lobbyists should be given additional opportunities to influence the rulemaking process and that agencies should water down health and safety standards if businesses object to their compliance costs. The Snowe-Coburn bill would require agencies to form panels of business representatives to review rules prior to the public comment period. It would also require agencies to conduct look-back reviews of existing rules on a regular basis and to consider reducing or waiving penalties if businesses are found in violation of health and safety standards.

To enforce the requirements on agencies, the Snowe-Coburn bill authorizes agency inspectors general to impose a one percent budget cut at an agency if it fails to review a rule properly. The bill would also allow businesses to sue agencies over the cost-benefit analyses they prepare during the rulemaking process, effectively allowing businesses to tie rules up in court before they can even be finalized.

Snowe says the bill is needed because the costs of regulation are too high. She regularly cites a study prepared by two economists, Nicole Crain and Mark Crain, for the Small Business Administration's Office of Advocacy. That study claims that the annual cost of regulations is $1.75 trillion. The statistic is included in the findings of the Snowe-Coburn bill, and Snowe also cited the figure in an opinion piece authored for *The Hill* and on the Senate floor.

However, the Crain and Crain study has been widely discredited. In an assessment of the study, the Congressional Research Service found shortcomings with the models used by Crain and Crain to predict regulatory costs and also noted that the study does not acknowledge the economic benefits of regulation. The nonprofit Center for Progressive Reform (CPR) published a report in February that found severe methodological problems with the study and concluded that "policymakers should disregard its misleading conclusions as they consider matters of regulatory policy."

Evidence actually shows that regulations can benefit the job market and the economy as a whole. A recent paper published by the Economic Policy Institute found that regulation can spur job creation in certain industries. The paper also found that regulations are generally beneficial for society and that cost-benefit analyses prepared by agencies before rules take effect often overstate costs and understate benefits.

Snowe also wrote in *The Hill*, "Too often, new regulations are piled on top of existing regulations without substantial consideration of the impact on those who will have to comply." However, agencies already comply with a host of analytical requirements under existing laws and executive orders. Agencies' regulatory cost-benefit reports, often hundreds of pages long, are exhaustive and can take years to develop. Additionally, two laws already exist requiring agencies to consider regulations' impacts on small businesses.

Snowe couches her bill as an attempt to help small businesses, but small businesses may be hurt and big businesses are likely to benefit from the legislation. As Rena Steinzor, president of CPR, points out, many firms that meet the legal definition of small businesses may employ 1,000 or more individuals, including petroleum refineries, which are permitted to employ up to 1,500 workers before losing their status as "small." These businesses could be tapped for the business panels all agencies would be required to form under the Snowe-Coburn bill, potentially squeezing out true small businesses. (Under existing law, only the Occupational Safety and Health Administration and the U.S. Environmental Protection Agency are required to form these panels.)

The Snowe-Coburn bill also calls for budget increases for the Small Business Administration's Office of Advocacy. To offset the increase, the bill would eliminate three existing small business programs: one to encourage drug-free workplaces, one to promote energy efficiency among small businesses, and one to help veterans start and maintain small businesses.

A May 4 vote to end debate on S. 493 failed, with only 52 Senators voting for cloture (eight short of the 60 needed). The vote could prove fatal to the small business aid bill, because the Senate is now expected to proceed to other issues. The vote fell strictly along party lines, with 52 Democrats and Independents voting for, and 44 Republicans voting against. (Three senators, including Coburn, did not vote.)

Watch What You Eat: A Groundbreaking Report on Food-Pathogen Combinations

Four months after President Obama signed the Food Safety Modernization Act (FSMA), a groundbreaking report from the Emerging Pathogens Institute (EPI) has highlighted the ten food-pathogen combinations that are the greatest burden on public health.

The FSMA, signed into law on Jan. 4, is a significant step toward implementing a proactive, public health-oriented food safety agenda, which the Obama administration laid out in July 2009. The FSMA expands the Food and Drug Administration's (FDA) regulatory authority by allowing it to order recalls of contaminated foods and requiring it to increase the number of inspections it conducts at high-risk food facilities.

The FSMA was drafted in response to concern about the prevalence of foodborne illness in the United States. According to figures from the Centers for Disease Control and Prevention (CDC), one in six Americans is sickened by foodborne illnesses each year. While most of these illnesses are mild, more than 100,000 Americans are hospitalized and 3,000 die as a result. Although this is an obvious area of concern for FDA and the Food Safety and Inspection Service (FSIS), the two regulatory agencies with the primary responsibility for guaranteeing our foods are safe, they are left with relatively little actionable information: the CDC tracks foodborne illness by pathogen but does not link the data to specific foods.

Researchers at EPI found that more than 95 percent of the annual illnesses and nearly 98 percent of the deaths can be attributed to only fourteen pathogens (disease-causing agents, such as bacteria, viruses, or other microorganisms). Because the impact of the different pathogens can be difficult to compare (e.g., the public health burden of a very rare but often deadly pathogen versus one that is more common but milder), the researchers set out two standard indexes of the burden posed by these top fourteen pathogens: monetary cost of the illness and the loss of Quality Adjusted Life Years (QALYs), a public health measurement of the discomfort and temporary or permanent disabilities caused by an illness. (One year of perfect health equals one QALY.)

By comparing this impact data to expert studies and records of foodborne illness outbreaks over the past eleven years, they produced the first-ever list of the ten food-pathogen combinations with the greatest cost to public health:

- *Campylobacter* in poultry, which costs $1.3 billion and causes a loss of 9,500 QALYs
- *Toxoplasma* in pork, which costs $1.2 billion and causes a loss of 4,500 QALYs
- *Listeria* in deli meats, which costs $1.1 billion and causes a loss of 4,000 QALYs
- *Salmonella* in poultry, which costs $700 million and causes a loss of 3,600 QALYs
- *Listeria* in dairy products, which costs $700 million and causes a loss of 2,600 QALYs
- *Salmonella* in complex (multi-ingredient) foods, which costs $600 million and causes a loss of 3,200 QALYs
- *Norovirus* in complex foods, which costs $900 million and causes a loss of 2,300 QALYs
- *Salmonella* in produce, which costs $500 million and causes a loss of 2,800 QALYs
- *Toxoplasma* in beef, which costs $700 million and causes a loss of 2,500 QALYs
- *Salmonella* in eggs, which costs $400 million and causes a loss of 1,900 QALYs

This ranking suggests obvious targets for reducing the incidence and impact of foodborne illness. While several of these pathogens are familiar, some of the conclusions suggested by the report are surprising:

- Foodborne pathogens are equally likely to be found in foods regulated by the FDA or FSIS. The EPI report suggests that diseases caused by contaminated poultry, pork, and beef – primarily regulated by FSIS – costs about $5.7 billion and 30,000 QALYs annually. Those in produce, dairy products, seafood, breads, beverages, and complex foods – within FDA's jurisdiction – cost about $6 billion and 24,000 QALYs.

  Deli meats and eggs, which are jointly regulated, cost an additional $1.8 billion and 7,000 QALYs. Salmonella, which causes more disease than any other foodborne pathogen, is found in foods regulated both by the FDA and FSIS.

  The FSMA focuses on increasing the FDA's food safety tools but does not include a parallel effort for FSIS. Some advocates have begun to call for legislation focused on strengthening regulations on meat and poultry production. In the meantime, however, there are opportunities for the agencies to work together on the most important food-pathogen combinations: the EPI report's authors suggest that the recently-formed Interagency Food Safety Analytics Collaboration, which includes CDC, FDA, and FSIS, could be used to explore interagency initiatives.

- Poultry is the single riskiest food, primarily due to contamination with *Campylobacter* or *Salmonella*. New FSIS regulations for these two pathogens are set to go into effect in

July 2011.

Department of Agriculture (USDA) data suggest that the public health impact of these rules will be quite small: a two percent reduction in incidence of salmonellosis and a less than one percent change in campylobacteriosis, according to experts. Nevertheless, these regulations are an important step forward: it has been more than 15 years since USDA tightened performance standards for *Salmonella*, and this is the first time USDA has acted to regulate *Campylobacter*. The agency's research suggests that a number of slaughter establishments will fail to meet the new standard.

- Four of the top ten pathogen-food combinations carry special risks for pregnant women: both listeriosis and toxoplasmosis can cause miscarriage, stillbirth, and neonatal death. The EPI report does not break out illnesses associated with pregnancy; however, it does cite previous studies that suggest that public education could make a difference. Pregnant women are often educated about the link between toxoplasmosis and pet cats but are less likely to know about the risk of contracting the disease from undercooked meat. Fewer than one in five pregnant women knew about the pregnancy-specific risks of *Listeria*, and less than one-third of the women who were aware of the risk understood which foods to avoid.

It has long been clear that America's food is not safe enough. Taken together, the top ten food-pathogen combinations cost about $8 billion and 37,000 QALYs each year. The EPI report offers both policymakers and regulators a roadmap to the most important risks on Americans' plates.

Workers Memorial Day and New Report Highlight Risk to U.S. Workers

April 28 marked Workers Memorial Day and the 40th anniversary of the Occupational Safety and Health Administration (OSHA). On the same day, the AFL-CIO released its annual report on the state of the health and safety of American workers, *Death on the Job: The Toll of Neglect*.

Workers Memorial Day was first celebrated in 1989 and is an international day of remembrance of workers who have died or been injured on the job, according to AFL-CIO's website. The date is especially notable this year because of OSHA's anniversary. 2011 also marks the 100th anniversary of the Triangle Shirtwaist Fire (March 25) and the one-year anniversaries of two other historic incidents, the BP Deepwater Horizon oil spill disaster (April 20) and the Upper Big Branch mine collapse (April 5).

Despite these reminders of workers maimed and killed on the job, there is a pronounced anti-regulatory environment on Capitol Hill and continuous attacks from corporations and business associations, which argue that a "tsunami" of regulations prevents job creation and hinders economic recovery.

Death on the Job annually tracks statistics on the numbers of workers who die or are injured on the job and highlights the most dangerous industries. The 2011 edition of the report notes that "the cost of job injuries and illnesses is enormous—estimated at $159 billion to $318 billion a year for direct and indirect costs of disabling injuries."

The most recent data in the report on deaths and injuries are from 2009 and rely mostly on preliminary data from the Bureau of Labor Statistics (BLS). According to BLS, on average, 12 workers die each day on the job. An estimated 50,000 workers die each year from occupational diseases.

In 2009, there were about 4,340 worker fatalities, down from the 5,214 deaths reported in 2008. "Industry sectors with the highest fatality rates were agriculture, forestry, fishing and hunting (26.0 per 100,000), mining (12.7 per 100,000) and transportation and warehousing (12.1 per 100,000)," according to the report.

The report argues that the BLS statistics are understated due to the lack of reporting or underreporting of injuries by employers. The report notes:

> In 2009, more than 4.1 million workers across all industries, including state and local government, had work-related injuries and illnesses that were reported by employers, with 3.3 million injuries and illnesses reported in private industry. Due to limitations in the injury reporting system and underreporting of workplace injuries, this number understates the problem. The true toll is estimated to be two to three times greater—or 8 million to 12 million injuries and illnesses a year.

The Occupational Safety and Health Act was signed into law in 1970 by President Richard Nixon and created OSHA, which began operations on April 28, 1971. *Death on the Job* contains data on OSHA standards, compliance staffing, and investigations, as well as data on state-level OSHA actions.

For example, the report contains a table on federal OSHA safety and health compliance staffing from 1973-2009, which displays total compliance staffing, the number of workers, and the number of compliance staff per million workers. These numbers illustrate, for example, that compliance staffing declined for six of the eight years of the George W. Bush administration, even though employment rose through 2007 before the most recent recession took hold.

Under the Obama administration, total compliance staffing and the number of compliance officers per million workers has been restored to about where it was at the beginning of the Bush administration, despite the decline in the number of workers during the recession. These numbers pale in comparison, however, to the peak numbers of compliance officers in the late 1970s. The report laments current enforcement numbers at OSHA, further debunking the anti-regulatory arguments that agencies, and particularly OSHA, are stifling business:

The number of workplace inspectors is woefully inadequate. The federal Occupational Safety and Health Administration (OSHA) and the state OSHA plans have a total of 2,218 inspectors (925 federal and 1,293 state inspectors) to inspect the 8 million workplaces under the OSH Act's jurisdiction. Federal OSHA can inspect workplaces on average once every 129 years; the state OSHA plans can inspect them once every 67 years. The current level of federal and state OSHA inspectors provides one inspector for every 57,984 workers.

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In This Issue

The Trouble with the "Pass-the-Hat" Funding Model for Government Technology Projects

Federal information technology (IT) spending is approaching $80 billion per year, and debate is swirling about who will pay for new government technology projects and how they will do so. The Government Accountability Office (GAO) recently examined one of the ways new projects are paid for: the “pass-the-hat” model, in which federal agencies contribute some of their funds to help support projects.

Rather than using funding expressly designated by Congress, a project under a pass-the-hat model is funded by contributions from other purpose accounts of multiple agencies, frequently prorated based on agency size or use. This model is different from “fee for service,” which also involves agency payments but is usually in return for specific services, such as payroll.

Many current transparency tools, such as USAspending.gov and Data.gov, do not utilize a pass-the-hat model, but instead are funded from one central fund, the Electronic Government Fund (E-Gov fund), which is annually appropriated by Congress to pay for transparency and technology projects. With Congress having cut the E-Gov fund by some 75 percent in the last fiscal year, pass-the-hat models may become a more attractive way to fund transparency initiatives in the future. But as GAO found, these models are inherently troubled and lack the accountability inherent in appropriated funding sources, making them less than ideal funding vehicles.

In its recent analysis, GAO focused on Grants.gov and highlighted a number of serious funding and governance challenges the site faces. Grants.gov is a large federal website, and as the GAO report notes, it serves as the portal for more than 1,000 federal grant programs from 26 federal agencies and processes some 250,000 grants each year. Grants.gov is intended to be a one-stop shop for federal grants: the site announces new grant opportunities from participating agencies, collects applications from potential grantees, and delivers them to the agencies for review. The only thing the site doesn't do is distribute funds directly to grantees.

However, Grants.gov is not performing well on the backend, and its pass-the-hat model is costing the government time and money, according to GAO.

Additionally, according to the GAO, the current funding system for Grants.gov is not equitable. The site, which is managed by the Department of Health and Human Services (HHS), uses a complicated formula for charging participating agencies. Essentially, Grants.gov contributions are based on agency size (as determined by the dollar amount of grants), percent of all grants posted to the site, and percent of applications submitted. However, the factors are not equally weighted, and as a result, the GAO found that large agencies are often penalized under the current model. For instance, the National Endowment for the Humanities (NEH) and the Department of Housing and Urban Development (HUD) have similar usage, with about the same number of grants available and grant submissions. But, since HUD is much larger than NEH, it is charged about $259,000 more than NEH, almost three times as much ($414,422 vs. $155,159).

At the same time, some agencies get more help from the Grants.gov office than others. For instance, some agencies frequently ask for updated application forms, while others only update their forms every once in a while. This help is not accounted for in the Grants.gov funding model and thus is provided without charge.

In other words, Grants.gov is not charging agencies based on use or costs incurred.

A second problem with Grants.gov's pass-the-hat model is that it is difficult to enforce. Since Grants.gov relies on the agencies for its funding, it is susceptible to the agencies' whims. As a result, it takes months for the funding to come through, with most of it coming late in the fiscal year. As of Sept. 16, 2010, Grants.gov was short some $370,000 in agency contributions for fiscal year (FY) 2010.

This is not an unusual situation for pass-the-hat projects, according to GAO, but the funding delay causes significant problems. "Until it receives its contributions," the report notes, "Grants.gov is generally not permitted to expend funds for system maintenance, upgrades, or any other activities or purchases." Instead, HHS must provide Grants.gov with basic funds to pay staff salaries and maintain office space until Grants.gov receives its member contributions.

Grants.gov's erratic funding stream has real consequences. Contracted work must be pushed to the end of fiscal years, when funds are most likely to be available for the site, regardless of when the work is needed. Managing and enforcing the contribution agreements are costly and time-consuming endeavors, since the Grants.gov model still requires congressional involvement, as the contributing agencies need Congress to sign off on their Grants.gov contributions. Managers of other pass-the-hat projects, such as Benefits.gov and the Disaster Assistance Improvement Program, agree that the funding uncertainty inherent in the model is one of their greatest management challenges.

Despite these problems, the Obama administration might be considering such a model for funding transparency projects in the future. Congress is intent on cutting, not growing, budgets, with the E-Gov fund just one victim of many. Instead of fighting Congress for a relatively meager amount of money ($34 million was the FY 2011 request from the administration), the White House may simply decide to skip the fight and pass the hat among the agencies, charging them for sites the E-Gov fund used to pay for.

However, congressional appropriations for specific transparency projects will ensure that important transparency websites remain online, rather than having their existence dependent upon the ability and desire of the administration in power to pass the hat to various agencies, seeking funding. If transparency projects, such as the IT Dashboard, are not funded adequately because an administration chooses not to go to bat for them, there is little accountability to the public. There are no hearings, no recorded votes, and too many potential reasons why the project wasn't funded.

Agency Performance Modernization Points toward Increased Government Efficiency

In January, President Obama signed the Government Performance and Results Modernization Act of 2010 (GPRA Modernization Act), updating a nearly 20-year-old law in an effort to increase government efficiency through funding choices. In April, the Office of Management and Budget (OMB) issued its first directives to federal agencies on how to implement the new legislation, and Congress has begun to conduct oversight related to the measure.

The original Government Performance and Results Act (GPRA) – passed in 1993 and signed into law by then-President Bill Clinton – helped shift the government from measuring its activities or agency outputs to measuring federal agency outcomes by evaluating the impacts a program or agency may have on the public or a segment thereof. In short, GPRA attempted to institutionalize performance budgeting, which creates a tighter connection between the amount of money Congress appropriates to a federal agency and how effectively the agency's programs accomplish stated goals.

The Obama White House championed the GPRA revamping in part as a way to refocus the performance tool and move away from the controversial Performance Assessment Rating Tool (PART), which was developed by the Bush administration to measure program performance unrelated to GPRA's statutory requirements. Good government groups, including OMB Watch, criticized PART as a vehicle for inserting ideology into the funding of programs through the routine act of reviewing performance.

The revamped GPRA will begin introducing short-term performance reviews, conducted every quarter, of specific, high-priority performance goals related to an agency's core mission. The GPRA Modernization Act also seeks to institutionalize the sharing and use of best practices among federal agencies and the introduction of cross-agency goals.

The Obama administration hopes those cross-agency goals, along with the communication necessary between agencies to work toward them, will help eliminate some of the waste inherent in supporting multiple federal programs and agencies working on the same problem, recently detailed in a Government Accountability Office (GAO) report – mandated by the GPRA Modernization Act – on government waste and overlapping programs.

On April 14, OMB released its initial directives for federal agencies to follow when implementing the new law. The April guidance sets the stage for further, more specific guidance over the next year. Until release of those later directives, agencies are required to identify a chief operating officer (May 2), name a performance improvement officer from among senior executives (June 1), and begin reviews on near-term, high-priority goals (June 30), which each agency identified in its fiscal year (FY) 2011 budget. In addition, agencies must begin thinking about the priority goals they each will submit for the FY 2013 budget.

To examine how federal agencies are doing in implementing OMB's latest directives, two subcommittees of the Senate Homeland Security and Governmental Affairs Committee held a joint hearing on May 10. Jeff Zients, the government's chief performance officer, told the subcommittees that he expects most agencies to meet their near-term deadlines and that a new website, performance.gov, will debut soon. The website will publish the names of each agency's chief operating and performance improvement officers, as well as an agency's performance against its priority GPRA goals.

John Griffith of the Center for American Progress recently rhetorically asked in a *Government Executive* piece whether the GPRA Modernization Act – suffused with government-speak about goals, data, and reviews – is just "another bureaucratic exercise in futility." Griffith says, "[N]ot necessarily." "When done well," he contends, "regular, goal-driven reviews can boost institutional performance dramatically."

Indeed, as Paul Posner, a professor of public administration at George Mason University and a well-known expert on government, recently reminded the joint Senate hearing, "[GPRA] is a success story and [those in and around government] shouldn't forget this." For a public that is habitually cynical about government and adheres to the conventional wisdom that Washington "will never make progress" and that "reform is a fool's errand," GPRA has enjoyed "17 years of sustained progress through three administrations."

That is not to say that the effort will not face challenges. Success of the GPRA Modernization Act, like the original law, is going to require buy-in by the senior leaders of federal agencies. As John Kamensky – a senior fellow at the IBM Center for the Business of Government and a key player in the design of the original GPRA legislation – acknowledges to Griffith, "For agency senior leaders to make that commitment, the reviews must cover issues that they see as critical to their mission." He adds, "This will likely require agencies to rethink their existing set of priority goals."

With that said, the Obama administration shows no sign of soft peddling this reform. Indeed, the White House's entire Accountable Government Initiative, which seeks to increase federal government performance using open government reforms to fight waste, fraud, and abuse, dovetails directly into the larger context of GPRA modernization and the idea that taxpayers should only pay for what works in the federal government.

EPA Suspends Chemical Reporting

On May 11, the U.S. Environmental Protection Agency (EPA) suspended the next submission period for the Toxic Substances Control Act's (TSCA) Inventory Update Reporting (IUR). The IUR is an inventory of chemical substances in commerce in the United States. The suspension came a month after the agency received complaints from House Republicans and the chemical industry about difficulties complying with new reporting requirements.

The IUR enables the EPA to collect and then make public critical information on the production, processing, importation, and use of certain chemicals. As previously reported in *The Watcher*, "[T]he IUR provides exposure-related data needed to understand chemical risks – information that is vital to identifying chemical risks to the public and environmental health and crafting regulations to protect them."

Currently, the IUR rule requires companies to file a report every five years for each chemical on the TSCA Inventory that they manufacture, process, or import, including basic information on the chemical's usage. The EPA issued a final rule, with no previous notice or opportunity for public comment, which suspended the next reporting submission period, scheduled between June and September. The information that would have been reported would have included data from the previous five-year period, 2006 to 2010.

In 2010, the EPA proposed many changes to its IUR rule that would increase the information required to be reported, the frequency of reporting, and the number of companies that would have to file an IUR report. The agency, which had last amended the IUR rules in 2003, proposed returning to many of the pre-2003 standards. For example, the 2010 proposed rule included returning the reporting frequency from the current five-year cycle to every four years. It would have also reestablished the previous reporting threshold, dropping it from the current 25,000 pounds back to the original threshold of 10,000 pounds. The proposed changes would have gone into effect for the 2011 submission period.

However, the announced suspension means that, for the time being, companies are not going to submit any chemical information. The EPA sent the Draft IUR Final Rule to the Office of Management and Budget (OMB) on Jan. 20, and OMB held at least six meetings on the rule (five with industry representatives and only one with environmental and public health groups). The suspension of the next submission period, according to the EPA, is to allow additional time to finalize the proposed changes to the IUR. The agency also stated that delay was "to avoid finalizing changes to the reporting requirements in the midst of the 2011 submission period."

Interestingly, the EPA noted that the reporting delay addressed concerns raised by chemical companies regarding the short time span between the final modification rule and the next submission period. On March 4, representatives from the American Petroleum Institute, Conoco Phillips, Occidental Petroleum, and ExxonMobil presented their concerns on the Draft IUR Modifications Rule to the EPA, including that the current 2011 submission deadline is unrealistic and should be extended because the proposed modifications have not yet been finalized. Richard Denison and Allison Tracy of the Environmental Defense Fund have provided detailed explanations of industry's complaints on the proposed changes.

The EPA's announcement also comes a month after House Energy and Commerce Committee leaders urged OMB to withdraw the EPA's proposed changes to the IUR. In a letter sent to OMB Director Jacob Lew on April 4, Energy and Commerce Committee Chairman Fred Upton (R-MI) and Environment and the Economy Subcommittee Chairman John Shimkus (R-IL) argued that the proposed rule fails to meet the requirements of the Paperwork Reduction Act and President Obama's Executive Order 13563 and "introduces needless burdens on the U.S. economy."

EPA's plans to finalize the proposed changes and to resume the chemical reporting requirement are unclear. The latest announcement states that the suspension is in effect until the IUR rule changes are finalized. However, there is no firm date for either the changes to be finalized or the suspension to be lifted. The agency acknowledged comments received from a coalition of environmental and public health advocates, including OMB Watch, but stated that it cannot respond to questions "about the appropriate timing for implementing the modifications until the modifications have been finalized."

The EPA's announcement was well received among industry representatives, but public interest groups highlighted the problems with the decision, especially on public health grounds.

Matt Shudtz of the Center for Progressive Reform said, "OMB continues to be a sluice gate to health and safety regulation, and it seems like industry's holding the controls. The public's health – in the form of protection from toxic chemicals – pays the price."

Declassification Board Seeks to Transform System

The Public Interest Declassification Board (PIDB) is seeking public comments on a series of draft papers offering recommendations on reforming the classification system. President Obama called for the recommendations for "more fundamental transformation" in tandem with his 2009 executive order on classification.

The board's eight papers outline proposals intended to improve public access to formerly classified information and to better manage the transition from paper-based to electronic records. In addition, the board invited public submissions of recommendations, which the board has organized into categories and will release the week of May 16. The board will also host a public forum on May 26 in Washington, DC, to discuss the proposals.

PIDB is an advisory committee appointed by the president and Congress and staffed by the National Archives and Records Administration's (NARA) Information Security Oversight Office (ISOO). Congress created PIDB through the Public Interest Declassification Act of 2000.

According to one of the board's papers, the "staggering volume" of classified material requires rethinking the current practices of classification and declassification. However, "the initial recommendations of the Board stop well short of anything that we would call transformation," wrote Steven Aftergood of the Federation of American Scientists' Project on Government Secrecy. There is broad agreement among government officials and experts that overclassification is a widespread problem. But according to Aftergood, "the Board does not propose any reductions in the scope of what is classified."

Instead, the PIDB proposals focus on technological and administrative reforms intended to ease the process of reviewing material for declassification. The board's first paper proposes creating software to assist the review process. The software would use rules and Bayesian inference to pre-screen material, allowing human reviewers "to focus exclusively on evaluating those pieces of information identified by the system" as requiring particular attention.

Another proposal would require classified digital information to bear standardized metadata. Such metadata could improve information management and identify relevant agencies, facilitating the declassification process.

The PIDB also proposes to develop standard procedures for handling congressional records for potential declassification. Classified legislative records are not subject to the same provisions as executive branch records; however, they may contain information that originated in the executive branch. In a comment on the paper, NARA's David Mengel notes that a pilot project is now underway to review classified Senate records at NARA's National Declassification Center (NDC).

One of the papers does address the prospect of reducing the amount of information that is classified. It also encourages broader use of discretionary declassification, paralleling Obama administration efforts to increase proactive and discretionary releases of information. However, in a comment on the paper, The Constitution Project's Sharon Bradford Franklin and Alison Roach argue that the proposal "lacks specific and concrete steps that agencies should take in order to meet those goals."

An additional paper proposes ending the concept of agency "ownership" of classified information. The current concept requires that a record be referred to each agency that contributed information before being declassified, which can be cumbersome and time-consuming. Instead, the paper suggests allowing either the agency that primarily authored the document to make declassification decisions, or making all declassification decisions centrally through the NDC.

Other papers propose reforming the handling of electronic classified information, prioritizing and streamlining the declassification of information of historical interest, and making a special category of information related to nuclear weapons subject to the general procedures of classified information.

The board's proposals have provoked a robust discussion in the comments. Those debates will likely continue with the response to the public submissions and at the public event scheduled later in May. There is no doubt that the current declassification system is failing; the various proposals deserve careful and open-minded consideration by the administration and Congress.

More than 100 Organizations Make Environmental Right-to-Know Recommendations to Obama Administration

On May 10, on behalf of more than 100 public interest organizations, OMB Watch presented a set of detailed environmental right-to-know recommendations to the Obama administration. Collaboratively drafted and endorsed by advocates from across the country, the recommendations aim to expand access to environmental information, equip citizens with data about their environmental health, and empower Americans to protect themselves, their families, and their communities from toxic pollution.

Though the Obama administration has launched several notable projects to improve transparency and accountability over the past few years, many environment and health advocates believe that Americans still lack adequate information to protect themselves, their families, and their communities from environmental harm. The 103-page report entitled, *An Agenda to Strengthen Our Right to Know: Empowering Citizens with Environmental, Health, and Safety Information*, offers specific recommendations on a variety of issues to address the perceived gaps in environmental information.

The Recommendations

The report is divided into five chapters, each corresponding to specific needs:

1. Improving access to information
2. Improving existing information sources
3. What new information is needed
4. Environmental justice
5. Empowering communities

Each chapter includes specific recommendations, organized under a number of subtopics.

Many of the recommendations involve detailed proposals calling for specific changes to how a certain agency performs a particular function. For example, chapter one includes recommendations for agencies to improve their Freedom of Information Act (FOIA) policies. These recommendations include increased training of FOIA officers and auditing FOIA responses to review the consistency and extent to which FOIA officers are fulfilling FOIA requests. Other recommendations, including creating new public affairs office policies, are more general, calling on the federal government to implement broad changes to reverse years of secrecy and isolation from the public.

There are three key priorities woven throughout the recommendations:

- Environmental justice must always be considered – Minority and low-income communities have historically borne a far greater proportion of environmental harm than other communities, and several recommendations address the need to improve data on this issue.
- Health risks from chemicals need to be better tracked and communicated to the public – There is a great need for more and better data on potential impacts to vulnerable populations, such as pregnant women and children, without overuse of restrictions such as trade secrets.
- Public participation has to start with the government – While there are many communities, organizations, and individuals across the country who are interested and concerned about environmental issues, the first steps to getting those people to engage must come from the government.

The report also includes several steps that the government can and should get started on right away. They include:

- Increase the collection and distribution of environmental justice data
- Fill data gaps on the harm from chemicals, as well as address information shortfalls on safer alternatives
- Ensure product labels disclose all ingredients and their associated risks
- Forge the Toxics Release Inventory into a more powerful disclosure tool
- Develop a unified facility reporting system

- Provide for worker and public participation.

The Environmental Information Initiative

The report is part of OMB Watch's Environmental Information Initiative (EII) project and is the result of a year-long collaborative effort. The project began in January 2010 with a small conference of advocates representing public health groups; labor organizations; local, state, and national environmental groups; and academic researchers. OMB Watch then organized several listening sessions across the nation and conducted interviews with advocates in various regions to gather information from stakeholders and to develop a draft agenda of policy recommendations.

In November 2010, nearly 100 public interest advocates from around the country convened in Washington, DC, to provide input on the recommendations. White House policy advisor Steven Croley, EPA Chief Information Officer Malcolm Jackson, and officials from the Departments of Interior and Health and Human Services spoke to the advocates and discussed several of the administration's open government initiatives, setting the stage for conversations on how to move the administration's transparency agenda forward and address environmental concerns.

Using input from conference participants, including a recommendations panel of 11 advocates with various backgrounds, OMB Watch finalized the recommendations and released them in report form on May 10.

Moving Forward

Several organizations have begun highlighting the report's significance to their work. Beyond Pesticides emphasized the importance of the report for addressing the current pitfalls with pesticide use and illness reporting data, noting that the recommendations include calls for required reporting and disclosure of this information. The Government Accountability Project (GAP) discussed the report's role for updating federal whistleblower protection policies, stressing that increasing transparency would protect workers and consumers, thereby strengthening food safety. GAP executive director Mark Cohen told OMB Watch, "The report is a significant tool for promoting greater government transparency and accountability." Climate Science Watch focused on the report's role in improving access to information and technical and policy experts, particularly for scientists, researchers, and the media.

OMB Watch, along with participating groups, is developing advocacy strategies to move forward with recommendations and make the most progress possible before the end of Obama's current term.

Obama Administration Weighing Rules to Keep or Repeal

On May 18, the Obama administration is expected to take the next step in its process for reviewing federal regulations. Agencies and the White House sit at an important crossroads: will they defend existing regulatory safeguards or weaken rules in an attempt to appease special interests?

Federal agencies are to submit to the White House by May 18 their preliminary plans for reviewing existing regulations. President Obama instructed agencies to develop the plans in a Jan. 18 executive order. Agencies are to make their plans public within two weeks.

Both defenders and critics of regulation are anxiously awaiting the plans. The plans, which are likely to differ from agency to agency, may provide information on which rules, if any, agencies plan to target for reform or repeal, thereby drawing the battle lines for upcoming debates over certain safeguards. The plans are also expected to propose an ongoing process agencies will use to evaluate existing rules now and in the future.

Obama indicated May 12 that his administration will likely eliminate some federal requirements. "We're actually looking through the entire *Federal Register*, which is where they keep all the regulations, and we're going through them and seeing what are some of these old laws that don't make sense anymore," Obama said at a town hall event televised on the CBS Early Show. He added that the administration is looking at "the regulations or paperwork burdens that we can eliminate while still making sure that we're getting the job done." However, Obama also called much of the criticism of regulation "overstated."

Criticism of regulation has come from all over Washington in recent months. Republicans and some Democrats in Congress have accused agencies of setting new health, safety, and environmental standards without adequately considering the rules' impacts on regulated industries. They have said that regulations hurt specific industries and slow job growth, even though the body of research on the subject shows that regulations actually help on an economy-wide basis.

Businesses have been lobbying the administration to eliminate critical protections. The Business Roundtable, a coalition of top corporate executives, has submitted to the White House two lists of proposed and existing regulations that the group wants withdrawn. The second list, sent to Obama in April, is dominated by requests to eliminate environmental protections for clean air, clean water, and safe oil drilling practices, among others. The letter also emphasizes the group's desire to shape implementation of the landmark health care reform law.

Obama has articulated his views on regulation cautiously. He has at times reinforced conservative rhetoric by casting federal requirements as a burden on businesses but has also spoken of the importance of health and safety standards. In a Jan. 18 *Wall Street Journal* op-ed that announced his executive order, Obama wrote about the need for a "balance" between the costs of regulation and their benefits to society. One week later in his State of the Union address, Obama said, "When we find rules that put an unnecessary burden on businesses, we will fix them. But I will not hesitate to create or enforce commonsense safeguards to protect the American people."

The "look-back" plans agencies are required to submit will provide another clue to the administration's posture toward regulation. Observers will also look to see whether the plans contain any specific rules to be targeted and whether those rules are also on the hit lists compiled by industry, such as the one submitted by the Business Roundtable.

Industry lobbyists have not limited their demands to looking back at existing rules; they have also targeted new and proposed rules for delay or outright elimination. For example, the U.S. Environmental Protection Agency (EPA) announced May 16 that it would delay "indefinitely" the implementation of a new boiler and incinerator standard that was designed to reduce toxic air pollution and prevent thousands of heart attacks and asthma attacks. According to the Associated Press, EPA made the move "in response to a request from industry groups."

After making their look-back plans public, agencies are required to collect public input, according to a memo issued by White House Office of Information and Regulatory Affairs Administrator Cass Sunstein. The Sunstein memo requires that agencies make their plans final between July 18 and August 6.

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In This Issue

Budget Process Stuck at Square One and In Danger of Irrelevance

From the outside, a great deal seems to be happening with the fiscal year (FY) 2012 budget process. The House debated a "clean" bill to raise the debt ceiling and is starting to vote on its yearly appropriations bills, and the Senate just voted on four budget proposals. But looks can be deceiving: despite these recent actions, the nation's budget process is teetering on the edge of irrelevance.

In the House, the appropriations process is moving along according to schedule. Unlike in 2010, when the House did not pass any appropriations bills until late July (and then only passed two bills out of twelve), the lower chamber is well on its way to passing at least two bills by the end of June. The House Appropriations Committee has already approved two bills, Homeland Security and Military Construction-Veterans Affairs, and both bills could be voted on in the full House in the coming days.

At the same time, the House voted on a bill to raise the debt ceiling, which the federal government is on track to hit in early August. Republicans in both houses have been calling for massive budget cuts in exchange for their votes on the debt ceiling, despite the fact that failing to raise the ceiling would result in a disastrous government default. However, the House vote was on a so-called "clean" bill, one without additional spending-related provisions; the legislation failed, 318-97.

In the Senate, debate continues to rage on the budget resolution. With the Senate Budget Committee waiting for the outcome of the bipartisan negotiations hosted by Vice President Joe Biden, the upper chamber is left without a budget blueprint for the coming fiscal year. To try to fill the gap, the Senate voted on four different budgets: the House budget passed in April, President Obama's budget, and separate budgets from Sens. Rand Paul (R-KY) and Pat Toomey (R-PA). All of the budget proposals were rejected.

However, all of these actions are mere distractions, since all of the votes are essentially meaningless. The House appropriations bills stand no chance of being approved in the Senate, since they are built on the House budget, which includes drastic cuts that are unacceptable to a Democratic Senate and president. The Senate budget vote on the House budget resolution was only held to put Republican senators on the record for supporting the effective dismantling of Medicare, with the other votes held for similar political purposes. Similarly, the House vote on the debt ceiling was meant to prove that a clean bill would not pass the House.

Senate Democrats are hoping to use the failed votes to argue against Republican budget cuts, and House Republicans are looking to do the opposite with the debt ceiling vote. In other words, these votes were meant to embarrass members on the other side of the aisle, not move legislation.

As a result of these theatrics, the budget process has not moved forward appreciably from square one. Instead, members of both parties are waiting for some kind of grand bargain to come from the Biden talks. These discussions, with four Democrats and two Republicans trying to hammer out a long-term budget plan, are many observers' last hope for a timely resolution to current fiscal debates. With Republicans unwilling to vote for a clean debt ceiling bill and Democrats reluctant to vote for any fiscal plan that does not involve at least some tax increases, the Biden talks could provide the compromise needed to raise the debt ceiling and move the FY 2012 budget process forward.

With everyone hoping for a grand bargain, however, the normal budget process is being left behind. Originally created in 1974, the current process introduces a form of checks and balances. One group of legislators (authorizing committees) approves programs, another (budget committees) sets the overall budget spending targets, and a third (appropriations committees) allocates money to approved programs. While the last group, the appropriators, is considered the most powerful, since they control the actual purse strings, all three groups have some power over each other.

The purpose of the annual budget process is to rationalize a subset of all federal spending. This subset, known as discretionary spending, accounts for about one third of all spending; the other two thirds is composed of mandatory spending (with most of that going to Social Security and Medicare) that is determined by other legislative vehicles. The annual budget process gives the relevant congressional committees a chance to assess the impact and value of the thousands of federal programs funded through discretionary spending. In this system, both the Budget Committees and the Appropriations Committees work to set the overall level of spending. And since the process has to be completed in both houses, there is double the number of spending decision points.

The budget process also allows for some measure of transparency and public participation. At every stage, committees hold hearings on their jurisdiction. The Budget Committee holds hearings on the budget blueprint, and the authorizing committees hold hearings on the programs under their jurisdiction. The hearings allow elected representatives, administration officials, and members of the public to critique or defend federal programs and proposed spending decisions.

What was created to control spending has now turned into a system with too many roadblocks. The Senate, which already gives an inordinate amount of power to individual senators thanks to the chamber's filibuster rules, is now paralyzed every step of the way, with neither appropriators nor budget-makers willing to follow the process. And while the House is passing appropriations bills, its efforts are simply resulting in starting positions for the budget negotiations to come, rather than a straightforward assessment of the budgetary resources necessary for federal programs to achieve their goals.

Indeed, the budget process currently in place has been effectively disregarded. FY 2012's budget "process" will likely be similar to last year's: upon failing to pass all twelve appropriations bills necessary to fund the federal government at the start of the fiscal year on Oct. 1, Congress will pass a series of stop-gap "continuing resolutions," likely followed by grandstanding for political gain, all to be resolved via a closed-door compromise solution after a series of budget crises like those seen earlier in 2011.

Breakdowns like this end up hindering transparency as well as frustrating attempts to honestly gauge the impact of federal programs and set spending levels accordingly. There is little to no public discussion about programs or funding levels. Any agreement coming from either the Biden talks or another, last-minute compromise will only involve top-line numbers, which will have been made without any consideration for specific programs. As a result, vital programs could be cut simply because they do not fit under arbitrary caps or other agreed-upon devices.

OMB Properly Addressing Improper Payments

On May 23, the Office of Management and Budget (OMB) announced the launch of four new pilot projects designed to further crack down on improper payments from the federal government. The projects focus on implementing best practices and sharing information across state and local governments that help administer payment programs in the departments of Health and Human Services (HHS), Agriculture (USDA), Labor (DOL), and Treasury.

As recently detailed by Kellie Lunney of *Government Executive*, the projects "are a result of collaboration among more than 200 state and local officials and other stakeholders on ways to reduce waste, fraud, and abuse," called the Collaborative Forum, and include:

- The Treasury Department working with states to help better collect outstanding federal debt through existing debt collection systems
- DOL providing states with greater access to unemployment insurance databases to better identify persons not eligible for benefits
- The Food and Nutrition Service (FNS) of the USDA facilitating the sharing of benefits information between states to make sure only those persons that qualify receive benefits
- The Centers for Medicare and Medicaid Services (CMS), under HHS, sharing a Medicaid provider enrollment system with states in an attempt to help detect and prevent provider fraud

OMB estimates the pilot projects could help the federal government save upwards of $100 million annually. While those savings seem trivial compared to the estimated $125 billion in improper payments made in fiscal year (FY) 2010, the success of these pilot projects could demonstrate the viability of sharing information and best practices with state and local governments across all of the government's 13 "high-error" programs.

President Obama has made increasing government efficiency and accountability a top priority of his administration and, along with reforming the contracting process, reducing improper payments has been at the top of his list. Within his first year in office, Obama signed Executive Order (E.O.) 13520, which, along with the Improper Payments Elimination and Recovery Act of 2010 (IPERA), called for federal agencies to begin better quantifying the problem of improper payments.

Each federal agency that administered a program that paid out dollars through some kind of a benefit was to assess the benefit-paying programs' risk of making a payment error, estimate and report these amounts annually, and plan for and take corrective actions to address the errors. The public can track the government's progress on improper payments at PaymentAccuracy.gov, the website created to collect and disclose each agency's progress or lack thereof at reducing, as OMB Director Jack Lew says, checks going "to the wrong person for the wrong amount and for the wrong reason."

Of the four pilot projects, the efforts underway at DOL, USDA, and HHS seem to provide further evidence that the administration's so-called "do not pay" list is producing results and that work advancing the idea continues apace.

Representing four of PaymentAccuracy.gov's top seven high-error programs based on the percentage of payments improperly made, the National School Lunch Program (NSLP) (USDA), Unemployment Insurance (UI) (DOL), Medicaid (HHS), and the Supplemental Nutrition

Assistance Program (SNAP) (USDA) seek to provide states with better information about who is and who is not qualified to receive benefits under their respective programs.

Similar to the federal "do not pay" list created last year to track "people and organizations that are ineligible to receive government benefits, contracts, grants, and loans," state and local government employees will look to federal agencies to provide comparable information so localities can better determine whether someone is eligible to receive food assistance, unemployment benefits, or medical insurance reimbursement.

One area where the federal "do not pay" list has shown results is Medicare. Though the combined fee-for-service and Medicare Advantage health insurance programs made close to $48 billion in improper payments in FY 2010, representing 24.6 percent of total Medicare payment dollars, fraud-fighting measures, including the federal "do not pay" list, helped bring down the total by over three percent from the previous year.

A recent Government Accountability Office (GAO) report, though noting that CMS still has much work to do on addressing further improper payments, praised the agency for its efforts "to tighten provider enrollment" and for the creation of "its Center for Program Integrity." The center, according to CMS, serves as a "focal point for all national and State-wide [*sic*] Medicare and Medicaid programs and [Children's Health Insurance Program (CHIP)] integrity fraud and abuse issues."

If the new pilot projects produce similar results and help bring improper payment levels down, then watch for the Obama administration to begin implementing lessons learned on a government-wide basis. One should note, however, that portions of the ongoing effort to reduce improper payments, particularly the operation of PaymentAccuracy.gov, could be threatened by the large cut to the Electronic Government Fund that passed Congress this spring.

The Transparency-Killing Budget

Progress toward increased government transparency will stall, and in some cases reverse, according to new details about the damage stemming from recent federal budget cuts. Federal Chief Information Officer Vivek Kundra explained the cuts' impact on key transparency and technology projects in a May 24 letter to Sen. Tom Carper (D-DE).

Under the fiscal year (FY) 2011 budget, critical transparency websites such as USAspending.gov and Data.gov will survive but will forego needed upgrades. Other projects will see reductions or will be terminated. However, many in the open government community will lobby Congress to reverse the cuts in its budget for FY 2012, which begins on Oct. 1.

Background

The Electronic Government Fund, or E-Gov Fund, is a line item in the General Services Administration (GSA) budget that supports government-wide technology projects. The fund was created by the E-Government Act of 2002 to coordinate both internal agency systems and public-facing services. Among the prominent products of the E-Gov Fund are:

- USAspending.gov, launched in 2007, implements the Federal Funding Accountability and Transparency Act of 2006 by providing a public searchable database of federal contract and assistance spending information
- The IT Dashboard, launched in 2009, provides public data on the cost and performance of federal IT projects and was used to identify and eliminate $3 billion in poorly-performing projects in 2010
- Data.gov, launched in 2009, provides a public catalog of machine-readable datasets from across the federal government
- Performance.gov, expected to launch later in 2011, will implement the GPRA Modernization Act of 2010 by providing information on agency plans and performance

However, in its initial spending bill for FY 2011, the House slashed the fund by 94 percent, from $34 million in the prior year to $2 million, amidst other widespread budget cuts. Transparency advocates sounded the alarm, and administration officials confirmed that key websites would likely shut down in the aftermath of such dire cuts.

After the Senate rejected the bill, the House offered another proposal, providing $17 million for the fund – still a steep 50 percent cut but far less drastic. The Senate also rejected that bill. However, in a third bill, H.R. 1473, which the House and Senate agreed to on April 14 and President Obama signed into law the next day, the cut deepened again to provide only $8 million for the E-Gov Fund, a 76.5 percent cut.

On April 21, Carper sent a letter to Kundra asking for information on how the cuts would affect the E-Gov Fund's projects.

Impact of the Cuts

"Several [E-Gov Fund] projects will experience a sharp decline given the limited amount of funding," Kundra wrote in his response to Carper. "No project will go unaffected."

According to Kundra, the administration will maintain USAspending.gov, the IT Dashboard, Data.gov, and Performance.gov "at their current levels of operation." However, "there will be no enhancements or other development to address needs for improvement." Efforts to improve the systems' operations, address data quality problems, support users, and expand the information available will be postponed or abandoned.

The exact status of Performance.gov remains unclear. At a congressional hearing on May 10, federal Chief Performance Officer Jeffrey Zients said Performance.gov would launch to the public "within the next few weeks." However, an administration official declined to specify a launch date for a May 27 *Nextgov* article. The official noted the administration's ability to meet the GPRA Modernization Act's deadlines would depend on future funding levels.

Kundra's letter also specifies two projects that will be terminated due to the funding cuts. The Citizen Services Dashboard was a project to make available to the public data on government agencies' customer service performance, such as timeliness, accuracy, and customer satisfaction. The Citizen Services Dashboard's relationship to President Obama's April 27 executive order on customer service is unclear. The administration will also cancel FedSpace, an internal collaboration website for federal employees.

The letter doesn't specifically address the fate of a number of other E-Gov Fund projects, such as PaymentAccuracy.gov, Challenge.gov, and Apps.gov Now.

Hope for FY 2012

Many of the feared cuts and delays could be avoided if Congress restores the funding for the upcoming fiscal year. The E-Gov Fund projects have drawn strong support from both parties, as well as nearly 10,000 individuals and a coalition of transparency advocates, including OMB Watch.

The House Appropriations Committee's Subcommittee on Financial Services and General Government, which sets GSA's budget, is scheduled to mark up its bill on June 16. The subcommittee has not yet released its proposal for the E-Gov Fund. However, the full Appropriations Committee has asked the subcommittee to cut a total of $2.1 billion, or 9.4 percent, from the agencies under its jurisdiction, which also includes the Treasury Department, the White House, and a number of independent agencies and commissions.

Several financial services agencies had been expected to see budgetary increases to implement the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act. If those increases occur, they would put greater pressure on other agencies under the subcommittee's jurisdiction to accept cuts to meet the target amount of net decreases.

The Senate Appropriations Committee has not yet announced allocations for its analogous subcommittee.

Fracking Disclosure Pursued on Different Fronts

On May 25, Texas and Michigan moved to join several other states in requiring the natural gas drilling industry to disclose the contents of fluids used in hydraulic fracturing, also known as fracking. On the same day, two of the biggest U.S. energy companies – ExxonMobil and Chevron – defeated proposals from their shareholders calling for more disclosure of the environmental impacts and risks of drilling for natural gas. Despite such industry resistance, fracking disclosure continues to gain traction as an issue, especially at the state level.

Hydraulic fracturing is a process where sand and fluids are pumped underground at very high pressure to cause tiny fissures in rock and force natural gas to the surface. Although most of the fluid is water, numerous chemicals, many of them toxic, are typically added to the mixture.

Fracking fluid is known to often contain benzene, toluene, and pesticides, among other harmful substances.

Fracking has been intensely debated for years by citizens, lawmakers, and industry. At the heart of the debate is whether the procedure is safe and whether policymakers are taking the appropriate precautions – at federal, state, and local levels – to protect America's water supply from fracking contamination.

Is Fracking Safe?

Opponents of fracking, including residents who live near drilling wells, contend that the process is not safe, and that, in particular, the process has poisoned drinking water and affected people's health. In addition, accidents at wells have led to fires and fracking fluids have reached streams. In April, Chesapeake Energy suspended fracking operations in Pennsylvania after thousands of gallons of drilling fluid spilled following an accident at a gas well.

A peer-reviewed scientific study, just published in the *Proceedings of the National Academy of Sciences*, referred to as the Duke study, linked hydraulic fracturing to cases of drinking water contamination "so severe that some faucets can be lit on fire." The study examined groundwater obtained from 68 wells throughout Pennsylvania and New York, finding that shallow drinking water systems within 1,000 meters of active natural gas drilling had methane levels 17 times higher than fresh water aquifers further away from active drilling sites. The study reinforces the findings of a 2009 investigation by ProPublica that revealed that methane contamination from fracking was widespread.

Proponents of fracking, primarily the oil and gas industry, insist that the procedure is safe and stress that it has opened up vast new supplies of natural gas that will reduce imports of the fuel. The natural gas and oil industry denies that any evidence exists that fracking contaminates or in any way endangers water supplies. Fracking supporters contend that the Duke study does not link water contamination to fracking fluids, but rather it shows that some well casings are faulty.

Despite industry's continued assertion that fracking is safe, shareholders have begun to call for disclosure of the practice's environmental impacts. At the May 25 shareholders' meetings of both ExxonMobil and Chevron, proposals requiring disclosure on the impacts of fracking received 40 percent of votes by shareholders at Chevron and 30 percent of votes by ExxonMobil shareholders. Referring to the Chevron vote, "Breaking 40 percent on a first year resolution has only happened a few times in the last few decades, so it shows how seriously the company's shareholders are taking this issue," said Michael Passoff of As You Sow, an advocacy organization that supported the resolutions at the two companies.

Do Federal Safeguards Exist?

Currently, industry enjoys an exemption from a regulation under a federal drinking water statute; this exemption permits companies to maintain secrecy around the chemicals used in fracking. In most cases, the Safe Drinking Water Act (SDWA) authorizes the U.S. Environmental

Protection Agency (EPA) to regulate the injection of fluids underground and limit pollution levels in drinking water. However, the 2005 Energy Policy Act stripped the EPA of its authority to monitor hydraulic fracturing, making it the only industry to benefit from such an exemption. Without the authority of the SDWA, EPA scientists are unable to analyze the chemicals, processes, and health and environmental effects of fracking.

In light of mounting concerns about the environmental and health impacts of fracking, congressional Democrats introduced the Fracturing Responsibility and Awareness of Chemicals Act (FRAC Act) in both the House and Senate on March 15. The FRAC Act would amend the SDWA and mandate full disclosure of fracking chemicals. Prior to that, Congress ordered the EPA in 2010 to conduct a study of the practices and environmental impacts of fracking, particularly on groundwater. The EPA has stated that the initial results will be made public by the end of 2012, with a final report released in 2014. The agency's 2004 study on fracking, which declared that the process was safe, was widely criticized as flawed and exaggerated, particularly by the EPA official who oversaw the study. That study enabled passage of 2005 energy legislation exempting fracking from federal regulation under the SDWA.

EPA Administrator Lisa Jackson testified before the House Oversight and Government Reform Committee on May 24 on energy policy and production. In her testimony, Jackson committed the EPA to "step in to protect local residents if a driller jeopardizes clean water and the state government does not act." She received both criticism and praise for her testimony.

In particular, in response to a question from Rep. Gerry Connolly (D-VA) regarding any evidence that hydraulic fracturing can affect water supplies, Jackson said, "There is evidence that it can certainly affect them. I am not aware of any proven case where the fracking process itself affected water, although there are investigations ongoing." Opponents of fracking started an online petition calling for Jackson to retract the comment and apologize for the misleading statement.

She received praise from fracking supporters, including Republicans who made the first part of her statement a talking point to argue that effective safeguards are already in place. In a press release posted on the Senate Committee on Environment and Public Works website, Sen. James Inhofe (R-OK), ranking member of the committee, commended Jackson's comments and pointed out that "...States are regulating hydraulic fracturing effectively and efficiently, and there is no need for the federal government to step in."

After a series of high-profile natural gas drilling spills, President Obama in early May asked the U.S. Department of Energy to form an expert panel to identify any immediate steps to "improve the safety and environmental performance" of fracking. The panel, which includes academic, environmental, and industry experts, will report those steps within 90 days of beginning its work. The panel's goal is to develop advice for the government within six months.

What Can States Do?

With the absence of federal regulation, states have begun requiring the disclosure of chemicals used in fracking fluid. A bill requiring natural gas drillers to publicly disclose the chemicals they use in hydraulic fracturing passed the Texas Senate after an attempt that would delay part of its implementation was defeated. Unlike other states, including Michigan and Wyoming, that have passed laws regulating the fracking process, Texas would be the first to impose a full disclosure requirement.

New disclosure rules in Michigan, announced by its Department of Environmental Quality (DEQ), will require natural gas companies to document their water use and to report the total volume of the water they recover from the wells they pump. The DEQ will publish some information about the chemicals used in the fracking process, requiring companies to disclose all Material Safety Data Sheets, and will post that data on the department's website for public review.

Wyoming was the first state to require the disclosure of chemicals used in fracking fluid. Following Wyoming's lead, other states have proposed similar rules, including California, which is considering a bill that would require companies to disclose information to a state supervisor who would later post it on a website.

Pennsylvania has proposed legislation that would require companies to disclose chemical information to the state but not necessarily the public. In Arkansas, a fracking disclosure bill was presented and withdrawn. The rules and legislation proposed in most of the states are similar: companies that use hydraulic fracturing must disclose some or all of the contents of the fracking fluids pumped underground.

Other states, such as New York and New Jersey, have taken an extra step and are pursuing moratoriums on fracking operations. In November 2010, New York imposed a statewide moratorium on fracking while a comprehensive review of the practice is undertaken. In March, New Jersey lawmakers advanced legislation that would make the state the first to permanently ban fracking.

Are We Alone?

Neither the practice of fracking nor the concerns about the impacts of the activity are limited to the United States. The French National Assembly approved legislation on May 12 that would ban fracking. If passed by that country's Senate, France could become the first nation to ban fracking altogether.

Agencies Release Preliminary Plans for Retrospective Reviews

On May 26, a wide range of federal agencies released 30 preliminary plans outlining steps each intends to take to meet requirements for reviewing existing regulations, reducing burdens on business, and expanding public participation in the rulemaking process. The plans are part of the Obama administration's efforts to examine ways to reduce regulatory costs and identify outdated and ineffective rules.

President Obama issued Executive Order 13563 (E.O. 13563), Improving Regulation and Regulatory Review, on Jan. 18. The executive order directed federal agencies to develop and submit preliminary plans to the Office of Information and Regulatory Affairs (OIRA) by May 18.

The plans meet the requirement in section 6(b) of E.O. 13563 for each agency to identify how it "will periodically review its existing significant regulations to determine whether any such regulations should be modified, streamlined, expanded, or repealed so as to make the agency's regulatory program more effective or less burdensome in achieving the regulatory objectives."

In announcing the public release of the preliminary plans at the conservative American Enterprise Institute, OIRA Administrator Cass Sunstein described the retrospective review effort as an attempt to change the regulatory culture of Washington by concentrating on cost-effective rules based on evidence of what works. The overall intent of the effort, he said, is to focus on burden reduction and cost savings. He indicated that this review is expected to save "hundreds of millions of dollars in annual regulatory burdens."

All 15 cabinet-level departments and the U.S. Environmental Protection Agency (EPA) submitted review plans, as did 14 non-cabinet agencies. The plans differ from agency to agency. The reviews of agency rules are not limited, however, to "existing significant regulations" as the E.O. states but, in some cases, include rules under development. This expansion of the reviews beyond the intent of the E.O. raises concern that proposed regulations will be endangered by additional special interest pressure, either at the agencies or while the rules are under review at OIRA.

Some plans provide information on specific rules agencies plan to target for reform or repeal, thereby drawing the battle lines for upcoming debates over certain safeguards. Some plans propose an ongoing process agencies will use to evaluate existing rules now and in the future. Agencies will be inviting public input on the preliminary plans and will then make their plans final between July 18 and Aug. 6.

Summaries of Preliminary Plans

The summaries of some major agency plans below provide a flavor of the different approaches agencies adopted to meet the requirements of the E.O. The development of the plans appears to have been decentralized and agency-driven. The fact that agency plans each have different formats and different approaches indicates that this was not a top-down, White House-driven exercise.

Department of Agriculture (USDA). USDA's plan intends to "simplify and reduce the reporting burden on the public for entry and access to USDA programs" and reduce costs by sharing information with other agencies. The agency already has a process for the development and review of all regulatory actions consistent with E.O. 12866 (the Clinton-era order directing agencies how to develop and submit for OIRA's review major proposed and final regulations). The process covers the full rulemaking cycle and will be amended to meet the requirements of E.O. 13563 and formally incorporate retrospective analysis into regulatory development procedures.

An example of the type of rule targeted by USDA's approach is the Food Safety and Inspection Service's (FSIS) consideration of how to use the new Public Health Information System to share collected data and reduce reporting requirements. FSIS is also considering reducing the requirement that meat, poultry, and egg product labels be submitted for approval prior to use to "decrease the recordkeeping burden on industry."

Environmental Protection Agency. EPA's preliminary plan lists 31 regulatory reviews for the initial period. The agency plans to address 16 of these priority items during the 2011 calendar year, while the other 15 reviews are longer-term actions. EPA plans to conduct periodic retrospective reviews every five years. It will solicit public input at the start of each review period and plans to aid the public in tracking reviews through the Semiannual Regulatory Agenda and the agency's Rulemaking Gateway.

EPA's plan is heavily focused on burden reduction and resource efficiency. In conducting retrospective reviews, the agency will look for ways to advance four broad initiatives: electronic reporting, improved transparency, innovative compliance approaches, and integrated problem solving. For many of the review items, EPA intends to reduce burden and improve efficiencies by replacing paper-based reporting with electronic reporting, coordinating and clarifying regulatory requirements, and eliminating regulatory requirements that have become redundant because of technological advances. For example, EPA intends to issue a proposed rulemaking during the summer ("Widespread Use of Onboard Refueling Vapor Recovery") that will eliminate redundancy in vehicle fuel vapor recovery systems. This would eliminate gas dispenser-based vapor control requirements that have become redundant due to modern onboard refueling vapor recovery technology. EPA estimates long-term cost savings at $67 million per year.

EPA has developed a comprehensive approach to conducting these reviews. It will conduct them following a four-step process: 1) solicit nominations for regulations in need of review; 2) select regulations for review; 3) conduct retrospective reviews; and 4) make modifications if necessary. In conducting retrospective reviews, EPA will evaluate regulations under several criteria corresponding to principles listed in the E.O. Considerations include: whether the benefits of a regulation justify its costs; whether there are alternatives to direct regulation that would still ensure environmental objectives are met; and whether the regulation applies to entities covered by multiple EPA regulations.

Of particular concern is EPA's plan to include reviews of many regulations already in development. The plan notes, "of EPA's current regulatory workload, almost two-thirds of [the] activity is a review of an existing regulation." This emphasis on new rules was not the intent of the E.O. and may indicate the agency has bowed to the intense political pressure to ease regulations. For example, EPA intends to review the efficacy of testing requirements issued under the 2008 Lead Renovation, Repair, and Painting Program. Additional testing and cleaning requirements, proposed in May 2010, are "designed to ensure that renovation work areas are adequately cleaned after the renovation work is finished and before the areas are re-occupied."

Lastly, EPA will review five rules in an attempt to determine why the cost estimates of the regulations differ from actual compliance costs. One of the goals is to determine if any systematic biases exist in EPA's ex-ante cost estimates, according to the plan.

Department of Health and Human Services (HHS). HHS's plan does not include a timeline for its review process but indicates that the rules discussed in its proposal will be reviewed over the next two years. According to HHS, the review process will focus on eliminating rules that are no longer necessary, but there is no listing of rules nominated for elimination. The department also indicates that the list of rules included in its proposal is incomplete because some initiatives have not cleared the internal process at the agency.

The plan includes new goals for the agency's ongoing review process, including increased transparency, more public participation in the review process, and strengthening agencies' ability to analyze regulations. In order to reach these goals, HHS indicates it will consider initiatives to improve online access to regulatory activity and set up a task force to determine how best to involve the public in the review process.

The review will include all significant regulations, whether they are final, proposed, or interim final. For example, the Food and Drug Administration (FDA) includes in its list of affected regulations a proposed rule requiring graphic warning labels on cigarette packages, which has a built-in review process for assessing the effectiveness of the labels. The Good Manufacturing Practice (GMP) food regulations, which are also on the FDA's review list, have been in the pre-rule stage since before the E.O. was issued.

A truly retrospective review of FDA's 2004 bar code rule will also take place. The agency proposes a cost-benefit reassessment to determine if the rule should be updated to include technology advancements.

Department of Labor (DOL). DOL's plan identifies nine rules as candidates for retrospective reviews. Five of these rules are "Signature Burden-Reducing Retrospective Review Projects," well-defined projects, each with an estimated cost savings; the other rules are more conceptual in nature and do not have estimates of cost savings. The agency does not outline a formal process for future retrospective reviews. Instead, during DOL's semiannual regulatory agenda planning periods, leadership will ask "agency officials to review existing regulations to determine whether items are candidates for retrospective review." This will be done by the existing Regulatory Council, which includes cross-agency leadership. There is a long list of factors to be considered but no clearly defined criteria for when a rule might be reviewed.

This plan also highlights several review efforts that are already underway, along with some new projects. For example, one of the Occupational Safety and Health Administration's (OSHA) "signature" projects is a proposed rule on harmonizing hazard communications. By harmonizing hazard classifications, safety data sheet formats, and warning labels, OSHA expects annualized savings of between $585 million and $798.4 million.

The Mine Safety and Health Administration's (MSHA) rule for approving electrical products used in underground mines has been in place since 1968. According to DOL's plan, MSHA expects to propose a new rule to "improve the efficiency of the approval process, recognize new technology, add quality assurance provisions, incorporate existing approval policies into MSHA regulations, clarify existing policies and procedures, and reorganize portions of the approval regulations." MSHA estimates that a streamlined process could save equipment manufacturers between $500,000 – $1 million.

Department of Transportation (DOT). DOT is using its preliminary plan to refine a preexisting plan the agency developed to review all of its regulations over a ten-year period. Under the existing plan, which began in 2008, the department is reviewing portions of the Code of Federal Regulations (CFR) each year. As part of its compliance with E.O. 13563, DOT will supplement its review process by expanding the participants to include inspectors, for example, and use advisory committees to review the agency's process. The plan lays out DOT's evaluation criteria.

The preliminary plan takes a rule-by-rule/issue-by-issue approach, overlaying the CFR review. The department took public comments after the E.O. was issued and used the preliminary plan to respond to issues raised in the responses the department received. DOT also asked individual departmental agencies for suggestions. The preliminary plan identifies 70 regulations for action and is divided into three sections: Actions being taken; further study required; and no further action.

Under the heading "Documents covered under this plan," DOT says, "This plan covers all of the Department's existing rules. Any review of a listed rule may also include related guidance, information collections, and other documents, such as waivers and interpretations."

Examples of rules DOT is likely to address include Federal Aviation Administration (FAA) rules that could streamline alcohol and drug testing programs and aircraft manufacturing certification rules.

A May 26 press release from OMB Watch expressed concerns about the retrospective review process while acknowledging that final plans are still months away. The focus of the E.O. was clearly on existing rules. Opening the door to proposed regulations, as many agencies' plans do, plays into the hands of special interests attempting to kill regulations targeting Wall Street and much more. Both the plans and the process for finalizing the plans could be significantly more transparent. Additionally, they could allow for more meaningful public participation. Many of the plans are simply too vague to know what action an agency intends to take on a particular rule.

The press release also notes that "there is a concern about allocation of agency resources. Many of the plans discuss multi-year processes for retrospective reviews. This comes at a time that Congress is cutting regulatory agency budgets. The result is likely to mean that the more agencies look back, the less they will be able to look forward. Americans demand more from their government to protect them from harm."

In the Aftermath of *Citizens United*, Courts Muddy the Waters on Political Engagement

While observers agree that *Citizens United v. Federal Election Commission* is already transforming the way political campaigns operate, courts cannot seem to agree what the decision truly means.

The *Citizens United* ruling made clear that corporations, including certain nonprofit organizations, may make independent expenditures during an election. Independent expenditures are communications that expressly advocate for the election or defeat of a federal candidate that is not made in coordination with the candidate. What remains uncertain is precisely how far the logic underpinning the decision may extend.

On May 26, a federal judge in Virginia ruled that a law barring corporations from making contributions directly to candidates is unconstitutional. During the 2008 election, two Virginia businessmen used company funds to reimburse their employees for contributing to Hillary Clinton's presidential campaign. Their attorneys argued that corporations should be treated just like individuals when it comes to campaign contributions, based on the logic of *Citizens United* that corporations are like individuals for the purposes of independent expenditures. The judge agreed, writing that "there is no distinction between an individual and a corporation with respect to political speech." That is, corporations can give the same amount of money to a campaign that a person can.

The practical implications of this ruling on the 2012 election are likely to be small: on May 31, the judge requested that attorneys on both sides file additional briefs arguing whether he should reconsider his decision, based on a 2003 U.S. Supreme Court decision that upheld a ban on corporate contributions to campaigns and that had not been brought up during initial arguments. Even if the judge does not reverse himself, campaign finance experts argue that the decision would apply only to candidates and corporations in the Eastern District of Virginia for the time being.

In another state case, the Montana Supreme Court is expected to rule whether its state's ban on corporate political spending is valid. The Montana Corrupt Practices Act of 1912 was enacted in response to the "copper kings," out-of-state corporate interests that were spending millions of dollars to elect legislators of their choice. The law bars corporations from using their general funds for political purposes but allows them to establish political action committees – just like the portions of the McCain-Feingold law that were invalided by *Citizens United*.

Montana Attorney General Steve Bollock argues the situation in Montana is different from the one the U.S. Supreme Court confronted in *Citizens United*. Bollock says that the most important factor leading to the Court's decision were what Justice Anthony Kennedy called the "onerous" Federal Election Commission requirements that kept many corporations from establishing political action committees. Not only is the state's process much simpler, Bollock argued in a press release, the state's history demonstrates that corporations have already corrupted the state's politics once and should not be given a chance to do so again.

The Minnesota legislature took a slightly different tack in response to *Citizens United*, becoming one of the states to pass a law requiring corporations to disclose their political spending within the state. As a result of that law, Target Brands, Inc. was forced to disclose campaign contributions to a conservative group during the 2010 election – contributions that became extremely controversial and for which the corporation eventually apologized.

On May 16, the Eighth Circuit Court of Appeals upheld Minnesota's disclosure law. "Unlike outright bans on corporate independent expenditures, which are viewed with great suspicion and subjected to strict scrutiny, courts generally view corporate disclosure laws as beneficial and subject such regulations to the less-rigorous exacting-scrutiny standard," wrote the majority. While critics of disclosure had argued that Target's experience shows that disclosure laws "chill" corporate political speech, the court agreed with voter advocates that political spending transparency, in fact, has benefits for voters.

As cases like these continue to percolate through the court system, it has become increasingly clear that the *Citizens United* decision was only the first in what will inevitably become a number of rulings on corporate political expenditures. The tremors *Citizens United* sent through the political system in January 2010 will continue to rumble while state and federal courts wrestle with cases like these.

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In This Issue

Commentary: Issa Releases New Spending Transparency Bill

On June 13, House Oversight and Government Reform Committee Chair Darrell Issa (R-CA) introduced a bill to revamp federal spending transparency. The new bill, called the Digital Accountability and Transparency Act (DATA Act), would create a new board to oversee spending transparency, as well as implement full multi-tier recipient reporting. While the bill is a welcome effort to improve federal spending transparency, it still lacks some key details, contains a few worrisome provisions, and does not go far enough in broadening transparency in federal spending.

The most significant action in the DATA Act is the creation of a new independent agency, the Federal Accountability and Spending Transparency Board, or FAST Board. The Board would essentially be a reinvention of the current Recovery Accountability and Transparency Board, which oversees the American Recovery and Reinvestment Act's transparency provisions and investigates potential abuses. The new FAST Board would extend its powers to all of federal spending while also taking control of USAspending.gov from the Office of Management and Budget (OMB).

Also on June 13, President Obama issued an executive order that creates a similar oversight board, called the Government Accountability and Transparency Board. In describing how the order will be implemented, Vice President Joe Biden noted that the administration has been working with Issa and other Republicans and Democrats in Congress to create the oversight board. Issa also stated that his FAST Board idea is being developed in collaboration with the administration.

Under the Issa bill, the Board would be led by a chairperson, who would be Senate-confirmed in a similar process to how the Comptroller General – the head of the Government Accountability Office (GAO) – is chosen. The Board itself is made up of a handful of agency inspectors general, deputy secretaries, and OMB officials. The DATA Act grants the Board subpoena power, as well as a limited ability to set federal data standards.

The FAST Board would then be charged with overhauling federal spending transparency procedures. Most notably, the DATA Act calls for recipient reporting to supplant the current system, the Federal Funding Accountability and Transparency Act (FFATA), which mostly relies on agency reporting (OMB Watch was involved in the creation of both FFATA and USAspending.gov). Similar to the Recovery Act model, under the DATA Act, all recipients of federal funds would be required to report on their use of the money. This is an important improvement over the current model.

The DATA Act also calls for the FAST Board to create common data elements and data standards to be used throughout all of the federal government's spending information systems. These improvements to financial reporting data could significantly enhance the ability of various federal data systems to communicate with each other, furthering data accessibility to the public and federal agency workers. To help ensure that recipient reports are accurate, the DATA Act also requires that agencies continue to report on their awards. These reports would be used to help verify recipient-reported data.

All of this information, the recipient reports and the agency-reported data, would be stored and displayed on a new website created by the FAST Board. Since the Board is independent, it could also serve as a "transparency portal," combining its spending data with other data sets it might find relevant.

However, what is most striking about the DATA Act is what is not in it. While the new legislation does improve federal spending in a number of ways, it still needs further refinement. The definition of "recipient" in the legislation is so vague that it is unclear if private entities (e.g., corporations) must report on their federal awards or if the DATA Act requires full, multi-tier reporting. And while the list of data points recipients must report is similar to both FFATA's and the Recovery Act's, it is missing some important points, such as place of performance and project status. Unfortunately, the new legislation also fails to require a new unique identifier for companies, a problem that has plagued federal data sets for years.

Similarly, it is strange that the DATA Act calls for agency-reported data, despite the fact that the bill is supposedly premised on the idea that agency-reported information is not high quality (an accompanying press release from the House Oversight and Government Reform Committee notes USAspending.gov data quality issues). Far better would be the inclusion of Treasury spending data, which is information on the actual cash outlays of the federal government. Treasury accounts are like the checkbook of the federal government: they are considered the gold standard for federal spending information. Information from these accounts would show exactly how much federal money was given to which entities. (This morning, June 14, during a hearing on the bill, Issa suggested that there may be a floor amendment mandating Treasury information, but as it is currently written, the bill does not do so.)

The DATA Act also does not include what is possibly the most obvious data check: having recipients report on their sub-awards. In the bill, as it is currently drafted, recipients only report on what they receive, not also what they give as sub-awards. If the recipient and subrecipient are reporting both what they received and what they gave out, the two reports can serve as checks on each other. Including such a requirement would substantially improve recipient report data quality, as well as cut down on waste, fraud, and abuse.

At the same time, the DATA Act doesn't require any performance information, either in the recipient reports or on the new website. One of the important lessons of the Recovery Act is that recipient reports are most useful when they include some kind performance metric. For instance, a housing project should note how many houses were built, or a road project should specify how many miles of roads were paved. Such information can help users understand if federal programs are meeting their performance goals, which should also be displayed on the new spending website. Linking spending and performance information on the same public website is the next important step in transparency, and the DATA Act does not take that step.

In addition to these issues is the FAST Board's exemption power. Under the DATA Act, the Board would be able to unilaterally exempt whole classes of recipients from the reporting requirement. While the Board would be required to publish aggregated data on "information that is exempt from recipient reporting ... but that is reported by an Executive agency," the Board would not be required to disclose why it exempted the recipients. Thus, not only would the public not know what information was left out of the recipient reports, they would not know why the information was exempted.

Strikingly, the DATA Act does not address a key area of government spending that has remained hidden – tax expenditures. Tax expenditures now account for about $1 trillion per year but largely go unreported. While it is challenging to make such information publicly accessible, the bill should at a minimum require the FAST Board to develop a plan for such disclosure.

Perhaps the most worrisome aspect of the DATA Act is that it also repeals FFATA, to date the most important spending transparency law ever passed. This action is especially problematic because the DATA Act has a sunset provision, which would require Congress to reauthorize the law in seven years. If Congress fails to act in time, the sunset provision would eliminate the entire DATA Act. So, after seven years of recipient reporting and new data standards, all of the new transparency provisions would have to be fought for all over again.

It is a bad idea to repeal a permanent law and replace it with a temporary law, especially when there is no reason to repeal FFATA outright. FFATA, as a law, is far from fatally flawed. As it is currently written, FFATA simply no longer goes far enough for today's transparency community. The DATA Act's recipient reporting and data standardization provisions are good, but the obvious solution is not to erase a perfectly good law. Instead, Congress should focus on amending FFATA with the positive provisions of the DATA Act and other language that will permanently improve federal spending transparency.

Commission on Wartime Contracting: Iraq Contracting Disaster Looming

On June 6, the Commission on Wartime Contracting (CWC) held a hearing to examine the Department of State's (State) continued preparations for taking control of operations in Iraq from the Department of Defense (DOD). In the past, the CWC has been less than sanguine about State's ability to run contingency operations in Iraq and has chided the agency for slow-walking reforms, especially in relation to contract oversight.

On Oct. 1, State will take full responsibility for the U.S. government's presence in Iraq, as the vast majority of U.S. combat troops are scheduled to depart the country by the end of 2011. At that time, the agency will begin performing many tasks the Pentagon has been carrying out for the last eight years. State has experience providing standing and moving security and training security and military personnel – duties the agency currently performs and will continue to perform in Iraq. However, State will also have to supply quick-reaction combat teams, route clearance, recovery of wounded personnel, removal of damaged vehicles, and the detection and disposal of explosive devices – none of which the agency has experience with.

To perform these tasks, State will rely on a large number of private security contractors (PSCs). In addition to the current small army of roughly 19,000 PSCs in Iraq right now, the agency estimates it will need another 6,000 to 7,000 contractors to carry out its responsibilities. The problem is that State does not have a reputation for vigilant contract oversight, and the CWC has been warning the government since the summer of 2010 of the potential serious consequences that would befall it if State and DOD failed to coordinate better before the Iraq transition.

In February, the CWC released its second interim report to Congress and again raised concerns about the DOD-to-State transition in Iraq. The interim report made 32 recommendations that attempted to address the underlying causes of contracting failures and included policy, statutory, and administrative suggestions. Prior to the June 6 hearing, the CWC asked State to comment on any recommendations that would affect its operations.

The CWC found some of State's responses "cursory" and others "logically dubious." Commissioners also told Under Secretary of State Patrick Kennedy, who was the sole witness at the CWC hearing, that the agency's argument against requiring a written rationale from contracting personnel for not pursuing a proposed suspension or debarment – it would be a "burden" – "approaches the borderline of government negligence."

Commissioners became even more incensed when, according to Jake Wiens at the Project On Government Oversight (POGO), "Kennedy could not answer how often recommendations for suspension or debarment are overturned," leading a co-chair, former Rep. Christopher Shays (R-CT), to wonder how the requirement "could be so burdensome if State didn't even know how frequently it occurred."

The CWC was similarly skeptical of State's rejection of the recommendation for the creation of a permanent office of inspector general for contingency operations, an idea pushed by some in Congress, as well. Wiens notes that commissioners cited State's well-documented history of antagonism toward IGs, including a recent example of the agency blocking an investigation by the Special Inspector General for Iraq Reconstruction (SIGIR) with minor bureaucratic excuses.

Despite Kennedy's assertions to the contrary, a recent Inspector General (IG) report provides justifications for the commission's concerns, which, according to Shays, "remain very much alive." In May, the State Department IG released a troubling report on the agency's performance on planning the Iraq transition. While State has "put in place planning and management mechanisms to effectively transition to a civilian-led presence in Iraq," "several key decisions have not been made, some plans cannot be finalized, and progress is slipping in a number of areas."

One of the biggest challenges that lie ahead for the agency is the successful transfer of reconstruction projects to Iraq, an area flush with opportunities for waste, fraud, and abuse. U.S. taxpayers have poured billions of dollars into projects throughout Iraq, yet the Iraqi government will not be able to maintain many of them, a finding recently highlighted by the commission. The State IG found that the agency has transferred over 5,400 projects to Iraq, valued at roughly $15 billion, but security concerns and "poor contractor performance" are "major hindrances to project completion."

While State has made progress in preparing for the day when DOD cedes control of operations in Iraq, there is still much for the agency to do. However, State should not carry all of the blame for potential failures. In July 2010, CWC recommended that Congress "immediately provide additional resources to State to support its increased contracting costs and personnel needs" in relation to the Iraq transition. The fiscal year (FY) 2011 continuing resolution provides just $48.3 billion to State, almost $5 billion less than the Obama administration's request of $53.1 billion – a funding level that did not even reflect the CWC's recommendation.

EPA Continues to Improve Chemical Transparency under TSCA

On June 8, the U.S. Environmental Protection Agency (EPA) unveiled the identities of more than 150 chemicals that had previously been claimed as confidential by industry. The EPA's action was the latest step in the agency's initiative, announced in 2010, to disclose more chemical information to the public.

Under Section 8(e) of the Toxic Substances Control Act (TSCA), companies that manufacture, process, or distribute chemicals must notify the EPA if they learn that any of their chemical substances present a "substantial risk of injury to health or the environment." However, TSCA allows companies to treat as confidential the chemical's identity in the public version of these reports if that information is entitled to such treatment. Although EPA suggests that companies provide a reason for the confidential business information (CBI) claim, an explanation is not required. The reports are made available on EPA's website, but when the company labels a chemical as confidential, the chemical's name is removed from the report's public version.

Following EPA's recent action, 150 chemical names will no longer be redacted from 104 health and safety studies. The newly disclosed chemicals involved in the studies are used in dispersant formulations and consumer products such as air fresheners, non-stick and stain resistant materials, and fire resistant materials.

The disclosure is the result of new EPA confidentiality decisions, as well as voluntary decisions by some companies in response to the EPA's challenge to industry to disclose such data. In many cases, the disclosed information often involves a company's original report, requesting confidentially, with additional pages indicating the name of the chemicals that were originally redacted. For example, one company updated its report with the addition of a cover letter, indicating the name of the chemical.

Public health advocates have long pushed for EPA to make public the names of chemicals in order to evaluate their health and safety. The Environmental Working Group published a study in January 2009 documenting that the names of 17,000 of more than 83,000 chemicals in commerce had been labeled a "trade secret" and thus remain hidden from the public. The Government Accountability Office (GAO) testified that about 95 percent of notices that companies send to the EPA include information labeled "confidential."

Beginning in 2010, the EPA has taken several steps to disclose more chemical information to the public. In January 2010, it announced a new policy of rejecting, with limited exception, CBI claims for publicly available health studies when the chemical name is already disclosed in the public portion of the TSCA Inventory – a list of all chemical substances in commerce. In March 2010, the agency provided free public access to the TSCA Inventory, which previously had only been available for a fee, and in that same month, EPA challenged industry to reduce the number of CBI claims in new TSCA filings. In May 2010, it began reviewing all CBI claims for chemical identities in health and safety studies, and it added chemical information to its Envirofacts online public database.

During the first half of 2011, EPA continued to make progress. In February, it announced that it would no longer protect the identities of 14 chemicals, which manufacturers had claimed were trade secrets, and in March, the agency declassified the names of chemicals in 42 other health and safety studies.

Though public health and environmental advocates have hailed EPA's June 8 announcement as a significant move toward greater openness, they continue to seek improvements to EPA procedures to reduce the amount of illegitimate CBI claims and to promote transparency. Several such recommendations are included in a report to improve the public's right to know about environmental, health, and safety issues, published by OMB Watch in May 2011 and endorsed by more than 100 organizations. They include:

- Upfront Substantiations – requiring chemical manufacturers to justify requests for secrecy when the information is submitted to the agency. Such upfront substantiation of the need for secrecy reduces the burden on agency staff to evaluate CBI claims.
- Fees for CBI Process – required fees to be paid by submitters of CBI in order to cover administrative costs and reduce illegitimate claims.
- Penalties for Illegitimate CBI Claims – impose fines and penalties against companies that illegitimately request CBI protections, such as for a chemical identity that is already publicly disclosed.

The right-to-know report also recommends that certain workers, including workers risking exposure to chemicals and health professionals such as emergency medical technicians, nurses, and doctors, have access to vital chemical information. Medical personnel must have complete access to names of chemicals in products – including CBI – to which their patients may have been exposed to accurately assess and treat signs and symptoms, care for injuries, and protect themselves.

The chemical industry is still wary of disclosure. Both the American Chemistry Council (ACC) and Society of Chemical Manufacturers and Affiliates (SOCMA) voice support for the EPA's effort to make public potential chemical risks, but not at the expense of trade secrets. Scott Jensen, spokesman for the American Chemistry Council, noted that "[i]t's important that EPA continue to recognize legitimate claims to safeguard intellectual property from competitors." Proctor & Gamble is concerned that the EPA will continue to require chemical companies to disclose more and more proprietary chemical information.

In its June press release, EPA announced its plans to regularly declassify and post materials under TSCA on its website. According to Steve Owens, assistant administrator for EPA's Office of Chemical Safety and Pollution Prevention, "[a] health and safety study with the chemical name kept secret is completely useless to the public."

Administration Lays Foundation for New CUI System

Seven months after President Obama issued an executive order on controlled unclassified information (CUI), the outlines of a new CUI system are taking shape. On June 9, the National Archives and Records Administration's (NARA) CUI office released initial guidance on implementing the order.

The notice lays the foundation for a system of CUI categories overseen by NARA and disclosed to the public, as called for in the executive order. Previously, agencies established methods for controlling unclassified information on an ad hoc basis, often without standards or oversight, resulting in an opaque and confusing jumble that stymied public access and inhibited information sharing.

Contents of the Guidance

The guidance requires agencies that handle CUI to establish a program for implementing the new CUI system, including training, markings, dissemination instructions, and decontrol procedures. Each agency is required to develop CUI training for its personnel. Transparency advocates have expressed concern that without adequate training, misunderstandings of CUI among agency staff could result in improperly applying the new system in a manner that unduly restricts public access. Agencies are also required to conduct self-inspections to assess compliance.

The guidance also establishes a uniform system for marking documents as CUI and encourages agencies to mark only the portions of a document subject to controls, rather than the entire document. Portion marking, which is required for classified information, can facilitate public access by limiting the amount of information controlled. The guidance makes clear that if a document bearing pre-CUI labels is reused, the prior labels are to be removed and the information is only to be designated as CUI if it meets the current requirements.

Besides the dissemination controls attached to specific categories, the guidance states that "agencies shall disseminate CUI only to individuals who require the information for an authorized mission purpose." Open government experts have raised concerns that this vague requirement could unduly restrict information sharing or public disclosure.

The guidance states that "CUI shall be decontrolled as soon as possible" and that "CUI may not be controlled indefinitely unless law, regulation, or Government-wide policy so stipulates." Each CUI category will have a "specific time frame or event" for decontrolling information. The guidance does not indicate what the time frames or events for decontrol will be, other than that a few categories may be controlled indefinitely.

In addition, the guidance states that CUI will be decontrolled prior to public release but does not specify the procedures to decontrol information. If the procedures are cumbersome, it could lead to delays or otherwise inhibit public access.

The guidance provides for NARA to oversee agency compliance with the new system, which could include formal reviews and audits. Advocates expect active involvement from NARA will be crucial to smoothly transitioning to the new system and overcoming inertia in the agencies.

Missing Components

While the guidance logically lays out many of the needed components of a CUI program, there are several aspects missing that open government advocates sought. First, the guidance does not include any firm requirements for agencies or NARA to consult with the public when developing policies to implement the new CUI system. Such participation and collaboration is credited by many public interest groups as a vital aspect to the development of the E.O. on CUI.

The guidance also does not require agencies or NARA to publish any information about CUI policies or the operation of the CUI system, other than the registry of categories. The open government community had recommended that agency CUI policies, self-inspection reports, and NARA implementation reports, for instance, be required as public records for all agencies. Open government groups had also asked for statistical data on the use of each CUI category.

In addition, the guidance does not include a mechanism for the public to request that information be decontrolled or that a CUI category be removed from the registry. The comparable procedure for classified information, Mandatory Declassification Review, is seen as a powerful tool for expanding public access and providing a check on overclassification.

The guidance also does not require the use of personal identifiers to indicate the individual who controlled a document. This practice is required in the classification system as a means to ensure accountability, such as identifying personnel who inappropriately classify information.

Next Steps

Agencies now have six months to develop a plan for complying with the guidance. Following that, NARA will establish deadlines for the agencies to phase into full implementation. NARA is also expected to issue additional guidance in the coming months, providing additional detail on how the new CUI system will function.

Perhaps the most critical decisions will be over approving categories for inclusion in the CUI registry. NARA will determine approved CUI categories based on agency submissions and publish a list online by November. The registry will cite the law, regulation, or government-wide policy that authorizes each category, as well as any sanctions established in the law or regulation. The executive order states that NARA cannot turn down categories with a solid basis in law, regulation, or government-wide policy. However, some agencies will likely argue doggedly to retain legacy categories without such a basis. In addition, the order authorizes NARA to "resolve conflicts among categories," which raises the promising but logistically challenging opportunity to replace multiple similar categories across several agencies with a uniform set of rules.

U.S. Chamber of Commerce Advances the Attack on Regulations

The U.S. Chamber of Commerce (the Chamber) continues to attack public protections and will advance the anti-regulatory community's agenda with a series of planned public events across the country later in 2011.

To help spread its message, the Chamber has enlisted former Sen. Evan Bayh (D-IN) and former Bush White House chief of staff Andrew Card for a national "roadshow" of "speeches, events, and media appearances," said Chamber president Tom Donohue in a June 2 memo. Bayh, who now works for lobbying/law firm McGuireWoods and serves as a Fox News commentator, will join Card in carrying out "a bipartisan message of regulatory reform." The Chamber is expected to officially announce Bayh's involvement and provide more details on the tour later in June.

Donohue also applauded the Chamber's efforts to "persuasively" link "over-regulation" to job loss and credited the group with helping delay or destroy several rules promulgated by the Occupational Safety and Health Administration (OSHA) and the U.S. Environmental Protection Agency (EPA). Bayh and Card will take part in an expansion of the Chamber's communications campaign, speaking about the dangers of the so-called "regulatory overload" facing the nation.

The Chamber also criticized the Obama administration's regulatory record at a hearing held June 3 by the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce. Following up on a Jan. 26 hearing on "The Views of the Administration on Regulatory Reform," the hearing examined how the White House Office of Information and Regulatory Affairs (OIRA) is implementing President Obama's Executive Order 13563, Improving Regulation and Regulatory Review.

The order, among other things, directed agencies to conduct retrospective reviews of existing significant regulations to determine whether they should be "modified, streamlined, expanded, or repealed so as to make the agency's regulatory program more effective or less burdensome in achieving the regulatory objectives." In response, federal agencies submitted preliminary plans for conducting these reviews to OIRA. (See the June 1 issue of *The Watcher* for a summary of agency plans.)

William Kovacs, Senior Vice President of Environment, Technology & Regulatory Affairs, testified on behalf of the Chamber. While the Chamber has expressed tepid support for Obama's executive order and the release of the review plans, Kovacs called for greater reform of what he characterized as "the bloated regulatory state."

OIRA Administrator Cass Sunstein testified that agencies "have already eliminated hundreds of millions of dollars in annual regulatory costs" and could produce over $1 billion in future savings. But according to Kovacs, the administration's retrospective review effort is "not nearly enough."

Kovacs, echoing a sentiment expressed by many opponents of public protections, told the committee that regulatory agencies are overstepping their bounds. Agencies now have the ability to "'legislate by regulation' and possess legislative power nearly equal to that of Congress," he said. Sunstein defended agencies, noting that statutory intent is the administration's guiding principle and that agencies cannot act without first being authorized by Congress to regulate.

Kovacs asserted that regulatory compliance costs are now up to $1.75 trillion a year, a number cited often by the Chamber and other regulatory opponents. This cost estimate comes from a heavily criticized report prepared by economists Nicole Crain and Mark Crain for the Small Business Administration. The report fails to consider the benefits of regulations, uses a series of flawed methods, and reaches cost estimates that differ dramatically from those reported by the Office of Management and Budget (OMB), which issues annual reports that consistently show that the economic benefits of regulation far outweigh compliance costs.

The $1.75 trillion figure "is the result of secret calculations, an unreliable methodology and a presentation calculated to mislead," said Professor Sidney Shapiro of the Center for Progressive Reform. The Congressional Research Service conducted its own assessment of the report and also identified serious problems with assumptions made in Crain and Crain's estimates. The Economic Policy Institute (EPI) also criticized the report in an assessment of regulations released in April. Under questioning during the hearing, Sunstein noted that he disagreed with the Crains' analysis.

The Chamber also attacked the volume of existing regulations. Based on numbers compiled by Wayne Crews of the conservative Competitive Enterprise Institute, Kovacs stated that 170,000 rules accumulated from 1976 to 2009. The Chamber prepared a chart illustrating the "growth of federal regulations." At a glance, it appears that regulations grow in number every year, but the numbers in the table show that fewer final rules were promulgated in 2009 than in *any* other year after 1976. In stacking up the finalized rules year by year, these calculations exclude actions that clarify, modify, repeal, or phase-out regulations. (View Kovacs' testimony.)

Kovacs also affirmed the Chamber's support for the Regulations from the Executive In Need of Scrutiny (REINS) Act, a bill that would require congressional approval for all major regulations, as well as amendments to the Regulatory Flexibility Act that would require agencies to consider the indirect impacts of rules on small entities. In addition, the Chamber recommended that the "arbitrary and capricious" standard for agency rulemaking in the Administrative Procedure Act be replaced by a "substantial evidence test," which would impose a higher burden on agencies in defending against challenges to both major regulations and guidance.

Advocates for health, safety, and environmental protections oppose most of the regulatory "reform" proposals the Chamber and its congressional allies are pushing and take issue with some of the data the Chamber uses to bolster its arguments. For example, in February, 72 public interest organizations wrote to Congress asking representatives to oppose the REINS Act. On June 9, the Coalition for Sensible Safeguards asked senators to vote against the Snowe amendment, which would have burdened agencies and made it more difficult for them to write and enforce rules. (The amendment was defeated the same day.) Additionally, new research by EPI shows that the claims that regulations harm the economy and cost jobs, the crux of the

Chamber's arguments, are unfounded.

Disclosing Dissension: Shareholders Push for More Control of Corporate Political Spending

Although the Federal Election Commission (FEC) is again trying to implement the *Citizens United* decision, shareholders across the country are refusing to wait for more control over corporate political spending.

On June 8, shareholders of Target Corporation sharply questioned the retailer's political contribution policy during the company's annual meeting. This close scrutiny is a result of the corporation's controversial decision to contribute $150,000 to a conservative political action committee in August 2010.

After weathering harsh public criticism last fall, Target voluntarily changed its policy on political spending. According to the "Civic Activity" section of the Target website, future decisions on contributions will be made based by "balancing [the retailer's] business interests with any other considerations that may be important to [its] team members, guests or other stakeholders." The company publishes a statement on its political contributions, including a list of all contributions of $5,000 or more, twice each year.

For many, policies like Target's are not enough. "Shareholders – not self-interested corporate managers – should, and can, decide policies on corporate political contributions," John C. Bogle, the founder and former CEO of Vanguard Investment Strategy Group, wrote in a recent *New York Times* op-ed. In the U.S. Supreme Court's opinion in *Citizens United v. Federal Election Commission*, Justice Anthony Kennedy wrote that a corporation's right to political speech depended on shareholders' ability to guide that speech. Any difference, he wrote, could be corrected "through the procedures of corporate democracy."

According to Bruce Freed, president of the Center for Political Accountability, shareholders of 28 corporations have voted on political spending resolutions in 2011. The diversity of the resolutions reflects the complexity of corporate political spending choices. Companies may, for example, choose to establish a political action committee (PAC) of their own, make independent expenditures, or contribute to trade organizations or other nonprofits.

Shareholder resolutions were made possible by a "no-action" letter issued to shareholders of Home Depot, Inc., by the Securities and Exchange Commission (SEC) in March. The Home Depot resolution, proposed by NorthStar Asset Management, requested the company disclose both actual and planned political contributions, alongside an analysis of how the spending matched the company's values or policies. It also requested that shareholders be given a non-binding advisory vote on the company's political spending policies and plans.

An attorney for NorthStar said that, "Although disclosure proposals are routinely filed and found nonexcludable, to our knowledge this was the first time the SEC ruled directly on a proposal providing an annual shareholder advisory vote on electioneering spending. ... This first time decision has cleared the way for further efforts, building upon the model established by the Home Depot proposal." In fact, at least 17 companies will face shareholder resolutions on political spending in 2011, in addition to the 28 votes that have already occurred.

While the SEC has been moving to authorize historic votes on corporate political spending, the FEC – the agency charged with regulating contributions and spending in federal elections – has been much slower to act. In January, the agency failed to issue a Notice of Proposed Rulemaking (NPRM) to begin implementing *Citizens United*. On June 15, the agency will again take up two versions of an NPRM: one from the Democratic commissioners and another from the Republicans.

While the revised NPRMs have changed since January, the ideological entrenchment plaguing the FEC has not. Unless the commissioners reach a surprising breakthrough, shareholders will have to depend on the SEC and themselves to enforce basic political spending transparency.

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In This Issue

Commentary: Stronger Estate Tax Should Be Part of Debt Ceiling Deal

Anti-tax ideologue Grover Norquist of Americans for Tax Reform (ATR) and his allies in Congress are calling for repeal of the estate tax. However, as lawmakers look to address our nation's long-term fiscal dilemma, they should consider the estate tax a key piece of the puzzle and should include a stronger version of the tax in any deal to raise the debt limit.

When President Obama reached a compromise with congressional Republicans in December 2010 over extension of the Bush tax cuts and long-term unemployment insurance, the agreement included a little-known deal on extension of the estate tax. Though there was no estate tax in 2010 due to the Bush tax cuts of 2001 and 2003, the tax would have returned in 2011 at pre-2001 levels without congressional action.

The tax policy compromise required only those individuals with multimillion-dollar estates to pay a 35 percent tax on assets worth over $5 million ($10 million for a couple) passed on to heirs. In 2009, the exemption level was already a generous $3.5 million with a 45 percent rate. In 2001, the estate tax had a future requirement that heirs pay a 55 percent tax on any assets above a $1 million exemption level. Other actions taken by Congress on rules for certain retirement account exemptions and generation-skipping transfer taxes will allow even more tax-free estate transfers.

In a May policy paper, the Center on Budget and Policy Priorities (CBPP) argued that the 2009 estate tax levels were already quite munificent and advocated for the current levels to expire at the end of 2012, which coincides with the expiration date of the Bush tax cut compromise. Using estimates from the Urban-Brookings Tax Policy Center, CBPP showed that had Congress reinstated the 2009 estate tax levels for 2011, "only 6,460 estates nationwide – one-quarter of 1 percent of estates – would have owed any estate tax" in 2011. "Thus, 99.75 percent of estates will not benefit from the more generous exemption level and lower rate instated under the tax-cut compromise."

With discussions underway between the White House and Congress over instituting some form of a long-term deficit reduction plan through agreement to raise the nation's borrowing limit, lawmakers have the opportunity to correct this unjust giveaway to the rich and demand a stronger estate tax. Most rumors about the contents of negotiations to raise the debt limit center around roughly $1 trillion in spending cuts over the next ten years while raising approximately $200 billion to $300 billion in additional revenue.

Those spending cuts will hurt programs like Medicaid that helps provide healthcare to the poor, the Securities and Exchange Commission (SEC) that oversees Wall Street, and Women, Infants, and Children (WIC) that provides nutrition to needy mothers, newborns, and children up to age five. If the deal included going back to 2001 estate tax levels, lawmakers could bring in an additional $68 billion over the next ten years, according to the Joint Committee on Taxation, and lessen the need to cut important federal programs.

Sen. Bernie Sanders (I-VT) made a similar argument recently in a letter to the White House, urging President Obama "not to yield to Republican demands to shield the wealthiest Americans and the most profitable corporations from responsibility for lowering deficits and reducing the national debt." Even the administration seems to be moving in this direction, as one staff member remarked to the *Washington Post* that their efforts are "focused on millionaires and billionaires." The estate tax fits that description perfectly.

As economic inequality rises and concentrations of wealth in this nation become more unbalanced, requiring multimillionaires to sacrifice alongside middle- and lower-income families is not only the fair approach to long-term deficit reduction, it is one of the only reasonable options left. Moreover, the public has shown that, if given a choice, they prefer to require high-income earners to help us out of our economic straits. Neither the president nor the vast majority of the Democratic Party were willing to argue for allowing a strong estate tax to come back to pre-Bush tax cut levels late in 2010, but they have the opportunity to do so now. They should do just that.

Administration to Revamp Federal Web Strategy

The Obama administration announced on June 13 a plan to retool its approach to federal websites, with an emphasis on consolidating or eliminating sites. Although the plan has the potential to increase transparency, open government advocates are concerned that important information could end up on the chopping block.

In a memo from the Office of Management and Budget (OMB), Chief Performance Officer Jeffrey Zients details the administration's plan to improve online services. The memo responds to President Obama's April 27 executive order (E.O.) on customer service, including "improving the design and management of agency websites providing services or information to the public." The administration also couched the plan as part of its Campaign to Cut Waste.

"While many Federal websites provide timely and accurate information and services, many others have redundant, outdated, hard to use, or poorly maintained content," Zients wrote. "This duplication not only can cause confusion, but also wastes taxpayer dollars."

Zients continued, "To simplify access to Federal services, the Government needs a comprehensive and consistent strategy for managing its web resources efficiently and assuring that valuable content is available online and is readily accessible."

The memo tasks Chief Information Officer Vivek Kundra with establishing, within 30 days, a task force to update policy for federal websites, including guidelines and best practices.

The administration will instruct agencies on how to improve some sites and eliminate others; by October, agencies will publish their plans for doing so. In the meantime, agencies are not allowed to establish new .gov domains without a waiver from Kundra.

The administration will also post publicly a list of all federal .gov domain names and update the list regularly. The administration is considering how to solicit public feedback on the domains.

The White House has primarily framed the move as a matter of cutting costs. "Most of these cuts we're going to make are small," Vice President Joe Biden said in an e-mail. "However, no amount of waste is acceptable, and these cuts will add up over time."

The White House admits it is difficult even to nail down the precise costs involved. The Energy Department, however, claimed that its web reform efforts had already saved $1 million in the past six months and will ultimately save $10 million per year. Whether comparable savings will be found in other agencies remains unknown.

Despite the focus on cost-cutting, the administration has also claimed that the reforms will result in better service to the public. "The federal government will do more with less, improving how it delivers information and services to the public by reducing the number of websites it maintains," wrote Macon Phillips, White House Director of New Media.

"The Energy Department will need to make new investments in" online communication, wrote Cammie Croft, the Senior Advisor and Director of New Media and Citizen Engagement at the Department of Energy. "The process we are undertaking now will put those efforts on a much better footing ... ensuring the American public gets the information they need, while eliminating wasteful spending none of us can afford."

However, open government advocates remain skeptical. "If the administration is going to reduce the number of websites, will they find a home for the information housed by these sites?" asked the Sunlight Foundation's Daniel Schuman.

Micah L. Sifry of the Personal Democracy Forum called the effort "cheap, dumb and cynical" and remarked, "Remember when the White House thought the internet was cool?"

The administration has not addressed the preservation of these sites. "If old sites are to be taken offline have they been archived properly and are URLs going to be redirected to where the material is being archived?" wondered Gary Price on INFOdocket.

Price's concerns could be reinforced by the fact that FiddlinForesters.gov, a website highlighted by President Obama as an example of "pointless waste and stupid spending that doesn't benefit anybody," had been taken down and returned a "not found" response. According to *NextGov*, the site profiled a group of Forest Service rangers "who sing about ecology, fire safety and the natural beauty of U.S. forests" and was estimated to cost around $125 per year to maintain.

Besides concerns about the loss of existing information, the administration's approach risks deterring efforts to make information newly available online. In comments on the customer service E.O., OMB Watch wrote that agencies should review their existing information services to identify gaps and regularly update websites to add information.

Proposed Congressional Changes to the Regulatory Process Unnecessary

On June 23, several senators outlined proposals for revamping the regulatory system, a system they blame for the nation's economic problems despite evidence to the contrary. Cass Sunstein, administrator of the White House Office of Information and Regulatory Affairs (OIRA), told the senators that the proposals were largely unnecessary and could have harmful unintended consequences.

The exchange between Sunstein and the senators took place at a hearing of the Senate Committee on Homeland Security and Governmental Affairs entitled "Federal Regulation: A Review of Legislative Proposals."

Sen. Joseph Lieberman (I-CT), chair of the committee, called the hearing to allow fellow senators to discuss their proposals for how to change the regulatory system. One of the few acknowledgements that regulations have benefits to society came from Lieberman in his opening comments when he said, "A nation without regulations would be a nation at risk." Smart regulations, he noted, help businesses by providing predictability and accountability.

The hearing's first panel featured Ranking Member Susan Collins (R-ME) and Sens. Olympia Snowe (R-ME), Rob Portman (R-OH), Pat Roberts (R-KS), David Vitter (R-LA), Rand Paul (R-KY), and Mark Warner (D-VA). They presented various ideas that would create more obstacles in the regulatory process and make it harder for agencies to fulfill their mission to protect the American people. Most of these proposals are part of the anti-regulatory agenda of Big Business associations like the U.S. Chamber of Commerce.

The proposals would erect more procedural hurdles in a rulemaking process that is already staggeringly complex. The bills would, among other things, duplicate analyses federal agencies are already legally required to perform and expand the list of analyses to potential impacts from indirect costs and to guidance documents. Other proposals call for allowing judicial review of individual parts of the regulatory process, imposing regulatory "budgets" on agencies, and expanding the reviews of rules OIRA undertakes to include rules promulgated by independent agencies like the Securities and Exchange Commission, the Federal Trade Commission, and the Federal Communications Commission – agencies designed by Congress to function independently from presidential control.

Sunstein was the lone witness on the second panel. He argued that rules have both costs and benefits and that under both Republican and Democratic administrations, the benefits of rules (economic, health, and safety) have outweighed the costs.

He stated that the Obama administration has taken steps to make the regulatory process more cognizant of harsh economic times and emphasized the need for better, evidence-based analyses of potential and existing rules through Obama's Jan. 18 regulatory executive order. That order, combined with laws already in existence, gives the administration the tools it needs to effectively control the flow of regulations and have a sound process, he said.

Executive Order 13563 directed federal agencies to develop and submit preliminary plans to OIRA by May 18. The plans meet the requirement in section 6(b) of the order for each agency to identify how it "will periodically review its existing significant regulations to determine whether any such regulations should be modified, streamlined, expanded, or repealed so as to make the agency's regulatory program more effective or less burdensome in achieving the regulatory objectives."

Under questioning from Lieberman and Portman, Sunstein said he expected the final retrospective review plans to identify changes in rules that will lead to significant cost savings and reductions in paperwork burdens. A June 14 memorandum from Sunstein directs agencies to quantify these changes and to propose specific timelines for implementing the changes. Final plans are due to OIRA by Aug. 6.

Although he did not directly criticize the legislative proposals in detail, Sunstein noted that one idea that several senators proposed, judicial review of cost-benefit analysis, would likely have unintended consequences and that the courts do not have the "skill set" to deal with the technical complexities of economic tools. Dealing with these issues in the courts would tie up regulatory and deregulatory actions in litigation and delay action.

Sunstein also called "deeply flawed" a report that many have been using to criticize the costs of the regulatory system. The report in question was commissioned by the Small Business Administration's Office of Advocacy and was written by economists Nicole and Mark Crain. It pegs the annual cost of regulations at $1.75 trillion, a figure which many on Capitol Hill and many senators in the hearing have repeated as they argue that federal agencies should halt or delay rules that protect our health, workplaces, communities, and environment. Sunstein noted the figure had become an "urban legend."

The study has been widely discredited by the Congressional Research Service, the Economic Policy Institute, and the Center for Progressive Reform. Even the Crains themselves have said that the number was "not meant to be a decision-making tool for lawmakers or federal regulatory agencies." Austan Goolsbee, the Chairman of the Council of Economic Advisers, wrote in a White House blog post on June 23 that the report's figure was "utterly erroneous."

Noticeably absent from the hearing were perspectives from the small business and non-governmental public interest communities; representatives from those communities were not invited to testify. To help fill the void, the Coalition for Sensible Safeguards, of which OMB Watch is a co-chair, held a press call the day before the hearing that featured powerful stories from a small business leader, a victim of foodborne illness, and a nurse.

All of the call's participants made clear that regulations are necessary and valuable; that protecting the American people and preventing harm are key parts of an agency's mission; and that rulemaking delays and the absence of strong standards and effective enforcement take a great toll on everyday people, often resulting in serious injuries, illnesses, and death.

Lieberman's committee is expected to work to combine some of the ideas outlined in the hearing into new legislative proposals. Several senators indicated a desire to add their own ideas to the mix, although they have not yet formulated drafts of bills.

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