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Lame Duck Session Holds Little Hope for Appropriations Bills

The congressional lame duck session began Dec. 5 as the 109th Congress returned to work on a set of long-deferred tax and budget items. However, Congress will likely postpone action on the bulk of these issues until the next session and quickly pass a continuing resolution (CR) that will last until early 2007.

The Budget

Though the first two months of the fiscal year are already over, Congress hasn't been able to finish work on ten of the 12 appropriations bills providing funding for the federal government in FY 2007, passing only the Defense and Homeland Security spending bills. With insufficient time - and even less political will - remaining this year to complete work on the remaining bills, GOP congressional leaders have announced they will extend

the current CR to keep the federal government operating until Feb. 15, 2007, pending an agreement with Democrats.

The impetus to block progress on the spending bills came chiefly from Sens. Tom Coburn (R-OK) and Jim DeMint (R-SC), who argued the CR would eliminate what they claim are "nearly 10,000 earmarks, or member-sponsored pork projects, larded throughout the spending bills Congress is currently considering, [which] could save taxpayers a cool $17 billion."

Under the CR, discretionary programs would be funded at the *lowest* of the FY 2006 level (last year's spending level), or the level passed by the House or the Senate for this year, thereby killing any proposed new spending, including all earmarks. This also means there is no inflation adjustment for agencies, the equivalent of cutting program resources. Were the CR to be extended to cover all of FY 2007, nominal cuts totaling about $7 billion in school breakfast and lunch programs, housing vouchers, assistance to veterans, and other social program spending would result.

The current CR expires this Friday, Dec. 8. If not extended, most of government will need to shut down.

Yesterday, Dec. 4, on National Public Radio, Senate Minority Leader Harry Reid (D-NV) indicated this week's lame duck session will not address program cuts resulting from the CR, and a full fiscal-year extension (through Sept. 30, 2007) of the CR was under serious consideration by Democrats. He noted the Democrats cannot address two years of appropriations bills in such a short time, and instead, they would focus on dealing with finishing appropriations bills for the start of the following fiscal year (FY2008) on Oct. 1, 2007.

Others have speculated the Democrats could wait until the last day of the CR and send the president a gigantic omnibus appropriations bill, lumping all the individual appropriations bills together, in a take it or leave it approach. The president has vowed to veto anything over $873 billion in total discretionary spending, but would be forced into shutting down government if he were to veto an omnibus spending bill above his bottom line.

Tax Extenders

It appears that after months of delay, a package of popular tax break extensions known as "extenders" will finally get an up-or-down vote, possibly with additional tax "sweeteners" that have been promised to specific members of Congress throughout 2006. Among the central elements of the package are:

- the research and development credit for business
- an exemption on federal income tax forms for state and local sales tax in those states without a state income tax
- incentives for employers to hire former welfare recipients

- deductions for restaurant improvements
- a deduction for out-of-pocket teacher expenses
- the college tuition deduction

This package failed in the Senate in July when it was tied to a poison pill, a proposed permanent estate tax cut.

On a stand-alone basis, the package would cost nearly $20 billion to extend retroactively through the end of 2006 and close to $40 billion if extended through 2007. This time, the package is widely expected to include a provision to forestall a scheduled five percent cut in Medicare payments to physicians, scheduled to take effect in January. The provision would cost an estimated $10.8 billion over five years. Also under consideration is a leftover "sweetener" provision from the first vote - a tax cut for timber industry capital gains - as well as an unrelated amendment that would grant permanent normal trade relations with Vietnam.

Uncertainty still exists regarding both the term and content of the package, but it is possible the House could vote on it as early as Tuesday, Dec. 5, and the Senate one day later.

Darkhorse Fixes: Agricultural Disaster Aid and the AMT Patch
The Senate has scheduled a vote today on a $4.5 billion agriculture disaster aid package proposed by Senate Budget Committee ranking member Kent Conrad (D-ND). However, according to *Congress Daily* (subscription required), Senate conservatives have threatened to drag the bill down with dozens of amendments, and President Bush has vowed to veto it unless offsets are provided.

Congress may also seek to provide a "patch" for the Alternative Minimum Tax (AMT), which would hold harmless the 20 million new taxpayers who next year would otherwise join the 3.5 million taxpayers currently paying the tax. The patch would be a heavy $40 billion lift, but some Democrats in Congress may be inclined to attach it to the extenders package this week rather than wait until next year, when revenue-neutral (PAYGO) budget rules may be in place and $40 billion in offsets would be required to pay for it. More likely, however, the GOP leadership will take no action, adding this item to the lengthy list of thorny tax and budget issues that will confront the Democrats when the 110th Congress convenes in early January.

Alternative Minimum Tax Likely to be Large Issue in 2007

The continuing creep of the Alternative Minimum Tax (AMT) is threatening to impact tens of millions of Americans in 2007 - a fact that will push it to the forefront of tax policy issues.

In 1995, 414,000 wealthy tax payers paid the Alternative Minimum Tax (AMT), and in

2001, that number grew to 1.3 million. Unless Congress acts, 23.4 million Americans are expected to be snagged by this "stealth tax" in 2007, which was originally intended to affect only 20,000 wealthy taxpayers.

However, it is not simply the large and growing number of people paying the AMT that is troubling, but *who* exactly is paying the tax. What was virtually unthinkable in 1969, when the tax was conceived, is now happening - households earning less than $100,000 are paying a tax that was originally designed to ensure that millionaires paid some minimum amount of income tax.

Recent tax policy under the Bush Administration has exacerbated the problem of the AMT. The 2001 and 2003 Bush tax cuts were designed to increase the amount of taxes paid through the AMT. The Tax Policy Center, which has written extensively about AMT, notes that tax cuts enacted between 2001 and 2006 have "more than doubled the projected share of taxpayers who will face the AMT in 2010, from 16.0 percent to 33.6 percent."

In fact, the degree to which Bush and his tax-cut supporters relied on the stealth tax to make his tax cuts appear more affordable is betrayed by the fact that if current tax law is extended beyond its 2010 sunset date, it will cost the Treasury more to repeal the AMT than it would to repeal the regular income tax.

Unlike the regular income tax, the AMT's exemptions and brackets are not indexed for inflation. As average incomes grow with inflation (and the AMT does not), more and more taxpayers incur liabilities in this parallel tax universe. As the AMT reaches deeper into the middle class, Congress is forced to periodically apply stopgap measures (typically called "patches") that adjust the AMT upwards to keep middle-class families from paying a tax they were never intended to pay.

Key Democrats have indicated their intention to put AMT reform at the top of their list. Rep. Charles Rangel (D-NY), incoming chair of the House Ways and Means Committee, has announced that he plans to make AMT repairs a top priority of his agenda, and Sen. Max Baucus (D-MT), incoming chair of the Senate Finance Committee, has been a longtime foe of the AMT.

The Center on Budget and Policy Priorities estimates the potential price tag of full repeal at $1.2 trillion through 2015. This is seen as the least desirable fix for a variety of reasons. Primarily, it is unaffordable, but repeal is also a regressive solution as more than half of the benefits of repeal would go to households earning more than $200,000 in 2010. Although Baucus may wish for full repeal of the AMT, it is not likely to be on the 110th Congress's agenda because of the cost of offsetting the lost revenue.

Short of full repeal, Congress has a number of options varying in cost and detail. For example, AMT exemption amounts and brackets could be indexed for inflation, with 2006 as the base year. The CBO projects this would cost $376 billion through 2015. But

this estimate assumes the 2001 and 2003 tax cuts are allowed to expire - a key point due to the large degree these tax cuts increase the cost of changing the AMT. If the tax cuts are extended, the cost of inflation indexing jumps to $848 billion.

Another option is for Congress to change the "preferences" of the deductions allowed under the AMT. Preferences are those deductions allowed under the regular income tax but not included in AMT liability calculations. For example, households may deduct state and local income taxes from their regular federal income tax, but not from the AMT. Depending on which credits or deductions are allowed under the AMT, this option would reduce the number of AMT taxpayers by more than 20 million, at a cost of $529 billion through 2015. There are numerous permutations of "preferences" possible, all of which would affect who would be liable for the AMT, how much they would pay, and the total cost of the fix.

However, AMT reform does not necessarily require forgoing considerable amounts of revenue. Leonard Burman at the Tax Policy Center has devised several revenue-neutral options that reinstitute the original goals of the AMT. In his paper, "The Expanding Reach of the Individual Alternative Minimum Tax," Burman proposes inflation indexing and allowing dependent exemptions, coupled with an increase in the rate of the top AMT bracket. In addition to these changes, Burman recommends other technical changes that would actually *raise* $9 billion in revenue through 2015.

Burman has also suggested eliminating the AMT, applying desirable AMT provisions to the regular income tax code, and adjusting the regular income tax brackets (i.e., increase tax rates) to make up for lost AMT revenue. This solution would do away with the parallel tax systems and simplify the tax code while maintaining progressivity. However, this idea most likely would be harder for Congress to swallow, since it would likely be branded as a "tax increase."

It is unclear whether any of Burman's proposals are a silver bullet that would painlessly fix the AMT to restore its equity (and revenue), but Congress will likely need to consider ideas like his in the AMT debate in the coming months.

EPA Drops Plan to Change TRI Reporting Frequency, Major Flaws Remain

In light of the midterm elections and ongoing pressure from the current Republican controlled Congress, the U.S. Environmental Protection Agency (EPA) is changing its views on some plans for the Toxics Release Inventory (TRI), the nation's premiere environmental right to know program. EPA has announced it will retain annual reporting of toxic pollution, dropping its proposal to shift reporting to every other year. At the same time, however, EPA has not dropped its plans to significantly raise the threshold for detailed reporting under the TRI program, resulting in less information

about toxic chemicals in our communities.

In Sept. 2005, the EPA announced three planned changes to the TRI reporting requirements:

- Move from the current annual reporting requirement to biennial reporting for all facilities, eliminating half of all TRI data;
- Allow companies to release ten times as much pollution before being required to report the details of how much toxic pollution was produced and where it went;
- Permit facilities to withhold information on low-level production of persistent bioaccumulative toxins (PBTs), including lead and mercury, which are dangerous even in very small quantities because they are toxic, persist in the environment, and build up in people's bodies.

The proposed changes have met serious opposition from a wide range of stakeholders. The agency has received more than 122,000 public comments, with the vast majority voicing strong opposition to all of EPA's plans. The Environmental Council of the States, a national association of state and territorial environmental agency leaders, passed a resolution urging EPA to withdraw its TRI proposals. The EPA's own Science Advisory Board sent an unsolicited letter expressing concern that the TRI changes would "hinder the advances of environmental research used to protect public health and the environment." The House passed an amendment to one of its spending bills to prevent the EPA from spending money to finalize the proposals.

In the Senate, opposition to the TRI rollbacks came the form of a hold from Sens. Frank Lautenberg (D-NJ) and Robert Menendez (D-NJ) on Molly O'Neill, the nominee for EPA Assistant Administrator in charge of the Office of Environmental Information. In a press release, Lautenberg chided the proposed changes for their potential to "deny thousands of communities - including 160 in New Jersey - full information about the release of hazardous toxic emissions in their neighborhoods."

In response to the hold, the midterm elections, which will put Democrats in charge of the Senate, and other mounting opposition, EPA began discussions with the senators over their concerns. Eventually, EPA agreed to drop its plan to change from annual to biennial reporting in exchange for Lautenberg and Menendez lifting their hold on O'Neill. In a letter to the two senators, EPA Administrator Steven Johnson wrote, "You will be pleased to know that I have decided against moving forward with changes to TRI reporting frequency." While not legally binding, the public assurance appeared to be sufficient to convince Lautenberg and Menendez that the agency will no longer pursue the less frequent reporting.

However, the problem of higher reporting thresholds remains, and it seems that Lautenberg and Menendez are unlikely to ignore this issue just because EPA has abandoned less frequent reporting. In a Nov. 30 statement, Lautenberg said, "It is welcome news that the Bush Administration is throwing out part of this bad idea, but

they still need to get rid of the rest. The Administration's proposed changes to the Right-to-Know Law would essentially gut it. The Administration's proposed changes are nothing more than a giveaway to corporate polluters at the cost of everyday Americans' health. The Democratic Congress is not going to let this kind of irresponsible policy stand. The wise course for the Bush Administration is to drop this entire pro-polluter plan."

With this contentious proposal still on the table, OMB Watch will continue to monitor the situation. Sean Moulton, Director of Federal Information Policy for OMB Watch, said: "We are disappointed EPA has not taken this opportunity to drop the entire ill-conceived proposal. Considering the almost unanimous opposition, EPA is going against the will of the American people, and putting the public's health at risk in the process." It is expected that EPA will issue a final rule on the reporting threshold changes by the end of December.

Terrorism Information Sharing Initiative Faces Several Hurdles

The Director of National Intelligence (DNI) submitted the Information Sharing Environment (ISE) Implementation Plan to Congress in November. Through changes in policy and technology, the plan articulates a multi-year vision for improving terrorism information sharing across the federal government and between foreign, federal, state and local governments, as well as key members of the private sector.

The ISE plan has a number of shortcomings, however. Most notably, it fails to include an explicit role for the public or any opportunity for the accountability and oversight that public involvement can provide. Additionally, the plan must overcome the problems posed by information being housed at different agencies, often within incompatible technologies, and controlled by cultures which are often reluctant to share information. One of the recent and significant information problems that agencies have created is the proliferation of sensitive but unclassified information categories, which severely restrict information flow.

Where's the Accountability?

Essential to the ISE implementation plan are oversight and accountability across the federal government and at key state and local nodes in the information nexus. The vastness of the plan necessitates diligent oversight to ensure that technologies, policies and information sharing practices are being appropriately implemented.

Ambassador Thomas McNamara, program manager of the ISE, has stated that the DNI lacks the capacity to conduct centralized oversight at the numerous federal and state agencies that will be a part of the ISE. Instead, the plan will count on Inspectors General (IG) at the various agencies to conduct oversight. The specifics of oversight, such as frequency of reporting and primary areas to review, should be formalized as the ISE plan

moves forward, ensuring compatibility of the IGs' oversight on agencies' progress.

An important source of oversight that is missing from the plan is the public. The media, public interest groups and the general public have long played a powerful role in overseeing government activities and practices. Public accountability has led to, among other things, the exposure of the government's failures in the aftermath of Hurricane Katrina and the shortcomings of the government's pre-9/11 counterterrorism efforts. The ISE plan, though, fails to recognize the role that the public needs to play in overseeing the implementation of a robust terrorism information sharing network.

More thought should be given to what level of access the public should have to terrorist threat information and how the public can regularly access information regarding the government's homeland security efforts. Available information should not be so detailed as to provide a roadmap for terrorists, but it should allow interested citizens to be assured that the government is taking steps to protect them, their families and their communities. If weaknesses exist in the government's homeland security preparations, little motivates the government faster than public outrage.

Sensitive But Unclassified Quagmire

A major problem facing any effort to link different agencies together are the new pseudo-classification categories of information that have proliferated since 9/11, unnecessarily restricting information flow. Agencies have created over 100 sensitive but unclassified (SBU) information categories, which are often poorly defined and lack explicit instructions on how to correctly categorize information.

There are many problems with the current SBU policies that make it increasingly difficult for the government to properly manage and utilize all of the information it possesses. For instance, the authority to mark documents as an SBU category is decentralized, and at some agencies, even government contractors can mark documents as SBU. This often leads to excessive use of the SBU category and the restriction of information that need not be controlled. Moreover, there are no time limits on how long information is to remain as SBU, and no review procedures have been formalized to oversee the process. These and other SBU shortcomings have led an informational standstill in which homeland security analysts often cannot access essential information at other agencies.

The Government Accountability Office (GAO) has reported on the problems relating to SBU, having released reports on problems at the Department of Energy, Department of Defense, Tranportation Security Administration, and across the federal government. In its most recent analysis, GAO investigated problems at the Department of Justice (DOJ), where it found that the department has failed to specify its policy, implement a training program, or offer any kind of review procedure. DOJ replied that it is waiting for DNI's ISE to issue its agency-wide SBU policy. It is unclear why DOJ cannot begin to make basic changes in its approach to training and in clarifying its application to the

thousands of employees at DOJ.

ISE is charged with reviewing agencies' SBU policies and issuing a centralized policy that all federal agencies are to follow, thereby helping to disentangle the policy quagmire. The ISE plan states that, "the growing and non-standardized inventory of SBU designations and markings is a serious impediment to information sharing among agencies, between levels of government, and, as appropriate, with the private sector." During the first quarter of 2007, ISE, in consultation with federal, state and local officials, will issue recommendations for SBU standardization.

Open government advocates hope these recommendations will help to create a robust policy that limits the amount of information withheld from the public to a minimum. Advocates say the policy should specify review procedures, require training programs, mandate regular reports, and, most importantly, enable information sharing of vital homeland security information across federal, state and local governments.

Pelosi and Reid Promise Increased Congressional Transparency

The new Democratic leadership in Congress is urging transparency as a primary tool to reform the legislative process. According to statements from incoming House Speaker Nancy Pelosi (D-CA) and incoming Senate Majority Leader Harry Reid (D-NV), the leadership is planning several new rules and pieces of legislation on tracking earmarks, requiring time to read proposed legislation, and media access to conference committee activities - all with a central theme of increased congressional transparency.

After the Jack Abrahmoff, Duke Cunningham, and Tom DeLay scandals, the flow of money into and out of government are likely to be a major focus of the Democrats' reform efforts. Pelosi and Reid have announced that rules to diminish lobbyists' influence will be among the first items addressed in January. Included in the proposed rules are requirements that earmarks, line items in appropriations bills that members of Congress designate for specific projects in their districts, be identified with the name of the sponsoring member. The proposed earmarks would then have to be cleared by policymaking committees before being sent to the Appropriations Committee for approval. The expectation of such requirements is that the disclosure will shame legislators from proposing or fighting hard to protect wasteful, inappropriate pork projects, while leaving the earmark funding option for worthwhile programs that members are willing to publicly advocate.

Another Democratic proposal would give legislators and the public more time to read and evaluate legislation before a vote. The expectation is that the additional time will allow congressional offices, public interest groups, and members of the media to review proposed bills and identify problematic and inappropriate provisions. The expected end result would be fewer bills that contain unread provisions being fast-tracked through the

legislative process. A prime example of this type of activity was the passage of the USA Patriot Act of 2001, a bill several hundred pages long that included provisions that have had sweeping impacts on civil liberties. Congress voted on the bill just hours after the final wording was printed. Later, some members of Congress apologized for voting for the USA Patriot Act without having time to read the entire bill.

As part of their initiative to cleanse Congress of corruption, Pelosi and Reid have announced that conference committees in the 110th Congress will be open to the media. Introducing transparency to the conference committee process may reduce conferees' incentives to strike provisions which passed both chambers of Congress and tack on unrelated language or provisions that were not considered in either chamber.

Shrouded in secrecy, the House-Senate conference committees that form when different bills pass the two chambers of Congress have been sources of late-night deals which often succumb to the demands of House and Senate leadership and powerful interest groups. For instance, the Democrats were essentially shut out of the conference committee negotiations on the Medicare Prescription Drug Improvement and Modernization Act of 2003. Both the House and Senate versions of the bill included a provision to allow the purchase of drugs from other countries at lower prices, but this language was stripped from the final bill by conference committee members.

Court Says Parts of Executive Order Used to Shut Down Charities are Unconstitutional

A Nov. 27 decision by a federal district court in Los Angeles found that two portions of Executive Order 13224 (EO), used to designate organizations as supporters of terrorism, are unconstitutional. The case was filed by the Humanitarian Law Project (HLP) and other nonprofits that want to provide support for "lawful, nonviolent activities" of the Kurdistan Workers Party (PKK) and Tamil Tigers (LTTE), which have both been designated as terrorist organizations.

The 46-page opinion of the court said the EO lacks standards for designating terrorist organizations, giving the President "unfettered discretion", so that designations could be "for any reason, including for.... associating with anyone listed... or for no reason." The opinion also struck down provisions allowing designation of people and groups "otherwise associated" with terrorism because the EO "contains no definable criteria for designating individuals and groups... [and] imposes penalties for mere association." The Center for Constitutional Rights, which acted as counsel in the case, issued a press release, in which Georgetown Law professor David Cole said, "The court's decision confirms that even in fighting terror, unchecked executive authority and trampling on fundamental freedoms is not a permissible option." The Justice Department says it has not yet decided on whether to appeal the ruling.

The court's opinion notes that PKK and LTTE both represent groups seeking self

determination in countries where plaintiffs allege they have been subjected to human rights abuses and discrimination. Their activities include political organizing and advocacy, social services, humanitarian aid, and defending people from human rights abuses. HLP brought the case because the law prohibits it from engaging in transactions with the groups, since they have been designated as terrorist organizations. HLP wishes to provide:

- training in human rights advocacy and peacemaking negotiations
- legal services to establish institutions that could provide humanitarian aid and negotiate a peace agreement
- direct humanitarian aid to the PKK and LTTE
- engineering and technical services to help rebuild infrastructure in areas devastated by the tsunami of 2004
- psychiatric counseling for tsunami survivors

EO 13224's power to designate people and organizations as "Specially Designated Global Terrorists" comes from the International Emergency Economic Powers Act (IEEPA), as amended by the USA Patriot Act, and the Anti-Terrorism and Effective Death Penalty Act of 1996. These acts authorize the President to declare an emergency with respect to "grave acts of terrorism and threats of terrorism." The laws give the President authority to make regulations to carry out the law, and he in turn has delegated power to make designations to the Secretary of the Treasury. This gives Treasury power to freeze and seize the assets of all persons or groups determined "...to assist, sponsor, or provide financial, material, or technological support for... such acts of (foreign) terrorism or those persons listed in the Annex to this order...or to be otherwise associated with those persons." The original Annex listed 27 persons and organizations, and now includes over 430 entities.

ACLU Seeks Congressional Hearings on Monitoring of Antiwar Groups

The American Civil Liberties Union (ACLU) recently released more documents highlighting government surveillance of antiwar organizations. As information on the scope of the Pentagon's Threat and Local Observation Notice (TALON) database continues to accumulate, the ACLU has requested a congressional investigation into this use of counterterrorism resources for surveillance of nonviolent domestic organizations.

A Nov. 21 ACLU press release describes new documents that again prove counterterrorism resources were used to monitor American groups opposed to the war in Iraq and military recruitment. The information came in response to a Freedom of Information Act lawsuit the ACLU filed earlier this year because of evidence that the Pentagon was conducting surveillance of peaceful antiwar organizations, including Quakers and student groups. The new documents consist of nine reports that describe planned demonstrations at military recruitment sites as "threats" and outline events that

took place at protests, such as reading the names of the dead.

Veterans for Peace was one of the groups cited in the new documents. Their executive director, Michael T. McPhearson, told the *New York Times* that he was not surprised his group was monitored and plans to continue to use the Internet to plan protests. One TALON entry on the group states, "Veterans for Peace is a peaceful organization, but there is potential future protest could become violent." Other groups mentioned in the newly released documents include the Georgia Peace and Justice Coalition and the War Resisters League, which advocates nonviolence.

In light of these new findings, the ACLU has called on Congress to hold formal hearings on the TALON database. Caroline Fredrickson, Director of the ACLU Washington Legislative Office, said, "Congress must shed light on this effort to spy on veterans and Quakers. We are pleased that new leaders have signaled a desire to get serious about congressional oversight." The ACLU wants Congress to find out how the Pentagon gathered the information, whether it was shared with other agencies, and use of TALON for FBI surveillance of antiwar, religious, animal rights and environmental groups.

According to a *CQ Today* article (subscription required), at least two Senate committees have shown interest in examining the issue, and all oversight committees have been briefed by the Pentagon. Wendy Morigi, a spokeswoman for incoming Senate Intelligence Committee Chairman John D. Rockefeller IV (D-WV), said the panel is aware of the issue and will continue to watch the Pentagon's activities. Morigi said, "Looking ahead, you can expect that the committee will continue to monitor and provide greater oversight of TALON, the NSA program, DoD activities, FBI intelligence gathering and any other domestic collection program." Sens. Carl Levin (D-MI) and Patrick Leahy (D-VT), both to be chairs of oversight committees, have also expressed concern over the problems with the material in the database.

The CQ report also indicates that officials acknowledged some information gathered by TALON should not have been collected. In January 2006, Deputy Secretary of Defense Gordon England required all DoD intelligence and counterintelligence employees to have new training on the policies for "collection, retention, dissemination and use of information related to U.S. persons." TALON was reviewed for any material that should not be there. "That review turned up 186 out of 13,000 reports that 'did not meet the criteria or intent of the TALON program,' said a Pentagon spokesman, Maj. Patrick Ryder."

Daniel J. Baur, director of the office that runs TALON, told the *New York Times* that changes were made earlier this year to prevent collection of information on protest groups. "Mr. Baur said that those operating the database had misinterpreted their mandate and that what was intended as an antiterrorist database became, in some respects, a catch-all for leads on possible disruptions and threats against military installations in the United States, including protests against the military presence in

Iraq."

Supreme Court Wades into Climate Change Debate

The U.S. Supreme Court heard oral arguments November 29 on the U.S. Environmental Protection Agency's (EPA) authority under the Clean Air Act to regulate carbon dioxide and other greenhouse gases (GHG) in new cars and trucks. The case, *Massachusetts v. EPA*, marked the first time the Court has heard arguments related to climate change. The Justices appeared most interested in whether the petitioners had standing to bring the case, and the Court spent little time on regulatory and environmental questions.

According to a BNA story and supported by the transcript of the oral argument, most of the questions from Justices Antonin Scalia, Anthony Kennedy, Samuel Alito and Chief Justice John Roberts focused on whether the petitioners suffered real harm from climate change, the standard for achieving legal standing. James R. Milkey, assistant attorney general for Massachusetts, argued the case on behalf of several states, environmental groups and three cities. In his responses to the standing questions, Milkey noted that Massachusetts alone is likely to lose more than 200 miles of coast as climate change occurs.

Deputy Solicitor General Gregory C. Garre, arguing on behalf of the EPA and the auto industry, said the administrative decision not to regulate GHG from new vehicles was an appropriate exercise of agency discretion. Garre also argued that the science of climate change is too uncertain for development of regulatory standards. The Bush administration has consistently argued this position, coupled with its concerns about the economic impact of regulating GHG.

Roberts and Alito noted that since auto emissions make up only about six percent of carbon dioxide emissions, the effect of federal regulations would be relatively small. This ignores the potential impact that a regulatory regime for carbon dioxide would have on emissions from other sources. Utilities, refineries, manufacturers and automakers would potentially be affected by EPA's ability to regulate GHG. Such regulation would also enhance the potential for development of cleaner technologies, green buildings and solar power. Industry groups are split over this issue; many industries moving toward a non-carbon future support the regulation of GHG.

Four Justices, David Souter, Ruth Bader Ginsberg, Stephen Breyer and John Paul Stevens, appeared more skeptical of the government's position. Souter argued that even small improvements in the amount of harmful emissions would lead to real benefits. Stevens noted that, according to EPA scientists involved in the decision, the agency omitted information from its administrative response that would have supported existing scientific information on climate change.

The Court's decision is expected in the spring, with Kennedy being the all-important

swing vote. If the petitioners win, the case will be sent back to the EPA for reconsideration of its decision on whether to regulate GHG; if the Court decides in EPA's favor, the decision not to regulate stands.

The case stems from a 2003 decision in which the EPA claimed it did not have the authority to regulate GHG emissions from new vehicles under Section 202 of the Clean Air Act. That decision was appealed in 2005 to the U.S. Court of Appeals for the DC Circuit, which issued a split opinion on the matter.

The outcome has significance for efforts at the state and regional levels to regulate GHG. In the Northeast, the Regional Greenhouse Gas Initiative (RGGI) is a cooperative effort to regulate carbon dioxide in states from Maine to Delaware. California also has a GHG initiative that is currently being challenged by the auto industry and may be impacted by the Court's decision in *Massachusetts v. EPA*.

FDA Negotiates Increase in Drug Company User Fees

Amidst concerns raised by public interest advocates, the Food and Drug Administration is negotiating with drug industry representatives to increase controversial user fees, according to news reports.

User Fees to Expand, Include Advertising

In 1992, Congress authorized drug companies to pay user fees directly to FDA to help underwrite the cost of drug approvals. With congressional funding for FDA on the decline, the agency has become increasingly reliant on drug companies to fund the drug approval process. At minimum, this arrangement gives the appearance of a conflict of interest that can harm public trust in FDA approvals. Drug-approval scandals over the last few years, however, such as the highly publicized Vioxx scandal, have raised troubling concerns that the agency spends much more time and resources approving drugs than testing their safety.

Ongoing negotiations between FDA and the drug industry are expected to increase fees for drug approval. While fees would ensure FDA review all new drug applications within two-and-a-half months, some of the user fees would also fund post-market safety research. Moreover, FDA is considering expanding user fees to expedite approval of pharmaceutical advertisements. Under the proposal, drug companies would pay FDA $40,000 to $50,000 before each television ad campaign.

A tentative user fee agreement will be published in the *Federal Register* sometime in December, according to the BNA Daily Report for Executives (subscription only).

Critics Blast User Fee System

The Prescription Drug User Fee Act (PDUFA) must be reauthorized by Congress in 2007. During its last reauthorization in 2002, Ranking Member Henry Waxman (D-CA) strongly rebuked the agency for putting expedited approval above public safety and called for industry to pay user fees to ensure that drug ads were not misleading. "Speeding the review of new drugs is important. But ensuring the public that drugs are safe and effective demands more. We cannot sacrifice safety for speed. And we must be vigilant in our oversight of prescription drug ads to be sure that misleading ads do not prompt unsafe or inappropriate use of drugs." Waxman will chair the House Government Reform Committee when reauthorization occurs next year.

The Institute of Medicine released a report in September detailing necessary improvements to FDA's drug approval and safety programs. Along with recommendations to increase FDA's enforcement and oversight capabilities, IOM blasted the user fee system, saying that "[t]he Prescription Drug User Fee Act mechanism that accounts for over half of the Center for Drug Evaluation and Research's funding and the reporting requirements associated with the user-fee program are excessively oriented toward supporting speed of approval and insufficiently attentive to safety." IOM recommended Congress "introduce specific safety-related performance goals in the Prescription Drug User Fee Act IV in 2007." Moreover, IOM called for adequate funding of FDA, saying that over-reliance on user fees "hurts FDA's credibility and may affect [the] agency's effectiveness."

GAO Urges New Congress to Increase Oversight in Key Areas

Congress's investigative arm, the Government Accountability Office (GAO), is prodding the upcoming 110th Congress to increase its oversight role, something Democrats are chomping at the bit to do. In a Nov. 17 report, GAO identifies 36 areas in need of congressional oversight, organized into three categories: near-term oversight; policy and program reform; and governance issues in need of long-term attention. The recommendations are comprehensive, covering an array of issues including, but not limited to, government contractor responsibility, tax and budget policy, environmental regulation, and government transparency.

Contractor Responsibility

Throughout its recommendations, GAO repeatedly calls for greater oversight of government contractors and grantees. Under near-term oversight, GAO recommends Congress "address governmentwide acquisition and contracting issues." GAO lists contract management as one its "high-risk areas," pointing out that acquisition and contract management issues "collectively expose hundreds of billions of taxpayer dollars to potential waste and misuse."

Specifically, GAO asserts that Congress should conduct oversight on the preexisting mechanisms agencies use to prevent contract abuse. Congress should also "monitor the

implementation of agency action plans to address the GAO high-risk areas related to acquisition and contract management." The recommendation singles out the Department of Defense (DoD), Department of Energy (DOE), and NASA because of their large budgets. DoD, DOE and NASA were also the three agencies that contracted out the most dollars in Fiscal Year 2005.

The report also mentions the General Services Administration (GSA), ranked fourth in terms of dollars contracted in FY 2005, as another oversight priority. Recently, GSA Administrator Lurita Alexis Doan announced that the agency will reduce audits of contractors - audits that often uncover and deter contractor abuse. On Dec. 2, the *Washington Post* reported Doan plans to cut $5 million in audit spending.

Under issues in need of long-term attention, GAO calls for increased scrutiny of recipients of federal grants. The recommendation states the existing audit structure does not go far enough and should include the "numerous federally established entities receiving significant federal funding that lack statutory requirements for accountability oversight." GAO recommends the creation of a "governmentwide accountability council" to reprioritize federal accountability issues and to coordinate the efforts of GAO, the White House Office of Management and Budget (OMB), and other oversight organizations.

Also within the scope of contractor responsibility, GAO recommends oversight on the collection of royalties that mining and energy companies owe for extracting resources from federal lands, with specific proposals for assessing the reliability of the data provided by oil companies, and reflecting market values in royalty rules. Democrats have vowed in their first 100 hours agenda to target oil companies by ending subsidies, including royalty reductions.

Budget and Tax Policy

In its recommendations, GAO also enters the tax policy debate. Under near-term oversight, GAO critiques the tax gap - the difference between what taxpayers pay and what they actually owe, a favorite issue of Sen. Max Baucus (D-MT), incoming chair of the Senate Finance Committee. The recommendation cites an Internal Revenue Service (IRS) figure estimating a net tax gap for 2001 of $290 billion. In order to rectify this financial blunder, GAO proposes more congressional oversight of the IRS. Among the ideas are: allowing the IRS greater withholding power on capital gains and securities sales; simplification of the tax code; and greater use of technology in taxpayer service and enforcement.

GAO goes into greater detail of its tax code simplification proposal in the policy and program reform category. The report criticizes the current income tax system and then calls for an overhaul that would broaden and simplify the process. One proposal calls for agencies to consider in their strategic plans the tax incentives they institute. Another suggestion calls for a bipartisan commission to examine options for both entitlement and

income tax reform.

GAO also has deep concerns over the country's long-range fiscal health, or lack thereof. With the debt and deficits high and likely rising, GAO comments, "Failure to grapple with these challenges will result in a government unable to respond to any new challenges and a crushing fiscal burden for future generations." GAO proposes a number of recommendations to mitigate the fiscal imbalance. Among the most interesting are the reintroduction of pay-as-you-go (PAYGO) rules (already likely to gain traction in the 110th Congress); requisite estimates of "long-term cost implications of major policy proposals (tax and spending) before they are acted upon;" earmark review; and consideration of biennial budgeting.

Environmental Regulation

GAO calls for increased oversight of various environmental laws and regulations. Throughout the report, GAO stresses the need for sound environmental information. "Without this kind of information," GAO states, "the nation's environmental policy and priorities will continue to be driven by anecdote and perception, rather than fact."

Government Transparency

GAO also recommends oversight of the ways in which the federal government allows access to some of its information. GAO recognizes the link between a transparent government and a healthy democracy, then goes on to suggest ways in which Congress could preserve said health. One proposal calls for Congress to compare how agencies respond to Freedom of Information Act requests from Congress, GAO, Inspectors General, and the public. Another recommendation calls for Congress to look into how and when agencies are deeming information sensitive but unclassified, and whether or not that designation impacts agency responses to information.

GAO recognizes the broad and beneficial implications congressional oversight can create. In the report, the head of GAO, U.S. Comptroller David Walker, calls for oversight to be constructive and to "hold people accountable for delivering positive results." He goes on to state, "This balanced approach is likely to help accelerate progress while avoiding a further erosion of the public's trust and confidence in government."

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