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In This Issue

We Need a Chemical Safety Bill Worthy of Sen. Lautenberg's Legacy

New Compromise Bill Weakens State-Level Protections, Leaves Vulnerable Groups at Risk

On May 23, the late Sen. Frank Lautenberg (D-NJ) and Sen. David Vitter (R-LA) introduced the Chemical Safety Improvement Act of 2013. The bill would amend the 1976 Toxic Substances Control Act, the nation's primary and outdated chemical safety law. Despite being promoted as a significant reform, the proposed legislation fails to improve the health and safety protections missing from current law. As it stands, it represents a significant retreat from the Safe Chemicals Act of 2013 that Lautenberg introduced earlier this year. The earlier bill should be the senator's legacy.

The Need for New Protections from Toxic Chemicals

The Toxic Substances Control Act of 1976 (TSCA) has proved itself inadequate for regulating chemicals and ensuring that products are safe for the public. The U.S. Environmental Protection Agency (EPA)

does not have sufficient authority to test and regulate the more than 80,000 chemicals currently in use.

TSCA got off to a terrible start by immediately exempting from any safety review the 62,000 chemicals in commerce at the time the law was passed. The law is written in a way that prevents EPA from requiring testing for all but about 200 chemicals, and that testing has resulted in partial restrictions on the use of just five chemicals.

Under TSCA, the burden of proof falls on the EPA to prove a chemical poses a health risk, rather than on chemical companies to prove the safety of their products. In fact, under TSCA, companies only have to submit safety data "if they have it." However, there is no legal obligation for chemical companies to research the potential health risks of their products before selling them to the public. This creates a perverse incentive to avoid such health research, since any problems discovered could be used by the government to limit use and thereby reduce profits. Without the ability to address the continual growth of chemicals in use, EPA cannot protect public health and the environment. In the meantime, countless Americans are being exposed to potentially toxic chemicals.

Senator Lautenberg's Earlier Reform Bill

Over the years, policymakers have proposed legislative remedies to strengthen EPA's authority on chemical safety, but Congress has not passed any of these measures. In April, Lautenberg re-introduced the Safe Chemicals Act of 2013 (S. 1009) to increase chemical safety, improve consumer access to information on chemical hazards in products, and protect vulnerable populations, such as low-income communities, children, and pregnant woman. The bill would require that chemical companies show their products are safe before they are included in consumer goods such as baby cribs and children's toys. The legislation, which is identical to the bill passed by the Senate's Environment and Public Works Committee last year, was strongly opposed by the chemical industry.

Reports indicated that Vitter had been working on a competing bill, which was written with help from the American Chemistry Council. Unexpectedly, the two senators joined forces shortly before Lautenberg's death to introduce a significantly narrower and more industry-friendly bill, which environmental and public interest organizations say pales in comparison to the Safe Chemicals Act.

Compromise Bill Fails to Protect Vulnerable Populations and Communities

The new bill, which came as a surprise to public health and environmental organizations, is an "unacceptably weak response to the chemical exposure problems American families face every day," stated Ken Cook, president of the Environmental Working Group.

Unlike the Safe Chemicals Act of 2013, the Chemical Safety Improvement Act fails to protect vulnerable populations that may be particularly susceptible to chemical exposures, such as children, developing fetuses, or those that might receive disproportionately high exposures, such as low-income communities living near toxic facilities. The new bill lacks any references to protecting children, infants, pregnant women, or the elderly. In contrast, children were specifically referenced 16 times in the Safe Chemicals Act.

The bipartisan bill also dropped provisions that were included in the Safe Chemicals Act that direct EPA to establish a Children's Environmental Health Research Program within 90 days to understand the "vulnerability of children to chemical substances and mixtures."

In addition, the new bill has eliminated provisions that called for more research on minority and low-income populations disproportionately exposed to toxic chemicals ("hot spots"). The Safe Chemicals Act would have required EPA to identify communities that are disproportionately exposed to toxic chemicals and to publish and update a list of these localities and develop plans for each.

Compromise Bill Affords Strong Secrets Protections to Industry

In stark contrast to the weakened and eliminated protections for children and other vulnerable populations, the new legislation creates strong protections for industry's confidential business information (CBI). Though the bill requires companies to provide upfront justification for CBI claims, it does not require the EPA to review all of the claims because significant categories of information would be presumed confidential. Moreover, any CBI claims made before the law is passed would be grandfathered in, preventing the EPA from requiring substantiation of these claims – unless the claims are for chemical identities or information that the EPA classifies as high-priority.

Currently, under TSCA, companies are allowed to demand that health and safety information of common chemicals be withheld from the public and medical professionals. The new bill would not significantly change that reality. The Environmental Working Group published a study in December 2009 documenting that the names and other information for 17,000 of more than 80,000 chemicals currently in commercial use had been labeled "trade secrets" and thus remain hidden from the public. The U.S. Government Accountability Office testified that about 95 percent of the notices that companies send to the EPA include information labeled "confidential."

The new bill would also make it difficult for medical personnel to learn the identity of secret chemicals when treating patients potentially exposed to those chemicals. It would require EPA to follow detailed procedures before allowing medical personnel to access confidential information. Moreover, the definition of which medical personnel can access confidential information would be narrower than the Safe Chemicals Act proposed. In emergency situations, the new bill only allows treating physicians or nurses to obtain the information. In nonemergency situations, only health professionals "employed by a Federal or State agency" or treating physician or nurse may obtain the information.

The Safe Chemicals Act aimed to reduce CBI claims by limiting the conditions under which the industry can claim CBI:

- All CBI claims would have to be justified up front;
- EPA would be required to review all CBI claims, or a "representative subset," and only approved claims would stand;
- Approved claims would expire after no more than five years, except for types of claims for which EPA determines the five-year term would not apply; and
- Workers and local and state government officials would have access to CBI, so long as they protect the information's confidentiality.

Recently, the EPA took small steps to limit the information that can be claimed as confidential business information under TSCA to ensure that only legitimate claims are granted such protections.

Compromise Bill Would Preempt State Law – Even When No Federal Standards Have Been Established

The Lautenberg-Vitter bill would also preempt local and state chemical laws, even in cases where EPA has not regulated a particular chemical.

California is far ahead of EPA in regulating dangerous chemicals, and its efforts to do so would be vitiated under the proposed TSCA reforms. Under California's primary chemicals law, Proposition 65, the state publishes a list of chemicals known to cause cancer or reproductive harm. Companies must notify state residents about significant quantities of the listed chemicals found in consumer products or building materials, or significant releases into the environment. To compile its list, California often requests additional test data from industry. Because California's economy is so large, and manufacturers want to sell their products there, the state's health and environmental standards can immensely impact the behavior of producers across the country.

Other states have also enacted legislation to protect their citizens and the environment from harm. Minnesota has banned dangerous chemicals, such as bisphenol A (BPA) from use in children's products and formaldehyde from use in children's personal care products like shampoos and bubble baths. Similarly, Washington State requires manufacturers of children's products to report when chemicals used in those products are considered dangerous. Information on current state legislation related to toxic chemicals can be found on the *Safer Chemicals* website.

However, the Lautenberg-Vitter bill bars any state from mandating the development of test data or information on a chemical if similar data must be submitted to EPA, and it would preempt protective state laws without requiring that EPA adopt comparable protections. The bill would prohibit a state from issuing new restrictions for chemicals that EPA has classified as either high- or low-priority for a safety assessment and determination and from creating or enforcing a restriction on the manufacture, processing, distribution, or use of a chemical once the safety determination is completed.

For chemicals that EPA considers "low-priority" – those that are likely to meet EPA's safety standard – the legislation prohibits EPA from ever performing a safety assessment or issuing safeguards to protect the public from exposure. For a chemical that EPA considers "high priority," meaning that it has a high risk of being a health hazard or being released into the environment, EPA will perform a safety determination, although the bill provides no deadline by which this determination must be completed. Moreover, states would be prohibited from regulating "high-priority" chemicals, even if EPA never gets around to doing so.

While the legislation provides that EPA may authorize state standards, the circumstances under which EPA may do so are limited, and states are unlikely to meet the requirements to regulate on their own.

Compromise Bill Requires Cost-Benefit Analysis Biased Toward Business

Another significant concern with the proposed legislation is that it requires EPA to perform cost-benefit analysis when deciding whether to restrict, phase out, or ban a dangerous chemical. The Fifth Circuit Court of Appeals used this methodology to invalidate EPA's proposed ban on asbestos. The Lautenberg-Vitter bill would codify the Fifth Circuit test, widely believed to have fatally weakened the original TSCA.

The Safe Chemicals Act, in contrast, does not require EPA to perform cost-benefit analysis when deciding how to best protect public health or the environment.

The Right Legacy

Lautenberg died on June 3. He had been pushing for reform of our broken chemical safety system for years before his death. The compromised Chemical Safety Improvement Act does not address the fundamental problems built in to the original Toxic Substances Control Act. It would be a travesty of justice and history if the Lautenberg legacy were to be a compromised bill that undermines state standards, leaves vulnerable groups unprotected, and codifies the cost-benefit methodology that made the original TSCA unworkable.

Rather than accept this reform bill, members of Congress who are serious about health and safety reforms should return to Lautenberg's original legislation, the Safe Chemicals Act of 2013. This would be a fitting tribute to the extraordinary career of a senator who was such a strong advocate for reform. With his passing, we have lost an important champion for the American people. Let us hope someone else steps in to take leadership on this important issue.

The Center for Effective Government's Open Government Policy and Regulatory Policy teams both contributed to this article.

Transparency is Key for Sustainable Growth, Global Panel Says

Open and accountable government is key to successful development, according to a report by a United Nations (UN) panel released May 30. The report, titled *A New Global Partnership: Eradicate Poverty and Transform Economies through Sustainable Development*, was produced by a panel of global dignitaries at the request of UN Secretary-General Ban Ki-moon. The report's emphasis on transparency represents the growing consensus among world leaders in favor of open government and could bolster support for transparency within the U.S.

The report recommends a framework for future progress on the Millennium Development Goals (MDGs). Adopted by UN members in the 2000 Millennium Declaration, the MDGs set global development targets for the year 2015 on topics such as poverty, health, and environmental sustainability. With 2015 now approaching, the leaders recommend setting a new batch of 15-year goals, incorporating lessons learned from the first MDGs and responding to recent trends.

One major change that the panel recommends is to recognize the centrality of effective open government in tackling challenges such as reducing poverty and preventing child deaths. "People the world over expect their governments to be honest, accountable, and responsive to their needs," the report notes. "This is a universal agenda, for all countries."

Goals for Global Development

The original Millennium Development Goals consisted of eight goals with 21 specific targets. For instance, the targets included reducing the maternal mortality ratio by three quarters and reducing the percentage of people without safe water and sanitation by half. Progress on the targets is monitored for each country, as well as globally.

In 2012, a High-level Panel was established to advise on a development framework beyond 2015. The panel included 27 members, co-chaired by the heads of government of Indonesia, Liberia, and the United Kingdom. The sole American panelist was John Podesta, chair of the Center for American Progress, previously chief of staff to President Clinton and co-chair of President Obama's transition team. The panel was tasked with consulting with stakeholders, in addition to drawing on their own perspectives, in preparing the recommendations.

The report noted "a deep respect for the Millennium Development Goals," commenting that the years since their adoption "have seen the fastest reduction in poverty in human history" and attributing this "unprecedented progress" in part to the MDGs. Although not all the targets have yet been achieved, the panel stated that the goals "have shown their value in focusing global efforts."

The panel concluded that "a new development agenda should carry forward the spirit of the Millennium Declaration and the best of the MDGs." The new agenda, though, should go further in promoting sustainable development, according to the report, with increased emphasis on inclusion, peace, good governance, job creation, and better integrating the different aspects of sustainable development. The original goals fell short, the panel asserts, by not including "the importance to development of ... open and accountable government."

For a future agenda, the panel proposes 12 goals with 54 targets. The report notes that "this list is illustrative rather than prescriptive." Nonetheless, the panel's proposals will likely be a starting point for future discussions. If the world commits to the goals in the report, the panel remarks, "we can imagine a world in 2030 that is more equal, more prosperous, more peaceful and more just than that of today." "A world," the panel adds, "where transparent and representative governments are in charge."

Emphasis on Transparency

The importance of transparency has been increasingly recognized over the course of the MDG process. The Millennium Declaration in 2000 resolved to ensure "the right of the public to have access to information," but otherwise made few statements about transparency. By 2010, the General Assembly identified the value of "transparent and accountable systems of governance" as a lesson learned and stressed the importance of "improved transparency and accountability" to ensuring that development

aid is used effectively. But the new report is remarkable in the extent of its embrace of open government.

Transparency takes pride of place in the report, with the panel proposing that one of the 12 goals be to "ensure good governance and effective institutions." The panel specifically recommends targets to "guarantee the public's right to information and access to government data," "increase public participation in political processes and civic engagement at all levels," and "reduce bribery and corruption and ensure officials can be held accountable." In particular, the panel suggests that ensuring access to public information should be a candidate for a "global minimum standard."

The report also highlights the importance of information about government finances. "We need a transparency revolution," the panel contends, "so citizens can see exactly where and how taxes, aid and revenues from extractive industries are spent."

The panel makes clear that transparency is instrumental to achieving the aims of development, such as creating jobs and improving education. "We are calling for a fundamental shift – to recognize peace and good governance as a core element of wellbeing, not an optional extra." Furthermore, the report calls for the targets themselves to be monitored in greater detail and for open access to those data.

Additionally, the report denotes the need for corporate responsibility, urging businesses to be "transparent about the financial, social and environmental impact of their activities" and encouraging greater transparency to reduce tax evasion.

Moving Forward

In September, the UN will convene a major meeting to discuss the MDGs and a potential future agenda. At that meeting, Secretary-General Ban will present his own report, drawing on the panel's recommendations. As the report states, "These discussions and processes could culminate in a summit meeting in 2015 for member states to agree the new goals and to mobilize global action so that the new agenda can become a reality from January 2016."

But much could change before world governments reach an agreement on a final agenda – if any agreement is reached at all. Supporters of transparency will need to continue to establish the importance of openness and accountability. For instance, the Open Society Foundations have already commented that the commitment to open government in the panel's report "should be included in whatever eventually emerges from the process."

It is not yet clear what impact such an agenda might have on the U.S. domestically, but the panel's embrace of transparency is undoubtedly a positive step. Together with other recent global events, such as the UN Human Rights Committee's 2011 recognition of freedom of information as a human right and the founding and growth of the international Open Government Partnership (OGP), the report echoes growing consensus around the world in favor of open government. The Obama administration should ensure that the U.S. remains at the forefront of the movement for transparency, not only in rhetoric but in achievement. Under the OGP, the U.S. is due to deliver a new set of transparency

pledges this fall; adopting an ambitious plan could demonstrate the seriousness of the Obama administration's commitment to being an open government innovator.

The report's clear linkage of transparency and development should give pause to politicians who would delay open government improvements or cut transparency investments because of the federal government's fiscal challenges. Transparency measures are a vital component of effective job creation efforts – not a distraction therefrom or a hindrance thereto.

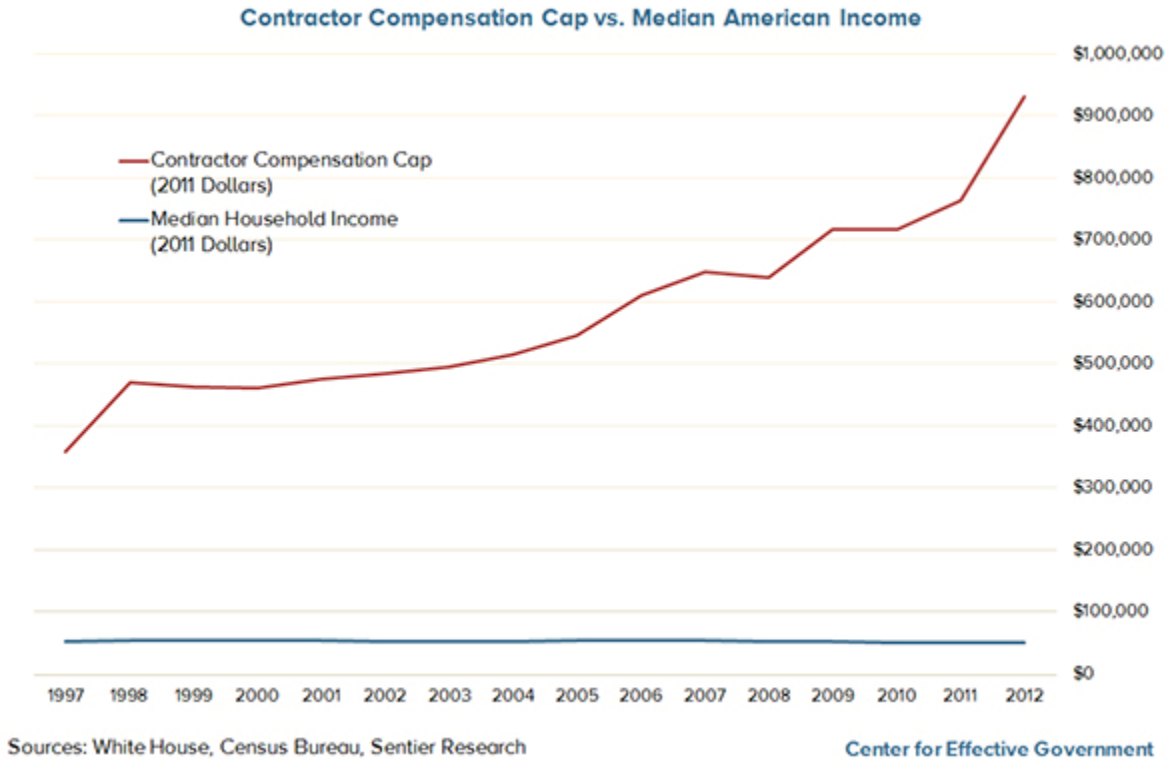
This report and the agenda it lays out may impact U.S. foreign policy for decades to come. As the world's largest donor of development aid, the U.S. has an interest in ensuring that its investments are as effective as possible in improving people's lives. Increasing the transparency of both donors and recipients of aid should further deter waste, fraud, or corruption and enable aid to be better targeted to do the most good.

As Austerity Shrinks Government Budgets, Contractor CEO Pay and Public Costs Set to Rise

In the midst of shrinking federal spending on infrastructure, scientific research, Head Start, and other government programs, the costs of government contractor executives' salaries and compensation are set to soar unless Congress takes action. This is another example of how current government policies transfer resources to the wealthy and away from the programs that broadly support and grow a vibrant middle class.

The maximum amount a government contractor can charge taxpayers for employees' salaries is about to rise at least 25 percent in the next few weeks, from $763,029 to more than $950,000 – nearly $1 million. This comes as federal employees have seen pay freezes – justified on the basis of saving public dollars – and as most Americans have seen stagnant incomes over the past several years. It also comes as federal spending is reduced through the Budget Control Act of 2011 and sequestration.

The limit is known as the contractor compensation cap. The annual increases in the cap have grown wildly out of control, far outstripping the pace of inflation as most Americans' household incomes have stagnated, according to the White House and some in Congress. In recent years, both the executive branch and Capitol Hill have floated proposals to revise this cap and the formula for calculating increases.



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The proposals vary in how widely the caps would apply to contracts and how much lower they would set the cap. In its latest legislative proposal, the White House's Office of Federal Procurement Policy (OFPP) has significantly backed down from the aggressiveness of its earlier recommendations. The details are contained in a legislative package that the Department of Defense sent to Capitol Hill on May 15.

The American Federation of Government Employees (AFGE) was strident in its criticism of the White House's new position. AFGE's President J. David Cox Sr. told *The Washington Post* that "Federal employees have had their pay frozen for three straight years, and more than 800,000 employees are being furloughed without pay for up to 11 days this year under sequestration... And the best the administration can do [is] impose this small change that will affect less than half of all service contracts." The Project On Government Oversight (POGO) stated in a blog post that "the White House shift in policy especially inside OFPP, is startling and might be bad news for taxpayers."

Congress Should Take Action

Currently, the formula for deriving the cap is pegged to private sector executive compensation. This cap does not determine what contractors actually pay their executives and employees; it only caps the amounts taxpayers are charged. However, "as a result of skyrocketing executive pay, the tab for taxpayers has soared to unreasonable heights in the intervening years," OFPP's acting administrator wrote in a blog post last year. "Unfortunately, Congress failed to reform the current reimbursement formula for contractor executives and, until it does, taxpayers will continue to foot a bill that is both unjustified and unnecessary."

Contractor Compensation Cap vs. Median American Income

Fiscal Year	Contractor Compensation Cap (2011 $$)	Contractor Compensation Cap (Real Time $$)	Median Household Income (2011 $$)
2012	$930,784+	$950,000+	$50,361
2011	$763,029	$763,029	$50,054
2010	$715,855.76	$693,951	$50,831
2009	$717,354.07	$684,181	$52,195
2008	$639,595.16	$612,196	$52,546
2007	$648,656.46	$597,912	$54,489
2006	$609,978.56	$546,689	$53,768
2005	$545,149.40	$473,318	$53,371
2004	$515,431.82	$432,851	$52,788
2003	$495,444.04	$405,273	$52,973
2002	$484,866.71	$387,783	$53,019
2001	$475,316.05	$374,228	$53,646
2000	$461,124.95	$353,010	$54,841
1999	$463,090.80	$342,986	$54,932
1998	$470,094.91	$340,650	$53,582
1997	$358,411	$250,000	$51,704

Sources: White House, Census Bureau, Sentier Research Center for Effective Government

The spectacular rate of increase in the amount of corporate executive pay has serious implications for taxpayers. "As a result of this rapid growth of private sector executive compensation over the past 15 years, taxpayers are being forced to reimburse contractors at a rate which has outpaced the growth of inflation and the wages of most of America's working families – as well as the growth of Federal salaries," according to the White House.

Cap Amounts: How Low Should They Go?

The savings could be substantial if the cap were lowered – but the extent of the savings would depend heavily on the details of which proposal is adopted.

For instance, in response to a question from Sen. Claire McCaskill (D□MO), the Army stated that it alone could save $6 billion annually on contract costs if a cap of $400,000 – the same as the president's salary – were enacted. There are some questions about the way this number was developed, but whatever the exact number is, the savings would be much greater if the cap was applied to all defense and civilian agency contracts. It would also be greater if the cap was $230,700 – the vice

president's salary – as the White House originally proposed in its FY 2014 budget request. Last year, the White House proposed an even lower, $200,000 cap.

However, the White House retreated to the $400,000 figure in a blog post dated May 30. The White House stated that "hundreds of millions of dollars" would be saved if its proposal is adopted.

A lower cap – everything else being equal – would yield greater taxpayer savings. However, the lower end of the proposals – such as the $200,000 amount – would be significantly lower than the cap was when it began in the late 1990s, especially when adjusted for inflation.

The Cap Should Be Universally Applied

While the president's plan would be a step in the right direction, it could create far more savings if it went further. Aside from the level of the cap itself, the president's proposal explicitly limits the cap to cost reimbursement contracts that cover only one-third of contract spending overall.

Perhaps most noteworthy is what the proposal doesn't affect: Fixed-price contracts that account for over 60 percent of contract spending. In Fiscal Year 2012, according to USAspending.gov, fixed price contracts represented over $300 billion in federal spending.

Unless the cap is universally applied, a majority of the potential savings from contractor compensation caps would be lost, as the Center for Effective Government pointed out recently in a letter to Joe Jordan, the administrator of OFPP, which is housed within the White House's Office of Management and Budget (OMB).

A legal basis for applying these caps already exists in the current rules for buying goods and services with fixed□price contracts. Whenever certain types of analysis are used with such contracts, federal cost principles apply to their pricing. Since the compensation caps are part of these cost principles, they would apply in these instances.

It's simple: whenever Federal Acquisition Regulation cost principles apply to the pricing of a contract, the caps should apply.

Many types of goods and services procured under commercial item contracts should be purchased with either cost reimbursement or fixed-price contracts. Thanks to contractor□friendly acquisition "reform" laws passed in the 1990s, the definition of commercial item defies logic. Weapons systems such as the Lockheed C□130J, which is not sold on the commercial market and is specifically tailored for the U.S. military, were deemed commercial items. More common examples of "commercial items" are major subsystems such as avionics that are not commercially available whatsoever. Goods and services that are not commercially available should be purchased using the types of contracts that give the government the power to protect taxpayers; contractor compensation caps would also apply either to pricing or reimbursement under these agreements.

Currently, the cap applies to *all* contractor employees only at the Department of Defense, the National Aeronautics and Space Administration (NASA), and the Coast Guard. Elsewhere in the government,

the cap applies to just the top five executives at contractor companies. The president's proposal would expand the cap to cover all contractor employees, with exemptions in unique cases for highly specialized scientists and engineers.

Beyond Caps: More Aggressive Negotiation Needed

The cap should not be a blank check for contractors to charge the government whatever they please for salaries and other forms of compensation. The government can negotiate lower levels of compensation for contractors if the prevailing compensation rate is lower or if contractors are proposing to charge taxpayers unreasonable amounts.

This is a very real issue. A few months ago, the Department of Energy Inspector General (IG) released a report that highlighted the risk to taxpayers if there is a myopic focus on whether the cap is exceeded or not. The IG found that because the Department of Energy only focused on keeping compensation below the cap, taxpayers may have ended up paying $3.45 million more for the salaries of other contractor executives over a five-year contract.

A consensus seems to be forming within the government that the current situation is untenable. Legislation is being prepared – with bipartisan support and in both the Senate and the House – that would bring executive compensation back to a more reasonable level, but contractors and their allies are seeking to water down any attempt to get better value for taxpayers. The White House's retreat from its earlier, more aggressive stance only weakens the negotiating position of the government, and Congress must step up to ensure that the cap is reined in.

Court Rejects Industry Challenge to Styrene Listing in the Report on Carcinogens

The U.S. District Court for the District of Columbia recently rejected industry challenges to an agency's decision to list the chemical styrene in the Twelfth Report on Carcinogens as "reasonably anticipated" to be a cancer-causing agent. A major styrene trade association and a manufacturer of the substance had sued the U.S. Department of Health and Human Services (HHS) for including styrene in the report.

The Listing of Styrene in the Report on Carcinogens

The Public Health Service Act of 1978 directs the Secretary of HHS to prepare a Report on Carcinogens every other year that identifies substances with the potential to cause cancer. The National Toxicology Program (NTP) prepares the report to be issued on behalf of the Secretary of HHS. NTP does not issue or enforce regulations; it only conducts its own evaluations of the scientific evidence on carcinogens and publishes its conclusions.

The statute requires that the report contain a list of all substances that are "known to be carcinogens" or "may reasonably be anticipated" to be carcinogens. Under NTP criteria, a substance is known to be a human carcinogen if there is sufficient evidence of carcinogenicity from studies in humans. A

substance is reasonably anticipated to be a human carcinogen if there is some evidence of carcinogenicity from studies in humans, evidence of carcinogenicity from animal studies, or other evidence to suggest a substance causes cancer.

The NTP nominated styrene for review in 2004 after an international body listed styrene as "possibly carcinogenic to humans." After a seven-year, multistep review process that included peer review and an opportunity for public comment, NTP finalized the report, which lists styrene as "reasonably anticipated to be a human carcinogen." The Secretary of HHS approved and published the report on June 10, 2011. The same day, the styrene industry filed suit challenging the listing.

Industry's Legal Challenge to the Styrene Listing

The Styrene Information and Research Council (SIRC), the major trade association for the styrene industry, and Dart Container Corporation, a manufacturer of styrene, raised several procedural challenges to the listing, none of which the court found persuasive.

They claimed that NTP's report violated the Administrative Procedure Act (APA) because it was issued "without observance of procedure required by law." The court considered the argument that NTP violated its own procedures concerning the timing of peer review and public comment periods but ultimately rejected the claim. The opinion noted that the industry "plaintiffs may question the wisdom" of NTP's approach, but did not show that NTP failed to observe a procedure required by law.

The suit also argued that HHS's listing of styrene violated the APA's arbitrary and capricious standard. The standard is highly deferential to agency action but does require that the agency "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." The court concluded that HHS provided sufficient justification for the decision to list styrene in the report's substance profile. Moreover, the administrative record adequately supported the agency's explanation.

In denying the challenges to the listing and affording deference to the agency's scientific judgments, the court rejected what is just the latest effort in a broad attack on NTP and the Report on Carcinogens. Since styrene's nomination in 2004, SIRC and other members of the styrene industry have campaigned aggressively to prevent or overturn the listing. As part of this campaign, the styrene industry solicited the help of the Small Business Administration's Office of Advocacy, as we explained in a January report.

Industry and the Office of Advocacy's Fight against the Listing

The Office of Advocacy has responsibility for ensuring that federal agencies evaluate the small business impacts of the rules they adopt. However, the office became involved in the scientific assessment of styrene after being contacted by SIRC and the American Composite Manufacturers Association (ACMA). After relaying ACMA's concerns to HHS, the Office of Advocacy submitted its own criticism of the NTP listing of styrene.

In a November 2011 letter, the office expressed concern about "the quality of [the Report on Carcinogens'] scientific analysis, the robustness of the scientific process, including procedures for peer review and public comment procedures, and that [the Report on Carcinogens] is duplicative of other federal chemical risk assessment programs, particularly the IRIS." These comments repeated the talking points provided by ACMA and SIRC.

In fact, Office of Advocacy staff admitted they made no effort to verify industry's claims at a hearing on the Report on Carcinogens, held by the House Science Committee and Small Business Committee in April 2012. After hearing the testimony, Rep. Brad Miller (D-NC) commented that the Office of Advocacy "relied for their scientific judgment and process comments on the information provided by Styrene lobbyists, so their testimony was really just an echo of what we heard from the Dow Chemical industry scientist."

Dow Chemical is a founding member of SIRC. Two of the association's websites are registered to the Management Information Systems Director at the American Chemistry Council (ACC). One of SIRC's lobbying firms also lobbied for ACC, while another of its firms lobbied for Dow Chemical. As our report concluded, "The Office of Advocacy became involved in the styrene issue in response to a request by the affected trade associations, which are dominated by big businesses or their lobbyists, and its comments repeated their arguments."

Many of the industry claims on which the Office of Advocacy relied have now been discredited and rejected by the district court. While the office criticized the report's scientific analysis and process, the court emphasized that deference is given to an agency's evaluation of scientific data within its technical expertise. The opinion explained that courts do not review scientific judgments of the agency "as the chemist, biologist, or statistician that [they] are qualified neither by training nor experience to be."

NTP was right to move forward with its styrene listing. The public has a right to know whether common chemicals pose a cancer risk, and the court was correct to reject the bullying tactics of the styrene industry.

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