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In This Issue

Budget Process Stuck at Square One and In Danger of Irrelevance

From the outside, a great deal seems to be happening with the fiscal year (FY) 2012 budget process. The House debated a "clean" bill to raise the debt ceiling and is starting to vote on its yearly appropriations bills, and the Senate just voted on four budget proposals. But looks can be deceiving: despite these recent actions, the nation's budget process is teetering on the edge of irrelevance.

In the House, the appropriations process is moving along according to schedule. Unlike in 2010, when the House did not pass any appropriations bills until late July (and then only passed two bills out of twelve), the lower chamber is well on its way to passing at least two bills by the end of June. The House Appropriations Committee has already approved two bills, Homeland Security and Military Construction-Veterans Affairs, and both bills could be voted on in the full House in the coming days.

At the same time, the House voted on a bill to raise the debt ceiling, which the federal government is on track to hit in early August. Republicans in both houses have been calling for massive budget cuts in exchange for their votes on the debt ceiling, despite the fact that failing to raise the ceiling would result in a disastrous government default. However, the House vote was on a so-called "clean" bill, one without additional spending-related provisions; the legislation failed, 318-97.

In the Senate, debate continues to rage on the budget resolution. With the Senate Budget Committee waiting for the outcome of the bipartisan negotiations hosted by Vice President Joe Biden, the upper chamber is left without a budget blueprint for the coming fiscal year. To try to fill the gap, the Senate voted on four different budgets: the House budget passed in April, President Obama's budget, and separate budgets from Sens. Rand Paul (R-KY) and Pat Toomey (R-PA). All of the budget proposals were rejected.

However, all of these actions are mere distractions, since all of the votes are essentially meaningless. The House appropriations bills stand no chance of being approved in the Senate, since they are built on the House budget, which includes drastic cuts that are unacceptable to a Democratic Senate and president. The Senate budget vote on the House budget resolution was only held to put Republican senators on the record for supporting the effective dismantling of Medicare, with the other votes held for similar political purposes. Similarly, the House vote on the debt ceiling was meant to prove that a clean bill would not pass the House.

Senate Democrats are hoping to use the failed votes to argue against Republican budget cuts, and House Republicans are looking to do the opposite with the debt ceiling vote. In other words, these votes were meant to embarrass members on the other side of the aisle, not move legislation.

As a result of these theatrics, the budget process has not moved forward appreciably from square one. Instead, members of both parties are waiting for some kind of grand bargain to come from the Biden talks. These discussions, with four Democrats and two Republicans trying to hammer out a long-term budget plan, are many observers' last hope for a timely resolution to current fiscal debates. With Republicans unwilling to vote for a clean debt ceiling bill and Democrats reluctant to vote for any fiscal plan that does not involve at least some tax increases, the Biden talks could provide the compromise needed to raise the debt ceiling and move the FY 2012 budget process forward.

With everyone hoping for a grand bargain, however, the normal budget process is being left behind. Originally created in 1974, the current process introduces a form of checks and balances. One group of legislators (authorizing committees) approves programs, another (budget committees) sets the overall budget spending targets, and a third (appropriations committees) allocates money to approved programs. While the last group, the appropriators, is considered the most powerful, since they control the actual purse strings, all three groups have some power over each other.

The purpose of the annual budget process is to rationalize a subset of all federal spending. This subset, known as discretionary spending, accounts for about one third of all spending; the other two thirds is composed of mandatory spending (with most of that going to Social Security and Medicare) that is determined by other legislative vehicles. The annual budget process gives the relevant congressional committees a chance to assess the impact and value of the thousands of federal programs funded through discretionary spending. In this system, both the Budget Committees and the Appropriations Committees work to set the overall level of spending. And since the process has to be completed in both houses, there is double the number of spending decision points.

The budget process also allows for some measure of transparency and public participation. At every stage, committees hold hearings on their jurisdiction. The Budget Committee holds hearings on the budget blueprint, and the authorizing committees hold hearings on the programs under their jurisdiction. The hearings allow elected representatives, administration officials, and members of the public to critique or defend federal programs and proposed spending decisions.

What was created to control spending has now turned into a system with too many roadblocks. The Senate, which already gives an inordinate amount of power to individual senators thanks to the chamber's filibuster rules, is now paralyzed every step of the way, with neither appropriators nor budget-makers willing to follow the process. And while the House is passing appropriations bills, its efforts are simply resulting in starting positions for the budget negotiations to come, rather than a straightforward assessment of the budgetary resources necessary for federal programs to achieve their goals.

Indeed, the budget process currently in place has been effectively disregarded. FY 2012's budget "process" will likely be similar to last year's: upon failing to pass all twelve appropriations bills necessary to fund the federal government at the start of the fiscal year on Oct. 1, Congress will pass a series of stop-gap "continuing resolutions," likely followed by grandstanding for political gain, all to be resolved via a closed-door compromise solution after a series of budget crises like those seen earlier in 2011.

Breakdowns like this end up hindering transparency as well as frustrating attempts to honestly gauge the impact of federal programs and set spending levels accordingly. There is little to no public discussion about programs or funding levels. Any agreement coming from either the Biden talks or another, last-minute compromise will only involve top-line numbers, which will have been made without any consideration for specific programs. As a result, vital programs could be cut simply because they do not fit under arbitrary caps or other agreed-upon devices.

OMB Properly Addressing Improper Payments

On May 23, the Office of Management and Budget (OMB) announced the launch of four new pilot projects designed to further crack down on improper payments from the federal government. The projects focus on implementing best practices and sharing information across

state and local governments that help administer payment programs in the departments of Health and Human Services (HHS), Agriculture (USDA), Labor (DOL), and Treasury.

As recently detailed by Kellie Lunney of *Government Executive*, the projects "are a result of collaboration among more than 200 state and local officials and other stakeholders on ways to reduce waste, fraud, and abuse," called the Collaborative Forum, and include:

- The Treasury Department working with states to help better collect outstanding federal debt through existing debt collection systems
- DOL providing states with greater access to unemployment insurance databases to better identify persons not eligible for benefits
- The Food and Nutrition Service (FNS) of the USDA facilitating the sharing of benefits information between states to make sure only those persons that qualify receive benefits
- The Centers for Medicare and Medicaid Services (CMS), under HHS, sharing a Medicaid provider enrollment system with states in an attempt to help detect and prevent provider fraud

OMB estimates the pilot projects could help the federal government save upwards of $100 million annually. While those savings seem trivial compared to the estimated $125 billion in improper payments made in fiscal year (FY) 2010, the success of these pilot projects could demonstrate the viability of sharing information and best practices with state and local governments across all of the government's 13 "high-error" programs.

President Obama has made increasing government efficiency and accountability a top priority of his administration and, along with reforming the contracting process, reducing improper payments has been at the top of his list. Within his first year in office, Obama signed Executive Order (E.O.) 13520, which, along with the Improper Payments Elimination and Recovery Act of 2010 (IPERA), called for federal agencies to begin better quantifying the problem of improper payments.

Each federal agency that administered a program that paid out dollars through some kind of a benefit was to assess the benefit-paying programs' risk of making a payment error, estimate and report these amounts annually, and plan for and take corrective actions to address the errors. The public can track the government's progress on improper payments at PaymentAccuracy.gov, the website created to collect and disclose each agency's progress or lack thereof at reducing, as OMB Director Jack Lew says, checks going "to the wrong person for the wrong amount and for the wrong reason."

Of the four pilot projects, the efforts underway at DOL, USDA, and HHS seem to provide further evidence that the administration's so-called "do not pay" list is producing results and that work advancing the idea continues apace.

Representing four of PaymentAccuracy.gov's top seven high-error programs based on the percentage of payments improperly made, the National School Lunch Program (NSLP) (USDA), Unemployment Insurance (UI) (DOL), Medicaid (HHS), and the Supplemental Nutrition

Assistance Program (SNAP) (USDA) seek to provide states with better information about who is and who is not qualified to receive benefits under their respective programs.

Similar to the federal "do not pay" list created last year to track "people and organizations that are ineligible to receive government benefits, contracts, grants, and loans," state and local government employees will look to federal agencies to provide comparable information so localities can better determine whether someone is eligible to receive food assistance, unemployment benefits, or medical insurance reimbursement.

One area where the federal "do not pay" list has shown results is Medicare. Though the combined fee-for-service and Medicare Advantage health insurance programs made close to $48 billion in improper payments in FY 2010, representing 24.6 percent of total Medicare payment dollars, fraud-fighting measures, including the federal "do not pay" list, helped bring down the total by over three percent from the previous year.

A recent Government Accountability Office (GAO) report, though noting that CMS still has much work to do on addressing further improper payments, praised the agency for its efforts "to tighten provider enrollment" and for the creation of "its Center for Program Integrity." The center, according to CMS, serves as a "focal point for all national and State-wide [*sic*] Medicare and Medicaid programs and [Children's Health Insurance Program (CHIP)] integrity fraud and abuse issues."

If the new pilot projects produce similar results and help bring improper payment levels down, then watch for the Obama administration to begin implementing lessons learned on a government-wide basis. One should note, however, that portions of the ongoing effort to reduce improper payments, particularly the operation of PaymentAccuracy.gov, could be threatened by the large cut to the Electronic Government Fund that passed Congress this spring.

The Transparency-Killing Budget

Progress toward increased government transparency will stall, and in some cases reverse, according to new details about the damage stemming from recent federal budget cuts. Federal Chief Information Officer Vivek Kundra explained the cuts' impact on key transparency and technology projects in a May 24 letter to Sen. Tom Carper (D-DE).

Under the fiscal year (FY) 2011 budget, critical transparency websites such as USAspending.gov and Data.gov will survive but will forego needed upgrades. Other projects will see reductions or will be terminated. However, many in the open government community will lobby Congress to reverse the cuts in its budget for FY 2012, which begins on Oct. 1.

Background

The Electronic Government Fund, or E-Gov Fund, is a line item in the General Services Administration (GSA) budget that supports government-wide technology projects. The fund was

created by the E-Government Act of 2002 to coordinate both internal agency systems and public-facing services. Among the prominent products of the E-Gov Fund are:

- USAspending.gov, launched in 2007, implements the Federal Funding Accountability and Transparency Act of 2006 by providing a public searchable database of federal contract and assistance spending information
- The IT Dashboard, launched in 2009, provides public data on the cost and performance of federal IT projects and was used to identify and eliminate $3 billion in poorly-performing projects in 2010
- Data.gov, launched in 2009, provides a public catalog of machine-readable datasets from across the federal government
- Performance.gov, expected to launch later in 2011, will implement the GPRA Modernization Act of 2010 by providing information on agency plans and performance

However, in its initial spending bill for FY 2011, the House slashed the fund by 94 percent, from $34 million in the prior year to $2 million, amidst other widespread budget cuts. Transparency advocates sounded the alarm, and administration officials confirmed that key websites would likely shut down in the aftermath of such dire cuts.

After the Senate rejected the bill, the House offered another proposal, providing $17 million for the fund – still a steep 50 percent cut but far less drastic. The Senate also rejected that bill. However, in a third bill, H.R. 1473, which the House and Senate agreed to on April 14 and President Obama signed into law the next day, the cut deepened again to provide only $8 million for the E-Gov Fund, a 76.5 percent cut.

On April 21, Carper sent a letter to Kundra asking for information on how the cuts would affect the E-Gov Fund's projects.

Impact of the Cuts

"Several [E-Gov Fund] projects will experience a sharp decline given the limited amount of funding," Kundra wrote in his response to Carper. "No project will go unaffected."

According to Kundra, the administration will maintain USAspending.gov, the IT Dashboard, Data.gov, and Performance.gov "at their current levels of operation." However, "there will be no enhancements or other development to address needs for improvement." Efforts to improve the systems' operations, address data quality problems, support users, and expand the information available will be postponed or abandoned.

The exact status of Performance.gov remains unclear. At a congressional hearing on May 10, federal Chief Performance Officer Jeffrey Zients said Performance.gov would launch to the public "within the next few weeks." However, an administration official declined to specify a launch date for a May 27 *Nextgov* article. The official noted the administration's ability to meet the GPRA Modernization Act's deadlines would depend on future funding levels.

Kundra's letter also specifies two projects that will be terminated due to the funding cuts. The Citizen Services Dashboard was a project to make available to the public data on government agencies' customer service performance, such as timeliness, accuracy, and customer satisfaction. The Citizen Services Dashboard's relationship to President Obama's April 27 executive order on customer service is unclear. The administration will also cancel FedSpace, an internal collaboration website for federal employees.

The letter doesn't specifically address the fate of a number of other E-Gov Fund projects, such as PaymentAccuracy.gov, Challenge.gov, and Apps.gov Now.

Hope for FY 2012

Many of the feared cuts and delays could be avoided if Congress restores the funding for the upcoming fiscal year. The E-Gov Fund projects have drawn strong support from both parties, as well as nearly 10,000 individuals and a coalition of transparency advocates, including OMB Watch.

The House Appropriations Committee's Subcommittee on Financial Services and General Government, which sets GSA's budget, is scheduled to mark up its bill on June 16. The subcommittee has not yet released its proposal for the E-Gov Fund. However, the full Appropriations Committee has asked the subcommittee to cut a total of $2.1 billion, or 9.4 percent, from the agencies under its jurisdiction, which also includes the Treasury Department, the White House, and a number of independent agencies and commissions.

Several financial services agencies had been expected to see budgetary increases to implement the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act. If those increases occur, they would put greater pressure on other agencies under the subcommittee's jurisdiction to accept cuts to meet the target amount of net decreases.

The Senate Appropriations Committee has not yet announced allocations for its analogous subcommittee.

Fracking Disclosure Pursued on Different Fronts

On May 25, Texas and Michigan moved to join several other states in requiring the natural gas drilling industry to disclose the contents of fluids used in hydraulic fracturing, also known as fracking. On the same day, two of the biggest U.S. energy companies – ExxonMobil and Chevron – defeated proposals from their shareholders calling for more disclosure of the environmental impacts and risks of drilling for natural gas. Despite such industry resistance, fracking disclosure continues to gain traction as an issue, especially at the state level.

Hydraulic fracturing is a process where sand and fluids are pumped underground at very high pressure to cause tiny fissures in rock and force natural gas to the surface. Although most of the fluid is water, numerous chemicals, many of them toxic, are typically added to the mixture.

Fracking fluid is known to often contain benzene, toluene, and pesticides, among other harmful substances.

Fracking has been intensely debated for years by citizens, lawmakers, and industry. At the heart of the debate is whether the procedure is safe and whether policymakers are taking the appropriate precautions – at federal, state, and local levels – to protect America's water supply from fracking contamination.

Is Fracking Safe?

Opponents of fracking, including residents who live near drilling wells, contend that the process is not safe, and that, in particular, the process has poisoned drinking water and affected people's health. In addition, accidents at wells have led to fires and fracking fluids have reached streams. In April, Chesapeake Energy suspended fracking operations in Pennsylvania after thousands of gallons of drilling fluid spilled following an accident at a gas well.

A peer-reviewed scientific study, just published in the *Proceedings of the National Academy of Sciences*, referred to as the Duke study, linked hydraulic fracturing to cases of drinking water contamination "so severe that some faucets can be lit on fire." The study examined groundwater obtained from 68 wells throughout Pennsylvania and New York, finding that shallow drinking water systems within 1,000 meters of active natural gas drilling had methane levels 17 times higher than fresh water aquifers further away from active drilling sites. The study reinforces the findings of a 2009 investigation by ProPublica that revealed that methane contamination from fracking was widespread.

Proponents of fracking, primarily the oil and gas industry, insist that the procedure is safe and stress that it has opened up vast new supplies of natural gas that will reduce imports of the fuel. The natural gas and oil industry denies that any evidence exists that fracking contaminates or in any way endangers water supplies. Fracking supporters contend that the Duke study does not link water contamination to fracking fluids, but rather it shows that some well casings are faulty.

Despite industry's continued assertion that fracking is safe, shareholders have begun to call for disclosure of the practice's environmental impacts. At the May 25 shareholders' meetings of both ExxonMobil and Chevron, proposals requiring disclosure on the impacts of fracking received 40 percent of votes by shareholders at Chevron and 30 percent of votes by ExxonMobil shareholders. Referring to the Chevron vote, "Breaking 40 percent on a first year resolution has only happened a few times in the last few decades, so it shows how seriously the company's shareholders are taking this issue," said Michael Passoff of As You Sow, an advocacy organization that supported the resolutions at the two companies.

Do Federal Safeguards Exist?

Currently, industry enjoys an exemption from a regulation under a federal drinking water statute; this exemption permits companies to maintain secrecy around the chemicals used in fracking. In most cases, the Safe Drinking Water Act (SDWA) authorizes the U.S. Environmental

Protection Agency (EPA) to regulate the injection of fluids underground and limit pollution levels in drinking water. However, the 2005 Energy Policy Act stripped the EPA of its authority to monitor hydraulic fracturing, making it the only industry to benefit from such an exemption. Without the authority of the SDWA, EPA scientists are unable to analyze the chemicals, processes, and health and environmental effects of fracking.

In light of mounting concerns about the environmental and health impacts of fracking, congressional Democrats introduced the Fracturing Responsibility and Awareness of Chemicals Act (FRAC Act) in both the House and Senate on March 15. The FRAC Act would amend the SDWA and mandate full disclosure of fracking chemicals. Prior to that, Congress ordered the EPA in 2010 to conduct a study of the practices and environmental impacts of fracking, particularly on groundwater. The EPA has stated that the initial results will be made public by the end of 2012, with a final report released in 2014. The agency's 2004 study on fracking, which declared that the process was safe, was widely criticized as flawed and exaggerated, particularly by the EPA official who oversaw the study. That study enabled passage of 2005 energy legislation exempting fracking from federal regulation under the SDWA.

EPA Administrator Lisa Jackson testified before the House Oversight and Government Reform Committee on May 24 on energy policy and production. In her testimony, Jackson committed the EPA to "step in to protect local residents if a driller jeopardizes clean water and the state government does not act." She received both criticism and praise for her testimony.

In particular, in response to a question from Rep. Gerry Connolly (D-VA) regarding any evidence that hydraulic fracturing can affect water supplies, Jackson said, "There is evidence that it can certainly affect them. I am not aware of any proven case where the fracking process itself affected water, although there are investigations ongoing." Opponents of fracking started an online petition calling for Jackson to retract the comment and apologize for the misleading statement.

She received praise from fracking supporters, including Republicans who made the first part of her statement a talking point to argue that effective safeguards are already in place. In a press release posted on the Senate Committee on Environment and Public Works website, Sen. James Inhofe (R-OK), ranking member of the committee, commended Jackson's comments and pointed out that "...States are regulating hydraulic fracturing effectively and efficiently, and there is no need for the federal government to step in."

After a series of high-profile natural gas drilling spills, President Obama in early May asked the U.S. Department of Energy to form an expert panel to identify any immediate steps to "improve the safety and environmental performance" of fracking. The panel, which includes academic, environmental, and industry experts, will report those steps within 90 days of beginning its work. The panel's goal is to develop advice for the government within six months.

What Can States Do?

With the absence of federal regulation, states have begun requiring the disclosure of chemicals used in fracking fluid. A bill requiring natural gas drillers to publicly disclose the chemicals they use in hydraulic fracturing passed the Texas Senate after an attempt that would delay part of its implementation was defeated. Unlike other states, including Michigan and Wyoming, that have passed laws regulating the fracking process, Texas would be the first to impose a full disclosure requirement.

New disclosure rules in Michigan, announced by its Department of Environmental Quality (DEQ), will require natural gas companies to document their water use and to report the total volume of the water they recover from the wells they pump. The DEQ will publish some information about the chemicals used in the fracking process, requiring companies to disclose all Material Safety Data Sheets, and will post that data on the department's website for public review.

Wyoming was the first state to require the disclosure of chemicals used in fracking fluid. Following Wyoming's lead, other states have proposed similar rules, including California, which is considering a bill that would require companies to disclose information to a state supervisor who would later post it on a website.

Pennsylvania has proposed legislation that would require companies to disclose chemical information to the state but not necessarily the public. In Arkansas, a fracking disclosure bill was presented and withdrawn. The rules and legislation proposed in most of the states are similar: companies that use hydraulic fracturing must disclose some or all of the contents of the fracking fluids pumped underground.

Other states, such as New York and New Jersey, have taken an extra step and are pursuing moratoriums on fracking operations. In November 2010, New York imposed a statewide moratorium on fracking while a comprehensive review of the practice is undertaken. In March, New Jersey lawmakers advanced legislation that would make the state the first to permanently ban fracking.

Are We Alone?

Neither the practice of fracking nor the concerns about the impacts of the activity are limited to the United States. The French National Assembly approved legislation on May 12 that would ban fracking. If passed by that country's Senate, France could become the first nation to ban fracking altogether.

Agencies Release Preliminary Plans for Retrospective Reviews

On May 26, a wide range of federal agencies released 30 preliminary plans outlining steps each intends to take to meet requirements for reviewing existing regulations, reducing burdens on business, and expanding public participation in the rulemaking process. The plans are part of the Obama administration's efforts to examine ways to reduce regulatory costs and identify outdated and ineffective rules.

President Obama issued Executive Order 13563 (E.O. 13563), Improving Regulation and Regulatory Review, on Jan. 18. The executive order directed federal agencies to develop and submit preliminary plans to the Office of Information and Regulatory Affairs (OIRA) by May 18.

The plans meet the requirement in section 6(b) of E.O. 13563 for each agency to identify how it "will periodically review its existing significant regulations to determine whether any such regulations should be modified, streamlined, expanded, or repealed so as to make the agency's regulatory program more effective or less burdensome in achieving the regulatory objectives."

In announcing the public release of the preliminary plans at the conservative American Enterprise Institute, OIRA Administrator Cass Sunstein described the retrospective review effort as an attempt to change the regulatory culture of Washington by concentrating on cost-effective rules based on evidence of what works. The overall intent of the effort, he said, is to focus on burden reduction and cost savings. He indicated that this review is expected to save "hundreds of millions of dollars in annual regulatory burdens."

All 15 cabinet-level departments and the U.S. Environmental Protection Agency (EPA) submitted review plans, as did 14 non-cabinet agencies. The plans differ from agency to agency. The reviews of agency rules are not limited, however, to "existing significant regulations" as the E.O. states but, in some cases, include rules under development. This expansion of the reviews beyond the intent of the E.O. raises concern that proposed regulations will be endangered by additional special interest pressure, either at the agencies or while the rules are under review at OIRA.

Some plans provide information on specific rules agencies plan to target for reform or repeal, thereby drawing the battle lines for upcoming debates over certain safeguards. Some plans propose an ongoing process agencies will use to evaluate existing rules now and in the future. Agencies will be inviting public input on the preliminary plans and will then make their plans final between July 18 and Aug. 6.

Summaries of Preliminary Plans

The summaries of some major agency plans below provide a flavor of the different approaches agencies adopted to meet the requirements of the E.O. The development of the plans appears to have been decentralized and agency-driven. The fact that agency plans each have different

formats and different approaches indicates that this was not a top-down, White House-driven exercise.

Department of Agriculture (USDA). USDA's plan intends to "simplify and reduce the reporting burden on the public for entry and access to USDA programs" and reduce costs by sharing information with other agencies. The agency already has a process for the development and review of all regulatory actions consistent with E.O. 12866 (the Clinton-era order directing agencies how to develop and submit for OIRA's review major proposed and final regulations). The process covers the full rulemaking cycle and will be amended to meet the requirements of E.O. 13563 and formally incorporate retrospective analysis into regulatory development procedures.

An example of the type of rule targeted by USDA's approach is the Food Safety and Inspection Service's (FSIS) consideration of how to use the new Public Health Information System to share collected data and reduce reporting requirements. FSIS is also considering reducing the requirement that meat, poultry, and egg product labels be submitted for approval prior to use to "decrease the recordkeeping burden on industry."

Environmental Protection Agency. EPA's preliminary plan lists 31 regulatory reviews for the initial period. The agency plans to address 16 of these priority items during the 2011 calendar year, while the other 15 reviews are longer-term actions. EPA plans to conduct periodic retrospective reviews every five years. It will solicit public input at the start of each review period and plans to aid the public in tracking reviews through the Semiannual Regulatory Agenda and the agency's Rulemaking Gateway.

EPA's plan is heavily focused on burden reduction and resource efficiency. In conducting retrospective reviews, the agency will look for ways to advance four broad initiatives: electronic reporting, improved transparency, innovative compliance approaches, and integrated problem solving. For many of the review items, EPA intends to reduce burden and improve efficiencies by replacing paper-based reporting with electronic reporting, coordinating and clarifying regulatory requirements, and eliminating regulatory requirements that have become redundant because of technological advances. For example, EPA intends to issue a proposed rulemaking during the summer ("Widespread Use of Onboard Refueling Vapor Recovery") that will eliminate redundancy in vehicle fuel vapor recovery systems. This would eliminate gas dispenser-based vapor control requirements that have become redundant due to modern onboard refueling vapor recovery technology. EPA estimates long-term cost savings at $67 million per year.

EPA has developed a comprehensive approach to conducting these reviews. It will conduct them following a four-step process: 1) solicit nominations for regulations in need of review; 2) select regulations for review; 3) conduct retrospective reviews; and 4) make modifications if necessary. In conducting retrospective reviews, EPA will evaluate regulations under several criteria corresponding to principles listed in the E.O. Considerations include: whether the benefits of a regulation justify its costs; whether there are alternatives to direct regulation that would still

ensure environmental objectives are met; and whether the regulation applies to entities covered by multiple EPA regulations.

Of particular concern is EPA's plan to include reviews of many regulations already in development. The plan notes, "of EPA's current regulatory workload, almost two-thirds of [the] activity is a review of an existing regulation." This emphasis on new rules was not the intent of the E.O. and may indicate the agency has bowed to the intense political pressure to ease regulations. For example, EPA intends to review the efficacy of testing requirements issued under the 2008 Lead Renovation, Repair, and Painting Program. Additional testing and cleaning requirements, proposed in May 2010, are "designed to ensure that renovation work areas are adequately cleaned after the renovation work is finished and before the areas are re-occupied."

Lastly, EPA will review five rules in an attempt to determine why the cost estimates of the regulations differ from actual compliance costs. One of the goals is to determine if any systematic biases exist in EPA's ex-ante cost estimates, according to the plan.

Department of Health and Human Services (HHS). HHS's plan does not include a timeline for its review process but indicates that the rules discussed in its proposal will be reviewed over the next two years. According to HHS, the review process will focus on eliminating rules that are no longer necessary, but there is no listing of rules nominated for elimination. The department also indicates that the list of rules included in its proposal is incomplete because some initiatives have not cleared the internal process at the agency.

The plan includes new goals for the agency's ongoing review process, including increased transparency, more public participation in the review process, and strengthening agencies' ability to analyze regulations. In order to reach these goals, HHS indicates it will consider initiatives to improve online access to regulatory activity and set up a task force to determine how best to involve the public in the review process.

The review will include all significant regulations, whether they are final, proposed, or interim final. For example, the Food and Drug Administration (FDA) includes in its list of affected regulations a proposed rule requiring graphic warning labels on cigarette packages, which has a built-in review process for assessing the effectiveness of the labels. The Good Manufacturing Practice (GMP) food regulations, which are also on the FDA's review list, have been in the pre-rule stage since before the E.O. was issued.

A truly retrospective review of FDA's 2004 bar code rule will also take place. The agency proposes a cost-benefit reassessment to determine if the rule should be updated to include technology advancements.

Department of Labor (DOL). DOL's plan identifies nine rules as candidates for retrospective reviews. Five of these rules are "Signature Burden-Reducing Retrospective Review Projects," well-defined projects, each with an estimated cost savings; the other rules are more conceptual in nature and do not have estimates of cost savings. The agency does not outline a formal

process for future retrospective reviews. Instead, during DOL's semiannual regulatory agenda planning periods, leadership will ask "agency officials to review existing regulations to determine whether items are candidates for retrospective review." This will be done by the existing Regulatory Council, which includes cross-agency leadership. There is a long list of factors to be considered but no clearly defined criteria for when a rule might be reviewed.

This plan also highlights several review efforts that are already underway, along with some new projects. For example, one of the Occupational Safety and Health Administration's (OSHA) "signature" projects is a proposed rule on harmonizing hazard communications. By harmonizing hazard classifications, safety data sheet formats, and warning labels, OSHA expects annualized savings of between $585 million and $798.4 million.

The Mine Safety and Health Administration's (MSHA) rule for approving electrical products used in underground mines has been in place since 1968. According to DOL's plan, MSHA expects to propose a new rule to "improve the efficiency of the approval process, recognize new technology, add quality assurance provisions, incorporate existing approval policies into MSHA regulations, clarify existing policies and procedures, and reorganize portions of the approval regulations." MSHA estimates that a streamlined process could save equipment manufacturers between $500,000 – $1 million.

Department of Transportation (DOT). DOT is using its preliminary plan to refine a preexisting plan the agency developed to review all of its regulations over a ten-year period. Under the existing plan, which began in 2008, the department is reviewing portions of the Code of Federal Regulations (CFR) each year. As part of its compliance with E.O. 13563, DOT will supplement its review process by expanding the participants to include inspectors, for example, and use advisory committees to review the agency's process. The plan lays out DOT's evaluation criteria.

The preliminary plan takes a rule-by-rule/issue-by-issue approach, overlaying the CFR review. The department took public comments after the E.O. was issued and used the preliminary plan to respond to issues raised in the responses the department received. DOT also asked individual departmental agencies for suggestions. The preliminary plan identifies 70 regulations for action and is divided into three sections: Actions being taken; further study required; and no further action.

Under the heading "Documents covered under this plan," DOT says, "This plan covers all of the Department's existing rules. Any review of a listed rule may also include related guidance, information collections, and other documents, such as waivers and interpretations."

Examples of rules DOT is likely to address include Federal Aviation Administration (FAA) rules that could streamline alcohol and drug testing programs and aircraft manufacturing certification rules.

A May 26 press release from OMB Watch expressed concerns about the retrospective review process while acknowledging that final plans are still months away. The focus of the E.O. was clearly on existing rules. Opening the door to proposed regulations, as many agencies' plans do,

plays into the hands of special interests attempting to kill regulations targeting Wall Street and much more. Both the plans and the process for finalizing the plans could be significantly more transparent. Additionally, they could allow for more meaningful public participation. Many of the plans are simply too vague to know what action an agency intends to take on a particular rule.

The press release also notes that "there is a concern about allocation of agency resources. Many of the plans discuss multi-year processes for retrospective reviews. This comes at a time that Congress is cutting regulatory agency budgets. The result is likely to mean that the more agencies look back, the less they will be able to look forward. Americans demand more from their government to protect them from harm."

In the Aftermath of *Citizens United*, Courts Muddy the Waters on Political Engagement

While observers agree that *Citizens United v. Federal Election Commission* is already transforming the way political campaigns operate, courts cannot seem to agree what the decision truly means.

The *Citizens United* ruling made clear that corporations, including certain nonprofit organizations, may make independent expenditures during an election. Independent expenditures are communications that expressly advocate for the election or defeat of a federal candidate that is not made in coordination with the candidate. What remains uncertain is precisely how far the logic underpinning the decision may extend.

On May 26, a federal judge in Virginia ruled that a law barring corporations from making contributions directly to candidates is unconstitutional. During the 2008 election, two Virginia businessmen used company funds to reimburse their employees for contributing to Hillary Clinton's presidential campaign. Their attorneys argued that corporations should be treated just like individuals when it comes to campaign contributions, based on the logic of *Citizens United* that corporations are like individuals for the purposes of independent expenditures. The judge agreed, writing that "there is no distinction between an individual and a corporation with respect to political speech." That is, corporations can give the same amount of money to a campaign that a person can.

The practical implications of this ruling on the 2012 election are likely to be small: on May 31, the judge requested that attorneys on both sides file additional briefs arguing whether he should reconsider his decision, based on a 2003 U.S. Supreme Court decision that upheld a ban on corporate contributions to campaigns and that had not been brought up during initial arguments. Even if the judge does not reverse himself, campaign finance experts argue that the decision would apply only to candidates and corporations in the Eastern District of Virginia for the time being.

In another state case, the Montana Supreme Court is expected to rule whether its state's ban on corporate political spending is valid. The Montana Corrupt Practices Act of 1912 was enacted in response to the "copper kings," out-of-state corporate interests that were spending millions of dollars to elect legislators of their choice. The law bars corporations from using their general funds for political purposes but allows them to establish political action committees – just like the portions of the McCain-Feingold law that were invalided by *Citizens United*.

Montana Attorney General Steve Bollock argues the situation in Montana is different from the one the U.S. Supreme Court confronted in *Citizens United*. Bollock says that the most important factor leading to the Court's decision were what Justice Anthony Kennedy called the "onerous" Federal Election Commission requirements that kept many corporations from establishing political action committees. Not only is the state's process much simpler, Bollock argued in a press release, the state's history demonstrates that corporations have already corrupted the state's politics once and should not be given a chance to do so again.

The Minnesota legislature took a slightly different tack in response to *Citizens United*, becoming one of the states to pass a law requiring corporations to disclose their political spending within the state. As a result of that law, Target Brands, Inc. was forced to disclose campaign contributions to a conservative group during the 2010 election – contributions that became extremely controversial and for which the corporation eventually apologized.

On May 16, the Eighth Circuit Court of Appeals upheld Minnesota's disclosure law. "Unlike outright bans on corporate independent expenditures, which are viewed with great suspicion and subjected to strict scrutiny, courts generally view corporate disclosure laws as beneficial and subject such regulations to the less-rigorous exacting-scrutiny standard," wrote the majority. While critics of disclosure had argued that Target's experience shows that disclosure laws "chill" corporate political speech, the court agreed with voter advocates that political spending transparency, in fact, has benefits for voters.

As cases like these continue to percolate through the court system, it has become increasingly clear that the *Citizens United* decision was only the first in what will inevitably become a number of rulings on corporate political expenditures. The tremors *Citizens United* sent through the political system in January 2010 will continue to rumble while state and federal courts wrestle with cases like these.

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