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Biennial Budgeting on the Horizon?

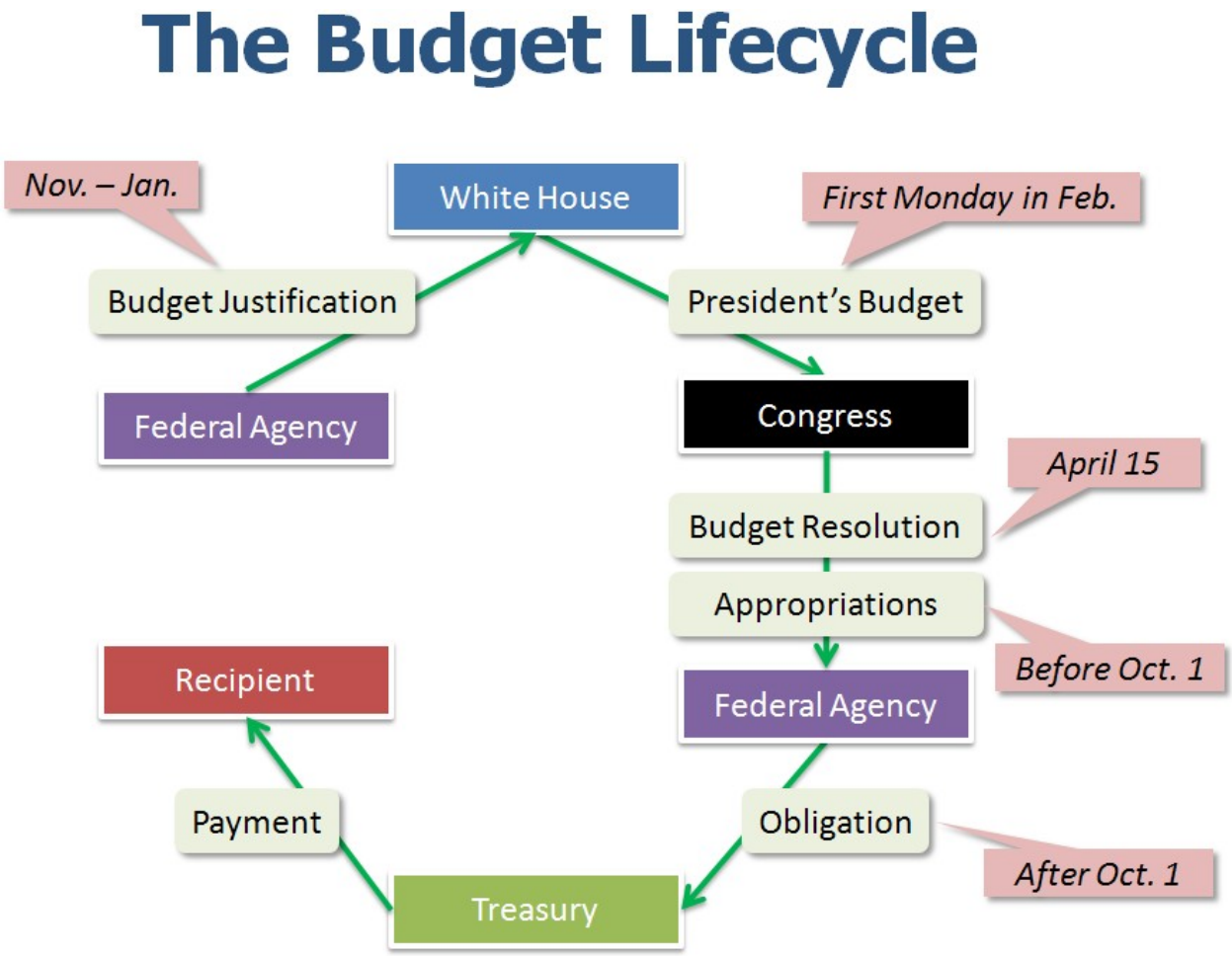
If the Senate confirms Jack Lew, President Obama's nominee to lead the Office of Management and Budget (OMB), Lew is likely to revisit the idea of biennial budgeting. The allure of biennial budgeting at the federal level is that it theoretically frees up more time for both Congress and federal agencies to work on issues outside of the budget. But would a move to biennial budgeting actually change the budget process for the better?

Under the current budget cycle, federal agencies start creating budgets two years before they're enacted. The Fiscal Year 2011 budget was formulated by agencies starting in mid-2009 and presented by the president in early 2010. If the system was working properly, Congress would approve all agency budgets by Oct. 1, the beginning of the new fiscal year.

At any given time, Congress and the executive branch are wrestling with three budget cycles: oversight of the current fiscal year, including consideration of supplemental appropriations and rescissions; preparing for the upcoming fiscal year, which starts Oct. 1 of the current year; and planning for the following fiscal year, which starts Oct. 1 of the next year.

In the recent past, Congress has been unable to complete its budget-making responsibilities, mostly by being late on enacting its appropriations bills. In 2010, however, Congress did not even pass a budget resolution. Many have commented that the complexities of the budget process, combined with congressional partisanship, have caused the annual budgeting process to break down.

Under a biennial budgeting regime, instead of completing the entire budget process every year, Congress would only work on spending bills every two years. In the off year, Congress could focus on the oversight of programs and address tweaks to the spending process through supplemental appropriations or rescissions. By not worrying about yearly budgets, Congress could spend more time improving how the federal government works.



(click to enlarge)

Historically, biennial budgeting was the norm in the states. According to the National Conference of State Legislatures, 44 states employed biennial budgeting in 1940, but only 20 will by the end of 2010. One of the reasons states are moving away from biennial budgets is the difficulty of forecasting revenues as far in advance as biennial budgeting requires. Another is that in the 1940s, many state legislatures were part-time; some only had long sessions every two

years. With the growth in power of state legislatures also came increased interest in controlling budgets.

Despite the trend away from biennial budgeting at the state level, there is increased interest at the federal level. While biennial budgeting has frequently received presidential support – Presidents Reagan, both Bushes, and Clinton all endorsed biennial budgeting – it has never been implemented at the federal level. Given that Lew oversaw the Clinton budgets that included recommendations to move to biennial budgeting, it was not surprising to hear Lew recommend it again at his recent Senate confirmation hearing. Sen. Kent Conrad (D-ND), the chair of the Budget Committee, echoed Lew in supporting biennial budgeting. In the past, key Republicans have also voiced support for the practice.

With Republicans expected to make gains in Congress in the November election, biennial budgeting is likely to pick up steam in 2011.

However, it isn't certain that the federal government would see any benefit from a biennial budget cycle. In a two-year budget cycle, federal agencies could use every second year to focus on implementing their programs, instead of working on the next year's budget. Agencies might also benefit from the added stability of biennial budgets, as program planners could set their sights on longer-term goals. But these advantages come at a cost. One of the hardest parts of preparing the federal budget is the technical aspect – preparing estimates of inflation, economic growth, revenue estimates, and more. Most elements of cost are based on assumptions. Out-year estimates have an increasing level of uncertainty associated with them, which are inherent in biennial budgeting. Many assumptions about difficult-to-control cost elements, such as payroll or travel costs, would have to be built into the estimates. The costs incurred are difficult to change, yet estimating the costs of a workforce almost three years ahead of time is not an easy task. The problem becomes even more pronounced when it comes to revenue estimates.

If Congress moved to a biennial budget system, it would need to rely on supplemental appropriations bills to make major corrections along the way. Overuse of the supplemental appropriations process would lead to a de facto annual appropriations bill, erasing any certainty agencies might gain from biennial budgets, while at the same time pushing more spending into extra-budgetary supplemental appropriations, undermining budget accountability.

The "budget certainty" argument also ignores the fact that the budget process already supports multi-year appropriations. Congress can, and routinely does, appropriate funding for a program over the course of several years, say for a new fighter plane that would require many years of sustained funding. Indeed, according to the Government Accountability Office (GAO), in 2000, about two-thirds of annual appropriations accounts had multi-year funding. Thus, agencies already receive the benefits of biennial appropriations but with the added ability to change funding levels if circumstances require it.

Moving to a biennial budget could exacerbate, not reduce, the greatest problem currently facing the budget process: gridlock. Congress has not passed its annual budget resolution, nor has it passed a single appropriations bill, despite the fact that the current fiscal year ends on Sept. 30.

Between now and then, Congress must pass a continuing resolution to fund government or face a crippling government shutdown. This current crisis has come about not because Congress is spending too much time on the budget process or does not have enough time; the problem is that the different factions of the Democratic Party cannot agree on spending levels, and they worry about Republicans tying them in knots politically.

As a result, the normal budget process is now far, far behind schedule and will most likely require multiple continuing resolutions before Congress passes one giant omnibus appropriations bill sometime after the election. Under biennial appropriations, the current political environment might mean Congress could chew through that second legislative year with more budget debates, since there isn't another budget cycle they're bumping up against. With today's political gridlock, biennial budgeting could lead to seemingly unending budget battles and two years worth of agency budgets held in limbo.

While biennial budgeting may bring some positive attributes to a budget process in need of reform, it is not a panacea or a full solution to the problems Congress currently faces. As budget expert Stan Collender asserts in a commentary in *Roll Call*, "The only thing biennial budgeting would absolutely cut is the number of politically difficult votes that Members of Congress have to take on the deficit."

Congressional Oversight Panel Examines TARP Contracting

On Sept. 22, the Congressional Oversight Panel (COP), the body tasked by Congress to oversee implementation of the Troubled Asset Relief Program (TARP), examined the Department of the Treasury's use of private contractors under the program. Witnesses from government, the private sector, and the nonprofit world critiqued Treasury's use of financial services contractors and highlighted lessons about improved competition and openness that the government should take from the soon-to-be-ended program.

Shortly after passage of the Emergency Economic Stabilization Act of 2008 (EESA), which created TARP, Treasury began turning to private entities, including investment management firms, law firms, accounting firms, and consulting firms, to assist with implementation of the $700 billion bank bailout. As of the end of August, Treasury had entered into 108 transactions to procure nearly $450 million worth of services.

Under TARP, Treasury entered into two forms of agreements, one with contractors and one with financial agents. Treasury utilizes contractors for basic services like document management, legal support, and information technology, while financial agents act for and on behalf of the government and may hold and manage money. While financial agents have a fiduciary obligation to the government, as deputy chair of the panel Damon Silvers pointed out, they "do not take an oath of office ... stand for election ... nor are they subject to civil service rules." Rather, "Their goal is to turn a profit – not to advance the public good."

Under EESA, Congress granted Treasury emergency contracting authority, which allowed the agency to bypass normal contracting rules under the Federal Acquisition Regulation (FAR), including those concerning competition and conflict of interest. Despite Treasury's steps to mitigate these issues – including issuing separate guidance on increasing competition in TARP contracts and conflict of interest regulations – questions remain.

Despite contractors and financial agents instituting required conflict of interest controls, including internal information firewalls, non-disclosure agreements, and restrictions on gifts and entertainment from outside groups, good government organizations worry that the rules rely too heavily on self reporting. Codes of conduct, incident reporting, and quarterly certifications on ethical issues such as conflicts of interest will likely not capture those employees or organizations that seek to skirt the rules.

According to Scott Amey, general counsel for the Project on Government Oversight (POGO), TARP's conflict of interest rule, instituted in January 2009, is in dire need of additional reforms. POGO and others have criticized the rule "for being cumbersome, ambiguous, inconsistent with the FAR, and requiring clarification." Clarification and improvements would end the "overreliance on retained entities to report organizational and personal conflicts" and "require constant agency monitoring and review."

Amey also pointed out the deficiency of Treasury's general contracting practices and the lessons the government should learn from it. In procuring nearly $4.8 billion in goods and services in Fiscal Year 2009, Treasury opened only 22 percent of those funds to full and open competition. All forms of restricted competition, including competitions within a selected pool of contractors and offers on which the government only received a single bid, account for only roughly 60 percent of Treasury's contract dollars. This means, as Amey aptly points out, that competition for a contract, even in a limited form, is really the exception to the rule at Treasury.

Amey and other witnesses, however, were impressed with the trend within Treasury to convert risky, potentially more costly contract types into more accountable contracts. Indeed, even though the agency entered into a number of time and materials contracts, Amey recognized that Treasury "has made progress in converting them to fixed price contracts when requirements were established and fixed prices could be determined."

Because many of the contracts the government entered into under TARP already exist, there is little the government can do fix these current problems. As Professor Steven Schooner, a George Washington University Law School professor, stated:

> Ultimately, Treasury – with its eyes open, and for good reason – entered into a large number of risky transactions, under severe time pressure. At this point, the moment had passed for the government to best employ the lion's share of the best practices to minimize and avoid risk. Many of those transactions will turn out fine. Some will not.

This is to say that the government should take the lessons from TARP contracting and apply them in the future should a similar crisis arise.

Look for the Congressional Oversight Panel to release a report soon on the Treasury Department's use of private contractors and financial agents in TARP programs utilizing the testimony from this recent hearing.

At UN, Obama Calls for Global Transparency but Offers Few Details

On Sept. 23, President Barack Obama addressed the United Nations (UN), calling on countries to strengthen government openness. He emphasized the importance of transparency in fighting corruption and increasing civic engagement. At a world summit the day before, Obama trumpeted his administration's new global development policy, which pledges more transparency related to U.S. aid activities. However, the administration refused to release the text of the policy, and details remain sparse.

In his speech to the UN General Assembly, Obama praised the benefits of transparency. He noted that the foundation of liberty and human progress "lies in open economies, open societies, and open governments." He went on to say that "America is working to shape a world that fosters this openness," and added, "The common thread of progress is the principle that government is accountable to its citizens."

Obama argued that one key element in creating accountability is "to make government more open and accountable." He challenged the United Nations members to return in 2011 with "specific commitments to promote transparency; to fight corruption; to energize civic engagement; to leverage new technologies so that we strengthen the foundations of freedom in our own countries, while living up to the ideals that can light the world."

Echoing the speech, the White House released a fact sheet on recent developments in transparency in the U.S. and abroad, which reiterated Obama's call for countries to return to the UN in 2011 with specific transparency commitments.

The day before the UN speech, Obama addressed a world summit to review progress toward the Millennium Development Goals (MDGs). Adopted by UN members in 2000, the MDGs set global development targets for the year 2015 on topics such as poverty, health, and environmental sustainability.

In his remarks, the president made clear that transparency would be a prominent element of U.S. development policy, saying the U.S. would focus its development efforts on countries with good governance and transparent institutions. The president also urged other donor countries to "commit to the same transparency that we expect from others."

Before the summit, OMB Watch sent a letter to the president asking him to publicly address transparency at the summit. The letter also detailed several needed reforms to improve U.S. aid transparency.

New Global Development Policy

The White House also used the summit as an opportunity to announce its new Presidential Policy Directive on Global Development. A fact sheet on the policy outlined the three areas of focus for development. First, the administration will seek to maximize the return on development investments by focusing on projects with the most sustainable outcomes. Second, the government will pursue a new model of engagement that will enable the U.S. to be a better partner in development projects. Third, development will be elevated within the government to the equal of diplomacy and defense. The fact sheet stated that the U.S. would expect transparency from recipients of U.S. aid and pledged "greater transparency" for U.S. aid activities.

In separate fact sheets, the Millennium Challenge Corporation emphasized transparency in its activities and the Treasury Department emphasized transparency in multilateral development banks to which the U.S. contributes, while the Global Climate Change Initiative mentions improving transparency in recipient countries.

The White House heralded the Presidential Policy Directive on Global Development as the first such policy by a U.S. administration but refused to release the text of the actual policy directive. Apparently, the policy is a classified document of the National Security Council. The fact sheet does repeatedly discuss the importance of development within the national security strategy.

The classification process requires documents to meet strict standards of including information that would be damaging to national security if released before the record can be classified. The administration has not articulated publicly how its development policy meets these requirements. (At the end of the Bush administration, a Senate hearing examined the problems of secret policies.)

Gregory Adams of development charity Oxfam America criticized the decision, noting, "The Administration should make sure that enough [information] gets out to not only provide the American people with a clear rationale for the new approach, but also make sure that our partners around the world understand how we plan to change the way we work with them."

Results of the MDGs Summit

The summit's outcome document noted the benefits of transparency and accountability in both donor and developing countries, as well as in UN agencies, to achieving the MDGs. The document emphasized that providing more data on aid spending and its results can mobilize greater support for donors to fulfill their commitments. The document also emphasized the role of transparency in ensuring that aid spending reaches its intended beneficiaries:

> To build on progress achieved in ensuring that [development aid] is used effectively, we stress the importance of democratic governance, improved transparency and accountability, and managing for results.

However, the document was criticized by the international human rights group Article 19, which called the transparency language "strong on rhetoric but weak on commitment" and said the transparency elements were "only minimal pledges."

Concerns over Industry Influence Mount in Cell Phone Right-to-Know Fight

In an effort to ensure mobile phone buyers can make informed choices, the city of San Francisco recently passed an ordinance requiring retailers to label cell phones with the amount of radiation the devices emit. In retaliation, a wireless industry trade group announced it will no longer hold its trade shows in San Francisco and filed a lawsuit to block enforcement of the ordinance. The fight has caused right-to-know advocates to raise concerns over the extent of the wireless industry's influence over regulators.

The San Francisco Board of Supervisors, citing "the potential harm of long-term exposure to radiation emitted from cell phones," voted 10-1 in favor of the "Cell Phone Right-to-Know Ordinance," which requires cell phone retailers to display the radiation levels for each phone model. Cell phone radiation is measured using a specific absorption rate (SAR), calculated by the amount of the phone's radiation energy (in watts, W) absorbed per kilogram of body tissue (W/kg). SAR levels for cell phones are already publicly available through the Federal Communications Commission's (FCC) website. The FCC sets acceptable radiation standards for cell phones.

Members of the public may search for the SAR of a particular cell phone model on the FCC's site. However, the site's searchability has been criticized, as searching is too difficult and time-consuming. The website requires users to enter the product's FCC ID number, usually found inside a phone beneath the battery.

Despite providing cell phone SAR values to the public, the FCC recently deleted information on how consumers can protect themselves from exposure to radiation from cell phones. The commission's website currently states:

> Some measures to reduce your RF [radiofrequency energy] exposure include:
>
> - Use a speakerphone, earpiece or headset to reduce proximity to the head (and thus exposure). While wired earpieces may conduct some energy to the head and wireless earpieces also emit a small amount of RF energy, both wired and wireless earpieces remove the greatest source of RF energy (the cell phone) from proximity to the head and thus can greatly reduce total exposure to the head.

- Increase the distance between wireless devices and your body.
- Consider texting rather than talking - but don't text while you are driving.

However, as recently as Sept. 17, the FCC website had included the following text as an additional precaution, information that has since been deleted:

> Buy a wireless device with lower SAR. The FCC does not require manufacturers to disclose the RF exposure from their devices. Many manufacturers, however, voluntarily provide SAR values. You can find links to manufacturer Web sites providing these SAR values on the FCC's Web site at www.fcc.gov/cgb/sar.

Advocates of the San Francisco right-to-know ordinance suspect industry influence may have pressured the FCC into removing information from its website.

The Environmental Working Group (EWG), a nonprofit public interest group, recently submitted a FOIA request to the FCC requesting all agency communications with the Cellular Telecommunications Industry Association (CTIA), the wireless industry's trade association, regarding the San Francisco ordinance. EWG is seeking disclosure of calendars, meeting documents, and e-mails between CTIA and the FCC. The consumer watchdog group is concerned that "CTIA wants the FCC to intervene in its lawsuit with San Francisco. And, in fact, the FCC has a history of siding with industry in legal disputes concerning cell phones."

CTIA is headed by Steve Largent, a former Republican congressman from Oklahoma who served on the telecommunications subcommittee of the House Energy and Commerce Committee.

According to CTIA, "The ordinance misleads consumers by creating the false impression that the FCC's standards are insufficient and that some phones are 'safer' than others based on their radiofrequency (RF) emissions." The industry group criticizes the city of San Francisco for requiring disclosure of information that will confuse consumers and condemns the ordinance for intruding on FCC's "exclusive and comprehensive regulation of the safety of wireless handsets." The ordinance is also unconstitutional, violating the Supremacy Clause in Article VI of the U.S. Constitution, according to CTIA.

A spokesman for San Francisco mayor Gavin Newsom, a supporter of the ordinance, countered industry complaints, stating, "This is a modest and commonsense measure to provide greater transparency and information to consumers." The ordinance does not make any judgment on the relative safety of various SAR ratings or phones, and only requires retailers to post information that is already available publicly – although not easily – through the FCC.

There currently is no conclusive evidence showing that mobile phones are dangerous. However, a number of scientific studies have identified links between cell phone use and human health problems.

In September 2009, EWG released a report reviewing the scientific literature regarding cell phone radiation and human health effects. The report raised concerns about the safety of cell

phone use over many years. EWG observes that a Food and Drug Administration (FDA) assertion on the safety of cell phone use failed to consider the long-term impact of the devices. (FDA has authority to take regulatory action if cell phones are shown to emit RF levels hazardous to the user.) The report goes on to identify studies linking cell phone radiation to increased risk for brain cancer, salivary gland tumors, behavioral problems, and migraines and vertigo. The report also cites a 2008 National Research Council study that raised concerns about the impact on children's health of cell phone radiation. Children are more susceptible to the effects of radiation than adults.

Despite the health concerns identified by EWG's analysis of scientific studies, the federal government continues to defend the existing SAR standard, 1.6 watts per kilogram, as safe. According to the FDA, "The weight of scientific evidence has not linked cell phones with any health problems." The FCC maintains that "currently no scientific evidence establishes a causal link between wireless device use and cancer or other illnesses."

The mayor and Board of Supervisors of San Francisco recognize that product labels are one of the most effective ways to provide crucial information to the public. The city has taken publicly available information that had been difficult to access and is making the data more easily available. It is in the best interest of the public to have relevant data easily accessible so consumers may make their own decisions, especially considering the incomplete and sometimes contradictory scientific data on the safety of long-term cell phone use.

EWG also maintains a searchable database listing SAR levels for cell phones, including smart phones, available on its website. The database allows users to compare the radiation levels of different models and includes lists of "best" and "worst" phones ranked by radiation levels.

OSHA's Whistleblower Protection Problems Continue, GAO Says

In a new report, the Government Accountability Office (GAO) has again strongly criticized the Occupational Safety and Health Administration (OSHA) for a range of problems and inconsistencies in the agency's handling of whistleblower protections.

The participation of workers is an important accountability and effectiveness mechanism needed to keep workplaces safe and legal. OSHA is responsible for protecting the substantive and procedural rights of employees who disclose prohibited or illegal practices and then experience retaliation for blowing the whistle on these practices. OSHA administers the whistleblower protection provisions of 19 different federal statutes covering industries and subjects as diverse as transportation, consumer products, environmental quality, and finance.

In a report released Sept. 17, GAO criticized OSHA for several failures to adequately protect workers and to develop agency practices that can lead to better implementation of its responsibilities. The report was requested by Sens. Tom Harkin (D-IA) and Patty Murray (D-WA) and by Reps. George Miller (D-CA) and Lynn Woolsey (D-CA). They requested GAO to

follow up on its January 2009 report that was critical of OSHA's whistleblower program to see if there were improvements at the agency.

For more than 20 years, GAO has criticized OSHA management for its neglect of the whistleblower program. OSHA's internal procedures, lack of resources and training for investigators, and inconsistent outcomes across the agency's regional offices are persistent problems. The most recent report highlights these same issues.

Specifically, the report concludes that:

- A large portion of agency investigators has not completed the two mandatory training programs for investigators established in 2007 and 2008. The report notes that "just over 60 percent has taken or registered for the second mandatory course. Additional training on specific, complex statutes has not been developed because of resource constraints."
- OSHA still has not implemented earlier GAO recommendations to provide investigators with a standard set of equipment (such as portable printers) and resources (such as standard software).
- "OSHA lacks sufficient internal controls to ensure that the whistleblower program operates as intended due to several factors, including inconsistent program operations, inadequate tracking of program expenses, and insufficient performance monitoring."
- Regions vary in the way they screen whistleblower complaints and assign personnel and by the level of manager who makes decisions about cases. The national office does not have access to data and case files to adequately monitor the regional offices for compliance with agency procedures.

GAO points out that the problems at OSHA are exacerbated by the increased numbers of whistleblower complaint statutes recently passed while OSHA's program resources have remained relatively flat. For example, since 2000, six new statutes addressing such broad issues as financial accountability, pipeline safety, and consumer product safety, as well as the new health care bill, all create new enforcement responsibilities for OSHA. The number of investigators has remained in the range of 63-80 (the current high in 2010). OSHA received resources for 25 additional full-time investigators in Fiscal Year 2010, but GAO raises concerns about the distribution of those new investigators among regional offices and whether they will be used strictly for whistleblower activities.

Assistant Secretary of Labor for Occupational Safety and Health, Dr. David Michaels, released a statement Sept. 16 addressing GAO's report, saying

> With our available resources, OSHA is working hard to ensure that whistleblowers are protected from retaliation. We are in the process of a top-to-bottom review of OSHA's whistleblower protection program. This comprehensive review will cover policy, resources, equipment and work processes. The objective is to identify any weaknesses and inefficiencies in the program and improve the

> way we conduct this very important activity. In addition, we have hired additional personnel in the past year in an effort to more efficiently process cases.

Michaels, who was only confirmed by the Senate on Dec. 3, 2009, noted that OSHA has set a goal that all investigators and their supervisors complete within 18 months the mandatory training programs as an example of actions the agency has begun.

The GAO report criticized the agency's responses to its recommendations, saying that the agency knows enough to begin implementing internal controls before a thorough review of weaknesses is completed.

A press release from the members who requested the GAO follow-up study noted that in congressional hearings on incidents like the Upper Big Branch mine explosion and the BP *Deepwater Horizon* oil spill disaster, Congress heard from many employees who feared being fired or who experienced some retaliation when disclosing significant workplace problems. Miller was quoted as saying, "As we have seen all too often, workers pay the tragic price when companies retaliate against workers who raise legitimate safety concerns. Strong and effective whistleblower protections are essential to ensuring a safe workplace since safety regulators can't be on every site."