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In This Issue

Congress Holds Hearings on Bush's Changes to Regulatory Process

Congress held back-to-back hearings Feb. 13 on President George W. Bush's Executive Order that amended the federal regulatory process. The first hearing primarily addressed the content of the amendments and the Good Guidance Practices Bulletin, both issued Jan. 18. The second hearing focused more on the legal and institutional challenges Bush's amendments raise.

In the first hearing, held by the House Committee on Science and Technology's Subcommittee on Investigations and Oversight, Chairman Brad Miller (D-NC) focused on the significant consequences of the changes and how centralizing executive power over the federal agencies will affect Congress's ability to protect public health and safety.

Three of the witnesses agreed that the amendments would lead to:

- significant delay in issuing regulations and guidance documents that the regulated community needs to comply with legal requirements;
- additional burdens on agencies already experiencing budget and personnel cuts and an increase in the analyses required in the regulatory process; and
- additional power for the Office of Information and Regulatory Affairs (OIRA) over the substance, timing, and review of critical public protections.

The House Committee on the Judiciary's Subcommittee on Commercial and Administrative Law held the second hearing. Chairwoman Linda Sanchez (D-CA) asked why the amendments and bulletin would encourage agencies to use more formal rulemaking avenues while other members focused on what Congress can do to mitigate the effects. Rep. William Delahunt (D-MA) addressed the pattern of presidential encroachment on congressional powers the amendments represent, calling it "institutional combat."

Witnesses at this second panel expressed alarm at the legal authority that could be given to presidentially appointed Regulatory Policy Officers (RPO) without the approval of Congress and without Senate confirmation. Also, the substitution of criteria like "market failure" for specific criteria Congress establishes in legislation is a legislative power grab by the executive branch and raises separation of powers issues that could lead to constitutional challenges.

The panel members addressed actions Congress could take to challenge the amendments. Options include:

- exploring appropriations riders to limit the implementation of some of the changes like market failure analyses;
- increasing congressional oversight of OIRA and especially the guidance it will issue to direct agencies in implementing the changes;
- urging the Senate to exert its advise and consent role over presidential appointees because nearly all of these appointees in regulatory agencies are confirmed by the Senate; and
- exploring legislative responses, such as exempting independent agencies from the guidance requirements or inserting specific authorizing legislation that limits the scope of or requires specific regulatory criteria.

Most of the supporters of Bush's amendments argued that there was nothing new in the changes and/or that they were just extensions of existing practices. They also said that the changes were necessary to codify "good government" practices. Some of the more disingenuous arguments in support of the amendments were that including a section on the formal rulemaking process (a trial-like hearing) was merely a reminder to agencies that a formal process existed, not encouragement to use it; that market failure was integral to the Clinton-era executive order that Bush's action amended; and that

presidentially appointed RPOs are not new.

If these claims are true, opponents argued, then why did Bush issue an executive order? Perhaps without a compliant Republican Congress, he can't achieve these administrative changes legislatively or by acquiescence. Also, the reach of the order is well beyond the guidance bulletin's, making additional action necessary. For example, requiring RPOs, aggregated costs and benefits assessments, and market failure criteria are mandates the guidance bulletin could not accomplish on its own.

As with the Iraq war, ethics in government, contractor responsibility, and the federal budget, there is no longer just one voice echoing from Capitol Hill. There may be limited changes Congress can make to mitigate the effects of the amendments, but the hearings indicate a willingness to shine some light on executive actions aimed at protecting special interest backers of the administration, and to exert the authority of Congress.

The amendments and the guidance bulletin go into effect in late July, and only then will we be able to gauge the real impacts of the changes. In the meantime, look for OIRA to issue guidance to agencies clarifying the new amendments, probably by amending Circular A-4, *Regulatory Analysis* which is the current directive used by the agencies. We urge Congress to give tough scrutiny to any guidance issued and continue oversight of these important regulatory issues.

FDA Drug Approval Process under Scrutiny

The U.S. Food and Drug Administration (FDA) is facing renewed criticism over the process by which it approves drugs for market. Recent reports indicate many drugs are approved before they are proven safe, and problems with the agency's structure and processes prevent it from fulfilling its mission. Subsequently, Congress has started using its oversight powers to scrutinize the agency, and the clamor for FDA reform is growing louder.

The Federal Food Drug and Cosmetic Act requires FDA to ensure the safety of new drugs before the agency approves the drugs for market. However, operating within a provision of the law, FDA often approves drugs before safety is established. The agency then requires drug manufacturers to further study drugs while they are on the market. These "post-marketing commitments" serve to streamline the drug approval process.

FDA recently revealed that many of the post-marketing commitments go unfulfilled. On Feb. 2, the agency published a report in the *Federal Register* detailing the progress of post-marketing commitments, which in Fiscal Year 2006 numbered 1,259. As *The NewStandard* reported, FDA said drug companies "had yet to initiate 71 percent of outstanding 'post-market' safety evaluations." Meanwhile, only 11 percent have been submitted. These drugs remain on the market, yet neither FDA nor drug makers have

proved their safety.

Congress also recently expressed concern over the FDA drug approval process. On Feb. 13, the House Committee on Energy and Commerce's Subcommittee on Oversight and Investigation held a hearing titled "The Adequacy of FDA Efforts to Assure the Safety of the Drug Supply." The hearing occurred in response to recent regulatory failures that allowed dangerous drugs on the market, such as the highly publicized Vioxx incident.

Hearing witnesses testified that the FDA drug approval process is subject to industry influence and that agency managers sacrifice sound science in the name of expeditious approval. Ann Marie Cisneros, a clinical researcher, accused the pharmaceutical company Aventis of being complicit in a fraudulent clinical research project which Aventis had sponsored.

The testimony of Dr. David B. Ross, a physician and former FDA pharmaceutical reviewer, told the story of the antibiotic Ketek. Dr. Ross claimed Ketek was approved despite persistent warnings of its danger: "FDA managers were so bent on approving Ketek that they suppressed evidence of fraud and pressured reviewers — including myself — to change their reviews."

The criticism leveled at FDA is not new. The Government Accountability Office (GAO), the investigative arm of Congress, issued a report in March 2006 identifying significant gaps in FDA's ability to monitor and regulate post-market drugs. The GAO report mentioned organizational structure, insufficient oversight and poor data availability as some of the major problems facing FDA. GAO recommended Congress expand FDA's regulatory authority for post-market drugs.

In September 2006, the National Academy of Sciences Institute of Medicine also identified problems at FDA. Most notably, "FDA and the pharmaceutical industry do not consistently demonstrate accountability and transparency to the public by communicating safety concerns in a timely and effective fashion."

The mounting evidence in the case for FDA reform increases the likelihood of congressional action. Congress will likely take up the renewal of the Prescription Drug User Fee Act (PDUFA), which is set to expire this year. The legislation gives FDA the authority to require drug manufacturers to pay fees that the agency then uses to conduct drug reviews. In his proposed FY 08 budget released in early February, President George W. Bush called for new industry fees to further finance FDA. User fees from regulated companies would account for 21.3 percent of FDA's budget and pay for nearly 60 percent of reviews, according to *USA Today*.

FDA critics are skeptical of the industry-paid user fees. In the House hearing, Dr. Steven E. Nissen, chairman of the Department of Cardiovascular Medicine at the Cleveland Clinic Foundation, chastised PDUFA: "We started down the wrong pathway when we

said that the regulated industry was going to pay the FDA to regulate itself."

In addition to PDUFA reauthorization, two Senate bills aim to enact reforms within FDA. A bill introduced by Sens. Charles Grassley (R-IA) and Christopher Dodd (D-CT) would separate FDA's drug safety office from its drug approval office, thus elevating FDA reviewers to the same status as managers who approve drugs, according to *Congressional Quarterly* (subscription). In an attempt to improve post-market regulation, a bill introduced by Sens. Edward Kennedy (D-MA) and Michael Enzi (R-WY) would focus more on the drug safety processes as they are currently used. Both bills are currently in committee.

It is unclear whether the drug approval process at FDA will be subject to reform. However, with the safety of many post-market drugs unknown, the issue is unlikely to go away. In his testimony, Ross chided his former employer: "Overall, there is a culture of approval [at FDA.]" He indicated that approval, not safety, is the top priority, adding, "If you can get a product on the market...then you find some way of doing it."

Grassroots Lobbying Survey Results Demonstrate Strong Support for Disclosure

In early February, OMB Watch conducted a week-long Internet survey on federal grassroots lobbying disclosure that asked respondents to express their support or opposition to a variety of disclosure principles. Over 1,100 people responded to the survey, and the results were clear: strong support exists for federal grassroots lobbying disclosure.

Of the respondents, 70 percent strongly supported federal grassroots lobbying disclosure in general, and another 18 percent moderately supported the concept. Only nine percent opposed disclosure. Even among nonprofit organizations, some of which were concerned about disclosure provisions, nearly 56 percent of respondents strongly supported disclosure.

Many of the principles described in the survey, such as reporting triggers, exclusions for communications with members and congregants, and exclusions for Internet communications — including bloggers — address concerns that surrounded the grassroots lobbying disclosure provision that was stripped from S.1, the Senate's lobbying reform and ethics bill that passed Jan. 18. The reactions of many survey respondents to the disclosure principles illustrate that if disclosure and transparency are the goals, we can gather and make public relevant information without imposing onerous reporting requirements and without chilling speech.

Court Upholds Islamic American Relief Agency Asset Freeze

On Feb.13, the U.S. Court of Appeals for the District of Columbia upheld a lower court decision that allowed the Treasury Department's Office of Foreign Assets Control (OFAC) to freeze the assets of the Missouri-based Islamic American Relief Agency. The court said the asset seizure was lawful because the court found the organization is an affiliate of a Sudanese group that was designated as a terrorist organization in 2004, making this the first case to allow such designation based solely on an alleged branch relationship. There was no finding that the U.S. group used funds to support terrorist activities, and no criminal charges have been filed.

In October 2004, OFAC designated the Sudan-based Islamic African Relief Agency (IARA), based in Sudan, as a "Specially Designated Global Terrorist." A few weeks later the Federal Bureau of Investigation raided the Islamic American Relief Agency's (IARA-USA) offices in Columbia, MO, shutting down a relief organization that provided disaster and war relief in Africa, Asia and Bosnia. The *Columbia Tribune* reported that tax records indicate IARA-USA provided nearly $23 million in such relief from 1992-2002. It was founded in 1985 by a Sudanese immigrant and named the Islamic African Relief Agency USA. In 2000, the U.S. group changed its name to the Islamic American Relief Agency and established a separate board of directors and finances.

In December 2004, IARA-USA filed suit challenging the asset seizure, claiming OFAC's action was not supported by the record and violated federal law and the U.S. Constitution. In September 2005, the U.S. District Court for the District of Columbia ruled in favor of OFAC, holding the "record supported OFAC's conclusion that IARA-USA was a branch of IARA," making the seizure lawful under Executive Order 13224 and the International Emergency Economic Powers Act, as amended by the PATRIOT Act. The court used incidents occurring prior to 2000, when IARA-USA changed its name and governance, to find a "branch" relationship between it and the IARA. It also did not allow IARA-USA access to documents used by the government.

In upholding the lower court ruling, the appeals court said a "highly deferential standard of review applies," and it would only overturn OFAC's action if it was found to be arbitrary or an abuse of discretion. The court noted, "We may not substitute our judgment for OFAC's." It acknowledged "that the unclassified record evidence is not overwhelming, but we reiterate that our review — in an area at the intersection of national security, foreign policy, and administrative law — is extremely deferential."

In its opinion, the court cited its previous decision upholding OFAC's action against the Holy Land Foundation, emphasizing that, when foreign affairs are involved, "We owe the executive branch even more latitude than in the domestic context." However, the ongoing criminal prosecution of members of Holy Land's board of directors has revealed questionable evidence supporting OFAC's claims.

The IARA-USA case is significant, since the court states that a charity can be shut down even when there is no allegation of direct support of terrorism if the organization has a

close enough relationship, history or other ties to a group that is designated by OFAC. The opinion notes, "IARA-USA argues that OFAC cannot block an entity's assets unless it determines that the entity poses an 'unusual and extraordinary threat to national security.' The district court rejected this argument, holding that the threat need not be found with regard to each individual entity....We agree."

The court also rejected IARA-USA's constitutional claims.

Bills to Regulate Independent 527s Reintroduced

Sponsors of the Bipartisan Campaign Reform Act (BCRA) have reintroduced legislation they pushed in 2005 and 2006 to subject independent section 527 political organizations to the same contribution limits and regulation as federal campaigns and political parties, with identical bills in the House (H.R.420) and Senate (S.463).

The bills, both called the 527 Reform Act of 2007 and sponsored by Sens. John McCain (R-AZ) and Russ Feingold (D-WI) and Reps. Christopher Shays (R-CT) and Martin Meehan (D-MA), would amend the definition of political committees under the Federal Elections Campaign Act of 1971 (FECA) so that any 527 organization (a nonprofit independent political committee that qualifies under section 527 of the Internal Revenue Code) is subject to federal election law requirements if it is a committee, club, association, or other group that spends $1,000 or more on:

- (1) a public communication that promotes, supports, opposes, or attacks a candidate for federal office during the year prior to the general election, or
- (2) certain voter drive activity. Such voter drive activity includes work on voter registration, voter identification, get out the vote efforts, and even "generic campaign activity."

Upon introduction of S.463, Feingold commented on the Senate floor: "We put a limit of $25,000 per year on the contributions that can be accepted for that non-federal account. This means no more million dollar soft money contributions to pay for get-out-the-vote efforts in the presidential campaign. Nothing in this bill will affect legitimate 501(c) advocacy groups. The bill only applies to groups that claim a tax exemption under section 527."

These lawmakers are relentlessly pressing for change, in both Congress and the courts. In light of the Federal Election Commission's (FEC) rejection of any plans to place 527s under the same regulations as campaigns and political parties, Shays and Meehan filed a federal lawsuit. A federal judge has set the end of May as a deadline to complete briefing in the ongoing case. In the meantime, the FEC has said it is taking a case-by-case approach to decide if 527s have a "major purpose" of influencing federal elections, which would subject them to increased regulation.

The 2008 presidential campaign gives this issue some urgency. This debate stems from the ambiguity as to what election law regulates and can be regulated. 527s are currently expected to play a large role in the 2008 Presidential election, but the rules will be unclear until the courts, Congress and the FEC provide clearer direction.

Congress Finally Finishes FY 07 Appropriations

It took four extra months and a new Congress, but on Feb. 14, lawmakers finished the FY 2007 appropriations cycle when the Senate passed H.J.Res. 20.

The $463.5 billion spending bill passed 81-15. The President signed the bill the next day, just in time to prevent a government shutdown.

Pressed for time, Senate leaders chose to pass the same version the House approved on Jan. 31, without considering amendments. Congress needed to finish the bill by Feb. 15, when a stopgap continuing resolution would have expired. And amendments could have also forced unpopular cuts across all programs. See this *Watcher* article for a rundown of the enacted bill.

The joint resolution wiped out about 9,300 earmarks that had been written into the FY06 appropriations bills or their report language. Only funding *directives* were excluded, with funding levels left the same. This move gives agencies the power to choose how this funding will be spent for FY07. In fact, agencies could decide to use the funding for the same purpose as the earmark directive had instructed.

Indeed, the Department of Energy has announced it will fund earmarked projected from past appropriations bills. Some representatives — notably Sen. Pete Domenici (R-NM) — have said they will ask agencies to fund canceled earmarks from drafted appropriations bills. In response, the Office of Management and Budget issued non-binding guidance to the agencies to disregard the FY06 earmarks and requests from Congress when they decide how to direct funding.

Enactment of the CR means the formal close of FY 2007 appropriations season. Lawmakers will soon turn to the regular FY 2008 spending bills. Appropriators are expected to act first, though, on the $100 billion FY 2007 war supplemental that President Bush requested at the same time that he sent his FY 2008 budget to Capitol Hill. Despite pleas from Congress and outside budget experts to break their reliance on supplemental funding requests for the war, it appears the administration has no intention of stopping this detrimental practice.

The supplemental is fast becoming a magnet for additional military and non-military funding items, some left unaddressed during the abbreviated debate at the end of the FY 07 appropriations process. Most notable among those items is funding for the Base Realignment and Closure (BRAC) commission. Lawmakers are also making plans to use

the measure to provide money for hurricane recovery and agriculture disaster relief, and perhaps even for the State Children's Health Insurance Program, which will face funding shortages as soon as May of this year. Sen. Dianne Feinstein (D-CA) said she may seek $1.2 billion in disaster relief for her state to deal with the recent frost damage to crops. And Oregon Senators, Republican Gordon H. Smith and Democrat Ron Wyden, want $400 million for a county payments program, of which their state is a primary beneficiary.

Squabbling Over Tax Cuts Continues to Delay Minimum Wage Increase

On Feb. 16, by a vote of 360-45, the U.S. House of Representatives passed H.R. 976, a ten-year, $1.3 billion package of offset tax cuts designed to accompany a $2.10 per hour increase in the minimum wage. On Feb. 1, the Senate adopted S. 2 — including its own set of offset tax cuts totaling $8.3 billion over ten years. The two tax packages differ markedly in size and content, and S. 2 includes the minimum wage hike while H.R. 976 comprises only the tax provisions, which could complicate the procedural road ahead.

In January, the House adopted a "clean" minimum wage increase without any tax cuts, 315-116. But House Ways and Means Chairman Charles Rangel (D-NY) finally relented to pressure from his Senate counterparts who insisted that a clean minimum wage bill would not pass in that chamber. Rangel and Ways and Means Committee ranking member Jim McCrery (R-LA) then drafted H.R. 976, the Small Business Tax Relief Act of 2007, which the Committee unanimously approved on Feb. 12.

Provisions of H.R. 976
H.R. 976's principal tax benefits include:

- one-year extension of the work opportunity tax credit (WOTC) expanded to cover veterans and high-risk youth (estimated cost: $695 million over ten years);
- one-year extension of tax code Section 179 small business expensing through 2010, with an increase in the deduction ceiling (estimated cost: $68 million)

The bill's main offsets include:

- disallowing the shifting of assets by parents to wealthy dependents qualifying for the lowest capital gains and dividend income (estimated revenue: $874 million);
- allowing the IRS an extra four months — 22 months instead of 18 months — to notify taxpayers of failure to comply with tax obligations before the service is required to suspend interest and penalties (estimated revenue: $506 million)

Not included in the Joint Committee on Taxation's scoring is H.R. 976's extension of a tip credit provision that restaurants get for paying Social Security taxes on employee tip income above the federal minimum wage. If the proposed minimum wage increase were

accounted for, the total price of the House tax cuts would rise by $552 million over ten years, to nearly $1.8 billion. The Senate bill includes no such provision.

Other Major Differences between H.R. 976 and S. 2

- Work Opportunity Tax Credit ("WOTC"): The House bill extends the WOTC for one year and expands it to include disabled veterans. The Senate provides for a five-year extension of the WOTC, also applying it to the hiring of veterans disabled after the Sept. 11 terrorist attacks. (Ten-year costs: House - $695 million; Senate - $3.6 billion)
- Leased Property Depreciation: S. 2 allows owners of leased property, restaurateurs and some retailers faster depreciation for improvements to leased property, extending the current provision for three months. (Ten-year costs: House - no such provision; Senate - $2.7 billion)
- Small Business (Section 179) Expensing: The House bill extends the so-called Section 179 expensing provision that allows small businesses to deduct from income as much as $112,000 for one year through 2010 and increases the maximum deduction to $125,000, indexed for inflation after 2010. The Senate bill provides only for a one-year extension, without an increase in the maximum, but allows it to override tax rules requiring gradual write-offs of capital investments. (Ten-year costs: House - $68 million; Senate - $257 million)

Business Interests Fighting Over Tax Cuts

Intense lobbying and counter-lobbying by various interests group within the business community has begun in earnest. In a Feb. 13 letter to Rangel and McCreary, the U.S. Chamber of Commerce praised the House for its "restraint . . . exercised in omitting onerous permanent tax increases from the package." The letter refers to provisions included in the Senate version that cap the deductions for deferred compensation for business executives and prohibit deduction of liabilities incurred in settlements.

But the National Federation of Independent Business (NFIB) and the National Restaurant Association are collaborating to lobby for inclusion of as many tax cuts in the final minimum wage bill as possible.

Procedural Problems May Cause Additional Delays

Because there is a constitutional requirement that tax measures must originate in the House, the next steps in reconciling the House and Senate versions of tax cuts to accompany the minimum wage increase could be complicated and take even more time. While business interests and the House and Senate continue to squabble over yet another round of tax cuts, the minimum wage increase remains unfinished, and millions of Americans who have gone over ten years without a pay raise are still struggling to make ends meet.

Congress Seeks to End IRS Privatization Program

Legislation has been introduced in the House and Senate that would halt an Internal Revenue Service (IRS) program that outsources certain tax collection responsibilities to private companies. The costly and dangerous program has been soundly criticized by Congress, the IRS National Taxpayer Advocate, and outside consumer groups since it began last fall.

The House bill, H.R. 695, co-sponsored by Reps. Chris Van Hollen (D-MD) and Steve Rothman (D-NJ), would repeal the authority to outsource tax collection, which Congress granted to the IRS in 2004. The bill has garnered 66 co-sponsors, including seven Republicans, since it was introduced on Jan. 24.

The Senate bill, S. 335, co-sponsored by Sens. Byron Dorgan (D-SD) and Patty Murray (D-WA) would accomplish the same by barring the IRS from using money to outsource tax collection. It currently has 17 co-sponsors, all Democrats.

These bills follow up on similar legislation that lawmakers failed to enact during the last session of Congress. The House came closest to repealing the program during the FY 07 appropriations process, when the appropriations bill that funds the Department of the Treasury was amended to repeal the privatization program. But that individual appropriations bill was never passed, and the amendment was not included in the FY 07 joint funding resolution, the legislative vehicle in which the Treasury Department appropriations were enacted.

The private collection program has been in operation since September 2006. Three private companies have received contracts to recover debts under $25,000 that the IRS has identified. IRS has not disclosed complete data on the program's expenses and revenues thus far, though GovExec.com reported the IRS had taken in $11 million as of end of December.

Private collection agencies can make up to a 24 percent commission fee on all the revenues they collect. IRS overhead expenses for revenue collection typically run at about three percent of total revenues — nearly one-eighth the cost of using private tax collectors.

Since its initiation, the program has been the subject of debate. In testimony before the Senate Budget Committee on Feb. 14, IRS Commissioner Mark Everson defended the program by claiming that the revenues would otherwise not be collected. Concerns about the program's costs, he said, are irrelevant.

Yet other experts disagree with Everson. In the National Taxpayer Advocate's (NTA) annual report to Congress, Nina Olsen argued the IRS may currently have the resources to pursue these uncollected taxes without private companies. (*The Office of the Taxpayer Advocate reports directly to the IRS Commissioner but is independent of the IRS. It serves as a type of ombudsman for taxpayers. The Office also recommends*

administrative and legislative changes within IRS, and can issue taxpayer assistance orders to help taxpayers.)

In the report, the NTA found that the three private collection companies that have received IRS contracts are only using 75 employees total. The IRS has assigned 65 of its employees to monitor and oversee those private companies — presumably enough staffing to do what the private companies are doing and at a much lower cost.

Furthermore, Congress has the option to give IRS more funding to collect unpaid taxes. The IRS did not request such funding in the FY 08 budget proposal, and nearly $100 million was cut from the enforcement budget at the IRS in the FY 07 joint funding resolution — another consequence of the 109th Congress' failure to complete appropriations bills on time.

The NTA has made abolishing the privatization program its second-highest priority for 2007. The NTA shares the concerns of many in Congress and outside advocacy groups that private collection agencies may have occasion and motive to take advantage of taxpayers who owe smaller debts, many of whom are elderly or disabled. It believes that IRS would handle these cases more efficiently and with less risk for the privacy rights of the taxpayer.

Take Action: Tell Congress to stop the wasteful IRS privatization program immediately!
OMB Watch and Citizens for Tax Justice are teaming up to mobilize support for these bills that will stop the IRS from continuing this privatization program. With your help, we can prevent the IRS from jeopardizing private and sensitive taxpayer information and wasting scarce resources by paying large fees to private corporations.

Send a letter to Congress today urging them to support H.R. 695 and S. 335 and end the IRS privatization program.

Congress, White House Going in Opposite Directions on TRI

On Feb. 14, Sen. Frank R. Lautenberg (D-NJ) and Reps. Frank Pallone (D-NJ) and Hilda Solis (D-CA) announced companion bills to restore the Toxics Release Inventory (TRI) and undo the U.S. Environmental Protection Agency's (EPA) recently finalized reporting rollbacks. At the same time, President George W. Bush issued an executive order which may exempt all federal facilities from reporting requirements, resulting in another severe attack on the TRI program.

Toxic Right-To-Know Protection Act

The Toxic Right-to-Know Protection Act will legislatively restore the stronger reporting

thresholds that were in place for almost twenty years. The bill would remove EPA's authority to alter the program's reporting requirements without the approval of Congress.

EPA finalized rules in December 2006 that weaken toxic reporting under the TRI program, despite enormous opposition to the changes. The changes will allow facilities to avoid detailed reporting of toxic pollution less than 5,000 pounds as long as less than 2,000 pounds are released to the environment. The EPA is also permitting facilities that manage up to 500 pounds of persistent bioaccumulative chemicals such as lead and mercury to avoid detailed reporting of the waste.

The proposed changes have been met with stiff resistance throughout the rulemaking process. Over 122,000 public comments were submitted in response to EPA's plans to cut TRI reporting, and more than 99.9 percent opposed the agency's proposals. During the previous session of Congress, Pallone and Solis introduced and passed an appropriations amendment that would have blocked EPA from moving forward with the reporting changes. Unfortunately, the Senate never had the opportunity to discuss a similar amendment since the Senate never acted on the EPA appropriations bill.

The House and Senate bills are identical. In the Senate, the bill (S. 595) is co-sponsored by Sens. Lautenberg, Barbara Boxer (D-CA), chair of the Senate Environment and Public Works Committee, and Robert Menendez (D-NJ). The House bill (H.R. 1055) has 47 additional cosponsors beyond Pallone and Solis.

Exemption of Federal Facilities from TRI

As members of Congress moved to repair the damage done to the TRI program, Bush issued an Executive Order that may exempt hundreds of federal facilities from reporting toxic pollution under the TRI program.

Federal facilities are not required by law to report to the TRI program; that requirement was established by President Bill Clinton in 1993 with E.O. 12856, "Federal Compliance With Right-to-Know Laws and Pollution Prevention Requirements". In 2000, Clinton issued E.O. 13148, "Greening the Government Through Leadership in Environmental Management", which set a series of environmental goals and requirements for federal agencies, including a reiteration of the requirement that federal facilities report under TRI. Because of this requirement, the earlier order (E.O. 12856) was deemed redundant and revoked, leaving E.O. 13148 as the sole order requiring federal facilities to report to TRI.

On Jan. 26, Bush issued E.O. 13423, "Strengthening Federal Environmental, Energy, and Transportation Management", which establishes goals for increased energy efficiency, reduced toxic waste, and other environmental improvements. However, the final section of Bush's new EO rescinds several previous executive orders, including Clinton's E.O.

13148, without reiterating that federal facilities must report under TRI.

Given that E.O. 13148 was the only order still in place requiring federal facilities to report under the TRI program, Bush's new order may exempt all federal facilities from reporting to TRI in the future. The exact impacts will also depend on what guidance the Council on Environmental Quality (CEQ) issues to agencies on implementing E.O. 13423. In 2004, the most recent year of TRI data, 313 federal facilities reported 90 million pounds of toxic chemicals released to the air, water and land.

The Toxic Right-to-Know-Protection Act would not establish a legislative requirement that federal facilities report under the TRI program. However, if the CEQ implementation guidance on E.O. 13423 does not maintain the reporting requirement for federal facilities, the legislation could be amended to undo that change as well.

FOIA Reform Kicks Off in the House

The House Subcommittee on Information, Census and National Archives of the Government Oversight and Reform Committee held a hearing on the Freedom of Information Act (FOIA) Feb. 14. The hearing served as an update on the implementation of Executive Order 13392, which requires agencies to develop and implement FOIA improvement plans, and as an opportunity to air the virtues and vices of FOIA and possible legislative solutions to improve public access to information.

Rep. William Lacy Clay (D-MO), chairman of the subcommittee, stated that he was committed to reforming FOIA to create greater public access to government information. "I am deeply concerned that this administration appears to be shielding information that ought to be accessible to the public," said Clay.

In the 109th Congress, the House and Senate seriously considered legislation to speed up FOIA and relieve agency backlogs. Two bills addressing FOIA, sponsored by Sens. John Cornyn (R-TX) and Patrick Leahy (D-VT), were well-received in both the House and the Senate, though neither received a vote on the floor. The Openness Promotes Effectiveness in our National (OPEN) Government Act and the Faster FOIA Act contained provisions to allow the public to recoup legal costs for challenging FOIA denials in court; mediate disputes between those requestors and federal agencies; and establish a commission to study FOIA backlog problems and recommend improvements.

In July 2006, federal agencies released their FOIA Improvement Plans, as required by Executive Order 13392. While the improvement plans met with considerable criticism, the executive order is still widely viewed as a significant acknowledgement of the importance of FOIA.

In testimony before the House subcommittee, the Government Accountability Office stated that, "Despite increasing the numbers of requests processed, many agencies did

not keep pace with the volume of requests that they received. As a result, the number of pending requests carried over from year to year has been steadily increasing; further, the rate of increase is growing."

In addition to FOIA backlogs, the hearing also stressed the significance of the John Ashcroft FOIA memorandum issued soon after 9/11 that encouraged agencies to consider the homeland security implications of released information and to restrict disclosure whenever legally possible. Under this new operating procedure, "secrecy is the default response," stated Anthony Romero, executive director of the American Civil Liberties Union, in testimony before the subcommittee.

To remedy the backlogs created by FOIA and reverse the culture of secrecy, Romero stated, "The first order of business should be legislative action to rescind the Ashcroft memo and restore the original purpose of FOIA by emphasizing the presumption toward disclosure."

Additionally, in his testimony, Clark Hoyt of the Sunshine in Government Initiative called for the creation of a FOIA ombudsman, "a champion for FOIA training and compliance, a place where individuals seeking to exercise their rights under FOIA can go for help short of filing a lawsuit."

Meredith Fuchs of the National Security Archive stated in her testimony, "Addressing delays will require a combination of (1) better reporting, so problems are identified before a decade elapses; (2) better tracking of requests by agencies, so that problems in the system can be fixed; (3) better leadership, including from the Chief FOIA officers appointed as a result of Executive Order 13,392; (4) more resources, including perhaps requiring agencies to fix FOIA budgets as a percentage of their growing public affairs' budgets; and (5) penalties for delay, including perhaps disallowing agencies from collecting any processing or duplication fees if they cannot meet the 20-day deadline."

Clay stated that the bills introduced in the 109th Congress would serve as starting points for a new FOIA reform bill and that he is looking for ways to improve upon them.

Congress Takes a Hard Look at Irresponsible Contractors

On Feb. 15, Sen. Byron Dorgan (D-ND) introduced the Honest Leadership and Accountability in Contracting Act, which is aimed at curbing abuse in government procurement and increasing competition and transparency. Concerns about federal contracts have been rising over the last few years as inquiries into contracts for Iraq reconstruction and Hurricane Katrina response have uncovered serious deficiencies or more questions.

Dorgan's bill (S. 606) would attempt to increase contractor accountability through several mechanisms. First, Dorgan proposes to use increased competition for federal

contract dollars to minimize waste and overspending. Provisions in the bill would require that large "umbrella" contracts valued over $100 million to be awarded jointly to at least two companies that would then compete for delivery orders worth more than $1 million. This approach could counter the troubling trend of increasing concentration of federal contract dollars within a small number of companies.

S. 606 would also hold contractors responsible for prior performance and activities. Scofflaw companies that have histories of violating labor, environmental, health and safety, and other laws would be prohibited from receiving federal contracts. Additionally, the bill would require that a website be established that provides information on contractors' compliance with laws, fines or misconduct charges. President Clinton attempted to put such contractor responsibility procedures in place through an administrative rule that President Bush repealed almost immediately upon taking office.

The bill would also attempt to reign in conflicts of interests by establishing restrictions on contracting officials going to work for companies to which they awarded contracts and requirements that appointees to positions that involve procurement have professional credentials and relevant expertise. Another provision would prohibit outsourcing oversight of federal contracts, a maneuver recently pursued by the General Services Administration, a major procurement agency for the federal government.

The bill is identical to legislation Dorgan introduced during the 109th Congress, which failed to advance. However, with Democrats in control of both the Senate and House and increasing attention on contractors, the bill could see movement this year. The bill has 23 Democratic co-sponsors.

DHS Receives Mixed Opinions on Proposed Chemical Security Rule

The Department of Homeland Security (DHS) received 89 comments, dominated by industry, in response to the proposed interim rule on chemical plant security. The rule establishes the first-ever federal chemical security program. Chemical companies and industry associations generally expressed strong support for the rule, whereas most public interest groups and government officials expressed great concern.

OMB Watch has performed a preliminary analysis of the comments, grouping them into industry associations and companies (55); government officials and agencies (15); environmental and public interest organizations (9); unaffiliated members of the public (5); university researchers (3); and unions (2).

Industry Comments

Fifty-five industry associations and companies commented on the proposed rule. For the most part, they were supportive of the changes and, in particular, appreciative of the flexibility granted in meeting risk-based performance security standards. Some

commenters expressed concerns over vague portions of the rule and asked for clarifications that would be beneficial for their industries. For instance, the American Petroleum Institute (API), an industry association representing approximately 400 oil and natural gas companies, stated that, "DHS must establish rules for 'high risk' facilities that threaten human health, national security, and/or economic security. If subjected to a terrorist attack, many API member company facilities would not likely pose any significant adverse impacts to human health, national security, or the economy. Therefore, API believes these facilities should not be designated as 'high risk'."

Government Comments

Fifteen government officials and agencies commented on the proposals. Most of these comments expressed great concern over the proposed rule. Many were worried that DHS's preemption provision would negatively impact state and local governments' ability to protect their populations from a chemical attack. The New Jersey Office of Homeland Security and Preparedness and the New Jersey Department of Environmental Protection stated, "It is also important not to penalize those pro-active states [that have implemented chemical security programs] and allow the states to retain the authority to adopt enhanced security requirements if states determine they are necessary."

Concerns were also expressed regarding the secrecy provisions of the proposed rule. Sen. Joseph Lieberman (I-CT), chairman of the Senate Homeland Security and Government Affairs Committee, commented that, "I am very concerned that these proposed rules do not strike the right balance and would instead lead to excessive secrecy that could damage, rather than promote, our security."

Public Interest, Union, and University Research Comments

Nine public interest organizations raised significant concerns with the proposed rule, as did comments from two unions and one law professor. Two additional comments from university researchers were submitted. One was neutral on DHS's rule, and the other included a mix of support for some provisions and opposition to other provisions. Public interest organizations expressed strong concern regarding the preemption provision and the rule's prevention of states from developing their own chemical security programs.

Also of concern were the secrecy provisions and DHS's refusal to consider safer technologies or procedures. OMB Watch and Public Citizen stated, "Instead of creating a new broad category of controlled information that could easily expand to include a wide variety of unintended health and safety information and slow sharing of important information, OMB Watch and Public Citizen recommend DHS identify a limited list of specific information that will be restricted from public access."

DHS is expected to review the 89 comments and finalize the interim rule by April 4. Given the interim nature of these regulations, it is possible that Congress may tackle the chemical security issue again this year and attempt to pass more comprehensive and

permanent provisions.