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In This Issue

Fiscal Stewardship

Debt Ceiling Deal Erodes Public Protections, Government Services
Democracy Demands High Level of Super Committee Transparency

Government Openness

Administration Fumbling Toward Scientific Integrity
Obama Administration Issues Environmental Justice MOU

Protecting the Public

Clean Air Rules Draw Support from Scientists, Industry Groups, and Public Health Advocates but Are Still Questioned by Powerful Interests

Protecting Nonprofit Rights

Neither Death Nor Certainty for the 501(c)(4) Gift Tax

Debt Ceiling Deal Erodes Public Protections, Government Services

The debt ceiling deal signed into law Aug. 2 will remake the federal budget process in the years to come. The procedures put in place by the new law are complex, and the final budgetary outcome will depend on a variety of factors. With $841 billion in immediate budget cuts, and with up to $2.5 trillion in total deficit reduction over the next 10 years, the law, known as the Budget Control Act (BCA), will have a profound effect on everything from public and environmental protections to education to federal information transparency.

Overview

The first part of the law is relatively simple. It mandates hard limits on total discretionary spending for the next ten fiscal years (FY), and if Congress allocates more funding than the budget caps allow, the amount of the overrun will be cut across all discretionary programs

equally. Underneath the caps, Congress can allocate spending to federal programs however it wants, meaning some programs might be cut to allow for the growth of other programs. The Congressional Budget Office (CBO) estimates that these caps will cut $841 billion over ten years compared to its baseline, which grows the federal budget at the pace of inflation.

For a complete run-down of how the new debt deal works, see OMB Watch's FAQ.

In addition to the discretionary budget caps, the law calls for the creation of a special joint committee of Congress, made up of 12 members. The majority and minority leadership of both houses have chosen three members each, leaving this so-called Super Committee with six Democrats and six Republicans, three from each house. This group will have until Nov. 23 to produce a proposal to reduce the deficit by at least $1.2 trillion over the next ten years. The Super Committee can raise revenue or cut any program, including Social Security, Medicare, and Medicaid, in creating a deficit reduction plan. Nothing is off the table.

If the Super Committee plan isn't enacted, a set of automatic, across-the-board cuts are triggered, starting with the FY 2013 budget. In addition to lowering the original discretionary spending caps, this process would also cut mandatory spending for the next nine years. All of these cuts are equally split between defense and non-defense spending, while certain programs, such as programs for low-income families, Social Security, Medicaid, and most of Medicare, are protected.

Spending Caps

The first spending caps in the law go into effect for the coming fiscal year, FY 2012, the budget that Congress is currently debating. Compared to the FY 2011 budget, the first year's cuts are relatively small, only $7 billion. A cut this small will effectively freeze federal programs at their current levels, meaning fewer new programs and limitations on the services they currently provide to the American people. However, compared to the CBO baseline, which accounts for inflation, the budget cap for FY 12 is far below – about $44 billion – where federal spending is projected to be. In essence, then, a budget cap that seems to be holding federal spending constant is, in fact, slowly eroding its value.

Table 1. Initial Discretionary Spending Caps (*billions of dollars*)						
Fiscal Year	CBO March Adjusted Baseline	Budget Control Act				
		Total Discretionary Cap	Security Cap	Non-security Cap	Amount Cut from Baseline	Percent Cut from Baseline
2012	1,087	1,043	684	359	44	4
2013	1,109	1,047	686	361	62	6
2014	1,134	1,066	*N/A*	*N/A*	68	6
2015	1,159	1,086	*N/A*	*N/A*	73	6
2016	1,186	1,107	*N/A*	*N/A*	79	7
2017	1,218	1,131	*N/A*	*N/A*	87	7
2018	1,251	1,156	*N/A*	*N/A*	95	8
2019	1,285	1,182	*N/A*	*N/A*	103	8
2020	1,319	1,208	*N/A*	*N/A*	111	8
2021	1,353	1,234	*N/A*	*N/A*	119	9
Total	12,101	11,260	*N/A*	*N/A*	**841**	7

The FY 12 budget cap represents an increase over the budget level the Republican-controlled House set earlier in 2011. Since the House has already completed work on about half of the yearly appropriations bills that make up the annual budget (at levels about $30 billion lower than the spending cap), House and Senate legislators will have to negotiate how and where to add money back to the deep cuts passed in the House. For instance, the House had slated the Labor-Health and Human Services-Education appropriations bill to be cut by almost 12 percent, a reduction of $18 billion. If Congress adheres to the debt ceiling agreement, this funding should be restored before that spending bill sees the president's desk.

However, while the BCA sets the upper limits of overall discretionary spending, it does not prevent spending below those levels. House Republicans will likely push for cuts below the already agreed-to spending cap in an effort to bring spending closer to their budget. The debate over the FY 12 funding level, with Democrats arguing for keeping spending as close to the cap as possible and Republicans demanding more cuts, will be the next big budget fight, and it has the potential to be just as dramatic as recent battles, with a similar potential for a government shutdown.

How Automatic Cuts Could Be Triggered

If the Super Committee cannot agree on at least $1.2 trillion in deficit reduction measures, then automatic, across-the-board cuts will be triggered. Beginning in FY 2013, spending cuts will be remarkably more drastic than those in FY 2012. Approximately $109 billion more will be cut from the budget, with half coming from defense spending and half from non-defense. In total, FY 13 discretionary spending will be reduced by $156 billion below the CBO baseline, an amount equal to the budgets for the Departments of State, Interior, and Transportation. Non-defense discretionary spending will see approximately an eight percent cut from the previous year's funding level, but when compared to the CBO baseline, or what the spending level would be if it kept pace with inflation, the cut is close to 13 percent.

Table 2. Estimates of Revised Discretionary Spending Caps Following Failure of Super Committee Proposal (*billions of dollars*)						
Fiscal Year	CBO March Adjusted Baseline	Budget Control Act				
		Total Discretionary Cap	Security	Non-security	Amount Cut from Baseline	Percent Cut from Baseline
2012	1,087	1,043	684	359	44	4
2013	1,109	953	492	461	156	14
2014	1,134	973	502	471	161	14
2015	1,159	993	512	482	166	14
2016	1,186	1,015	523	492	171	14
2017	1,218	1,040	536	504	178	15
2018	1,251	1,065	549	517	186	15
2019	1,285	1,092	562	530	193	15
2020	1,319	1,119	576	543	200	15
2021	1,353	1,146	590	556	207	15
Total	12,101	10,439	5,523	4,916	**1,662**	14

These deep and sweeping cuts will affect everything from education, employment programs, environmental protections, food safety programs, weather tracking, transportation, and renewable energy research. The result will be a noticeable deterioration of those public structures that support the economy and most Americans' daily activities.

These cuts will also have important ramifications for citizens' access to the government. Staff to handle Freedom of Information Act requests; the Government Printing Office, which, as we highlighted in an earlier *Watcher* article, provides access to congressional bills, the U.S. Code, and the Code of Federal Regulations; and maintenance of websites that provide federal spending information will all see cutbacks.

If non-defense discretionary spending is decreased by 13 percent under such automatic cuts, almost every program is likely to see funding reductions. Few, if any, programs will see budget increases, since any increase in funding must come out of another program. These cuts will likely result in heavy staff reductions in every agency, which would mean fewer meat inspectors policing the nation's slaughterhouses and packing plants; fewer personnel reducing waste, fraud, and abuse in government contracting; fewer staffers monitoring Wall Street; and fewer FBI and CIA agents tracking down terrorists.

Paradoxically, the automatic cuts could be the lesser of two evils. The BCA allows the Super Committee to target *any* program for spending cuts, including Social Security, Medicare, and Medicaid. No programs are untouchable through a Super Committee deficit package.

What the BCA Doesn't Say Could Pose a Risk to Crucial Public Protections and Services

There's another feature of the debt ceiling deal that should trouble those who value the services and protections provided by the government: the BCA does not forbid the Super Committee from inserting provisions into its proposal that do not directly affect the deficit.

The likelihood of this occurring should not be underestimated, and one recent example of such behavior is illustrative. House Republicans mounted a considerable effort earlier in 2011 to insert some 80-plus "policy riders" to FY 2011's budget, despite the fact that most of these provisions were policy-related and had little or nothing to do with the budget. The representatives' wish list included undoing health care reform, defunding Planned Parenthood, gutting a slew of environmental protection rules, and prohibiting the Federal Reserve from using money to create a new consumer finance protection bureau.

The BCA mandates an up-or-down vote on any committee-approved package in its entirety, with no amendments allowed. This means that any policy riders that survive the committee process would be attached to the package, and Congress would have no opportunity to remove them. With a $1.2 trillion trigger set to go off, Congress will feel the urgency to approve the deal, greatly enhancing the prospect that a raft of conservative special interest provisions become law.

Democracy Demands High Level of Super Committee Transparency

During the past week, leaders of the House and Senate announced the members of the debt ceiling deal's Super Committee. Now, all eyes are turning to the committee's co-chairs, Sen. Patty Murray (D-WA) and Rep. Jeb Hensarling (R-TX), to see if they will institute basic transparency standards that many within and outside government are calling for. With so much decision making power concentrated in the hands of just 12 members of Congress, the country deserves the maximum possible level of transparency in the committee's operations.

The Super Committee

According to the 2010 census, the current population of the United States is just over 308 million people. The voting-age segment of this population selects 535 individuals to represent the people's interests in Congress. The average number of constituents represented by one of the 435 House representatives is approximately 647,000; a senator can represent anywhere from 563,626 people (WY) to more than 37 million people (CA). By contrast, each of the 12 members of the Super Committee will be representing their own constituents and up to 25 million other Americans.

The members of the Super Committee are:

- **House**
  - Rep. Dave Camp (R-MI)
  - Rep. Jeb Hensarling (R-TX)
  - Rep. Fred Upton (R-MI)
  - Rep. Xavier Becerra (D-CA)
  - Rep. Jim Clyburn (D-SC)
  - Rep. Chris Van Hollen (D-MD)

- **Senate**
    - Sen. Max Baucus (D-MT)
    - Sen. John Kerry (D-MA)
    - Sen. Patty Murray (D-WA)
    - Sen. Jon Kyl (R-AZ)
    - Sen. Rob Portman (R-OH)
    - Sen. Pat Toomey (R-PA)

A first glance at some demographic information related to the Super Committee members is available on *The Fine Print*.

The Potential for Special Interest Influence

Giving so few individuals the authority to make decisions that will affect every area of government activity makes them targets (or recipients) of special interest largesse.

A recent Associated Press (AP) examination of the committee members' campaign finance reports finds that the "six Democrats and six Republicans ... have received more than $3 million total during the past five years in donations from political committees with ties to defense contractors, health care providers and labor unions." In fact, each of the 12 members have "received more than $1 million overall in contributions from the health care industry and at least $700,000 from defense companies," according to the AP.

According to Bloomberg News, the defense industry will likely seek help from committee co-chair Murray. She is one of the few unabashed congressional advocates of defense contractors, especially Boeing Inc., which does significant business in the legislator's home state of Washington.

The Center for Responsive Politics (CRP) notes that Hensarling, the Republican co-chair, has pulled in hundreds of thousands of dollars from the banking and insurance industries.

The potential conflicts between the Super Committee members' parochial interests and the nation's interests are a further reason for consternation. The Sunlight Foundation's *Party Time* blog recently noted that legislators and their supporters have already planned fundraisers that take advantage of the members' positions on the Super Committee: "At least five members of the congressional Super Committee tasked with reducing the nation's deficit are scheduled to hold or host fundraisers just as the panel will be beginning its work" in early September. Though it is legal for committee members to pursue these fundraisers, the appearance of impropriety should give them pause.

Super Committee Transparency Is Essential

In light of the high stakes involved and the striking potential for a number of special interest-driven problems, the open government community is calling for super-disclosure and transparency by the Super Committee. A dedicated website should be created and the

committee's activities should be posted on it in real time. Any documents, proposals, or testimony the committee receives should be posted immediately. All witness lists and hearing agendas should also be posted. The committee should develop ways to collect, aggregate, and display public commentary on the various proposals that come before the group. To prevent conflicts of interest, real or perceived, all committee members and staff should post their financial holdings online, along with information on all campaign contributions to members.

The challenge facing the Super Committee, coupled with the barrage of special interest lobbying that is sure to commence when Congress returns to Washington in September, demands an incredibly high level of transparency throughout the committee's deliberations. If the American people are to trust the decisions the committee reaches, the process must be open, it must be accessible, and it must offer opportunities for meaningful public participation and feedback. Anything less would be a great disservice to our nation.

Administration Fumbling Toward Scientific Integrity

The Obama administration's efforts to protect scientific integrity moved forward recently with the submission of five finalized agency policies and 14 draft policies, but progress has been slow and haphazard. The administration recognizes that sound, uncensored science is critically important to protecting public health and the environment. The administration also understands that agencies should foster a culture of scientific integrity that includes effective policies and oversight to protect science from political manipulation and research misconduct. However, it has yet to undo the damage wrought by the previous administration.

Background

The George W. Bush administration was widely criticized for abuses of scientific integrity, including political manipulation of scientific findings and suppression of the free flow of scientific information. These policies undermined the effectiveness of the public structures that protect our health, economy, and environment by delaying decision making and weakening public trust that government policies were based on the best available scientific and technical information.

As a candidate and in his inaugural address, President Obama pledged to restore scientific integrity. Shortly after taking office, he issued a memo on scientific integrity, which stated that "political officials should not suppress or alter scientific or technological findings and conclusions."

The memo directed the White House Office of Science and Technology Policy (OSTP) to develop guidelines to protect scientific integrity within 120 days. However, those guidelines were not released until December 2010, more than a year past the deadline. Despite the delay, OMB Watch praised the guidelines as a step forward and called for agencies to aggressively implement them.

In May, OSTP asked each agency to submit a draft scientific integrity policy within 90 days. In the interest of transparency and accountability, OMB Watch called for agencies to publish their proposed policies for public comment before finalizing them. However, OSTP did not formally instruct agencies to solicit public feedback.

Agency Policies

On Aug. 11, OSTP posted information about the progress (or lack of progress) each agency had made in meeting the most recent deadline. Several agencies have adopted final scientific integrity policies, while others have released draft policies for public comment. Advocates have criticized both the content of some of the policies and the closed process that produced them.

Of the five agencies with final policies, only the Department of the Interior undertook visible public consultation. The Department of Commerce and the National Aeronautics and Space Administration (NASA) have published their final policies but do not appear to have solicited public comment at any point in the process. The Justice Department and the intelligence community do not appear to have publicly published their final policies nor solicited public comment on those policies.

Fourteen other agencies have submitted draft policies to OSTP, and several have published drafts for public comment, including the U.S. Environmental Protection Agency (EPA), the National Oceanic and Atmospheric Administration (NOAA), and the National Science Foundation (NSF). Of the remaining agencies, some are reportedly considering public consultation before finalizing their policies, while others do not plan to solicit public comment.

The Department of the Interior example demonstrates the value of consulting with the public before finalizing a scientific integrity policy. The department's draft policy was criticized by OMB Watch and other groups for failing to address political interference with science and lacking protections for scientists who blow the whistle on misconduct. After receiving public comment, however, Interior made revisions, and the final policy was significantly improved.

What's in the Policies?

The OSTP guidelines directed agency policies to address four areas: foundations of scientific integrity, including appropriate whistleblower protections; communications policies; federal advisory committees; and professional development of scientists, including opportunities to present research and serve in professional organizations.

While the available plans make some progress on those topics, the issue of scientists communicating with the media has been especially contentious. Public Employees for Environmental Responsibility (PEER) called EPA's proposed policy "pathetically weak" for failing to ensure that public affairs staff don't become gatekeepers restricting communication between scientists and the media.

The available policies are also thin on details of how political manipulation of science will be prevented. For instance, the Union of Concerned Scientists (UCS) said NOAA's policy "has raised the bar for scientific integrity policies," but also said it was "critical for the agency to establish specific practices to protect the integrity of agency scientific findings to prevent manipulation."

Next Steps

OSTP has not set a hard deadline for final policies, but the Aug. 11 blog post states that the office "will be working with [agencies] this fall as they finalize their policies."

We invite readers to submit their comments on the proposed plans to:

- NOAA (by Aug. 20);
- EPA (by Sept. 6); and
- NSF (by Sept. 6).

Recommendations

OMB Watch continues to call for stronger commitments to public participation and more public accountability by all federal agencies. OSTP should direct agencies to publish draft policies for public comment at least one month before finalizing them and to finalize their policies before the end of the year.

Agencies should ensure their policies establish clear expectations that science will be free from political manipulation, with procedures to insulate science from inappropriate influence and to redress the problem if it does occur. The first component should be a policy that makes clear that non-science officials do not have the authority to alter findings or explanations without approval of the scientific personnel that produced the information. The second component should be a mechanism through which scientific and research personnel can submit concerns about possible political manipulation and receive an independent review. Complaints could be reviewed by an agency's inspector general's office or a scientific review board.

Agency policies should also protect the free flow of information, in particular safeguarding scientists' freedom to communicate with the media without public affairs staff acting as censors or gatekeepers. While public affairs officials often coordinate and disseminate information to the media and the public, factual scientific findings should not proceed through the same message machine that oversees speeches and press releases. Otherwise, the risk is too great that a public affairs review will mutate into a political review and that findings will be delayed or changed to suit the goals of an administration.

Protecting scientific integrity also requires a culture change within federal agencies. To achieve this, leadership from the top of the agency; adequate training and communication of new policies and practices to personnel; and effective enforcement and oversight mechanisms, including appropriate involvement of agency inspectors general, will be crucial.

Finally, OSTP should take needed actions to regain its leadership position on scientific integrity, including communicating more openly with stakeholders and the public.

Obama Administration Issues Environmental Justice MOU

On Aug. 4, 17 federal agencies signed a memorandum of understanding that aims to address and reduce the disproportionate harm from environmental degradation that affects indigenous, low-income, and minority communities. The "Memorandum of Understanding on Environmental Justice and Executive Order 12898" (MOU EJ) is the most recent step taken by the Obama administration to address the environmental burdens facing these communities and to encourage people from affected communities to participate in public processes designed to improve environmental health and safety.

The MOU EJ lays out agency responsibilities and formalizes commitments, processes, and procedures outlined in Executive Order (E.O.) 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations," issued by President Bill Clinton in 1994. The MOU EJ expands the scope of the Interagency Working Group on Environmental Justice to include agencies not originally named in E.O. 12898. It also adopts an Interagency Working Group charter, providing the working group with more structure and direction.

By signing the MOU EJ, agencies agree to develop environmental justice strategies, ensure public input into those strategies, and collaborate with other agencies on environmental justice issues. Each agency is required to review, update, and post online its existing or draft environmental justice strategies by Sept. 30. Agencies must get public input on their strategies, though no specific process for encouraging participation is required. Final environmental justice strategies will be posted online by Feb. 11, 2012.

The MOU EJ also requires participating agencies to provide annual progress reports on their efforts to address environmental justice issues. These reports will include progress on implementing environmental justice strategies and performance measures identified by each agency, as well as responses to any questions or recommendations provided by the public.

Agencies must focus on particular problems afflicting the environment and health of minority and low-income communities, including the impacts of climate adaptation and commercial transportation, as well as implementing the National Environmental Policy Act and Title VI of the Civil Rights Act of 1964.

Background

Environmental justice, as defined by the U.S. Environmental Protection Agency (EPA), is the

> fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and

> enforcement of environmental laws, regulations, and policies.... It will be achieved when everyone enjoys the same degree of protection from environmental and health hazards and equal access to the decision-making process to have a healthy environment in which to live, learn, and work.

The issue emerged as a concept and movement in the early 1980s by indigenous, minority, and low-income community groups subject to a growing number of hazardous and polluting industries located within their neighborhoods. According to the 2007 environmental justice report, *Toxic Waste and Race at 20*, more than nine million people are estimated to live in neighborhoods within two miles of 413 hazardous waste facilities nationwide. Neighborhoods that host commercial hazardous waste facilities average 56 percent minority populations, whereas areas without such facilities average just 30 percent minority populations. Neighborhoods within two miles of waste facilities are typically economically depressed, with poverty rates 1.5 times greater than communities beyond the two-mile radius. The struggle to defend local communities from environmental hazards became closely linked to the civil rights and other social movements and is predominantly led by grassroots minority groups.

The environmental justice movement was surprisingly successful in drawing attention to this disparity over the years. The EPA, under President George H.W. Bush, established an Office of Environmental Justice. President Clinton further advanced the movement by enacting E.O. 12898, which directed federal agencies to develop a strategy for implementing environmental justice, but many advocates feel little has been done to implement the order.

Environmental Justice under President Obama

The Obama administration has undertaken several environmental justice initiatives. In September 2010, EPA Administrator Lisa Jackson and White House Council on Environmental Quality Chair Nancy Sutley reconvened the Interagency Working Group on Environmental Justice for the first time in more than a decade. In December 2010, the White House organized the Environmental Justice Forum, where cabinet secretaries and senior administration officials met with more than 100 environmental justice leaders from across the country to discuss environmental and public health issues affecting their communities. At the meeting, the administration recommitted to advancing the mandate of E.O. 12898.

The Obama administration also launched the Partnership for Sustainable Communities grant program, which awards grants each year for "livable and sustainable communities" around the country. The EPA also developed Plan EJ 2014, a roadmap that will help the agency integrate environmental justice into all programs, policies, and activities.

Environmental justice, environmental, and public health organizations welcome the administration's efforts to elevate environmental justice issues and increase interactions with environmental justice communities. The recommendations in *An Agenda to Strengthen Our Right to Know*, endorsed by more than 100 organizations, included full implementation of E.O. 12898 and expanding its coverage to include additional agencies. Additional recommendations involved improving the scope of equity-based data collection, identifying sources and methods

for obtaining and analyzing environmental justice data, widely disseminating this data, and improving capacity-building in affected communities.

In a press release announcing the MOU EJ, Jackson states, "All too often, low-income, minority and Native Americans live in the shadows of our society's worst pollution, facing disproportionate health impacts and greater obstacles to economic growth in communities that can't attract businesses and new jobs.... Expanding the conversation on environmentalism and working for environmental justice are some of my top priorities for the work of the EPA, and we're glad to have President Obama's leadership and the help of our federal partners in this important effort."

However, with the EPA in the crosshairs of House Republicans and an across-the-board attack on all federal regulatory agencies, it seems that a lack of funding may hinder the realization of these goals.

The following agencies signed the EJ MOU: EPA; White House Council on Environmental Quality; Department of Health and Human Services; Department of Justice; Department of Agriculture; Department of Commerce; Department of Defense; Department of Education; Department of Energy; Department of Homeland Security; Department of Housing and Urban Development; Department of the Interior; Department of Labor; Department of Transportation; Department of Veterans Affairs; General Services Administration; and Small Business Administration.

Clean Air Rules Draw Support from Scientists, Industry Groups, and Public Health Advocates but Are Still Questioned by Powerful Interests

The U.S. Environmental Protection Agency (EPA) has drafted several new rules designed to reduce emissions of harmful air pollutants and improve public health, but some of the standards still await final approval. Environmental and public health advocates have applauded the tougher standards, and a number of industry groups have said they are well positioned to comply with the new rules. The rules will provide businesses with the regulatory certainty that firms say they need to invest in modern pollution-control technologies. Moreover, major power and energy companies say that these new standards will yield important economic benefits.

On July 6, EPA finalized the Cross-State Air Pollution Rule (CSAPR) requiring states to reduce power plant emissions of air pollutants that contribute to ozone and fine particle pollution in other states. The agency is also under a court-ordered deadline to finalize proposed Mercury and Air Toxics Standards for Power Plants (MATS) by Nov. 16. The MATS rule, also known as the "Air Toxics Rule," would set national emissions standards for mercury, arsenic, and other toxic air pollution from power plants. The tougher standards would save between 6,800 and 17,000 lives and prevent 11,000 heart attacks per year.

In comments submitted to EPA on the proposed MATS rule, the Clean Energy Group, a coalition of electric utilities and power companies, including PG&E, Calpine, Exelon, and Consolidated Edison, Inc., wrote that overall, "the proposal is reasonable and consistent with the requirements of the Clean Air Act." The comment stated "that the electric sector is well-positioned to comply" with the new standards and encouraged EPA to complete the rule as scheduled. Exelon Corp., in separate comments, urged the agency to implement the rule as quickly as possible, arguing that "delaying or weakening [the rule] will harm our health and economic well-being." According to Exelon, the rule "will provide the certainty that industry desperately needs to modernize and improve" and will encourage "investment in a clean, modern, efficient generation fleet, thus promoting long-term economic health for both the electric industry and the nation as a whole." These national emissions standards will also help level the playing field between companies striving to meet modern emissions standards and competitors that have failed to adapt to technological advances.

In fact, a Congressional Research Service review of evidence illustrates that the primary impacts of EPA rules will be on inefficient units "more than 40 years old that have not, until now, installed state-of-the-art pollution controls." These are units that can and should be modernized or replaced. For those plants that are retired, a study released Aug. 10 by the American Clean Skies Foundation finds that communities can repurpose retired coal-fired power plant sites and capitalize on opportunities to create healthier environments, foster new business activity, and encourage job development.

"By spurring entrepreneurs who have good ideas and the drive to work hard, the EPA has helped give rise to countless small businesses in clean energy, advanced lighting, pollution control and more, which in turn are creating jobs," wrote David McKinney, CEO of Clean Light Green Light, a manufacturer of high-power LED lighting solutions.

Nonetheless, the American Chemistry Council, the U.S. Chamber of Commerce, and the Business Roundtable are attacking the new EPA rules and predicting devastating impacts on the power sector. However, the CRS review showed that recent reports by the North American Electric Reliability Corporation (NERC) and the Edison Electric Institute (EEI) overstated the costs of environmental and health standards and ignored the benefits.

Anti-environmental industry groups are also stepping up their pressure to delay implementation of a new ozone rule until 2013. In the meantime, several of these groups are scheduled to meet with President Obama's pro-business chief of staff, William Daley, in what looks like an attempt to bypass established practices and the president's executive orders on regulatory compliance and open government, as well as a Clinton-era executive order that attempts to shield the regulatory review process from undue industry and political influence.

On the other side, nine senators have written to Obama expressing "disappointment at the Administration's continued delay in setting a health-protective ozone air quality standard." The new ozone rule has been delayed four times, despite the fact that the current standard allows emissions that exceed scientific recommendations. The Aug. 11 letter faulted the opponents for "ignoring 40 years of data demonstrating that clean air investments are good for public health

and the economy."

Neither Death Nor Certainty for the 501(c)(4) Gift Tax

Anyone keeping tabs on the efforts of the Internal Revenue Service (IRS) to assess gift taxes on major donations to 501(c)(4) organizations should be wondering if the old adage regarding the certainty of death and taxes needs to be updated in the post-*Citizens United* era.

In February, the IRS warned five major donors to 501(c)(4) organizations that they might owe gift taxes on their contributions. These examinations had raised interest in both legal and political communities – both for their nearly unprecedented nature and for their potential implications for the 2012 elections.

On July 7, the IRS announced that it would drop the examinations until it had determined "whether there is a need for further guidance" regarding whether the gift tax can be applied to large contributions to 501(c)(4) organizations. Deputy Commissioner for Services and Enforcement Steven T. Miller cited the "significant legal, administrative, and policy implications with respect to which we have little enforcement history" as the reason behind the decision.

501(c)(4) organizations are often called "social welfare organizations" because the tax code says they may be "[c]ivic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare." While nonprofits organized under section 501(c)(4) must have a "primary purpose" that does not relate to elections, they are nevertheless free to collect unlimited contributions from donors who may remain anonymous. After *Citizens United* enabled for-profit and nonprofit corporations to make independent expenditures to advocate for or against particular candidates, major political donors began looking to 501(c)(4) organizations as a way to influence the political process.

It is an understatement to say that "[t]he use of undisclosed funds has skyrocketed." In 2010, a total of $4 billion, or $45 for every vote cast, was spent. Outside groups trying to influence federal elections spent $266.4 million, with at least $135 million coming from groups that do not publicly disclose their donors.

Even before voters went to the polls in 2010, it was clear that the role of 501(c)(4) organizations in our electoral system was changing and deserved serious examination. On Sept. 29, 2010, Senate Finance Committee Chairman Max Baucus (D-MT) sent the IRS a letter requesting an investigation into whether 501(c)(4) organizations' "political activities reach a primary purpose level" and "whether they are acting as conduits for major donors advancing their own private interests regarding legislation or political campaigns, or are providing major donors with excess benefits."

By May, five donors had been notified by the IRS that they were being audited with an eye toward determining whether they owed gift taxes on their contributions. The gift tax is currently assessed at 35 percent of gifts over $13,000 – except for certain protected transactions,

including donations to 501(c)(3) and 527 organizations. Since 1982, the IRS has maintained that contributions to 501(c)(4) organizations are different and could be subject to the tax. Nevertheless, news reports and practitioners' anecdotes suggest that the IRS has generally not sought to enforce this position. In fact, even the one publicly available letter to a donor under investigation suggests only that an examination is beginning – not that the donor owes any back taxes or penalties.

Even though the IRS insisted that the investigations were being managed by career civil servants and that they were not part of a larger review of the activity of 501(c)(4)s, the investigations still drew vociferous critiques. In a letter dated May 18, Republicans on the Senate Finance Committee accused the IRS of targeting conservative political activists. The announcement that the examinations had been suspended did little to quell the controversy because it left potential donors with no guidance as to what the IRS might do about future contributions to 501(c)(4) organizations.

While some practitioners assert that "tax lawyers as a whole have not changed their views" about whether contributions to 501(c)(4)s are subject to the gift tax, others are advising both donors and 501(c)(4) organizations themselves to "consider carefully the possible gift tax implications of contributions."

Perhaps even more concerning than tax uncertainty, however, is the appearance of political interference. "The clear implication left by the I.R.S. action on July 7 is that I.R.S. enforcement activity can be curtailed by intervention from a handful of members of Congress, whatever their party affiliation, when political contributions are at risk," Marc Owens, a lawyer who used to head the division of the IRS which oversees nonprofits, wrote in a letter on behalf of four clients.

If such political interference has, in fact, caused the IRS to suspend its investigations into large donors to 501(c)(4) organizations, Americans are left with little to be certain about as the 2012 elections approach. Will groups without a true social welfare purpose continue to be allowed to spend unlimited, undisclosed amounts of money to influence elections with no tax implications for the organizations or their donors, or will the IRS move beyond congressional complaints and other criticisms to ensure that 501(c)(4) organizations are following the law while engaging in electoral politics?

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