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In This Issue

Despite Debt Ceiling Deal, Future Budget Road Looks Bumpy

Although the recent debt ceiling deal theoretically brings Republicans and Democrats into agreement on spending levels for the next 10 years, the two parties remain miles apart on key budgetary issues. These fissures are likely to become apparent as Congress comes back into session and legislators begin work on a stop-gap continuing resolution over the coming weeks to stave off a government shutdown at the beginning of the next fiscal year, which starts Oct. 1.

The House passed six of the requisite 12 appropriations bills before the summer recess, a record for recent Congresses. But since coming back from break, there has been action in only one subcommittee. House appropriators seem to be waiting for an omnibus bill from the Senate, which would combine all the remaining legislation into one large budget bill.

By contrast, the Senate passed only one bill before the recess, but the Senate Appropriations Committee has passed three bills since and will be working on another six in the coming weeks. The debt ceiling deal set an overall spending level for FY 2012, and this seemed to get the Senate moving, as it had been unable to reach consensus on spending levels before the recess. Without

a target number, the individual appropriations subcommittees were unwilling to hold public hearings or politically tough votes on their bills.

The debt ceiling deal set a spending cap slightly below the spending level for the current fiscal year ($1.050 trillion in FY 2011 vs. $1.043 trillion in FY 2012, a difference of less than a percentage point). As a result, the Senate is working with budget levels higher than the House levels, since the House budget slashed more than $30 billion from the budget.

Some conservatives are trying to rally support for the House to demand the lower levels in the House budget resolution, but House leadership is publicly supporting the budget levels set out in the debt ceiling deal.

A potentially bigger difference between the two houses is how the funding is allocated below the overall cap. The Senate holds defense spending flat from last year, while the House budget increased defense spending significantly. This means cuts to non-defense spending are much smaller in the Senate budget; by increasing defense spending by three percent, the House budget forces drastic cuts in other areas.

With many pro-defense conservatives already up in arms over the defense cuts in the debt ceiling deal, it is not clear that Republican members of the House will agree to the Senate's proposal to keep defense spending flat (the debt ceiling deal caps "security" spending, which is defined as the Departments of Defense, Homeland Security, Veterans Affairs, and several other budget areas, meaning Congress could grow Pentagon spending at the cost of the other security programs while staying under the cap).

Even if the House agrees to the Senate's general budget levels, there are multiple opportunities for the two parties to clash. Congress had been debating short-term extensions of both the surface transportation bill, which funds hundreds of billions of dollars worth of transportation projects over a five-year time period, and the reauthorization of the Federal Aviation Administration (FAA). Republicans have delayed both bills. They refused to reauthorize the FAA unless anti-union measures were attached and then demanded the transportation bill be cut by half. Over the weekend of Sept. 10-11, congressional leaders agreed to punt both issues into early 2012, temporarily defusing the situation. The weekend agreement also temporarily renews the gas tax, which pays for a great deal of the transportation bill; this delays a fight on that issue until 2012.

Perhaps the most contentious short-term fiscal issue before Congress is disaster relief. Thanks to a spate of costly natural disasters – an earthquake, Hurricane Irene, Tropical Storm Lee, and subsequent flooding, the Federal Emergency Management Agency (FEMA) is running out of funding, and the White House is seeking $5.1 billion in disaster aid for FY 2011 and FY 2012. While Republicans agree that more funding is needed to help rebuild communities across the country, House leaders are insisting that any new funds be offset by cuts elsewhere, outraging Democrats who accuse the GOP of essentially playing politics with natural disasters. House Appropriations Committee Chair Hal Rogers (R-KY) announced on Monday, Sept. 12 that

disaster relief will be a part of the continuing resolution later in September, but he did not say how it would be integrated.

Of course, all of this is just a precursor to the premier budget fight to come, by way of the debt ceiling deal. The so-called Super Committee created by the deal is charged with releasing a massive $1.2 trillion deficit reduction package by Thanksgiving, and the committee may consider incorporating pieces of President Obama's recently announced jobs bill into it (which would require deeper cuts to other programs). With a highly public fiscal fight looming in the future, Congress may decide to clear the decks by quietly wrapping up or postponing contentious issues in the FY 2012 budget.

CWC's Final Report: Make Investments in Contracting Oversight

On Aug. 31, the Commission on Wartime Contracting (CWC) released its final report to Congress, detailing contracting issues in Iraq and Afghanistan. Although most media outlets focused on the sensational estimates of funds lost through waste and fraud over the course of the wars – possibly totaling $60 billion – the report makes a much broader and compelling argument for systemic contracting reforms and better contractor oversight. With the current atmosphere of austerity on Capitol Hill, Congress should heed these recommendations.

Congress created the CWC in 2008 by including language in that year's defense authorization. Tasked with examining the extent of reliance on and the performance of private contractors in Iraq and Afghanistan, the commission held 25 hearings over the course of three years, made repeated fact-finding trips to the Middle East, and published several reports to Congress. The CWC has established itself as a remarkably influential source for nonpartisan information on war-related contingency contracting. The commission will wind down and cease operations at the end of September.

The commission makes several broad recommendations, providing details on how to improve contract planning, expand competition, improve interagency coordination, and jettison unsustainable foreign projects abroad, and, most importantly, strengthen the federal government's capacity to provide effective contract management and oversight. Without developing their own capacity for oversight, agencies can get trapped in a vicious cycle of continued dependence on the services of the private sector, as the government is never able to develop the capacity to perform the functions on its own.

Without adequate management and oversight, contractors may overstep their authority and engage in behavior that puts the U.S.'s mission or U.S. personnel at risk. And when the government overrelies on some contractors, it may find it difficult to cut off the offending parties because alternative service providers are not available.

The federal government will only be able to improve contract management and oversight by increasing the number of oversight personnel, according to the commission. Currently, agencies do not have the number of staff needed to oversee the number of contractors working in war

zones. A recent U.S. Army report found a similar deficiency of oversight staff in domestic contracting, as well.

Of course, for the federal government to hire more oversight staff, Congress would have to provide the relevant agencies – such as the Department of Defense (DOD), the State Department, and the U.S. Agency for International Development (USAID) – with additional funds. This seems unlikely, though, in light of looming budget cuts that are likely in either outcome provided by the debt ceiling deal.

The CWC report argues that additional upfront investments in contractor oversight will pay off in the end by saving money lost to corruption and fraud.

Even though military personnel are scheduled to begin transitioning out of Iraq at the end of this year and Afghanistan in the near future, the costs of moving out of the arena and the continuing U.S. presence in these countries will be large enough to warrant these immediate investments in oversight personnel.

For instance, the State Department will soon take over responsibility for Iraq from DOD and will have to begin performing many tasks the Pentagon has been carrying out for the last eight years. To perform these tasks, State will rely on a large number of private security contractors (PSCs). In addition to the current small army of roughly 19,000 PSCs in Iraq right now, the agency estimates it will need another 6,000 to 7,000 contractors to carry out its responsibilities.

For over a year now, the CWC has been pointing to the potential challenges of this handoff. State does not have the personnel to oversee the numerous contractors that will soon flood into the country. A similar situation is likely to occur in Afghanistan some years down the road as the U.S. military draws down its forces in the country.

At least some members of Congress recognize the significance of the CWC's recommendations. In September, Rep. John Tierney (D-MA) introduced legislation that would create a permanent special inspector general for overseas contingency operations, an idea originally proposed by Sen. Claire McCaskill (D-MO) and endorsed by the CWC in its final report.

EPA Both Increases and Delays Public Access to Critical Greenhouse Gas Data

In August, the U.S. Environmental Protection Agency (EPA) made several changes to the Greenhouse Gas (GHG) Mandatory Reporting Rule that will improve, but also delay, public access to critical air pollution data. The EPA will launch an electronic tool to collect and make public GHG pollution data from companies. However, the agency allowed firms in several industries to delay disclosing the factors used to calculate their GHG emissions.

Launched in 2009, the EPA's GHG Reporting Program requires facilities to annually report GHG emissions data. The first round of data will be submitted electronically by Sept. 30. EPA

will make non-confidential GHG data publicly available by the end of 2011, while deferring – until 2013 and 2015 – reporting requirements for certain data elements used to calculate emissions.

GHG Electronic Reporting Tool

On Aug. 22, the EPA launched a new electronic tool to enable 28 industrial sectors – equal to approximately 7,000 large industrial GHG emitters and suppliers – to submit their emissions reports to the EPA via the Internet. This includes power plants, petroleum refineries, and landfills. Prior to the launch, the EPA tested the electronic GHG Reporting Tool (e-GGRT) with more than 1,000 stakeholders, including industry associations, states, and non-governmental organizations (NGOs), to make sure it was clear and easy to use. A summary of the testing is publicly available via the EPA's GHG Reporting Program's website.

The tool marks yet another move by the EPA toward electronic reporting. In the past six months, the EPA has required electronic reporting for new chemical notices under the Toxic Substances Control Act (TSCA) and announced its plans to require electronic reporting of all Toxics Release Inventory (TRI) data. Electronic reporting comes with numerous benefits, such as significantly reduced data errors, easier public access, and faster identification of environmental and health risks. In addition, electronic reporting reduces costs for both the reporting facilities and the agencies associated with collecting and disseminating national data.

We hope that when the GHG tool produces public data, it will also provide tools that allow users to easily analyze large sources of GHG pollution in their areas, compare performance, and track industry averages. If the data is presented properly, the public will be able to use the information to ensure that emitters take responsibility for the way they are contributing to climate change. Industries can use the data to compare their performance against other companies in their sector, help decrease their carbon pollution, increase efficiency, and save money.

Public reporting of pollution has proven a powerful tool in fostering public awareness of environmental problems and generating significant reductions in emissions. For instance, the Emergency Planning and Community Right-to-Know Act created TRI, a national database of toxic emissions reported by industrial sources, in 1986, and the EPA began taking data a year later. Since that time, the private sector has reduced the amount of toxins it releases by more than half.

Deferring Certain GHG Data

In a final rule published on Aug. 25, just days after the electronic reporting tool was launched, the EPA deferred reporting requirements for certain data elements used to calculate GHG emissions. The elements covered by the rule include production and throughput quantities, product compositions, raw materials used, and other process-specific information.

The agency set two deadlines for reporting these data elements, depending on the data involved. The EPA deferred one set of inputs to March 31, 2013, despite the fact that the agency claimed such inputs could be quickly evaluated; the reason for the delay is unclear. This deadline applies to electric transmission systems, stationary fuel combustion, underground coal mines, municipal solid waste landfills, industrial wastewater treatment, electric equipment manufacturers, and industrial waste landfills.

The agency delayed the second set of inputs, which require longer assessment, until March 31, 2015. This affects several data elements that must be reported by stationary sources that combust fuels, including petrochemical production, iron and steel production, industrial wastewater treatment, petroleum refineries, lead production, and more than 20 other sectors.

The agency delayed this reporting requirement to further examine industry concerns that the data elements contain confidential business information (CBI) and should not be disclosed. Pursuant to the Clean Air Act, "emissions data" cannot be classified as CBI. On July 7, 2010, the agency proposed that all GHG emission equation inputs are considered "emission data" and therefore, under the Clean Air Act, must be made available to the public.

The EPA received extensive industry input in response to its July proposal, raising concerns that many GHG emissions inputs may include CBI. To resolve industry concerns about CBI, EPA released a proposed rule in December 2010 deferring the input reporting requirement until March 31, 2014.

In comments submitted to the EPA regarding the proposed 2014 deferral, environmental organizations stated, "The deferral would seriously degrade the reporting system's data quality, deny the public its legal right to this vital emission data, and disrupt other reporting programs."

The EPA will have difficulty designing new GHG limits for industries without data on emissions input, the groups argued. "The delay proposed for reporting the verification data elements means that no one will be looking over industry's shoulders," they asserted

Several states share similar concerns about the deferral, stating that the data is crucial to designing effective policies to address climate change. As a result, some states have begun limiting GHG emissions on their own. For example, Washington State is creating its own greenhouse gas inventory, and California has started its own cap-and-trade program. Both states had planned to coordinate their plans with the federal program. Additionally, the six New England states, along with New York, New Jersey, Maryland, and Delaware, have joined a Regional Greenhouse Gas Initiative's cap-and-trade program for carbon dioxide.

Despite these concerns about the initial deferral decision, the EPA not only left the deferral in place, it extended it for an extra year. This appears to be in direct contradiction of the agency's stated goal to minimize the use of CBI claims and other gamesmanship that industry uses to hide crucial environmental health information from the American people.

Commentary: Progress, Pitfalls in Addressing Government Secrecy 10 Years after 9/11

Sunday marked the 10-year anniversary of the 9/11 terrorist attacks. This is an appropriate time to look back on what happened to government openness and access to information in the aftermath of the attacks. It seems that after 9/11, government officials stopped believing that Americans could be trusted with information – about their communities, about risks and dangers they could face, and about government actions on their behalf. Withholding information from citizens is a slippery slope for any democracy, yet over the past decade, government secrecy has expanded under the misguided belief that sacrificing citizen access to government information would somehow make us more secure.

Fears that terrorists would exploit our openness and use public information to find new targets to attack weaknesses in our security systems led us to start locking away huge amounts of information almost immediately after 9/11.

For example, access to Environmental Impact Statements (EIS) for Department of Energy facilities was eliminated. Under the National Environmental Policy Act, EISs are produced specifically to allow the public to understand the possible impacts of government facilities and activities on communities in the area and to engage in debate.

In another instance, communities that faced the prospect of new pipelines running through their backyards lost access to the Pipeline Mapping System. The system allowed users to better understand the risks associated with pipelines so people could help ensure the safety of their communities.

The government scrambled to take down information from the Internet that discussed dangers or risks in even the most cursory way. Pilots were blocked pilots from getting the information they needed to avoid new no-fly zones. Online maps replaced government buildings with blurred-out images. Public officials ordered that safety notices on hazardous materials be removed as labels. Information on environmental risks such as groundwater pollution was no longer available. An alphabet soup of new "secure" information categories emerged – For Official Use Only, Sensitive Homeland Security Information, and so on – replete with confusing guidance on who could see this newly restricted information and how it could be used.

In hindsight, many of these decisions weren't logical or sensible. For example, first responders argued that they needed to know if hazardous materials were in containers in the event of an accident. Pilots inadvertently flew into restricted areas. Communities were not allowed to see potential industrial contamination of their water supplies. The benefits derived from using public information to make our lives and our communities better was lost.

However, with distance and experience, public officials appear to have gained some perspective. Much of the information that was hastily removed or blocked has been re-posted. Even more encouraging, the commitment to information sharing and democratic participation is back on the federal government's radar – in an extremely positive way.

The Obama administration promised to be the most transparent in history and is trying to make good on this pledge. In the past two years, all federal agencies have developed plans to share more information with the American public and to increase public participation in policymaking. Federal agencies are cataloguing and examining restricted information categories in order to better share information with state and local authorities and the public. The federal government is using interactive websites and other tools to communicate with the public and open up large amounts of official information on a wide variety of issues and activities.

Nonetheless, the United States still has a long way to go to undo official reactions to 9/11. For example, the Transportation Security Administration (TSA) rule that requires airline passengers to show identification remains a so-called "secret rule," the text of which has never been published in the *Federal Register*, posted on the TSA's website, or otherwise made publicly available (this is ironic, since all passengers know of and are required to adhere to this rule). Additionally, though the 9/11 Commission found that over-classification and the resulting difficulty in sharing information between agencies and others significantly contributed to our failure to detect and deter the 9/11 attacks, we have not significantly reduced the amount of information mistakenly classified or sped up the process of declassifying information that can be released.

The unfortunate reality is that we live in world full of dangers – terrorists, economic instability, toxic pollution, natural disasters, failing bridges, recalled consumer products, and more. The public not only has a need to know about these dangers, but a fundamental right to know as much about them as possible so that they might protect themselves and their communities. Of course, there will always be top secret and sensitive information that cannot be shared, but in a democracy, we should make nondisclosure the exception, not the rule, even during wartime. In a democracy, citizens have a presumptive right to know what their government knows and what actions it is taking on the public's behalf. With wholesale secrecy, people won't even know what they don't know. This negates the basic premise of an effective, accountable democracy: an informed citizenry.

Building a 21st Century FOIA System

The Obama administration is seeking to use technology to better support the Freedom of Information Act (FOIA) system. The effort could improve access to government information, empower Americans, and strengthen democratic accountability.

Background

Fifteen years after the Electronic Freedom of Information Act Amendments (E-FOIA) were signed into law in October 1996, the law's vision of technology improving public access to government information is still under construction. Here are the elements envisioned:

Proactive Disclosure: Although typically considered a request-and-response system, FOIA has almost always required the proactive disclosure of some information. Seizing on new technology

to broaden public access, E-FOIA expanded the information that agencies are required to proactively disclose and required agencies to post such information on their websites.

E-FOIA thus began to move the FOIA system toward greater proactive disclosure, shifting government toward more effectively and efficiently embodying openness. President Bill Clinton embraced this shift in his signing statement, noting, "As the Government actively disseminates more information, I hope that there will be less need to use FOIA to obtain government information."

Despite fifteen years of intense technological progress since E-FOIA, however, Congress has not updated the proactive disclosure standards. In addition, compliance has fallen short, as noted in a 2002 General Accounting Office (now the Government Accountability Office) study and a 2007 National Security Archive survey. As a result, vital opportunities to bolster openness through proactive disclosure have been missed.

Requests and Processing: Although Clinton hoped that proactive disclosure would lessen the need for FOIA requests, processing public requests for information remains an essential tool for democratic accountability. But an effective FOIA system can be undermined by confusing and unhelpful customer service, as well as long delays collecting information from poorly designed IT systems.

E-FOIA clarified that electronic records, like those on paper, are subject to FOIA. But the law still allows agencies to use IT systems that require expensive and lengthy manual processing in order to make their information available to the public. For example, a recent House Oversight and Government Reform Committee survey found that agency financial systems frequently require manual processing to provide information to other government systems or the public.

Poor technology also often hamstrings requesters' interaction with agencies. For instance, although agencies generally accept requests via e-mail, many do not provide a web form for requests. Such forms could make filing and processing requests much easier. In addition, while the OPEN Government Act of 2007 required agencies to assign tracking numbers to requests, most agencies do not provide an automated system to check the status of a request using such information. As a result, requesters often have to wait days for a manual reply to their status inquiry.

New initiatives

On Sept. 6, the Department of Justice's Office of Information Policy (OIP) announced that it would focus on using technology to strengthen the FOIA system. OIP oversees FOIA administration across the government.

Specifically, OIP announced that it would convene a technology working group in fiscal year 2012, which begins Oct. 1, to focus on improving FOIA processing, such as document searches, reviews, and consultation between offices.

The OIP working group could complement the efforts of the Office of Government Information Services (OGIS) within the National Archives and Records Administration. OGIS, which was created in 2007 by the OPEN Government Act, has focused on improving the experience of FOIA requestors. As a result, OGIS has developed a set of best practices for agencies to follow in their FOIA implementation, most recently published in February. Many of the best practices involve more effectively using technology to expand proactive disclosure and improve customer service.

The OGIS best practices include:

- Establishing categories of records that can be proactively disclosed regularly
- Posting online documents that have been released under FOIA
- Posting a case log online that allows requesters to search by tracking number to see their status
- Posting more information online about the agency's FOIA process, such as the agency's FOIA regulations, contact information for the agency's public liaison, and information about the requestor services offered by OGIS
- Communicating with requesters by e-mail or phone where it would be more efficient than mail

In addition, the administration has repeatedly emphasized the importance of proactive disclosure. For example, in March, the White House announced that it would require agencies to post their staff directories online, as well as their congressional testimony and reports to Congress. Unfortunately, a July audit by OpenTheGovernment.org found that most agencies had not yet done so.

Finally, the administration's in-progress reform of federal websites policy could support improvements. In August, the White House asked for feedback on revising a 2004 Office of Management and Budget (OMB) memo that establishes information to be included on federal websites. In response, OMB Watch recommended significantly expanding the categories of information to be disclosed from those currently listed in the memo. OMB Watch's comments also recommended that agencies allow the public to submit and track FOIA requests, and to receive responses, online.

Further recommendations

The OIP working group should solicit ideas on improving the FOIA system from the public. In addition, the OIP working group should consult with the intergovernmental Open Government Working Group.

In addition to developing short-term guidance to agencies, the OIP working group should address the longer-term question of how IT systems facilitate or impede FOIA. In recent comments on the administration's Open Government Partnership national plan, OMB Watch called for agencies to consider full-circle transparency, including responding to FOIA requests, in making IT investments. More thoughtful planning up front in the design of IT systems could

save enormous amounts of staff time if systems were designed with a presumption of automatic disclosure. The OIP working group should begin to consider this topic, along with the Federal Chief Information Officers Council and the Federal Records Council. With a good, long-term IT strategy, the effectiveness and efficiency of the FOIA system could easily be transformed.

Agencies should comply with the OGIS best practices. Additionally, agencies should revise their FOIA regulations to embrace greater use of technology to improve customer service and expand proactive disclosure.

Finally, OIP should update its reporting guidelines to agencies in order to better assess the use of technology in the FOIA system, including compliance with the OGIS best practices.

Federal Agencies Release Retrospective Review Plans

On Aug. 23, federal agencies released their final plans for conducting retrospective reviews of regulations as directed by a January executive order from President Obama. Overall, the final plans closely reflect the preliminary plans released by agencies in May. Agencies stuck to their missions and did not cave to political or industry pressure to undermine their responsibilities to establish and enforce standards to protect the public.

The release of final plans for federal agencies' retrospective reviews of rules is the culmination of eight months of work. The process began with Obama's Jan. 18 Executive Order 13563, "Improving Regulation and Regulatory Review" (E.O. 13563), which instructed federal agencies to develop plans for the ongoing review of existing regulations to identify rules that are "outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them."

On May 26, 30 executive branch agencies submitted draft plans that reflected internal assessments of rules that might need to be revisited, along with suggestions from the public about the regulations that should be reviewed. The four independent agencies that submitted preliminary plans in May (the National Labor Relations Board, the Railroad Retirement Board, the Surface Transportation Board, and the Office Thrift Supervision) did not publish final versions in August. These and all other independent agencies are expected to release plans in November. The Securities and Exchange Commission (SEC) announced Sept. 6 that it is accepting public comment through Oct. 6 on its plan to conduct retrospective reviews.

The plans of the 26 federal agencies that report directly to the president contain the list of rules that will be revised in accordance with the executive order, as well as descriptions of how the agencies intend to incorporate ongoing retrospective review processes into their administrative procedures. Many of the agencies found inefficiencies in paperwork submission procedures, approval processes, or outdated technology requirements that can be fixed through minor changes to existing regulations. Others found that better coordination between departments or among agencies could eliminate redundancies and streamline procedures.

In finalizing their plans, some agencies integrated specific cost savings and burden-reduction benefits in their estimates of overall savings. Others added or subtracted rules to be reviewed. Many agencies also added information about the results of their requests for public comment. Most of these changes can be traced to a June 14 Office of Information and Regulatory Affairs (OIRA) memorandum that provided guidelines for what should be part of the plans. In the memorandum, agencies were encouraged to include "specific reforms and initiatives that will significantly reduce existing regulatory burdens and promote economic growth and job creation." The memo also reiterates the importance of public participation and requests that agencies include cost savings and burden reduction estimates and timelines for implementation of the changes in their plans.

OMB Watch reviewed the plans produced by six agencies that are most commonly involved in protecting public health and safety: the U.S. Environmental Protection Agency (EPA), the Food and Drug Administration (FDA) (in the Department of Health and Human Services (HHS)), the U.S. Department of Agriculture (USDA), the Department of the Interior (DOI), the Department of Labor (DOL), and the Department of Transportation (DOT). The plans were reviewed under various criteria including their impacts on health and safety protections, public participation, and transparency. (See our webpage for highlights, detailed analyses of three plans (EPA, FDA, and DOL), and background materials.)

Impact on Health and Safety Protections

Given industry pressure for deregulation and the fact that E.O. 13563 and subsequent guidance stressed cost savings and reducing paperwork requirements for regulated entities, the public interest community was concerned that the look-back process would have a chilling effect on agencies and cause them to repeal or weaken health and safety regulations. However, the analysis suggests that agencies worked to protect their primary missions while looking for cost savings.

For example, the HHS plan states, "This Department has a mission and responsibility to protect public health and safety and this mission and responsibility must take priority. It is only by maintaining a robust and healthy workforce and citizenry that the nation's economy will grow and prosper. This Department will continue to be sensitive to the need to promote the economic health of the nation without sacrificing the health and welfare of the American people."

However, the effects of some of the regulatory changes may not be clear for many years. Although agencies listed the rules that they will be revising, and in some cases estimated the effects the changes will have on industry and the public, the specific changes intended were not always made clear. For example, many agencies indicated they will reduce paperwork requirements by switching to electronic reporting. This seems like a reasonable, efficient change, but if the electronic reporting system does not collect all of the same information as the current system, it could deprive regulators and the public of vital industry data.

Public Participation

OIRA's guidance indicated that agencies should seek public input on specific rules to be reviewed and on the retrospective review process. Of the agencies analyzed, all six published notices in the *Federal Register* requesting public comment on the reviews. All except USDA had two separate comment periods: one prior to the release of the preliminary plan to suggest rules to be included and one after the preliminary release, during which the public was encouraged to comment on both the rules proposed for review and on the integration of a periodic retrospective review into agency procedures.

Each agency had its own approach to requesting public input, with mixed results. EPA had the longest comment period – a total of 77 days over two comment periods – and received more than 800 responses. USDA had the shortest public participation window, only accepting comments in the 30 days before the preliminary plan was released. Nevertheless, USDA received the most comments (about 1,100). Conversely, DOI, which accepted comments both before and after the release of the preliminary plan, for a total of 61 days, received suggestions from only about 40 commenters.

In addition to using *Federal Register* notices, some agencies reached out to the public in other ways. EPA held twenty public meetings and listening sessions before the release of its draft look-back plan. DOT held one meeting that participants could attend in person, over the Internet, or by phone. DOT and DOL also created interactive websites through Ideascale, a program similar to a message board or comment section of a blog that allows participants to post suggestions, respond to others' posts, and "agree" or "disagree" with submissions.

Inclusion of Public Suggestions

Public input is only useful if the agencies incorporate the suggestions into their plans. As with the rest of the review process, each agency took a different approach to including and reacting to public comments. DOT attached an appendix to its plan that listed every comment it received. For each rule that a commenter suggested revisiting, DOT provided an explanation for why it was or was not including it in the retrospective review. Other agencies, such as FDA, also had clear descriptions of comments and explanations for action or inaction where appropriate. The Food Safety and Inspection Service (FSIS) in USDA and DOI, on the other hand, summarized common suggestions from the public but did not explain why certain rules were selected for review while others were not.

The vast majority of comments were from industry members and associations. The industry comments tended to recommend two types of revisions: eliminating or easing regulations they saw as burdensome and standardizing or clarifying rules in which compliance was redundant or confusing.

The Institute for Policy Integrity at the New York University School of Law submitted comments to both EPA and DOT. The authors suggested that the retrospective review process should be used to identify lapses in regulation and cautioned that instigating reviews based on the "extent

of public complaints," one of DOT's criteria for determining reviews, could lead to agencies caving to the demands of special interests instead of creating good policies.

Continuing Concerns

Despite certain agencies' efforts to make as much information as possible available to the public, significant parts of the review process still lacked transparency. Notably, the E.O. and subsequent guidance specifically asked agencies to list rules to be "modified, streamlined, expanded, or repealed." None of the plans analyzed included specific breakdowns of which rules fell into which categories. In addition, agencies often wrote vague and overly technical descriptions of the proposed revisions to rules. As a result, the full impact of the retrospective review process will not become clear until the scheduled revisions are completed.

Despite instructions that the reviews should cover only "existing significant regulations," many agencies included proposed rules in the review process. Approximately one of every four rules in the plans of DOL, DOI, and FDA were in the proposal stage. While DOI and FDA acknowledge the inclusion of proposals in their plans, the Labor "Scope of Plan" section incorrectly states that the reviews will only include existing regulations.

The inclusion of these proposed rules in the review process is problematic because the purpose was to find inefficiencies in the existing regulatory system, not to allow special interests to have another opportunity to influence the rulemaking process or cause delay in the implementation of new safeguards.

Creating an Ongoing Retrospective Review Process

In addition to this initial retrospective review, the executive order directed agencies to set procedures for the periodic review of existing rules. The Regulatory Flexibility Act (RFA) already requires agencies to review all rules that have a "significant economic effect upon a substantial number" of small businesses every 10 years. During an RFA review, the agency must consider whether or not the rule is necessary, public complaints about the rule, the complexity of the regulation, whether it conflicts with or duplicates other federal or state regulations, and the extent to which the climate (technology, economic conditions, etc.) of the regulated entities has changed since the rule was last revised.

To comply with the RFA, the Small Business Regulatory Enforcement Fairness Act, and Executive Order 12866 on regulatory review, most agencies have regulatory review procedures in place. Agencies also annually list the rules they intend to review in the fall regulatory agenda. Most of the final plans stated that the retrospective review process demanded by E.O. 13563 will be integrated into the agency's existing system. For example, DOI requires each bureau within the agency to review every section of the Code of Federal Regulations under its purview every five years. In order to incorporate a retrospective review into the larger review process, DOI is adding a requirement that each bureau include a retrospective review of one major rule in its regulatory agenda each year.

This approach seems to be a good compromise. With so many existing review requirements already in place, imposing additional backward-looking review demands on agencies could divert dwindling agency resources from addressing new health, safety, and environmental challenges; from completing rules to implement existing laws; or from critical enforcement activities.

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