OMB WATCH
Promoting open government, accountability, and citizen participation since 1983

Subscribe | Blog | Donate

The Watcher

September 27, 2011 Vol. 12, No. 18

In This Issue

Obama's Deficit Reduction Plan Has Room for Improvement

The nation is less than two months away from what could be a seminal moment in its fiscal history. In late November, the new "Super Committee," formed by the recent debt ceiling deal, will release its set of recommendations to cut the federal budget deficit by $1.2 trillion. In an effort to influence the hectic debate the committee's recommendations are sure to start, President Obama released on Sept. 19 a $3.3 trillion deficit reduction plan as a package of recommendations for the committee to adopt.

While the president's recommendations are probably more progressive than any plan the committee will produce, they leave room for improvement, especially on the revenue side. The president's recommendations include 28 separate tax provisions, totaling $1.6 trillion, with many only accruing a few billion dollars over the next ten years.

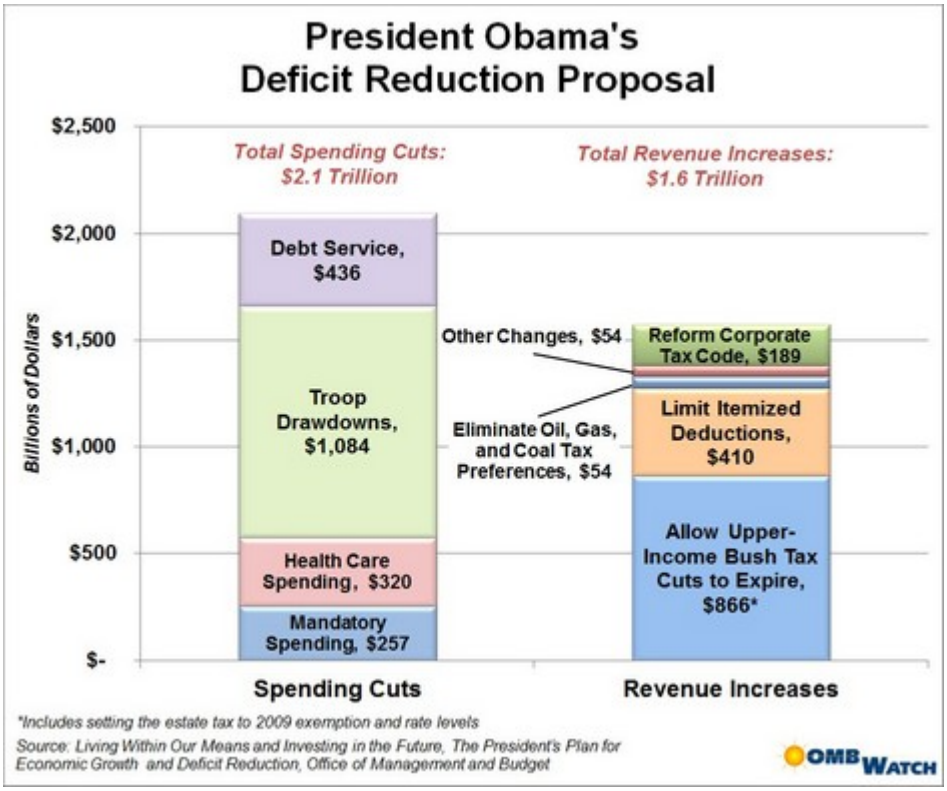
By far the largest tax provision in Obama's plan is the expiration of the upper-income Bush tax cuts (including returning the estate tax to 2009 levels). This reduces the deficit by $866 billion over ten years, more than half of the total revenue that the plan would collect. The president's

proposal would return the top two tax brackets to their late-1990s levels of 36 percent and 39.6 percent, an increase of about three percentage points for each bracket. These changes would only affect families earning about $250,000 per year or more. The middle-income tax cuts, however, would remain untouched, making the entire tax code more progressive overnight.

Another quarter of the president's revenue comes from limiting the benefit of itemized deductions on upper-income taxpayers. This is a broad change that would affect many well defended tax breaks, including the home mortgage interest deduction, the charitable giving deduction, and certain medical expenses, but without specifically targeting any particular item. Currently, the deductions are worth whatever a taxpayer's top marginal tax rate is, since itemized deductions simply lower a taxpayer's taxable income. (For example, someone in the 35 percent bracket who gives $100 to her favorite charity would see a $35 tax benefit, whereas someone in the 28 percent bracket would see a $28 benefit.). The recommendations limit the benefit of these deductions to 28 percent of a taxpayer's income for taxpayers in the top two brackets, essentially "leveling off" the benefit after the third-highest bracket, but it would not cap the total amount of itemized deductions a taxpayer can claim. In other words, taxpayers who currently see a deduction of 35 cents of every donated dollar would receive only a 28-cent benefit, or a 20 percent decrease. This change, while seemingly small, would bring in $410 billion over the next ten years.

The president's recommendations generate another $110 billion over ten years by closing three complicated corporate tax loopholes. Two of the loopholes, the so-called "last-in, first out" (LIFO) and "lower-of-cost-or-market" (LCM) loopholes, are accounting maneuvers that businesses can use to game the costs of their inventories in order to inflate their deductions. By closing these two loopholes, the president's plan would save about $60 billion over ten years. The third loophole involves the foreign tax credit, which Obama proposes to determine on a "pooling" basis, or based on the consolidated earnings and profits and foreign taxes of all of a company's foreign subsidiaries. Changing the credit to a pooling basis would save the nation about $53 billion over the next decade. (Note that these three provisions are a subset of the green bar labeled "Reform Corporate Tax Code" in the accompanying chart.)

Notably absent from the list of revenue provisions is reference to the "Buffett Rule," which is named after billionaire financier Warren Buffett and which holds that households making over $1 million a year should not pay a smaller share of their income in taxes than middle-class families. While this rule has received a great deal of attention in the news, the president's plan only includes this as a principle, not a specific policy provision. Instead, Obama hopes that his changes will help make the tax system fairer and closer to complying with the Buffett Rule.



(Click to enlarge)

While a great deal of the president's deficit reduction comes from tax increases on high-income earners, Obama's plan would also cut $1.7 trillion in spending. The plan assumes $1.1 trillion in savings from troop reductions in Iraq and Afghanistan and $600 billion in spending reductions from almost 60 different health care and mandatory program policy changes. Of the $600 billion in domestic spending cuts, the president recommends saving some $257 billion from assorted mandatory programs, such as eliminating direct payments to farmers ($30 billion over ten years), and another $320 billion would come from health care programs, most prominently Medicare and Medicaid. About $135 billion of the health savings comes from allowing Medicare Part D low-income beneficiaries to benefit from the same rebates Medicaid receives for name-brand and generic drugs.

Although a good portion of the health care savings avoids reducing benefits, the billions of dollars in benefit reductions that are proposed would impact low-income families and retirees. The Super Committee could mitigate these impacts by generating a plan that produces additional revenues instead of proposing cuts. One popular alternative is a financial speculation tax, which would charge a small fee on each stock transaction in an effort to discourage short-term, high-volume speculation. Many other countries, even some with flourishing financial centers such as Great Britain, have a similar tax, and the United States had one until the late 1960s. Two polls from 2010 suggest that a majority of Americans would support some kind of a financial speculation tax.

The organization Our Fiscal Security estimated in 2010 that a 0.5 percent tax per transaction would raise about $77 billion per year. Others have estimated a broad financial speculation tax could raise $130 billion per year. Over ten years, a financial speculation tax would decrease the deficit far more than any of the mandatory savings proposed in the president's plan, and the tax has the added incentive of having a positive policy outcome (less volatility in trading).

Taxing capital gains and dividends as ordinary income could be another source of revenue. Currently, these forms of income are taxed at a lower rate than some wages, creating preferential treatment for a source of income derived from wealth. By repealing the 15 percent rate for capital gains and dividends, and instead taxing it according to the normal income tax rates, the nation could bring in $918 billion over the next decade while making the tax code fairer.

The president could also recommend instituting a wealth surtax instead of the mandatory cuts. A wealth surtax, such as a tax bracket for millionaires, would make the tax code more progressive. The past decade has seen a marked increase in wealth in the upper reaches of society, while low- and middle-class wages have stagnated. Creating a wealth surtax could raise as much as $750 billion in the next ten years, ensuring that any deficit reduction is balanced and fair.

Any of these three options would make the president's recommendations to the Super Committee more progressive. They would more than replace the mandatory and health care cuts in Obama's current plan. The extra funding could even help undo some of the harmful discretionary cuts agreed to as part of the recent debt ceiling deal.

Study Shows Private Contractors Usually Cost More than Public Employees

Conventional wisdom in Washington dictates that the private sector can always provide services at a lower cost than the federal government. A new study from the Project On Government Oversight (POGO), however, turns conventional wisdom on its head, demonstrating that the government rarely reaps the purported benefits of lower costs through the outsourcing of service work. In fact, POGO found that, on average, the government pays service contractors more than 1.8 times the amount it pays federal employees with the same education, doing the same job and performing similar tasks.

From the beginning of the Republic, politicians have debated about the size of government. As the federal government became a larger, more expansive social welfare institution, President Dwight Eisenhower became the first modern president to establish a policy of outsourcing federal services if a commercial equivalent was available for less.

In the 1980s, President Ronald Reagan, guided by his conservative ideology, expanded the outsourcing of government services. The approach reached its zenith with the "yellow pages test," prescribing that the government contract out any service found in the phone book. Since

the Reagan administration, Republican and Democratic presidents alike have promised to reduce duplication and inefficiencies in government, which is often code for reducing the size of the federal workforce.

As the total U.S. population has grown, the number of federal civilian workers as a share of the population has declined. However, since work still needs to be done, the government has turned to contractors to perform public work, creating an expensive and expanding "shadow government." POGO notes that the size of the federal workforce has remained relatively constant over the last decade at about 2.5 million, but "the contractor workforce has increased ... from an estimated 4.4 million to 7.6 million in 2005." Additionally, the government now spends over $320 billion on service contracts annually, representing roughly one-quarter of all discretionary spending.

Conservatives have argued that "privatizing" public sector work will save costs because of the "overgenerous" pay and "lavish" benefits of public employees. This argument, as POGO indicates, relies "on the theory that the government pays [prevailing] private sector compensation rates when it outsources services."

As POGO's study reveals, this is rarely the case. Rather, service contractors charge more than twice the going private sector compensation rate for comparable tasks; to be more specific, private contractors are, on average, paid more than 1.8 times the amount the federal government pays its own employees to perform similar functions.

POGO's study examined 35 different occupational classifications and compared the "full costs of federal employee annual compensation" with the "average annual contractor billing rates" for those tasks. In 33 out of the 35 classifications, service contractors charged more than it would cost for the federal government to perform the task in-house; in the most egregious examples, service contractors charged more than three times the cost of a federal employee to perform a similar task in one case and almost five times as much in another. In over a third of the jobs studied, service contractors charged the government more than twice what federal employees earned to perform similar work.

The occupational classifications span routine services like grounds keeping and quality assurance to functions like budget analysis and language specialization – "frequently used to perform intelligence functions" – that can fall between legitimate work the government can outsource and inherently governmental tasks that only a federal employee should perform.

POGO limited its investigation to the General Service Administration's (GSA) 35 occupational classifications because the federal government does not provide accurate data on "contractor employees who perform government functions at a particular department or agency at any given time."

POGO calls on Congress to require federal agencies to use a standard coding system when awarding contracts, "the collection, reporting, and oversight of life-cycle costs associated with government services," and "greater transparency and improved pricing on GSA Schedule service

contracts." Lack of transparency will continue to limit the ability of the government and the public to determine how much money the government saves or wastes through outsourcing, or to correct any excessive costs incurred. However, the report does not make the case that the federal government should never utilize contractors to perform the examined functions. POGO's investigation simply found that *on average*, federal employees perform the vast majority of the given tasks for less than a comparable contractor employee.

In addition to collecting and reporting lifecycle costs and greater accuracy and transparency of service contractor numbers, Congress should eventually require the posting of all federal contracts online – with appropriate redactions of any proprietary information – and the creation of a more accessible Federal Awardee Performance and Integrity Information System (FAPIIS), which provides contractor performance information. While the cost of contractor services and the raw numbers of contractors are important to determining whether the government is getting value for its dollars, the public deserves a full accounting of what contractors are getting paid and how they perform.

This is particularly true today, as the nation debates how to reduce government spending. Members of the Super Committee should think about reducing the amount spent on service contracts before considering funding cuts for important public programs that help keep Americans safe and healthy, like food inspection, child nutrition, and low-income housing.

Administration and Global Partners Forge Ahead with Open Government Agenda

The launch of the Open Government Partnership (OGP) on Sept. 20 marks a new era for open government in the United States and abroad. The national action plans released by the OGP founding countries offer the potential to create more responsive governments that better serve the needs and aspirations of their peoples.

President Obama envisioned the partnership a year ago in his address to the United Nations, when he called on countries to make "specific commitments to promote transparency; to fight corruption; to energize civic engagement; [and] to leverage new technologies." The initiative was introduced to the world as the OGP in July, with seven partner countries agreeing to develop plans to strengthen open government in their nations.

At the formal OGP launch on Sept. 20, the U.S. and its seven partners released their plans and endorsed a joint Open Government Declaration outlining their principles. In addition, 38 additional countries joined the partnership and will endorse the declaration and release their own plans in March 2012.

Obama Administration Embraces Open Government

The Obama administration's leadership in the partnership reaffirms the administration's commitment to open government. In his remarks at the inaugural OGP event, Obama called

open government "the essence of democracy." Obama also noted the partnership in his address to the UN the following day.

The declaration signed by the U.S. and partner countries states, "We accept responsibility for seizing this moment to strengthen our commitments to promote transparency, fight corruption, empower citizens, and harness the power of new technologies to make government more effective and accountable."

New U.S. Commitments

The administration's plan laid out specific goals and commitments for 26 issues. It included a number of important new commitments that will improve open government, such as:

- *Improving fiscal transparency*, including publishing more information on revenue the government receives from companies extracting natural resources and on foreign aid paid by the U.S. to developing countries
- *Expanding the use of technology in Freedom of Information Act (FOIA) administration* in order to build a 21st century FOIA system
- *Reforming the failing records management system*, which too often results in delays in providing information to the public or the improper loss or destruction of information
- *Strengthening citizen engagement*, including redesigning Regulations.gov, launching the ExpertNet system, and developing best practices for agencies to follow in public participation
- *Increasing access to data* by launching new user-oriented communities on Data.gov and establishing guidelines for greater sharing of scientific data

The plan also includes the continuation of several important initiatives previously announced by the administration, such as the "We the People" petition platform; the Government Accountability and Transparency Board, which is developing recommendations to improve spending transparency; expanding access to regulatory compliance information; publishing more information to help consumers make informed decisions; and making federal websites more useful for the public.

The open government community praised the plan. Katherine McFate, President and CEO of OMB Watch, said in a statement, "This bold, ambitious plan will push the U.S. toward fully realizing the president's goal of making our national government as transparent as possible and fully open to citizens."

International Commitments

The action plans for the other seven founding OGP countries also contained innovative and bold commitments that help raise the bar for open and accountable government programs. For instance, Brazil, the co-chair of the OGP along with the U.S., committed to holding a national conference on transparency and participation in 2012 to highlight the issues and gather broader input on additional steps. Brazil also plans to establish a pro-ethics company registry to give

visibility to those corporations that invest in corruption prevention. The United Kingdom's plan included a commitment to create sector-specific Transparency Boards to challenge government to make more data public. The U.K. also agreed to development of a central data warehouse, similar to the U.S.'s Data.gov.

Improving citizen participation was a major focus of other countries such as the Philippines, which included commitments to create an empowerment fund to support civil society groups to organize communities to engage in implementation and oversight of poverty reduction programs. The country also pledged to increase the level of consultation with civil society organizations on the government budget by expanding its participatory budgeting process to 12 departments and six government corporations by the end of 2012. The Norway plan emphasized improving opportunities for women to participate in civic life. Among the commitments the country pledged to address are equal pay for equal work, ensuring women apply for top posts in the private sector, and tackling gender stereotypes through schools, the labor market, and the media.

Next Steps

Having committed to these advances, the Obama administration will now turn to implementing them. The U.S. plan contained few details on the vehicles or timeline for accomplishing each goal. Under the OGP roadmap for participation, the administration will need to continue to consult with the public as it implements the plan.

The administration is also required to report on progress toward realizing the plan within one year. In addition to the self-assessment report, the partnership will also publish an independent assessment of the administration's progress, written by civil society groups.

Improving the Public's Right to Know at Rio+20

On Sept. 2, 30 U.S. public interest groups joined civil society organizations around the globe in demanding that their national governments improve access to environmental and public health information and increase public participation in environmental policymaking. These organizations are calling on their governments to make such commitments at the United Nations Conference on Sustainable Development (UNCSD) in order for people around the world to be able to effectively use environmental information to protect themselves, their families, and their communities from pollution, toxic chemicals, and other hazards.

The UNCSD will convene in Rio de Janeiro, Brazil, in June 2012 to discuss the institutional framework for sustainable development and how to build green economies. Rio+20, as the conference is being called, is a follow-up to the 1992 Rio Conference on Environment and Development. At the 1992 conference, 178 governments confirmed that active involvement and participation of citizens and non-state actors at all levels was a prerequisite for successful environmental policies.

Although public access to environmental information has improved over the past two decades, in many countries, citizens – especially the poor and marginalized – still lack adequate information to protect themselves, their families, and their communities from environmental harm. Thus, the need for Rio+20 is clear, and participating nations must be prepared to take additional steps to address the shortcomings in people's environmental right to know that still exist today.

Three Demands (3Ds) Campaign for Rio+20

To prepare for Rio+20, The Access Initiative, a global network that promotes access to information, participation, and justice in environmental issues, launched a campaign to encourage public interest organizations from various countries to present their governments with a list of three next steps to improve environmental decision making. The focus of the Three Demands, or "3Ds", Campaign is to improve the thrust and implementation of Principle 10 of the 1992 Rio Declaration, which asserts:

Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

In other words, in 1992, the framers of Principle 10 recognized the fundamental truth that better environmental decisions are made when all interested citizens are fully informed and involved. Furthermore, information on environmental issues should come from all branches of government, and citizens should be able to take environmental problems to administrative agencies and the courts to be resolved.

So far, organizations from 26 countries have each generated and delivered their three demands to improve access and participation in environmental decision making. The most frequent demands made by public interest organizations in these countries include:

- Create regional conventions on Principle 10 in various areas around the world. Many groups, especially in Latin America, felt that international agreements with neighboring countries would help fortify weak enforcement of their existing requirements to grant access and encourage participation.
- Improve access to information and public participation in environmental assessment practices. For instance, Indian groups demanded that the public be consulted earlier on environmental impact assessments of proposed projects and urged that the public consultation process be brought to other environmental issues such as forest conservation, biodiversity, and clean air and water.
- Establish broad legal reforms to ensure access to information, including stronger right-to-know laws, freedom of information protections, and more.

- Create central government databases for environmental data.
- Form environmental courts to settle environmental cases more quickly and less expensively.
- Implement citizen enforcement clauses of major environmental laws. For example, the Jamaican demands included a call for legislation that would allow citizens to take direct legal action against polluters, even if those polluters were government facilities.

The Three U.S. Demands

While the U.S. has made more progress on environmental protection and access to information than many other countries, the system is far from perfect, and many communities still struggle to understand and engage in the environmental issues impacting their air, water, and land. To address these problems, the 30 U.S. public interest groups, including OMB Watch, submitted three requests that largely mirrored themes and recommendations advanced in the environmental right-to-know report, *An Agenda to Strengthen Our Right to Know*, which was endorsed by more than 100 organizations and released on May 10.

Specifically, the organizations requested that the federal government:

- Initiate a process to review and evaluate environmental and public health information holdings in every major federal agency.
- Identify and adopt a set of best practices on public participation for federal agencies to follow. Once developed, these documents and web-based information services should be made publicly available by posting on agency websites, Regulations.gov, and any other venue that will promote widespread availability of the information.
- Direct federal agencies to develop and implement a component of their open government plans that focuses on priorities for regional and state offices. The component should establish the most important open government issues and set specific goals for the regional or state offices to complete milestones, with target deadlines included.

Next Steps

The UN Second Preparatory Committee is collecting comments from countries, organizing partners, and the public as it prepares for Rio+20. The compiled inputs will be used in the development of the initial version, or "zero document," of the conference's outcome document. Comments on expectations of the conference, reviews of existing proposals the conference will consider, how to close the implementation gap, and possible mechanisms for cooperation can be submitted online and are due by Nov. 1. The "zero document" is expected to be released to the public in January 2012.

Prior to the November deadline, U.S. groups will hold meetings with the U.S. State Department, U.S. Environmental Protection Agency, and the White House to encourage the United States government to lead by example.

On the international level, the Access Initiative first presented results of the 3Ds campaign at the UN Department of Public Information's 64th NGO (non-governmental organization) Conference, which occurred Sept. 3-5 in Bonn, Germany. The goal of the conference was to provide public interest input on sustainable development goals for the Rio Conference. By the end of the conference, 1,500 NGOs and other stakeholders agreed to a Declaration, which will be submitted to the zero document process by the November deadline. The declaration calls on Rio+20 to establish an international convention that deals specifically with access to information, public participation, and environmental justice.

Small Business Owners: Clean Energy Economy Will Increase Prosperity

A poll of small business owners conducted by the Small Business Majority reveals strong support for clean energy solutions as one important element leading to innovation, economic growth, and job creation. Huge majorities support "bold" environmental initiatives to increase fuel efficiency and support the U.S. Environmental Protection Agency's (EPA) regulation of carbon emissions.

The poll was conducted in July and released on Sept. 20. The report on the findings, *Small Business Owners Believe National Standards Supporting Energy Innovation Will Increase Prosperity for Small Firms*, illustrates the clear disconnect between the Capitol Hill rhetoric about business support for reducing regulations and the real problems facing small business owners. Among the notable findings:

- An overwhelming majority, 86 percent, "believe Washington doesn't understand how small business works and doesn't provide them help."
- "Economic uncertainty and rising costs are hurting small business more than taxes and regulation." Only 13 percent agree with the notion that regulations were the biggest problem for small businesses, while only 23 percent think that taxes are the main problem. Instead, the real problems are economic uncertainty (46 percent) and the rising costs of doing business (43 percent).
- Innovation and efficiency are the keys to small business survival. Eighty-seven percent of respondents believe that innovation, fuel efficiency, and energy efficiency are good ways to stimulate economic growth and create prosperity. The poll asked specific questions about fuel efficiency and changes in the automotive industry and by wide margins, the respondents believe the government and the auto industry should be doing more to increase efficiency and drive innovation.

Reinforcing the points they made in the survey, many business owners are countering rising costs by embracing energy efficiency with actions such as installing efficient lighting, reusing materials, and more.

The report comes on the heels of other recent reports that debunk the political rhetoric about the causes of the economic problems the country is facing. For example, the National

Association for Business Economics (NABE) found in an August survey that a large majority of business economists have a positive perspective on the regulatory environment, contradicting the overheated, anti-regulatory rhetoric coming from Big Business lobbyists.

According to these NABE respondents, many of whom work hands-on in the business world, the watchword "uncertainty," when used by many businesses, refers to anxieties over the weak economy, not so-called "regulatory uncertainty." Nearly 75 percent of survey respondents said that "once the economy starts to improve, such anxieties will go away." Eighty percent of survey respondents felt that the current regulatory environment was "good" for American businesses and the overall economy. NABE also noted, "The majority of survey respondents indicated that while uncertainty might be a concern, it is not a major one."

The Political Economy Research Institute (PERI), affiliated with the University of Massachusetts, Amherst, in conjunction with CERES, published in February a report analyzing the job creation impact of two new EPA clean air rules. (CERES is a coalition of investors, environmental groups, and other public interest organizations that invest in sustainable economy projects.) The two rules PERI examines in the analysis are the Clean Air Transport Rule (finalized in July as the Cross-State Air Pollution Rule) and the National Emissions Standards for Hazardous Air Pollutants for Utility Boilers (known as the “Utility MACT” rule).

According to the report, investments in pollution control and generating capacity could result in nearly 1.5 million jobs over five years, from 2010 to 2015. The report breaks down by 36 eastern states the numbers of jobs in new construction, operating and maintenance, and from retirements. The economic benefits from these jobs are substantial; the report does not include calculations of the benefits from better health and cleaner air.

A Sept. 19 report by the Economic Policy Institute (EPI), entitled *The Combined Effect of the Obama EPA Rules*, also debunks anti-regulatory rhetoric by showing that new EPA rules "will be of tremendous benefit to public health, and the combined compliance cost of the rules – both finalized and proposed – amounts to only about 0.1 percent of the economy, and thus are not a significant factor in the overall economy’s direction," according to EPI's press release. The report analyzes several proposed rules targeted by the House in coming weeks and, as EPI showed in earlier reports, the benefits of these rules far outweigh the costs imposed on polluting industries.

The evidence is clear: the American people do not have to choose between job creation and protecting their families and communities from environmental, workplace, and consumer product hazards. American businesses can adapt to new standards; they’ve been doing it for decades. They know they have to continually evolve to survive and grow. Attempts by Congress to dismantle the regulatory system will do nothing to create jobs now and would very likely cost American businesses the jobs and industries of the future.

Time to Take Regulations Seriously: How Legislative Sleight-of-Hand is Being Used to Undermine Public Protections

When the 112th Congress convened, it agreed to a rule that, barring emergencies, no bill would be voted on until its text had been publicly available for three days. Recently, however, anti-regulatory legislators have become adept at using amendments and seemingly innocuous provisions to attempt to undercut long-standing safeguards without providing sufficient time for debate and discussion of the implications of their actions. These tactics threaten public protections and the legislative process itself.

The Transparency in Regulatory Analysis of Impacts on the Nation (TRAIN) Act, passed by the House on Sept. 23, would require that an interagency panel of non-experts review U.S. Environmental Protection Agency (EPA) regulations before they are issued. The panel would be asked to consider costs of proposed regulations and issue a report. The panel's report amounts to nothing more than bureaucratic red tape: not only do EPA and the Office of Management and Budget (OMB) already perform this function, but the TRAIN panel's report would necessarily be less useful because the panel is directed to consider cumulative costs of proposed and final regulations, a highly speculative analysis that would serve only to artificially inflate costs. This type of analysis stacks the deck against issuing safeguards in a process based on net benefits.

The bill would also eliminate deadlines for action on two rules – the Mercury and Air Toxics Standards and the Cross-State Air Pollution Rule (CSPAR) – both of which are required by the Clean Air Act (CAA). The Mercury and Air Toxics Standards, which is a proposed rule, restricts the amount of mercury and toxins that utilities can emit. The CSPAR, which has been finalized by EPA, limits the amount of air pollution that crosses state lines.

Last-Minute Floor Amendments Avoid Debate

Not satisfied with the anti-regulatory slant of the TRAIN Act, Reps. Ed Whitfield (R-KY) and Bob Latta (R-OH) each introduced amendments that would make even greater changes to the CAA and the current regulatory process. The House approved both the Whitfield and Latta amendments when passing the TRAIN Act, providing only 10 minutes of floor debate for each.

The Whitfield amendment negates the effect of both the Mercury and Air Toxics Standards and the CSAPR. The amendment requires EPA to set standards for air toxics emissions based on a complicated formula that produces an "in the aggregate" standard for all toxic pollutants rather than separate standards for each pollutant. According to the Energy and Commerce Committee Democratic staff, "[t]his would require EPA to make completely subjective decisions about whether a plant that emits more carcinogens but less neurotoxins is better or worse performing than a plant that emits fewer carcinogens but more neurotoxins. There is no known methodology for making these decisions, which would be impossible to defend in court."

In short, the Whitfield amendment represents a fundamental shift in EPA policy – something that most members of the public think should be subject to debate and consideration. On Sept. 19, Education and Commerce Committee Ranking Member Henry Waxman (D-CA) and Energy

and Power Subcommittee Ranking Member Bobby Rush (D-IL) sent a letter to committee chairman Fred Upton (R-MI) and subcommittee chairman Whitfield that made this point. They specifically objected to Whitfield's floor amendment, which they called an "egregious abuse of process." The letter emphasized that the amendment "makes radical changes in the Clean Air Act provisions that address toxic air emissions . . . [that] have never been considered in hearings or debated in Committee." Because "[m]embers are being asked to vote on major changes to the Clean Air Act without any idea what they would do," Waxman and Rush asked the chairs to withdraw the amendment "from consideration and hold hearings on it, so that members and the public can understand the effect of [the] proposal before it is brought to a vote."

Latta's amendment requires EPA to consider feasibility and cost when setting National Ambient Air Quality Standards (NAAQS) for air pollutants. The Clean Air Act specifically prohibits such considerations, and the U.S. Supreme Court affirmed in 2001 that costs to polluters should not be considered when setting health-based air quality standards that are required to protect the public.

"The Latta amendment will reverse 40 years of clean air policy, allowing our national goals for clean air to be determined by corporate profits – not public health," Waxman said. Like the Whitfield amendment, the Latta amendment comes without the honest debate commensurate with the seriousness of its effects. According to Energy and Commerce Committee Democrats, "The process for consideration of the Latta amendment is as objectionable as its substance . . . This proposal has never been considered in hearings or debated in Committee. No legislative record exists to evaluate the amendment."

When "Study" and "Deadline Extension" Become Avoidance

Proponents of the TRAIN Act, like Rep. Rob Bishop (R-UT), contend that the bill requires additional study of EPA rules but does not actually stop or cut any regulation. These characterizations of the bill have been countered by opposition from public interest and environmental groups, members of the Senate, and even the White House. The Executive Office of the President released a White House Statement of Administration Policy on Sept. 21. "While the Administration strongly supports careful analysis of the economic effects of regulation," it said, "the approach taken in H.R. 2401 would slow or undermine important public health protections." The statement concluded that senior advisors would recommend a veto of H.R. 2401.

Like the TRAIN Act, the EPA Regulatory Relief Act of 2011 (H.R. 2250) and the Cement Sector Regulatory Relief Act of 2011 (H.R. 2681), passed through the House Energy and Commerce Committee during the week of Sept. 19, have been opposed on both substantive and procedural grounds. The bills' sponsors contend that they merely provide additional time for EPA to establish, and for industry to comply with, new emissions standards for boilers, incinerators, and cement plants. However, they would actually make substantial alterations to the Clean Air Act and EPA's long-standing practice for establishing emissions standards for hazardous air pollutants.

John Walke, the clean air director for the Natural Resources Defense Council (NRDC), denounced the sponsors' characterization of the bills' impacts in testimony given at a Sept. 8 hearing before the Energy and Commerce Committee. "Let me emphasize in the strongest possible terms that these bills are not mere 15 month delays of the rules as EPA itself has requested, as some have misrepresented the legislation. Instead the bills reflect the complete evisceration of the substantive standards for achieving reductions in toxic air pollution, coupled with the elimination of any statutory deadlines for EPA to re-issue standards to protect Americans."

Although the versions of H.R. 2250 and H.R. 2681 that were reported out of committee require that EPA issue the rules after the 15-month delay period, they retain the provisions making substantive changes to the CAA. Both bills would force EPA to impose the "least burdensome" regulatory alternative from a range of options, including less stringent work practice standards, even though section 112 of the act allows EPA to impose such standards only "in cases where it is not feasible to prescribe or enforce an emission standard" such as an achievable control technology standard. "These changes would radically distort the Clean Air Act's twenty-year approach to controlling toxic air pollution and would have enormous health impacts," Walke said.

When the committee marked up H.R. 2250 and H.R. 2681 on Sept. 20 and 21, Rep. John Dingell (D-MI) stated that the bills failed to meet the goals of having "good legislative process and good legislative product." Dingell urged the committee to recognize the need to proceed under the proper procedures before taking steps to alter the CAA, and to "ensure [that EPA] can function in a proper and transparent process." Rep. Joe Barton (R-TX), however, expressed confusion over the controversy around the bills, which he said were "basically extension[s] of compliance deadlines."

If the contentious debate in the House Energy and Commerce Committee is any indication, the current political climate surrounding regulations, especially environmental protections, may continue to test the integrity of the legislative and committee processes. The public expects and deserves a transparent and thorough discussion of the implications of any congressional action that would substantially alter an important statute like the Clean Air Act.

OMB Watch • 1742 Connecticut Avenue, N.W. • Washington, D.C. 20009
202-234-8494 (phone) | 202-234-8584 (fax)