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Commentary: Fiscal Hawks Shaping Focus of Debt Commission

On April 27, President Obama's fiscal commission convened its first meeting, kicking off a seven-month discussion among 18 panelists on ways the federal government can reduce the federal budget deficit and shrink the national debt. The next day, many of those same panel members, including co-chairs Erskine Bowles and former Sen. Alan Simpson (R-WY), attended a "Fiscal Summit" organized by the Peter G. Peterson Foundation to discuss the same issues. Talk about how to overcome deficits and the debt at the Peterson event, which centered on eviscerating the nation's social safety net, mirrored discussion at the commission meeting.

The inaugural meeting of the president's deficit commission lasted close to three hours and included testimony from Federal Reserve Chairman Benjamin Bernake, Office of Management and Budget (OMB) Director Peter Orszag, and former Congressional Budget Office (CBO) directors Rudolph Penner and Robert Reischauer, along with statements from each of the panel members. Throughout the meeting, most commission members – with the notable exceptions of

Sen. Richard Durbin (D-IL) and Reps. Xavier Becerra (D-CA) and Jan Schakowsky (D-IL) – regurgitated the new conventional wisdom on Capitol Hill that current deficits and long-term debt are the same problem and that Congress must act immediately by attacking "entitlements," including Medicare, Medicaid, and Social Security.

The April 28 Peterson event, nicknamed the "Deficit Fest" by *Huffington Post* columnist Dan Froomkin, featured some of the same unexamined assumptions and misguided ideas thrown around by politicians of both parties the previous day. While there has been some talk about keeping all options on the table, as Froomkin notes, "the pillars of the Washington establishment" have only one "fully developed policy proposal," which "is that America's most successful social program needs to be scaled back so that it provides fewer people less money over a shorter period of time."

According to economist Dean Baker, Peter Peterson "is a Wall Street investment banker who has ... committed over $1billion of his wealth to this effort ... to cut Social Security and Medicare." Baker was part of a group brought together by the Campaign for America's Future – the political action arm of the Institute for America's Future, a progressive policy research institute – the same day as the president's fiscal commission meeting to highlight the ostensible level of Peterson's influence over the debt panel's priorities. Ironically, C-SPAN, the cable network of Congress and the executive branch, grouped the video of the president's fiscal commission meeting with the videos of the morning and afternoon sessions of the Peterson fiscal event together under the same post.

There are a few voices of moderation. Froomkin labeled Center on Budget and Policy Priorities (CBPP) Executive Director Robert Greenstein and Economic Policy Institute (EPI) President Lawrence Mishel as insurgents at the Peterson event. The columnist sympathetically notes that the former "repeatedly reminded the audience of the enormous cost of tax giveaways to the wealthy and corporations," and the latter "argued that cutting Social Security benefits, for instance by increasing the retirement age, would unduly affect lower-income people."

While support for Social Security and Medicare have always been robust, the "tinkering around the edges" approach of raising the age limit a little here and cutting a few benefits there has an exaggerated effect on the poor and minorities. As Mishel noted during the Peterson function, while "life expectancy grew a lot over the last few decades ... it only really grew for people in the upper half of the income distribution. People in the bottom half of the income distribution are not living longer." This means that lower-income folks, who usually lack the funds to adequately represent themselves in government, will get cut out from the social safety net, leaving middle- and upper-income individuals with the benefits.

Moreover, the problem with long-term debt growth is rooted in medical costs, not Social Security. Despite scaremongering rhetoric about the impending “insolvency” of Social Security, remediation of its funding issues would do little to pull the federal budget off its unsustainable course. If Congress takes no action, Social Security will continue to pay retirees their promised benefits until 2037, after which they are projected to receive 76 percent of their promised benefits. To correct this, Congress could increase the Social Security payroll tax from 12.4

percent to 14.4 percent. An even better solution, far more progressive in nature, would be to increase the limit on taxable earnings. Currently, the Social Security tax is paid only on the first $106,800 of each employee's taxable earnings; increasing this amount could substantially mitigate the problem.

However, growth in health care costs, which the CBO projects to outpace economic (GDP) growth, will cause Medicare and Medicaid expenditures to increase from 9 percent of the size of the economy (in 2007) to 19 percent in 2082. While the combination of fully financing Social Security, Medicare, and Medicaid through deficit spending will cause the federal debt to equal over 1,100 percent of GDP in 2080, the CBO notes that Medicare and Medicaid will account for 80 percent of spending increases between now and 2035, and 90 percent of spending growth between now and 2080.

Amendments Bring Policy Debates to the Budget Resolution

On April 22, the Senate Budget Committee approved its Fiscal Year 2011 budget resolution, moving the chamber one step closer to setting spending limits for the coming appropriations process. The resolution provoked controversy, as it would cut spending levels below those in President Obama's budget request, which itself mandated a significant spending freeze on discretionary spending outside of defense and homeland security. The measure also frequently attracts contentious, policy-related amendments, and the current resolution is no exception.

Possibly the most significant amendment passed by the committee would create a new point of order should the Senate consider a provision or amendment under the reconciliation process that would "create gross new direct spending that exceeds 20 percent of the total savings" in the provision. Sen. Judd Gregg (R-NH) introduced the amendment, which would require 60 votes to overcome a point of order, effectively counteracting the procedural advantages that reconciliation provides. His objective was to ensure that legislation passed under reconciliation is largely used for deficit and debt reduction. Had this point of order been in effect this spring, it would have prevented reconciliation fixes for the recent health care legislation, according to Gregg. Going forward, the provision will make it difficult to use reconciliation on the pending climate bill and could have a lasting effect on the budget process.

Another noteworthy amendment was offered by Sen. Russ Feingold (D-WI), who actually ended up voting against the overall budget resolution. Feingold's amendment would force Congress to pay for future war spending by requiring any such funding be offset over a ten-year period. To date, despite calls for "responsible" budgeting, Congress has funded the wars in Iraq and Afghanistan through yearly supplemental appropriations, which allow the spending to avoid budget limits set out in the budget resolution while creating larger budget deficits. By requiring that this spending be paid for over a ten-year window, Feingold's amendment helps to put war funding on equal footing with other government spending. Feingold's amendment passed on a 15-8 vote, with two Republicans joining all thirteen Democrats in voting for the amendment.

The committee also approved an amendment from Sen. Lindsey Graham (R-SC), which reduced the overall amount obligated under the Troubled Asset Relief Program (TARP). Passed in 2008, the Bush administration intended to use the $700 billion in TARP funding to purchase "toxic" assets, mostly the billions of dollars in subprime loans and other housing-related securities that helped bring about the financial crisis and to help improve the health of the nation's struggling financial institutions. However, the program never fulfilled its grand intentions and ended up using far less of the $700 billion authorized to it. As of March 31, only about $500 billion was allocated to be spent, of which about $185 billion was repaid by entities receiving bailouts. That leaves some $385 billion in unallocated funding under TARP. Graham's amendment would reduce the TARP authorization by $44 billion to get rid of some of this unallocated money.

As it does not appear that any more financial institutions will be in dire need of support, the Obama administration had been planning on using some of the remaining TARP funds to create a small business loan program, a move which would require congressional authorization. Sen. Mark Begich (D-AK) introduced an amendment to authorize these loans, but the committee instead narrowly approved Graham's alternative in a 12-11 vote, rebuffing the administration.

The committee also passed an amendment offered by Sen. Sheldon Whitehouse (D-RI) that took aim at the U.S. Supreme Court's decision in *Citizens United v. Federal Election Commission* that allowed unlimited corporate spending on political campaigns (see related story). The amendment creates a reserve fund that will allow legislators to change assumptions in the budget resolution that would remove certain hurdles for authorization of funding for the Securities and Exchange Commission (SEC), FEC, and other agencies to regulate corporate involvement in elections.

The committee's budget resolution was also notable for amendments it rejected. Among others, it voted down an amendment from Sen. Jeff Sessions (R-AL), who once again tried to institute particularly strict discretionary budget caps for the next three fiscal years. Sessions introduced a similar amendment to three other legislative vehicles (which OMB Watch strongly opposed), and the Senate voted it down every in every instance. Sessions' amendment would have instituted substantial discretionary budget cuts, far below the levels asked for by either the president's budget request or the budget resolution put forward by the Budget Committee's chairman, Sen. Kent Conrad (D-ND). The amendment failed on a party line vote (10-13), possibly because the chairman's budget represented a safe middle ground between the president's request and Sessions' budget caps, giving centrist Democrats on the committee the political cover they needed to avoid implementing severe spending cuts.

While the amendments detailed above are some of the more significant ones passed by the Senate Budget Committee, there are many more amendments in the resolution's future. It must pass the entire Senate, the House Budget Committee, and the entire House, and it will pick up (and probably drop) more amendments at each stage of the process. This, of course, is assuming the leadership of either chamber decides to continue pushing forward with the budget resolution. According to the Congressional Budget Act of 1974, which dictates the steps of the budget process, the House may begin considering appropriations bills after May 15 if a budget resolution has not been passed. Since the House Budget Committee has not yet scheduled a

markup, odds are Congress will not meet that deadline.

Open Government Advocates Grade Federal Agency Openness Plans

On May 3, a group of open government experts, including OMB Watch, released a review of federal agencies' initial Open Government Plans that were published on April 7. Overall, the independent audit organized by OpenTheGovernment.org found that agencies did good work, but much remains to be done.

Under the Obama administration's Dec. 8, 2009, Open Government Directive (OGD), all agencies were required to produce Open Government Plans within four months. Agencies met the deadline but with inconsistent levels of success. While many agencies went beyond the requirements of the OGD for certain aspects of the plans, others failed to address basic requirements in the directive.

OpenTheGovernment.org identified key differences between plans that excelled and those that underperformed. The coalition cited each plan's level of specificity, ease of accessing information, identification of key audiences, and the quality and sustainability of flagship initiatives as the critical scoring areas that most often made the difference between strong and weak plans. However, the report also noted that many of the deficiencies in these areas can be easily fixed.

The April 7 plans were graded based on the specific requirements set forth in the OGD. The requirements were judged on a 0 to 2 scale, with 0 assigned for requirements that were unaddressed, 1 assigned for partial progress on a requirement, and 2 assigned for satisfactorily meeting the requirement. Bonus points were awarded for exceeding the requirements. The total score possible, excluding bonus points, was either 58 or 60 depending on whether an agency has original classification authority. This is because the OGD had special declassification requirements for those agencies, increasing their total possible points. Agency plans that were awarded bonus points may have exceeded the maximum score of 58 or 60.

Overall, most agencies scored at 70 percent of total points or higher. Fewer than half of all agencies received 80 percent or higher. The top three agencies, which scored above 100 percent, were the National Aeronautic and Space Administration (NASA), the Department of Housing and Urban Development (HUD), and the U.S. Environmental Protection Agency (EPA). It should be noted that no agency achieved 100 percent compliance with the OGD criteria, as can be seen in the agencies' basic scores (scores that did not include any bonus points). Those agencies that scored over 100 percent overcame minor point deductions by earning bonus points.

The report separated the plans' scores into three groups. The strongest plans included eight agencies that had the most detailed, deadline-specific, and innovative plans. The middle set was the largest, composed of agencies that made strong efforts on the plans but still needed

improvements on several requirements. Five agencies made up the weakest set, with plans that were significantly lacking in several components.

The five lowest scores, in order from lowest to highest, went to the Department of Justice (DOJ), the Department of Energy, the Office of Management and Budget (OMB), the Department of Defense, and the Department of the Treasury. Of particular disappointment to many of the evaluators was the poor performance by OMB and DOJ. Given that OMB has responsibility for overseeing portions of the OGD and DOJ has long overseen federal implementation of the Freedom of Information Act (FOIA), evaluators expected these agencies to seize this opportunity to lead by example.

For instance, OMB could have taken this opportunity to make its new contractor accountability database – the Federal Award Performance and Integrity Information System (FAPIIS) – accessible to the public. DOJ's ranking at the bottom of the stack was also disappointing given Attorney General Eric Holder's guidance to federal agencies in 2009, which stated his strong support for President Obama's commitment to open government.

The open government community and the administration both recognize that the Open Government Plans are evolving, "living documents." Kate Beddingfield, a spokesperson for the White House, commented on the OpenTheGovernment.org evaluation, stating, "We also agree that much remains to be done on this unprecedented effort to make government more transparent, and we look forward to continuing to work together with open government advocates and the public on the evolution and implementation of these plans."

The Department of Transportation has already produced a new version of its plan. The department refers to its plan as "a living document" that will change and improve over time. This second plan was not scored by the audit, which was restricted to only reviewing the initial plans, but it addresses many of the areas for which the initial plan was found to be deficient. The White House Office of Science and Technology Policy has also announced its intention to develop another version of its plan, demonstrating significant interest in the effort coming from federal agencies.

Agencies also conducted self-assessments of their own plans, the results of which are summarized on the White House's Open Government Dashboard. Comparing OpenTheGovernment.org's independent evaluation to the self-assessments reveals different perspectives on what the agencies have achieved so far. The White House provided a similar list of 30 specific criteria on a checklist and graded plans on a three-tiered scale: green for fully satisfying the requirement; yellow for partial progress on the requirement; and red for failing to meet the requirement. The dashboard summarizes performance on the criteria in five categories: formulating the plans; transparency; participation; collaboration; and flagship initiative, along with an overall plan score derived from the scores in the five main categories.

The White House assessment shows that three agencies scored green in all five main categories, as well as for the overall plan: the Department of Health and Human Services (HHS), the

Department of Transportation (DOT), and NASA. In OpenTheGovernment.org's independent audit, both NASA and DOT scored very high and were ranked 1st and 6th, respectively.

However, HHS ranked 20th in the independent audit, which placed it near the bottom of middle group. Although HHS was applauded by evaluators for its specific commitments to identifying and publishing high-value data sets in 2010, it did not score well in all areas. HHS was found lacking in demonstrating the sustainability of its initiative and failed to identify specific timelines for the reduction of its Freedom of Information Act request backlog. The most evident reason for the discrepancy between the White House and independent assessments is that the White House gave credit for compliance even if an agency included an aspirational reference to the requirement without concrete steps for meeting its goals. This only merited one point in the independent audit.

In some respects, the independent audit is the embodiment of the OGD in that it has established a new type of collaborative interaction between the public and federal agencies, aimed at improving government openness. Many of the federal agencies have reached out to the independent evaluators to better understand and respond to the assessments. Building on this, the openness community plans to revisit agency plans in June to see what progress, if any, agencies have made on satisfying all of the OGD requirements.

Currently, the open government community is also developing standards for what information each federal agency should, at a minimum, disclose. This "floor" on government openness is important because it can ensure consistency between agencies, which can enable the public to obtain certain information across the government, regardless of which agency website is visited. The floor criteria will focus on providing basic information and actions designed to achieve agency accountability and promote informed public participation. Once these standards are completed, the openness community will begin assessing whether agencies are meeting them.

The evaluators view the agency plans and the audit as the beginning of a process to make government more transparent, participatory, and collaborative. Future audits will eventually transition from focusing on planning to actual progress on taking action to accomplish their specified goals. As agencies move forward in coming months, their efforts to act on their plans will garner increased attention from the openness community.

EPA Puts More Environment Online

Several new online tools developed by the U.S. Environmental Protection Agency (EPA) are now available to provide the public with a variety of environmental information collected by the agency. The tools provide access to information about enforcement actions against polluters in the Chesapeake Bay watershed and across the nation, plus information about health risks from toxic chemicals and the ongoing oil spill disaster in the Gulf of Mexico. These online information access tools follow the recent release of the EPA's Open Government Plan, which makes public access to information a priority for the agency.

Clean Water Act

The EPA recently launched a new set of online tools, data, and interactive maps containing information on violations of the federal Clean Water Act. The web tools are part of EPA's Clean Water Act Action Plan. The agency has made enforcement of water quality laws a priority and in 2009 invited public participation on the creation of the action plan. In response to public comments, the EPA made data use a key feature of the plan.

According to the head of EPA's enforcement office, Cynthia Giles, "Making this information more accessible and understandable empowers millions of people to press for better compliance and enforcement in their communities."

The new web page provides interactive information from EPA's 2008 Annual Noncompliance Report, which pertains to about 40,000 permitted Clean Water Act polluters across the country. The site includes information on how many permits have been issued, how frequently sampling data is reviewed to determine if violations occurred, the frequency of violations, and the frequency that formal enforcement was taken in 2008. The information on the website is also available in HTML format, as a PDF document, and as a data table.

Despite the website's numerous useful features, a significant amount of information remains missing. Many states control their own water quality programs, and the new website cautions users that "states are not required to enter the data in the federal data systems." The agency therefore estimates how much information for a particular state is available through the web page. Some states do not even provide information to the EPA database on serious violations.

Summary data for each state's enforcement actions are only available for 2008 and for non-major permittees. The new website also does not count large major facilities, general permits, or wet weather permits. Detailed information, information from additional years, and reports from larger facilities are available on EPA's Enforcement and Compliance History Online (ECHO) database website.

Chesapeake Bay

Similar to the Clean Water Act Annual Noncompliance Report, EPA recently launched an online map that shows the locations of federal air and water enforcement actions in the Chesapeake Bay watershed and airshed.

EPA Administrator Lisa Jackson stated in a press release, "Transparency and accountability are essential to the work we're doing to clean up the Chesapeake and restore these treasured waters. The community now has new tools it needs to see where EPA is taking action to improve water quality and protect the bay."

The interactive map provides information on EPA enforcement actions and cases since 2009 under the Clean Air Act, Clean Water Act, and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, also known as Superfund).

Again, similar to the Clean Water Act Annual Noncompliance Report, some data from state governments are not available. The map does not show environmental enforcement actions taken by state or local environmental agencies.

Clicking on the flag for a specific facility on the map will open the enforcement case report for that facility. From this page, a user can click to retrieve more detailed facility data. In some cases, a settlement has been reached, and the details are available via links on the website.

EPA developed a draft Chesapeake Bay Compliance and Enforcement Strategy following a May 12, 2009, executive order from President Obama. The draft strategy seeks to target the greatest sources of pollution impairing the bay and its tributaries. The draft strategy is a multi-state plan for addressing violations of federal environmental laws and will be finalized in May as part of the evaluation of progress in meeting the goals of Obama's Chesapeake Bay Executive Order.

Both the Clean Water Act Annual Noncompliance Report website and the Chesapeake Bay enforcement map draw their compliance information from EPA's ECHO database. ECHO contains a large amount of enforcement and compliance data, but navigating and understanding the significance of the data in ECHO remain challenges.

For example, one facility found in the Chesapeake Bay watershed is the Oxford Waste Water Treatment Plant in Oxford, MD. According to the new online map, this water treatment plant exceeded its effluent permit 27 times over a three-year period. Clicking on the facility's flag on the map of Maryland produces a detailed report from the ECHO database. However, it is still far from intuitive to identify from the ECHO report what the exceedances were and what the consequences were – both for the facility in terms of fines or changes to operations and to the environment in terms of impacts to water quality or damage to habitat.

The public is well served by online tools that not only provide useful statistics, but also empower citizens by placing the information into a useful context. If a facility has violated federal law repeatedly, what have been the consequences? Is the facility changing its operations to be more in compliance? Has there been any ecological damage, and if so, what mitigation has occurred? These are basic questions of accountability, and the data must help state and federal regulators and the public answer these questions and hold polluters accountable. The two new online tools take strong steps in this direction, but more could be done with the ECHO database to make it more effective. A more versatile search feature and expanded downloading capabilities would help many users. All users would benefit from having the data placed into meaningful context.

Oil Spill and Toxics Data

Part of the agency's ongoing response to the disastrous oil spill in the Gulf of Mexico has been to create a web page through which users can learn about EPA's response and the impacts on the region's air and water quality. Users of the new page can see the agency's plan for sampling and testing air, water, and sediment quality in the Gulf and track air quality monitoring data in real time.

One other recent addition to EPA's online data array is the release of "ToxRefDB," which allows the public to search and download thousands of toxicity testing results on hundreds of chemicals. Users may search by a chemical's name or identification number. The detailed information includes a diagram of the chemical and its basic characteristics and links to relevant animal studies on the health threats of the chemical. The database contains pesticide registration toxicity data that used to be stored as hard-copy and scanned documents.

The new online tools continue a trend started early in 2009 with the release of the EPA's MyEnvironment program. The MyEnvironment tool allows the public to enter a place name or zip code and receive a diverse amount of environmental information linked to that geographic region. MyEnvironment incorporates geographic information with local air and water quality data, cancer risk estimates, pollution reports from local facilities, and other environmental data.

Environmental, Health, and Safety Agencies Set Rulemaking Agendas

On April 26, federal agencies published their updated rulemaking agendas outlining past, present, and future regulations. The agendas provide insight into the Obama administration's plans and expectations in the coming months.

Each spring and fall, the executive branch publishes the *Unified Agenda of Regulatory and Deregulatory Actions*, commonly called the *Unified Agenda*. The agenda includes the individual rulemaking agendas for all executive branch agencies, including independent commissions. Agencies post online brief descriptions of their rules and projected timetables for milestones and completion. The agendas include proposed rules, final rules, recently completed rules, and long-term actions.

EPA

The U.S. Environmental Protection Agency (EPA) led all individual agencies with 342 agenda items. EPA added 43 new entries since its last agenda was published. Among them are a proposal to limit greenhouse gas emissions from heavy-duty vehicles, an update to the Chemicals of Concern list to include the consumer product chemicals bisphenol-A and phthalates, and proposed standards for the use of nanoscale materials.

EPA's agenda also indicates the agency is on track to finalize new greenhouse gas regulations for stationary sources such as factories and refineries. The agency expects to issue a final rule in May. A draft of the final rule was sent to the White House Office of Information and Regulatory Affairs for review on April 20. EPA announced in April new standards to limit greenhouse gas emissions from vehicles, and a companion rule for stationary sources has been expected.

EPA also says it will continue to update national air quality standards. EPA expects to issue final rules strengthening regulation of sulfur dioxide and ozone, or smog, in June and September, respectively. In November, EPA will consider whether to tighten controls of carbon monoxide

and will review existing regulations for particulate matter in December. EPA has said it will review, and revise if necessary, by the end of 2011 the standards for all six major air pollutants (sulfur dioxide, ozone, carbon monoxide, particulate matter, nitrogen dioxide, and lead) covered under the Clean Air Act.

Department of Labor

The Department of Labor has placed several new initiatives on its rulemaking agenda. The Occupational Safety and Health Administration (OSHA) announced its intent to launch the Injury and Illness Prevention Program which, if finalized, will require employers to maintain and follow safety plans that incorporate best practices and aim to protect workers from hazards they may face on the job. The program would be a departure from the hazard-by-hazard approach the agency has traditionally taken.

The Mine Safety and Health Administration (MSHA) is planning a rule to address a major procedural flaw that has drawn attention in the wake of the Massey Energy Upper Big Branch mine explosion that killed 29 workers in April. The agency will attempt to close a loophole whereby mine operators keep themselves off MSHA's pattern-of-violations list by challenging safety violations.

The Labor Department does not expect to finish work on many high-profile rules in 2010. For example, an OSHA proposal to limit workers' exposure to silica dust is not expected until February 2011. The rule has been on the agency's agenda since 1997. MSHA projects it will propose the new pattern-of-violations rule in January 2011.

David Michaels, the head of OSHA, acknowledged that many rules, particularly exposure standards, take too long to complete. "There are so many hoops we go through with every standard," Michaels said, referring to both public participation requirements and analytical requirements such as risk assessments. "We are working very hard to move [standards] more quickly," Michaels said.

Seth Harris, the Deputy Secretary for Labor, said that the Labor Department will take the timetables in agencies' agendas more seriously than it has in the past. Harris said the agencies should consider their agendas "a production schedule," adding, "I'm holding them accountable for meeting their deadlines." Michaels and Harris spoke April 29 at an event at the Center for American Progress where the department's agenda was discussed.

The agenda, though broad in scope and varied in issues, reflects the Labor Department's new philosophy of "plan, prevent, protect," Harris said. "Plan, prevent, protect aims to change the calculus so that employers and other entities regulated by the Labor Department will take responsibility for employment law compliance." The philosophy is intended in part to counter the "catch me if you can" attitude some employers have, in which they view workplace law violations as a cost of doing business, he said.

Other Agencies

The Department of Transportation (DOT) faces similar challenges. DOT's National Highway Traffic Safety Administration (NHTSA) says it will propose in December new regulations for accelerator control systems, which could potentially address the unintended acceleration defect that caused Toyota to recall millions of vehicles earlier in 2010. However, the rule has been on NHTSA's agenda since 2008. NHTSA is also behind schedule on a rule to create a 10-year-old test dummy needed to develop additional child restraint regulations. Congress directed the agency in 2002 to improve car safety for children weighing more than 50 pounds.

The Food Safety and Inspection Service (FSIS), the arm of the U.S. Department of Agriculture responsible for meat and poultry safety, added no new rules to its agenda. The agency says it will propose or finalize 12 new rules in the next few months. However, FSIS has already missed target dates for most of those rules, based on timetables in past agendas. FSIS is currently operating without a Senate-confirmed head, possibly complicating efforts to write new rules.

Some agencies' agendas reflect a focus on specific issues or problems confronting those agencies. The Food and Drug Administration (FDA), part of the Department of Health and Human Services, will direct much of its rulemaking capacity toward implementing the Family Smoking Prevention and Tobacco Control Act signed into law in 2009. The law gives FDA jurisdiction over tobacco for the first time. FDA added six new tobacco-related rules to its agenda. The agency expects to issue this summer proposals on cigars and smokeless tobacco products and to propose in November new regulations for cigarette pack warning labels.

The Consumer Product Safety Commission (CPSC) will continue to set standards under the Consumer Product Safety Improvement Act, the product safety overhaul Congress passed in 2008 largely aimed at protecting children. The act set a number of deadlines for new rules and programs. In the coming months, CPSC's commissioners will make final decisions on infant walker safety standards and take steps necessary to create an online database where the public can file complaints and incident reports about potentially dangerous products.

The Department of Energy (DOE) continues to update energy efficiency standards for appliances and other consumer products. DOE will soon propose energy efficiency standards for refrigerators and home furnaces. In 2010, DOE has already finalized new efficiency standards for small motors and for commercial clothes washers. The agenda includes several new items, including an energy conservation standard for televisions, expected to be proposed in December 2012.

Historically, the agenda has not been a useful tool. Agencies often miss timelines and milestones, and agencies have been subjected to long procedural delays due to the complexity of the regulatory process. However, the agenda can be a useful planning and accountability tool to measure the Obama administration's efforts to solve long-neglected health and safety problems if, as Labor's Harris suggests, it is used more as "a production schedule."

The entire Spring 2010 *Unified Agenda* is available at www.reginfo.gov/public/do/eAgendaMain. The next *Unified Agenda* is due to be published in October.

DISCLOSE Act Seeks to Blunt Impacts of Citizens United

To blunt the impacts of the U.S. Supreme Court decision in *Citizens United v. Federal Election Commission*, Rep. Chris Van Hollen (D-MD) and Sen. Charles Schumer (D-NY) recently introduced companion bills, both called the DISCLOSE Act (the Democracy Is Strengthened by Casting Light On Spending in Elections Act). The legislative response would create new, rigorous campaign finance disclosure requirements meant to prevent moneyed interests from drowning out the voices of citizens and smaller advocacy organizations.

The *Citizens United* decision in January struck down parts of the Bipartisan Campaign Reform Act (BCRA), which prohibited corporations (including nonprofit organizations) and labor unions from airing any "electioneering communications" – broadcast messages that refer to a federal candidate in the weeks before a general election or primary. The Court also ruled that corporations can use unlimited funds from their general treasuries to expressly advocate for the election or defeat of candidates for federal office as long as the actions are independent of campaigns.

During a press conference held outside the Supreme Court on April 29, Schumer said, "No longer will groups be able to live and [be] spending in the shadows." To offset the January ruling, the DISCLOSE Act (S. 3295) would strengthen financial disclosure and establish disclaimer requirements while setting new limits on political involvement by government contractors and foreign-controlled corporations. 39 Democratic senators and one independent have co-sponsored the bill thus far.

All corporations and 501(c)(4), 501(c)(5) (unions), 501(c)(6) (trade associations), and 527 organizations that spend money on independent expenditures or electioneering communications to influence a federal election are "covered" under the bill. The legislation expands the definition of an independent expenditure to include both express advocacy and the functional equivalent of express advocacy "because it can be interpreted by a reasonable person only as advocating the election or defeat of a candidate."

The companion bill in the House, H.R. 5175, was announced with two Republicans signing on as co-sponsors, Reps. Mike Castle (R-DE) and Walter Jones (R-NC). Upon releasing the bill, Van Hollen stated, "Every citizen has a right to know who is spending money to influence elections, and our legislation will allow voters to follow the money and make informed decisions."

Specifically, the DISCLOSE Act would require more explicit disclaimers. The CEO or highest-ranking official of a corporation would be required to appear on camera to say that he or she "approves this message." The top funder of the ad would also have to record a "stand-by-your-

ad" disclaimer, and the top five donors to an organization that purchases campaign-related TV advertising would be listed on the screen at the end of the message.

Part of the goal of the bill is to provide the public with complete information regarding the funding sources of campaign-related expenditures and rein in entities that try to hide their activities by donating to an intermediary. This is done, in part, by increasing the information that has to be disclosed to the Federal Election Commission (FEC).

If an organization such as a 501(c)(4) or 527 group spends more than $10,000 in a 12-month period on independent expenditures or electioneering communications (including transferring funds to another organization for the purpose of influencing an election), all donors who have given $1,000 or more to the organization during that period would have to be disclosed.

Expenditures of $10,000 or more made more than 20 days before an election, and expenditures of $1,000 or more made within 20 days before an election, would also have to be reported to the FEC within 24 hours.

Additionally, the DISCLOSE Act would allow a donor to specify that a contribution may not be used for campaign-related activity. An organization would then be restricted from using the donation for that purpose and would not disclose the donor's identity.

Other provisions include:

- Corporations can establish a separate "Campaign-Related Activity" account to receive and disburse political expenditures
- Federally registered lobbyists must disclose any election spending costing more than $1,000, as well as the name of the candidate or campaign supported or opposed
- All campaign-related expenditures must be disclosed on an organization's website with a link on the homepage within 24 hours of reporting the information to the FEC
- Expenditures must also be disclosed to shareholders and members of the organization in periodic or annual financial reports
- Political parties can spend unlimited amounts of their own funds in support of the party's candidates, as long as a candidate or group of candidates does not "control" the spending

The DISCLOSE Act goes beyond disclosure and would prohibit corporations that receive federal contracts worth more than $50,000 from spending money to influence federal elections. Companies that have received and not paid back funds from the federal Troubled Asset Relief Program (TARP) would also be forbidden from spending money on elections, as would companies that have 20 percent foreign voting shares, a majority of foreign directors, or foreign nationals controlling U.S. operations of foreign-based corporations.

The Senate version also includes two provisions that are absent from the House bill. First, senators would be required to file their campaign finance reports electronically to the FEC. House and presidential candidates have had to file electronically since 2001. Second, if an

organization spends $50,000 or more on airtime to run ads that support or oppose a candidate, the targeted candidate would be entitled to lower rates for broadcast ads.

Many have criticized the legislation for requiring "too much" disclosure. Numerous reactions suggest that the bill will effectively infringe upon First Amendment rights and ultimately chill speech. Some advocacy groups are also concerned that, if enacted, the DISCLOSE Act could potentially deter donors who do not want to be identified in television ads.

For example, the U.S. Chamber of Commerce promised to fight the legislation even before it was introduced. U.S. Chamber President and CEO Thomas J. Donohue said, "Stifling free speech is an abuse of the legislative process and is unconstitutional. It will not stand."

However, the Court in *Citizens United* upheld disclosure requirements as constitutional. Specifically, the majority opinion said that "disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages."

President Obama, who has criticized the *Citizens United* decision, issued a statement noting that with the DISCLOSE Act, "The American people can follow the money and see clearly which special interests are funding political campaign activity and trying to buy representation in our government." Obama also urged Congress to act quickly. "Passing the legislation is a critical step in restoring our government to its rightful owners: the American people," he said.

Sponsors hope Congress can pass the bill before the July 4 recess in order to have a new law in place for the upcoming 2010 congressional elections. However, this is an ambitious schedule, as the legislation is already facing tough opposition. House Administration Committee Chairman Robert Brady (D-PA) announced that the committee will hold a hearing on the bill on May 6. The legislation lacks bipartisan support in the Senate, but Schumer predicted it will ultimately be enacted with backing from some Republican senators.

Supreme Court Hears Arguments on State Disclosure of Petition Signatures

On April 28, the U.S. Supreme Court heard oral arguments in *Doe v. Reed*, a lawsuit filed by a political action committee in Washington State. The case could decide whether public disclosure of referendum petition signatures is permitted or if signing such a petition is a private political act protected by the First Amendment.

Doe v. Reed centers on the public's right to know who signed petitions related to Referendum 71, a 2009 attempt to overturn Washington's expanded domestic partner law, which gives gay and lesbian couples the same rights as married couples.

Protect Marriage Washington, an anti-marriage equality political action committee, submitted 138,500 petition signatures to place Referendum 71 on the ballot. The names of the petition signatories are a matter of public record based on Washington's Public Records Act.

The petitioners in *Doe v. Reed*, including Protect Marriage Washington and several signatories, are arguing that if the petition signatures are released, the signatories will be subjected to harassment and abuse. As a result, they argue, the public will be discouraged from signing petitions in support of placing referenda and initiatives on the ballot, and this will have an adverse effect on free speech.

The State of Washington is arguing that the names should be disclosed upon request, as required by the state's Public Records Act. Such disclosure helps to sort out whether fraudulent names were used on the petition to reach the required number of signatories to qualify an initiative or referendum for the ballot.

The state's Attorney General, Rob McKenna, who argued in support of disclosure, told the *Seattle Times* that the "state's disclosure laws impose a 'modest burden' on petition signers, compared with the 'very compelling, very strong government and public interest in transparency, accountability and fraud protection.'"

Protect Marriage Washington succeeded at the district court level when a judge blocked the release of the signatures. The case then moved to the U.S. Court of Appeals for the Ninth Circuit, which reversed the lower court's decision. The Ninth Circuit noted that "the signatures are collected in public and shown to public officials and that the release of the names furthers the important governmental aim of preserving electoral integrity." Protect Marriage Washington then appealed to the Supreme Court, which blocked the release of any signatures until it could hear and decide the case.

The outcome of this case could impact referendum and initiative petitions nationwide. If the Court rules that disclosing the names would discourage free speech and thus violate the First Amendment, it would likely keep all referendum and initiative petitions in Washington private. The same effect would possibly be seen in two dozen other states, as well.

Twenty-three states submitted a joint amicus brief in support of the State of Washington. The states argued that public disclosure of referendum petitions "imposes minimal burdens on protected speech" and "furthers Washington's compelling interests in preventing election fraud, preserving ballot integrity, and promoting open government."

The states argued that petition fraud has become more common in recent elections. "In Washington specifically, there was a 'rapid transformation . . . from volunteer to professional signature gatherers' in the 1990s. In conjunction with this shift, scholars now conclude that there may be as much, if not more, corruption in initiative campaigns than representative elections." Disclosing the names will allow the public to verify the validity of the signatures.

Several media organizations, including Reporters Committee for Freedom of the Press and Gannett Company, also submitted a joint amicus brief in support of Washington. They argued that if "the Court allows referendums to be placed on the ballot without disclosing the identities of the government actors/citizens who petitioned for the referendum, the general public has no way of holding the government accountable for the legislation."

Several members of the Court seemed skeptical of arguments seeking to keep the signatures secret. Justices Antonia Scalia, Ruth Bader Ginsburg, Sonia Sotomayor, and John Paul Stevens asked James Bopp, attorney for the petitioners, some pointed questions, poking holes in Bopp's arguments in support of keeping the signatures private.

Scalia told Bopp that "running a democracy takes a certain amount of civic courage. And the First Amendment does not protect you from criticism or even nasty phone calls when you exercise your political rights to legislate."

When discussing the possibility of threats, Scalia said, "The threats should be moved against vigorously, but just because there can be criminal activity doesn't mean that you – you have to eliminate a procedure that is otherwise perfectly reasonable."

Sotomayor focused on the implications of this ruling beyond the case at hand. She asked Bopp, "You don't think that putting aside this kind of referendum, just a hypothetical referendum having to do with a certain tax scheme – you don't think the voters would be interested in knowing what kinds of people in what occupations are interested in that particular tax benefit or not?"

Bopp responded that a "few might be, but we think this is marginal information." He also said that "the petition signature and distribution is only for a very limited governmental interest."

Chief Justice John Roberts and Justice Samuel Alito asked McKenna questions that indicate that they may support keeping the petition signatures a secret from the public. They questioned McKenna on how far disclosure will go if it is allowed.

Roberts asked whether "having your name revealed on a petition of this sort might have a chilling effect on whether you sign it."

Alito and Roberts also asked McKenna questions focusing on the possibility of violence, harassment, and intimidation against petition signatories. Roberts asked McKenna, "Do you think that the disclosure of the names, pending the resolution of their as-applied challenge, would subject them to incidents of violence and intimidation?"

Doe v. Reed is part of a recent pattern to eliminate disclosure laws. This case draws parallels to *Many Cultures, One Message v. Clements*, a lawsuit on behalf of two volunteer groups challenging part of Washington State's grassroots lobbying disclosure law as a violation of their First Amendment rights to free speech, assembly, and petition. Washington is one of 36 states that have some sort of law addressing disclosure of grassroots lobbying.

The organizations seeking to prevent grassroots lobbying disclosure are making similar arguments as the petitioners in *Doe v. Reed*. They argue that the registration and reporting rules prohibit them from "exercising their right to engage in anonymous political speech," according to the suit. They further argue that grassroots lobbying disclosure laws and the cost for violating them may discourage small groups from becoming active in politics and public policy.

The Supreme Court is expected to decide *Doe v. Reed* by the end of June.