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In This Issue

Buffett Rule Targets Capital Gains

On April 16, the Senate voted on a bill that would have enshrined the "Buffett Rule" in the tax code, which would have ensured that millionaires and billionaires pay their fair share of taxes. With the bill's defeat, Congress should consider other options to increase tax fairness.

As millions of Americans scrambled to finish their taxes, the Senate voted to protect the most regressive aspect of today's tax code. Currently, many wealthy taxpayers pay little or nothing in taxes, with the most prominent recent example being Republican presidential candidate Mitt Romney, who recently disclosed that he paid a tax rate of only 13.9 percent on $21 million in income. Congress's failure to approve the Buffett Rule indicates its unwillingness to enact a truly progressive tax code.

The Buffett Rule is named after billionaire Warren Buffett, who famously pointed out that his secretary paid a higher tax rate than he did. Buffett (and other extremely wealthy people) often pay low taxes because the majority of their income comes from capital gains and dividend payments,

which are taxed at a lower rate than ordinary wages. More than 200,000 millionaires and billionaires pay less than 30 percent of their income in taxes, and the 400 wealthiest taxpayers, all of whom earned more than $110 million in 2010, paid an average of only 18 percent in taxes. By only paying a maximum rate of 15 percent on capital gains income, wealthy taxpayers can pay a lower tax rate than those who earn income through their salaries or wages, which are taxed at a maximum rate of 35 percent. Since the rate for capital gains is less than half the highest tax rate for wages, wealthy taxpayers often have effective tax rates lower than professional middle-class families.

The Buffett Rule in general targets this capital gains preference by instituting a tax floor. Sen. Sheldon Whitehouse's (D-RI) version of the Buffett Rule would require that taxpayers with annual incomes over $2 million pay at least 30 percent of their income in taxes. The rule is phased in gradually, starting at $1 million, so that these taxpayers would not face a steep tax "cliff" when their income rises above $1 million. According to the Tax Policy Center, the Buffett Rule would affect some 217,000 taxpayers, 1,470 of whom pay no taxes whatsoever (the White House recently released a new tool allowing taxpayers to see how many millionaires paid lower taxes than them).

As an example of how the Buffett Rule would work, take a hypothetical wealthy, married taxpayer. If the taxpayer has $2 million in wages and $8 million in capital gains, assuming no deductions, the taxpayer would only owe about $1.89 million in taxes, or less than 19 percent. This is about the same tax rate as a married couple earning $110,000 a year, even though the wealthy taxpayer earns more than 90 times more. Under the Buffett Rule the Senate rejected, this wealthy taxpayer would have seen his taxes almost double.

While the Buffett Rule would have been a step in the direction of ensuring everyone pays a fair share, a better solution would be to simply raise the capital gains tax rate itself. As noted before, the Buffett Rule essentially targets capital gains income for millionaires and billionaires. However, it would have added a new level of complexity to the tax code. Increasing just the capital gains rate itself, which President Obama has recommended in his latest budget, is both simpler, as it requires no new calculations, and it would raise far more money.

Moreover, insofar as the Buffett Rule limits itself to taxpayers with income over $1 million, it is forgoing billions of dollars a year in lost tax revenue. The Joint Committee on Taxation estimated that the Senate's version of the Buffett Rule would raise approximately $47 billion over 10 years. Raising the capital gains rate to 20 percent and taxing qualified dividends as ordinary income, as the president recommends, would bring in $242 billion over 10 years. Treating capital gains income as ordinary income, or taxing it at the higher rates for wages, would generate about $900 billion in revenue in the next decade.

Either the Buffett Rule or raising the capital gains rate could raise significant revenue to pay for important federal programs. For instance, in July, federal student loan interest rates are scheduled to double, costing the average loan recipient thousands of dollars over a 10-year period. In 2008, more than a third of all undergraduates had a federal student loan. Keeping the rates low for these students would cost at least $30 billion over the next 10 years. Implementing the Buffett Rule would bring in at least $47 billion over 10 years, more than enough to pay for keeping student loan interest rates low. But raising capital gains rates themselves would do much more, potentially allowing Congress to fix

the student loan hole, add graduate students back to the program, and expand the Pell Grant (which helps pay for college for low-income students) to include millions more students.

Raising taxes on wealthy taxpayers, either through the Buffett Rule or simply raising capital gains rates, would have two benefits. The reforms would ensure that everyone pays their fair share in taxes, and they would help raise revenue for crucial public protections and social safety net programs at the same time.

GAO Reports Defense Department Barely Moving toward a Comprehensive Service Contracts Database

Earlier in April, the Government Accountability Office (GAO) released the second in a series of new, congressionally mandated reports assessing the Department of Defense's (DOD) efforts to compile an inventory of service contracts. Congress intends for the Pentagon to include these reviews in its yearly budget work and expects "inherently governmental work" currently performed by private contractors to be brought back "in-house." This review process will help the Pentagon find ways to reduce costs and limit the over-reliance on contractors.

Seventy cents of every contracting dollar spent by the federal government in 2010 was spent by the Pentagon; $371 billion of the $530 billion in federal contract spending was awarded through DOD contracts. Moreover, DOD contracting is continually plagued by stories of $435 hammers, 19 cent washers that cost almost $1 million to ship, and other impossible-to-justify charges.

As a result, Congress has enacted legislation demanding that the Pentagon take steps to improve its acquisition and service contract management systems. In 2008, Congress inserted language into that year's National Defense Authorization Act requiring the Pentagon to compile and review an annual inventory of service contracts, including the collection of key data, such as:

- The "function and missions" performed by the contractor
- The name of the contracting organization
- The funding source and operating agency paying the contract
- The number of full-time contractor employees that the contract is paying for

Additionally, Congress required the Pentagon to integrate the information on contractors into its annual strategic workforce plans and budget justification materials.

Congress directed the GAO to assess the progress DOD and its departments were making in cataloging this data over the following three years. The first report in the series, released in January 2011, paints a picture of disorganization and inefficiency.

The Pentagon has no database that officials can use to create a common inventory. In fact, due to the challenges in addressing "the different requirements of the military departments and components," the Pentagon estimates that it will not be able to field the common database system until 2016, which

may be too optimistic since GAO found that "DOD has not established milestones or time frames for the development and implementation of the data system" within its work plan.

Pentagon departments have to rely on the Federal Procurement Data System – Next Generation (FPDS-NG) to compile their inventory reports, but the FPDS-NG dataset does not contain much of the specific data DOD is looking for, including multiple services provided through a single contracting action, services provided through a contract predominantly for supplies, or contractor employment numbers.

Moreover, GAO found that some Navy commands contacted were not even aware that they were supposed to conduct a review, and Navy headquarters did not follow up to ensure that they had conducted the inventories. In fact, the Pentagon was not able to tell Congress that all DOD departments were either collecting or had plans to start collecting the appropriate contractor data, including employment figures, until November 2011. All other federal agencies began collecting this information earlier.

Although not comprehensive, the 2009 inventory was able to identify more than 2,000 instances of contractors performing inherently governmental functions, as determined by Army and Air Force reviews. When GAO performed a random check to see if these jobs had been converted back to civil service jobs, they found private contractors still in eight out of 12 positions. While GAO found that DOD made some improvements between its 2009 and 2010 service contract inventory reports, providing greater detail and higher levels of accuracy, the Pentagon plan for establishing a department-wide service contract database has yet to incorporate appropriate milestones and timeframes or to hold managers responsible for in-sourcing contracts.

Updated Agency Plans Show Path toward Culture of Openness

On April 9, numerous federal agencies released new versions of their Open Government Plans, detailing the activities they will undertake to bolster transparency and citizen participation. The latest versions are the second generation of plans; the original plans were published in 2010 in response to President Obama's transparency memo and the administration's Open Government Directive.

By prompting agencies to examine their operations and think creatively about opportunities for transparency, the Open Government Plans can be a powerful tool to help create a culture of greater openness in government. The new plans include a number of promising initiatives but also reveal some aspects of the process that need improvement.

Background

On his first full day in office, President Obama issued a memo establishing the principles for open government in his administration: transparency, participation, and collaboration. That memo directed the Office of Management and Budget (OMB) to issue a directive with specific steps for agencies to take in order to implement those principles.

In December 2009, OMB issued the Open Government Directive to fulfill that responsibility. Among other things, the directive instructed agencies to develop Open Government Plans, with the participation of the public, and to update those plans every two years. In their plans, agencies were to address Obama's openness principles of transparency, participation, and collaboration by developing specific new initiatives that the agency would implement. Agencies published the initial plans in April 2010. After the open government community reviewed the plans, several agencies revised them to incorporate additional reforms.

The agencies' initial open government plans resulted in a range of efforts to improve transparency and participation. For instance, the Department of Labor launched an Online Enforcement Database that contains information on inspections the department conducts to ensure businesses are complying with the nation's worker rights and safety laws and regulations. The Department of Energy's Open Energy Information website uses an open-source platform similar to Wikipedia to allow users to search, edit, add, and access energy-related data. The Department of Transportation's (DOT) Regulation Room, a flagship initiative of the agency's first Open Government Plan, is a partnership with Cornell University to explore new online methods to engage the public in rulemaking. The U.S. Environmental Protection Agency's (EPA) earlier plan detailed improvements to the AIRNow program that now allows the public to receive air quality alerts through Facebook and Twitter.

Agencies were due to publish the first update to their plans on April 9 of this year, two years after the initial plans were released. Some agencies solicited ideas from the public or the open government community while developing the new plans, but overall outreach was less robust than for the "version 1.0" plans. Many agencies published updated plans by the deadline, although several have yet to release theirs. The "version 2.0" plans include an update on the agencies' initial plans, as well as new openness commitments to be implemented from 2012-2014.

What's in the New Plans

The available plans propose a number of new agency efforts and policy changes. Several agencies included plans to strengthen the agencies' culture of openness, improve implementation of the Freedom of Information Act (FOIA), increase public access to data, and make websites more user-friendly, among other topics.

Culture: The culture of an organization can influence the way policies and programs are implemented. Government needs to foster a culture of openness in order for transparency to be sustainable. The open government community's 2008 recommendations, *Moving Toward a 21st Century Right-to-Know Agenda*, emphasized the need to create a pro-transparency atmosphere within government, such as through incentives.

For example, the Department of Health and Human Services (HHS) implemented the Secretary's Innovation Awards program from its version 1.0 plan, which recognizes employees that take initiative to promote transparency, participation, and collaboration. The Social Security Administration (SSA) and DOT also have employed similar incentive programs to reward workers that uphold open government principles.

DOT has invested in training seminars for employees so they may be better equipped to use social media to organize meetings and further engage the public. HHS will take on a similar initiative geared toward training employees in collaboration and information sharing. SSA also plans to incorporate open government into its employee training.

HHS and SSA also plan to adapt their strategic processes, such as planning, and organizational structure in order to support their open government efforts.

FOIA: The EPA plan includes the development of a cross-agency [FOIA portal](#) as a flagship initiative for the agency. SSA and the Department of Commerce plan to investigate greater use of technology for FOIA processing.

The Department of Justice (DOJ) committed to begin publishing its logs of processed FOIA requests on a monthly basis. DOJ and the Department of Homeland Security plan to update their FOIA regulations in 2012, although [DOJ's previous proposal was criticized](#) as actually detrimental to transparency.

Other initiatives: Several agencies plan initiatives relating to improving public access to data (including HHS, the Department of Agriculture, the Department of Housing and Urban Development, and the General Services Administration), making websites more user-friendly (the Treasury and Commerce departments as well as the National Aeronautics and Space Administration), and use of social media to communicate with the public (DOJ, Commerce, DOT).

Next Steps for Increasing Openness

The agencies that have not yet published an updated Open Government Plan should do so soon. Agencies that have already published a plan should begin soliciting feedback from stakeholders and the public and preparing for implementation.

Many agencies have been inconsistent at encouraging participation in developing the open government plans. Now that the version 2.0 plans have been published, agencies should make a concerted effort to reach out to stakeholders for their views. Only through outreach can agencies ensure that their plans will be useful for their stakeholders and user communities. In addition, agencies should remain engaged with stakeholders on the topic of their open government plans, rather than only seeking feedback every two years when the plans are updated.

To support effective implementation and agency accountability, agencies should also develop specific timelines and milestones for their initiatives and regularly report on progress or changes to the plan. The Open Government Directive calls for clear and detailed implementation plans, and although some agencies have included this information in their open government plans, several plans remain vague and general. Having milestones and progress reports allows the public to assess agencies' efforts. While agencies should have the flexibility to revise their plans if necessary, milestones and progress reports help ensure that open government implementation remains an agency priority.

Finally, there is an ongoing need for government-wide coordination and oversight of the open government plans. The White House should supply continued leadership to help agencies overcome obstacles to implementation and reinforce the importance of open government activities. The interagency Open Government Working Group also should continue to provide a forum for agencies to share ideas and build support for the common purpose of delivering a more open and accountable government for the American people.

EPA Releases Open Government Plan 2.0

The U.S. Environmental Protection Agency (EPA) and other major federal agencies released updated versions of their Open Government Plans on April 9. The EPA's Open Government Plan 2.0 discusses its ongoing efforts to increase transparency and instill a culture of greater openness through activities designed to increase participation in rulemaking, allow greater public access to EPA data, and speed the processing of Freedom of Information Act requests.

Background: The Open Government Directive

Under the Obama administration's Dec. 8, 2009, Open Government Directive (OGD), each agency was required to produce an Open Government Plan, which described how the agency would incorporate the principles of transparency, participation, and collaboration into its ongoing work. Additionally, each plan was to include at least one "flagship" initiative designed to advance the principle of openness.

The EPA's first open government plan, or version 1.0, was released in April 2010 (and revised version 1.1 was released in June 2010) and emphasized community engagement as its flagship initiative. In the past two years, the EPA has expanded its outreach to environmental justice communities, increased public awareness of and engagement in the rulemaking process, and improved public access to environmental information by developing mobile applications. The EPA's deputy administrator is finalizing a report on how these and other community-based outreach efforts are being coordinated across the agency.

In June 2011, the agency launched the "Apps for the Environment" contest as a way to reach out to software developers, students, research institutions, colleges, and universities and encourage them to develop mobile applications to increase environmental awareness and creatively use the EPA's data and information. The agency hoped the contest would enable users to have easier access to environmental and public health data and that the information would enable more users to make more informed decisions.

Adam Borut and Andrea Nylund of EcoHatchery won best overall app for their creation of a Light Bulb Finder, which helps consumers select the best energy efficient replacement bulb and provides information on cost savings and the environmental impact of the replacement. Will Fry and Ali Hasan of Fry Development Company and Differential Apps won the best student award for their app, EarthFriend, which provides interactive educational games that use facts and data from the EPA's databases to suit audiences of different ages.

To assist other government agencies that are considering launching a similar challenge, the EPA published a description of the process and lessons staff learned in conducting the Apps for the Environment Challenge. The lessons learned include: structure the challenge so all stakeholders win; make the data/user/developer connection sustainable; get internal buy-in; partner with complementary parties (the EPA sought advice from the Department of Health and Human Services); and listen to what your stakeholders need.

Plan 2.0

For the version 2.0 plans, the administration directed agencies to propose at least four new open government efforts to undertake between 2012 and 2014. The EPA selected expanding public participation in rulemaking, developing new software to better process Freedom of Information Act requests, designing tools to improve access to scientific data, and updating their Strategic Data Action Plan.

Public Participation in Developing Regulations

As the managing partner of the eRulemaking program, the EPA has included in its version 2.0 plan a number of actions to improve public access to information on regulations and participation in rulemaking. Specifically, the agency plans to undertake the following initiatives:

- Complete overhaul of Regulations.gov, which will include "a new look and feel," easier searching, more accurate search results, and more tools for accessing data and public comments. The EPA launched the redesigned website in February.
- Develop Application Programming Interfaces (APIs) that will better enable government and non-government sites "to repackage and incorporate eRulemaking data into their sites and applications." APIs are technical interfaces that enable people to automatically download data from one website (Regulations.gov, for example) to another. The agency hopes that developing APIs will broaden the reach and impact of eRulmaking's data and participation platform.
- Changes to the Federal Docket Management System. The EPA will create new tools to better manage public input in rulemaking and directly deliver the input to federal policymakers.
- Use social media and partnerships with other agencies and non-governmental organizations "to improve outreach, public awareness, and public participation in the regulatory process."

Freedom of Information Act Module

As its flagship initiative for plan version 2.0, the EPA has taken the lead on developing a multi-agency Freedom of Information Act (FOIA) system that will include best practices from across the government. In September 2011, the EPA partnered with the National Archives and Records Administration (NARA) and the Commerce Department to create a FOIA portal.

The portal, expected to be launched in October 2012, will increase transparency, reduce costs, and streamline back-end processing. The goal is for the portal to serve as a single interface for the public to submit FOIA requests to any of the three participating agencies. Staff could generate e-mails to requesters to seek clarifying information or send invoices for fees, reducing mail delays and postage

costs. Released documents would be uploaded to a public website, and the requester would be notified of their availability. The system would also allow requesters to submit appeals electronically.

Science-Based Decision Support Tools

The agency also plans to provide environmental health information that can be more easily understood by average citizens. The EPA has long been criticized for providing environmental health data that is difficult to find and hard to understand. To attempt to improve in this area, agency scientists will form partnerships among EPA's community programs, Native American tribal groups, and other federal agencies.

The partnerships will refine two online support tools – the Community-Focused Exposure and Risk Screening Tool (C-FERST) and the Tribal-Focused Environmental Risk and Sustainability Tool (Tribal-FERST). The goal of C-FERST is to allow local groups to better understand population-based exposure and risk assessments. Tribal-FERST incorporates information for "assessing and fostering tribal well-being."

Data-Focused Efforts and the Strategic Data Action Plan

The EPA also plans to update its [Strategic Data Action Plan (SDAP), or SDAP 1.0](#), to:

- Support new and current Data.gov communities, such as Ocean, Energy, Law, Health, and OpenData. These communities gather related databases into one place to allow users to more easily explore connections between different collections. Also, support White House data initiatives, including "Big data" (an effort to develop tools and techniques to glean insights from large, complex data collections) and smart disclosure (helps consumers make better choices through tools such as nutrition labels and fuel economy indicators).
- Improve access and make more data available to the public.
- Align data registration and description efforts, which can be critical to making data more findable. Description and registration also provide greater context to those seeking to use complex datasets.

Assessment

While the aspirations and goals of the EPA's Open Government Plan 2.0 are laudable, it does not adequately address the weaknesses of earlier plans. Like versions 1.0 and 1.1, Plan 2.0 does not detail the concrete steps the agency will take to respond to public comments received via the Internet. Increasing public participation is as much about responding to input from the public as it is about creating avenues for them to submit ideas. Without some response from the agency, people may become discouraged and stop participating.

Also, though Plan 2.0 mentions the EPA's efforts to employ social media and partnerships, it does not fully address the agency's strategy for using these tools to disseminate information, especially to disadvantaged communities, or how the tools will help them form stronger partnerships. We hope future progress reports and updates will provide more details on the agency's outreach strategy.

Unfortunately, once again, there is no mention of how the EPA will address the widely acknowledged problem of businesses using "trade secrets" exemptions to avoid disclosure of the identity of chemicals found in hazardous waste and a variety of commercial and industrial products. Businesses submitting mandatory information to the EPA frequently fail to disclose all or part of the information by labeling it "confidential business information." This label allows companies to inappropriately hide data, such as the chemicals used in fracking fluid or health risks from industrial products, from the public. EPA has taken steps recently to address this problem within the Toxic Substances and Control program by establishing boundaries on what can't be claimed as trade secrets and disclosing information that had previously been labeled as trade secrets. However, the agency should devise a broader plan to get a handle on the scale of the problem and correct it agency-wide by developing a narrower definition of what legitimately constitutes trade secrets and procedures to detect and reject false claims.

The EPA plans to review its Open Government Plan every six months, making revisions as necessary. The public is encouraged to comment at www.epa.gov/open.

Cutting Costs and Courting Contamination: What Food Safety Budget Cuts Mean for Public Safety

The Food Safety and Inspection Service (FSIS), the federal regulator of meat, poultry, and egg products, faces resource limitations that make it more difficult for the agency to ensure the safety of the food supply. New plans to cut costs could have severe consequences for public health and safety.

Although the FSIS budget had seen a fairly steady increase since the agency was created, over the past two years, funding has fallen and its budget and staffing levels have failed to keep up with increases in food production. As a result, the number of meat, poultry, and egg product recalls has increased.

The U.S. Department of Agriculture (USDA) created FSIS in 1981. Federal law requires the agency to monitor the slaughter, processing, and labeling of all meat and poultry and to inspect meat, poultry, and egg products to ensure products are not contaminated. The agency is responsible for ensuring the safety and wholesomeness of the billions of pounds of meat, poultry, and egg products that enter the market each year.

President Obama's budget request for fiscal year (FY) 2013 seeks about $8 million less than FSIS received in 2012. This cut comes after two consecutive years of funding decreases for the agency.

**Budget Increases Fail to Keep Pace with Size of Mandate**

Since FSIS began operations, meat and poultry consumption in the U.S. has increased sharply. Between 1981 and 2011, the amount of meat and poultry inspected and approved by the agency more than doubled – from about 52 billion pounds in 1981 to about 107 billion pounds in 2011. Much of the increase is due to the expanding U.S. poultry market: pounds of poultry approved by FSIS nearly quadrupled during that time.
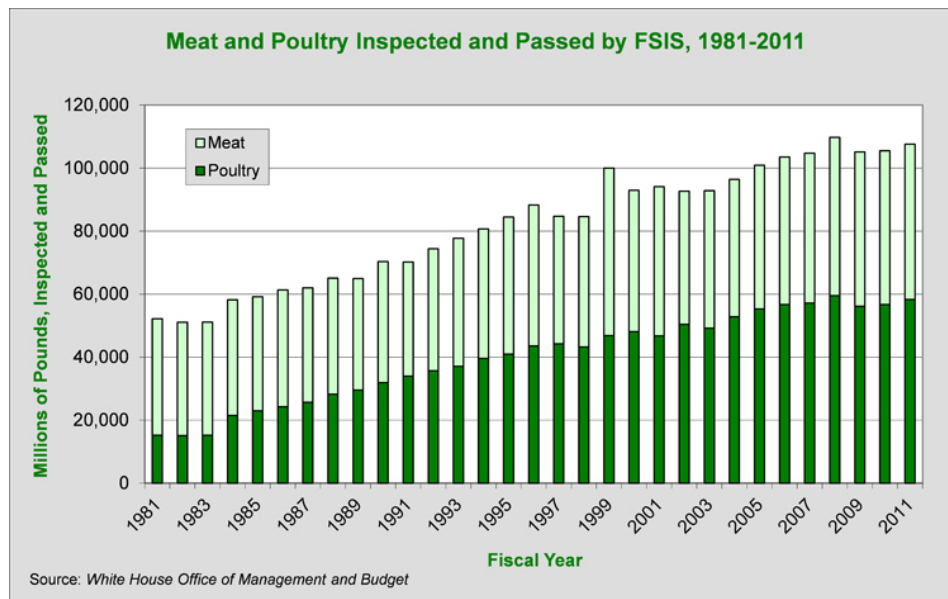
click image to enlarge

Even though FSIS's overall budget has, on average, increased over time, its staff and resources have been dwarfed by the expansion of the meat and poultry industry. Of its appropriated funds, in FY 1981, FSIS spent $14.74 per thousand pounds of meat and poultry inspected and passed, when adjusted for inflation. By FY 2011, the figure had fallen to $9.36 per thousand pounds – a drop of more than 35 percent.

FSIS's workforce has contracted even more. FSIS employed about 190 workers per billion pounds of meat and poultry inspected and passed in FY 1981. In FY 2011, FSIS employed 88 workers per billion pounds, a 54 percent decrease.
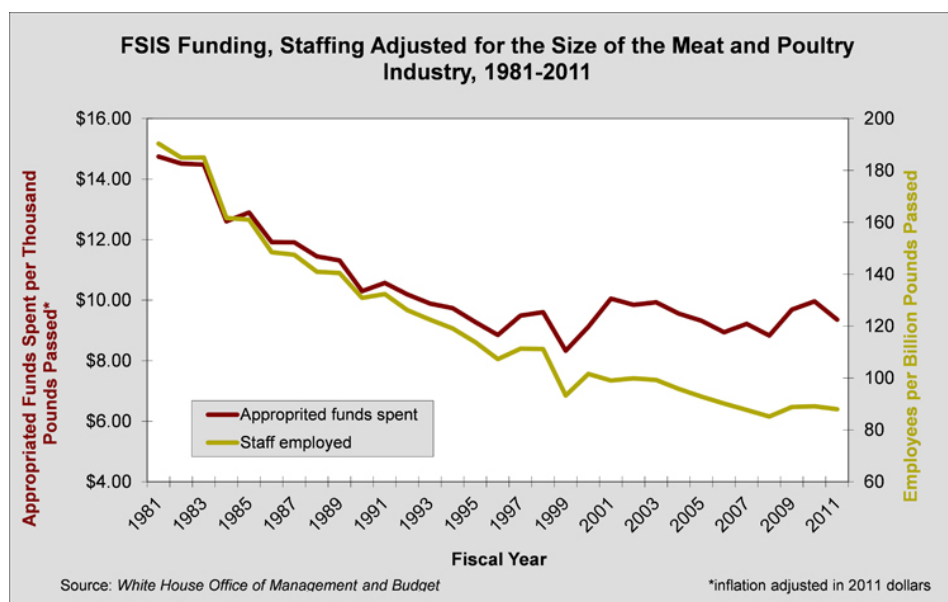
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Where's the Inspector?

The falling ratio of inspectors to meat and poultry examined is concerning, since much of this work still relies on visual inspection by experienced examiners. A new USDA cost-cutting proposal should also set off alarm bells.

In January, FSIS published a controversial new proposal that would shift responsibility for poultry inspections away from agency inspectors to employees of the slaughter and processing plants. Cass Sunstein, administrator of the White House Office of Information and Regulatory Affairs (OIRA), cited this proposed change as a reform that will save industry and FSIS money without increasing public health risks. We feel the true costs and risks have not been fully explored.

Under the proposed new system, FSIS inspectors will no longer visually inspect every poultry carcass. Instead, processing plant employees will perform the visual inspections and a smaller number of inspectors will randomly test for bacteria. FSIS estimates that it will save between $85 million and $95 million over the next three years by laying off 1,000 inspectors. However, the General Accounting Office (now the Government Accountability Office (GAO)), reporting in 2001 on a pilot project of this kind of "self-regulation," wrote that independent, follow-up inspections at the program's processing plants showed that "most of the inspection systems at these plants did not meet the safety standard for the presence of fecal material, which could contain harmful bacteria such as *E. coli.*"

Poultry companies estimate that they will save approximately $250 million because they will be able to significantly speed up their production lines. Workers in poultry plants already suffer an alarming rate of injuries and illnesses due to the cold temperatures in which they work, the sharp tools used on the line, dangerous machinery, and the repetitive nature of their jobs. Work in these plants is already among the most dangerous in the country, and turnover is high. For consumers, the consequences of reducing the number of inspectors could be also be dire.

Recalls on the Rise

Recalls of the products FSIS is supposed to inspect have increased in recent years. Keeping unsafe products off the market and away from consumers is much more cost-effective for industry and our public health system than resorting to recalls of tainted meat, poultry, or egg products.
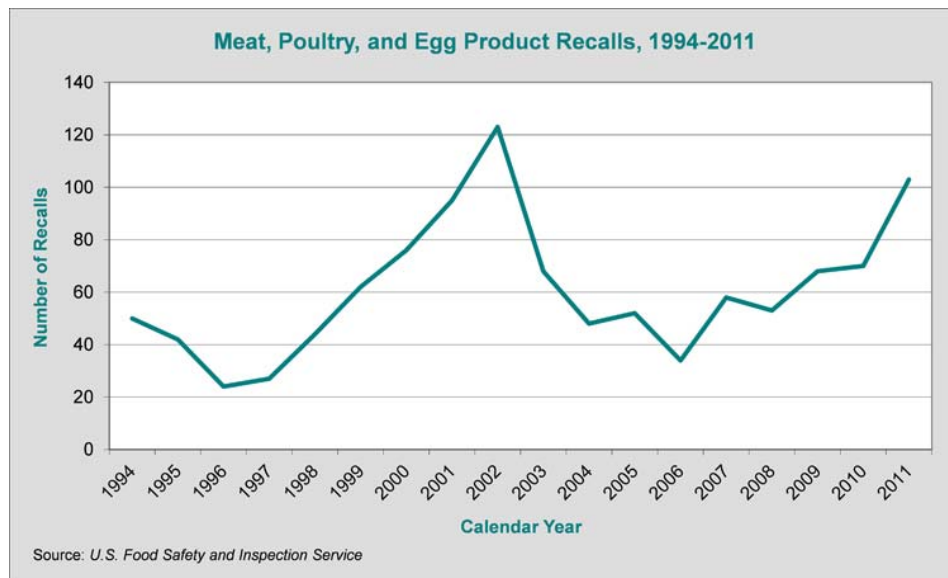
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After a record 123 recalls were announced in 2002, the rate dropped for several years, with fewer than fifty meat, poultry, and egg recalls in 2006. Unfortunately, the number of recalls is again on the rise. In 2011, 103 recalls were announced, the most since 2002.

The number of persons infected with *Salmonella* is also increasing. According to the CDC, the rate of *Salmonella* infection in the U.S. remained steady from 1996 to 2006 but has increased by 15 percent since then. In 2010, the incidence of confirmed *Salmonella* infections per 100,000 people was the highest on record for the years CDC has reported data.
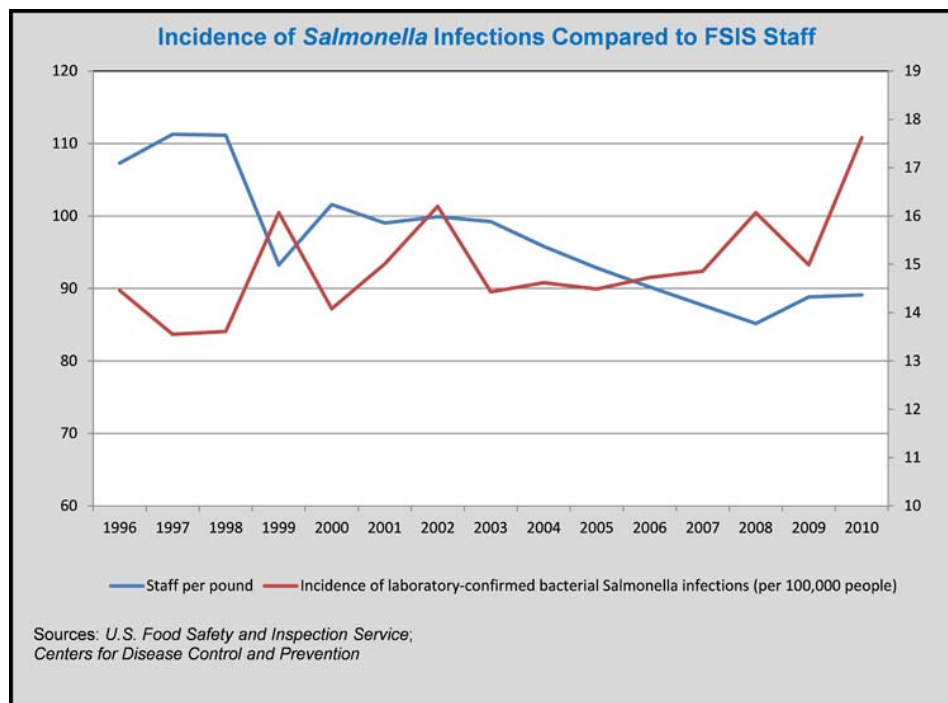
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And in 2011, a deadly outbreak of an antibiotic-resistant strain of *Salmonella* Heidelberg resulted in one of the largest food recalls in U.S. history. Cargill Meat Solutions recalled approximately 36 million pounds of potentially contaminated ground turkey products linked to the *Salmonella* infections. The outbreak lasted for seven months and infected a total of 136 persons in 34 states.

Congress has failed to make the investments in our food inspection infrastructure that are required to ensure food safety. We need to restore and enhance FSIS's capacity to protect American families by shoring up the agency's funding levels to allow it to fulfill its responsibility to keep our food supply safe.

Spotlighting the Federal Election Commission's Efforts to Keep Political Spending in the Shadows

"[P]rompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters," the U.S. Supreme Court wrote in *Citizens United v. Federal Election Commission*. On March 30 – more than 26 months after *Citizens United* was decided – a federal judge struck down a Federal Election Commission (FEC) regulation that had been preventing disclosure.

Judge Amy Berman Jackson's decision is likely to be appealed – and, therefore, may not directly impact the 2012 elections. Nevertheless, the decision is a reminder that the FEC, like all other federal regulatory agencies, has an obligation to fulfill the will of Congress.

The Bipartisan Campaign Reform Act (BCRA), often called the "McCain-Feingold" law, required that every "person" who spends more than $10,000 per year on "electioneering communications" must disclose the name and address of any donor who contributed $1,000 or more. BCRA also prohibited most corporations and labor organizations from using corporate or treasury funds to make electioneering communications – a provision that was struck down in part in *Wisconsin Right to Life v. FEC* and entirely in *Citizens United v. FEC*.

Like other laws, BCRA only became effective when it was implemented by the relevant federal agency – in this case, the FEC. After *Wisconsin Right to Life* was decided in 2007, the FEC decided to rewrite its regulations to prevent what the agency believed to be an overly broad application of the disclosure rules found in BCRA.

Jackson wrote, "There is no question that the agency was animated by concerns that the disclosure provision might be too burdensome or too broad as a matter of policy when applied to all corporations and labor unions, as opposed to just [certain advocacy organizations] it covered before. In other words, the agency did not purport to be responding to a direct delegation of rulemaking authority or addressing an ambiguity inherent in the statutory scheme: it specifically undertook to modify existing law to fit the changed circumstances."

The FEC's post-*Wisconsin Right to Life* regulations are responsible for allowing vast amounts of political spending to evade disclosure. This became even more concerning after the Supreme Court's

Citizens United decision relied so heavily on the theory that a robust disclosure system is adequate – and necessary – to prevent the appearance of corruption and allow voters to make informed decisions. According to Democracy 21, less than 10 percent of the $80 million spent on "electioneering communications" in the midterm elections was disclosed.

Even more important are the fundamental questions Jackson's opinion renews about the ability of the FEC to fulfill its core mission. Jackson's order, demanding that Congress's intent in BCRA be respected, is just a first step toward full disclosure of the influence of money in our electoral system.

The FEC has yet to successfully issue regulations that would implement the *Citizens United* decision. The agency has been stymied by ideological deadlocks that have prevented it from issuing even routine enforcement orders, let alone moving forward with such a significant regulatory initiative. Formed in the aftermath of the Watergate scandal to help prevent political corruption and illicit spending, the FEC now looks increasingly irrelevant and will require a significant overhaul in order to meet its basic obligations.

Observers like Citizens for Responsibility and Ethics in Washington, Democracy 21, and Common Cause have long been raising concerns about the ability of the FEC to function properly. In addition to concerns about whether the FEC has become a "captured" agency, they also point out that five of six commissioners' terms have expired, yet no one has been nominated to replace them.

With the fall elections now less than seven months away, it is clear that the FEC will not be able to move forward with new contribution or spending rules to address the onslaught of secret contributions and outside spending that plague modern political campaigns. Stopgap proposals that involve the Securities and Exchange Commission and the Federal Communications Commission in trying to increase disclosure are only partial solutions. Without fundamental reform, the FEC cannot achieve its mandate of assuring that our elections – and, in turn, our public officials – are free from corruption and undue influence by big-spending special interests.

Combined Federal Campaign #10201