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Why Federal Budget Rules Matter

As we often try to remember on these pages, the federal budget, which may superficially appear to be merely a convoluted collection of insignificant numbers, is actually the decoder ring to a better understanding of our country's real priorities -- since not a lot happens to improve a problem without spending money, the federal budget reveals which problems our country's policy makers are working to improve. Even less understood and farther removed from our daily lives are the intricacies of federal budget rules. These rules, which govern how the House and Senate must work to craft the country's annual budget, are in place to ensure that sufficient time is given to debating and developing the a course for tackling the nation's problems.

The Senate may lose some of the rules governing Senate budget procedures -- rules that helped to earn it the title of the "world's greatest deliberative body" -- including a 60-vote requirement (called a "supermajority" to distinguish it from the "simple majority" of 51 votes) on certain issues, will expire October 1, 2002. In addition to helping to ensure that proposed tax cut legislation is debated thoroughly, the supermajority rule has kept the appropriations bills from becoming bogged down in unrelated amendments, while allowing for debate about the spending priorities of the country.

For a look at these rules and what their expiration could mean for upcoming issues as diverse as estate tax repeal, Social Security and future appropriations, see this OMB Watch analysis.

Senate Finds Compromise on Information in Homeland Security

Shortly after the House passed a Homeland Security Act that contained broad restrictive information provisions, the Senators on the Government Affairs Committee reached a compromise on narrower language. The final House provisions included a broad new Freedom of Information Act (FOIA) exemption, with extremely vague definitions, for information voluntarily submitted to the new Department, granted corporations civil immunity, preempted all state and local open records laws, and made it a crime for any federal employee to release such information to the public.

The President proposed a simplistic and overly broad FOIA exemption in his bill. That provision said that, "Information provided voluntarily by non-Federal entities or individuals that relates to infrastructure vulnerabilities or other vulnerabilities to terrorism and is or has been in the possession of the Department shall not be subject to section 552 of title 5, United States Code [the Freedom of Information Act]." None of the terms had been defined.

The President's proposal did not take into account the long-simmering debate over whether any new legislation is needed. Proponents of a FOIA exemption, led by Rep. Tom Davis (R-VA) and Sens. Robert Bennett (R-UT) and Jon Kyl (R-AZ), argued that companies have information that they want to voluntarily submit to the government that could help to countermand potential terrorism. But, they warned, these companies will not submit such information because they fear it could be disclosed under FOIA. Opponents of the FOIA exemption, led by First Amendment advocates and other public interest groups including OMB Watch, argued that FOIA already protects voluntarily submitted information from disclosure. They cite case law, such as the *Critical Mass Energy Project v. NRC*, to make their point.

House Republicans recognized that the President's proposal was too vague. Led by Davis, the House developed a very broad FOIA exemption, but one far more refined than the President's. Democrats offered amendments to strip out the FOIA restriction and other information provisions, both while the Select Committee on Homeland Security was considering the bill, and while on the House floor.

In the House Select Committee, Majority Leader Dick Armey (R-TX) slightly modified the Davis proposal so that it only covered the new Department of Homeland Security. (The Davis proposal would have covered information voluntarily submitted to a number of agencies.) Otherwise, the Armey proposal was nearly identical to that offered by Davis. It said anything voluntarily submitted to the new Department would be exempt under FOIA. It also had a provision protecting companies that voluntarily submit information from any civil liability proceedings. It had a provision that preempted state and local openness laws to insure that any information that will not be disclosed under the new FOIA exemption will not be disclosed by a state or locality. Finally, it created a new criminal penalty for any federal employee that releases information that is intended to be restricted under the new law.

Rep. Rosa DeLauro (D-CT) offered an amendment to strike the Armey language, but was defeated in a party line vote of 4-5, with all of the Republicans voting to keep the exemption, and all of the Democrats voting to remove it. While debating the Homeland Security Act on the House floor, Rep. Jan Schakowsky (D-IL) offered another amendment to strip out the restrictive information provisions. The amendment was defeated in a highly partisan vote of 188 in favor and 240 against.

At the same time, Davis offered another amendment that would have broadened the Armey proposal by extending the FOIA exemption to any agency the Department of Homeland Security designated or with which the new department shared any critical infrastructure information. Like the Schakowsky amendment, it too was defeated -- in a 195 to 233 vote.

While the debate in the House was raging, several Senators were working on a possible alternative for consideration during a Senate Government Affairs Committee business meeting to mark-up Committee Chair Joseph Lieberman's (D-CT) National Homeland Security and Combating Terrorism Act of 2002 (S. 2452). The Lieberman bill did not include any restrictive information provision or FOIA exemptions. However, it was expected that Bennett, who serves on the Committee, would offer language similar to his Critical Infrastructure Information Act (S. 1456), which was co-sponsored with Kyl. Bennett and Kyl's S. 1456 proposed exempting voluntarily disclosed "critical infrastructure" information from FOIA -- a concept fiercely opposed by environmentalists, reporters, libraries, and other public interest groups.

Sen. Patrick Leahy (D-VT), chair of the Judiciary Committee, which has oversight over FOIA, along with Lieberman and Sen. Carl Levin (D-MI), began discussions with Bennett over a potential compromise that would, in essence, codify existing case law. Most of the public interest community felt this was unnecessary but understand the need for doing something to stave off other, more troubling amendments.

At the last second, a compromise was reached and offered at the Committee level by Levin and Bennett. The compromise amendment:

- Applies only to "records" whereas the House version applies to "information." FOIA usually applies to "records," which is a more narrowly-defined term than is "information;"
- Limits the FOIA exemption to records pertaining to "the vulnerability of and threats to critical infrastructure (such as attacks, response and recovery efforts)," rather than the much broader proposal of any "critical infrastructure information;"
- Defines "furnished voluntarily" (which are the records covered by the exemption) more narrowly than the Administration or House proposals to ensure that records submitted by companies to obtain grants, permits, licenses, benefits or other government approvals are still subject to the FOIA process; the House bill defines voluntary submissions more broadly to exempt many more documents;
- Contains no civil immunity provision, no preemption of state or local openness laws, or any effort to criminalize disclosure of information as the House bill does, and it does not contain an antitrust immunity/protection as the Bennett-Kyl proposal did.

According to Bennett, he vetted the compromise with the Bush administration and it endorses the compromise. Bennett also said that the business community, while wanting more, can live with this language. So, although the bill still faces debate on the Senate floor, where any number of amendments could be offered, it is expected that the compromise will prevail. Once the bill passes the Senate, it must then be reconciled with the House. If the Senate language retains its strong bipartisan support then it should be heavily favored over the contentious House language in the final bill.

FirstGov Folded Into New GSA Office

On July 23, the General Services Administration (GSA) announced the creation of a new Office of Citizen Services and Communications that will incorporate the Office of FirstGov, which oversees the federal government's web portal, the Information Technology Office and the Intergovernmental Solutions Office. GSA Administrator Stephen Perry promised that the new office will serve as a "single front door to the services and information" the public requires in the medium it prefers.

While the formation of the new office is closely linked to the President's management agenda and strives to streamline citizen services, there are reports that the office is disorganized and unsure of its specific goals. Federal Computer Week reported that Casey Coleman, the new office's chief technology officer, was only able to reiterate the Bush administration's commitment to "citizen-centric government" without offering details as to what this means.

Perry announced in an online chat on July 31 that the new office will "improve agency responsiveness to citizen inquiries through a modernized and streamlined process that will remove some of the barriers that currently impede responsiveness," though he offered no explanation of what that process will be, according to FCW. Agency employees say the structure for the new office is modeled after one in Canada, which pulls together a call center, a publications center, and a portal. But without concrete details on how GSA will improve its responsiveness to the public, its new Office of Citizen Services may continue to be a mystery to the citizens it's trying to serve.

A Plan of Mismanagement of Information

The Government Printing Office (GPO) has operated as the sole clearinghouse and manager of most federal documents for years. The GPO is responsible not only for overseeing the printing of the multitude of documents produced by the federal government each year, much of which is contracted out to private printers, but also for ensuring that the documents are properly archived with federal depository libraries. However a recent order from the Office of Management and Budget (OMB) has instructed all 130 federal departments and agencies using the GPO to arrange their own printing beginning September 1.

The stated reason behind this directive is cost savings. According to OMB, the move, which will cost GPO 1,500 jobs -- half its workforce -- and two-thirds of its annual $712 million in revenue, may save taxpayers money, as much as $50 million a year. In other words the plan might shave almost 40 cents off each of the nearly 130 million individual tax returns currently being filed in the United States.

Little is mentioned about what this plan may cost the American people. Indeed some claim that the plan will waste money and cost taxpayers more as each department is forced to duplicate the GPO's expertise in contracting out private printing work. The largest printing trade association, Printing Industries of America, opposes OMB's directive, complaining that bidding to every agency individually will put smaller printers at a serious disadvantage.

Looking past the issue of tax dollars, this plan could make our government less transparent. It is possible that the decentralization of printing and management of federal documents will make it even more difficult to trace government documents. The move could mean that even fewer government documents would be publicly available. Many of the major librarian associations openly oppose the plan for just these reasons.

The issue has become a highly political struggle between the executive and legislative branches, especially since GPO is a legislative branch agency. Congress has shown its disapproval of the plans in three recent reports accompanying the Senate Legislative Branch appropriations bill and the Senate and House Treasury, Postal Service, and general government bills. There has even been talk that the matter may require going to the Supreme Court for a solution.

However, as political wrangling over cost and control continue, the most important issue -- access to government information -- risks getting lost in the shuffle. The GPO has done more than just print government documents over the years; it has acted as a critical point in the dissemination of information to the public and in increasing the accountability of the federal government. No price can be put on the importance of that role, certainly not 40 cents.

Section 508 One Year Later

On the first anniversary of the implementation of a key federal law designed to improve technology access for all persons with, and within, federal agencies, questions and concerns about the level of compliance continue to loom.

Section 508 is the federal law under which federal agencies, in their development, procurement, maintenance, or use of electronic and information technologies, must give disabled employees and members of the public access to such technology that is comparable to the access available to others, or run the risk of lawsuits brought against non-compliant agencies. While Section 508 standards do not require outfitting all federal technology to facilitate access and use with every department and agency, even if they lack employees with disabilities, the standards do require technology to have the capacity to be used by all persons.

Since Section 508's implementation on June 21, 2001, the federal government has not been able to claim 100% compliance with respect to technology accessibility across all agencies and departments (Congress is not obligated to follow Section 508 standards). This is due, in part, to both continued uncertainty as to what is actually required, in addition to logistical barriers that hamper widespread compliance.

The most noticeable effort to date has been the push towards implementing consistent accessibility design and practices for federal agency websites, as more information and services are delivered to the public online -- including the reported 54 million Americans with disabilities. Yet this does not necessarily include the modification of older archived content, information in multimedia or PDF formats, or design elements (such as forms, tables, and specialized formatting tags) to ensure all information on websites is usable to all visitors.

Agencies are not the only party adapting to accessibility guidelines and expectations, as vendors are also attempting to navigate the Section 508 landscape. On April 25, 2001, a final rule was published regarding the intersection of federal acquisitions procedures and Section 508 guidelines. The two federal procurement councils -- the Civilian Acquisition Agency Council and the Defense Acquisition Regulations Council -- were responsible for key amendments to that rule which required agencies to follow Section 508 standards on contracts awarded and signed (not just solicitations issued) after June 25, 2001 -- even if contracts were solicited and negotiated before the standards took effect. Agencies are able to claim an exemption from this Section 508 rule before any contract is signed, however, if either "undue burden" or utilization of the technology at issue for national security functions can be demonstrated.

In order to make their technology purchases as cost-effective as possible, agencies tend to acquire and utilize equipment for as long as possible, in upwards of as much as 5 years. Vendors, however, constantly develop and introduce new products, upgrades or fixes at a much faster pace, often more quickly than agencies are able to allocate funds and successfully incorporate into their operations. As new technologies become available, vendors have expressed concerns that different technologies have different accessibility standards which apply to their operation and settings in which they are used, and that some technologies, because of the multiple functions they perform, may have multiple standards which apply to them before they are even usable by one individual, much less many persons with special needs.

In response, the CAAC and the DARC issued a joint June 26, 2002 request for comments through August 26, 2002, as to whether the Section 508 law needs to be modified in order to both make more explicit, and set boundaries around, what's required of the vendors supplying technology at issue to federal agencies. Proponents of an explicit standard argue that such clarification would help minimize confusion, but critics allege that it would constrain what types of technologies could

be used in too narrow a context across potentially incompatible agency environments, while also locking in both agencies and vendors to inflexible solutions normally addressed through individual agency statement-of-work documents.

Rather than touting success, the atmosphere around the first anniversary of Section 508's implementation appears to be one of cautious optimism that the federal government has embraced a commitment to providing a level of access with respect to technology, and is on its way to meeting the goals attendant with the longstanding expectations of the public.

FEC Releases Draft Rules on "Issue Advocacy"

The second set of proposed regulations implementing this year's new campaign finance reform law will focus on "electioneering communications," also known as sham issue ads. At its August 1 meeting, the Federal Election Commission (FEC) released draft rules, which will be published in the Federal Register on August 7. Final regulations are scheduled to be ready by late September, and will become effective the day after this fall's elections. (The "electioneering communications" rules will not apply to the 2002 elections.) The FEC is required to complete all rulemaking proceedings before the end of the year.

The public comment period is extremely short, allowing nonprofits and other affected parties to comment by August 29, unless they wish to testify at the public hearing. In that case comments and the request to testify must be submitted by August 21. The hearing will beheld August 28-29 at the FEC offices in Washington.

The Bipartisan Campaign Reform Act of 2002 (BCRA) prohibits corporations, including nonprofits, and labor unions from broadcasting messages that identify candidates for federal office within 60 days of a general or special election and 30 days of a primary or nominating convention or caucus. (Print, telephone and Internet communications are not covered.) There are several exceptions to this ban, including news broadcasts, announcements of candidate debates and forums and expenditures by groups that qualify as "independent" under current FEC rules. BCRA also authorizes the FEC to create additional exemptions for broadcasts that refer to federal candidates without opposing or supporting their election. The proposed rules use this authority to address grassroots lobbying, and references to bills or laws that are identified by a candidate's name (i.e. McCain-Feingold). The FEC asks for comments on whether the regulations should only apply to paid advertisements, so that public service announcements or free cable TV time would not be restricted.

Four alternatives for grassroots lobbying exemptions are presented, and comments are sought on which, if any, are most consistent with the new law. The alternatives include:

1. calls to action on pending legislation asking that a specific Member of Congress be contacted, without indicating the Member's position on the bill or supporting or opposing the candidate's re-election
2. brief suggestions that the candidate be contacted and urged to take a position on a legislative or executive matter, without reference to the candidate's record, fitness for office, etc.
3. a reference to specific legislation or a public policy issue that can be addressed through legislation, and including contact information, or
4. calls to action urging contact with incumbent legislators to urge support or opposition to legislation, institutional action or policy proposals.

The electioneering communications ban does not apply to unincorporated entities, including 501(c)(3) organizations, or 501(c)(4) organizations that only use contributions from individuals to pay for the broadcasts, PACs and individuals. However, they cannot broadcast to a "targeted" area, which is defined as an audience of 50,000 or more in the district if a candidate for the House is mentioned, or the state of a candidate for the Senate. Expenditures of $10,000 or more must be disclosed, and the proposed regulations address practical aspects of implementation, such as how the 50,000-member audience threshold will be determined.

The FEC is encouraging commenters to submit by email by addressing their comments to Mai T. Dinh, Acting Assistant General Counsel, at Electioneering@fec.gov. Written comments can be sent to Ms. Dinh at the FEC, 999 E Street NW, Washington, DC, 20463. Faxes to 202/219-3923 should be followed by sending a printed copy.

For background information on BCRA and issue advocacy see our webpage on Money in Politics. Also see the FEC Press Release.

To view the full draft of the regulations as an Adobe Acrobat file, click here. For more background on the campaign finance reform law, see the Campaign Finance Institute's interactive guide to the law.

Update: Nonprofits Left Out of Corporate Reform Bill

Despite being included in the House version of corporate reform legislation, a provision that would require disclosure of corporate ties to nonprofits was not included in the final version that was signed into law. As reported in a previous Watcher, the provision would have required disclosure of contributions by corporations to any nonprofits where a corporate officer or a family member was also an officer.

Versions of this legislation have been introduced repeatedly over the past few years, so it is likely that it will be seen again in the future.

The House version was offered by Rep. John LaFalce (D-NY) after reports that certain nonprofits received beneficial treatment from Enron directors. The Senate had no language requiring disclosure and the final bill had no such language.

Diesel Rule, Rollback of Power Plant Regs to Move Ahead Despite Congressional Appeals

The Bush administration last week reaffirmed its commitment to strengthen diesel-engine standards but at the same time to rollback enforcement efforts against aging coal-fired power plants after receiving separate Congressional requests that it reconsider.

According to the Washington Post, House Speaker Dennis Hastert (R-IL) and other Republican lawmakers urged the administration to postpone a new standard for long-haul diesel trucks at the urging of Caterpiller, Inc., a leading truck manufacturer based in Illinois, which will face stiff penalties for noncompliance when the regulation is implemented in the fall. The standard grew out of a consent decree in 1998 between the Clinton administration and seven leading tucking companies, including Caterpiller, which for years unlawfully deceived the government about compliance with clean air regulations. Several of these companies (Cummins Inc. and Mack Trucks Inc.) have been able to develop technology to meet the new requirements, which are expected to reduce emissions of nitrogen oxide by 1.2 million tons within a year, and have argued, successfully, that the administration move forward.

Meanwhile, Sens. Joseph Lieberman (D-CT) and John Edwards (D-NC) released a letter signed by 44 senators asking that the administration postpone its plans to relax enforcement of the Clean Air Act's New Source Review program, requiring older power plants to make upgrades to control pollution. "[B]ecause the specific changes proposed have not been subject to careful study and full public comment, we have serious concerns that the changes could allow more air pollution -- causing more asthma, more heart and lung problems, and more premature deaths," the senators wrote. Administration officials dismissed the letter, signed by three Republicans, as "political posturing," according to the Post.

Maloney Introduces Contractor Accountability Bill

Rep. Carolyn Maloney (D-NY) introduced legislation (H.R. 5292) last week that seeks to ensure federal contractors follow the law by creating a centralized database on actions taken against them, including government lawsuits, consent decrees, and administrative agreements.

The legislation, which is co-sponsored by Reps. Stephen Horn (R-CA) and Jim Turner (D-TX), follows a report by the Project on Government Oversight (POGO), as well as articles in U.S. News & World Report and Mother Jones, which demonstrated that many of the largest federal contractors are also major league lawbreakers.

Currently, it is extremely difficult to piece together a federal contractor's history of compliance with the law. POGO was forced to draw on a wide range of disparate sources, including agency press releases and news articles, to produce its report. A comprehensive, centralized database will make it much easier for federal debarment officials to ensure that taxpayer dollars do not subsidize lawbreaking. If made available through the Internet, as it should, such a database would also make federal contractors more accountable to the public.

"In a time when corporate accounting scandals are being revealed at an unprecedented pace, isn't it wise to have a full accounting of the Federal government's investments?" Maloney said in a prepared statement. "By spending over $215 billion a year on goods and services, the United States is the largest consumer of goods and services. Yet the Federal government's watchdogs, the Federal suspension and debarment officials, currently lack the information they need to protect our business interests. We currently have no central way of accounting for the performance of our purchases, but this bill will change that."

The bill also requires prospective contractors that have been convicted of two similar violations to account for their actions before being awarded a contract, placing the burden of proof on them to demonstrate "responsibility." This provision is similar to, but more modest than, a Clinton-era standard -- repealed by the Bush administration -- that directed bidding companies to report any violations from the previous three years, and directed government contracting officers to consider this information in awarding contracts.

Chemical Plant Security Act Approved in Senate Committee

On July 25 the Senate Environment and Public Works Committee unanimously approved S. 1602, a substitute version of the bill originally offered by Sen. Jon Corzine (D-NJ) in October 2001, that would require each chemical plant to address its vulnerability to a terrorist attack. Under the bill, plants must submit plans to the Environmental Protection Agency (EPA) showing how they will address their vulnerabilities. As this article points out, chemical plants have many hazards that could be removed to make them safer in the case of an accident or a terrorist attack. This could mean substituting safer chemicals or storing smaller quantities of hazardous chemicals on site. This August 5 Washington Post article points out that there continues to be concern for security at chemical plants and reports that Bush administration officials are pushing for measures very similar to those in the Corzine legislation.

The substitute bill passed out of committee was modified from the original bill. The substitute makes it more clear what specific regulations the EPA must develop, and strikes a provision from the original bill that held a facility liable for an accidental or criminal release of a hazardous chemical if an investigation found a problem at the facility, according to BNA, a Washington trade publication. Corzine told reporters that he held his ground on the bill, and thinks they will have to come back to a discussion about transportation facilities.

The unanimous passage of this bill provides it with increased momentum as debates of homeland security continue and the September 11th anniversary approaches. There has been talk that the Chemical Security Act may be offered as an amendment to the Senate's bill, the National Homeland Security and Combating Terrorism Act of 2002 (S. 2452), which

would create a cabinet level Department of Homeland Security.

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