Mercatus Reports

Editor's Note: *This issue,* REGULATION *debuts "Mercatus Reports," a digest of recent federal regulatory actions. The digest is prepared by the Mercatus Center at George Mason University. The Mercatus Center is an academic, non-partisan organization that seeks to build and apply an understanding of how individuals cooperate through the market and political processes, and to highlight the dynamic experimentation and innovation that are essential features of the market process. More information on the organization can be found on the Web at* www.mercatus.org.

The Mercatus Center regularly submits comments on proposed regulations to the appropriate federal agencies.

ARSENIC IN DRINKING WATER SYSTEMS

FINAL: JANUARY 22, 2001

In a final rule published on January 22, the Environmental Protection Agency (EPA) lowered the allowed level of arsenic in public drinking water systems from 50 micrograms per liter (ug/L) to 10 ug/L. Though arsenic poses acute risks at high doses, it is a naturally occurring substance for which health risks have not been observed at the levels found in U.S. drinking water systems. EPA justifies the new standards using evidence of cancer risk from high arsenic doses in Taiwan and Chile. The data from these countries may significantly overstate the risk of arsenic ingestion in the United States, particularly since U.S. studies found no statistical evidence of arsenic risks.

The 1996 Amendments to the Safe Drinking Water Act authorized EPA to develop standards that balance the benefits and costs borne by community water systems. However, the rule would require communities to incur costs of reducing arsenic that, by EPA's analysis, are significantly greater than the health benefits they would receive. A Mercatus analysis suggests the rule would impose net costs on communities (over and above benefits) of $600 million per year, draining scarce resources that could, if used elsewhere, achieve much greater health protection benefits.

Southwestern states, where arsenic occurs naturally in water supplies, will be hardest hit. Sen. Pete Domenici (R-N.M.) introduced legislation Jan. 31 (S. 223) to void the rule, which he said could cost New Mexico water systems at least $400 million in initial capital expenditures and at least $16 million in annual costs without producing any "scientifically documented health benefits."

APPLIANCE STANDARDS FOR AIR CONDITIONERS AND HEAT PUMPS

FINAL: JANUARY 22, 2001

Unlike previous energy efficiency standards, which have taken as long as 10 years to develop and issue, Department of Energy's (DOE) air conditioner and heat pump standards hurtled through the regulatory process at lightning speed. The Department announced its proposal last October 4, accepted public comment until December 4, and, just two weeks later, circulated a final draft among other agencies in the administration. Over the objections of other administration officials, and contrary to many public comments, these rules were displayed at the Federal Register on the last day of the Clinton administration, and were published on January 22.

Although DOE suggests the proposed standards will yield modest average net savings for those consumers who buy a new appliance in 2006 (when the standard becomes effective), this average hides the fact that a majority of consumers would lose money. For instance, DOE estimates $45 in average net savings over the 18-year life of a more efficient air conditioner. Yet, 73 percent of all households would lose an average of between $17 and $188 on these new air conditioners (because their climates are not severe enough to offset the higher initial price tag). A relatively few households — 27 percent — would average a net savings of $457, an amount high enough to produce the net savings of $45 averaged over all households.

Despite the varied climate conditions around the nation, DOE did not consider alternatives to a one-size-fits-all standard for air conditioners and heat pumps.

HEAVY-DUTY TRUCK EMISSIONS

FINAL: JANUARY 18, 2001

The vast majority of U.S. citizens live in areas that already comply with EPA's ozone and particulate matter (PM) ambient air standards; yet, to address the pockets of noncompliance, EPA has lowered exhaust emission standards for heavy-duty highway engines and vehicles to less than one-tenth the current standards. In addition, because the sulfur levels in fuel may harm the new engine technologies required to meet the lower standard, this rule also requires reduced sulfur levels in diesel fuel from the current cap of 500 parts per million (ppm) to a cap of 15 ppm.

These nationwide restrictions on emissions and diesel sulfur will impose large costs on American citizens without corresponding benefit. Consumers throughout the nation will face higher prices for consumer goods and public transportation — assuming EPA's requirements are even

feasible. In fact, EPA had to assume that unproven emissions control technologies will develop rapidly and at low cost to make its rule even remotely feasible. Feasibility also depends critically on highly optimistic assumptions about the cost and investment behavior of the suppliers of highway diesel fuel.

President Clinton made a commitment, in a July 16, 1997, memorandum to EPA Administrator Carol Browner, that the costs of achieving ambient air standards would not exceed $10,000 per ton. Yet the costs of reducing diesel sulfur to the levels required by this rule would exceed $80,000 per ton.

TOXIC RELEASE INVENTORY, LEAD AND LEAD COMPOUNDS

FINAL: JANUARY 17, 2001

The Toxic Chemical Release Inventory (TRI) rule lowers reporting thresholds for lead and lead compounds from 25,000 or 10,000 lbs. down to 100 lbs. If a facility manufactures, processes, or uses more than 100 lbs. of lead or lead compounds per year, it would now be subject to annual TRI reporting requirements.

Despite extensive information on these chemicals, the reporting thresholds are not based on any quantitative analysis of the magnitude of releases that will be accounted for under different thresholds, nor the risks posed by releases. EPA recognized this, but only after it issued the final rule did it refer the rule to its Science Advisory Board for review.

Under the rule, facilities must identify the number of pounds of lead "released" into the environment. The term "released" refers not only to chemicals that are transferred off-site as waste or released (routinely or accidentally) on-site into the air, land or water, but also to chemicals that are recycled or treated. A reviewer of the TRI data cannot easily ascertain whether a "release" reflects responsible management and recycling, emissions allowed by regulation, or accidental spills; so, data on pounds of chemicals released, as provided by TRI, fail to provide communities with relevant data on risks that may be present.

ROADLESS AREAS

FINAL: JANUARY 12, 2001

This rule bans all road construction and timber harvesting on 58.5 million acres of national forest land around the country. The roadless areas covered by the rule are biologically diverse, and usage varies tremendously across the nation.

The Forest Service has not shown that a universal ban on road construction is either necessary or appropriate for protecting important values — such as water quality, wildlife, and recreation — in these diverse roadless areas. In fact, in some cases, the economic and environmental benefits of prohibiting road construction are likely to be less than the economic and environmental costs of not being able to build a road. Forest Service data suggest that many roadless areas are in need of ecosystem restoration activities that will not occur without road construction.

The Forest Service did not consider alternatives to a complete ban on road construction, such as allowing low-impact temporary roads as needed for forest health or ecosystem restoration. Such alternatives could achieve environmental goals more effectively, while simultaneously minimizing economic and environmental costs.

CLOTHES WASHER EFFICIENCY

FINAL: JANUARY 12, 2001

These DOE regulations requiring clothes washing machines to use less water and energy are based on the recommendation of a group of appliance manufacturers and energy conservation advocates. (See "Consumers in the Ringer," p.14.) DOE expects the new regulation will eliminate standard vertical axis washers from the market, in favor of horizontal axis washers, which tend to be front-loading (rather than top-loading).

The new standards will reduce consumer choice by eliminating the most popular washing machine models. Manufacturers currently offer energy- and water-efficient washing machines that already meet the new standards, but consumers are not buying them. According to a comparison by *Consumer Reports*, front-loading washers are currently available for $700 to $1,000, while top-loaders range from $400 to $930. DOE admits consumers will have to pay about $240 more to buy a front-loading model, but it promises that consumers will more than recover the higher purchase price in lower water and energy operating costs over the expected 14.5-year life span of the washers.

DOE assumes that consumers' preference for less efficient washers stems from ignorance about these cost tradeoffs. It does not consider the possibility that consumers actually prefer the features of the less-efficient machines (such as loading clothes at the top, rather than kneeling or stooping to load them in the front of the machine, or the ability to add clothes once the wash cycle begins, or the safety afforded by top loaders). In fact, in a survey commissioned by the Mercatus Center, respondents rejected the proposed standard by nearly three to one, even when told that the required machines would save them money.

MEDICAL PRIVACY

FINAL: DECEMBER 28, 2000

Under the 1996 Health Insurance Portability and Accountability Act, Congress gave itself until early 1999 to enact legislation to protect the privacy of individually identifiable medical information. In the event that Congress missed its own deadline, it instructed the Department of Health and Human Services (HHS) to promulgate privacy protections no later than the end of 1999. Congress missed its self-imposed deadline, so HHS has established guidelines that health plans (insurance companies, HMOs, etc.), health care providers (doctors, hospitals, etc.), and payment clearinghouses must follow to "protect the privacy of individually identifiable health information maintained or transmitted in connection with certain [health-related] transactions."

Patients must be given access to and copies of their records, as well as the ability to correct those records. Plans and providers must also ensure that business partners institute and follow required privacy protections. Individu-

ally identifiable records may be released if the patient provides "informed consent," or in connection with payment and/or treatment without informed consent. The rule also provides three principal situations where nonconsensual release is permitted: (1) Law enforcement access to private medical records is made available under a probable cause/safe harbor provision; (2) non-profit medical research and development may access individually identifiable records; and (3) transmission of individual medical data to federally maintained databases of medical records is also exempted from individual consent requirements.

HHS estimates that the one-time start-up costs for the new rules will be $613 million. By contrast, Mercatus estimates start-up costs at nearly $2 billion. (Principal differences in the estimates arise from more careful accounting of the costs of legal review, policy documentation, and personnel training expenses.) HHS estimates recurring annual costs of compliance at $674 million, while Mercatus estimates these costs at roughly $1 billion. (Again, principal differences in the estimates arise from more careful accounting by Mercatus of the costs of obtaining patient authorizations. Importantly, neither set of estimates includes cost estimates for ensuring business partner compliance.) HHS loosely attempts to quantify the benefits of the rule by suggesting that if patients perceive a more private medical environment, they may incline more toward early treatment and therefore lower overall medical costs. On this reasoning, HHS estimates that benefits stemming from the rule's increased privacy protections may range from $200 million per year to possibly as much as $1.6 billion per year.

BLACKLISTING

FINAL: DECEMBER 20, 2000

The Federal Acquisition Regulatory Council (FARC) published changes to the Federal Acquisition Regulations (FAR) on December 20, 2000. The FAR set the rules for granting government contracts by the various agencies that procure goods and services from private firms. At the heart of this rule is a change in the standards by which firms bidding for government contracts are judged in the area of "integrity and business ethics."

The rule shifts the burden of determining whether a firm meets the proper standards for business ethics from the agencies authorized by Congress, to government procurement agents. At the same time, the rule provides little guidance for judging a firm's history of practices or even what should be judged. Vague terminology and imprecise guidelines can only lead to inconsistent and contradictory application of the rule. Furthermore, any potential contractors deemed unworthy of a contract are barred de facto from doing business with the government for up to three years — they become, in other words, a "blacklisted" firm.

Currently, firms with questionable business ethics face a hearing and may provide evidence on their behalf before being officially barred from government contracting. Under this new regime, blacklisting takes the place of formal hearings and firms cannot answer the charges against them. Firms may be blacklisted for violation of any federal regulation, including labor standards, but may also face blacklisting for an administrative complaint even before charges are ever filed or evidence is heard.

The rules went into effect January 19. Congressman Tom Davis (R-Va.), has requested a six-month hold on the regulations, citing the impracticality of implementing such sweeping change on such short notice.

MODIFIED PATIENTS' BILL OF RIGHTS

FINAL: NOVEMBER 21, 2000

By Presidential Memorandum dated November 4, 2000, the Pension & Welfare Benefits Administration (PWBA), under authority of Employee Retirement Income Security Act, was ordered to promulgate a modified patients' bill of rights (formally titled, "Regulations Establishing Minimum Requirements for Benefits Claims Procedures"). The proposed rule went final in just 17 days, and gives employee health care plans 15 days to grant or deny coverage for non-urgent claims, and 72 hours for urgent claims. PWBA estimates that less than one percent of claims are not already handled within the rule's "expedited" timeframes.

In addition to the specified time frames, covered employees must also have a "reasonable opportunity" to appeal coverage denials. In particular, participants are entitled to a "full and fair" review of any adverse benefit determination, including at least 60 days to appeal and submit written documentation. In cases of dispute, insurers must provide free access to and copies of all claim records. Claim denials based on medical judgments (e.g., experimental treatments) require plans to consult an independent medical expert. Covered employees may also pursue additional legal remedies (litigation) when plans fail to follow the rules specified by PWBA.

PWBA estimates the ongoing costs (expediting claims reviews of the one percent, expert opinions, processing appeals, and notifying and facilitating participants rights under the rule) at $400 million per year. Their cost estimates do not include estimates for increased litigation potential. Employees are expected to bear the bulk (more than 80 percent) of these costs—inasmuch as benefits constitute a part of most compensation packages. The Department of Labor (where the PWBA is housed) was unable to quantify any benefits from the rule's imposition. As stated in the proposed rule, "Lacking data on the number of claims and appeals that are wrongly denied and the incidence and severity of resultant injuries, the Department was unable to quantify the economic benefits of improved health outcomes under the regulation."

ERGONOMICS PROGRAM

FINAL: NOVEMBER 14, 2000

One of the most controversial midnight regulations, this rule mandates the establishment of ergonomics programs to attempt to eliminate or control musculoskeletal disorder (MSD) hazards. The Occupational Safety and Health Administration (OSHA) defines MSDs as "disorders of the muscles, nerves, tendons, ligaments, joints, car-

tilage, blood vessels, and spinal discs, in the following areas of the body: neck, shoulder, elbow, forearm, wrist, hand, abdomen (hernia only), back, knee, ankle, and foot," including tendonitis and lower back pain. Employers would be responsible for alleviating a variety of symptoms that may or may not be caused by the workplace. For example, if shoveling snow on a weekend caused an employee pain or stiffness, his symptoms would be an "MSD incident" for which the employer would be responsible if a job "significantly aggravated" them and they resulted in restricted work activity.

Despite the comprehensive requirements the rules would impose, OSHA's approach fails to address the fundamental problem of MSDs in the workplace: lack of information on causation and on viable, cost-effective solutions. Instead, it mandates elaborate procedures and employer obligations without contributing to the body of knowledge about the causes of and solutions to work-related MSDs. In fact, MSDs have been declining since 1994, as high worker's compensation claims and a growing awareness among employees and employers furnish automatic incentives to correct the problem.

The Mercatus Center conservatively estimates that the rule will cost Americans (as consumers and workers) $5.8 billion every year without offering benefits over and above those that would be achieved in the absence of the standard. Based on new data from OSHA, the Employment Policy Foundation suggests that compliance with the rule could cost over $125 billion per year.

OSHA has received more public comment on this proposal (over 19,000 separate documents) than on any prior rule in the agency's history. Yet OSHA has allowed the least amount of time from proposal to final rule of any rulemaking issued over the last 12 years (with the exception of a revision to the non-controversial dip tank standard). Though required by law to review the entire docket and consider public comment, OSHA issued the final rule just three months after the docket for public comment closed. R