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In This Issue

CBO Reports Charities Would Lose 6-12% on Estate Tax Repeal

The Congressional Budget Office has released two new reports on the impact of the estate tax on charitable giving. The reports confirm that there is a significant negative impact on charitable giving that would result from the elimination of the estate tax.

The first report, "The Estate Tax and Charitable Giving" examines families' contribution to charities to determine the impact of changes to estate tax law and the impact of full repeal. The bottom line result is that the study estimates that raising the exemption level to $2 million or $3.5 million would reduce charitable giving by less than 3 percent, and that **permanent estate tax elimination would reduce total charitable giving by between 6 and 12 percent**

While the percent numbers may seem small, it is important to note that this is a decline relative to *all* charitable giving -- which was about $201 billion in 2003. **So according to the CBO, eliminating the estate tax would mean a loss in total charitable giving of between $12 and $24 billion per year.** Note that this estimate is larger than previous estimates, which were in the $10 billion range (see Bakija and Gale, 2003).

The second paper, "Charitable Bequests and the Repeal of the Estate Tax" is a technical empirical study of the impact of the estate tax on giving, and follows research by David Joulfaian in 2000, and by Jon Bakija and Bill Gale last year. This CBO paper uses both the Joulfaian and the Bakija and Gale methodologies on more recent data. **It confirms the results in the previous work and finds that a "variety of estimates" of the decline in *bequest* giving are in the range of 20 to 30 percent.** To put this in context, Joulfaian had estimated a 12 percent drop, while Bakija and Gale had estimated a 37 percent drop. Robert McClellan, the author of the report, shows that the differences in results are primarily due to various differences in methodology rather than differences in the data sample chosen for analysis.

These new studies again confirm that the estate tax does provide an important incentive to give to charity, and that eliminating it would mean significant lost revenue and service cuts for the nation's nonprofit organizations.

For more information on the CBO results, see:

- The Estate Tax and Charitable Giving by Robert McClelland and Pamela Greene, Congressional Budget Office (2004)
- Charitable Bequests and the Repeal of the Estate Tax by Robert McClelland, Congressional Budget Office (2004)

For more on the charitable impact of estate tax repeal see:

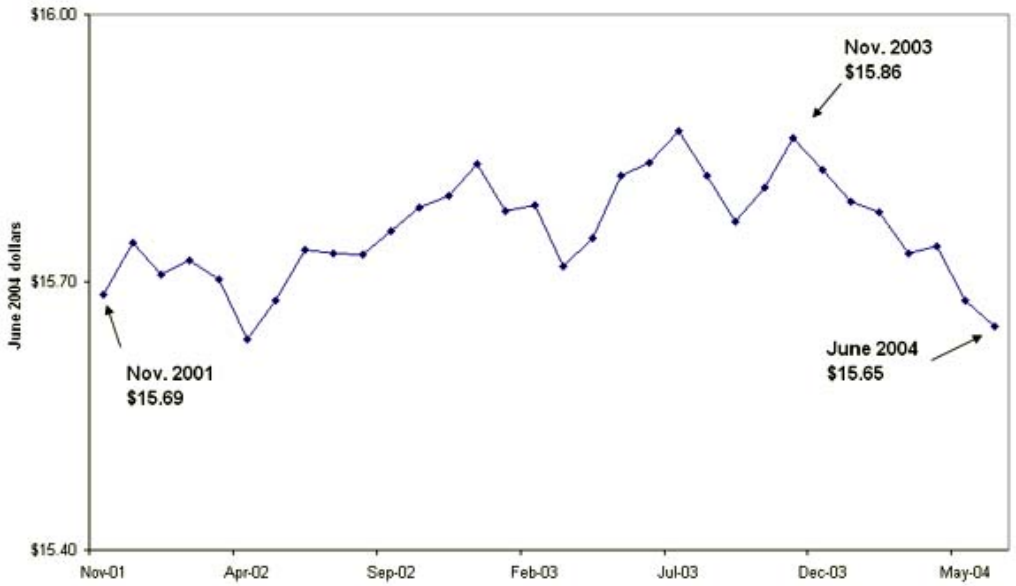
- Effects of Estate Tax Reform on Charitable Giving by Jon Bakija and William Gale, Tax Policy Center (2003)
- Estate Taxes and Charitable Bequests by the Wealthy by David Joulfaian, National tax Journal (2000)
- The Estate Tax and Charitable Giving by Gary Bass and John Irons, OMB Watch (2003)
- The Estate Tax and Charitable Giving: State-by-State Analysis by John Irons OMB Watch (2003)

Economy and Jobs Watch: Wages Fail to Keep Pace with Inflation

While many observers believe that the economy is in the process of recovering from weak growth and a dismal labor market, there is still considerable evidence that the recovery is not serving everyone.

Recent data shows that real average hourly wages for production and non-supervisory workers (about 80 percent of the population) have declined over the past several months -- reversing all of the gains since the end of the recession. (See graph below.)

Figure 1: Real hourly wages since recession ended, November 2001-June 2004



Source: Economic Policy Institute, Economic Snapshot, July 16, 2004

The Economic Policy Institute attributes this decline to three factors: 1) a continuing weak labor market with unemployment stuck at 5.6%, 2) the new jobs created by the current economy appear to be lower quality jobs, and 3) a recent up-tick in inflation.

In addition, the share of gross domestic product (GDP) going to labor compensation is near 40-year lows. All this comes at a time when corporate profits are at record highs as a share of GDP.

For more information, see

- Inflation-adjusted wages fall again in June Economic Policy Institute
- Hourly Pay in U.S. Not Keeping Pace With Price Rises New York Times July 18, 2004
- Corporate Profits at Record Highs, While Labor Compensation at 38-year Lows OMB Watch

Tax Cuts: See You in September ...

A bipartisan agreement to extend the so-called "middle-class" tax cuts for an additional two years bit the dust last week. Efforts to extend the cuts will now be delayed until Congress returns in September.

The "middle-class" (see related article) tax cuts under discussion are tax reductions for married couples, the new 10 percent tax bracket, and the expansion of the child tax credit. These tax cuts were included in the 2001 tax cut package, but to reduce the costs (on paper at least) they were scheduled to phase out at the end of this year. (If you are confused about the phase-in and phase-out schedule from the 2001 and 2003 tax cuts, Citizens for Tax Justice has produced a handy "cheat-sheet".)

Senate Finance Chairman Grassley (R-IA) had intended to wait until September to attempt extension of these cuts, on the grounds that there would be more urgency (since the cuts expire December 31) that might override concerns about the cost of the cuts. However, after pressure from the White House to pass the tax bill before the Democratic National Convention, House and Senate leaders managed by Tuesday to reach a bipartisan agreement to extend the three tax cuts for an additional two years and fix the Alternative Minimum Tax (AMT) problem for an additional year, at a cost of $80 billion. The agreement included no offsets to pay for the cost, possibly resulting in a "no" vote by Senators Chafee (R-RI) and Snowe (R-ME), but was considered certain to pass and garner at least a handful of Democratic votes. It also would have included an increase in the child tax credit refund for low-income families, which was omitted from the 2001 legislation.

The agreement was touted as a victory for President Bush. Even though Bush had called for a five-year extension, the two-year extension would end during an election year, 2006, and was not seen as much of concession. The five-year extension would cost about $120 billion.

Suddenly, on Thursday, the White House announced in no uncertain terms its opposition to the two-year extension. Apparently, the Administration would rather have a "no" vote on a five-year extension, allowing the blame to fall on Democrats, than a "yes" vote on a two-year extension. As a consequence, the deal collapsed and any extension will be delayed until September.

Should 'Middle-Class' Tax Cuts be Extended, Offset or Not?

The political reality, especially in an election year, makes extension of the so-called "middle-class" tax cuts very likely. Hardly anyone is arguing against extending these cuts, as long as they are paid for. However, there are very good arguments why, even If the cost of the extension is offset, extension of these tax cuts is not supportable.

What's the problem with "middle-class" tax cuts that are offset?

- "Middle-class" is in quotes for a reason. While these tax cuts do provide modest benefits for middle-class families, and may include the refundable child tax credit that benefits low-income families, they benefit wealthier families far more. As a double whammy, rising deficits and caps on spending resulting from tax cuts that mostly benefit the wealthy reduce revenue for public services that primarily middle- and low-income families depend upon, such as education, healthcare and mass transit. Under the Bush presidency, tax rates have nearly flattened, with the wealthiest one percent of the population now paying 32.8 percent of their income in taxes, and most of the rest paying 29.4 percent, according to an analysis by Citizens for Tax Justice. That tosses the principle of progress taxation out the window. No offsets that could roll back some of the tax cuts to the very wealthy have been suggested.
- The tax cuts will not pay for themselves, in spite of arguments that they produce economic growth. We are borrowing money (adding to the national debt) to pay for the tax cuts. At some point, deficits and a burgeoning national debt will begin to hurt the economy and the borrowed money must be paid back. Who will pay then? According to a report by the Tax Policy Center, middle and low-income families will pay the price for the tax cuts.
- While one- or two-year extensions appear to cost less, in reality they make the tax cuts permanent in all but name. Massive retirement of the baby-boomers will continue increasing the cost of medical care, already growing much faster than inflation. Social Security will no longer take in enough revenue to pay out benefits. Even if no more tax cuts are passed, if the tax cuts that are phased out continue to be extended, we will be even less able to deal with future needs.
- Ultimately, the fiscal hole which the tax cuts -- middle class or not -- are rapidly deepening poses an even greater threat. In a recent speech, Brookings Institution Fellow Henry Aaron asserted that "[o]ver the long haul, the nation faces budget challenges so great that they threaten the stability of our nation's democratic political institutions."

The huge cost of the Bush tax cuts of 2001 and 2003 has created a structural problem -- there is not enough revenue to meet the country's needs. The 2004 appropriations process, with its budget cap too tight to adequately fund even high priorities, is just the beginning. As the adage "you don't miss the water 'till the well runs dry" observes, we may not recognize the importance of government spending to our everyday lives until those services are even more radically cut. And that is what our future holds without some tax "increases."

Appropriations: A Broken Process

Not only was Congress unable to pass a budget resolution this year --passage of appropriations is also in jeopardy.

As predicted, the only appropriation bill completed by Congress for FY 2005 (which begins on October 1, 2004) is the $417.5 billion Defense bill approved on Thursday, July 22.

Partisan politics, an unworkably tight budget cap, and only 18 legislative workdays make even passing an omnibus bill combining the other 12 appropriations before October 1 a huge challenge. If it doesn't happen, there will be continuing resolutions to keep government running, and possibly a lame-duck session after the November elections. A yearlong continuing resolution might even be considered, funding government at last year's levels.

The whole budget process for FY 2005 represents a huge failure by Congress to do what is arguably its most important annual job.

OMB Fails to Meet Another Deadline

The Office of Management and Budget is required to produce a "Mid-Session Review" by July 15 of each year. However, the mid-session budget review has still not been issued.

Reports are that OMB's Mid-Session Review will show a "shrinking" deficit for fiscal year 2004 -- from a projected $521 billion (as estimated in Bush's fiscal year 2005 budget) to $420 billion. Just in case the budget review comes out during the next couple of weeks -- possibly just before the Republican National Convention -- here are some caveats about the projections taken from a column by Stan Collender as published in NationalJournal.com .

- Projections, which are always questionable at best, can be used to make a convincing case for a variety of outcomes.
- A $420 billion deficit is a new all-time high when adjusted for inflation -- hardly a cause for congratulation.
- A $420 billion deficit is higher than that claimed in Bush's 2004 budget, submitted on February 3, 2003, which projected a deficit of $307 billion.
- Even more strikingly, the deficit predicted in Bush's 2003 budget was only $14 billion -- making a $420 billion deficit much, much higher than predicted.

Keep an eye out for the Mid-session Review, and watch out for the rhetoric. It can be found on OMB's website sometime in the next few weeks.

California Nonprofits Caught in Revenue Squeeze

The California Association of Nonprofits (CAN) recently completed a study of the impact on nonprofits of funding cutbacks in California. In the report "Holes in the Safety-net: Study of Funding Cutbacks and Safety-net Nonprofits in California," CAN found that a wide range of nonprofits in the state are squeezed between revenue reductions and increased demand for services.

In their survey, over 40 percent of organizations responded that revenues were down over the previous year, compared with 32 percent that reported increases. Of those that saw decreases, funds were reduced by 22.5 percent on average.

The reductions led most commonly to hiring and salary freezes, and layoffs. In addition, service delivery was also hampered: half of respondents have reduced or eliminated aspects of programs, and 46 percent had slowed program innovation.

In addition to revenue reductions, nonprofits reported an increase in the number of people who need their services. There were increases in the number of people needing shelter, greater demand for food air, increases in elderly unable to afford medications, and increases in many other areas.

Nonprofits are struggling to cope with the squeeze. The report finds that 70 percent of nonprofits are increasing fund-raising efforts to raise funds from individuals and foundations. These efforts undoubtedly place additional strains on the philanthropic and local communities.

The report contains several recommendations in the areas of improving nonprofit operations and structure, improving capacity (including advocacy capacity), and addressing public policy and values. In the later category, the report recommends that "as a community we must develop policies and strategies that attack the structural deficits that underlie the serious safety-net issues facing our state," and that "government must not abandon its safety-net role."

The experience in California is unlikely to be unique; many other nonprofits throughout the country continue to struggle for the very same reasons as in California.

The full report is posted on the CAN website at:

- Holes in the Safety-net: Executive Summary
- Holes in the Safety-net: Report body

Justice Department Supports Dismissal of Second Data Quality Lawsuit

The Justice Department (DOJ) issued a memorandum June 25 recommending the dismissal of a lawsuit filed by the Chamber of Commerce and the Salt Institute under the Data Quality Act (DQA). The March 31 lawsuit against the National Heart, Lung and Blood Institute (NHLBI) within the National Institutes of Health (NIH) challenged agency statements about sodium consumption.

The DOJ memo states that the plaintiffs lack standing to challenge the sodium study that underlies the agency statements because it is not sufficiently demonstrated that they incur any injury because of the agency's statements. Additionally, DOJ asserts that the court does not have subject matter jurisdiction, and even if it did, there is no statutory basis for federal court review, as the DQA contains no provisions allowing private parties to enforce the statutory terms in court.

This memorandum comes days after a Minnesota federal district court ruled that the DQA does not permit petitioners to seek judicial review. The court ruled the DQA itself does not create any private right of action.

The Chamber and Salt Institute filed a brief July 16 refuting the DOJ's recommendations. Although the DOJ memorandum does not cite the Minnesota case, the industry brief does argue that this case should not set precedent. They argue that a key Supreme Court test was not followed and there was no substantial information to justify the ruling.

While the Minnesota federal court case was the first data quality case to come before the court, it did not set a strong precedent. The Chamber of Commerce and Salt Institute lawsuit is one of four additional lawsuits that have yet to be resolved. DOJ's memorandum sends a strong message that the DQA does not allow for judicial review and the outcome of this case will help determine whether future parties will submit suits under the DQA.

EPA Announces E-rulemaking Online Forum, Public Meetings

The Environmental Protection Agency (EPA) has announced a countrywide series of public forums for August on an eRulemaking Initiative. The four forums will be held in Boston, Chicago, San Francisco and Washington, D.C. In addition to EPA's public meetings, Harvard University is partnering with the eRulemaking Initiative to host an online dialogue during August. Details about the online dialogue will be released soon.

The eRulemaking Initiative is an effort to develop online tools that will allow agencies to more effectively utilize Internet technology in their regulatory process. The increased use of technology holds significant promise for increasing the transparency and accountability of government agencies. The eRulemaking Initiative could provide improved access to government information related to regulatory programs along with new search and information management tools.

The EPA hopes to use the forums to gather feedback on the usability and features of the electronic system currently available to the public at the Regulations.gov website. The forums will also provide an opportunity to provide input on the planned government-wide electronic federal docket management system. The forums are open to any and all stakeholders. The announcement is published in the Federal Register.

New Report Explores Chemical Dangers from Power Plants

A new report by the Working Group on Community Right-to-Know estimates that 3.5 million Americans living near some 225 non-nuclear power plants are at risk from leaks or releases of gaseous ammonia or chlorine. It calls for these plants to switch to safer alternatives to ensure the safety of surrounding communities.

The Working Group analyzed information submitted to the Environmental Protection Agency (EPA) from individual facilities. Facilities are required to assess the dangers they pose to the surrounding communities.

In addition to the 3.5 million people at risk, the report found that two two-dozen power plants account for two-thirds of the people in danger. Also that California, Texas, Florida, Illinois, Minnesota, Pennsylvania, Missouri, Rhode Island, Virginia, and New Jersey each have more than 100,000 people living in power plants' vulnerability

zones

Congress has considered, and continues to consider, legislation that would require facilities that store large quantities of dangerous chemicals, including power plants, to reduce the danger from chemicals by reducing storage and switching to safer alternatives when possible. This type of policy would move past the Risk Management Program, which currently simply collects information from these facilities. This report utilized the risk management plans (RMPs) filed by facilities. Unfortunately, Congress has been unable to decide on a course of action on this issue. Industry has significantly contributed to this inaction by continually lobbying against new safety requirements and using the threat of terrorism as an excuse to try and dismantle to RMP program.

The report, Unnecessary Dangers: Emergency Chemical Release Hazards at Power Plants, demonstrates the power and usefulness of information to help make communities safer. It is available at www.crtk.org.

DHS Extends Comment Period through August 16 for Environmental Directive

The Department of Homeland Security (DHS) reopened its comment period for its draft directive containing policy and procedures for implementing the National Environmental Policy Act, after several public interest groups requested an extension. The new deadline for comments is August 16.

The proposal seeks to hide Environmental Impact Statements (EIS), partially or wholely, from public disclosure for security reasons, according to DHS. For more information on DHS's directive, read OMB Watch's article "DHS Seeks Exemptions From Public Disclosure Requirements", which makes the case that withholding information has little to do with security. For information about the extension notice, draft directive, and public comments already submitted, see DHS's website.

Transportation Bill Pre-empts State Sunshine Laws

A provision in the transportation spending bill, H.R. 3550 and S. 1072, could pre-empt state and local sunshine laws and pre-empt public access to problems on the roads, highways, sea, and air.

The administration requested that the amendment in Section 3029 of the spending bill be added and it appears unlikely to be removed. The section allows information designated as "sensitive security information" to be shielded from disclosure. The language is not scheduled for debate when House and Senate negotiators meet to hammer out differences in the House and Senate versions of the bill. Thus, the likelihood that the provision will be removed appears low.

This legislation, like many of the efforts to expand secrecy since and before 9/11, assumes that secrecy makes us safer while the free flow of information endangers our safety. And yet, when Congress or the executive branch gives government officials the authority to keep secrets, they should carefully craft these laws and regulations with two principles in mind. First, any exceptions to open government should be made only when government can make a public case that such disclosure will harm national security.

Second, government should ensure that information not threatening to national security be left unrestricted and available to the public. Creating broadly defined zones of secrecy under imposing titles such as "sensitive security information" or "Sensitive Homeland Security Information" only hinders the government's ability to keep necessary secrets and prevent unnecessary ones. Strong safeguards for our secrets and the free flow of information protect the government from improper accusations of corruption or abuse and protect the public's trust.

Momentum Grows to Limit 'Classified' Information

Amidst growing criticism that the White Hose and Central Intelligence Agency (CIA) attempted to classify information that would prove more embarrassing than threatening national security, senior Republicans and Democrats in Congress are moving to reform the classification system.

Senators Ron Wyden (D-Oregon) and Trent Lott (R-MS) introduced legislation, S. 2672, which would create an Independent Security Classification Board to oversee agencies' use of the "classified" stamp. Modest in scope, the proposal would allow a three-member board to pass judgment on agencies' decisions to classify documents. The board could decide the agency improperly classified information that should otherwise be available to the public. The president could overrule the board's decision, but would have to make a public statement in doing so.

The practical effect of such a board may be to create an environment in which agencies think more carefully when invoking their ability to classify information. Currently there are few good safeguards to prevent agencies from abusing their power to stamp information as secret. The bureaucracy that oversees the classification system for the federal government, the Information Security Oversight Office, reported the federal government used the "classified" stamp 25 percent more times in Fiscal Year 2003 than in the previous year.

The proverbial straw that broke the camel's back was the Central Intelligence Agency's initial proposal to black out as much as half of the Senate Intelligence Committee's report on pre-war intelligence about Iraq. Although in the end roughly 15 percent of the text was kept secret, the CIA's efforts to squash parts of the report left a bad taste in some Republican mouths. Lott, hardly a champion of the public's right to know, even said publicly that the CIA's efforts were "an insult."

The executive order outlining procedures for stamping information as "classified" explicitly forbids agencies from using the stamp to hide embarrassing or illegal activity.

Several high-profile reports over the last year created controversy when the executive branch sought to black out, or redact, key sections when the reports were released to the public. Last year, the administration redacted 28 pages of Congress' 9/11 joint inquiry that reportedly identifies links between al Qaeda and the Saudi government. And before issuing its final report last week, the 9/11 Commission struggled with the White House for months over access to documents.

There are, however, several limitations to the legislation. The legislation gives the president authority to define the scope of the board's authority. The president would also have the power to overrule the board rulings. In addition, much of the board's materials would themselves be classified and exempt from public disclosure under the Freedom of Information Act.

The legislation also does not address other recommendations of the last bipartisan commission to examine government secrecy and classification. The unanimous 1997 report (posted here by Steve Aftergood) of the Commission on Protecting and Reducing Government Secrecy recommended that a national classification center be established to evaluate and oversee the classification system among federal agencies. The Commission was led by Senator Daniel Patrick Moynihan and enjoyed participation of a bipartisan panel including Senator Jesse Helms. Further, the Commission envisioned an appeals board with greater independence and authority to require declassification.

The prospects for Congress to pass much-need, long-sought reform of the classifications system are murky at best. Members of the 9/11 Commission are pressuring Congress to act quickly on their recommendations, and spending bills waiting congressional action in September.

Similar legislation (H.R. 4855) was introduced in the House by Representatives Robert "Bud" Cramer (D-AL) and Leonard Boswell (D-IA), although that legislation currently has not attracted Republican co-sponsors.

Data Quality Whistleblower Fired

A Fish and Wildlife Service (FWS) biologist has been fired after filing a data quality challenge that accused the agency of using flawed science in approving development projects in Florida panther habitat.

The biologist, Andrew Eller, received a letter dismissing him after 30 days, for reasons of engaging in "unprofessional" exchanges with the public and completing projects late. Eller claims that the dismissal amounts to retaliation for his work to protect the panther habitat from development, including his data quality challenge. Under the Endangered Species Act developers and government agencies must consult with FWS before initiating work that would affect panther habitat.

Eller filed a data quality request along with the Public Employees for Environmental Responsibility (PEER) challenging the data FWS used in defining panther habitat. They charged that the agency used daytime-use habitat rankings to define the overall habitat and that such data would be incorrect because the panther is most active at night. The challenge asserted that using the more accurate nighttime data could vastly change the extent of panther habitat. Additionally, the petitioners charge that incorrect survival rates and telemetry data are used. An outside expert panel reported similar flaws in a report last year.

A spokesman for the agency asserts that Eller's dismissal is based solely on his performance -- he was suspended three times in the past. Eller says he has been "at odds with management for two years now on panther science," and admitted that one suspension was warranted -- he used inappropriate language with a consultant. However, he claims that any overdue projects were due to understaffing of his office.

Additional Resources:
Data Quality Petition
FWS Petition Response
Sun-Sentinel article

House Lobby Disclosure and Reforms Proposed

Rep. Martin Meehan (D-MA) announced July 14 that he is filing legislation to strengthen lobbying disclosure requirements and reform the way the House of Representatives operates. Supported by Common Cause, Democracy 21 and Public Citizen, Meehan said the legislation is needed because "â€¦never before have special interest lobbyists claimed so great an influence over the policy process." The bill does not have a number yet.

Proposals to create greater transparency in relationships between lobbyists and members of the House include:

- **Searchable Database**- A searchable, downloadable database of lobbying disclosure reports would be created to make publicly disclosed information easier to access and more useful. Electronic filing of federal lobbying disclosure reports would be mandatory in order to make the database viable and keep it current.
- **More Frequent Reports**- Lobbying disclosure reports would be filed quarterly rather than semi-annually, as they now are.
- **Disclose Grassroots Lobbying**- Reports would have to include the identity of grassroots lobbyists and list their expenditures and the issues they lobby on. Lobbying to members or shareholders would not be considered grassroots lobbying.
- **Disclose Coalition Members**- Coalitions that lobby would have to disclose their members. Groups that spend less than $1,000 to participate would not have to be disclosed.
- **Links to FEC Database**- Cross-linking between the lobby disclosure reports and the Federal Election Commission's database with campaign contributions and expenditures would be required.

The bill proposed to give the minority party in the House more input, including the right to propose amendments on floor votes and have notice of conference committee meetings. A 30 minute maximum time limit for floor votes would be imposed to avoid arm twisting, and late night votes could only be held if approved by a two-thirds majority of the House. The House Administration Committee would be comprised of an equal number of members from both major parties, and the minority party would have a majority on the Government Reform Committee.

Stronger ethics standards would be imposed, including increasing the one year prohibition on former Members of Congress lobbying on issues that came up in their committees while they served in the House to three years.

Meehan's office has posted a PowerPoint presentation explaining the proposals on his website.

Senate Finance Committee Holds Charities Roundtable

On July 22 the Senate Finance Committee held a closed door roundtable discussion with leaders and experts on the charitable sector to discuss a bipartisan staff proposal for reforms.

Committee Chair Charles Grassley (R-IA) told the group he expects some legislation on reform to go forward this fall, while other proposals need more refinement. Grassley's remarks indicated that he recognizes "the need to balance reforms with the burden it places." The roundtable was attended by authors of white papers submitted to the committee. A list of participants and links to the white papers are posted on the committee website. BNA quoted one participant as saying the session was helpful in reviewing a broad range of issues.

OSHA Delays Worker Safety Action, Reopens PPE Rule for Comment

The Occupational Safety and Health Administration has reopened for comment a rule requiring employers to pay for personal protective equipment, "such as fall arrest systems, safety shoes, and protective gloves," that workers must currently purchase themselves, or do without (69 Fed. Reg. 41,851 (2004)). Although the rule, first proposed during the Clinton administration in March 1999 (64 Fed. Reg. 15,401), was open for public comments until June 1999, OSHA has let it languish on its long-term agenda for most of the past four years, and has yet to announce any anticipated date for finalizing the rule.

Labor groups decry the move to reopen comments five years after the initial period ended as playing politics with safety, further delaying action while giving the appearance that OSHA is working on it. They note it also coincides with a recent OSHA summit on safety and health issues of Hispanic workers. The rule is particularly important to the Hispanic population, and the Congressional Hispanic Caucus has repeatedly petitioned OSHA to move on it. CHC has stated, "Tens of thousands of workers are bearing the cost of safety in the workplace, or worse, paying the price because they are unable to bear the cost."

OSHA officials claimed in The Hill that the rule has actually been in a final stage since before President Bush took office, but the agency's own semiannual regulatory agendas show otherwise.

NIOSH To Move Deeper into the Bowels of Government

Five former NIOSH and MSHA administrators sent a letter to Department of Health and Human Services Secretary Tommy Thompson last week to protest the Center for Disease Control's plan to move the National Institute for Occupational Safety deeper into the bureaucracy of the CDC.

The CDC's new reorganization plan includes the decision to cluster NIOSH with several environmental health agencies into the Coordinating Center for Environmental Health, Injury Prevention, and Occupational Health, one of four coordinating centers that will report directly to the CDC administrator.

The former administrators were joined by a wide range of individuals and organizations, including the United Auto Workers, American Association of Occupational Health Nurses, American Industrial Hygiene Association, AFL-CIO, and the NIOSH Board of Scientific Counselors, who charged that the move will curtail NIOSH's autonomy, undermine its influence on regulation, and perhaps impact its budget. Furthermore, concern was raised that the move fails to meet the intent of Congress as set out in the Occupational Safety and Health Act. "Clustering NIOSH with a number of environmental health programs would undo the intent of Congress and place it essentially where it was thirty-four years ago," the board members of NIOSH's Board of Scientific Counselors stated in a letter to CDC Director Julie Gerberding.

NIOSH was established by the Occupational Safety and Health Act of 1970 as a separate institute that reported directly to the Secretary of Health, Education and Welfare with the mission "to conduct research, experiments, and demonstrations, develop plans, establish criteria, promulgate regulations, authorize programs, and publish results and industrywide studies." President Gerald Ford later moved NIOSH under the CDC, even though occupational health and safety has very little to do with the CDC's primary goals of disease control and prevention. Moving NIOSH deeper into the CDC would only further de-emphasize the agency's importance, visibility and autonomy.

Read Some Letters Opposing the Reorganization of NIOSH:

- American Association of Occupational Health Nurses Letter
- American Society of Safety Engineers Letter
- AFL-CIO Letter

NHTSA Changes Strategy from Safety Features to Crash Prevention

The National Highway Transportation Administration has announced
that it will drop its emphasis on making vehicles safer in crashes in favor of a new focus on "crash prevention."

"I'd like to begin to focus on the event before the crash," NHTSA administrator Jeffrey Runge told the Society of Automotive Engineers in Washington last May. "We may have plateaued out in terms of crashworthiness."

Whereas NHTSA regulatory initiatives for the last 34 years have sought to boost crash protection devices, such as seatbelts and airbags, which mitigate the harm from crashes, the new safety devices to be tested and implemented by NHTSA seek to avoid a crash altogether. These devices use new "smart technology" currently touted by car manufacturers and available in high-end vehicles to avoid, among other things, rollovers, drifting in lanes, and drowsy drivers. One such measure being considered is electronic stability control, which adjusts a vehicle's braking and steering in an emergency, reducing the chance of rollover.

Though safety advocates approve of any new attempts to increase the safety of vehicles, many have expressed concern that NHTSA is abandoning its historic mission of protecting passengers in a crash. They also dispute NHTSA's claim that there are no further advances to be made in crash protection. According to NHTSA officials, a new proposed rule on side-curtain air bags may be the last major crash-protection regulation. The shift in NHTSA's policy is already evident in its research and development projects, which focus increasingly on crash avoidance technology.

Mad Cow Disease Regulation Fails to Protect U.S. Food Supply

Although food safety officials testified to a House subcommittee
that two new regulations will enhance existing rules to make an effective firewall against mad cow disease, a new report reveals that the rules mainly protect the meat industry and are not strong enough to prevent contamination of the food supply.

According to the report by the Center for Progressive Regulation, the centerpiece of the mad cow regulation is a so-called "zero tolerance policy" for the introduction into the food chain of certain cattle parts that are at highest risk of spreading bovine spongiform encephalopathy (BSE). However, the report reveals that the zero tolerance policy actually allows the meat industry to opt out of a stringent hazard prevention approach and instead adopt less stringent industry-designed standards.

Report Reveals Weaknesses in Food Safety Policy

Prior to the outbreak, the federal government regulated the contamination of the domestic meat supply through (1) a ban on imports from countries that had suffered BSE outbreaks, (2) a surveillance program that tested a small number of downer cattle, and (3) partial restrictions on feeding animal protein to cattle. With the discovery of a BSE cow in Washington state last December, the USDA and FDA have stepped up existing regulation and also initiated two new pieces of regulation designed to act as a firewall against the contamination of the human

food supply. However, according to a report released on July 22 by the Center for Progressive Regulation, the new regulations act to quell public fears and protect the meat industry rather than actually prevent high-risk substances from entering the food supply.

The primary example of loopholes in the new regulation regards preventing specified risk materials (SRMs) from entering the food supply. SRMs, which include brain, ganglia, and spinal cord tissue, are the animal parts most likely to contain the mad cow disease "prion" (a protein particle that lacks nucleic acid). According to Secretary of Agriculture Ann Veneman, preventing SRMs from entering the food supply is the best way to prevent the threat of BSE to humans. As she stated in a July 14 government reform subcommittee hearing, "When you remove the Specified Risk Materials from the food supply, as the chairman of the International Committee said to me, that is the most important thing that you do to protect public health."

The new USDA regulation claims a zero tolerance policy on SRMs. However, as the CPR report uncovers, the regulation allows industry to choose one of two methods for meeting the requirements. Either companies can apply the existing standards of the Hazard Analysis and Critical Control Point (HACCP) system, a preventive approach to food borne hazards currently used to control the spread of contaminants such as salmonella and E. coli, or industry can use what is called a prerequisite program. This program option, favored by industry, allows companies to come up with their own standards for preventing SRMs from entering the food supply. The prerequisites program requires no oversight or approval from the USDA or FDA and provides no punitive measures for violations. Prerequisite programs are generally used for basic sanitation or other contaminations that are seen to be low risk.

Companies are not required to release their prerequisite plans for SRMs, but the food safety department at the University of Nebraska has released standard operating procedures for the control of specified risk materials that best approximate the level of scrutiny required of a prerequisite program. According to the plan, "grossly identifiable spinal cord material spread by the splitting process will be trimmed from the carcass with a knife." The guidelines also require that the meat be inspected by "visual observation" once per day. With such imprecise guidelines, it seems likely that SRMs will continue to pass into Americans' food supply. Furthermore, these policies clearly do not meet the zero tolerance level mandated by the regulation.

The industry position is that there is no need to use the more stringent HACCP strategy because the chance that the meat will contain the mad cow disease prion is relatively low. However, the regulation seeks to eliminate the presence of the SRMs, and not that of the mad cow prion. Therefore, the industry methods are wholly inadequate for dealing with the regulation and render the firewall flimsy at best.

Another regulation bans the feeding of mammalian proteins to ruminants, including bovines. However, the regulation allows for the feeding of chicken litter to cows. Since the chickens are fed cow proteins, it is possible that the chicken litter is contaminated with cow protein, which is then fed back to the cows in the form of chicken litter. Ruminant-to-ruminant feeding is the only known way that BSE spreads from cow to cow.

USDA Defends Surveillance Plan

Although these two significant problems weaken the mad cow regulation, the USDA was called upon by a House government reform subcommittee to defend only its surveillance program. The USDA's plan, which took effect in June, will concentrate testing on high-risk cattle. The vast majority of the 265,000 cattle that will be tested over the next twelve to eighteen months will come from cattle most likely to have BSE, including nonambulatory "downer" cattle and cattle showing signs of a disorder of the central nervous system. Because BSE rarely occurs in cattle less than thirty months of age, the test will only be administered to cattle over thirty months old. The USDA believes that by targeting high-risk cattle, it can increase its chances of finding potential cases of BSE and therefore better calculate the prevalence of BSE in the bovine population.

The USDA asserted that by targeting high-risk cattle for testing, it would be able to find one case of made cow disease in ten million. Rep. Henry Waxman (D-CA) and food safety experts charged that the claim was based on faulty assumptions. The current surveillance program is largely voluntary; therefore, the population sampled will not be arbitrary. Furthermore, though less likely to occur, cases of BSE have been found in young and healthy-looking cattle.

The surveillance program is not intended to be a public health safeguard. Rather, the surveillance program is designed to indicate the prevalence of BSE in the domestic bovine population. Although it does not protect against the spread of BSE, the testing is still crucial because accurate knowledge of the prevalence of BSE can establish the effectiveness of current safeguards. Fearing the market repercussions of a positive result, many farmers lack incentive to test their cattle. By allowing industry avoid testing cattle, the USDA sacrifices accuracy in order to protect industry interests.

Though most of the program is voluntary, BSE testing is mandatory for all nonambulatory cattle going to slaughter. However, since new regulations prohibit such "downer" cattle from entering the food supply, many of these never reach the slaughterhouse, and therefore are not required to be tested. That gap in the testing requirement leaves a large number of high-risk cattle out of the tested group. Instead, farmers often bury these cattle on their property.

Though the hearing focused on the accuracy of the surveillance techniques, testimony by the USDA inspector general revealed the weaknesses of the system prior to the 2004 tightening of regulations by the USDA. Cattle ranchers and meat packers were often unclear on which animals to test and what organization is responsible for testing. In the case of the Washington state cow, discrepancies existed as to which cow was actually the BSE positive cow and whether or not the cow was ambulatory at the time it reached the slaughterhouse. The issue is important because only nonambulatory cattle are required to be tested at the slaughterhouse. As Rep. Waxman pointed out, the recent discovery of a BSE-infected cow in the United States appears to have been due to luck rather than improved regulation.

The risk of mad cow disease here is still very low. However, the USDA's and the FDA's approach, while appearing to provide strong protection, instead has gaping loopholes that may protect industry, but not public health.

Court Rejects Agency Reasons for Trucker Hours Rule, Calls Arguments 'Troubling'

In a stinging rebuke, an appeals court rejected a change to regulations limiting the daily and weekly number of hours that truckers can work without rest breaks. Although the court based its decision on the agency's failure to consider a statutorily mandated factor, it also identified weaknesses in several arguments commonly raised to block regulation, repeatedly calling the arguments "troubling."

The suit was brought by Public Citizen, which calls truck driving "one of America's most hazardous occupations." Public Citizen notes that almost 700 truckers die in crashes every year, and those crashes put all other drivers at risk.

About the Rule

The rejected rule, which was issued in April 2003 by the Federal Motor Carrier Safety Administration, differed significantly from the version in the agency's Notice of Proposed Rulemaking (NPR) three years earlier:

- The final rule increased the maximum total daily driving from ten to eleven hours and dropped the NPR's requirement of a mandatory two-hour break during the day.
- The NPR, citing research about circadian rhythm cycles, would have required a 24-hour daily cycle. The explanation in the final rule admitted the 24-hour cycle would be "ideal from a scientific viewpoint" but stressed that an "inflexible" across-the-board requirement would unduly disrupt the trucking industry. The final rule mandated a 24-hour cycle only for drivers who took the maximum off-duty time (ten hours) and worked the maximum number of driving hours (fourteen). Those who maximized driving hours and *minimized* off-duty hours (ten hours), by contrast, were allowed to work on a *21*-hour cycle.
- The NPR would have mandated a "weekend" of 32 to 56 hours, including two night-time periods, in order to prevent drivers from working five consecutive night shifts and to allow drivers to compensate for sleep deficits during "circadian-optimal times." The final rule mandated only a 34-hour "restart" phase, that would allow drivers to drive another seven- or eight-day work week after one 34-hour off-duty block. The restart provision would have actually increased the number of hours truckers could drive each week above the cap from the old existing rules. As the court noted, the old rules had set absolute caps of 60 hours for a seven-day week, or 70 hours for eight, whereas trucking companies could game the new rules and force truckers to work 77 hours in a seven-day period.
- The NPR would have reduced the "sleeper-berth exception" of the old rules. Under existing rules, drivers could break their required eight hours of consecutive rest into two separate periods totaling eight hours if they spent the rest period in the trucks' sleeper berths. The NPR would have closed this loop-hole for solo drivers but retained it, in modified form, for team drivers. The final rule rejected the NPR's closure of the sleeper-berth exception, calling the NPR's approach "inflexible" because the use of sleeper berths is "firmly entrenched in the practice, culture, and equipment of the trucking industry." FMCSA also argued that there was no evidence that the sleeper-berth exception posed a "safety hazard" and rejected existing studies as

"inconclusive."

- The NPR would have required electronic on-board recorders to monitor compliance with the rule. The agency rejected EOBRs in the final rule, citing insufficient evidence of the costs and benefits of EOBRs.

About the Decision

The court found that one reason was sufficient to vacate the rule: "The FMCSA points to nothing in the agency's extensive deliberations establishing that it considered the statutorily mandated factor of drivers' health in the slightest." The court nonetheless took the unusual step of outlining, "for a sense of completeness," a number of other problems in the rulemaking that it repeatedly called "troubling."

Failing to Consider Drivers' Health

Testing the hours of service rule for a rational connection between the rule and the factual basis for it, the court rejected the rule as arbitrary and capricious because "the agency failed to consider the impact of the rules on the health of drivers, a factor the agency must consider under" its statutory mandate. Although 49 U.S.C. § 31506 (d) requires FMCSA to "*consider* the costs and benefits" of rule changes, the law demands more of FMCSA for health and safety issues:

> (a) Minimum safety standards. . . . At a minimum, the [hours of service] regulations shall ensure that --
>
> > (1) commercial [trucks] are maintained, equipped, loaded, and operated safely;
> > (2) the responsibilities imposed on [truckers] do not impair their ability to operate the vehicles safely;
> > (3) the physical condition of [truckers] is adequate to enable them to operate the vehicles safely; and
> > (4) the operation of commercial [trucks] does not have a deleterious effect on the physical condition of the [drivers].

Id. § 31136. The court rebuked the agency for failing to demonstrate any point in the rulemaking record in which "it considered the statutorily mandated factor of drivers' health in the slightest." Rejecting the agency's sole evidence of considering drivers' health -- a point at which it had considered the effect of driver health on vehicle safety -- the court admonished the agency that the law that driver health and vehicle safety may occasionally overlap but are nonetheless separate considerations. "It is one thing to consider whether an overworked driver is likely to drive less safely and therefore cause accidents," explained the court. "Whether overwork and sleep deprivation have deleterious effects on the physical health of the driver is quite another."

Other 'Troubling' Factors

The court also identified four specific parts of the rulemaking that it found particularly "troubling": (1) the decision to increase driving time from ten to eleven hours, (2) the maintenance of the sleeper-berth exception, (3) the rejection of EOBRs, and (4) the replacement of the NPR's "weekend" period with a 34-hour "restart." Several of these decisions simply defied the factual basis of the evidence in the record. Some of them embodied larger problems that have recurred throughout recent anti-regulatory rhetoric beyond the hours-of-service case itself.

Cost-Benefit Analysis and Economics

The agency's economistic rationales repeatedly come under attack in the court's opinion. FMCSA cited its cost-benefit analysis as a justification for the decision to increase driving time from ten to eleven hours, arguing that the simultaneous increase in mandatory daily off-duty time (from eight to ten hours) worked with the increase in maximum daily driving time (from ten to eleven hours) to result in net benefits. The economics, however, failed to consider the very human limitations on the practical value of those calculations:

> [T]his analysis assumes, dubiously, that time spent driving is equally fatiguing as time spent resting -- that is, that a driver who drives for ten hours has the same risk of crashing as a driver who has been resting for ten hours, then begins to drive. . . . In other words, the model disregarded the effects of "time on task" because, the agency said, it did not have sufficient data on the magnitude of such effects.

By assuming away the fatiguing effects of time on the job, despite its own admission that the risk of crashing increases "geometrically" after the eighth hour on duty, the agency rigged its economics to justify an industry-

favored alternative.

When it zeroed out the effects of driving time because of insufficient data, FMCSA replicated a favorite habit of leading proponents of cost-benefit analysis in regulatory decisions: treating unquantified effects as though they had zero value. These zeroed effects tend, incidentally, to be effects that could result in conclusions other than those in industry interests. Another prominent example of such zeroing is an oft-cited study by Robert Hahn, co-director of the AEI-Brookings Joint Center for Regulatory Studies, that zeroed out all unquantified benefits of regulations in order to argue that half of all major rules passed in a 15-year period failed net benefits testing. Hahn's practice of zeroing out these benefits (even some quantified, monetized benefits, for which Hahn decided simply to substitute a zero) was recently revealed by a law professor who discovered other unsupported assumptions in major anti-regulatory economics studies.

FMCSA also attempted to evade entirely its obligation to consider the use of EOBRs. The court noted that the agency had failed even to test the use of the on-board recorders, despite the agency's acknowledgment that noncompliance with the current system of paper logs is "widespread," because the costs and benefits of EOBRs are unknown. The rigging here is even more obvious, because FMCSA could have tested EOBR use and based its estimates on that study. Further, common sense demands the conclusion that EOBR use could have significant benefits: as the court reasoned, EOBR use will induce compliance with the hours of service regulations, and compliance will have substantial health and safety benefits.

Uncertainty

"Uncertainty" is an important term in anti-regulatory thought. In scientific terms, it can refer to the probability of an event (statistical uncertainty) or to an event with an unknown probability (true uncertainty). In either sense, uncertainty is a technical aspect of any scientific information. In everyday discourse, uncertainty is the opposite of certainty; we use the term to refer to lingering questions about which we lack sufficient facts to state an answer with firm conviction. In anti-regulatory rhetoric, the single word is often used to toggle back and forth between both the scientific and the quotidian meanings, the effect being to make even overwhelming scientific consensus appear unresolved.

The court in this case rejected FMCSA's attempt to use uncertainty as a reason for failing to regulate. FMCSA assumed away the fatiguing effects of "time on task" in its cost-benefit model in order to justify increasing the maximum daily driving time, arguing that the studies showing incredible increases in crash risk after the eighth hour of driving do not provide sufficient evidence for attributing fatigue to the time spent driving. The court argued that this use of uncertainty was problematic:

> Quite apart from the circularity of the agency's explanation, moreover, the model's assumption that time-on-task effects are nil is implausible. Again, the agency admits that studies show that crash risk increases, in the agency's words, "geometrically" . . . after the eighth hour on duty, and the agency does not deny that this geometric risk increase results at least in substantial part from time-on-task effects. **The mere fact that the magnitude of time-on-task effects is *uncertain* is no justification for *disregarding* the effect entirely.** . . . In light of this dubious assumption, the agency's cost-benefit analysis is questionable . . . .

(Emphasis added.) In its rejection of the agency's claim that uncertainty prevented it from even roughly estimating the benefits that would accrue from increased compliance with hours-of-service regulation because of EOBRs, the court added, "Regulators by nature work under conditions of serious uncertainty, and regulation would be at an end if uncertainty alone were an excuse to ignore a congressional command . . . ."

The effect of the court's decision is to erase the rule and send the agency back to the drawing board.

For Further Reading:

- Notice of Proposed Rulemaking: 65 Fed. Reg. 25,540 (2000)
- Final Rule: 68 Fed. Reg. 22,456 (2003)
- Decision in *Public Citizen v. Federal Motor Carrier Safety Administration*, No. 03-1165 (D.C. Cir. July 16, 2004) (also on Westlaw at 2004 WL 1585847)

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