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Commentary: The Rocky Path toward a Budget Resolution

Regardless of which party is in power, springtime in the nation's capital always means one thing: budget debates. After the president submits his budget proposal in February, Congress has until April 15 to pass a budget resolution, a non-binding plan for the spending and revenue levels that congressional appropriations committees are to follow when creating the spending bills for the coming fiscal year. However, in election years, members of Congress are reluctant to go on record as increasing the federal budget deficit, especially since budget resolutions are not absolutely necessary to fund the federal government.

Since 2000, Congress has only passed a concurrent budget resolution (a budget resolution passed by both houses) once during an election year. Here in 2010, with congressional Democrats expecting a hard fight in November, there has been talk of skipping the FY 2011 budget resolution and simply proceeding to the year's appropriations bills. Congressional leadership is reportedly even considering pushing off votes on the appropriations bills until after

the elections. But the budget resolution is a powerful tool in the spending process, and not passing it now could make it more difficult to spend more responsibly down the line.

The main function of the budget resolution is to prescribe spending levels, not to actually authorize spending. The resolution sets spending limits for the entire discretionary budget, for each appropriations committee, and for any other committee with jurisdiction over spending (budget resolutions also include revenue floors, meaning taxes cannot fall below a certain level). Any bill violating these levels could trigger a point of order, a procedural hurdle that could remove the bill from consideration, although the point of order can be waived by a majority vote in the House or a three-fifths vote in the Senate.

The second function of the budget resolution is that it allows for a procedure known as "budget reconciliation." In the budget resolution, there can be instructions for certain congressional committees to change current law so that overall spending and/or revenue levels conform to the limits set out in the budget resolution.

Most importantly, reconciliation lowers the voting threshold in the Senate to only a simple majority, down from the three-fifths normally needed to overcome a filibuster. Additionally, reconciliation instructions limit debate on the ensuing changes to twenty hours and also limit amendments to those ruled as “germane” to the budget. While this provision is not important in the House, which routinely sets limits on debate and amendments, it means that revenue and spending bills included in the reconciliation instructions in the Senate are not subject to filibusters. However, reconciliation can only be used to pass provisions that lower the federal budget deficit. For instance, a provision addressing how the military should try suspected terrorists would trigger a point of order. These rules are intended to prevent non-budget items from avoiding Senate filibuster rules.

Therefore, from the standpoint of the majority party, reconciliation can be a potent tool. Without reconciliation, congressional leadership must find 60 votes to pass spending bills and face mountains of amendments, which can be difficult. Faced with this high hurdle, the leadership might make compromises and deals to win more votes, deals such as the ones used to round up votes for the recent health care reform package. But with the lower vote threshold provided by reconciliation, congressional leadership can afford to lose a few votes. Instead of making these side deals, leadership can push a cleaner bill, without carve-outs or loopholes. By limiting debate on the budget, reconciliation can lead to better policy, as the necessity of so-called horse-trading is reduced significantly.

On the other hand, the reconciliation process has been used in highly partisan ways to push the president’s agenda. For example, it was used in 1981 to push President Reagan's budget. Just when it appeared the Reagan budget was dead, an omnibus spending bill was moved under reconciliation rules. Similarly, the Bush tax cuts of 2001, 2003, and 2006 all were done through the reconciliation process.

The FY 2011 budget resolution is already late. By law, Congress must pass it by April 15, although there is no consequence to missing the deadline. On April 21, the Senate Budget

Committee will begin marking up its budget resolution, and both Sen. Kent Conrad (D-ND) and Rep. John Spratt (D-SC), the chairs of the two budget committees, have publically stated their support for completing the resolution. But in today's atmosphere, with Democrats facing possible losses at the ballot box in November and partisanship ramping up to new heights, passing a budget resolution in either chamber will require that Congress make the difficult decisions that it was ultimately elected to make.

GAO: Contractors Overseeing Other Contractors in a Contingency Environment Problematic

Of the $38.6 billion worth of contracts and grants obligated to Iraq and Afghanistan during fiscal year 2008 and the first half of fiscal year 2009 by the Department of Defense (DOD), the Department of State (State), and the U.S. Agency for International Development (USAID), roughly $1 billion went to contractors to help administer some of the contracts and grants. A recent Government Accountability Office (GAO) report finds that DOD, State, and USAID often enter into these administration contracts haphazardly without checking for potential conflicts of interest or ensuring adequate oversight.

The government's extensive reliance on contractors throughout the wars in Iraq and Afghanistan is nothing new. DOD, State, and USAID have used contractors for everything from reconstruction efforts to providing security for government officials, all with mixed success. As this most recent GAO report shows, sometimes the government even turns to contractors to help with administering other contracts and grants. This can include "on-site monitoring of other contractors' activities, supporting contracting or program offices on contract-related matters, and awarding or administering grants."

Clearly, conflicts of interest could arise, as government decisions on contract and grant administration, which represent "the government's primary mechanism for assessing whether it is getting the expected products or services from contractors or whether grantees are performing in accordance with grant programs," might be "inappropriately influenced by, rather than independent from," a contractor's actions.

GAO found that these three agencies lacked any sort of overarching strategy in deciding when to use contractors to support contract and grant administration. It turns out that more often than not, "individual contracting or program offices within the agencies" made the decision "on a case-by-case basis." Moreover, contracting officials within DOD, State, and USAID often chose to outsource administration functions because they lacked a sufficient number of government personnel or in-house expertise to oversee the contract or grant.

Because none of the three agencies has a strategic workforce plan that incorporates how, when, or why they should outsource the administration of a contract or grant, GAO also found that DOD, State, and USAID often did not do enough to mitigate conflicts of interest or oversight risks. Although the three agencies "generally complied" with statutory and policy guidelines,

they often did not utilize their broad discretionary powers to limit these risks as much as they could.

One example cited in the GAO report is illuminating:

> Joint Contracting Command - Iraq/Afghanistan (JCC-I/A) awarded a $1 million contract to support the Armed Contractor Oversight Directorate in Afghanistan. The contractor, which itself was a private security contractor, was assigned a number of responsibilities related to oversight of private security contractors...[N]o clauses were included in the solicitation or contract that precluded the contractor from bidding on other contracts. After the support contract had been awarded and performance begun, the support contractor competed for and won a separate contract to provide armed guard services in Afghanistan.

Eventually, JCC-I/A counsel became aware of the situation – that a contractor would be responsible for its own oversight – and canceled the administration support contract, but the event sheds light on the lack of effort by the agencies to prevent conflicts of interest.

The other problem that GAO found with DOD, State, and USAID not employing a strategic workforce plan that reflects the outsourcing of contract and grant administration was a lack of sensitivity to contractors performing tasks closely related to inherently governmental functions. Without adequate oversight, administering contracts or grants can inappropriately influence the "government's control over and accountability for decisions that may be based, in part, on contractor work." Not only can performing those functions present a conflict of interest for a contractor, but the government can easily lose control of critical decision making processes, as well.

GAO also found that the three agencies have made improvements to their lackluster policies on outsourcing administration duties. DOD is currently working on policies to better address both organizational and personal conflicts of interest for contractors. DOD acknowledged that the Army's contracting workforce is 55 percent of what it was in the mid-1990s, while the amount of work outsourced has jumped from $11 billion to $165 billion. On April 19, DOD told the Commission on Wartime Contracting that it would hire more contracting specialists and increase training for those overseeing contracts. State is examining a better policy on organizational conflicts, and USAID already has a decent system for addressing a contractor's personal conflicts. But the bigger question seems to be whether the government can ever adequately control accountability and oversight risks when outsourcing functions like this.

The Office of Federal Procurement Policy is currently reviewing a change to the inherently governmental policy. Good government groups like OMB Watch would like to see tasks so closely related to inherently governmental functions like contract and grant administration in-sourced by default, if not completely removed from the list of tasks the government can outsource. It seems that the government only perpetuates its inability to in-source a function by continuing to outsource it. Moreover, there is too fine a line between performing an inherently

governmental action and one that is only closely associated. Bringing contract and grant administration under the "inherently governmental" umbrella would bring much-needed oversight to government contracting.

Open Government Plans Seek Revamp of Culture and Structure

On April 7, federal agencies released their individual plans to be more transparent, participatory, and collaborative, pursuant to the Obama administration's Open Government Directive (OGD). The plans varied in scope and quality, but several interesting trends were noticeable. As agencies update their plans, these trends may become baselines for open government or may be abandoned, depending on how successful key agencies' plans prove to be.

While a comprehensive evaluation of the plans has not been completed, initial reviews of plans from major agencies revealed numerous interesting trends and conclusions, and this article covers five of them.

Experience and Resources

The first overall trend developed out of the wide variation that was quickly noticeable in agency Open Government Plans. While differences between the plans may seem to be the opposite of a trend, the way the plans differed was revealing. The OGD instructed agencies to pursue transparency, participation, and collaboration. The agencies that excelled and stood out in terms of the scope, detail, and innovation within their plans were those that had both the resources and the previous experience with pursuing these issues. Agencies that regularly deal with very engaged public audiences, such as those that handle issues of health and environment, took the lead here. Both the Department of Health and Human Services and the U.S. Environmental Protection Agency had impressive plans that creatively sought to engage the public with new information and tools.

Fitting well into the trend with both resources and experience with engaging interested stakeholders, the National Aeronautics and Space Administration (NASA) open government plan is also exceptional in terms of scope and detail. The agency provides specific goals for three months, six months, one year, and two years for all 13 ongoing activities related to open government, as well as five new initiatives and three flagship initiatives. For example, NASA lists short-term open government goals, such as updating website reading rooms within the next three months with documents for which three or more requests have been made. It also includes longer-term goals of substantially decreasing FOIA backlogs and switching over to a web-based FOIA database within the next two years.

At the other end of this trend were agencies with fewer resources and significantly less experience with open government efforts, whose plans lacked the vision and depth of their more experienced counterparts. For instance, the Small Business Administration, a smaller federal agency, selected as its flagship initiative a plan to overhaul its website. While the agency lists inclusion of mapping tools, interactive web chats, and community discussion forums on its site,

the lack of details on these features leave the impression of a basic website redesign that might include one or two innovations. Similarly, the Department of Housing and Urban Development's plan frequently lacks concrete deliverables or specific details on the agency's goals, giving the impression that it is a plan to plan.

Even some of the largest federal agencies with significant resources but less familiarity with transparency had a noticeable lack of innovation. The Departments of Defense and Homeland Security contain few transparency programs unique to those agencies and rely largely on working with already existing government-wide programs, such as Recovery.gov, USAspending.gov, and the federal IT dashboard. Many of the agencies that were less experienced with transparency focused greater attention on collaboration with other agencies.

The missing details from the initial plans for some agencies might be attributable to lack of resources, lack of experience on open government issues, or lack of interest in achieving real open government changes. Only time will tell which agencies fall into which categories.

Governance

The second trend is the level of effort by numerous agencies to establish clear governance structure for the ongoing open government efforts. Several agencies realized the difficulty of simply adding the open government responsibilities to existing positions or structures, which might treat the new requirements as secondary to their more long-standing priorities. Instead, these agencies wrote into their plans whole new structures of governance to oversee implementation of the initiatives and develop future projects. Such action enables greater accountability and increases the likelihood that deliverables will be produced.

For instance, the Department of Transportation proposed what it called a "sustainable governance structure" that incorporates open government principles into "every-day principles." Included in this structure are several councils, including the Chief Information Officer Council, the Technology Control Board, and a Data.gov Group, among others. As another example, the Department of the Treasury has already convened an Open Government Steering Committee representing each of its bureaus and has established several subcommittees on data, communications, and its web presence.

Culture

The third notable trend among the plans was the effort to directly address the need for changing the climate within agencies in order to foster transparency, participation, and collaboration. The agencies that made significant effort to address these cultural changes emphasized that such a focus was important not only to achieving initial goals, but also critical to the long-term sustainability of the open government effort.

There were two common elements of culture change that many agencies included in their plans. First, several agencies sought to link openness to their core mission and goals, the theory being that if openness efforts are recognized as methods to improve agency functions, then employees

will continue to pursue them without the need for requirements. The Department of the Treasury, for example, seeks to align its open government strategy with the agency's existing strategic plan and core mission areas.

The second culture change method that seemed quite prevalent was exploring the use of awards or prizes for openness to encourage employees to embrace transparency. Making open government a part of individual recognition gives employees a personal stake in agency efforts to lift the shroud of secrecy. For instance, the Department of Health and Human Services (HHS) is launching a Secretary's Innovation Awards program, which will recognize and reward HHS employees who innovate how HHS operates, with those who harness transparency, participation, or collaboration being leading candidates.

Technology

The fourth clear trend was the emphasis on technology in the agency plans to address all three principles of open government – transparency, participation, and collaboration. Many agencies announced plans for wikis, new online tools, intranet forums for officials to share ideas, online dialogs with the public, and more. In the Internet age that we live in, and with the Web 2.0 revolution in full swing, this focus is understandable.

The General Services Administration stands out for its plan to develop a citizen engagement platform, as well as a challenges and prizes platform for other agencies to use in pursuit of open government improvements. The agency is also planning to further improve the idea discussion forum used by agencies to develop their Open Government Plans. Interestingly, NASA also deserves credit for pushing the technology boundaries with its flagship initiatives. Among its flagship initiatives were the plans for open source software development and the "Nebula" cloud computing platform. The technology products and leadership in innovation from these two agencies, if successful, could have significant repercussions for open government across federal agencies.

Dashboards

A fifth notable trend, a subset of the overall technology focus, is the increasing use of web-based dashboards to provide the public with information concerning agency progress toward certain goals that help both the agency and the public identify potential problems and solutions. Of all the information technology being proposed in the plans, the dashboards seemed to consistently get the highest profile, often listed as flagship initiatives. For instance, the Justice Department presented plans for a Freedom of Information Act (FOIA) dashboard to monitor and track agency progress in responding to public requests for information. The Office of Management and Budget selected enhancing its Office of Information and Regulatory Affairs (OIRA) Dashboard, which provides information on regulatory actions, as the flagship initiative of its plan. The White House Office of Science and Technology Policy is also planning a dashboard that tracks research and development progress across agencies, similar in scope to the existing IT dashboard, which is part of USAspending.gov.

While dashboards are tools with great potential, they are only as good as the information within them; without substantive and detailed data, these dashboards will fail to measure up to expectations of most open government advocates.

The current Open Government dashboard on the White House's website is a good example of a dashboard that does not yet provide metrics to make it truly informative. Currently, the Open Government dashboard simply reports compliance, progress, or non-compliance by agencies on a handful of OGD requirements. This is in sharp contrast to the flexibility and usefulness of information on the federal IT spending dashboard that identifies agency spending on technology programs and helps identify where those programs are stalled or ineffective. This same criticism can be leveled at the OIRA dashboard, which provides new graphics but no criteria on which to judge performance.

Further information on how agencies fared in complying with the OGD will be available in a forthcoming audit being coordinated by the OpenTheGovernment.org coalition.

EPA Plan Seeks to Instill Transparency into Agency DNA

The U.S. Environmental Protection Agency (EPA) has released its plan for improving the agency's transparency as part of the Obama administration's Open Government Directive (OGD). The EPA was an early proponent of the new openness agenda, with EPA Administrator Lisa Jackson calling for the agency to operate "as if it were in a fishbowl." The agency's new Open Government Plan documents numerous ongoing and future actions that should continue the agency's advance toward transparency and accountability.

The Dec. 8, 2009, OGD instructed federal agencies to create, among other things, "a public roadmap" detailing how each agency will incorporate the principles of openness laid out in President Obama's Jan. 21, 2009, transparency memo. Each plan is required to address how the agency will improve transparency, public participation, and collaboration with the public and other governmental offices. Additionally, each plan must include at least one "flagship initiative" that describes a specific initiative being implemented to advance the openness principles.

The EPA Open Government Plan chronicles numerous openness actions the agency had taken prior to the Office of Management and Budget's (OMB) release of the directive. The agency plan also lays out many additional actions planned for the next several months. Throughout the document, EPA affirms its intent to instill an agency-wide culture of openness and learn from these early actions, identify what works, and spread the best practices throughout the agency. Overall, the plan depicts an agency that is making transparency a true core value of its operations and supports this assertion with numerous examples and laudable plans for future community engagement.

Flagship Initiative

EPA has chosen to undertake as its flagship initiative a broad set of actions under the theme of community engagement. According to the plan, EPA chose this theme because of its "wide applicability – potentially influencing nearly every part of the Agency." The components of the initiative include plans to push out to the public information about environmental impacts to urban waterways; air and water test results; the pollution permitting process; and the rulemaking process. Two additional projects will use new technology to create mobile phone applications that provide human health advisories and product information. An agency work group will identify ways to inform and engage communities that lack electronic access to information, as well.

EPA's approach to the flagship initiative is multifaceted, covering several agency programs, reaching different types of audiences, and addressing several aspects of agency operations. This is a prudent approach that should provide the agency with ample case studies with which to identify what works and what does not and why. It should also allow EPA to scale up the successful strategies across the agency.

OpenEPA Online Forum

In February 2010, EPA, in accordance with OMB instructions, launched a website, OpenEPA, an online forum designed to gather comments and ideas from the public on what should be included in the agency's plan. EPA, as well as many other agencies, has decided not to close the forum now that the plan is released. Rather, the agency is keeping the forum open and will report on its progress in implementing the ideas on a quarterly basis. To date, the forum has received more than 200 ideas from the public.

The online forum channeled a large amount of public input to the agency, giving staff much to work with as they move ahead with greater transparency. One reason the forum functions as well as it does is the active involvement of the forum moderator. The moderator works to ensure postings are relevant to the agency's open government activities and answers basic questions. The moderator can also serve the useful purpose of pushing information about the agency's work out to the public, directing them to the new open government actions, data sets, and tools, and communicating what progress has been made so far. Such back-and-forth communication is crucial to building public trust in the forum. Including comments and responses from additional agency staff and senior officials may also improve the forum's standing as a reliable tool for public engagement.

The agency plans to add to the OpenEPA website a section that asks the public to share innovative ways EPA data are being used. The posts will then be ranked by the public.

Measuring Success

The EPA is hoping to gather public comment on ways to judge how well its transparency initiatives are working. The agency's Open Government Plan includes some ideas on what

metrics may be used to evaluate the initiatives, such as the number of electronic town hall meetings, number of data sets and tools published, and the number of opportunities for public input on EPA actions. EPA recognizes that the criteria for measuring success will evolve as the initiatives advance. Many of the openness initiatives have never been tried before, and the tools for evaluating the implementation of government openness are neither fully developed nor tested.

Collaboration

EPA has included a number of ongoing and planned actions to expand its collaborations with other governmental offices and the public. One such action is the EPA's work with the Securities and Exchange Commission (SEC) and the Occupational Safety and Health Administration (OSHA) to link datasets for facilities that are regulated by each of the agencies. Such connections will help the public see a broader picture of the environmental, economic, and social performance of companies.

Other collaborations include a wiki for watershed managers to share best practices and learn about grant opportunities; a new mobile phone application that provides threat information to emergency responders; and a project with regulators in Massachusetts that provides real-time air quality data.

Access to Experts

The EPA has long been criticized for limiting the public's access to program staff, especially program scientists with the expertise to comment in depth on pressing issues, such as the hazards of specific toxic chemicals or the impacts of climate change. The agency's public affairs office has been regarded as an obstacle to journalists and other members of the public getting the information needed to ensure accountability.

The EPA's plan does not adequately address the degree of openness warranted to agency scientists. According to the advocacy organization Union of Concerned Scientists (UCS), the Open Government Plans "would not have prevented even the most flagrant examples of censorship of scientists during the previous administration." UCS's criticism, which is not limited to EPA, further notes that "many federal scientists are still not protected by policies that would allow them to speak freely with the public and the press." The idea receiving the most votes on EPA's forum calls for the development of a media policy that ensures EPA scientists can share their expertise with the public and not fear retaliation by their supervisors or political staff at the agency.

The EPA's plan only proposes to develop a "formal network of EPA staff experts to connect and respond to public inquiries." Otherwise, there is no mention of an agency-wide communications policy that would provide greater access to staff scientists and encourage the freer exchange of ideas between staff scientists and the public.

Other Potential Weaknesses

The agency's plan also does not mention how EPA will address the widely acknowledged problem of excessive trade secrets. Businesses submitting information to EPA frequently choose to hide all or part of the information under the label "confidential business information," which prompts the agency to conceal the data from the public. This privilege is overused by industry to inappropriately hide data, such as health risks from industrial products, from the public. Although EPA has taken important recent steps to address this, the agency should devise a plan to comprehend the scale of the problem and correct it.

Additionally, the agency recognizes the importance of informing stakeholders about its open government projects, but the plan's strategy for disseminating information about the openness actions is sparse. The initiatives in the plan must be publicized throughout the agency, including regional offices, to state and local governments, and to the public, especially to those citizens who may not already have experience using EPA tools or participating in EPA programs. Many noteworthy initiatives either have commenced or are planned for the near future. Their success depends to a large degree on how well the abundant stakeholders become familiar with them. The EPA's plan for the wide adoption of openness principles relies largely on the 2003 Public Involvement Policy. The addition of plans for more specific actions that mesh the 2003 policy with the 2010 Open Government Plan could prove useful.

EPA plans to review its Open Government Plan every six months, making revisions as necessary, which is far more frequently than the every two years called for by OMB. The public is encouraged to comment at www.epa.gov/open.

What's Next for Coal Mine Safety?

In the wake of the latest coal mining disaster that killed 29 miners at the Upper Big Branch Mine in West Virginia, calls for safety reforms and enhanced regulatory powers echo once again. While mine safety has improved since the recent high death toll of 2006, it remains to be seen if this incident will result in significant changes or if deaths and injuries will continue to be perceived as a cost of doing business.

On April 5, an explosion at the mine killed 25 miners and filled the mine with toxic gases that prevented rescue teams from searching for four miners not immediately accounted for. In the days that followed, as the toxic gases were ventilated and rescue efforts resumed, evidence indicated that all 29 miners feared caught in the explosion at the Upper Big Branch mine had died. Two other miners were hospitalized as a result of the blast. It was the worst mine disaster since 1984.

Recent mine disasters have resulted in calls for new safety rules and enhanced powers for the Mine Safety and Health Administration (MSHA), the office within the Department of Labor responsible for regulating mine safety. MSHA has seen budget and staffing cuts over its lifetime and struggles to fulfill its mission as a result.

In 2006, 47 coal miners died in mining incidents. Congress passed the Mine Improvement and New Emergency Response Act (MINER Act) to respond to some of the immediate issues raised by the Sago, Aracoma Alma, and Darby mine disasters, for example. Many health and safety provisions discussed after those accidents were not included in the MINER Act. In 2008, Congress tried to pass additional legislation to provide improvements to safeguard miners' health and safety. The legislation passed the House but died in the Senate.

In 2007, a mine collapse at the Crandall Canyon coal mine in Utah, which trapped six coal miners and led to the deaths of three rescue workers, again called into question MSHA's ability and willingness to regulate mines and the questionable practices of mine owners. The Upper Big Branch explosion raises many of these same issues about safe mining practices and MSHA's effectiveness.

Although the investigation into the causes of the explosion at the Upper Big Branch mine is just getting started, Labor Secretary Hilda Solis and MSHA's two top officials, Joseph Main and Ken Stricklin, briefed President Obama April 15 on the disaster. In the briefing, the officials laid out the pattern of violations at the mine, owned by Massey Energy Company, including above-average numbers of violations and the failure to address significant violations. "Massey mines have been placed onto potential pattern of violation status, the first step in the pattern of violation process, 13 times," according to the briefing.

The pattern of violation program identifies the worst mining companies and invokes enhanced MSHA enforcement efforts. Companies can escape this status, however, by contesting citations to the independent Federal Mine Safety and Health Review Commission (FMSHRC), which has a backlog of approximately 16,000 cases. The briefing noted, "In short, this was a mine with a significant history of safety issues, a mine operated by a company with a history of violations, and a mine and company that MSHA was watching closely."

According to an April 10 *Washington Post* article, Massey challenged 34 percent of its citations in 2009, more than any other coal company. Filing challenges has been a normal business practice in recent years because the backlog at FMSHRC means companies will not pay fines for contested citations, or MSHA will choose to settle the proposed penalties.

The presidential briefing further explained gaps in MSHA's regulatory authority and proposed reforms that could enhance the agency's ability to deal with chronic violators and protect miners who disclose unsafe working conditions.

In a strongly worded statement after the briefing, Obama said the tragedy was a failure "first and foremost of management, but also a failure of oversight and a failure of laws so riddled with loopholes that they allow unsafe conditions to continue."

He directed Labor officials to continue the investigation into the disaster at Upper Big Branch, to give extra scrutiny to mines that have "troubling safety records," to work with Congress to improve enforcement and close loopholes in current laws, and to review MSHA's policies and practices to "ensure that we're pursuing mine safety as relentlessly as we responsibly can."

Obama acknowledged that the industry and regulators know how to prevent these types of explosions, saying, "I refuse to accept any number of miner deaths as simply a cost of doing business."

On April 16, Solis requested an independent analysis of MSHA's internal review of the disaster by the National Institute for Occupational Safety and Health (NIOSH) and announced that both MSHA's review and NIOSH's analysis would be made available to the public. The announcement came on the heels of criticism MSHA received for appointing MSHA personnel to lead the agency's investigation instead of naming people independent of the agency to study the causes of the explosion. (The state of West Virginia is conducting its own independent evaluation of the disaster.)

On April 19, MSHA announced that it was immediately initiating a quality impact inspections program aimed at coal mine operators who are "frequent violators," according to an e-mail from *Mine Safety and Health News* editor Ellen Smith. MSHA defines a frequent violator as "an habitual violator of health and safety standards above the national average." A quality impact inspection will include monitoring conveyor belts, methane monitors, and ventilation controls, among other factors related to mine explosions. The inspections will be conducted by several inspectors at once depending on the size of the targeted mine.

Congress is also preparing to deal with mine safety again. On April 14, Rep. George Miller (D-CA), chair of the House Committee on Education and Labor and a vocal supporter of mine safety reform, released a list of the 48 mining companies MSHA targeted in 2009 for the pattern of violations program but which contested numerous violations in order to escape being listed in the program.

Sen. Tom Harkin (D-IA), chair of the Health, Education, Labor and Pensions Committee (HELP), said that the committee would hold a hearing April 27 to assess how to change a system that encourages mining companies to avoid penalties by contesting them. A future hearing will assess whether Labor's mine safety agencies have sufficient resources to process appeals from operators and will discuss legislation to enhance MSHA's enforcement capacity that the HELP committee let die in 2008.

That bill, H.R. 2768, the S-MINER Act, called for additional powers for MSHA. President Bush threatened to veto the legislation. The S-MINER bill would have:

- Expanded MSHA's ability to deal with mine owners and operators who are in violation of federal regulations by allowing penalties to be imposed that could not be reduced by FMSHRC and would hold corporate officers and operators liable
- Allowed the Secretary of Labor to halt production at mines if operators refuse to pay civil penalties
- Provided MSHA with subpoena power
- Required MSHA to take interim steps to improve emergency response technologies while permanent regulations, required by the MINER Act, were being developed

- Required mine operators to use better technology for measuring coal dust exposure and cut in half the federal exposure limit for coal dust

Given the other items on the congressional agenda in an election year, it is unlikely that major mine safety reforms will be passed in 2010. A more likely scenario that could impact attitudes toward miner safety may be unfolding in the courts, where the first wrongful death suit against Massey was filed April 15, according to the *Charleston Gazette*.

In addition, a Raleigh County, WV, prosecutor said that a state homicide investigation was possible pending the results of the state's investigation into the causes of the accident. West Virginia has an involuntary manslaughter statute that would allow such a prosecution.

Unfortunately, both of these legal scenarios require miners to die before companies are held accountable.

At Agencies, Open Government and E-Rulemaking Go Hand in Hand

Several agencies are highlighting their rulemaking activities as part of the Obama administration's push to improve government transparency and public participation. The Department of Transportation (DOT), U.S. Environmental Protection Agency (EPA), U.S. Department of Agriculture (USDA), and Department of Labor (DOL) all recognized the importance of regulation by including rulemaking and regulatory innovations in their Open Government Plans.

The plans, released April 7, show an increased emphasis on e-rulemaking, the term used to describe electronic public access to rulemaking documents and participation in the regulatory process, at the agency level. For several years, the government-wide Regulations.gov website has been the primary arena for e-rulemaking activity. However, the individual agency initiatives reflect a growing need for agencies to tailor rulemaking outreach and participation to their own policy areas and needs.

DOT launched Regulation Room, a pilot project experimenting with new and more innovative ways to educate the public about rulemaking and spur participation. Regulation Room, at regulationroom.org, is hosted by the Cornell e-Rulemaking Initiative (CeRI), DOT's partner in the project. Regulation Room is one of DOT's Flagship Initiatives. (The Obama administration's Open Government Directive required all agencies to include a "flagship" transparency initiative in their Open Government Plans. Background is available at www.ombwatch.org/node/10626.)

Regulation Room currently only applies to one DOT rulemaking, a proposed regulation to restrict truck drivers from text messaging while driving. CeRI will continue to experiment with web-based technologies during future rulemakings and report its results to DOT, according to the plan.

Regulation Room presents information on the DOT texting rule in traditional formats – for example, displaying the *Federal Register* notice of proposed rulemaking – as well as in novel ways. The Rule Dashboard displays information in a question-and-answer format. For example, the "Which drivers are covered" heading communicates to users, in plain language, the classes of drivers that would be covered by the proposed rule's definitions and estimates on the number of drivers it would impact. Other headings include "What penalties" for information on failure to comply with the rule and "What costs & benefits" for estimates of the costs to industry and gains in motorist safety.

The website also experiments with new means of participation in rulemaking. The site emphasizes collaboration, encouraging users to discuss the decisions the agency will need to address and to respond to one another in a blog-like format. Then, Regulation Room's moderators will summarize the discussion and ask users to collaborate in developing joint comments for submission to the agency. This process occurs concurrently with the official public comment period hosted by the agency.

EPA also included an e-rulemaking innovation among its Flagship Initiatives. EPA's new Rulemaking Gateway was launched in February but is also highlighted in the agency's Open Government Plan.

Each EPA rulemaking now has its own webpage with basic information about the rule, including an abstract and timeline for the rulemaking with projected milestones where appropriate. Users can search for rules by stage in the rulemaking process or topic, as well as by a variety of economic and social sectors the rule is expected to impact.

The Rulemaking Gateway also gives users an opportunity to comment on EPA rulemakings. Typically, rules are only open for public input during a legally required comment period immediately following publication of a notice of proposed rulemaking. On the Rulemaking Gateway, users can comment on rules at any time outside of the formal comment period.

EPA's online Rulemaking Gateway is integrated with Regulations.gov, which the agency also runs, but the gateway includes only EPA documents and issues. If information on EPA rulemakings is already available on Regulations.gov, or if a rule is open for public comment on Regulations.gov, the gateway includes links that give users quick access to relevant pages on Regulations.gov.

The U.S. Department of Agriculture is focusing on one particular rulemaking in its Open Government Plan with the launch of a website dedicated to the development of a new national forest plan, a rule detailing the USDA's overall approach to forest management. "[W]e believe this effort will increase agency credibility and public understanding of the planning rule and lead to a planning rule that endures over time," USDA said in its plan.

The planning rule website is a central hub for all information related to the rulemaking, including information on public meetings and background information for new users. It also includes participation mechanisms. The agency says, "Our planning rule Web site provides the

latest information and opportunities to participate in the conversation via our planning rule blog." Like EPA's Rulemaking Gateway, USDA's planning rule website was launched before the release of its Open Government Plan, in December 2009. It is also a Flagship Initiative.

The Department of Labor's Open Government Plan addresses the enforcement side of regulation. The Department's new online enforcement database contains information on inspections the department conducts to ensure businesses are complying with the nation's worker rights and safety laws and regulations. The database covers enforcement activity at DOL's Employment Benefits Security Administration, Mine Safety and Health Administration, Office of Federal Contract Compliance Programs, Occupational Safety and Health Administration, and Wage and Hour Division.

Currently, shortcomings in the search and sort functions limit users' ability to find information. For example, users are not currently able to search by the name of a business or facility. However, the website provides important information that had been difficult to obtain. For example, users can find information on enforcement actions at Massey Energy, a company that has recently been in the national news because of the 29 people who died in one of their mines in West Virginia. DOL says it will continue to make improvements to the site.

Agency-by-agency changes are occurring in the absence of a broader, administration-wide e-rulemaking policy. While administration officials have indicated a desire to transform e-rulemaking practices, the administration has failed to describe how e-rulemaking fits into its goals of making government information more accessible and expanding public participation – goals embodied in the Open Government Directive and plans.

The White House has taken steps to address particular e-rulemaking issues. In conjunction with the release of agency Open Government Plans, White House Office of Information and Regulatory Affairs (OIRA) Administrator Cass Sunstein issued two memos related to e-rulemaking.

One memo encourages agencies to consistently use Regulation Identifier Numbers, or RINs, to tag documents. Currently, agencies assign a RIN to every rulemaking, and the RIN appears in the proposed and final rules published in the *Federal Register*. Under Sunstein's memo, agencies will now need to display the RIN on all documents associated with the rulemaking, such as cost-benefit analyses and information collections. The move will allow the public to more easily link rules to their supporting evidence and, in turn, could promote public participation, the White House says.

The other memo relaxes agency obligations under the Paperwork Reduction Act (PRA) to seek White House approval to use web-based interactive technology. The memo says that voluntary social media and other web-based forums – for example, blogs, wikis, or message boards – will not be considered information collections under the PRA. The memo is intended to stem concern that agencies need to comply with the PRA before including comment sections on their websites or using online services like Facebook and Twitter.

The White House is expected to continue to find ways to improve e-rulemaking practices and foster innovation. Both the White House and individual agencies emphasized that the plans, documents, and websites released April 7 were only first iterations and that the open government process is ongoing.

Grassroots Lobbying Disclosure Laws and the First Amendment

On April 15, the Institute for Justice (IJ) filed a lawsuit on behalf of two volunteer groups challenging part of Washington State's grassroots lobbying disclosure law as a violation of their First Amendment rights to free speech, assembly, and petition. In *Many Cultures, One Message v. Clements*, the groups claim that having to register as grassroots lobbying organizations is burdensome, and revealing information about their financial supporters could leave donors open to threats from opponents.

The groups challenging the law are Many Cultures, One Message, which opposes the use of eminent domain for redevelopment in southeast Seattle, and Conservative Enthusiasts, a 501(c)(3) nonprofit volunteer organization that promotes small government and opposes taxes. According to IJ, "Each face the dilemma of registering with the government or halting their efforts to urge their fellow Washingtonians into political action."

The defendants in the lawsuit are Jim Clements, chairman of the state's Public Disclosure Commission, and several other members of the commission. The commission enforces disclosure and campaign finance laws.

Grassroots lobbying activities seek to encourage the public to take specific positions on legislative matters or public policies and typically feature forms of communication that request the recipients to contact their lawmakers regarding a specific issue. These communications are directed at the general public or at selected groups on organization mailing lists. Currently, federal law does not require the registration of people or groups that solely engage in grassroots lobbying, nor does it require disclosure of such activities.

The State of Washington is one of 36 states that have some sort of law addressing disclosure of grassroots lobbying. In Washington, the law requires that any person or entity that spends more than $500 in one month or $1,000 in three months making grassroots lobbying expenditures must file with the state's Public Disclosure Commission and disclose his or her/its name, address, business, and occupation. The law also requires disclosure of the names and addresses of anyone or any group such a person or entity is working with, as well as anyone who contributes more than $25 to the group's grassroots lobbying efforts.

Many Cultures, One Message and Conservative Enthusiasts sought an exemption from the law in December 2009. In March 2010, the Public Disclosure Commission ruled that the groups would still have to file disclosure reports as grassroots lobbying organizations if they made expenditures exceeding the amounts specified in the law. The commission's response letter to IJ stated, "These statutes enable the voters to 'follow the money' in lobbying and campaigns,

including grassroots lobbying." The letter asserted that the citizens of Washington State passed the law by initiative in 1972 to "maintain openness and transparency in lobbying and financial efforts to affect legislation."

The groups' lawsuit claims that the state law creates "expensive, complex, and time-consuming administrative requirements that interfere with, and chill Plaintiffs' ability to exercise, their right to engage in political speech and association." In addition, the registration and reporting rules are vague, and prohibit them from "exercising their right to engage in anonymous political speech," according to the suit. They further argue that grassroots lobbying disclosure laws and the cost for violating them may discourage small groups from becoming active in politics and public policy. In Washington State, the maximum penalty is $10,000 per violation.

An IJ press release on the case announced, "Washingtonians from both sides of the political spectrum filed a lawsuit today [April 15] to stop their state from monitoring, collecting and publicly disseminating information about the political activities of private citizens who do nothing more than urge their fellow citizens to take political action."

IJ's lawsuit cites the recent U.S. Supreme Court decision in *Citizens United v. Federal Election Commission* as support for the finding that onerous rules can amount to a ban on speech. The Associated Press quoted IJ executive director Bill Maurer as being "encouraged" with the Court's "less regulatory direction regarding campaign finance laws." However, in *Citizens United*, disclosure laws were upheld as constitutional, and the decision stated that "transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages."

The lawsuit also reveals the groups' concern with the state gathering personal information and making it available on the Internet, which they charge may leave donors and others vulnerable to harassment. A case that will soon face the U.S. Supreme Court addresses similar issues.

In *John Doe No. 1 v. Reed*, petition signers challenged the constitutionality of Washington's Public Records Act, which requires state and local governments to make public the identities of those who sign a referendum or initiative petition. Those challenging the law argue that petition signing is political speech subject to First Amendment protections, while Washington Secretary of State Sam Reed asserts that signing a referendum or initiative petition is a legislative act and that petitions to add measures to the ballot are public records. The Ninth Circuit has ruled that disclosure of such signatures serves an important government interest and promotes government accountability.

A Congressional Research Service (CRS) report notes that grassroots lobbying disclosure regulations have been deemed constitutional in the past. A 2008 report points out that the "Supreme Court of the State of Washington in 1974, for example, upheld very detailed lobbying disclosure provisions of State law concerning 'grassroots' lobbying activities in *Young Americans for Freedom, Inc. v. Gorton*." In that case, the court held, "To strike down this portion of the initiative would leave a loophole for indirect lobbying without allowing or

providing the public with information and knowledge re the sponsorship of the lobbying and its financial magnitude."

A further suggestion in the CRS report hypothesizes that a law that only requires disclosure and reporting, only covers paid grassroots lobbying, and does not prohibit any activity, would stand up against court challenges. Such a law would exclude "volunteer organizations, volunteers, and individuals who engage in such activities on their own accord out of the coverage and sweep of the provisions." The law would have to be "drafted in such a manner so as not to be susceptible to an overly broad sweep bringing in groups, organizations and other citizens who do no more than advocate, analyze and discuss public policy issues and/or legislation."