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Congress Inches Closer to Final War Supplemental Vote

Legislation appropriating over $100 billion for continued war funding (H.R. 2346) is moving closer to a final vote in Congress, despite significant delays and recent disagreements during conference committee negotiations. The main issues of contention include the release of detainee photos, a funding provision for the International Monetary Fund, and overall concerns related to the bloated cost of the bill. President Obama originally requested $90 billion for the legislation, but that figure has grown to $106 billion.

Perhaps the most controversial issue in the legislation was an amendment introduced by Sens. Joe Lieberman (I-CT) and Lindsey Graham (R-SC) that sought to prohibit the release of photos of detainees being tortured. There was a heated debate about the relative merits of the need for government transparency versus the potential endangerment of U.S. soldiers who are serving in

high-risk areas abroad. The conference committee eventually agreed to drop the amendment, assuaging a number of liberal House Democrats.

The president's $80 million request to close the Guantanamo Bay prison and transfer detainees was also modified. In its altered form, the bill would prohibit the relocation of detainees to the U.S. and would require the president to report on the specific destination and security risk of each individual before the release of any funds for transport.

In addition to funds for U.N. peacekeeping dues ($721 million) and military personnel shortfalls ($534 million), the conference agreement also allocates funds for items such as the Pakistan Counterinsurgency Capability Fund ($400 million), which is meant to assist Pakistan's security forces as well as provide funds for humanitarian relief and necessary reconstruction.

Some items may appear to be funded at lower or higher levels relative to the previous fiscal year, but the final figures need to be analyzed in conjunction with the administration's baseline budget figures. Earlier in 2009, the administration vowed to rely more on baseline budget figures instead of supplemental spending bills and some increases/decreases were subsequently reflected in the current bill. The administration has stated that this will be "the last planned war supplemental."

The bill also requires the president to submit two reports about the ongoing efforts in Afghanistan and Pakistan, including the United States' policy objectives and benchmarks for evaluation, as well as an assessment of the Afghani and Pakistani governments' roles in anti-terrorist efforts.

In addition to war funding, the bill contains some unrelated supplemental funding. The president requested and conferees included a provision that provides an additional $5 billion to the International Monetary Fund (IMF) for the organization's lending programs. These additional funds are meant to help the IMF combat economic situations that may continue to arise due to the global economic environment, but some Republicans protested its inclusion, indicating that the provision should not be attached to a war funding bill. Given the recent disharmony among Democrats regarding some of the bill's proposed and included provisions, it may be tough to rally enough votes to pass the legislation if Republicans decide to vote against it based on the IMF provision.

The conference agreement also includes $1 billion for a "cash-for-clunkers" program, where consumers can receive a $3,500-$4,500 voucher to trade in their existing cars for more fuel-efficient vehicles, and an additional $4 billion on top of Obama's request of $3.7 billion for fighting pandemic flu outbreaks.

The House is expected to vote on the conference report as soon as June 16, with the Senate following shortly thereafter.

Senate Likely to Confirm First-Ever Chief Performance Officer

On June 16, the Senate Homeland Security and Governmental Affairs Committee (HSGAC) voted to approve the nomination of Jeffrey Zients to serve as the nation's first Chief Performance Officer (CPO), moving the issue to the full Senate.

On June 10, HSGAC held a confirmation hearing for Zients, where senators questioned him about his private sector background and a host of topics he will be responsible for overseeing, such as excessive outsourcing, lack of use of performance data, government overpayments, waste and mismanagement in IT projects, federal workforce development, and overburdened acquisition employees. In response, Zients acknowledged up front that the private sector and government are inherently different types of structures, and he generally promoted some ideas already developed within the new administration, such as curbing the Bush administration's competitive sourcing initiative.

Zients will oversee four statutory offices at the Office of Management and Budget (OMB) – Information and Regulatory Affairs, Federal Procurement, E-government and IT, and Federal Financial Management – and fulfill two roles: the deputy director for management at OMB and advisor to the president on performance issues.

This will be Zients' first foray into government service, and his comments at the hearing focused on the need to strengthen performance metrics and emphasized the challenges of measuring success in the public sector. Among other things, Zients will face the challenge of improving government performance in the face of an aging federal workforce, a patchwork of information technology systems that overlap and are not compatible with each other, and the trend toward outsourcing government functions.

In response to questions from senators, Zients agreed that the government's outsourcing policies needed to be reexamined to make sure that agencies still retain control and accountability for outsourced work. He also stated that work should not be outsourced if it falls within government's expertise or can achieve savings by being adapted elsewhere in the government.

Overall, Zients reiterated the president's desire to increase transparency and acknowledged the need to improve tools such as the Program Assessment Rating Tool (PART) in order to improve resource allocation decisions and increase the use of reliable and unbiased performance data among policymakers. He also vowed to work closely with the committee on issues related to acquisition employees, an overloaded security clearance system, and government overpayments.

While the Zients nomination is not controversial, it may get delayed because some Republicans are upset with the Democrats' decision to move forward with July hearings on U.S. Supreme Court nominee Sonia Sotomayor. A number of nominations have been tied up in the Senate because of this, and Senate Majority Leader Harry Reid (D-NV) recently criticized Republicans for holding up the process. What impact these events will have on the timing of the Zients confirmation remains unclear.

Commentary: Defense Acquisition Reform -- Where Do We Stand?

Recent events are pointing to a shift in the way the Department of Defense (DOD) will implement future government contracts. The passage of a new law, the planned addition of much-needed acquisition personnel at DOD – by far the government's largest contracting agency – and an intended top-to-bottom overhaul of the Air Force's procurement process are all geared toward reforming a system ripe with waste, fraud, and abuse. Despite significant progress, these reforms face critical challenges ahead.

On the morning of May 22, President Obama signed into law a major weapons procurement reform – the Weapon Systems Acquisition Reform Act (WSARA) of 2009 – which represents a small step toward fixing the chaotic and troublesome weapons acquisition process at DOD.

One of the main goals of this law is to try to foster more competition within different parts of the DOD weapons contracting process, thereby harnessing the theoretical power of the free market. This is a much-needed reform, as six industry giants have, at the urging of the Clinton administration long ago, gobbled up most of the competition within the world of defense contracting. The six companies – Boeing, General Dynamics, Lockheed Martin, Northrop Grumman, Raytheon, and United Technologies Corp. – represented 29 percent of the total DOD contracting dollars spent in FY 2008, according to USASpending.gov.

Despite the requirement in WSARA that obligates the Secretary of Defense to "preserve the option of competition" throughout the life of a weapons program through the use of ten competition-promoting measures, there may not be enough companies to make sure that true competition exists to meet the requirements. Because of this, what is more likely is that the Pentagon will use a national security waiver in the law to skirt the intent of the reform. This loophole will allow wasteful weapons programs to slip by the prospective knife of Congress. However, to be fair, that knife is not always competently, if at all, wielded by congressional members.

The creation of a Director of Cost Assessment and Program Evaluation (DCAPE), a presidentially appointed and Senate-confirmed oversight position created under WSARA, is the second important aspect of the reform law. DCAPE will provide independent cost assessments to the Secretary of Defense of some, although not all, of DOD's major weapons programs. One of the vital tasks of this new position will be to make recommendations, through the Secretary of Defense, for Congress to eliminate a program after it exceeds the newly strengthened cost overrun rules. The success in completing that task assumes that Congress can see beyond parochial interests, sit on its hands, and not interfere to rescue a weapons program that the Defense Department may say it does not want or need. Unfortunately, if the recent efforts by congressional members to save the few programs Obama and Secretary of Defense Robert Gates have recommended cutting – including the F-22 fighter jet, the C-17 cargo plane, and the VH-71 presidential helicopter – is any indication, then prospects look bleak.

Another goal of the new law is to eliminate conflicts of interest in the weapons procurement process. Because the Pentagon relies on so few manufacturers for the nation's aircraft, missiles, ships, and other weapons systems, there often are conflicts of interest during the multiple phases of the production process. Firms that construct a weapon, and, consequently, are responsible for the evaluation of the contracting process up to that point, may have been responsible for the design of the same program. It is questionable that employees of a company would find fault with anything previously done by their own colleagues.

WSARA takes steps to eliminate these organizational conflicts of interest by preventing a contractor from working on multiple stages of a program; precluding the awarding of a contract to a subcontractor whose parent company is the prime contractor for the same weapons program; and requiring advice on systems engineering from sources independent of the prime contractor.

In addition to the important reforms contained within this new law, the Pentagon announced in early April that it plans to beef up its acquisition personnel by hiring 20,000 new procurement officers. Eleven thousand of these new posts will be former contracting positions converted to civilian jobs. This expansion, with an intended completion date of 2015, will represent a 15 percent increase in acquisition personnel, a sorely neglected part of the Pentagon for years.

What is even more important is the conversion of acquisition jobs from contracting to civilian posts. The sheer amount of DOD contract work for procurement tasks creates an unnecessary potential for conflicts of interest. A contracting company advising the Pentagon on procurement issues, and therefore with insider knowledge of the process, could theoretically take on another contractor as a client to advise on winning contracts from the Defense Department.

Finally, the Air Force has recently released a plan to restructure its entire procurement process, which could end up as a model for the rest of the DOD and perhaps the entire federal government. Spurred by previous contracting failures, this restructuring calls for revitalizing the Air Force acquisition workforce, demanding more specific systems requirements, instilling budget and financial discipline, and establishing clearer lines of authority and accountability within the acquisition process. The key, Air Force officials stress, is to get the best people possible and provide them with sound training to complement their experience. The Air Force realizes that this problem requires a long-term approach and has stated that these reforms will take three to five years to bear results.

While these changes and reforms are a good start, the true test of whether the defense contracting process will become streamlined and efficient is whether these stakeholders follow through with their recent actions. Do the White House, Congress, and the Pentagon consider their tasks for reforming the defense acquisition process complete, or do they rightly regard these efforts as the start of a much longer process? Without proper follow-through – meaning a continuous monitoring of the reform effort – the limited increase in oversight and regulations, the addition of personnel, and the plans for internal reform will do little to transform the defense procurement process.

Torture Photo Disclosure Ban out of War Spending Bill but Still Possible

During the week of June 8, an amendment seeking to block disclosure of photos of abused detainees in U.S. custody was removed from the Supplemental Appropriations Act of 2009 (H.R. 2346). However, Sens. Joseph Lieberman (I-CT) and Lindsay Graham (R-SC), sponsors of the amendment, have pledged to insert the language into other legislation. Moreover, the release of the torture photos is the subject of a lawsuit that may reach the U.S. Supreme Court.

In September 2008, the U.S. Court of Appeals for the Second Circuit ruled in favor of the American Civil Liberties Union (ACLU) in its lawsuit against the Department of Defense concerning a Freedom of Information Act (FOIA) request for records and photos of abused detainees. The court wrote, "It is plainly insufficient to claim that releasing documents could reasonably be expected to endanger some unspecified member of a group so vast as to encompass all United States troops, coalition forces, and civilians in Iraq and Afghanistan." In response to an April 27 court order for the release of the photos, the Obama administration initially agreed to turn over the material by May 28. At the urging of some in Congress and elsewhere, however, President Obama has since changed his mind.

The administration now argues that releasing the photos could "further inflame anti-American opinion." However, Amrit Singh, an attorney for the ACLU, said that there is value in releasing the torture photos. Singh stated, "Recently released legal memos elucidate the Bush administration's torture policies, but as long as the photos are being suppressed, the public will not know the full horror of the policies' consequences."

Lieberman and Graham attempted to prevent the release of the photos by creating a new specific exemption for them under FOIA. The senators offered the exemption as an amendment to the bill for supplemental war funding. The amendment would have withheld any "photograph relating to the treatment of individuals engaged, captured, or detained after September 11, 2001, by the Armed Forces of the United States." There was no requirement that the Defense Secretary justify the withholding of documents, such as explaining how the photos may endanger personnel or provide evidence of foreseeable harm in the classified certification. The lack of a requirement for such justification runs contrary to Obama's promise in his May 21 speech that, "I will tell the American people what I know and don't know, and when I release something publicly or keep something secret, I will tell you why."

Both the House and Senate passed versions of the supplemental bill with the amendment removed, but only after Obama assured Democratic members of Congress that he would appeal the Second Circuit's decision to the Supreme Court. This gave Democrats assurance that the Supreme Court would rule on the merits of disclosure. On June 12, a conference committee produced a compromise version of the supplemental bill that is due to be voted on shortly by the House and Senate.

Regardless of the president's plans or action by the courts, Graham promised to continue inserting the provision into subsequent legislation, arguing, "Every photo is a bullet for our

enemy." Lieberman pledged the same, declaring, "... and then we'll continue to do everything we can to attach it to other legislation, to slow up the process."

The appellate court paved the way for the administration to appeal the ACLU case to the Supreme Court when it recalled its order on June 10. It is unknown how the Supreme Court might rule; however, a decision against the ACLU may be more harmful than a legislative prohibition on the release of the torture photos, as legislative measures are often easier to reverse than Supreme Court decisions.

Bills Would Require Disclosure of "Fracking" Chemicals

Bills recently introduced in both the House and Senate seek to force natural gas drilling companies to disclose what chemicals are pumped into the ground in a practice known as hydraulic fracturing, or "fracking." Although the process has been linked to drinking water contamination and other harms to public health and the environment, companies are currently allowed to conceal the toxic chemicals they use.

Hydraulic fracturing is a process where sand and fluids are pumped underground at very high pressure to cause tiny fissures in rock and force natural gas to the surface. Although most of the fluid is water, numerous chemicals, many of them toxic, are typically added to the mixture. Fracking fluid is known to often contain benzene, toluene, and pesticides, among other harmful substances.

Currently, the industry enjoys an exemption from regulation under a federal drinking water statute that permits companies to maintain secrecy around the chemicals used. Gas drillers and the companies that supply them are attempting to fend off Congress' efforts to close the loophole and to preserve the confidentiality of the chemicals used, claiming the mixtures are trade secrets. Without the information about the chemicals, scientists are unable to research the potential health effects of hydraulic fracturing.

The legislation, known as the Fracturing Responsibility and Awareness of Chemicals Act, or FRAC Act, specifies that drillers must disclose the identities of the chemicals used in the fracturing fluids. In medical emergencies, even trade secrets must be disclosed, with or without a written statement of need. The Senate version of the bill is sponsored by Pennsylvania Sen. Robert Casey, Jr. (D) and New York's Charles Schumer (D).

According to Rep. Henry Waxman (D-CA), whose Energy and Commerce Committee is moving the House bill (H.R. 2766), "The current exemption for the oil and gas industry means that we can't even get the information necessary to evaluate the health threats from these practices."

The bills remove the oil and gas industry's exemption from regulation under the federal Safe Drinking Water Act (SDWA), which was granted in a previous, Republican-controlled Congress. The SDWA authorizes the U.S. Environmental Protection Agency (EPA) to regulate the injection of fluids underground and limits pollution levels in drinking water. The exemption, known as

the "Halliburton loophole" for the company that pioneered the process and the influence of its former CEO, Dick Cheney, was inserted into the Energy Policy Act of 2005. No other industry enjoys such a blanket exemption from SDWA regulation. Without the authority of the SDWA, EPA scientists are powerless to analyze the chemicals, processes, and dangers of hydraulic fracturing.

Chemicals used in fracking enter the environment in three main ways. Up to one-third of the fracking fluid is left underground during the process, and this can seep into underground drinking water supplies and the source waters for rivers and lakes. Spills and accidents on the surface can also contaminate water supplies. Finally, the two-thirds of the fluid that is retrieved after being injected underground is waste water that must be disposed, presenting another potential avenue for release into the environment.

Rep. Maurice Hinchey (D-NY), one of the House bill's cosponsors, said, "It's time to fix an unfortunate chapter in the Bush administration's energy policy and close the 'Halliburton loophole' that has enabled energy companies to pump enormous amounts of toxins, such as benzene and toluene, into the ground that then jeopardize the quality of our drinking water." Hinchey added, "The bill also lifts the veil of secrecy currently shrouding this industry practice."

Another House cosponsor, Rep. Diana DeGette (D-CO), announced, "When it comes to protecting the public's health, it's not unreasonable to require these companies to disclose the chemicals they are using in our communities – especially near our water sources."

In DeGette's home state, Colorado, gas drilling has greatly expanded over the last eight years, and nine Colorado municipalities have already passed resolutions similar to the proposed federal legislation. New state rules in Colorado require gas drillers to give the inventory of chemicals to medical personnel when requested, as well as to state officials. The general public remains barred from access to the information, however.

The federal bills do not require reporting of quantities of fracking fluids used, the amounts of the toxic chemicals used or disposed of, or where the chemicals end up. However, with knowledge of the chemicals themselves and the authority to regulate the process, EPA scientists would be able to track the fate of the fracking fluids and analyze impacts to the environment.

In cases of medical emergencies caused by exposure to fracking chemicals, the legislation gives companies that were forced to disclose proprietary chemical formulas the right to require a confidentiality agreement from the treating nurse or doctor after the emergency. However, it is not clear if the patient must sign a confidentiality agreement, or if the physician is barred from telling the patient what chemicals they have been exposed to. The legislation's focus on medical emergencies fails to consider or address chronic exposure to fracking chemicals, which could create non-emergency medical situations where disclosure of the chemicals is important.

The industry contends that oil and gas production would drop considerably – threatening the economy and the country's goal of energy independence – if the legislation becomes law. This argument is made despite industry assertions that the value of the natural gas in just one

geologic formation in the Northeast would be worth up to one trillion dollars. Opponents of federal regulation also claim that state regulators provide sufficient oversight of fracking operations.

Food Safety Legislation Progresses Slowly

The first steps on real food safety reforms were the subject of a House hearing June 3 in the Energy and Commerce Committee's Subcommittee on Health. The subcommittee unveiled the Food Safety Enhancement Act of 2009, a synthesis of several different bills that had been introduced earlier this session.

In 2007, the Government Accountability Office (GAO) designated protection of the nation's food supply as a high-risk area requiring immediate attention. The high-risk designation is saved for those policy areas that require transformational change. In testimony before the Energy and Commerce Committee in April 2007, GAO's Lisa Shames, Acting Director of Natural Resources and Environment, told Congress that "limitations in the federal government's food recalls heighten the risk that unsafe food will remain in the food supply and ultimately be consumed. Food recalls are largely voluntary, and federal agencies responsible for food safety have no authority to compel companies to carry out recalls in these cases." There are 15 agencies that have responsibility for food safety under approximately 30 different laws, according to her testimony.

Since GAO designated food safety as a high-risk area, Congress has held 24 hearings on the issue, according to testimony at the June 3 hearing by Caroline Smith DeWaal of the Center for Science in the Public Interest, who was testifying on behalf of members of the Safe Food Coalition. The Food Safety Enhancement Act Discussion Draft unveiled May 26 was a combination of many of the more narrowly focused bills that have been introduced in Congress in recent years. It was aimed at the Food and Drug Administration (FDA), which oversees roughly 80 percent of the U.S. food supply. The bill contains provisions that:

- Focus on prevention of, not reaction to, foodborne illness outbreaks;
- Shift responsibility for the safety of products to manufacturers;
- Require both domestic and foreign food suppliers to register with FDA annually and implement safety plans that identify and protect food from hazards;
- Give FDA the power to set minimum safety plan specifications and the power to audit the plans;
- Require registered facilities to pay a $1,000 registration fee, as well as pay for re-inspections, recalls, and, possibly, export certificates;
- Set minimum inspection frequencies based on the level of risk of the facilities, with the goal of inspecting high-risk facilities at least once in every six to 18 months;
- Enhance FDA's ability to trace the origin of tainted foods by requiring industry to develop an interoperable record to ensure an effective and timely traceback of the distribution chain; and
- Provide FDA with enhanced authority to mandate recalls and detain unsafe foods

Dr. Margaret Hamburg, the newly-confirmed FDA commissioner, testified at the hearing, calling the legislation "a major step in the right direction." From FDA's perspective, an effective food safety system needs to focus on prevention, give FDA the legal enforcement tools to match its responsibilities, and provide the agency with sufficient resources to match the responsibilities. According to Hamburg, the bill accomplishes most of these goals. FDA has suffered budget cuts, lost staff, and been heavily criticized for its failure to adequately protect the public during a host of food safety incidents leading up to and following GAO's designation of food safety as a high-risk topic.

Surprisingly, as a result of many of the operational problems FDA has, Hamburg testified that the inspection frequencies outlined in the bill would "far exceed" the resources available to the agency. "It would be difficult, if not impossible, for FDA to hire and train thousands of additional staff so quickly – even while relying on inspections by state, local, and other federal and foreign government officials. As a result, FDA would support modification of these provisions to take into account the operational challenges involved, such as by changing these inspection frequencies," Hamburg said.

Food industry witnesses largely supported the bill but took issue with details of provisions addressing traceability, country-of-origin labeling, the size of the registration fees, and some of FDA's expanded powers, especially the extent of mandatory recall powers the agency would be given. They were largely supportive of more resources for FDA to meet its responsibilities. In complaints about the size of the fees on registered facilities, Pamela Bailey, President and CEO of the Grocery Manufacturers Association, presented a somewhat contradictory argument, noting, "Our industry is ultimately responsible for the safety of its products, but securing the safety of the food supply is a government function which should be largely financed with government resources."

Several Republicans on the committee focused on the size of the registration fees and targeted those as a potential stumbling block for bipartisan support. They voiced objections to expanding FDA's powers to force recalls and use subpoenas, two powers that FDA does not have under current law.

Food safety advocates generally supported the bill. DeWaal, for example, called it "a strong bill" that addresses critical components in building a new framework for a modern food safety system. The preventive approach, coupled with inspections, traceability of foods, enhanced research and surveillance, more resources, and better enforcement tools, can lead to major improvements, she argued. She also claimed that better oversight by FDA helps the food industry by protecting it from damage suffered by recalls and outbreaks of pathogens. The $1,000 registration fee pales in comparison to the millions of dollars industry spends on advertising and the economic impacts of outbreaks.

Rep. John Dingell (D-MI) formally introduced the bill June 8. The subcommittee completed a markup June 11 and subsequently referred the bill without amendments to the full committee.

Several bills addressing food safety improvements were introduced in the Senate early in the 111th Congress but have languished in the Agriculture, Nutrition, and Forestry Committee and the Health, Education, Labor, and Pensions Committee.

OIRA's Role in the Obama Administration Examined

A panel of regulatory policy experts discussed how the White House Office of Information and Regulatory Affairs has been functioning during the Obama administration and how reforms could benefit the public. The discussion came as the White House prepares to issue a new executive order that could alter the way regulations are written.

The American Bar Association's Administrative Law and Regulatory Practice Section held the discussion June 10. Michael Fitzpatrick, associate administrator of the White House Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs (OIRA), gave an insider's account of OIRA's role in the Obama administration.

Rulemaking agencies submit to OIRA drafts of proposed and final regulations before publishing those regulations for the public to see. OIRA comments on, and sometimes edits, agency regulations. OIRA also shares draft rules with other agencies for their comment. The office also checks the cost-benefit analyses agencies prepare in support of their regulations. For the most part, OIRA has maintained this role during the Obama administration, Fitzpatrick said.

Fitzpatrick said that since Jan. 21, the first full day of the Obama administration, OIRA has completed reviews of 136 regulations. Thirty-eight of those regulations are considered by the administration to be "economically significant," imposing an economic impact of $100 million or more, either through compliance costs or improved social welfare. Fitzpatrick's statistics covered regulations approved by OIRA through June 5.

Of the 136 regulations, 37 were withdrawn from OIRA review. On Jan. 21, White House Chief of Staff Rahm Emanuel instructed rulemaking agencies to halt their work on all regulations under development during the Bush administration, including those that had been sent to OIRA. Fitzpatrick cited Emanuel's memo as the reason for the withdrawals.

The remaining 99 regulations were approved by OIRA, in some cases after the agency agreed to make changes.

Fitzpatrick said the average length of the review periods was 32 days for the 38 economically significant regulations and 28 days for all other regulations. He called the pace "expeditious," citing longer review times during the first few months of the Bush administration. Fitzpatrick said, under President Bush's OIRA, the average length was 52 days for economically significant regulations and 64 days for all other regulations approved from Jan. 21, 2001, to June 5, 2001.

However, an OMB Watch analysis of the data shows faster paces for both administrations. In his analysis, Fitzpatrick included regulations submitted to OIRA during the Bush administration

and, when analyzing the Bush years, regulations submitted during the Clinton administration. In both cases, most of these holdover regulations were withdrawn. Many of these regulations had languished at OIRA for months during the presidential transitions.

OMB Watch chose to include only those regulations submitted to and approved by OIRA after each administration began (Jan. 21, 2001, and Jan. 21, 2009, respectively). According to OMB Watch, under President Obama's OIRA, the average length was 21-22 days for economically significant regulations and 20-21 days for all other regulations. Under President Bush's OIRA, the average length was 14-15 days for economically significant regulations and 25-26 days for all other regulations. (Times are presented as ranges due to rounding.)

Under the Obama administration, OIRA has quickly approved several high-profile regulations, including a U.S. Department of Agriculture rule barring downer cows from entering the food supply (reviewed in seven days), a Department of Transportation regulation requiring stronger vehicle roofs in order to protect passengers during accidents (reviewed in 22 days), and a U.S. Environmental Protection Agency finding that declares greenhouse gases a threat to public health and welfare (reviewed in 24 days).

Statistical analyses do not paint a complete picture of OIRA's role in rulemaking, panel member and OMB Watch Executive Director Gary D. Bass noted. The small but powerful office can have a great impact on the substance of the regulations that effect Americans' everyday lives. Bass called on the Obama administration to improve the regulatory process by reducing the time it takes to complete rules, ensuring that agencies are allowed to produce regulations in an environment of limited political interference, requiring more transparency, stimulating public participation, and providing agencies with the means to enforce rules in effect.

Another panel member, former OIRA Administrator Susan Dudley, disagreed, saying that little, if any, change is needed in the way OIRA operates. Dudley, who worked at OIRA from 2007 to 2009, said the office plays a salutary role and its powers should be preserved. She also supported the use of cost-benefit analysis in rulemaking but has urged improvements. In the Summer 2009 issue of the journal *Regulation*, Dudley lamented, “Although analytical tools for estimating benefits and costs are getting more and more sophisticated, our analysis doesn’t seem to be getting better at predicting actual outcomes.” Dudley also identified “Engaging the public to be more aware of the actual effects of regulation” as an upcoming challenge.

Sid Shapiro, an administrative law expert at the Wake Forest University School of Law, also focused on cost-benefit analysis. Shapiro said current methods of cost-benefit analysis – which focus on assigning dollar values to regulatory benefits, such as injuries reduced or lives saved, and then compare those benefits to compliance costs – do not help the government or the public make informed decisions. Shapiro said the government should do a better job of accounting for benefits that are difficult or impossible to "monetize."

OIRA is still operating under Executive Order 12866, Regulatory Planning and Review. President Clinton signed E.O. 12866 in September 1993, and President Bush continued using it throughout his administration.

President Obama has indicated his intent to replace E.O. 12866 with a new order governing the regulatory process. On Jan. 30, Obama called on OMB Director Peter Orszag, as well as the federal agencies responsible for writing rules, to present him with recommendations on a new executive order within 100 days.

OIRA solicited public comment on the existing state of the regulatory process and published the comments online – an unprecedented action in the development of executive orders. Fitzpatrick said the most common topic covered in comments was the role of cost-benefit analysis. The second most common topic was the role of OIRA, specifically, its relationship with rulemaking agencies.

Although the deadline for the OMB and agency recommendations has passed, the administration has given no indication of its plans. The administration has not released OMB or agency comments.

The process may be moving slowly because Obama's nominee to lead OIRA has yet to be confirmed. Obama nominated Harvard Law Professor Cass Sunstein in April. His nomination was approved by the Senate Homeland Security and Governmental Affairs Committee on May 20, but the full Senate has yet to schedule a vote.

Grassley Seeks Disclosure of Ethics Waivers

Sen. Charles Grassley (R-IA) is determined to make public every ethics waiver issued to former lobbyists who now work in the Obama administration. A Jan. 21 executive order put in place restrictions on lobbyists who work for the federal government. The order included a waiver process, allowing exemptions if the "application of the restriction is inconsistent with the purposes of the restriction" or if it is in the "public interest." Grassley is prodding the administration to disclose all waivers granted under the policy. Grassley has also requested information on every letter of recusal that waived employees have on file.

Grassley recently requested a complete list of waivers and letters of recusal, including the names of all individuals and the agencies they are employed with, the reason for granting the waiver, and the issues the employees are disqualified from working on. Grassley's June 10 letter to Robert Cusick, the director of the Office of Government Ethics (OGE), stated, "The American people deserve a full accounting of all waivers and recusals to better understand who is running the government and whether the administration is adhering to its promise to be open, transparent and accountable."

According to *Politico*, "[Cusick] did not know definitively how many ethics waivers had been granted, but he said 'there's been no great surge of waivers.' Unlike waivers, which have to be approved by White House ethics lawyer Norm Eisen and are on file at the White House, letters of recusal are kept at the agency employing the official and are more difficult to track, Cusick said."

While there is no one place to find all the waivers and letters of recusal, public statements by the White House reveal that only four waivers have been issued to date. The administration has been quite guarded about the exceptions it has granted. According to Grassley's letter, he also wrote in February 2009 asking for details on the waivers from the White House's budget office. Grassley was told that this information will not be available until the annual report required by the executive order is released in 2010. Grassley retorted, "That is unacceptable, and the American people deserve this information in real time."

Further, Grassley wrote that the current system of granting waivers "has created a situation where the transparency and accountability touted by the White House are lost because there is no comprehensive database of the waivers and recusals granted."

As Grassley called for instant disclosure of waivers, so did the executive director of OMB Watch, Gary D. Bass, in an op-ed published in May. Bass stated, "All granted waivers, along with information about the individuals receiving the waivers, should be immediately disclosed. The government should create a comprehensive website that lists any waivers, as well as related lobbying and campaign contribution information pertaining to waived individuals, in easy-to-use, searchable formats."

Meanwhile, new examples to fuel the argument for more transparency continue to pop up. For example, Charles Bolden was recently nominated as administrator of the National Aeronautics and Space Administration (NASA), and he may require a waiver because of his work as a lobbyist for a NASA contractor, ATK. According to the *New York Times*, "Bolden would be issued a limited waiver to the administration's ethics policy that states appointees cannot take part in matters 'directly and substantially related' to their former employers for two years."

In addition, Andrew McLaughlin, Director of Global Public Policy for Google, has reportedly been nominated for the position of Deputy Chief Technology Officer in the White House. The nomination has not yet been formally announced. Two consumer groups, the Center for Digital Democracy and Consumer Watchdog, have said the appointment would violate the intent of Obama's ethics rules.

As Grassley noted, "I am concerned that Section 3 [of the executive order] could be used to gut the ethical heart of the Order. Each day, new nominees to key Government positions are reported. Many of these nominees have been nominated despite the fact that they have previously served as lobbyists or in a manner that would preclude their participation under the Order absent a Section 3 waiver."

Even though the order requires appointees to sign a pledge stating that they will not work on any issues related to their former clients for two years, the administration continues to be bombarded with criticism for nominating appointees whose past work appears to violate the policy. Meanwhile, nonprofit groups continue to call for timely disclosure and clarity of all waivers *before* the annual report due out in 2010.

Questions about LDA Guidance Remain

New congressional guidance on lobbyist reporting and registration termination under the Lobbying Disclosure Act (LDA) has sparked concerns over accuracy and potential conflicts with current law. The guidance addresses filing requirements for lobbyists, as well as criteria for deregistering as a lobbyist, particularly important given President Barack Obama's hiring rules that place restrictions on those who have lobbied in the past two years. The deregistration rules may create enormous loopholes that could result in non-reporting of lobbyist activities.

On June 9, the Clerk of the House and the Secretary of the Senate released updated guidance on compliance with the LDA. The congressional offices also answered five questions about terminating a lobbyists' registration. An individual is required to register if he or she has two lobbying contacts or if 20 percent or more of his or her time is dedicated to lobbying. Also, each individual that "is registered or required to register" must file Form LD-203, a new semi-annual reporting requirement on campaign contributions. The only way for an individual that "is registered or required to register" to avoid filing LD-203 is to stop being a registered lobbyist.

According to the new guidance, a lobbyist can deregister if the person has had fewer than two lobbying contacts over two consecutive quarters. However, the LDA says that even if there are fewer than two lobbying contacts in a quarter, if an individual spends 20 percent of more of his or her time lobbying, the individual cannot deregister.

Many worry that if the guidance is implemented, a number of active lobbyists would deregister. They couldn't lobby two or more people, but they could direct others to make actual contact with covered officials, similar to a conductor in front of an orchestra. Even if a person spent 100 percent of his or her time on lobbying, as long as the person only has one contact with covered officials in each quarter, he or she could escape lobbying disclosure.

Attorneys at Caplin & Drysdale stated in their *Political Activity Law Bulletin* that they believe the notice was intended to convey that "an individual can deregister if he or she has never met the 'two contacts' test, does not meet that test in the current quarter and does not expect to meet it in the upcoming quarter." They also indicated that "this new guidance seems to create a discrepancy with the plain meaning of the statute."

The guidance may have been issued as a response to the mass of federal lobbyists deregistering in the wake of the strict requirements under Obama's executive order on ethics, which prohibits, for two years, an individual registered under the LDA from working in an agency that he or she lobbied. Additionally, a political appointee may not participate in "any particular matter" that the person lobbied on within the past two years and may not participate in the specific issue area in which the particular matter falls. A question that remains unanswered is whether lobbyists, who have retroactively amended their lobbying reports, will be able to join the administration.

The Hill reports that the two congressional offices plan to review the guidance they just issued in light of the possible inconsistencies with the law. The article also notes that many major law

firms are advising their clients not to deregister until the congressional offices complete their review. Improperly deregistering and not reporting under the LDA carries severe penalties.