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Proposed Budget Process Changes Are Too Risky

With the budget resolution appearing to be stalled in the Congress, attention may soon turn to changing the overall budget process.

Some conservative members have proposed a bill (H.R. 3800, "Family Budget Protection Act of 2004") that would fundamentally alter the playing field for crafting a budget in the Congress. Other budget process bills (such as H. R. 3973, "Spending Control Act of 2004) include some of the components of the broader bill.

Each of these bills forsakes budget responsibility by abandoning the process that led to surpluses in the 1990s, and instead twists the system in order to peruse a conservative agenda. The proposed changes would have the effect of biasing the system towards corporate and individual tax cuts, towards military spending, and away from domestic programs. To take two examples of proposed changes, the reforms would exempt tax cuts from offset requirements while requiring new entitlements to be paid for only with program cuts; and they would allow funds to be shifted from domestic programs to military spending, but not the reverse.

With a budget deficit forecast to be in the range of a half trillion dollars this year alone, now is not the time to experiment with risky, untested and undisciplined budget rules.

For more details on the effects of proposed changes to the process, including changes to PayGo rules, see:

- Proposed Changes Would Create Unbalanced, Flawed Budget Process (OMB Watch)
- House Budget Committee Process Proposal Would Not Restrain Those Areas of the Budget that Have Contributed Most to the Deficits (CBPP)

A Tax Cut a Week in the House

In spite of the "PayGo" logjam over whether or not tax cuts ought to be offset, which continues to prevent passage of a budget resolution, the House persists with its "a tax cut a week" schedule.

In recent weeks, the House has passed tax cuts at a cost of over $500 billion over the next ten years - none of which is offset. They include:

- H.R. 4181 to make permanent expanded tax breaks for married couples.
- H.R. 4227 for a one-year adjustment of the Alternative Minimum Tax.
- H.R. 4275 (AMT) to make permanent the expanded 10percent tax bracket.

This week, the House is scheduled to consider H.R. 4359, which would make the $1,000-per-child tax credit permanent.

These tax cuts were originally part of the first Bush tax cut (The Economic Growth and Tax Relief Reconcilation Act passed in 2001 at a 10-year cost of $1.3 to $1.6 trillion) and are scheduled to "sunset," or return to previous law, in 2005. All of the 2001 tax cuts were passed with complicated phase-in and sunset provisions through 2010. Permanent extension of all of the 2001 tax cuts — including those, such as the estate tax repeal, that benefit only the wealthiest — is high on the President's priorities. "Fixing" the AMT, which has not risen with inflation and threatens middle-class taxpayers with higher taxes, is also a high, but costly, priority. For more on the AMT, see an OMB Watch analysis.

While there is broad support for these three "middle-class" tax breaks, and for fixing the AMT, there is concern over the pricetag. However, efforts in the House to offset the costs, or make permanency contingent on balancing the budget, have failed.

What is rarely part of the discussion is the reality that the small monetary benefits to individual taxpayers **will** be offset by reductions in the services that we all depend upon. The money to pay for the tax breaks has to come from somewhere.

Even beyond the costs of the tax cuts — radically decreasing federal revenue even while the costs of the Iraqi conflict grow - the federal tax code is increasingly skewed in favor of investors over workers. An analysis by the Institute on Taxation and Economic Policy, released by Citizens for Tax Justice, shows that personal taxes on earnings are now two and one-half times greater than taxes on investment income. Another analysis by William Gale and Peter Orszag, published in The *American Prospect*, also presents evidence that "tax cuts enacted during George W. Bush's presidency shift the burden of taxation away from upper-income, capital-owning households and toward the wage-earning households of the lower and middle classes."

Internet Tax Ban Going Nowhere

As reported in the last Watcher, on April 28 the Senate passed a four-year continuation of the now-expired Internet tax moratorium. Disagreements with the House make passage of the ban unlikely.

The continued prohibition of taxation on the charges a user pays to an ISP to connect to the Internet is strongly opposed by state groups, including the National Governors Association, the Multistate Tax Commission, and others, because of losses to state revenue. It is strongly supported by by the telecommunications industry — the primary beneficiaries of the ban. It appears that major differences between the House and Senate on the scope of the bill make it unlikely that it will move forward. The Senate bill, besides being only for four years, exempts VoIP (Voice over Internet Protocol) from the ban and also "grandfathers in" states with existing taxes. The House bill is much broader, does not include any grandfather clauses, and makes the ban on Internet taxes permanent.

Update on Long-term Proactive Initiative

We thought you would like to know about an exciting and promising new effort aimed at stimulating the development of a long-term, proactive initiative on federal tax and budget policy.

Expert analyses, and President Bush's own budget, indicate that the present federal course of revenue cuts and rising healthcare costs is unsustainable. The long-term picture makes the current budget crisis that has dominated many nonprofit meetings look like a walk in the park. Conservatives have described the strategy as "starve the beast." Grover Norquist, a leader in the conservative movement, was more direct: "Kill the taxes and you kill the government."

The routine is familiar: conservatives present an alarming proposal, the nonprofit community fights the proposal and a "compromise" emerges. The compromise is better than the original proposal, but still pretty dreadful. We spend most of our time defending against things we don't want, like spending cuts or tax giveaways, and very little pursuing a vision of what we do want.

OMB Watch believes it is time to break this cycle. This past December, after a series of interviews with nonprofit leaders, we released a "call-to-action" paper. Conversations stemming from the paper overwhelmingly indicated enthusiasm for development of a proactive vision of tax and budget policy, and a long-term plan for achieving that vision. With the support of the Open Society Institute, the Marguerite Casey Foundation, and the Annie E. Casey Foundation, we have since taken the following steps:

- **Conducted a broad survey of the nonprofit community**
  More than 700 groups nationwide responded to an online survey about their organizations' current tax and budget activities and interest in a longer-term campaign, issues it would focus on, challenges it would face, and the needs of groups who might participate. The survey found 90 percent of respondents supporting the launch such a long-term effort. (More details)
- **Held five regional strategy sessions in March and April**
  Local participants at state and regional strategy sessions in Columbia, S.C., Chicago, Seattle, Phoenix and Philadelphia engaged in lively, rich discussions about "where we are now," "where we want to be in ten years," strategies for getting there, challenges and opportunities along the way, and possible next steps. Major themes that emerged include the need to address attacks on the role of government, the importance of strengthening civic responsibility, possible elements of a 10-year vision, and resources needed to make a long-term initiative successful, including infrastructure and leadership. Crosscutting all of these was one question: What does the nonprofit community need to do differently to be more effective on the federal tax and budget front? Each session was co-hosted by an organization in that state. Summaries will be posted as they become available.
- **Begun planning a national retreat for June 13-14**
  A planning committee is currently organizing a two-day retreat in the Baltimore-D.C. area to bring together local, state and national nonprofit leaders. Using the survey results, the regional meetings, and our many discussions with other national groups, participants would develop a long-term proactive federal tax and budget strategy, and develop immediate next steps toward making this initiative a reality.

OMB Watch is fulfilling the role of "provocateur" and does not intend to be "in charge." There is widespread support for such a campaign and many challenges and needs to be met: better values-based framing and messaging, broadening and re-energizing the base, developing a leadership structure, improving coordination,

and determining how to best influence the debate.

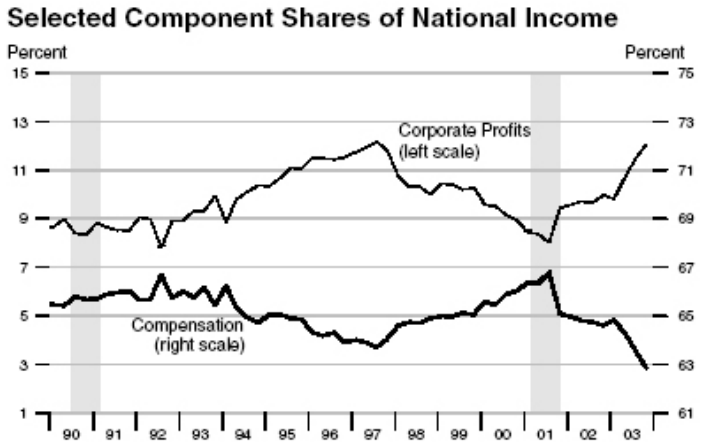
OMB Watch is proceeding with two high-priority items. First, we are developing a prototype of a tax-and-budget Internet resource center designed to provide easy access to the large volume of very useful, existing federal tax-and-budget information and tools. The resource center would also promote networking among state, local and national groups of all types. It should be available for preview later this summer. In addition, we are developing a "Face on the Numbers" database — a collection of true stories about how government services have aided real people and how gaps in services have hurt people. The database would help the news media, policymakers and others translate complex statistics into human terms. (To contribute stories, please contact Ellen Taylor at OMB Watch. For more on this, visit Face on the Numbers.)

Much more needs to be done to advance this initiative. Its success depends on all of us participating as a community in its development. As the "provocateur," we at OMB Watch also know we have much to learn in order to do this wisely. In particular, we are committed to building on existing activities at the local, state and federal levels, expanding resources for longer-term activities, and linking short-term actions with long-term objectives. John Irons, Ellen Taylor and Gary Bass — lead staff from OMB Watch — welcome your input, as well as the names of any colleagues this may interest. For updates on the project, you may subscribe to our "taxbudgetaction!" email listserv by using a convenient sign-up box.

Economy and Jobs Watch: Corporate Profits at Record Highs, While Labor Compensation at 38-year lows

Recent data show a major shift in the balance between corporate income and labor compensation. As a share of the economy labor compensation has not been this low in almost 40 years (since 1966), and after-tax corporate profits are at the highest levels ever recorded by the Bureau of Economic Analysis.

Since it's peak in 2001, as a share of gross domestic product (GDP), labor compensation has decreased by about 4 percent (from 67 to 63 percent) and corporate profits have increased by about 4 percent (from 8 to 12 percent) — see chart below. After taxes, corporate profits reached 9.6 percent of GDP — the highest level recorded dating back to 1947.



(Components are percent of GDP; source: graphic adopted from National Economic Trends, St. Louis Federal reserve.)

Over the past year, the overall economy, as measured by GDP, has grown consistently at a rate of about 5 percent, and is seen by many to be a sign that the economy has, at long last, come out of the 2001 recession. The conventional wisdom is that increased overall production will eventually make its way into the pocketbooks of ordinary Americans. However, this recovery appears to be different — in part because of the dismal performance of employment in the postrecession period — but also because it appears that a lower proportion of national income is going towards labor.

An economic recovery is not real unless there is widespread participation in the economy, and the economic

benefits accrue to a broad base of Americans. The current recovery appears to be failing that test.

Economy and Jobs Watch: Employment Struggling to Recover

Employment increased by a steady 288,000 jobs in April, the Department of Labor announced earlier this month. The unemployment rate remains steady at 5.6 percent as well.

Together with last month's employment numbers, the data show that the overall labor market is belatedly showing some signs of life — although the overall post-recession employment situation continues to significantly lag behind past economic recoveries. For the first time since WWII, the economy has not returned to pre-recession employment levels at this point in the recovery.

In addition, the labor market has weakened for some segments of the population. Teenage unemployment (16- to 19-year-olds) has increased over the past few months and is currently at 16.9 percent. Some are predicting a dismal employment situation for teens this summer.

Finally, the employment number was still below the Bush Administration's projection for the number of jobs that would be created due to tax law changes. Over the past 10 months, the total number of jobs is about 2 million below the administration's prediction, which was made just last summer. (See JobWatch.org for more details.)

OMB Fast-Tracks Revised Peer Review Policy

The Office of Management and Budget (OMB) appears unwilling to allow a sober and unhurried review of their revised proposal for government-wide peer review requirements. The revised proposal was published in the Federal Register April 28 with only a 30-day public comment period that is scheduled to end May 28. OMB rejected a request from various public interest groups for a 60-day extension to the public review period.

OMB proposes to establish a government-wide set of requirements for when and how federal agencies use scientific peer review. The policy includes very restrictive provisions for the most influential scientific information, restrictions that could delay and dilute the scientific studies most important to protecting public health and safety. After receiving strong opposition for its original peer review proposal from scientists, environmentalists, and public interest groups, OMB significantly revised the proposal.

Given the many substantive changes that have been made to the document, a longer period of time is necessary to enable the public, including interest groups and scientists, to fully review and consider the complex proposal. The original peer review proposal attracted a great deal of attention from scientists, academics and former regulators. For many, analyzing government policies is not their primary responsibility. They have research deadlines, classes to teach, businesses to run and a review period longer than one month seems essential to obtain their useful input, particularly since these guidelines may have significant policy impact. However, OMB claims that an extension is unnecessary because those persons interested in the proposal are already familiar with it from the first review.

OMB has also rejected a request signed by various public interest groups that the revised peer review proposal undergo a 120-day interagency review process. Federal agencies have extensive experience with scientific information, peer review and the regulatory process. It is essential that OMB consider these agencies' opinions during the development of a government-wide peer review policy. OMB recognized the importance of agencies' feedback during the review of the original draft *Peer Review Bulletin* and undertook a separate comment process specifically for federal agencies. Even though the revised proposal does not have an explicit process to elicit feedback from agencies, as the original proposal had, OMB claims that it "continues to engage the agencies."

Urge OMB to reverse their decisions and conduct a proper and full review of the proposed peer review policy, click here.

One Week Remains for Comments on Critical Infrastructure Information Rule

Only a single week remains to submit comments to the Department of Homeland Security (DHS) on the highly controversial Critical Infrastructure Information (CII) rule. DHS published an interim final rule in the *Federal Register* Feb. 20 with a 90-day public comment period that ends May 20.

Even though the agency continues to accept comments on the CII program, the rule went into effect upon publication. DHS has reported to Congress that it has already received several submissions for the CII program.

The stated objective of the CII program is to encourage corporations, which own a majority of the country's "critical infrastructure," to inform the government about any problems or vulnerabilities associated with the infrastructure. However, to encourage companies to participate in this voluntary reporting program the government promised to never publicly disclose the submitted information, nor use it for any regulatory actions including inspections, violations and fines. Additionally, the submitted information may not be used for any civil liability. In other words, the companies received liability immunity for any problems they reveal to the government under the CII program.

Many have criticized these provisions as giving away both the public's and the government's ability to apply pressure and ensure that any vulnerabilities are eliminated. The CII program may become a bureaucratic dead-end into which companies can dump their documents to receive secrecy and immunity.

Other complaints have been raised about the basic structure and implementation of the program. Currently the program is limited to direct submissions to DHS. However, DHS has expressed a desire to expand the rule to allow companies to submit information through any federal agency. Such a change could restrict agencies' ability to operate. Since CII information cannot be used for any regulatory action, allowing the information to flow through regulatory agencies would taint all of their actions. For instance, if a chemical facility submitted CII through the Environmental Protection Agency, when EPA next inspected the facility the company could claim that EPA unfairly targeted them because of their CII submission and thereby avoid responsibility for any problems discovered during the inspection.

OMB Watch will soon complete its detailed comments on the interim final CII rule. Citizens can tell DHS to limit this program and not to provide a safe haven for companies dragging their feet on fixing infrastructure problems click here.

Secret ACLU, NYCLU Lawsuit Tests Constitutionality of Patriot Act

While Congress remains reluctant to extend provisions of the Patriot Act set to expire in 2005, the American Civil Liberties Union (ACLU) and New York Civil Liberties Union revealed that they secretly filed a lawsuit last month challenging the constitutionality of a section of the Patriot Act that gives the government the authority to use "National Security Letters" to subpoena business records without judicial oversight.

This latest turn follows a familiar pattern in the Kafkaesque debate about the Patriot Act. Gag orders on people that the federal government targets under some sections of the Patriot Act prevent anyone from learning about the circumstances surrounding the government's use of those very same Patriot Act powers. For example, when the FBI uses its powers under section 505 of the Patriot Act, the part of the law targeted in the recently filed lawsuit, to demand that an Internet Service Provider or other business turn over email traffic and other customer information, the recipient of the letter cannot discuss the Letter with anyone. "It isn't even clear that a recipient can speak to a lawyer," Ann Beeson, an ACLU lawyer, told the New York Times.

The secrecy surrounding this case has created obstacles for the public interest plaintiffs. The groups kept the lawsuit a secret while they negotiated with the government what they could say publicly about the secret case. Once they came to agreement on those terms, the ACLU issued a press release that, in part, described the schedule of the case. The government claimed the release violated the judge's secrecy order. The ACLU removed two paragraphs from the version of the press release on its website while attempting to resolve the matter. The judge refused to lift the seal but outlined a process for redacting information from court documents before releasing them to the public. The judge kept under seal information relating to terrorism investigations that may come to light during the case.

Meanwhile, key Republicans are balking at extending provisions of the Patriot Act that expire in 2005. The White House has pressed Congress to extent the sunsetting provisions this year, but the current chairperson of the House Judiciary Committee, Rep. Jim Sensenbrenner (R-WI), has expressed no interest in doing so. In the

Senate, a key player is on the Judiciary Comittee, Sen. Arlen Specter (R-PA), a co-sponsor of legislation by Sen. Larry Craig to strengthen controls on the government's Patriot Act powers.

National Security Letters subpoenas can be served on any individual or business in connection with counterintelligence and terrorism investigations. Questions about the impact of the Patriot Act on civil liberties have persisted in part because of the secrecy surrounding how the government uses its Patriot Act powers, which undermines open, democratic debate about the Act's most controversial provisions.

FEC Delays Political Committee Rulemaking for 90 Days

At its May 13 meeting the Federal Election Commission approved a General Counsel recommendation to defer action on its political committee rulemaking for 90 days. The General Counsel said the FEC needed time to give the complex issues in the case more thorough consideration, saying "It is just as important not to drop the issue as to get it right." The move makes it unlikely any new rules will take effect this year. In response the House Administration Committee has scheduled a hearing for May 20.

The action followed rejection of a proposal from Commissioners Michael Toner and Scott Thomas, who advocated for quick action that would have subjected most 527 organizations (groups exempt from federal income tax whose primary purpose is to influence elections) to FEC rules. Everything from political parties and candidate campaigns to local ballot measure campaigns are included in this category. Although their proposal did not specifically exempt 501(c) organizations from regulation, they made it clear that they intended to do so and would be willing to amend their proposal accordingly. The Commission rejected this approach because two major elements of the Toner-Thomas proposal are undefined: what constitutes a "major purpose" to influence federal elections, and what communications "promote, support, attack or oppose" a federal candidate.

The FECâ€™s decision not to drop the rulemaking means that they will come back in mid-August likely to adopt one of three options outlined by the General Counsel — issue a final rule, make a new proposal and seek public comment, or defer action and seek guidance from Congress.

The ruling allows Democratic leaning political committees like Americans Coming Together and the Media Fund to continue their operations. Within days of the FEC meeting Republican leaning groups, such as the Club for Growth, said they would begin raising funds.

Shortly after the FEC meeting ended, Rep. Robert Ney (R-OH), chair of the House Administration Committee, announced an oversight hearing for May 20. In a press release Ney said he wants the FEC Commissioners to explain their action and expressed concern about the growing activity of 527 organizations. More details are at nonprofitadvocacy.org.

OMB Updates Guidance for Federal Grantees

As part of its effort to streamline the federal grants process, the Office of Management and Budget has published updated versions of its grants circulars that make definitions of key terms consistent for all types of grantees. The new Title 2 of the Code of Federal Regulations will centralize all policy guidance and rules for grants and cooperative agreements.

The Federal Financial Assistance Management Improvement Act (FFAMIA) requires the federal government to simplify the grants process. In August 2003 OMB proposed changes to its guidance on cost principles that would reduce confusion by making descriptions of similar cost items consistent in three of its Circulars: A-21 (Educational Institutions), A-87 (State, Local and Indian Tribal Governments) and A-122 (Non-Profit Organizations).

The OMB announcement includes a chart so that grantees can compare the old and new versions of the cost principles. There were no changes to the existing definition of lobbying in A-122, but a new section (d), Executive Lobbying Costs, was added. It disallows costs for "attempting to improperly influence, either directly or indirectly, an employee or officer of the Executive Branch of the Federal Government to give consideration or to act regarding a sponsored agreement or a regulatory matter. Improper influence means any influence that induces or tends to induce a Federal employee or officer to give consideration or to act regarding a federally-sponsored agreement or regulatory matter on a basis other than the merits of the matter."

The definition of "executive lobbying" is consistent with federal law prohibiting use of federal funds to lobby for a grant award or cooperative agreement. It allows advocacy on federal regulatory matters as long as it is based on the "merits of the matter".

The simplified cost principles will affect more than 600 programs administered by 26 federal agencies. Currently the federal government spends about $400 billion per year on these programs. The announcement acknowledged that many programs rely on more than one federal grant from more than one agency, adding to the complexity of grant administration. Some of the 184 comments OMB received suggested improvements to the circulars. However, OMB will consider such changes in the future.

On May 11 OMB announced that it has created a new Title 2 in the Code of Federal Regulations that will be a central point of reference for all government wide guidance on grants. The announcement said subtitle A will include all government wide guidance for grants and cooperative agreements, and subtitle B will c contain all specific agency regulations adopting OMB guidance. Subtitle A will be published in two phases. First, a Chapter II will include all guidance and circulars in their current form. As changes are made and finalized they will be published in Chapter I and the old version in Chapter 2 will be deleted. OMB Circulars will continue to be available on OMB's website.

The announcement said OMB is working with an interagency group to "consider ways to improve the OMB guidance and to develop an outline, to the extent possible, for agency regulations implementing the guidance." After final changes to the Circulars are completed, OMB will review agency regulations to ensure conformity. However, OMB said the diversity of programs "makes it inappropriate for the OMB guidance to prescribe all of the agency-specific and program-specific requirements that may be needed." Agencies are required to provide OMB with justification for any alternative or additional provisions in their regulations.

Democratic Senator Cancels Criticized Fundraiser

Sen. Blanche Lincoln (D-AK) has decided to cancel his July 28 fundraiser that was to be held during the weekend of Democratic National Convention in Boston. Worried about both potential criticism and comparisons with the fundraiser hosted by Rep. Tom DeLay's (R-TX), Lincoln decided to pull the plug. For more on this see last week's *Watcher* story entitled, In the Name of Charity or Political Gain?

Lawsuits Challenge Viewpoint Discrimination Against Nonprofit Public Communications

The American Civil Liberties Union (ACLU) filed two federal lawsuits aimed at protecting nonprofit speech.

Organizations advocating for changes in federal drug policy, represented by the ACLU, filed suit in federal district court challenging the constitutionality of an amendment in the FY2004 appropriations bill. The amendment, sponsored by Rep. Ernest Istook (R-OK), prohibits federally funded transit authorities from accepting advertisements promoting the decriminalization of any Schedule I substance, including marijuana, for medical or other purposes. Istook introduced the amendment after seeing an advertisement on the District of Columbia's Metrorail system that showed a picture of a man holding a woman in his arms with a tag line, "Enjoy better sex! Legalize and Tax Marijuana." After the FY2004 appropriations became law, the ACLU along with the Drug Policy Alliance, Change the Climate (authors of the Metrorail advertisement), and the Marijuana Policy Project submitted an advertisement to the Washington Metropolitan Area Transit Authority (WMATA) showing a group of ordinary people standing behind prison bars under the headline, "Marijuana Laws Waste Billions of Taxpayer Dollars to Lock Up Non-Violent Americans." The ad was rejected. The groups are asking the court to declare the Istook Amendment unconstitutional and to order WMATA to accept the paid advertisement. Arguments in the case were heard April 28.

For more background information on the Istook Amendment see our Dec. 15 *Watcher* article, Istook Strikes Back - Another Attack on Nonprofit Speech.

For more information on the ACLU et al. suit against the Washington Metropolitan Area Transit Authority see the ACLU's press release.

In another case of viewpoint discrimination, the 3 Rivers Music Festival in South Carolina, refused the Midlands chapter of National Organization for the Reform of Marijuana Laws (NORML) the right to advocate and distribute

information at the festival. NORML was the only nonprofit organization to have their booth application turned down by the festival. The South Carolina Chapter of the ACLU immediately sent a letter to the 3 River Music Festival demanding that NORML be able to attend the festival and have a booth. In addition to the letter, the ACLU filed a federal suit against the festival. Festival then agreed to allow NORML to participate, but stated that it had a written policy that called for the removal of any activists that do not remain in their booth to distribute literature. Before the judge was able to rule on the case, the 3 Rivers Music Festival decided to allow nonprofits to hand out literature. In the end, NORML attended the festival, had a booth alongside nonprofit advocacy groups, and freely distributed literature.

Anti-regulatory Bill Pushes Through House

A bill making its way through the House threatens to advance the cause of "regulatory budgeting" policies that ration our protections of the public health, safety and environment based on phony cost and benefit numbers tailoredto serve industry interests.

Called the "Paperwork and Regulatory Improvements Act of 2004," H.R. 2432 moved from its subcommittee directly to markup by the full government reform committee May 13. The House as a whole has yet to take up the bill but could do so very soon now that it is being reported out of committee.

H.R. 2432 calls for the following:

- **Making the case for regulatory budgeting.** The bill would move us closer to "regulatory budgeting," a dangerous concept that treats the vital protections of public health, safety, and environment as though they were gratuitous expenses that must be rationed. The ultimate vision of regulatory budgeting is a world in which the economists have the final say on our public safeguards, as incalculable and literally priceless benefits, such as lives saved, irreplaceable natural resources conserved, and diseases prevented, are turned in cash-dollar figures and weighed against the costs to industry of complying with new protective rules. Our safeguards could then be "budgeted" and subjected to arbitrary caps. H.R. 2432 will bring us closer to this nightmare scenario by having the White House study the feasibility of regulatory budgeting, in the process using taxpayer dollars to create the data that will be used to make the case for turning the vision of regulatory budgeting into a frightening reality.

- **Hiding the anti-regulatory agenda.** The bill would also require the White House to incorporate its annual report on the costs and benefits of regulation into its annual budget papers. This annual report lays out an anti-regulatory agenda and has been the platform the White House uses to invite industry to nominate public safeguards to be added to a "hit list." Given its important role in anti-regulatory policy, this report should not be buried under the arcana of budget issues. This section of the bill would also advance the regulatory budgeting agenda by re-framing our public safeguards as "off-budget costs."

- **Slowing the process.** This bill would further slow down the regulatory process by increasing the analysis that proposed rules have to go through. One section would establish that yet another arm of the government, this time Congress' own General Accounting Office, will be required to conduct its own cost-benefit analysis of proposed regulations — even though the agency and, many times, OMB as well have already conducted their own analyses. Cost-benefit analysis takes a lot of time, demands a large investment of resources, and produces very little benefit except to industry, which such analyses typically favor.

The bill also taps into understandable frustrations with IRS paperwork to advance a larger agenda that could limit the collection of information needed to make sure our public safeguards are effective. No one loves "red tape," but the cause of cutting red tape has left us with the Paperwork Reduction Act, a seemingly benign law that calls for mandatory reductions of all federal information collections, including the gathering of data intended to serve the public interest. One section of H.R. 2432 would advance the "paperwork-reduction" effort by studying ways to reduce IRS paperwork "burdens" on small business. Definitions of "small business" would include, in some cases, multimillion dollar corporations that are leaders in their respective fields but have small numbers of employees.

OSHA Bills Protect Employers at Cost of Workers' Safety

The House may soon consider four bills amending the Occupational Safety and Health Act of 1970, which would effectively consolidate White House control over the Occupational Safety and Health Review Commission (OSHRC) and provide leniency to employers at the cost of the health and safety of workers.

The first, the Occupational Safety and Health Small Business Day in Court Act, would give greater leeway to businesses that fail to file a response to OSHA citations within the 15-day deadline. Under this amendment, an OSHA citation is not final if the employer failed to contest the citation within the given time due to "mistake, inadvertence, surprise, or excusable neglect." Though the bill may ensure all businesses get their day in court, it also allows employers to contest a ruling after it is finalized, potentially clogging the commission with appeals while workplace hazards go on unchecked.

The second of the proposed bills would, under the guise of efficiency, add two more board members to the Occupational Safety and Health Review Commission. The president would be able to appoint both new members, with one term to expire in 2006 and the other in 2008. The bill also gives the President the ability to increase the length of the term of a member of the board for up to a year. Struck down during markup was a clause that would have allowed a two-person majority for any subcommittee designated by the chairman. As the bill stands, Bush administration appointees will hold two-fifths of the vote in a commission that decides cases by a simple majority. In adding two additional positions both to be filled by the President, this bill gives substantial power to decide OSHA cases to the White House. In a commission that makes decisions through a majority vote, adding members seems an ineffective way to increase efficiency.

The bill also requires that those commissioners have *legal training*, rather than just *related training*. Thus, healthcare professionals or safety experts who may be able to evaluate the health and safety risks posed by a violation will not be able to hold a seat on the commission.

Not only could the White House tighten its grip on OSHRC through the addition of two positions, but a third bill states that OSHRC, and not the Secretary of Labor, should be give deference in interpreting OSHA standards, even though those standards are developed and implemented by the Secretary of Labor, not OSHRC. The legislation overturns a 1991 Supreme Court decision that determined that the Secretary of Labor should be given deference.

The fourth bill, the Occupational Safety and Health Small Employer Access to Justice Act, would award attorney's fees to small business employers who challenge OSHA citation and win, regardless of whether the citation was substantially justified. Previous legislation already grants attorney's fees in cases in which the citation is unjustified. Expanding the right to attorney's fees will have a serious chilling effect on OSHA's ability to give citations in borderline cases, leaving violators to go unpunished. Businesses that qualify under the act, those with assets of up to 7 million dollars and up to 100 employees, make up 97.7 percent of private sector businesses and have a substantially higher rate of employee injury than larger businesses.

Side-Impact Air Bag Rule Issued, but Advocates Raise Questions

The federal highway safety agency has issued a new rule requiring side-impact air bags. However, safety advocates argue that, while a significant step forward, the rule is neither innovative nor sufficient to address side-impact collisions.

The new rule governs the amount of impact a test dummy registers during crash testing. The consequences of the new performance standard will most likely be that automakers will make air bags that protect the head during side-impact collisions a standard feature of new vehicles. For vehicles with sensors that detect a rollover, these side-impact bags will provide additional protection for the head during rollover crashes.

Safety advocates, however, argue that the new rule is not so new: it embodies a safety standard that auto makers had already voluntarily set in an agreement with Canada. Further, NHTSA called for industry to install side- impact air bags back in 1999, but the public was excluded from a negotiation that resulted only in side-impact air bags being offered at a high mark-up as a luxury option rather than a standard safety feature.

Moreover, the side-impact standard does not completely address the issue of vehicle incompatibility. In a side-impact crash, a strike vehicle collides with a struck vehicle. If the striking vehicle is a pick-up truck or SUV and the struck car a sedan, the damage can be significant. As Public Citizen points out, the new side-impact standard only addresses the smaller struck vehicle and ignores the larger vehicle's aggressive design features that

contribute to the incompatibility problem.

For more comprehensive safety measures, Public Citizen urges the passage of the Safe, Accountable, Flexible, and Efficient Transportation Equity Act, or SAFETEA. The SAFETEA bill, currently pending in Congress, would extend beyond the side-impact standard by minimizing incompatibility, reducing rollover crashes and injuries, and implementing new public disclosures of vehicle safety information.

FDA Ignores Experts, Rejects Plan B for Over-the-Counter Use

The Food and Drug Administration (FDA) rejected an application to make Plan B, the "morning-after pill," available without a prescription, despite the nearly unanimous advice of its own panel of experts that the drug was safe for over-the-counter use.

An FDA-appointed group of scientists, medical professionals, and consumer and industry representatives reviewed materials on the safety and effectiveness of Plan B. For a drug to be approved for over-the-counter use, a patient must be able to do three things without the intervention of a physician: diagnose the problem, treat the problem effectively, and understand the drug's label. Considering both product safety and the requirements for over-the-counter use, the advisory committee determined in a 23 to 4 vote that the drug was a safe and effective option for women.

The decision was lauded by healthcare professionals as well as FDA staff members. In December, more than 70 medical and advocacy organizations signed a letter supporting the committee's recommendation to make Plan B available over the counter. In January, the Association of Reproductive Health Professionals (ARHP), representing more than 11,000 reproductive healthcare professionals, wrote FDA commissioner, Mark McClellan, to voice their support for the over-the-counter status of Plan B.

Dr. Steven Galson, acting director of the FDA's center for drug evaluation, made an unprecedented move when he rejected the advice of the joint committee, the healthcare community, and FDA staff, and wrote Plan B makers Barr Pharmaceuticals that the drug was "not approvable" for OTC sale.

The FDA rejected the proposal on grounds that not enough research had been done on whether girls younger than sixteen would understand how to use the drug. According to The New York Times, Galson maintains that "the worst-case scenario" of the availability of Plan B without a prescription "is you've got a young couple and they would normally use a condom when they were having intercourse, but since they know they can run to the CVS to get Plan B, are they going to worry about that?"

Even if Plan B required further studies, Dr. Galson could have deemed the drug approvable and still required that more information be provided. Rather he chose took the stronger stance of deeming the drug "not approvable," which requires the company to reapply for over-the-counter status rather than simply produce the necessary information. As Dr. Galson told the New York Times, "We said that the shortcomings are so large that we are not able to go that intermediary step."

The drug company plans to meet the hurdle put in place by the FDA and to resubmit its request for over-the-counter status. The ruling appears to require that Barr Pharmaceuticals do additional clinical trials as well as reapply for over-the-counter status, possibly delaying the appearance of Plan B on the shelves for years. The original application for over-the-counter status was likewise delayed; after it was filed in April 2003, FDA slated its ruling for February 2004, but delayed its decision until May for undisclosed reasons.

Rather than allowing the easy access of a safe drug that could avoid 89 percent of unwanted pregnancies from occurring, the administration chose instead to play to the politics of its electoral base.

Transcript of Advisory Board Meeting

Briefing Information from Advisory Board Meeting, including findings from studies of Plan B's safety and effectiveness

FDA's information on Plan B, including the letter of not approvable status

eRulemaking Workshops

The School of Public Policy and Public Administration at the George Washington University will host a series of half-day workshops on the federal eRulemaking Initiative June 2 to 4. The purpose of the workshops is to solicit input from various end-user communities with a stake in eRulemaking.

Participants representing six broadly defined constituencies are being invited to attend including: 1) larger businesses, 2) smaller businesses, 3) labor & environmental advocacy groups, 4) good government and public participation groups, 5) state & local governments, and 6) the legal and lobbying professions. Organizers also welcome the participation of federal agency personnel and academics at any of the sessions.

The eRulemaking Initiative represents the government's first serious steps toward more effectively integrating new electronic technologies such as the Internet into the regulatory process. For years public access advocates have encouraged the government to make greater use of the Internet. Many hope that as a component of making it easier to participate, the eRulemaking Initiative will provide fast electronic access to vast amounts of information, studies and documents related to any rule.

Space is limited at the workshops so only those willing to attend and contribute to a serious dialogue should register. The workshops are free and include lunch. (Registration and Information.)

As U.S. Embraces Secrecy, Other Countries Embrace Openness

Countries around the world are embracing laws promoting openness in government, according to an updated global survey for freedominfo.org, a web site operated by the National Security Archive and other openness advocates.

Over fifty countries have adopted freedom-of-information laws similar to the United States' Freedom of Information Act, which guarantees the public's right to access documents held by most of the executive branch. More than half of these governments passed these laws within the last decade.

The May 2004 update of the report, The Freedominfo.org Global Survey: Freedom of Information and Access to Government Records Around the World, includes profiles of four new laws passed since the report was last updated in September 2003. Each profile links to the text of the law and briefly notes the law's effectiveness (or lack thereof).

Ironically, while this report documents that other countries are embracing open government and more democracy to keep government accountable, the federal government here in the United States is under fire for turning its back on this country's biggest competitive advantage, its openness, and vastly expanding government secrecy. While the White House scrubs information from government websites, suppresses or rewrites scientific conclusions to conform to ideological and policy positions, Congress and the Bush Administration have undermined FOIA in two direct ways: The Homeland Security Act, passed in 2002, allows businesses to tell the federal government behind closed doors about known public health and safety threats to our nation's "critical infrastructure" without facing requirements, timetables or other consequences to fix the problems. And, reversing the previous administration's presumption of openness, Attorney General John Ashcroft in October 2001 directed federal agencies to reject requests for documents under FOIA whenever possible.

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