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Bush's Midnight Rule Campaign Comes to a Close

President George W. Bush and senior administration officials appear to have concluded their midnight regulations campaign, leaving the incoming Obama administration with a host of new rules it may not agree with. In the past two months, the Bush administration has finalized at least 20 controversial midnight regulations affecting everything from the environment to health care and worker rights.

The regulations are scheduled to take effect before President-elect Barack Obama takes office. Some will take effect on Jan. 20 — the day of Obama's swearing in. Regulations are considered final upon publication in the *Federal Register*, but generally, federal law requires agencies wait at least 30 or 60 days before making the rules effective.

The Bush administration's shrewd timing handcuffs the Obama administration from repealing any Bush-era regulations in effect. Had Bush waited until January to finalize those controversial regulations — thereby missing the opportunity to close the 30- or 60-day

effective date window during his term — the Obama administration would have had an opportunity to delay the rules' effective dates and/or reevaluate the content of the regulations. (The Bush administration employed such a strategy upon taking office, delaying dozens of controversial Clinton-era regulations.)

Obama transition officials have shown interest in tackling Bush's midnight regulations. Incoming White House counsel Gregory B. Craig told *The New York Times* the Obama administration "will take appropriate steps to address any concerns in a timely manner."

But because Bush has limited the incoming administration's options, congressional action will likely be necessary to spur the reconsideration or reversal of the Bush regulations. Congress could disapprove regulations on a case-by-case basis using the Congressional Review Act. Congress could also use legislation to explicitly authorize the Obama administration to act on Bush-era regulations without having to reenter the often cumbersome rulemaking process.

Rep. Jerrod Nadler (D-NY) introduced Jan. 6 the Midnight Rule Act (H.R. 34), which would require incoming cabinet officials to approve Bush-era regulations before they are allowed to take effect. Other congressional members are mulling their options for addressing individual regulations.

The Democratic leadership has pledged to take its cues from the incoming Obama administration. Spokespersons for the offices of Senate Majority Leader Harry Reid (D-NV) and Speaker of the House Nancy Pelosi (D-CA) have said they are "waiting for guidance from the administration before adopting a specific strategy," according to *The New York Times*.

Reid and 16 co-sponsors, all Democrats, have introduced a "Sense of Congress" bill (S. 8), that, if adopted, would express Congress's displeasure with Bush's midnight regulation campaign.

Public interest groups are challenging the administration on a number of midnight regulations. A group of park conservation advocates are suing the Department of the Interior over its Dec. 10, 2008, rule, which lifts the 25-year-old ban on carrying loaded guns in national parks. According to a statement, "The groups are arguing that the rule is unlawful because the Department of the Interior did not conduct an analysis of the rule's environmental effects."

Environmental groups are suing Interior over another rule that puts endangered species at greater risk. The rule changes the implementation of the Endangered Species Act, which requires scientific consultation for decisions that could impact species. "The Bush rule allows federal agencies involved with projects such as new highways, bridges, dams and airports to ignore the views of wildlife experts and instead internally determine the threat level posed to imperiled wildlife," the groups said in a statement. "These agencies not only lack the expertise to make wildlife decisions, but often they have a built-in conflict of interest."

Highway safety advocates have filed a "petition for reconsideration" with the Department of Transportation over a rule that allows truck drivers to spend up to 11 consecutive hours on the road. The rule also shortens mandatory rest times between work weeks. The groups are asking

that an older 10-hour limit be reinstated, citing studies that show the risk of a crash increases during long runs like those allowed under the new rule.

One of the most controversial midnight regulations gives health care providers the right to refuse to provide women with access to or information about reproductive health services, if a provider objects on moral or religious grounds. The rule requires providers receiving federal funding to certify in writing that they are complying with laws intended to preserve an individual's right of conscience. On its face, it seems to target abortion and sterilization services, but critics say the Department of Health and Human Services (HHS) wrote the rule so broadly that it could also reduce access to information about and the dispensing of contraception.

The HHS provider conscience regulation and the endangered species rule were among at least six midnight regulations finalized the week of Dec. 15, 2008 — the final week for agencies to make certain their rules would take effect by the close of the Bush administration.

In addition:

- The U.S. Environmental Protection Agency (EPA) published two rules: one exempting farms from reporting to the government the air emissions generated by animal waste, and another reclassifying thousands of tons of hazardous waste, allowing it to be burned as fuel.

- The Department of Labor announced revisions to its guestworker program that weaken already modest protections for farmworkers.

- The Department of Transportation finalized a regulation that could lead to an increase in the privatization of public toll roads by forcing states to accept bids from private companies.

The provider conscience rule and both EPA rules are scheduled to take effect Jan. 20.

HHS published another controversial regulation on Dec. 24, 2008. The administration says the regulation, which requires government grantees to pledge opposition to prostitution and sex trafficking, will take effect Jan. 20, just 27 days after being finalized. HHS gave no defense for its decision to shorten the effective date window, ignoring the requirements of the Administrative Procedure Act (APA) that call for a minimum 30-day waiting period before a rule becomes effective.

Under the APA, agencies may only dispense with the 30-day requirement if they can show "good cause" for doing so. Similarly, the Obama administration could suspend any of Bush's midnight regulations if it cites good cause. However, both the executive branch and courts generally apply the good cause exemption conservatively, so a broad application of the provision is unlikely.

Transition at OIRA: What Kind of Change?

Change is coming to the leadership position at the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB). Two news reports during the week of Jan. 5 highlighted the outgoing and (potentially) incoming administrators of the office that reviews federal agencies' proposals for providing public health, safety, consumer, and environmental protections.

On Jan. 6, President Bush named Susan Dudley to the position of Acting Administrator of OIRA. The appointment was necessary to extend Dudley's tenure in the position she has held since April 2007. Dudley was one of a handful of recess appointments whose tenures expired when the 110th Congress officially ended — and a new recess appointment could not be made. In order to continue the work of the Bush administration through Jan. 20, it was necessary that someone be appointed to fill the position in an acting capacity, and Dudley was Bush's logical choice. According to a Jan. 8 BNA article (subscription), Dudley has submitted her resignation from the post effective Jan. 20.

Dudley's initial nomination was widely opposed by those who support an active role for government in providing regulatory protections, including OMB Watch, and was widely supported by business groups and those who view regulations only as unnecessary infringements on free markets. The controversy surrounding her nomination may have prevented the Senate from confirming her when the 109th Congress reconvened following the November 2006 elections, even though Republicans controlled the Senate at that time. Although new confirmation hearings were being scheduled in 2007 under Democratic leadership, Bush decided to use his recess appointment powers to install Dudley at OIRA. She is the only OIRA administrator not confirmed by the Senate since the office was created in 1980.

President-elect Obama's choice to head OIRA is Cass R. Sunstein, a prolific legal scholar, according to a Jan. 8 article in the *Chicago Tribune*. Sunstein is a friend of Obama's from Chicago and a member of the presidential transition team. He is currently a law professor at Harvard University and remains a visiting professor at the University of Chicago, where he and Obama taught. Sunstein is the author of numerous books and articles and has written on constitutional, administrative, financial, and environmental issues.

According to the *Tribune* article, Obama's decision to name Sunstein to OIRA signals Obama's commitment to overhaul regulatory processes that determine both financial sector regulations and health, safety, and environmental regulations. Obama has not formally nominated Sunstein and has not made any statement about the nomination.

Sunstein's writings may make his nomination for OIRA as controversial as Dudley's nomination. He is widely published and regarded as an intellectual heavyweight. Some of his writings raise concern over his appropriateness to lead an office that can ultimately control the outcome of health, safety, and environmental regulations. For example, the title of an October 2008 law review article he wrote asks, "Is OSHA Unconstitutional?" Sunstein uses the article

to advance the theory that the Occupational Safety and Health Act gives the Labor Department undue authority to promulgate health and safety regulations.

He has also written articles critical of traditional environmental regulatory approaches and has advocated for the use of market mechanisms and cost-benefit analysis, even when statutes explicitly exclude the consideration of costs in determining regulatory standards. In early January, *E&E News PM* quoted Frank O'Donnell, president of Clean Air Watch, as saying, "[Sunstein] appears to be embracing the very positions of the Bush EPA [Environmental Protection Agency] and other business interests who for years have tried to use this business of cost-benefit analysis as a device to attack the Clean Air Act."

The president of the Center for Progressive Reform, law professor Rena Steinzor, likewise criticized Sunstein's views on cost-benefit analysis in a blog post Jan. 9. She argues that Sunstein should not be "given a free pass" to be OIRA administrator and that "progressives concerned about regulatory policy and Sunstein's ample writings on the subject will want to hear assurances that under his leadership OIRA will stop serving as a roadblock to much needed protections."

Gary Bass, executive director of OMB Watch, said, "I have enormous respect for Sunstein's intellect, but there is a good deal of concern in the public interest community about his support of cost-benefit analysis and what that means for regulatory policy in an Obama administration. He has an immensely difficult task in front of him if the administration wants to change the regulatory process to provide greater public protections."

Justice Nominee May Bring Sunlight to Office of Legal Counsel

On Jan. 5, President-elect Obama nominated Dawn Johnsen as Assistant Attorney General for the Office of Legal Counsel (OLC). Johnsen has written articles advocating for restrained executive power and increased government transparency, in particular at OLC. The office issued several secret and controversial opinions during the Bush administration.

The OLC provides legal advice to the president, Cabinet departments, and other executive branch agencies regarding the constitutionality or legality of particular policies. OLC memoranda are regarded as binding on the executive branch, and as their legal opinions are most often kept secret, they frequently go unreviewed by Congress or the judiciary. The office has provided a legal justification for some of the Bush administration's most controversial counterterrorism activities, including John Yoo's secret 2002 torture memorandum, the National Security Agency's secret warrantless wiretapping program, and secret Central Intelligence Agency prisons.

Johnsen, most recently a professor at Indiana University Law School, spent several years at OLC during the Clinton administration, including two years as acting head. Along with eighteen other former attorneys from OLC, Johnsen authored a white paper — "Principles to Guide the Office of Legal Counsel" — outlining the manner in which OLC should operate.

Johnsen and the other authors concluded that greater transparency at OLC would have trickle-down effects across the federal government, strengthening the rule of law and the system of checks and balances while enriching the quality of American democracy.

The white paper recommends OLC make its opinions public "in a timely manner, absent strong reasons for delay or nondisclosure." The former OLC attorneys believe doing so promotes accountability, "ensur[ing] executive branch adherence to the rule of law and guard[ing] against excessive claims of executive authority," and as a corollary, "transparency also promotes confidence in the lawfulness of governmental action." The paper also proposes that the public disclosure of legal advice helps agencies understand and apply such advice. Finally, disclosure allows the legislative and judicial branches to better evaluate and check executive actions.

In an article published in the *UCLA Law Review*, entitled "Faithfully Executing the Laws: Internal Legal Constraints on Executive Power," Johnsen sees OLC as an essential contributor to the checks and balances on the president's power. Complementing the external checks of the legislative and judicial branches, Johnsen believes OLC can serve as a check internal to the executive branch. "OLC must be prepared to say no to the President. For OLC instead to distort its legal analysis to support preferred policy outcomes would undermine the rule of law and our democratic system of government."

Johnsen believes that the "torture opinion" was constructed on a flimsy legal basis, explicitly to achieve the goals of the executive. She theorizes that had OLC been concerned with not merely justifying action regardless of its constitutionality, but with providing a neutral legal analysis, such an opinion would never have been issued.

President-elect Obama made repeated campaign promises about having the most transparent administration in our country's history. Based on Johnsen's previous writings, her nomination appears to not only signal a strong intent to break with Bush administration policies, such as the use of torture, but also a significant step to ensure and improve transparency across the executive branch.

Transparency Concerns Raised about EPA Nominee

President-elect Barack Obama's nominee to lead the U.S. Environmental Protection Agency (EPA), Lisa Jackson, has drawn both praise and criticism from environmental advocates. Some have accused Jackson of limiting public participation, denying the release of information to the public, and weakening scientific integrity in her time as a state environmental commissioner in New Jersey. Other environmentalists have hailed the nomination and believe the events should not be attributed to Jackson.

Jackson served as commissioner of the New Jersey Department of Environmental Protection (DEP) from February 2006 to November 2008. Much of the criticism of Jackson's tenure concerns charges of weak enforcement and poor administration, especially related to the

cleanup of the state's numerous toxic waste sites — New Jersey is home to more Superfund sites than any other state in the nation.

However, Jackson's environmental supporters place the blame for DEP's shortcomings on miserable state budget conditions and obstacles generated by Governor Jon S. Corzine (D). Moreover, many of the DEP problems identified predate Jackson's tenure, by more than 20 years in the case of some Superfund sites.

Several criticisms directed against Jackson may have implications for government transparency and scientific integrity at a Jackson-led EPA. Public Employees for Environmental Responsibility (PEER), a national watchdog group that has a chapter active in New Jersey, has identified alleged cases of secrecy and reprisals against scientists in Jackson's DEP.

According to reports posted on PEER's website, a whistleblower in the DEP was reassigned after criticizing the objectivity of a panel investigating the relicensing of a nuclear power plant. In another case, a 20-year DEP veteran scientist, Zoe Kelman, resigned in protest when she allegedly was removed from a chromium study after criticizing DEP standards for chromium pollution. PEER has also accused Jackson's DEP of issuing a "gag order" against its employees following criticisms of the agency's performance regarding the cleanup of toxic sites.

Concerns have also been raised about excessive withholding of information. In July 2007, PEER petitioned the DEP to change rules to allow public release of officials' calendars and meeting information. The petition was denied. The group also criticized a task force created to review DEP's permitting programs and offer suggestions for streamlining the processes. The task force was dominated by industry representatives, lacked public involvement, and failed to make substantial recommendations, according to PEER.

The New Jersey chapter of the Sierra Club strongly supports Jackson's nomination and refutes many of the criticisms from PEER and others, calling them "false and derogatory statements ... based on half truths and faulty information." The Sierra Club chapter blames previous DEP commissioners and several governors, including Corzine, for many of the problems facing the state and DEP. The Sierra Club chapter disagrees with DEP's policy of preventing disclosure of meeting sign-in logs, but it blames a previous commissioner for instilling the secrecy. The chapter also denies that there was a lack of transparency in the proceedings of the permit efficiency task force and defends the task force's final report.

John Pajak, President of the New Jersey Work Environment Council, also noted his dissatisfaction with the governor in the organization's endorsement of Jackson. "While we have differences with some of Governor Corzine's environmental policies," stated Pajak, "Lisa Jackson has proven an able DEP Commissioner and has helped make New Jersey safer and more secure." In a press release following Obama's announcement, Environment New Jersey, a state conservation organization, also hailed the choice of Jackson. The group claimed, "As head of New Jersey's Department of Environmental Protection, Lisa Jackson championed

legislation to put New Jersey on the forefront of global warming solutions."

The EPA under outgoing administrator Stephen Johnson has drawn extensive criticism for the erosion of transparency at the agency. Given that Obama has made repeated statements about intending to have the most transparent administration in our country's history, many environmental advocates are looking forward to a change in direction at EPA that restores transparency, accountability, and scientific integrity. New Jersey Sen. Robert Menendez (D) said of Jackson, "I am confident she will bring the change we need from what has been simply disastrous environmental policy under the Bush administration." The Senate will hold a confirmation hearing for Jackson on Jan. 14.

Jackson joined the New Jersey DEP in March 2002 as Assistant Commissioner of Compliance and Enforcement after 16 years with EPA, initially at its headquarters in Washington and more recently at its regional office in New York City. In 2005, before being nominated Commissioner, Jackson also served as the DEP's Assistant Commissioner for Land Use Management.

Department of Energy Proposes Eliminating 20-Year-Old Disclosure Test

On Dec. 9, 2008, the Department of Energy (DOE) published a proposed rule that would revise its official Freedom of Information Act (FOIA) regulations to remove a 20-year-old requirement for weighing the public interest in records disclosure decisions. In the same rulemaking, DOE also proposed to raise FOIA copying fees from five cents to 20 cents a page.

The rule would remove one sentence from the agency's FOIA regulations. The sentence requires the use of a public interest "balancing test" and states, "To the extent permitted by other laws, the DOE will make records available which it is authorized to withhold under [FOIA] whenever it determines that such disclosure is in the public interest." OMB Watch and other groups, including the National Security Archive and the Federation of American Scientists, submitted comments opposing the rule change.

Balancing Test and FOIA Requirements

In the proposed rule change, DOE argued that the balancing test goes "beyond the requirements of FOIA." However, OMB Watch contends that it represents a process to ensure agency compliance with the law, additional statues, and court rulings related to FOIA. In fact, the sentence embodied the decisions of a U.S. Supreme Court opinion in 1976 that held, "Disclosure, not secrecy, is the dominant objective of the [FOIA]." The opinion was upheld in 1991 when the Court stated that FOIA established a "strong presumption in favor of disclosure." While neither the original law nor any amendments specifically require an agency to implement a balancing test, both the statutory history and court decisions make it clear that under FOIA, agencies are expected to use reasonable mechanisms to identify information for

public disclosure.

Agency Burden

The primary charge DOE levels against the public interest balancing test is that implementing the test places an undue burden on the agency. However, DOE fails to provide any details concerning financial, personnel, or time costs borne by the department because of the test. OMB Watch insisted that DOE must "provide sufficient information and supporting documentation" for a proper public comment process. The National Security Archive argued, in its comments, that proactive release of information in the public interest actually reduces burden on the DOE's FOIA program. The Archive stated, "DOE will receive fewer requests for the same information if it releases records to journalists and others who will publish it or posts frequently requested records as required by E-FOIA."

The department also claimed in the proposed rule that the test forces the agency "to reconsider a determination." Despite this claim, the simple balancing test language merely requires the agency to consider public interest along with other components when making disclosure decisions.

Impact of Balancing Test on Disclosure

The department stated in the proposed rule that "the extra balancing test does not alter the outcome of the decision to withhold information," explaining that instead, the DOE follows Department of Justice guidance, without elaborating on precisely which guidance DOE uses. It is somewhat perplexing that DOE claims an undue burden from the balancing test, while also stating the test does not alter any decisions. This lack of information and apparent paradox makes it impossible for commenters to appropriately respond. The 2001 FOIA memorandum from then-Attorney General John Ashcroft, restricts discretionary disclosures and promotes withholding information when there is a "sound legal basis" to do so. However, other FOIA guidance indicates an agency has flexibility on discretionary releases and would seem to argue for just such a balancing test to help determine which records should be disclosed.

Copying Costs

The DOE described an increase in copying fees from five cents to 20 cents a page as "modest and reasonable" and "more reflective of current costs and would bring DOE into conformity with the rest of the government." However, several aspects of this characterization appear difficult to defend. While 20 cents per page could be considered a modest amount of money, it would be difficult to describe a 400 percent increase as "modest." The proposed fee also does not match other major agencies. According to *Federal Register* records, the departments of State, Justice, Interior, and Homeland Security all have copying fees less than 20 cents per page. DOE has also not provided any information about current copying costs incurred by the department and how the proposed fee increase better reflects those costs.

Timing of the Proposed Rule

OMB Watch recommended that DOE withdraw the proposed rule until after the incoming Obama administration has established its FOIA guidance to agencies. If a rule change were still necessary, OMB Watch argued that additional information would be needed on the following issues:

- Burden imposed on the agency by the public interest balancing test
- Process by which the balancing test is administered
- Department of Justice guidance being referenced
- Copying charges assessed under FOIA by other agencies
- DOE's costs associated with copying records

Comments were accepted for only 30 days, and the comment period was conducted during the holiday season. Comments were due by Jan. 8.

The incoming administration will almost certainly bring with it new guidance on FOIA. There will likely be a new Attorney General memorandum on FOIA, along with other new policies and guidance from the Department of Justice. Given that an incoming administration means changes to the guidance are likely in the near term, OMB Watch argued that hurried rules "can be burdensome to the taxpayer as they are often challenged in court. They also prevent the completion of a thorough and proper democratic process by minimizing public scrutiny and participation."

Oversight Report Highlights Lack of Transparency in TARP

When Congress passed the legislation that created the $700 billion Troubled Asset Relief Program (TARP), it authorized the creation of the Congressional Oversight Panel (COP) to monitor the execution of the program by the Treasury Department. The panel is required to issue reports on a regular basis, and its latest report, released Jan. 9, indicates that the Treasury Department either cannot or will not answer the questions posed to it in the COP's previous report, released on Dec. 10, 2008.

The Dec. 10 report was issued within days of the panel's formation; the COP therefore had little time to produce substantive information on TARP. Instead, the panel posed to Treasury 44 questions falling under ten broader topics. One month later, the COP reported on Treasury's responses to those questions. Of the 44 questions originally asked, the Treasury Department failed to respond to 25 and provided non-answer responses to five others. The answers to the questions the Treasury Department *did* address provide a murky picture of the effectiveness of TARP and the processes by which Treasury is implementing the program.

In responding to the very basic question, "What is Treasury's strategy?" the department enumerated a series of goals without indicating a plan by which those goals could be achieved. Treasury also failed to respond to the question of what it sees as the fundamental problem in

the financial markets that TARP is supposed to fix. As the COP report's authors reason, without an understanding of the underlying problem, it is impossible to devise a strategy to tackle the problem itself rather than merely treat the attendant symptoms. What's more, the report indicates that Treasury is not collecting sufficient data to provide support to its claim that the program is in fact attenuating those symptoms.

Although Treasury provides several broad-based data points that it believes are sufficient to measure the effectiveness of TARP, the COP would prefer that Treasury collect and provide a more robust set of data. The COP believes that "metrics that gauge the markets more broadly, as well as other economic measures [are necessary], in order to form any firm view of the effectiveness of Treasury's strategy."

In addition to these broad metrics, the panel was also interested in assessing changes in the level of lending by banks that have participated in TARP. The COP believes that analyzing data on each bank receiving TARP funds would provide insight into whether banks are lending at higher levels than they otherwise would. And while Treasury has told the COP that it is working with banking regulators to obtain information on tracking TARP dollars, it has yet to inform the COP which, if any, metrics are being used to measure the impact of TARP funds on bank lending levels. Treasury also remains circumspect on answering the more general question, "What have financial institutions done with the taxpayers' money received so far?" The Treasury Department's response suggests that it gave little forethought into gathering information that would indicate if banks receiving TARP money were using the funds as intended.

On the specific question, "Have the companies used the funds in the way Treasury intended when it disbursed them?" Treasury provided no response to the COP. And with respect to whether banks are increasing their levels of lending, the COP insists that Treasury provide "some evidence" to support its assertion that lending levels are increasing. However, Treasury's response to this question is emblematic of its attitude toward transparency with respect to its approach to administering TARP.

The COP asked reasonable questions that Treasury can certainly answer, such as what authority the department assumes it has in executing specific TARP programs or how it determines the value of a given bank's assets. Yet the Treasury Department has refused to directly answer these questions. For other inquiries, such as those about the financial markets and the banking system, Treasury is resistant to obtaining data the COP considers useful in providing insight into the effectiveness of TARP. The resistance from the Treasury Department to disclose information about its activities and also to collect the necessary data to evaluate their actions has important implications for the very financial system that TARP was intended stabilize.

As the COP report argues, "The confidence [in the nation's financial markets] that Treasury seeks can be restored only when information is completely transparent and reliable." Without knowledge of Treasury's method of assessment of the health of the banks that receive TARP funds, potential creditors to those banks will have little basis on which to judge market risk.

The report also states that the "recent refusal of certain private financial institutions to provide any accounting of how they are using taxpayer money undermines public confidence in [the health and the sound management of all financial institutions]."

Many in Congress share these concerns and are developing legislation to increase the amount of information required to be disclosed about TARP. On the same day the COP released its second oversight report, Chairman of the House Financial Services Committee Barney Frank (D-MA) introduced legislation designed to, among other things, improve TARP oversight. The TARP Reform and Accountability Act of 2009 (H.R. 384) would :

- Require insured depository institutions that receive funding under TARP to report quarterly on the amount of any increased lending (or reduction in lending) and related activity attributable to such financial assistance.

- For recipients that are not insured depository institutions or that do not have a federal regulator, require any reporting and impose other terms no less stringent than those applicable to insured depository institutions, and require Treasury to examine the institution or delegate such functions to the Federal Reserve.

- Require Treasury to reach agreement with the institution and its primary federal regulator on how the funds are to be used and benchmarks the institution is required to meet so as to advance the purposes of the act to strengthen the soundness of the financial system and the availability of credit to the economy.

President-elect Obama, through Director-designate of the National Economic Council Larry Summers, has expressed a desire to improve transparency and oversight of TARP. Writing to congressional leadership on Jan. 12, Summers requested the release of the final $350 billion of TARP funds and promised that the incoming administration would "impose tough and transparent conditions on firms receiving taxpayer assistance." Summers also stated that Obama is "committed to ensuring a full and accurate accounting of how the Treasury Department has allocated the funds spent to date and going forward." While the letter was short on what specific remedies Obama intents to implement, it indicated that the Obama administration will likely pursue transparency and accountability policies that mark a departure from the current administration.

Regardless of the impact of transparency on the financial markets, there still exists the essential right of the public to know how the federal government is deploying hundreds of billions of dollars to repair a sector of the economy that, as has been argued relentlessly by economists and policymakers, has a large impact on all American families. The COP's activities and investigations and Frank's legislation are important first steps in clearing initial obstacles to transparency of the TARP, but they also indicate the myriad aspects of the program that remain behind closed doors and deserve increased public scrutiny.

House Adopts Changes in New Rules Package

The 111th Congress began work on Jan. 5 when the House approved a new rules package, including further earmark reforms and a modification of pay-as-you-go (PAYGO) rules.

According to a fact sheet released by Majority Leader Steny Hoyer's (D-MD) office, the new rules package would further "strengthen the integrity of the institution," and help to "restore accountability to the House." Among the many changes covered in the rules package are:

- Extension of the disclosure requirement for members negotiating post-House employment from the date a successor is elected to the date the member completes his or her service
- Elimination of term limits for committee chairs
- Modification to the motion to recommit rule often used by the minority to amend legislation being debated or send bills back to committee for major overhauls
- Including a prohibition on inserting earmarks in conference committee deliberations that have not first appeared in either the House or Senate version of the bill
- Enhancing PAYGO rules to bring them in line with the Senate rule to facilitate use of the same Congressional Budget Office (CBO) baseline

There are three distinct changes to the House PAYGO rules enacted during the previous Congress. The first is a technical change in how PAYGO rules operate in the House. Because the House and Senate did not institute identical PAYGO rules during the 110th Congress, each chamber had to reference a different baseline used by the CBO to calculate compliance with their PAYGO rules. The House has now modified its PAYGO rule to bring it into alignment with the Senate rule. This is a straightforward change intended to expedite negotiations between the House and Senate during conference committees.

The next change is the addition of an emergency exception to the House PAYGO rule. PAYGO has long had an exception for legislation developed to respond to an "emergency," and this change allows for such an exception in the case of "an act of war, an act of terrorism, a natural disaster, or a period of sustained low economic growth." The rule uses a widely accepted definition of "emergency" developed by the Office of Management and Budget in 1991 that states the spending or tax change must be (1) necessary, essential or vital; (2) sudden; (3) urgent or pressing; (4) unforeseen; and (5) temporary in nature.

The final change to the House PAYGO rule allows for additional flexibility in complying with the deficit-neutral nature of PAYGO. During the 110th Congress, each individual bill passed by the House was required to be deficit-neutral over both a one-year and five-year window. The change made in the rules for the 111th Congress allow for one House-passed bill to offset the cost of a separate House-passed bill if the two are linked together during the engrossment stage — or when legislation has been voted on and approved by the House and is being prepared to be sent to the Senate. Supporters of the change asserted that it will not weaken PAYGO rules to allow for legislation that increases the deficit, but it should make it easier

overall to pass legislation that is also deficit-neutral.

The addition of an emergency designation and the added flexibility of being able to link bills after passage to comply with PAYGO rules angered certain members on both sides of the aisle, who feel these changes open the door to pass any legislation without worrying about long-term budget impacts.

In addition to PAYGO, the new rules package makes a small change to earmark reforms that were also instituted at the start of the previous Congress. The change would allow a point of order to be raised against an "airlifted" earmark, which occurs when an earmark is added to a conference report being negotiated between the House and Senate, even though that specific provision is not included in either the House-passed or Senate-passed bill. This one change, however, falls short of instituting more aggressive earmark transparency rules.

There are other efforts underway, however, that will strengthen the disclosure requirements for earmarks in the 111th Congress. First, House Appropriations Committee Chairman David Obey (D-WI) and new Senate Appropriations Chairman Daniel Inouye (D-HI) announced new rules on earmark disclosure on Jan. 6. The two major reforms come close to embracing a proposal that Sen. Jim DeMint (R-SC) introduced during the 110th Congress that would require the posting of information on earmarks online *before* votes on legislation, not after as has happened in the past. Specifically, Obey and Inouye are calling for:

- Posting Requests Online: To offer more opportunity for public scrutiny of member requests, members will be required to post information on their earmark requests on their websites at the time the request is made, explaining the purpose of the earmark and why it is a valuable use of taxpayer funds.

- Early Public Disclosure: To increase public scrutiny of committee decisions, earmark disclosure tables will be made publically available the same day as the House or Senate Subcommittee (rather than Full Committee) reports its bill or 24 hours before Full Committee consideration of appropriations legislation that has not been marked up by a Senate Subcommittee.

The proposal from Obey and Inouye does not make clear exactly how these new online disclosure rules will work or how much good they will do. By requiring that each member of the House post earmark requests on his or her own website, the rule spreads information across 435 different websites. Obey and Inouye also do not standardize the type of information to be posted or where or how it should appear on each member's website. Bill Allison posted a succinct explanation on the Sunlight Foundation's blog about why this system of disclosure is problematic, at best. It would be better for public access and easier for lawmakers if earmark requests were posted in a central online database that was fully searchable and open to the public.

In addition to the Obey/Inouye rule, a bipartisan group of senators introduced legislation on Jan. 7 to improve earmark transparency and make it easier to block individual earmarks in

legislation. Sens. John McCain (R-AZ), Russ Feingold (D-WI), Claire McCaskill (D-MO), Tom Coburn (R-OK), and Lindsay Graham (R-SC) are cosponsoring a bill that would let senators raise points of order against unauthorized earmarks in appropriations bills. Sixty votes would be required to waive the point of order and retain the unauthorized earmark.

The Senate bill also requires appropriations and authorizing conference reports to be available online in a searchable form at least 48 hours before the Senate considers the legislation and requires that recipients of federal funds disclose payments to registered lobbyists.

Associations Release Recommendations for Obama, Congress, to Strengthen Nonprofit Sector

Two major nonprofit associations, Independent Sector and the National Council of Nonprofits, have released detailed recommendations on how the federal government can strengthen and serve communities through nonprofit organizations, including some proposals that can be included in the upcoming economic stimulus package.

Nonprofits hope the next administration will not only realize the value of the sector, but also embrace it with policies that promote long-term sustainable social change. For example, President-elect Barack Obama can encourage Americans to give more or volunteer more, to ultimately give back to one another. The new Congress and administration are being called upon to promote national service, ease lobbying restrictions on charities, and much more.

The National Council of Nonprofits has submitted its recommendations to Obama's transition team, specifically addressing the Corporation for National and Community Service, the GIVE Act, and the Serve America Act. Their document states, "The nonprofit sector serves as America's social safety net to provide for people needing basic human services like food, shelter, and health care. Yet that community safety net is unraveling rapidly, straining to endure the additional weight dropping on it from the economy."

On Jan. 6, Independent Sector, a nonpartisan coalition of over 600 charities and foundations, issued a seven-page document, *Policy Proposals to Strengthen the Nonprofit Community's Ability to Serve our Society*.

Independent Sector (IS) offers six broad policy proposals including:

- Ensure adequate resources and fair and responsible fiscal policies to support vital programs that sustain, protect, and strengthen communities
- Preserve and expand policies that help Americans give back to their communities
- Ensure that nonprofits have the capacity and capital to serve the needs of their communities
- Protect the rights of Americans to speak out through nonprofit organizations
- Ensure that Americans are able to continue vital charitable work throughout the world without unduly jeopardizing their safety or their civil rights

- Support funding and policies that provide for transparency and accountability to ensure integrity and public trust in charitable institutions

Encourage Americans to Join Service Programs

IS supports improving national service programs. For example, the Serve America Act, introduced in the previous Congress, would expand opportunities to engage in community service through stipend programs, voluntary paid leave, and subsidies from employers. In addition, it would allow older people to donate money from their individual retirement accounts to charity without paying taxes on the charitable disbursements. It also includes the creation of the Commission on Cross-Sector Solutions to America's Problems. Similarly, the National Council of Nonprofits supports the creation of the Commission, intended to transform "relationships among the three sectors: public, private, and nonprofit (including volunteers). The Commission can provide a vision of 'interdependent' sectors and the new infrastructure to support it."

The National Council of Nonprofits recommends that the Nonprofit Capacity Building Initiative (NCBI) be included in the Serve America Act as an amendment. "To ensure the continued viability of the social safety net, the federal government should purposefully work to strengthen nonprofits by including the NCBI program in the Serve America Act. Targeted grants in a pilot program can inform the Commission on Cross-Sector Solutions of replicable solutions through field experiences of innovative, proven capacity building."

Improve Nonprofits' Resources to Serve Our Communities

IS promotes establishing an office within the executive branch to coordinate education and oversight efforts that are directed toward improving the capacity of nonprofit organizations in all federal agencies. Similarly, the National Council of Nonprofits supports the GIVE Act to reauthorize the Corporation for National and Community Service (CNCS) and suggests elevating its CEO to a Cabinet-level position within a Social Entrepreneurship Agency for Nonprofits.

As Obama outlines on Change.gov, a Social Entrepreneurship Agency for Nonprofits would be placed within the Corporation for National and Community Service and would be dedicated to building the capacity and effectiveness of the nonprofit sector. Obama has already started to call on Americans to serve their communities. The Presidential Inaugural Committee released a public service announcement for television and radio, in which the President-elect asks Americans to get involved through USAservice.org.

U.S. Nonprofits Working Abroad

Noting criticisms of the Department of the Treasury's Anti-Terrorist Financing Guidelines, which are meant to prevent the diversion of charitable money to terrorism, IS calls for the adoption of the Principles of International Charity, which were developed by a working group

of nonprofit organizations as a proposed alternative to the guidelines.

Referencing the Partner Vetting System, which requires U.S Agency for International Development (USAID) grantees to collect and hand over to the U.S. government information about its employees, IS cautions against any such action. "Congress should prevent federal agencies administering foreign assistance programs from imposing requirements on international charitable organizations that would cause them to violate the civil rights of those with whom they work, to unduly jeopardize the safety of their employees and partners working outside the United States, or their own charitable missions."

Advocacy and Speech Rights

The National Council of Nonprofits' document recognizes that Obama "can help restore the American people's ability to participate meaningfully in their government by amplifying their voices through nonprofits." Nonprofit organizations allow Americans to have a collective voice to influence and change policies. To uphold and respect this tradition, both groups recommend that Congress protect the rights of nonprofit federal grantees to lobby with non-federal funds. In addition, IS specifically suggests raising "the $1 million ceiling on lobbying expenses set in 1976 to at least $3 million to account for inflation and eliminate confusing distinctions between 'grassroots' and 'direct' lobbying. Congress should amend the tax code to permit private foundations to support nonpartisan lobbying activities conducted by other 501(c)(3) organizations under the same rules that apply to those organizations."

At a time when every dollar counts, adequate funding and support for lobbying and advocacy is essential for change. This assertion is supported by recent research from New Mexico. A report from the National Committee for Responsive Philanthropy (NCRP), *Strengthening Democracy, Increasing Opportunities*, found that "for every dollar invested in the 14 advocacy and organizing groups studied, New Mexico's residents reaped more than $157 in benefits." The report's executive summary states that "communities with more engaged residents are stronger economically, politically and socially than communities in which residents are disconnected from each other and from civic institutions."

Some of these recommendations for the sector could be acted upon immediately, as groups are requesting their inclusion in the economic stimulus package. Promoting community and national service has started as a short-term request as groups are urging the inclusion of a "nonprofit stimulus" as part of the economic recovery plan. The proposals were drafted by the coalitions America Forward, ServiceNation, and Voices for National Service. The groups are circulating a letter that will be sent to Obama and Congress. The letter urges that the stimulus package include money to expand national service programs and support nonprofits that are providing social services. The letter references the Serve America Act, S. 3487.

The letter states, "A nonprofit stimulus fund, patterned after the network of social innovation funds that President-elect Obama called for during the campaign, could help stabilize and grow effective nonprofit organizations that provide vital services in the areas of education,

youth development, poverty alleviation, the environment and more."

Public Comments Ask FEC to Clarify, Simplify Campaign Finance Rules

After seeking public comments on ways to improve campaign finance regulation, enforcement, and compliance, the Federal Election Commission (FEC) heard a common theme: its rules and procedures can hinder nonprofits and small organizations from effectively participating in the political process. Nonprofits, including OMB Watch, recommended improvements that the FEC can make to ensure that all groups can fully participate in our democracy. A public hearing on the rules will be held on Jan. 14.

OMB Watch's comments asked the FEC to address problems that vagueness in several key regulations and case-by-case enforcement creates for nonprofit organizations. These problems arise in the electioneering communications rule, definition of "express advocacy," and definition of "major purpose."

The electioneering communications rule, which was established in the implementation of the Bipartisan Campaign Reform Act (BCRA) of 2002, prohibits corporations, including nonprofits, from airing broadcasts that refer to a federal candidate 30 days before a primary election and 60 days before a general election. In *Wisconsin Right to Life v. FEC*, the U.S. Supreme Court limited the electioneering communications prohibition to broadcasts that are "susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate." OMB Watch expressed concern with the FEC's ability to fairly and adequately enforce the restrictions due to the lack of clarity in the FEC's rule interpreting the Supreme Court's ruling.

OMB Watch also noted the uncertainty that arises under the FEC's case-by-case approach to deciding whether a communication is permissible. This method provides little guidance as to what is and is not prohibited activity and may ultimately have a chilling effect on groups that want to engage in issue advocacy through broadcast communications.

The FEC rule provides a safe harbor and gives some examples of communications that fall within it. However, this approach has the same kinds of problems charities and religious organizations are experiencing with the vagueness of the Internal Revenue Service's (IRS) "facts-and-circumstances" standard for enforcing the tax code's ban on partisan intervention in elections by 501(c)(3) organizations. The comments asked the FEC to consider moving away from the safe harbor and toward a more explicit rule that is less ambiguous.

The OMB Watch comments also noted that the definition of express advocacy, which plays an important role in triggering FEC contribution limits and reporting requirements, is very similar to the standard set in the Supreme Court's opinion in *WRTL* and leaves too much room for interpretation. As a practical matter, this vagueness makes it impossible for citizens' organizations that want to communicate with the general public to judge whether their

broadcast is allowable or not, which causes them to assume a risk of sanctions.

The major purpose test, established in *Massachusetts Citizens for Life (MCFL)*, is used to determine which organizations should be considered political committees. The *MCFL* decision notes that if the "major purpose" of an organization is to influence federal elections, it should be considered a political committee subject to FEC rules. However, the definition of the term "major purpose" is unclear, making it difficult to determine when an organization is considered a political committee and subject to FEC rules. OMB Watch urged the FEC to provide better guidance.

OMB Watch also asked the FEC to consider working with the IRS to harmonize the definitions of "major purpose" and "primary purpose." Organizations exempt under 501(c)(4) of the Internal Revenue Code, known generally as "social welfare" organizations, are allowed to engage in partisan political activity as long as it is not their "primary purpose." However, similar to the FEC's "major purpose" test, there is no IRS definition that clearly defines what constitutes "primary purpose." Harmonizing the definitions will help alleviate confusion that is sometimes caused due to the similarity of the terms, the lack of clarity surrounding both terms, and the FEC and the IRS using different standards.

Additional Comments Urge Simplification, Improved Disclosure

Other groups that commented to the FEC focused on procedural issues. Virginia Red State wrote that the record keeping burden discourages small political action committees from engaging in the grassroots political process. The group wants the FEC to allow small PACs to submit financial statements instead of the FEC form. Diane Valentino, who wrote on behalf of a local Democratic club, shared a similar sentiment. She wrote that the "rules, regulations, paperwork, [and] filings are so complex" that it is impossible for small groups to operate without expensive professional assistance.

The Sunlight Foundation's comments focused on technical and electronic issues. It wants the FEC to provide new web services, make the information available in a timelier, more user-friendly manner, improve electronic filing procedures, and provide online disclosure of significant agency contacts. The organization believes that transparency will improve "the public's confidence in government."

Craig Donsanto, Director of the Election Crimes Branch in the Department of Justice's Public Integrity Section, submitted a comment stating the DOJ should have a larger role in enforcement matters. Donsanto argues that since BCRA increased the penalties and seriousness of campaign finance violations, DOJ should be involved. He says that when FECA crimes are involved, enforcement efforts should be "coordinated with a federal prosecutor."

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What is the Obama Agenda for Bush-Era Regulations?

Just hours after President Barack Obama took the oath of office on Jan. 20, new White House Chief of Staff Rahm Emanuel issued a memo setting out the Obama administration's policy for dealing with some regulations left by the administration of President George W. Bush. The Emanuel memo puts a freeze on all regulations still in the pipeline and gives agencies leeway to deal with those Bush-era regulations already finalized but not yet being implemented. However, the memo does not address most of the controversial regulations finalized by the Bush administration in its last days; these rules are already in effect and impacting the nation.

Regulations in the pipeline

Under the Emanuel memo, agencies are to put a hold on any proposed or final regulations that had been under development during the Bush administration. The Emanuel memo states, "No proposed or final regulation should be [published] unless and until it has been reviewed and approved by a department or agency head appointed or designated by the President after noon

on January 20, 2009." The memo makes exceptions for regulations that address "urgent circumstances relating to health, safety, environmental, financial, or national security matters," as well as regulations needed to meet statutory or judicial deadlines.

The moratorium covers all regulations in any stage of the rulemaking process but not yet finalized — a figure that likely numbers in the hundreds. For example:

- In August 2008, the Department of Labor proposed a rule that would change the way federal regulators calculate estimates for on-the-job risks. The rule would also add an extra comment period to new worker health standards, creating unnecessary delay. However, the Bush administration's Labor Department did not finish its work on the rule.

- In July 2008, the Justice Department proposed a rule that would expand the power of state and local law enforcement agencies to investigate potential criminal activities and report the information to federal agencies. The rule would broaden the scope of activities authorities could monitor to include organizations as well as individuals, along with non-criminal activities that are deemed "suspicious." The Justice Department did not finish developing the rule.

The memo is addressed to the heads of all executive branch agencies, including Cabinet-level agencies and, presumably, independent regulatory agencies such as the Securities and Exchange Commission and the Consumer Product Safety Commission.

Final regulations not yet in effect

The Emanuel memo allows agencies to reevaluate those Bush-era regulations that were published in the *Federal Register* as final rules but which have not yet taken effect. The memo asks agencies to "consider extending for 60 days the effective date" of those regulations and instructs agencies to open a 30-day public comment period on any decision to extend a regulation's effective date.

Publication in the *Federal Register* marks the official finalization of a regulation. After publication, according to federal law, agencies must wait 30 or 60 days (depending on the significance of the regulation) before making a new regulation effective — that is, before implementing its requirements or provisions. Agencies may also choose to wait longer than 30 or 60 days before making a new regulation effective.

A separate memo from Office of Management and Budget (OMB) Director Peter Orszag identifies eight criteria agencies may use to reconsider regulations that have not taken effect. For example, agencies may extend the effective dates of the regulations if they find regulations that do not meet legal muster or were not developed in an open and transparent manner, according to Orszag.

Among those Bush administration final regulations that are not yet in effect:

- A U.S. Environmental Protection Agency (EPA) regulation that alters the way industrial facilities count their emissions under the New Source Review program. Under the regulation, industrial facilities are not required to combine all their emissions when determining whether they meet federal emissions thresholds, if the emissions are for two or more different purposes. EPA published the regulation Jan. 15, and it is scheduled to go into effect Feb. 17.

- A Department of Agriculture (USDA) regulation that sets requirements for country-of-origin labeling on meat and other perishable food items. Although consumers support country-of-origin labeling, critics say the regulation has loopholes. USDA used an overly broad definition of "processed" foods that can be exempt from labeling requirements. USDA published the regulation Jan. 15, and it is scheduled to go into effect March 16.

Regulations not covered by the memo

What the Emanuel memo does not do may be more important than what it does do. Because the Bush administration was able to finalize many regulations in time to make them effective before Bush left office, the Obama administration will be unable to freeze them or delay their effective dates. The memo also may not apply to other types of agency actions like guidelines or policy statements that have effect of regulations.

The administration finalized dozens of regulations that drew fire from environmental, consumer, worker, and healthcare advocates. A new report by the Center for American Progress and OMB Watch, *After Midnight*, recaps the Bush administration's midnight regulations campaign and identifies strategies for reversing them. The report includes a list of more than two dozen controversial midnight regulations, including:

- An Interior Department regulation that went into effect Jan. 12 allows mining companies to dump the waste (i.e. excess rock and dirt) generated during mountaintop mining into rivers and streams.
- An EPA regulation that went into effect Jan. 20 exempts farms from reporting to the government potentially harmful air emissions that come from animal waste.
- A Department of Health and Human Services (HHS) regulation that went into effect Jan. 20 could limit women's access to reproductive health services by requiring health care providers to certify they will allow their employees to withhold services on the basis of religious or moral grounds or risk losing federal funding.
- A Department of Labor regulation that went into effect Jan. 17 weakens already modest wage protections and housing standards for agricultural workers.

These and other regulations will continue to carry the force of law until they are changed or reversed by the Obama administration, invalidated by the courts, or until Congress intercedes.

Midnight regulations in the courts

The Orszag memo opens the door for expedited court settlements on both final regulations not yet in effect and final regulations in effect if suits have been filed challenging the rules before the effective date. A court ruling invalidating one of Bush's midnight regulations would give agencies two options: do nothing, thereby reverting to the pre-Bush status, or write (or revise) a new regulation substantially different from the Bush rule.

For final regulations not in effect, the Orszag memo points agency officials to the Administrative Procedure Act, which allows agencies to postpone effective dates for regulations under judicial review "when an agency finds that justice so requires."

Orszag also reminds agencies that they may choose not to defend Bush-era regulations — both effective and not effective — in court. The memo states, "In special cases ... you may consider the appropriateness of not defending a legally doubtful rule in the face of a judicial challenge."

Lawsuits have already been filed on a number of Bush's midnight regulations. In separate suits, a group of state attorneys general and reproductive health rights advocates have sued HHS over the "provider conscience" rule mentioned above. Environmentalists have filed suit on several controversial regulations, including the mountaintop mining rule and a regulation which changes the way the Interior Department implements the Endangered Species Act.

GAO Report Highlights High-Risk Areas

The Government Accountability Office (GAO) released its latest report to Congress Jan. 22 highlighting the wide range of high-risk areas in government that it urges the new Congress and administration to address. The report updates the areas already on GAO's list and adds three new high-risk areas: the outdated financial regulatory system, medical product oversight and regulation, and toxic chemical assessment.

Since 1990, GAO has regularly issued reports in its high-risk series, usually at the beginning of each new Congress. The new report, issued as the 111th Congress was still organizing itself, includes 30 areas that GAO has identified as either being susceptible to high levels of waste, fraud, and abuse or in need of transformational change to achieve greater efficiency, effectiveness, and accountability. Some of the areas on the current list were designated high-risk as early as 1990, while three new areas were added to this version of the report.

The three new areas added to the list are modernizing the outdated U.S. financial regulatory system, protecting public health through enhanced oversight of medical products, and transforming the U.S. Environmental Protection Agency's (EPA) processes for assessing and controlling toxic chemicals. Each of these critical regulatory issues has been addressed in earlier GAO reports. (Reports are available on GAO's website.)

Modernizing the Outdated U.S. Regulatory System.
The U.S. is currently facing the worst economic crisis since the Great Depression, with

widespread failures of important financial institutions, home foreclosures nationwide, and massive job losses. GAO writes that several factors "have revealed limitations in the existing financial regulatory system." Among them:

- The current structure is limited in its ability to oversee large conglomerates and especially their risk management activities.
- Financial problems have originated from large, important market institutions that are under-regulated or are not regulated at all. For example, part of the subprime mortgage crisis was caused by nonbank mortgage lenders not subject to direct oversight.
- As new and more complex investment products were developed and marketed by financial institutions, the regulatory system has been unable to keep up with the rapid changes.
- The various boards and agencies responsible for setting the accounting standards regulators rely on have not always been able to keep up with the pace of change in the investment products.
- As financial markets have become increasingly global, "the current fragmented" U.S. regulatory structure has made it more difficult to coordinate with international regulators.

In the high-risk report, GAO urges Congress to consider a report the office issued Jan. 8 that suggests a framework for evaluating new proposals to revamp the existing regulatory system. It contains "key elements that any new regulatory system should include regardless of the structure it takes, such as ensuring systemwide risks are identified and mitigated and that consumers are protected."

Protecting Public Health through Enhanced Oversight of Medical Products.
The Food and Drug Administration (FDA), part of the Department of Health and Human Services, is responsible for ensuring that medical products used in the U.S are safe and effective. FDA oversees drugs, medical devices used in over 100 million surgical procedures each year, and biologics, a class of biologically-produced medicines. Many of these products are manufactured in other countries and fall under FDA's approval and inspection programs.

GAO's report supports numerous other analyses of FDA's "significant challenges that compromise its ability to protect Americans from unsafe and ineffective products." Demands on the agency to oversee an increasing number of complex products, increased globalization, new statutory responsibilities, and significant declines in its resources have all factored into FDA's inability to respond effectively. (See, for example, an OMB Watch article on new statutory responsibilities and FDA's Science Board report entitled *FDA Science and Mission at Risk*.)

Among GAO's recommendations is the need to improve FDA's data management for its foreign drug inspection program and to conduct more foreign inspections, improve its monitoring of post-market product safety, better manage its oversight of promotional materials developed by drug companies and others aimed at both the medical profession and consumers, and vastly improve its oversight of clinical trials of new drugs. Taken together, these problems create a

significant need for FDA to "enhance its oversight of medical products to better protect public health."

Transforming EPA's Processes for Assessing and Controlling Toxic Chemicals. According to GAO, EPA "lacks adequate scientific information on the toxicity of many chemicals that may be found in the environment — as well as on tens of thousands of chemicals used commercially" in the U.S. This information is critical to sound regulatory decisions EPA needs to make under several environmental statutes.

EPA's Integrated Risk Information System (IRIS) is a database of information on the health effects of exposure to many chemicals. EPA has only assessed nine chemicals in the last three fiscal years and has a substantial backlog of assessments. The program "is at serious risk of becoming obsolete," according to GAO. IRIS assessments have been halted or delayed due to several factors GAO outlines, including 1) new review processes by the Office of Management and Budget (OMB) and other federal agencies; 2) EPA's decisions to delay many assessments pending collection of new scientific information; and 3) the compounding impact of delaying assessments. "Thus EPA's decisions to wait for new research on key chemicals rather than relying on the best available scientific data at the time of [*sic*] the assessment is conducted — as had been EPA's general approach in the 1990s — can have a significant impact on assessment completion dates."

OMB's effort to allow federal agencies to review the IRIS assessment process has undercut EPA's ability to manage the process and allows agencies potentially affected by the chemical assessments to have a virtual veto over assessments.

GAO notes that in its several reports on EPA's handling of scientific information regarding the toxicity of chemicals, "Neither Congress nor EPA has implemented the most important recommendations aimed at providing EPA with the information needed to support its assessment of industrial chemicals. Without greater attention ... the nation lacks assurance that human health and the environment are adequately protected."

White House Promises a New Era of Sunlight

In his first full day in office, President Barack Obama acknowledged the importance of transparency by signing an executive order on the Presidential Records Act (PRA) and issuing memoranda on the Freedom of Information Act (FOIA) and open government standards in general. He further pledged that he would "hold [himself], as president, to a new standard of openness."

Obama issued an order to the Attorney General to draft new FOIA guidelines for agency heads that contain a presumption of openness in making decisions concerning disclosure of information. These guidelines will replace the existing October 2001 memorandum issued by then-Attorney General John Ashcroft that encouraged agencies to withhold information whenever there was a "sound legal basis" to do so. Obama's instructions mandate that "the

presumption of disclosure should be applied to all decisions involving FOIA."

It remains to be seen what the new Attorney General memorandum will say. It may return government to the standard established by then-Attorney General Janet Reno's October 1993 memorandum, or it may set new and possibly more progressive standards for FOIA openness. Reno required that "the principle of openness in government [be] applied in each and every disclosure and nondisclosure decision that is required under the Act." Her memo instructed agencies to use FOIA exemptions only where "the agency reasonably foresees that disclosure would be harmful to an interest protected by that exemption." In other words, the policy was to disclose information if there was no foreseeable harm, even if there might be an argument to be made that an agency could legally withhold the information. The Ashcroft memo flipped this, telling agencies that they should obstruct disclosure if they could make a sound legal argument; thus, the "foreseeable harm" standard set by Reno was replaced with a "sound legal basis" standard by Ashcroft. Ashcroft told agencies that the Justice Department "will defend your decisions" to withhold records, in whole or in part, under FOIA.

Obama remarked in his FOIA memo that "the presumption of disclosure also means that agencies should take affirmative steps to make information public." In the past, FOIA memos have focused on providing guidance to agencies on responding to requests. If the new guidance under Obama includes requirements to proactively post information online, prior to receiving a request, it would be a significant change in FOIA policy.

Obama also issued an executive order limiting an incumbent president's ability to restrict public access to presidential records. The measure repealed President George W. Bush's Executive Order 13233, which created an unlimited delay in releasing records of former presidents beyond the previously held 12-year mandatory disclosure period. Before an incumbent president can withhold material under the PRA, he or she must now consult with the Attorney General, the Archivist of the United States, and White House counsel.

Most importantly, Obama also set forth his broad vision for government openness, going beyond mere compliance with existing disclosure laws. The president mandated that the Chief Technology Officer, along with the Director of the Office of Management and Budget (OMB) and the Administrator of General Services, develop an Open Government Directive in the next 120 days. This directive will be designed to establish actions to be taken by agencies in an effort to move toward a government that is transparent, participatory, and collaborative. Not only did Obama promise to increase disclosure of information, but he pledged to do so in a timely manner and in forms that the public can easily find and use. This includes the increased use of new media and Internet technologies, as well as greater efforts to solicit public input. The order did not specify what actions should be included to achieve these goals or how they should be implemented.

The declarations made by the president reflect key recommendations made in a report published by OMB Watch in November 2008, *Moving Toward a 21st Century Right to Know*. Several groups involved in the creation of that report have lauded the president's first steps toward greater government transparency. Rick Blum of the Sunshine in Government Initiative

stated that these declarations "will help keep the public informed in our technology-driven, connected society. On open government, the dawn is breaking."

However, the report also detailed actions that should be taken by the president and Congress in order to create a "culture of openness" within agencies. While presidential orders can establish new requirements, overcoming entrenched attitudes of secrecy will require new incentive and enforcement mechanisms and ongoing emphasis on transparency as a performance issue. Also, any actions taken by the administration are vulnerable to being overturned by future administrations if not protected by legislation. This makes congressional action on transparency vital to ensuring that new mechanisms for openness are available to future generations.

Obama Transparency Rhetoric Trickles Down to EPA

The new administrator of the U.S. Environmental Protection Agency (EPA), Lisa Jackson, pledged in a memo to staff to "uphold the values of scientific integrity, rule of law, and transparency every day." In the memo, Jackson also highlighted five priorities for the EPA, including reducing greenhouse gases and strengthening EPA's chemicals management and risk assessment programs.

Jackson, former head of New Jersey's Department of Environmental Protection, took control of the embattled agency on Jan. 26. In a memo to EPA employees, Jackson laid out the philosophy, as articulated by President Obama, that she plans to apply to her tenure as administrator. Transparency and respect for the scientific analyses of EPA staff were included as key values. Jackson cited former EPA administrator William Ruckleshaus' commitment to run the agency as if it were "in a fishbowl," with its actions and motives available for all to observe.

"I pledge that we will carry out the work of the Agency in public view so that the door is open to all interested parties and that there is no doubt why we are acting and how we arrived at our decisions," said Jackson in the memo. She also embraced Ruckelshaus' promise "to communicate with everyone from the environmentalists to those we regulate, and we will do so as openly as possible."

Jackson promised EPA employees that science will be the "backbone" of EPA programs. Citing the damage that can be done to scientific integrity, Jackson promised not to "disguise" policy decisions as scientific findings, an accusation frequently leveled at the Bush EPA. Jackson stated, "I pledge that I will not compromise the integrity of EPA's experts in order to advance a preference for a particular regulatory outcome." According to the memo, "When scientific judgments are suppressed, misrepresented or distorted by political agendas, Americans can lose faith in their government to provide strong public health and environmental protection."

The EPA during the Bush administration came under frequent attack for allowing politics to distort and override the findings of agency scientists. The pledges of transparency and

scientific integrity represent a clear move by the new administrator to break from the policies of the previous EPA administration.

The principles laid out in the memo echo Jackson's testimony during her Senate confirmation hearing. In her opening remarks, Jackson stated that "President-elect Obama has affirmed two core values that he expects EPA to uphold during his Administration: scientific integrity and the rule of law. He has also made it clear we will operate with unparalleled transparency and openness. I pledge to uphold those values."

In addition to outlining the core values that will guide her tenure, Jackson highlighted several priorities that will receive her "personal attention." The five issues are reducing greenhouse gases, improving air quality, managing chemical risks, cleaning up hazardous waste sites, and protecting waters. Jackson specifically referred to the Toxic Substances Control Act (TSCA) when highlighting the need for strengthened chemicals risk management.

The Government Accountability Office (GAO) recently added EPA's TSCA-related programs to its list of federal high-risk programs, which are programs in need of broad-based management transformation to improve their effectiveness.

The values espoused in the new administrator's memo may help to ease concerns over Jackson's commitment to transparency raised prior to her confirmation hearing. On the day of Jackson's swearing in, Public Employees for Environmental Responsibility (PEER), one of Jackson's more vocal critics, sent a letter urging Jackson to translate the promises of openness and scientific integrity into concrete and enforceable policies. PEER listed several specific recommended policy changes, including protections for government whistleblowers and eliminating "gag orders" on agency scientists. Despite the promising rhetoric of Jackson's initial memo, no specific actions were proposed or committed to on the administrator's first day.

Jackson pledged "to follow the rule of law." While acknowledging the discretion granted the EPA to implement environmental laws, she also recognized the authority of Congress and the courts. "When a court has determined EPA's responsibilities under our governing statutes, EPA cannot turn a blind eye to the court's decision or procrastinate in complying." The EPA had been heavily criticized during the Bush administration for failing to regulate greenhouse gases with its authority under the Clean Air Act, especially following the 2007 U.S. Supreme Court decision explicitly stating the agency's authority and obligation to do so.

During her confirmation hearing, Jackson was asked what process would be best to review previous EPA decisions to identify instances where science had been compromised. Jackson responded that a strong inspector general (IG) offers the best mechanism for such an evaluation. The EPA inspector general position is currently vacant, with the IG's duties being performed by the deputy IG, who was himself investigated by Congress for his plan to cut the number of inspectors working under him.

Jackson directed her employees to hold her accountable for her promises. "If ever you feel I am

not meeting this commitment, I expect you to let me know," she said.

New Potential and Challenges for White House Website

President Barack Obama replaced the Bush administration's White House website at noon on Inauguration Day. The new website has been met with both applause and criticism in its first week of operation, but it offers indications of how the new president may utilize Internet technology to better inform the public.

In one of its first posts, the first presidential blog announced that the touchstones of the new website would be communication, transparency, and participation.

Communication

The new White House website features RSS feeds, similar to the old version, allowing people to be updated on site changes through an RSS reader, without having to continuously check the site. The site also allows the public to sign up for e-mail updates.

Currently, however, users are unable to access information that had been posted on the former administration's White House site. Some of those pages still show up in Google searches, but the links redirect users to the relevant Obama administration pages rather than archived versions of the old pages.

To address a similar website transition, the State Department created an archived version of the department's Bush-era website, which is available to the public. The State Department's effort provides easy public access to government information, much of which is still relevant, and could serve as an example for other agencies as well as the White House. Past presidential websites, such as that of the Clinton administration and Bush administration's White House website, have been preserved by the National Archive and Records Administration, but links from the new White House site would probably be most helpful for people looking for older information.

Transparency

The new White House website models much of its design and layout from the transition team's former website, change.gov. In a previous *Watcher* article, we commented that change.gov demonstrated a commitment to transparency during that hectic planning phase, which boded well for the importance of transparency during Obama's time in office.

This also seems to be the case for the new whitehouse.gov. The White House website now has a blog, which is often updated multiple times a day and contains all of President Obama's executive orders and memoranda to date. It also links back to the *Federal Register* for previous presidential orders.

Participation

Of note on the White House site is the inclusion of YouTube videos as the standard format for the president's weekly address. Despite initial controversy over tracking cookies installed by YouTube, the White House quickly managed to resolve issues when they were raised by the public. The president has promised to post all non-emergency legislation to the White House website and open it up to public review and commentary.

While the new website boasts greater participation, it has been criticized for not meeting expectations for greater interactivity. Neither the YouTube nor blog posts currently allow for comments from the public. The website has a contact page that allows users to send messages to the webmaster, but it does not provide the same opportunities for public discourse as change.gov did. The blog might take on the same comment features as the State Department's blog, which has a moderated comments policy.

The Government Shift to Information Age 2.0

The administration is still hurrying to apply its openness standards to its information infrastructure. Media coverage indicates that the new White House has been burdened by software difficulties — operating on software platforms that have not been upgraded in six years. The website also does not include transcripts of press conferences at this time.

The primary question may not be whether the administration will apply its change.gov innovations to federal Internet technology, but rather whether or not the Washington bureaucracy will be slow and resistant to such change. Forging the White House website into an example for transparency, participation, and openness for other agencies may require considerable cultural change within the government, as well as several rule changes.

Macon Phillips, director of New Media at the White House, has asked for suggestions concerning improvements or ideas to the website. You can provide your feedback using the White House's contact form.

Obama Withdraws Family Planning Policy, Restores Some Nonprofit Speech Rights

On Jan. 23, President Barack Obama issued a memorandum withdrawing the Mexico City Policy. The Mexico City Policy prohibited organizations funded by the U.S. Agency for International Development (USAID) from using private, non-USAID funds to engage in activities including "providing advice, counseling, or information regarding abortion, or lobbying a foreign government to legalize or make abortion available." Foreign nonprofits, referred to as nongovernmental organizations (NGOs), were already barred from using U.S. funds to pay for abortions as a method of family planning. However, the Mexico City Policy went further and ultimately restricted the free speech rights of government grantees.

President Clinton overturned the Mexico City Policy, also known as the Global Gag Rule, following its imposition by the first President Bush. President George W. Bush reinstated the policy in 2001, further distorting the distinction between the government-funded and privately funded work of nonprofits. Bush implemented the policy through conditions in USAID grant awards and extended the policy to "voluntary population planning" assistance provided by the State Department.

The Obama memo states, "These excessively broad conditions on grants and assistance awards are unwarranted. Moreover, they have undermined efforts to promote safe and effective voluntary family planning programs in foreign nations." With regard to conditions in voluntary population planning assistance and USAID grants, under Obama's memo, the Secretary of State and the administrator of USAID must waive conditions in any current grants and advise grantees that they have been waived.

In a statement released after the memorandum was issued, Obama said; "For too long, international family planning assistance has been used as a political wedge issue, the subject of a back and forth debate that has served only to divide us. [. . .] It is time that we end the politicization of this issue." The statement also noted the president will work with Congress to restore U.S. funding for the United Nations Population Fund "to reduce poverty, improve the health of women and children, prevent HIV/AIDS and provide family planning assistance to women in 154 countries." Notably, Obama's action on the global gag rule does not mean that U.S. funds can be used for abortions.

In 2003, OMB Watch highlighted a report, *Access Denied: U.S. Restrictions on International Family Planning*, which found that the global gag rule "led to closed clinics, cuts in healthcare staff and dwindling medical supplies, leaving women, children and families without access to vital healthcare services." In October 2004, OMB Watch released Continuing Attacks on Nonprofit Speech: Death By a Thousand Cuts II, which documented attempts to limit the policy voice of nonprofits, including the global gag rule.

The very controversial issues of abortion and family planning services notwithstanding, the danger in the global gag rule lies in the restrictions on organizations' private funds. Nonprofits have criticized the program because if they received U.S. funds, they could not use private funds (including money from other countries) to provide counseling about or perform abortions, even in countries where abortion is legal. The federal government was able to control speech, conditioned on receipt of government money, and impact the mission of many organizations through these restrictions.

In the past, courts have ruled that restrictions on the privately funded speech of nonprofit government grantees are a violation of the First Amendment.

The chairman of the House Foreign Affairs Committee, Howard Berman (D-CA), issued a statement along similar lines. He said, "This policy — which would violate the constitutional right to freedom of speech if placed on U.S.-based non-governmental organizations — applied even if abortion-related services were funded only with non-U.S. funds, and even if abortion

was legal in the country in which services were provided."

Opposition to the policy has existed because of the implications for family planning and abortion, but the fundamental free speech issues and implications for the mission of nonprofit organizations are also of vital importance. Federal restrictions on private funds, conditioned on receipt of government grants, amount to an unconstitutional coercion of speech and appropriately should be curtailed.

Lobbying and Ethics Reform Takes Center Stage at the White House

On Jan. 21, President Barack Obama signed an executive order on Ethics Commitments by Executive Branch Personnel. The order details new restrictions for political appointees that work in the Obama administration. It limits the role lobbyists can play in the executive branch and attempts to reduce the influence of powerful special interests by addressing the revolving door — when government officials move to and from private sector jobs.

The Obama order says that a person cannot be hired by an agency if he or she lobbied that agency within the last two years. There is also a two-year ban on appointees — even those who are not lobbyists — from working on any issue they used to cover when in the private sector. Additionally, there is a ban, which runs for the entirety of the administration's time in office, on lobbying any other executive branch official or senior appointee should an appointee leave government service. The order requires appointees to sign a pledge stating they will abide by the new rules.

Executive branch employees are also barred from accepting gifts from lobbyists, and hiring at all agencies must be based upon qualifications and experience, not political connections.

In making lobbying and ethics reform one of his first items of business, Obama was acting on campaign and transition promises of significant change in the way the federal government does business. Obama's campaign website stated the intention to close the revolving door on former and future employers. The campaign site also pledged to "create a centralized Internet database of lobbying reports, ethics records, and campaign finance filings." The order does not address the searchable website. In addition, Obama planned to create an independent watchdog agency to oversee congressional investigations into ethics violations.

The executive order provides for a waiver from the new ethics rules. The director of the Office of Management and Budget (OMB), in consultation with the president's Counsel, can grant the waiver for one of two reasons: "(i) that the literal application of the restriction is inconsistent with the purposes of the restriction, or (ii) that it is in the public interest to grant the waiver."

The order represents an attempt to deal with industry representatives coming into government and regulating the very industry the person used to represent, or being in a position to dole out federal funding to a particular company or industry.

Obama's order is an attempt to reverse this trend by requiring all appointees seeking employment in the administration to pledge not to "participate in any particular matter involving specific parties that is directly and substantially related to my former employer or former clients, including regulations and contracts."

Despite the best intentions toward a more open and honest government, these rules have already faced some tough realities. Two exceptions to the rules have already been made for administration nominees. William Lynn was appointed Deputy Secretary of Defense but had been a registered lobbyist for defense contractor Raytheon until July 2008; Raytheon received $11.7 billion in federal funding in Fiscal Year 2007, not including money through partnerships with other companies. And William Corr was nominated as Deputy Secretary at the Department of Health and Human Services; in the past, he has lobbied on behalf of the Campaign for Tobacco-Free Kids.

The White House issued a waiver to Lynn because of his unique qualifications. In response, the Project On Government Oversight (POGO) issued a statement of disapproval and called on Obama to remove Lynn's name from consideration. "The Obama Administration should not allow its ethics standards to begin with a series of waivers and loopholes which immediately undermine its good intentions."

According to *Congressional Quarterly*, Senate Armed Services Committee Chairman Carl Levin (D-MI) endorsed the waiver, "which the panel had sought before voting on the nomination. But Levin said that under congressional ethics rules, Lynn would still have to recuse himself for one year from matters related to Raytheon."

On Jan. 23, POGO, Citizens for Responsibility and Ethics in Washington (CREW), the Government Accountability Project (GAP), and Public Citizen signed a letter to Levin and Ranking Member John McCain (R-AZ). The letter states that the groups do not doubt that Lynn is qualified for the position, and that before the new rules, "there would have been little ground for questioning the proposed nomination of Mr. Lynn." But the letter notes that Lynn's background clearly violates Obama's executive order and that the nomination does not "meet the spirit of these standards for a waiver."

The Hill recently reported that the same groups opposed to Lynn's nomination do not find Corr's nomination problematic. "I don't think they're the same. I think there's this problem of tarring all lobbyists with the same brush," said Melanie Sloan, the executive director of CREW.

"For these groups, their chief objection to Lynn moving from Raytheon, a major defense contractor, to the Pentagon is the potential for financial conflicts of interest," noted *The Hill*. "Because the Campaign for Tobacco-Free Kids does not earn money from HHS programs, Corr would not be in the same position, the watchdogs argued. 'His former group is not going to profit from him being at HHS,' said Mandy Smithberger, a national security investigator at the Project on Government Oversight."

Overall, the standards for issuing a waiver are unclear. More so, the problem is not the

lobbying industry itself but the role money plays in politics. Some argue that without an overhaul of the campaign finance system, specifically the public financing system, other attempts to improve government ethics will continue to be undermined.

The definitions outlined in the order may also allow some ways around these new rules. For example, those who leave the administration are free to lobby Congress or engage in lobbying activities that do not meet the threshold for someone to be required to register as a lobbyist.

Obama bolstered existing limits on gifts from lobbyists or lobbying organizations. However, many are concerned that an exception that allows for speaking engagements or attending "widely attended events" is not included in the new executive order. According to BNA Money and Politics (subscription required), "Without this exception, the strictly applied gift ban would appear to bar officials from accepting an invitation offered by a company or other entity that employs lobbyists to have a meal or other hospitality at any Washington event. [. . .] The order also retains a provision allowing an administration official to accept the cost of travel to and participation in an event outside of Washington, as long as the trip is related to the official's duties." This may mean that appointees can attend events across the country, but not accept an invitation in Washington, D.C.

Because some unplanned consequences of the order have clearly already appeared, it may have to be modified in the future. Importantly, the order leaves open the possibility for improvement and the consideration for further disclosure requirements. For example, the director of the Office of Government Ethics has been charged with reporting on "steps the executive branch can take to expand to the fullest extent practicable disclosure of such executive branch procurement lobbying."

House Makes Transparency a Priority for Stimulus

The House is poised to vote on an $825 billion economic stimulus package. The legislation represents a historic effort to stabilize the economy through fiscal policy by approving $275 billion in tax cuts and $550 billion in direct spending, including funding for health care, education and job training, community development and housing, and energy and transportation infrastructure projects.

In addition to a massive infusion of resources, the bill has unprecedented disclosure and accountability requirements that represent a singular attempt to bring transparency and accountability to the implementation of the legislation. While the bill makes significant strides in the right direction, Congress would do well to strengthen the legislation's disclosure provisions to ensure that spending is as transparent and accountable as intended.

A section entitled "Accountability in Recovery Act Spending" in the American Recovery and Reinvestment Act of 2009 (H.R. 1) details a set of provisions intended to allow the general public to see where, how, and why the appropriated funds are spent. The bill calls for the establishment of a new website, "Recovery.gov", dedicated to promulgating information on

stimulus spending. The new website would be "a portal or gateway to key information ... and provide a window to other Government websites with related information." This website would contain:

- A database of findings from audits, inspectors general, and the Government Accountability Office
- Data on relevant economic, financial, grant, and contract information in user-friendly visual presentations
- Detailed data on contracts awarded by the government for purposes of carrying out the law, including information about the competitiveness of the contracting process
- A means for the public to give feedback on the performance of contracts awarded

Information on contracts that are not fixed-price and not awarded using competitive procedures must also be posted in a special section of the website.

The House economic recovery bill is significantly more sophisticated in its approach to transparency and oversight than legislation Congress approved that created the Troubled Asset Relief Program (TARP). The TARP law simply mandated that the Treasury Department post online "a description, amounts, and pricing of assets" purchased under the program.

Transparency and oversight in the American Recovery and Reinvestment Act of 2009 extend beyond posting spending data on the Internet. The economic recovery bill establishes an "Accountability and Transparency Board." The oversight body would be headed by the new Chief Performance Officer, Nancy Killefer, and composed of six inspectors general and/or deputy secretaries from various federal agencies. It would be charged with coordinating and conducting oversight of federal spending under the law to prevent waste, fraud, and abuse by submitting monthly reports to Congress on contract and grant awards, contractor performance, and the adequacy of contractor and acquisition oversight within the federal government.

In addition to the Board, the bill would also create an "Independent Advisory Panel" and require regular oversight by the Government Accountability Office (GAO), Congress's investigative arm. Composed of experts in the fields of economics, public finance, and other related disciplines, the Independent Advisory Panel would be charged with advising the Accountability and Transparency Board with an aim to prevent and otherwise identify waste, fraud, and abuse related to spending under the law. The bill also appropriates $25 million to GAO for the ongoing oversight of and reporting on the stimulus bill.

OMB Watch has analyzed the bill's transparency and accountability section and has found areas in which Congress could expand or improve the legislation as drafted. Our analysis expounds on these areas in some detail, but in short we suggest the bill stipulate that:

- Recovery.gov be open to indexing by commercial search engines
- All contract and grant transactions should be posted on USASpending.gov, with a special notation that such contracts and grants are created through the stimulus

legislation
- All reports, findings, minutes and agendas of meetings, official letters and correspondence of the Board, and any data or information gathered during investigations by the Board be made publicly available and posted on Recovery.gov within five business days of the release of information

The existing transparency and accountability measures are substantial and will likely provide unprecedented access to data about stimulus spending enacted through this legislation. However, with minor changes, Congress could significantly increase the depth of transparency and accountability of the funds spent under this bill.

Groups Launch Bailout Watch to Oversee Government Bailout Actions

OMB Watch and five other nonprofit organizations have collaborated to form a project called Bailout Watch. The project will research, investigate, and analyze the federal government's bailout activities and publish resources and data for policymakers, the media, and interested citizens.

The project will be conducted as a partnership with a number of groups, which will provide leadership on different aspects as dictated by their expertise. Coordinated by OMB Watch, the project also includes the Center for Economic and Policy Research, the Economic Policy Institute, OpentheGovernment.org, the Project on Government Oversight, and Taxpayers for Common Sense.

The goal of the Bailout Watch project is to identify specific data that should be disclosed (and made available in an online, indexed, searchable format), research and investigate government decision making processes related to the bailout, and provide analysis and commentary about the effectiveness of different bailout programs. The groups also hope to work closely with oversight bodies including the Special Inspector General for the Troubled Asset Relief Program (TARP), the Congressional Oversight Panel, and the Government Accountability Office. The initial focus of the project will be on TARP and its use of the $700 billion authorized by Congress, but it will also reach beyond TARP to include related financial bailouts.

Specifically, Bailout Watch will draw upon the expertise and resources of the partner organizations to fulfill three primary goals:

Identify specific data that should be disclosed: There has been much discussion about the way in which Treasury provides information about various bailouts. While dollar amounts have been disclosed, albeit late, the related data concerning items such as warrants, value and type of stock obtained, and transaction terms need to be disclosed. When necessary, the project will seek the advice of financial market experts to help identify the specific types of data that are needed for more useful analysis of the TARP program. The project will urge the Obama administration and congressional oversight bodies make such data available in

useable, searchable formats. When the data is not available in such formats from the government, Bailout Watch partners will step in to make sure it is accessible.

Bailout Watch has started this process by drafting an initial list of government data and information that should be disclosed to the public about the TARP program. The data memo was originally drafted by the Economic Policy Institute and was further developed by the Bailout Watch partner organizations. OMB Watch has shared this data memo with the Obama transition team, OMB officials, congressional leaders and oversight bodies, and other organizations working on bailout issues. A second memo is also being drafted, detailing other information that should be disclosed by institutions receiving TARP funding, including data on loans, executive compensation, dividend payments, and mortgage-related concerns.

Conduct research and investigations: Even if the Obama administration increases transparency and provides all the data being requested, there will be a need for further research and investigation to ensure against real and perceived conflicts of interest in the TARP program and to highlight any sweetheart deals involved in implementing TARP. This includes further research on institutions that receive money and on the contractors involved in the transactions. It also entails monitoring the implementation and oversight of bailout activities, including working closely with the government oversight bodies.

Taxpayers for Common Sense has begun part of this work by researching details about the institutions receiving TARP funds and publishing these details in bank/institution profiles available on its website.

Produce analysis and commentary: Ultimately, if Bailout Watch is successful in creating a more robust clearinghouse of information about the TARP program, including more information made public from the Obama administration and additional research and investigation by the Bailout Watch partner groups, it will be possible to provide public interest analysis and commentary on the government's actions. Questions this analysis and commentary would seek to answer include: Are these the right types of stock to purchase? Will there be a real chance that taxpayers will get their money back? How do the bailout activities impact federal deficits and debt? What purchases and investments by the government are the most beneficial to broad economic growth?

While the TARP program will be the first focus of Bailout Watch because of the poor state of transparency and disclosure of information about resources that have already been spent, there are many more areas of the government involved in bailout activities. By some estimates, the government has already allocated somewhere between $3 trillion and $7 trillion to bailout activities beyond the TARP program, including actions by the Federal Reserve, the Federal Deposit Insurance Corporation (FDIC) and other agencies and entities. Accordingly, as the project progresses, and to the extent possible, the scope of work will be expanded beyond TARP to include actions by the Federal Reserve (which is notorious for its lack of disclosure and not controlled by the incoming Obama administration), the FDIC, Fannie Mae and Freddie Mac, and other institutions involved in bailouts that may yet occur.

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Congress Takes Step Toward Stimulus Transparency

When the Senate took up the $819 billion House-passed economic stimulus package (H.R. 1) the week of Feb. 2, not only did the chamber modify myriad spending and tax measures, but it also altered the bill's transparency and accountability provisions. The Senate's version of H.R. 1, the American Recovery and Reinvestment Act of 2009 (ARRA), contains less detail on specific data the Obama administration must provide on stimulus spending. Neither version provides the level of detail that may be needed to collect and disseminate information about the type of jobs that are created or preserved, the wages paid to workers, or information about who may be getting such jobs. The assumption is that the Obama administration, through its Recovery.gov website, will tackle these thorny implementation issues.

While much of the transparency and accountability language found in the chambers' bills is virtually identical, there are notable differences. OMB Watch has analyzed the differences in the two versions of ARRA and put together a side-by-side comparison of the bills. The analysis

finds that the provisions in both bills are broadly similar, with each mandating that the federal government make available online certain stimulus spending on a designated website. The largest gap between the two bills is specification of who would be required to report detailed information on stimulus-funded projects.

The Senate bill would require that *all recipients*, except for individuals, of stimulus funds report on a quarterly basis to the federal agency that authorized those funds:

- The total amount of recovery funds received from the agency
- The amount of funds expended or obligated to projects
- A detailed list of all projects for which recovery funds were expended, including:
    - The name and description of the project
    - An evaluation of the completion status of the project
    - An analysis of the number of jobs created or retained by the project

The House bill would require similar, but not identical, reporting for infrastructure projects only. That bill would require the federal, state, or municipal agency funding the project to post on the stimulus website a notice to the public of the infrastructure project, with the notice including: a description, purpose, and total cost of the infrastructure investment funded; the rationale of the agency funding the project; and contact information for the person at the government agency in charge of the project. For funds authorized for "operational purposes," the federal, state, or local authority would be required to publish on the website "a description of the intended use of the funds, including the number of jobs sustained or created." The Senate bill does not differentiate between infrastructure and operational expenditures.

Additionally, the House and Senate bills also take different approaches to contracting and oversight. The House bill contains a provision that would require, "to the maximum extent possible," contracts to be fixed-price and competitively bid. Contracts that are not would be posted in a special section of the stimulus website. The House bill also would require inspectors general to investigate concerns raised by the public regarding stimulus spending and to make available on the stimulus website any findings, audits, or reports resulting from an investigation. The Senate bill omits these two oversight provisions but does include a provision identical to one found in the House bill that requires the Comptroller General to conduct bimonthly reviews, and prepare reports on such reviews, of the use of stimulus funds by selected states and localities.

The stimulus oversight provisions in the House and Senate versions of ARRA, while unprecedented and greatly welcome, leave unanswered many questions. For example, what will be the role of USASpending.gov, a congressionally mandated website that provides information about nearly all government spending? Given that USASpending.gov is required to provide information about subgrants and subcontracts but has not accomplished this task, how will Recovery.gov do it? Given a large sum of money will go through states and be subcontracted, will states also be required to post information on their websites about spending within the state? Will the Recovery.gov website incorporate newer Web 2.0 technologies that make access to and use of the underlying data easier for all? These types of

questions are not likely to be answered in the legislation, but rather by the Obama administration.

For a detailed comparison of the two bills, see our analysis here.

OMB Watch Joins Stimulus Transparency Coalition

OMB Watch has joined more than 30 other groups calling for transparency and accountability requirements in federal recovery efforts, including the American Recovery and Reinvestment Act (H.R. 1). The Coalition for an Accountable Recovery (CAR) is an assembly of organizations and individuals who believe transparency and accountability are essential to ensuring that hundreds of billions of dollars of federal spending is disbursed fairly; spent with minimal waste, fraud, and abuse; and can be assessed as effective or ineffective.

CAR released polling data showing bipartisan support for economic stimulus legislation and creation of a searchable website that holds government accountable. The CAR coalition immediately focused attention on the spending bill moving through Congress to ensure it contains adequate disclosure and accountability requirements. The "trans-partisan" coalition – it includes libertarian, progressive, and conservative organizations – is also beginning to monitor how the Obama administration will implement its Recovery.gov website.

The Troubled Asset Relief Program (TARP), a $700 billion bailout to banks, demonstrated the importance of transparency and accountability. TARP has been riddled with minimal transparency, making it difficult for congressional oversight panels, the media, or the public to know how the money is being spent and how taxpayers will benefit. CAR has recognized that now, before a single stimulus dollar is spent, is the time to initiate efforts to impart meaningful transparency and accountability requirements on what will likely be an $800 billion economic stimulus package of spending and tax cuts. The members of CAR agree that:

> There must be requirements for detailed data and research tools on a searchable website to allow the public to effectively track and analyze the actions of the government (federal and state) – as well as bailed-out companies, subsidized companies, and government contractors – to judge how any recovery funds, including those to the financial sector, are being spent.

Only through transparency can the public, analysts, and the news media ascertain whether federal spending has not been wasted on profiteering, pay-to-play arrangements, or unseemly executive compensation. And by improving existing government information infrastructure in addition to deploying the tools of Web 2.0 technology, the federal government can achieve an unprecedented level of transparency. CAR's vision of accountable and transparent spending is one in which accurate spending data are collected in a timely fashion and disseminated through existing government websites like USASpending.gov, as well as external stakeholders through programming interfaces. The coalition recognizes that effective transparency rests not

just on the usability of federal spending websites but also crucially on the data reporting infrastructure within the government.

While federal law requires that the government provide details on federal contracting and grant expenditures through USASpending.gov, existing reporting requirements fall short of enabling full transparency. Currently, once the federal government gives money to a state, those funds are not tracked by USASpending.gov. Yet, the economic stimulus package being debated in Congress would expend significant resources through state and local agencies. Only by capturing data on these expenditures through state-level reporting will Congress be able to ensure that all federal contracting and grant funds are visible to watchdogs within and outside the government.

CAR insists that all recipients of federal funds, including state and local agencies and the contractors and subcontractors working for those agencies, be required to report on the use of stimulus funds and metrics that could be used to gauge the economic impact of those funds. These data should include:

- Information currently collected by USASpending.gov
- The activity/services to be provided under the contract, grant, loan, or subsidy, including copies of the contract
- Relevant performance measures (e.g., jobs saved or created, wages and benefits paid for such jobs, demographics of those hired)
- Performance data about the recipient of federal funds (e.g., on-time performance, quality of work)

Additionally, to facilitate the reporting of these data, the federal government should promulgate clear definitions of and standards for reported data.

But transparency and accountability do not end with expenditure data reporting. CAR believes that reporting the method by which stimulus funds were distributed is also fundamental to implementing accountability. By posting contract bidding procedures online and by specifically identifying those contracts that were not competitively bid would enable the general public, analysts, and the press to readily identify opportunities for waste, fraud, and abuse. Furthermore, CAR believes that information on the lobbying of officials at the state and federal level should also be reported online and on the same site on which stimulus spending data are posted.

CAR sees the enactment of effective transparency and oversight of stimulus spending as the first step in bringing to bear the power of 21st century technology on all federal expenditures. As the Senate debates approving an $800 billion economic stimulus package, and as the Treasury Department disperses $700 billion in capital injections into banks, the public is recognizing a gap in transparency and accountability. According to polling conducted by Lake Research Partners and the Topos Partnership, 79 percent of Americans believe that making the government more open to the public is important, and 83 percent believe that the government should be more accountable to American citizens. By applying CAR's proposed implements of

stimulus transparency, the federal government would not only be addressing the public's concerns, but it would also be taking great strides toward becoming a more responsible steward of the nation's resources.

Congress Again Sets Sights on Toxics Right to Know

Rep. Frank Pallone (D-NJ) recently reintroduced the Toxic Right-to-Know Protection Act (H.R. 776), which would restore the thresholds for reporting of toxic pollution under the Toxics Release Inventory (TRI) program. A 2006 rule from the U.S. Environmental Protection Agency (EPA) raised the thresholds significantly. An identical version of the bill failed to move out of committee in 2008.

In a press statement, Pallone said, "Communities have a right to know what kinds of chemicals are being dumped in their backyards. With the weakening of TRI rules under the Bush administration, communities have lost a lot of power to hold companies accountable. This legislation puts people before polluters, and once again arms communities with the information they need to protect their neighborhoods."

Since 1986, TRI has provided the public with data on releases and transfers of toxic waste at thousands of facilities nationwide. The list of reportable chemicals, as well as the covered industries, has grown over the life of the program. The 2006 TRI rule promulgated by the Bush administration was seen by numerous public health and environmental advocates as a major setback, harming citizens' ability to protect the health of their communities and families.

According to Pallone's office, "The Toxic Right-to-Know Protection Act will undo changes that have seriously undermined the Toxics Release Inventory (TRI), a critical tool that has given communities access to an online database describing what toxic chemicals are being released from nearby plants and refineries. The TRI program has been extremely successful in empowering communities by ensuring that they know what chemicals and how much of these harmful chemicals are being released into the air, water and ground."

The EPA finalized the TRI rule in December 2006 despite enormous opposition. The rule raised the threshold for the amount of pollution facilities can release before they are required to report detailed data on the pollution. As documented in an OMB Watch report, of the more than 122,000 public comments submitted in response to EPA's plans to cut TRI reporting, more than 99.9 percent opposed the agency's proposals.

The introduction of legislation to strengthen the reporting thresholds coincides with the continuation of a lawsuit brought by thirteen states against EPA to restore the old reporting rules. It is unclear whether the new EPA leadership might pursue settlement of the suit. In a break from the Bush administration, the Obama administration recently announced its intention to end its appeal to the U.S. Supreme Court in defense of controversial Bush-era rules affecting mercury pollution from fossil fuel power plants. This action could be interpreted

as a willingness to settle additional pollution-related lawsuits originally defended by the Bush Department of Justice.

The new bill is identical to legislation Pallone introduced in 2007, which would have restored the threshold for detailed reporting of releases to 500 pounds. The 2007 bill managed to get a hearing but never made it to a vote in the House Energy and Commerce Committee. The same committee again has jurisdiction, but no plans for the new bill have been announced. Similar legislation in the Senate has not yet been introduced, and the Senate's plans for dealing with TRI are unclear.

New Director of National Intelligence Promotes Smarter Classification

During his recent confirmation hearing, Admiral Dennis Blair, the new Director of National Intelligence (DNI), derided the current classification system, which promotes over-classification of intelligence-related information. He discussed the need for a cultural change in the intelligence dissemination process that includes new training for analysts and greater accountability.

The problem of over-classification is a long-standing issue that has been addressed by many groups. In 2007, Mark Agrast of the Center for American Progress testified before Congress that too much secrecy, "whether through over-classification or through pseudo-classification—conceals our vulnerabilities until it is too late to correct them." However, despite awareness of the problem, little action has been taken by either Congress or the executive branch to resolve the issue. Blair's testimony may signal a new opportunity to address the issue.

In his response to pre-confirmation hearing questions, Blair said that "we need a classification system that adequately protects information that requires protection, e.g. intelligence sources and methods, but at the same time allows such information to be shared as needed among agencies of the intelligence community." To accomplish this, Blair proposed requiring intelligence analysts to be trained in report writing that removes references to sources and methods so that information could more easily be shared between intelligence agencies. Such actions could help the federal government more effectively share its intelligence with state and local governments without barriers caused by document control labels. Such labels often delay the vital transmission of information to those who need to be informed.

Shifting the Culture of Intelligence

In his answers, Blair also declared the need for a shift in intelligence community culture. He called for increased incentives for the creation of intelligence reports that can be made as widely available as possible. A major problem plaguing the current system, Blair stated, is that "there are many penalties for those who disclose classified information and few rewards for those who take the additional effort to write at lower levels of classification." Blair recognized

that intelligence information should eventually become part of the nation's historical record and that it should be systematically reviewed for disclosure 25 years after classification.

Further, Blair took an expansive view of the role of the DNI. Among the DNI's responsibilities is providing strategic intelligence to policymakers, but the DNI must also meet the needs of "front-line officers of the Department of Homeland Security and state and local law officials." Blair promised to use his authority to encourage combined actions of intelligence agencies to accomplish common missions. Intelligence agencies are not known for such cooperative attitudes. The lack of cooperation and information sharing between various agencies were among the problems highlighted by the 9/11 Commission.

21st Century Intelligence in Democracy

Blair outlined his desire to regain and retain the public trust in intelligence activities, as well. He stated, "The American people are uncomfortable with government activities that do not take place in the open, subject to public scrutiny and review." While the activities of intelligence officers must be secret to be effective, he promised to work candidly with oversight committees and to operate in a manner consistent with the Constitution and the rule of law.

Specifically, Blair addressed the issues of surveillance, detention, and interrogation policies, for which the Bush administration received severe criticism. Blair took clear stances against the use of torture and surveillance activities that circumvent established processes for authorization. He declared torture immoral, illegal, and not effective. Moreover, he called for clear standards for humane treatment in detention and interrogation programs. Working with oversight committees of Congress will be critical in establishing public reassurance that effective accountability exists over these policies.

Repeat Business

Past occupants of the DNI position have attempted to address some of the themes concerning increased information sharing. In the weeks before his departure, outgoing DNI Michael McConnell called for measures to utilize technology to increase information sharing among federal intelligence agencies. These efforts are somewhat similar to the DNI's experimentation with the creation of a cross-agency wiki, Intellipedia, in 2006 that was immediately met with agency resistance.

What appears to be unique to Blair's approach is the focus on cultural change within the intelligence community. While McConnell and previous DNIs worked to maximize agency access to information at the federal level, changing the way officials view their mission and the intelligence dissemination process will make intelligence more useful to those who need it on the ground.

Sen. Dianne Feinstein (D-CA) remarked that Blair "will inherit an intelligence community that has been beset by major failures and controversy over the past ten years."

Obama Begins Regulatory Reform

President Barack Obama took two steps toward reforming the way federal agencies develop public protections. On Jan. 30, the president issued a memorandum to the heads of executive departments and agencies asking for recommendations to help develop a new regulatory executive order. The same day, he issued an executive order overturning two Bush-era executive orders that changed the way regulations were developed.

The memo on regulatory review was published in the Feb. 3 *Federal Register*. It appears to initiate a process that would lead to a new executive order outlining the path agencies need to follow to develop rules and the review of those rules by the White House. The regulatory executive order currently in force, Executive Order 12866, was issued by President Clinton in 1993 and amended twice by President Bush.

Obama's memo differs from other presidential administrations considerably in its tone toward the value of public protections. He writes, "I strongly believe that regulations are critical to protecting public health, safety, our shared resources, and our economic opportunities and security." He also acknowledges the "expertise and authority" of the federal agencies, a philosophy that is in stark contrast from the Bush administration, where agency expertise and authority were often overridden by White House interests. By publicly requesting recommendations from the agencies, Obama is providing a seat at the table for agencies as the administration begins formulating a new order.

The memo directs the Office of Management and Budget's (OMB) director to work with agencies to produce the recommendations within 100 days. Specifically, the recommendations should address the following issues:

- The relationship between the agencies and the OMB office that reviews agency regulations, the Office of Information and Regulatory Affairs (OIRA);
- Disclosure and transparency in the process;
- Encouraging public participation in agency rulemaking processes;
- The role of cost-benefit analysis;
- "The role of distributional considerations, fairness, and concern for the interests of future generations;"
- Ways to keep the process from unnecessary delays;
- The role of the behavioral sciences in producing regulatory policy; and
- The best tools to use in the process to achieve public goals.

Most of these issues have been debated by regulatory scholars, public interest organizations, and business interests for years. Obama's transition team received many proposals on how to improve the regulatory process from think tanks, legal experts, scientific organizations, and public interest organizations. OMB Watch also initiated a project led by 17 regulatory and policy experts that made recommendations to the new administration and Congress.

Observers will pay particular attention to any recommendations on cost-benefit analysis in light of Obama's presumed controversial choice for OIRA administrator. Obama is expected to nominate University of Chicago law professor Cass Sunstein to the post. Sunstein is an ardent advocate of cost-benefit analysis and has written that agencies need guidance from OIRA in order to do the analyses correctly and make them useful as regulatory tools. He also argues that cost-benefit analysis should be a major, but not necessarily a determinative, consideration in justifying agency rulemakings.

The Obama administration has not yet described a process by which the public can offer input on the formulation of a new executive order. The Obama memo provides no requirement for public consultation, nor does it require the agency recommendations to be made public. However, on his first full day in office, Obama announced in a memo on transparency and openness that transparency, participation, and collaboration would be guiding principles in his administration.

The executive order Obama issued, Executive Order 13497, was published in the *Federal Register* on Feb. 4. It revoked a controversial order Bush issued in January 2007 that gave OIRA more control over agency regulatory practices by amending E.O. 12866. Critics of the Bush changes, including OMB Watch, argued that additional delay in issuing regulations would result from two changes: 1) making regulatory policy officers within agencies presidential appointees and giving them power to initiate or kill regulations, thus usurping what had traditionally been a power of the agency heads; and 2) requiring agencies to submit significant guidance documents (nonbinding information documents of all types that clarify how to implement rules) to OIRA for review before releasing the documents. There was no time limit by which OIRA had to act on the guidance documents.

In addition, Bush provided OIRA with another rationale for limiting which rules would be approved. By requiring agencies to identify a "specific market failure," Bush's amendments shifted the criterion for issuing rules from identifying a problem like public health or environmental protection. OIRA could return a rule or kill it if an agency did not convince OIRA of a market failure justifying the agency's actions.

The Obama order also revoked a 2002 Bush order that amended E.O. 12866 by removing the vice president from a formal role in resolving disputes regarding regulations under review. The changes shifted those responsibilities to others in the White House, usually the president's chief of staff. By revoking these two Bush executive orders, Obama has returned to the Clinton-era framework for rulemaking and review, pending the outcome of the process he has begun with the memo asking for agency recommendations.

New Limits on Toxins in Toys Take Effect

Effective Feb. 10, the Consumer Product Safety Commission (CPSC) will begin enforcing new standards for children's products containing lead and phthalates. The standards take effect just

days after a federal court voided a Bush administration effort to legalize the sale of products not meeting the standards if the products had been manufactured before Feb. 10. CPSC is enforcing the regulations in response to a 2008 law that gives the agency new powers and responsibilities to protect the public from potentially dangerous consumer products.

Congress directed the CPSC to set a lead standard for the content of children's products when it passed the Consumer Product Safety Improvement Act (CPSIA, H.R. 4040) in July 2008. The law established a new limit for lead in children's products – 600 parts per million (ppm). Previously, CPSC only limited lead in the paint or coatings on children's products.

Congress overhauled the beleaguered agency and expanded its powers after a record number of children's products were recalled in 2007. Most of the products were recalled for high lead levels. CPSC announced 106 lead-related recalls in 2007, totaling more than 17 million individual products.

In addition to lead, CPSC is restricting phthalates in children's products for the first time. Products may not contain more than 1,000 ppm of the chemical. Environmentalists and consumer advocates hailed Congress's decision to limit phthalates – a compound commonly found in soft plastics – as a victory for children's health. Scientists have linked phthalate exposure to reproductive and developmental abnormalities in fetuses and infants.

The new standards affect manufacturers, importers, distributors, and retailers. Both the lead and phthalate limits apply to products manufactured in the future and products already in inventory. Products already on store shelves, regardless of their manufacture date, cannot be sold if they exceed the new standards.

In 2008, CPSC announced its intent to exempt products already in inventory from the new phthalate limit. A federal court, overruling CPSC, interpreted the CPSIA as clearly prohibiting the sale of any products exceeding the phthalate limit.

The breadth of the new standards' impact has prompted business groups to push back against CPSC. In response, CPSC announced Jan. 30 it will delay enforcement of provisions in the CPSIA that require businesses to test their products for lead and phthalate levels and certify that those products meet the new requirements. However, the new standards will still be put in place on Feb. 10.

Business representatives chafed at CPSC's claim that the delay in testing and certification provides relief. Carter Keithley, president of the Toy Industry Association, an organization that lobbies on behalf of toymakers, said on Feb. 2, "The testing and certification requirements are deferred for one year, but compliance with the new CPSIA standards begins in just over a week . . . and the only way to demonstrate this compliance is through testing."

Another industry lobbying group, the National Association of Manufacturers, petitioned CPSC to delay altogether the effective date of the lead standard. CPSC's two commissioners, Nancy Nord and Thomas Moore, voted to deny the petition.

Meanwhile, public interest groups continue to pressure CPSC to vigorously enforce the new law and subsequent health and safety standards like those for lead and phthalates. "The CPSC is authorized to address most, if not all, the concerns of small business in a way that maintains the integrity of the law while offering relief to independent manufacturers," a coalition of consumer groups said in a statement. "The law's implementation cannot come too soon."

CPSC faces other challenges in enforcing the law. The agency's resources have steadily eroded since it was founded in the 1970s. From FY 1974, when the agency first became fully operational, to FY 2008, CPSC's budget was cut almost 40 percent when adjusted for inflation, according to an OMB Watch analysis of CPSC budget data. Employment at the agency was nearly halved over the same period. CPSC had a budget of $80 million and a staff of approximately 420 in FY 2008.

The CPSIA authorizes $118 million for CPSC in FY 2010, meaning Congress can appropriate up to $118 million when it takes up annual spending bills. The first die in the 2010 appropriations process will be cast when President Barack Obama releases his budget proposal, expected in the next few weeks. FY 2010 begins Oct. 1, 2009.

Conyers Introduces Bills Protecting Voter Rights in Election Aftermath

During the 2008 presidential election season, there were numerous allegations of attempts to disenfranchise legitimate voters. Some of the techniques involved voter caging, voter purging, and deceptive practices. To prevent the use of these techniques in the future, Rep. John Conyers (D-MI) introduced legislation that would ban deceptive practices and eliminate voter caging. He also introduced a bill that would restore voting rights to numerous individuals who have been convicted of felonies and would make Election Day a holiday.

Conyers recently introduced H.R. 103, the Caging Prohibition Act of 2009. The bill bans state or local election officials from prohibiting a voter from registering or voting in a federal election if the decision is based on a voter caging document or list, an "unverified match list," or an immaterial error on an application or registration document. It also prohibits state or local election officials from formally challenging a voter for any of the aforementioned reasons. Also, in order for a person, other than a state or local election official, to challenge a voter, the challenger must have first-hand knowledge that is "documented in writing" and "subject to an oath or attestation under penalty of perjury." Violating the provisions in the bill can result in a fine or imprisonment up to five years.

Voter caging is a practice whereby political parties or officials send a document to a set of registered voters or individuals who have applied to register to vote; any documents returned as "undeliverable despite an attempt to deliver such document to the address of a registered voter or applicant," and any documents with addressee instructions that are not followed, are considered "voter caging documents." An "unverified match list" is then generated; this is a

"list produced by matching the information of registered voters or applicants for voter registration to a list of individuals who are ineligible to vote." The voters and potential voters who end up on this list are then often challenged at the polls, a controversial practice due to individuals who wind up on match lists due to postal service errors, clerical mistakes, and other circumstances beyond their control.

Conyers also introduced H.R. 105, the Voting Opportunity and Technology Enhancement Rights Act of 2009, which protects voter rights, improves election administration in federal elections, prohibits deceptive practices, prohibits voter caging, restores voter rights, and makes Election Day a legal public holiday.

The bill is designed to improve election administration by establishing national standards for write-in absentee ballots, addressing verified ballots, establishing requirements for counting provisional ballots, establishing minimum requirements for voting systems and poll workers in polling places, allowing same-day voter registration, addressing the integrity of voter registration lists, allowing early voting, improving voting systems, making uniform voter registration standards, establishing voter identification standards, and ensuring the election administration is impartial. Some of these provisions may bump up against the traditional role of the states in administering elections.

The bill is also designed to prohibit deceptive practices in federal elections by modifying the penalty for voter intimidation, establishing sentencing guidelines, and setting out methods to report violations. Furthermore, the bill restores voting rights to all citizens except those who are serving a felony sentence at the time of a given election. The legislation also establishes methods that states and the Federal Bureau of Prisons would be required to use to notify individuals that their rights have been restored.

H.R. 103 has been referred to the House Committee on the Judiciary. H.R. 105 has been referred to the House Committee on the Judiciary, as well as to the Committees on House Administration and Oversight and Government Reform.

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The Watcher

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Stimulus Becomes Law; Implementation Begins

When President Barack Obama signed into law a $787 billion economic stimulus package on Feb. 17, he also approved an unprecedented set of transparency and oversight provisions. The law calls for the establishment of a Recovery Accountability and Transparency Board to oversee the disbursement of more than $500 billion in federal cash outlays and a website to publicly track the spending.

Obama announced on Feb. 23 that Interior Department Inspector General Earl Devaney will be tapped to head the Board. Devaney, labeled the "busiest gumshoe inside the federal bureaucracy," has been lauded for investigating and uncovering corruption in deals with Native American tribes by former uber-lobbyist and now-convicted felon Jack Abramoff. Obama's selection of Devaney indicates the degree of seriousness with which Obama is

approaching stimulus spending oversight, but it is just the first step in ensuring that the nation's resources are not squandered on waste, fraud, and abuse.

The American Recovery and Reinvestment Act (ARRA) also requires the board to establish a website that will be a "portal or gateway to key information related to this Act." Provisions from the law require the website to include "data on relevant economic, financial, grant, and contract information;" "detailed data on contracts awarded by the Government;" and "a means for the public to give feedback on the performance of contracts." The Obama administration has already launched the website, Recovery.gov, which will serve as the board's online portal to recovery spending. Since none of the stimulus funds have been spent yet, the website only contains some overview data and policy statements at this point.

While all of the oversight and transparency provisions in the act will provide much needed accountability to federal recovery spending, Obama has set a high bar for transparency and accountability. Accordingly, on Feb. 18, the Office and Management and Budget (OMB) issued implementation guidance to the federal agencies. Impressive for its speed and comprehensiveness, the guidance still leaves many unanswered questions and raises potential flaws. OMB says this is the first of several guidance documents.

Specifically, the initial guidance issued by OMB indicates that reporting of spending may be limited to one level of sub-recipients. The guidance only requires the first subsequent recipient (the sub-recipient) of federal recovery money to report on the use of the funds. For example, if the federal Department of Transportation gives a grant to the state of Georgia to repair and build roads, and Georgia then gives some portion to the city of Atlanta for area roads, there would be no requirement for companies receiving contracts from the city to report on the use of the money or the number of jobs created. Sweetheart deals between officials and their friends may go unnoticed without a federal requirement that reporting follow federal funds for multiple levels of contracting or grantmaking.

Another potential oversight weakness stems from the failure of the law to require that full contract or grant documents for recovery spending be made available online. Instead, it calls for *summaries* of contracts or grants totaling more than $500,000, as well as those that were not competitively bid or not awarded as fixed-price agreements, to be posted on the Recovery.gov website. OMB Watch has published an analysis of the act's transparency and accountability provisions, which details these and other oversight mechanisms.

In addition to analyzing the act's oversight measures, OMB Watch is also actively working with the Coalition for an Accountable Recovery (CAR), a group of more than 30 organizations and individuals who believe transparency and accountability are essential to ensuring that hundreds of billions of dollars of federal spending is disbursed fairly; spent with minimal waste, fraud, and abuse; and can be assessed as effective or ineffective. The coalition is chaired by OMB Watch and Good Jobs First; the Project on Government Oversight is leading CAR's legislative oversight work; and the Sunlight Foundation is spearheading transparency issues.

A top agenda item for the coalition is strengthening the potential ability of the Recovery.gov website to provide robust transparency to the public, journalists, advocacy organizations, and federal and state government overseers. CAR has developed a vision for a comprehensive federal and state data collection and dissemination system. Now it is preparing to describe the architecture needed to reach this vision. Accordingly, the coalition is collecting viewpoints on:

- Data Needs: All the specific data elements that are critical to ensuring accountable results
- Reporting Formats and Interface: Which information (e.g., unique entity identifiers, a parent company identifier) should be registered with a central data repository and in which format (e.g., XBRL) should that information be reported
- Machine Readable Access: How web developers can access the data; the standards and methods for accessing the data (e.g., XML, APIs, RSS, Atom); and whether both cleaned-up data (corrected for typos, etc.) and original data should be available
- People Readable Access: How the public can obtain data and what analytic tools will be provided, including what type of tools should be available on the website (e.g., mapping, downloading of searches, etc.)

To offer comments on any of these items, visit OMB Watch's CAR headquarters.

President Obama to Release His Fiscal Year 2010 Budget

President Barack Obama is expected to release his Fiscal Year 2010 budget on Feb. 26. Details of the spending blueprint remain vague, but media reports indicate that the president's budget, unlike those of his predecessor, will hew closer to real-world situations. For example, Obama's budget will include spending on the conflicts in Iraq and Afghanistan, physician reimbursements under Medicare, costs associated with natural disasters, and lost revenues from changes in the alternative minimum tax.

The administration will use the FY 2010 budget to focus attention on federal health care programs and their effect on the long-term deficit. Specifically, the president will suggest that by making the health care system more efficient and increasing taxes, the 46 million Americans who do not have health insurance can be covered without increasing the deficit. He will also push for the elimination of several programs, including Medicare Advantage subsidies for private insurance companies and will propose a reduction in spending on defense contracts. Federal outlays will also be affected by the withdrawal of troops from Iraq and an increase in taxes on wealthy Americans. To boost revenue, the president is expected to argue that taxes on the income of hedge fund managers should be taxed at income tax rates, instead of at the capital gains rate of 15 percent.

Acknowledging trillion dollar deficits as far as the eye can see, the White House held a bipartisan "fiscal responsibility summit" the week of Feb. 23 to address the nation's growing financial burdens. After committing enormous outlays to such spending measures as the recently-enacted $787 billion stimulus bill and the Troubled Asset Relief Program (TARP),

OMB Director Peter Orszag believes that the administration will begin planning to reduce the federal budget deficit. "[Obama] wants to present an honest budget, he wants to focus on health care, and he will cut the deficit by at least half by the end of his first term," said Orszag. Obama also plans to address this longer-term fiscal matter in his address to Congress tonight, Feb. 24.

Congress Looks to Complete Fiscal Year 2009 Funding Bills

On Feb. 23, the House released details of a $410 billion omnibus spending bill. The bill would continue funding large portions of the federal government for the remainder of the fiscal year, which ends Sept. 30. The omnibus bill bundles appropriations for nine out of 12 spending bills set to expire on March 6. The Senate is expected to pick up the legislation the first week of March.

At the close of the last fiscal year – Sept. 30, 2008 – Congress approved a continuing resolution (a stop-gap spending bill) to fund education, scientific research, nutrition and housing services, and a host of other vital federally funded programs. This was needed because Congress only acted on three appropriations bills in 2008, covering the Pentagon, Homeland Security, and Veterans Affairs. Democrats in Congress felt they could not resolve their differences with former President Bush and opted for the continuing resolution to continue funding the government until March 6. Work on completing legislation to fund the operations of the federal government resumed in earnest during the week of Feb. 23.

When the House Appropriations Committee unveiled summaries of the nine remaining spending areas on Feb. 23, it also posted the legislative text of its FY 2009 spending plans on the committee's website. The $410 billion spending package would be more than an eight percent increase over FY 2008 and would increase funding for many important programs, including:

- $6.9 billion for the Women, Infants, and Children (WIC) nutrition program, a $1.2 billion increase over FY 2008
- $3.2 billion for state and local law enforcement and crime prevention, $495 million above FY 2008
- $2 billion to study global climate change, a $262 million increase over last fiscal year
- $5.1 billion, $337 million above 2008, for IRS enforcement
- $30.3 billion for the National Institutes of Health to research diseases such as Alzheimer's, cancer, and diabetes, a $938 million increase over FY 2008
- $17.3 billion for college education grants, $3 billion more than in FY 2008

The omnibus bill would also mark a turning point in the trend of privatization of federal government services. Significantly, it would end the IRS's inefficient Private Debt Collection Program (PDC). The PDC not only unnecessarily puts taxpayers' sensitive personal information at risk, but, as Taxpayer Advocate Nina Olson has repeatedly pointed out, it is a waste of federal resources. The bill would also put on hold the Commercial Services

Management Initiative. This government-wide program that pits private contractors against federal employees in competitions to determine who can deliver federal programs at the lowest cost has been criticized by the Government Accountability Office and has been ultimately ineffective at reducing agency costs.

Seven of the nine annual appropriations bills have been approved by the Senate Appropriations Committee, and four have been approved by the House Appropriations Committee (all have been approved by House Appropriations subcommittees). Although the text of these committee reports is available online through the Library of Congress's website *Thomas*, congressional Republicans are calling for greater transparency in the appropriations process. House Republican Leadership penned a letter to Speaker of the House Nancy Pelosi (D-CA) and House Majority Leader Steny Hoyer (D-MD) asking that they make the text of the bill and an explanatory statement available online. Echoing President Obama's rhetoric on transparency, the authors stated that "[r]ecent experience has demonstrated that transparency, scrutiny, and regular order are essential tools for crafting effective and prudent legislation." House Democrats, following Obama's lead and agreeing with the Republican request, have made available online legislative text and a bill summary.

FY 2009 Omnibus Spending Levels by Budget Area
(in billions of dollars)

Budget Area	FY 2008 Enacted	Bush Request	FY 2009 Omnibus
Agriculture, Rural Development, Food and Drug Administration	18.0	18.6	20.5
Commerce, Justice, Science and Related Agencies	51.8	54.1	57.7
Energy & Water Development	30.9	31.2	33.3
Financial Services and General Government	20.7	22.3	22.7
Interior, Environment, and Related Agencies	26.3	25.6	27.6
Labor, Health and Human Services, Education, and Related Agencies	145.1	145.4	151.8
Legislative Branch	4.0	4.7	4.4
State,Foreign Operations, and Related Programs	32.8	38.2	36.6
Transportation, Housing and Urban Development, and Related Agencies	48.8	50.6	55.0

State Secrets Legislation Introduced on the Heels of Sensitive Court Decision

During the week of Feb. 9, the Obama administration invoked the state secrets privilege in a sensitive legal case. The decision has led some groups to question if President Barack Obama is breaking from the Bush administration's interrogation and intelligence policies as promised, or if he intends to continue existing practices. Meanwhile, both houses of Congress are considering legislation (H.R. 984 and S. 417) to narrow the interpretation of the largely undefined privilege created by case law.

Mohamed et al. v. Jeppesen Dataplan, Inc. was a case dismissed by the U.S. Court of Appeals for the Ninth Circuit on Feb. 9. The case was originally filed in May 2007 when the American Civil Liberties Union (ACLU) sued a Boeing subsidiary, Jeppesen Dataplan, for providing logistical support to the Central Intelligence Agency (CIA) when the agency forcibly disappeared five of the ACLU's clients for interrogation abroad (known as extraordinary rendition). In February 2008, a lower court dismissed the case when the Bush administration claimed the state secrets privilege. The ACLU appealed the lower court's dismissal.

The Obama administration reasserted the privilege on Feb. 9, explaining that it had thoroughly vetted the previous administration's claim and agreed with its decision to invoke the privilege.

The use of the state secrets privilege by the Obama administration brought swift and strong reactions from civil liberty groups. Anthony D. Romero, Executive Director of the ACLU, complained, "Candidate Obama ran on a platform that would reform the abuse of state secrets, but President Obama's Justice Department has disappointingly reneged on that important civil liberties issue." Romero also warned, "If this is a harbinger of things to come, it will be a long and arduous road to give us back an America we can be proud of again."

There are other cases pending on state secrets, including *El-Masri v. Tenet* and *Al-Haramain v. Bush*. Whether or not the Obama administration continues to pursue the same application of the privilege in these cases is unknown. It may be that the administration conducts cases pertaining to the actions of a prior administration differently from how the current administration will apply the state secrets privilege to its own actions.

Legislation: A Path to Change?

It has been 50 years since the U.S. Supreme Court established the state secrets privilege. Historically, it has only been invoked to withhold specific pieces of evidence from being reviewed by a judge for possible introduction at trial. Officials in the Bush administration interpreted the privilege more broadly to pressure courts to dismiss entire cases under the claim, arguing that any and all records related to the government's defense would be state secrets. Since courts, especially lower courts, rarely challenge use of the Supreme Court-established privilege, most cases have been dismissed upon the government's assertion of the privilege. In 2007, the Supreme Court also refused an opportunity to review the broader use of the privilege.

This has led many to support new legislation that would, at least, restrict the interpretation of the privilege. Since there is no law currently governing the use of the privilege, legislative action is the only way to ensure consistent executive interpretation across different administrations. The State Secrets Protection Act was reintroduced in both the House by Rep. Jerrold Nadler (D-NY) and the Senate by Sen. Patrick Leahy (D-VT) as an attempt to narrow the interpretation by setting uniform standards for how courts must view each assertion of the privilege. Senate co-sponsor Arlen Specter (R-PA) said that the act would bring "meaningful oversight by the courts and Congress to ensure the Executive branch does not misuse the privilege." Leahy and Specter are the chair and ranking member, respectively, of the Senate Judiciary Committee, which has oversight of these issues.

The bills are the same as those introduced last year, but the two versions contain some small yet key differences. The Senate bill directs courts to weigh executive branch state secrets claims over the claims of the plaintiff. The House bill, however, takes an approach aimed at retroactively narrowing the application of the privilege. The House legislation seeks to reopen cases, as far back as 2002, in which the privilege was claimed. The Senate version would apply only to current and future cases.

EPA Inspector General Rips Program on Chemical Risks in Communities

The U.S. Environmental Protection Agency (EPA) is in need of significant improvements in the implementation of the agency's Risk Management Program, according to a new report from the EPA Office of Inspector General (OIG). The OIG report highlights the need for greater accountability for the Clean Air Act program. However, EPA has refused to provide program data online, reducing the public's ability to ensure the safety of vulnerable communities.

The Risk Management Program requires various facilities around the country to file a Risk Management Plan (RMP). It was created by an amendment to the Clean Air Act in 1996, and it is designed "to reduce the likelihood of airborne chemical releases that could harm the public, and mitigate the consequences of releases that do occur."

The OIG identified two major concerns with the program. First, the agency has no procedures for identifying which facilities have not submitted or re-submitted their RMPs. Second, EPA's inspection process is not strong enough to provide assurance that facilities are complying with program requirements.

An analysis of facilities in Colorado, North Carolina, Pennsylvania, Texas, and Oklahoma with large quantities of regulated chemicals stored on-site found that 48 out of 62 high-risk facilities that may be subject to the Risk Management Program had not filed RMPs. Moreover, about five percent of covered facilities had not updated their RMPs, as is required every five years. The OIG found that EPA had no national procedures or timelines to identify non-filers. Unless addressed, this failure of the program will likely result in some facilities never filing RMPs or taking needed actions to prevent or mitigate accidents.

The OIG also found that more than half of the high-risk facilities have never been inspected. The report notes that 162 high-risk facilities, each impacting more than 100,000 people in the event of a worst-case chemical accident, have never been inspected by EPA officials. This oversight was attributed to the structure of the program. Most states rejected delegation of the program (only nine states administer the program inside their respective jurisdictions), so EPA must ensure compliance for the overwhelming majority of facilities nationwide. Due to limited resources, a low number of EPA inspectors, and other logistical difficulties, it has been impossible for EPA to inspect every site. OIG proposes EPA adopt a risk-based approach to inspections so that high-risk facilities receive priority. EPA is now working on solutions to follow through on these recommendations and anticipates completion by the end of 2009.

Under the Risk Management Program, facilities that contain more than 140 regulated toxic and flammable substances are required to submit a RMP to EPA. “The RMP describes and documents the facility’s hazard assessment, and must include the results of an off-site consequence analysis for a worst-case chemical accident at the facility.” Facilities are also required to implement prevention and emergency response programs, as well as an in-house mechanism to ensure implementation. Additional requirements are placed on facilities depending on the magnitude of their worst-case assessments.

The OIG report does not identify specific facilities that have failed to submit RMPs. A management failure of the program not addressed in the OIG report is the EPA's lack of online disclosure of the plans. The agency removed the plans from its website shortly after the 9/11 terrorist attacks. Despite rulemaking changes reportedly designed to re-establish online access, the plans remain offline. EPA's public access is limited to in-person visits to regional reading rooms. Each individual is limited to viewing ten RMPs a month and may take handwritten notes, but is otherwise prohibited from copying the documents or removing them from the reading room. The only remaining online access for RMP information is the Right-to-Know Network at rtknet.org, a collection of environmental databases operated by OMB Watch. OMB Watch secured access to RMP information as a result of legal action two years ago under the Freedom of Information Act and provides access to all sections of the RMPs except for the Off-Site Consequence Analysis portion, also known as the Worst Case Scenario, which is prohibited from being distributed electronically.

Failure to disclose this information diminishes accountability both of facilities and of the agency overseeing the program. Public disclosure of government information creates pressure on agencies to properly carry out their responsibilities in implementing programs such as the Risk Management Program. When the disclosure is stopped or strongly curtailed, the government also eliminates a significant driver for strong program management. Broader public disclosure of RMPs might have brought some of the problems discovered in the OIG report to light sooner. Withholding emergency response plans also defeats the purpose of the entire program – to better protect the public from possible chemical emergencies. Emergency plans are useless if not disseminated to the public before an emergency.

Nada Known about Nano – Reporting Requirement Inches Forward

As the nanotechnology industry continues to grow, government policies are slowly being developed to gather basic information on potential threats to the environment and public health. For years, the federal government has promoted the nanotech industry, even though little has been known about the environmental and public health impacts of the materials. Recent actions by California, Canada, and the U.S. Environmental Protection Agency (EPA) will require companies to report data on potential threats from the use of nanotechnology.

Nanotechnology – the development and use of materials on the scale of individual atoms and molecules – has received federal support in the form of public-private partnerships and funding to research, develop, and commercialize new technologies. However, research on the health and environmental impacts of these new materials has lagged significantly behind these promotion efforts. The House recently passed a bill (H.R. 554) to reauthorize the primary federal nanotechnology research program, the National Nanotechnology Initiative (NNI). Included in the reauthorization is an expanded focus on evaluating growing environmental, health, and safety concerns. The bill was introduced by Rep. Bart Gordon (D-TN) on Jan. 15.

On the state level, California appears to be the furthest along in collecting information about the potential impacts from nanotechnology. California's Department of Toxic Substances Control (DTSC) recently issued an "information call-in" that outlined the department's intent "to request information regarding analytical test methods, fate and transport in the environment, and other relevant information from manufacturers of carbon nanotubes." The department then sent formal letters to more than two dozen companies and institutions that use carbon nanotubes – one of the most common nanomaterials – requesting a range of information. According to the DTSC, this information request "will identify gaps in the existing information that could be filled to better protect human health and the environment." The California information request cites several studies that identify potential environmental and public health threats from carbon nanotubes as one of the reasons for the need to fill the data gaps.

In January, BNA (subscription required) reported that Canada is preparing to require Canadian companies to report their use of nanomaterials. Environment Canada, the national environmental agency, will begin data collection in February to assess the risks from nanomaterials and identify actions needed to protect public health. The Canadian program will be similar to an EPA program started in early 2008, the Nanoscale Materials Stewardship Program (NMSP). However, the EPA program is a voluntary reporting system that has experienced very little participation.

The EPA called its voluntary program's data collection a success, despite the fact that the interim report on the NMSP, released in January, acknowledged that only 29 companies had submitted data. The report also noted that only four companies had agreed to conduct tests of their materials, leading the agency to conclude that "most companies are not inclined to voluntarily test their nanoscale materials."

Beyond the NMSP, EPA is also taking a small but important step toward filling data gaps on nanomaterials. In October 2008, the agency announced that carbon nanotubes are considered to be "new chemicals," which require submission of a premanufacture notice (PMN) that provides the agency with basic information about the new chemicals. The PMN submissions require all available data on chemical identity, production volume, byproducts, use, environmental release, disposal practices, and human exposure. This collection of basic data allows EPA to help manage the potential risk from chemicals new to the marketplace.

The Project on Emerging Nanotechnologies, a partnership between the Woodrow Wilson International Center for Scholars and the Pew Charitable Trusts, estimates that $60 billion worth of nano-enabled products were sold in 2007, with sales estimated to have grown to $150 billion in 2008. More than 600 nanotechnology-enabled consumer products are on the market.

Nanotechnology uses materials that are from one to 100 nanometers in size. A nanometer is one billionth of a meter (for perspective, a sheet of paper is about 100,000 nanometers thick). Nanoscale particles tend to be more chemically reactive than their ordinary-sized counterparts because they have more surface area. At the nanoscale, materials have different chemical and physical properties than materials at larger scales. For example, the NNI states, "There is potential for nanosized particles to be transported through cell walls and other biological barriers in ways that are different from their macroscale counterparts."

Nanotechnology research is seeking to apply nanomaterials in, among other areas, pharmaceuticals, medical equipment, batteries, photovoltaics, and even bioengineered food.

EPA Preparing to Battle Climate Change on Multiple Fronts

The U.S. Environmental Protection Agency (EPA), led by new administrator Lisa Jackson, is taking its first steps toward tackling global climate change. Jackson has announced her intent to review several Bush-era policies that limited the agency's ability to curb greenhouse gas emissions through regulation.

With those documents presumably still in the agency's hands, and with the full support of President Obama's White House, EPA appears poised to take action. Carol Browner, Obama's lead advisor on climate change issues, told the National Governors Association Feb. 22 that EPA "will make an endangerment finding," according to *The Wall Street Journal*. "The next step is a notice of proposed rule making," Browner added.

Under the Clean Air Act, if EPA determines that vehicle emissions pose a risk to public health or welfare, a so-called endangerment finding, it triggers a legal obligation to regulate the pollutant.

The endangerment finding, along with a proposal to regulate tailpipe emissions, was sent to the White House Office of Management and Budget (OMB) for review in December 2007.

OMB officials refused to open the e-mail attachments sent by EPA, effectively shuttering the agency's work.

An endangerment finding for greenhouse gas emissions would likely prompt the regulation of stationary sources as well. Similar to tailpipe regulation, the Clean Air Act directs EPA to regulate stationary sources, such as power plants and oil refineries, if emissions threaten health or welfare.

Jackson is already setting the stage for stationary source regulation. Jackson announced Feb. 17 that she would review a memo written by her predecessor, Stephen Johnson, maintaining that greenhouse gas emissions should be ignored when considering regulation of a stationary source.

Jackson is reconsidering Johnson's Dec. 18, 2008, memo in response to a request from the Sierra Club. According to a press statement, "EPA will vigorously review the Johnson memo to ensure that it is consistent with the Obama Administration's climate change strategy and interpretation of the Clean Air Act." In the meantime, "[P]ermitting authorities should not assume that the memorandum is the final word on the appropriate interpretation of Clean Air Act requirements," Jackson wrote to the Sierra Club.

The U.S. Supreme Court has already interpreted the Clean Air Act as giving EPA the authority to regulate greenhouse gas emissions. In April 2007, the Court ruled in *Massachusetts v. EPA* that the agency should determine whether greenhouse gases pose a threat to public health and welfare and, if so, regulate them. However, the Bush administration successfully stalled for the remainder of its term both the endangerment finding and regulation.

In addition to the endangerment finding and corollary federal regulatory proposals, Obama has instructed EPA to reevaluate a 2007 decision that prevented several states from moving forward with plans to curb greenhouse gas emissions from vehicles. Under pressure from the White House, Johnson refused to grant the states a waiver to regulate vehicle emissions.

According to a press statement, "EPA believes that there are significant issues regarding the agency's denial of the waiver. The denial was a substantial departure from EPA's longstanding interpretation of the Clean Air Act's waiver provisions."

In 2005, California petitioned EPA to allow the state to regulate vehicle emissions. Under the Clean Air Act, only EPA can regulate emissions, but the agency may grant a waiver to California if the state wishes to adopt more stringent regulations. If EPA grants California a waiver, other states may choose between the national regulations and California's regulations. Seventeen other states representing almost half the U.S. auto market are expected to adopt California's standards.

Jackson is also moving forward with two proposed rules that had languished under Johnson. EPA has sent OMB two draft proposed rules: one that would mandate an increase in the

proportion of biofuels in the national gasoline supply and another that would create a registry for greenhouse gas emissions.

Under Executive Order 12866, OMB's Office of Information and Regulatory Affairs (OIRA) reviews and edits drafts of proposed and final regulations before they are shared with the public. The two EPA rules are among the first that Obama's OIRA will review.

The proposals are not released to the public until OIRA has completed its review.

Both rules have missed deadlines set by Congress. The renewable fuels standard – which requires a quadrupling of the renewable fuels supply, including a substantial amount of cellulosic ethanol or other advanced biofuels – was mandated under the 2007 energy bill. Congress set a deadline of Dec. 19, 2008, for EPA to finish the rule, but the agency has yet to even propose it.

The FY 2008 omnibus appropriations bill required EPA to propose the greenhouse gas registry rule by Sept. 26, 2008, a deadline it missed, and finalize the rule by June 26, 2009, a deadline it is in danger of missing.

According to EPA, the greenhouse gas registry rule "would establish monitoring, reporting, and recordkeeping requirements on facilities that produce, import, or emit greenhouse gases above a specific threshold in order to provide comprehensive and accurate data to support a range of future climate policy options."

USDA Announces Changes to Food Labeling Rule

U.S. Department of Agriculture (USDA) Secretary Tom Vilsack announced Feb. 20 that a food labeling rule finalized in the last days of the Bush administration will go into effect as scheduled. The rule has been under review at USDA in accordance with a Jan. 20 memo from White House Chief of Staff Rahm Emanuel, which placed a moratorium on all final rules not in effect at the time President Barack Obama took office. However, Vilsack is asking food producers to follow additional voluntary country-of-origin labeling practices that could close loopholes left by the Bush rule.

In the USDA press release announcing the agency's intent to implement the rule, Vilsack released a letter to producers outlining the additional labeling practices and said USDA intends to track industry compliance before deciding whether the rule should be amended to achieve the intent of Congress. Vilsack is quoted as saying, "I strongly support Country of Origin Labeling – it's a critical step toward providing consumers with additional information about the origin of their food."

Country-of-origin labeling (COOL) was mandated by Congress in the 2002 farm bill. The law required beef, lamb, pork, fish, perishables, and peanuts to be labeled. Subsequent

appropriations legislation in 2004 and 2005 delayed implementation of COOL practices until September 2008.

To meet this deadline, the Bush administration issued Aug. 1, 2008, an interim final rule (a rule published first as a final rule instead of a proposed rule and with the opportunity to comment at the time the rule is promulgated). The Food, Conservation and Energy Act of 2008, known as the 2008 farm bill, expanded the list of products covered by COOL requirements.

Vilsack's Feb. 20 letter to industry groups indicated that after reviewing the final rule promulgated by the Bush administration, he had "legitimate concerns" about some of the rule's provisions. Specifically, he noted "treatment of product from multiple countries, exemptions provided to processed foods, and time allowances provided to manufacturers for labeling ground meat products." Despite these concerns, Vilsack is allowing the final rule to go into effect March 16 but is "suggesting" that the manufacturers adopt additional practices to provide consumers with greater information.

For example, because of confusion about how to label meat products that pass through different countries during production, the label should indicate which "production steps occurred in each country." Thus, an animal born, raised, and slaughtered in different countries has to bear a label indicating in which countries the animal was born, raised, and slaughtered.

Vilsack also criticized the rule's definition of "processed food" as possibly too broad. The rule exempts foods if processing would "change the character" of the food item, if the item is combined with some other food item, or if the item is cooked, cured, or smoked. For example, a bag of combined frozen peas and carrots in a grocery store is considered a processed food even though a bag of frozen peas and a bag of frozen carrots are not considered processed and, therefore, have to be labeled.

USDA's Agricultural Marketing Service is responsible for implementing the country-of-origin program. Vilsack's letter promises close scrutiny of producers' efforts to meet the voluntary steps before deciding on any amendments to the existing rule.

Questions Loom for President's Office of Faith-Based and Neighborhood Partnerships

On Feb. 5, President Barack Obama signed an executive order establishing the White House Office of Faith-Based and Neighborhood Partnerships to help address the nation's social problems by strengthening the capacity of faith-based and community organizations. The executive order amends a Bush-era order that created the former Office of Faith-Based and Community Initiatives. Despite campaign promises, the Obama order does not reverse the Bush policy that allowed federal agencies to award contracts to faith-based organizations that discriminate in their hiring processes based upon religious affiliation, marital status, or sexual orientation.

The Obama order expands the faith-based program by calling for an increase in federal funding of social service programs run by religious institutions and by establishing a federal advisory board composed of 25 diverse religious and secular leaders to consult on how funding will be distributed and to help shape the administration's policies on issues such as abortion, AIDS, and social welfare.

Before Obama signed the order, he spoke at the annual National Prayer Breakfast, where he outlined the program and referenced the important role community groups play in alleviating social ills. "The goal of this office will not be to favor one religious group over another – or even religious groups over secular groups," said Obama. "It will simply be to work on behalf of those organizations that want to work on behalf of our communities, and to do so without blurring the line that our founders wisely drew between church and state. This work is important, because whether it's a secular group advising families facing foreclosure or faith-based groups providing job-training to those who need work, few are closer to what's happening on our streets and in our neighborhoods than these organizations. People trust them. Communities rely on them."

According to *The Washington Post*, the office will expand its agenda and "will be more involved in policy planning than it was during the Bush years." The top priorities for the office will be reducing poverty and making community groups a part of the economic recovery, interfaith relations with leaders around the world, strengthening the role of fathers in society, and addressing teenage pregnancy and reducing the need for abortion.

The Obama order references the importance of supporting community groups while maintaining the separation of church and state. The order states, "It is critical that the Federal Government strengthen the ability of such organizations and other nonprofit providers in our neighborhoods to deliver services effectively in partnership with Federal, State, and local governments and with other private organizations, while preserving our fundamental constitutional commitments guaranteeing the equal protection of the laws and the free exercise of religion and forbidding the establishment of religion."

A separate 2002 Bush order had been criticized for not instilling safeguards to assure that federally funded services are appropriately coordinated, provided by qualified individuals, and provided without requirements for religious observance. This order also claimed that the constitution's guarantee of freedom of speech ensured that groups may receive federal taxpayer money "without impairing their independence, autonomy, expression or religious character." This assertion was intended to grant the right to faith-based institutions to use federally funded programs to proselytize for their religion. Perhaps the greatest controversy was that the Bush order allowed discriminatory practices in employment and in access to services.

In July 2008, during a speech in Zanesville, OH, candidate Obama said that he planned to prohibit religious hiring discrimination for federally funded positions, as well as religious proselytizing. "If you get a federal grant," Obama said, "you can't use that grant money to proselytize to the people you help and you can't discriminate against them or against the

people you hire on the basis of their religion." This opposition was reiterated in a fact sheet issued by the campaign on plans to work with faith-based organizations. "Religious organizations that receive federal dollars cannot discriminate with respect to hiring for government-funded social service programs."

Instead of completely withdrawing Bush's order, Obama outlines that the director of the new White House Office of Faith-Based and Neighborhood Partnerships should seek guidance from the Department of Justice on specific legal issues. The order says that when legal or constitutional issues arise regarding "existing or prospective programs and practices," the executive director is to seek the opinion of the White House counsel and the attorney general. According to news reports, "the hiring rules would be reviewed on a case-by-case basis when there are complaints and that the Justice Department will provide legal assistance." A number of groups are saying the order does not go far enough in rescinding the Bush hiring policies and are now calling on Obama to act on this campaign promise.

The Obama order also creates the President's Advisory Council on Faith-Based and Neighborhood Partnerships. Jim Wallis, founder of Sojourners Magazine and a member of the council, said the council and the new faith-based office "offers the chance to move beyond necessary programs to fund exemplary faith-based organizations [. . .] to a broader and deeper vision of real 'partnership' between the faith community and sound social policies."

Members of the advisory council will be appointed to one-year terms, which may be extended. The role of the council will be "to identify best practices and successful modes of delivering social services; evaluate the need for improvements in the implementation and coordination of public policies relating to faith-based and other neighborhood organizations; and make recommendations to the President."

The advisory council consists of both those who have publicly supported and opposed the hiring issue. One member of the new advisory council is Richard Stearns, president of World Vision. Recently, new reports highlighted a 2007 Justice Department Office of Legal Counsel (OLC) legal opinion allowing a $1.5 million grant to World Vision, a Christian aid group that makes religious belief a condition of employment. Since the 2002 Bush order could not replace existing statutes, the OLC opinion interprets the Religious Freedom Restoration Act as a way for agencies to exempt grantees from statutes such as the Civil Rights Act of 1964, which forbid discriminatory hiring.

Existing religious hiring rights is a controversial issue; while some groups argue that hiring based on religion is necessary for their work and identity, others assert that it is a violation of Americans' civil rights. Groups charged that as written, the Obama order continues to allow discrimination in hiring. Americans United for Separation of Church and State (AU) issued a press release citing executive director Rev. Barry W. Lynn. Lynn said, "It should be obvious that taxpayer-funded religious bias offends our civil rights laws, our Constitution and our shared sense of values."

In July 2008, OMB Watch joined the Coalition Against Religious Discrimination (CARD), a group of religious, civil rights, and civil liberties groups, in letters to the presidential candidates advocating corrective action to "restore religious liberty and civil rights as critical components of future administrative policy."

AU has put out an action alert calling on the public to contact the White House asking the president to put forth an executive order that directly bars employment bias in all publicly funded programs. In the letter to Obama, AU asserts, "When you signed an executive order creating the Council, you failed to put an immediate end to such discrimination and clearly ban proselytization. Although you have offered criticism of some of the constitutional pitfalls of Bush's Faith-Based Initiative, I am saddened to note that every rule and regulation of his Initiative remains intact today."

While Obama's executive order may be controversial because of the hiring issue, some elements are heartening to many. For example, the change of the office's title to include "partnership," the specific priorities put forth for the office, and the creation of a new advisory council all offer the chance for constructive outcomes. Obama said the office will "be a resource for nonprofits and community organizations, both secular and faith based, looking for ways to make a bigger impact in their communities, learn their obligations under the law, cut through red tape, and make the most of what the federal government has to offer."

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Recovery Transparency Meets Mixed Results

Three weeks after President Barack Obama signed into law the $787 billion American Recovery and Reinvestment Act of 2009 (Recovery Act), states have begun to see federal economic stimulus funds move within their borders. Behind the hundreds of billions of dollars soon to follow are some 25 federal departments, agencies, and administrations that are in charge of allocating the funds. In addition to this unprecedented level of emergency spending is a pledge by Obama to "watch the taxpayers' money with more rigor and transparency than ever." The speed at which the administration and some federal agencies have moved is impressive, even as there has been uneven implementation of transparency efforts.

Spending data on Recovery.gov, the new website established to monitor how the Recovery Act is being implemented, is organized haphazardly. To find information on Medicaid disbursements, for example, one must comb through a list of press releases to find a link to that spending. The Recovery.gov website links to the Recovery Act legislative text and contains a breakdown of the act's spending provisions by spending area (e.g. health, transportation, tax cuts, etc.), but the website does not – perhaps cannot yet, given the short time frame of its implementation – contain a listing of all federal Recovery Act programs with their attendant funding levels and state allocations. This fact, however, is mitigated by information provided by federal agency Recovery Act websites – a list of which is available on Recovery.gov.

The emblem which the Administration will use to identify Recovery projects

When the Office of Management and Budget (OMB) issued guidelines to the federal agencies on Recovery Act spending, it mandated that they establish on their own websites a specific and easy-to-find area to detail Recovery Act spending. These Recovery Act sections of agency websites are all located by adding "/recovery" after the agency's web address. For example, the Department of Transportation's Recovery site is located at "www.dot.gov/recovery." The Recovery Act and subsequent instructions to create agency websites are only weeks old, but some agencies have moved adroitly and are providing organized, detailed information. Other agencies have not done so.

An example of an agency that is managing its Recovery Act site well is the Department of Housing and Urban Development (HUD). On the HUD Recovery Act site, one finds a list of Recovery Act programs and is able to click on each program to view a description of the program; the dollar amounts of total funding for that program; total funds allocated; total funds obligated; and total funds expended. Additionally, HUD provides downloadable spreadsheets that present the level of funding each state will receive from each HUD grant program.

The Health and Human Services (HHS) Recovery Act website, while aesthetically pleasing with useful maps, lacks organization; it requires the user to hunt for funding allocations and program descriptions. The Department of Agriculture (USDA) Recovery Act site, however, provides programmatic spending allocation detail, while linking to USDA sub-agency sites that provide almost no Recovery Act information whatsoever. As federal funds begin to be transferred to the states through grants or federal programs, the need for well-organized and informative agency websites is becoming apparent.

The OMB guidance also instructs agencies to produce and make available on Recovery.gov, from March 3 to May 12, weekly reports detailing "total appropriations, total obligations, and total expenditures as recorded in agency financial systems on a cumulative basis" and "[a] short bulleted list of the major actions taken to date and major planned actions." These reports are not yet available at Recovery.gov, but they are available at the agency websites. And, like

the establishment of agency Recovery Act websites, this requirement has met with uneven results.

Most agencies provide a downloadable spreadsheet with the information exactly as described in the OMB Guidance. Unfortunately, the guidance specifies that spending be reported by Treasury Account. The Treasury Account number, however, does not indicate to which program it belongs, leaving everyone but program budget specialists bewildered as to how agency Recovery Act funds are allocated. However, a few agencies, like HHS, provide a program description to match the Treasury Account in their spreadsheets. But some agencies, like the U.S. Environmental Protection Agency and USDA, do not, as of the time of this writing, provide the required weekly report.

The level of transparency envisioned by the administration is ambitious, and with a law that is barely three weeks old, missteps and less than one hundred percent compliance is to be expected. Tracking Recovery Act spending at the program level, however, is only one challenge the Obama administration faces when it comes to spending accountability. As Recovery Act funds are disbursed to the states through contractors and subcontractors (and grantees and subgrantees), a sophisticated system of data reporting gathering will be required. In an effort to assist the administration in developing such a system, the Coalition for an Accountable Recovery, co-chaired by OMB Watch and Good Jobs First, has put forth its recommendations for a Recovery Act data collection and reporting system in a memorandum, "Interim Recovery.gov Data Reporting Architecture." It is certain that a series of iterations will be necessary to refine such a model to achieve the transparency articulated by the Obama administration, and as such, the CAR coalition will continue to solicit feedback from stakeholders and the administration to that end.

Industry Secrecy Still Hindering Protection from Toxics

The excessive use of confidential business information claims is a major factor preventing the government from safe, effective management of thousands of industrial chemicals, according to several experts who recently presented their views to a congressional panel. The witnesses asserted that when information about potentially dangerous chemicals is labeled as trade secrets, government agencies and the public are denied the opportunity to evaluate the risks of chemicals and take action to protect public health and the environment.

The House Subcommittee on Commerce, Trade, and Consumer Protection recently held a hearing to review the Toxic Substances Control Act (TSCA), a 33-year-old law enforced by the U.S. Environmental Protection Agency (EPA). Under the law, the agency is supposed to review and manage the risks of chemicals in commerce in the United States. Companies that submit chemical information to the EPA are allowed to mark certain information as confidential business information (CBI). The EPA is not allowed to disclose CBI to the public or other levels of government.

In testimony before the subcommittee, John Stephenson of the Government Accountability Office (GAO) reported that TSCA's confidential business information provisions restrict foreign, state, and local governments, as well as the public at large, from better controlling the risks of potentially harmful chemicals.

According to the GAO, "EPA's ability to provide the public with information on chemical production and risk has been hindered by strict confidential business information provisions of TSCA." The undisclosed information is needed for various activities, including "developing contingency plans to alert emergency response personnel to the presence of highly toxic substances at manufacturing facilities."

The GAO testimony also drew attention to the EPA's inability to counter a company's claims of confidentiality. About 95 percent of premanufacture notices are submitted containing some information labeled "confidential." These notices contain basic health and safety information and are required before a company can manufacture a new chemical. EPA has no information on whether these confidentiality claims are warranted and few resources to investigate and challenge inappropriate claims. As a result, vital information is not disclosed.

EPA reported that it challenges only 14 confidentiality claims per year and that companies withdraw nearly all the challenged claims. Approximately 700 new chemicals are introduced into commerce each year.

Reforming the CBI provisions in TSCA has been a recommendation of the GAO and several public interest groups. Richard Denison, a senior scientist with the Environmental Defense Fund, criticized many aspects of the toxics law, including the excessive use of CBI claims. In his testimony before the House panel, Denison stated that EPA's weak capacity to challenge the extensive CBI claims "further exacerbat[es] the lack of transparency and accountability of its assessments."

In a recently published article, Denison cites cases where information indicating substantial risk from a chemical is submitted with the chemical's specific name, identifying number, and even the name of the company submitting the data, all labeled as confidential.

J. Clarence Davies, one of the original architects of TSCA and a senior advisor at the Woodrow Wilson International Center for Scholars, also criticized several aspects of the statute. The CBI provisions make TSCA "less conducive to state-federal cooperation than any other environmental statute," and "major impediments" to international cooperation.

Among the industry representatives providing testimony to the panel was the American Chemistry Council (ACC), a trade association representing 140 chemical companies. The president of the ACC stated that TSCA should be "modernized" because the public's confidence in federal chemicals management has been "challenged." The industry association offered tempered support for limited release of CBI to state, local, and foreign governments.

Many policymakers have long held that TSCA is inadequate to protect public health and the environment and needs significant strengthening. In a statement submitted for the hearing, Rep. Henry Waxman, chairman of the House Committee on Energy and Commerce, said that "for years, it has been clear that TSCA is not living up to its intent." Mr. Waxman cited the EPA's inability to ban asbestos, a notorious known carcinogen, as an example of the weakness of the statute.

EPA Administrator Lisa Jackson announced in a memo to EPA employees in January, "It is clear that we are not doing an adequate job of assessing and managing the risks of chemicals in consumer products, the workplace and the environment. It is now time to revise and strengthen EPA's chemicals management and risk assessment programs."

The ability to protect certain sensitive corporate information allows businesses to keep confidential research and development programs, new chemical formulations, and the specific economics of their operations – all crucial to maintaining competitiveness. Yet, as the GAO and EPA data attest, the amount of CBI is enormous, and the limits it places on the public's right to know hinder the EPA's ability to protect public health and the environment.

Superior uses of CBI exist. EPA's highly successful Toxics Release Inventory (TRI) program requires industry to substantiate up front any CBI claim and provides simple, common-sense limitations on CBI claims. An OMB Watch report, *A Citizen's Platform for Our Environmental Right-to-Know*, uses the TRI model for handling CBI to outline a CBI policy for TSCA and other statutes. This model has worked well in providing critical information to the public through TRI and has resulted in few confidentiality claims while fully protecting CBI.

Sunshine Illuminates More Bush-era OLC Memos

On March 2, the U.S. Department of Justice (DOJ) released a set of previously classified memoranda from the Office of Legal Counsel (OLC). OLC produced the documents for senior members of the George W. Bush administration. The release is yet another step in the Obama administration's implementation of its commitment to transparency.

In total, nine memoranda were released and were largely dated between 2001 and 2003. However, more secret memos exist; the American Civil Liberties Union (ACLU) has requested 41 classified OLC memos, including those released by DOJ under the Freedom of Information Act.

The OLC issues legal opinions at the request of the White House Counsel. These opinions effectively have the weight of law, as OLC's decisions are binding on executive branch agencies. When OLC memos are classified, agencies operate under what many transparency advocates have called "secret law," unknown to the public.

Generally, OLC memos address specific policy proposals, but in the years following the Sept. 11, 2001, terrorist attacks, they were used to address wider areas of law and amorphous

hypothetical scenarios. Crafted in an environment of fear and uncertainty, these memos gave President Bush broad legal authorization to wage a war on terrorism.

Some of the issues covered by the released memos included the president's authority over detainees, the use of military force against terrorism, military detention of U.S. citizens, and the power to transfer captured suspects to foreign custody.

In a March 2002 memo, for instance, the OLC argued that the president "appears to enjoy exclusive authority" on the issue of how to handle captured enemy soldiers because the power "is not reserved by the Constitution in whole or in part to any other branch of the government." Article I, Section 8 of the U.S. Constitution, however, gives Congress the power to "declare War, grant letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water." The OLC dismissed this clause as pertaining to captured property only as distinct from captured persons.

An October 2001 memo serves as an eerie testament to the rights the government was willing to take away from citizens in exchange for the appearance of safety and security. The OLC stated that "the Fourth Amendment does not apply to domestic military operations designed to deter and prevent future terrorist attacks."

Also included in the release was an 11-page, Jan. 15, 2009, memo written by Steven Bradbury. As the Bush administration waned, Bradbury wrote that many of the memos authored between 2001 and 2003 "do not currently reflect, and have not for some years reflected, the views of OLC." Bradbury retracted the arguments used in the released memos, as well as others that are still classified, such as previous OLC opinions concerning Foreign Intelligence Surveillance Act (FISA) applicability.

In a footnote, Bradbury wrote that the memo "is [not] intended to suggest in any way that the attorneys involved in the preparation of the opinions in question did not satisfy all applicable standards of professional responsibility." The inclusion of this statement is rather unusual, but it is likely due to an anticipated inquiry within the DOJ by the Office of Professional Responsibility. The report, currently in draft form, is apparently critical of the conduct of the three primary authors of the 2001-2003 OLC memoranda – John Yoo, Jay Bybee (now a federal appeals court judge), and Bradbury.

The memos appear to have been interpretations of existing law, not operational plans – their disclosure did not pose a threat to national security. Instead, it seems the Bush administration withheld the documents to avoid public controversy.

The release of the memos is a positive sign of transparency at DOJ amidst otherwise bleak prospects. The Obama administration committed itself to an "unprecedented level of openness," but the DOJ has been heavily criticized for pursuing the Bush administration's application of the state secrets privilege in a key case concerning extraordinary rendition. More recently, the DOJ also decided to pursue the same course as the Bush administration in the search for missing Bush administration e-mails. The Obama administration sought to dismiss

litigation over the e-mails, even though it recognizes that the restoration process for the e-mails is not complete.

Obama Turning Back Clock on Some Bush Midnight Rules

The Obama administration is taking action to reverse controversial regulations finalized in the closing days of the Bush administration, including one affecting endangered species and another limiting access to reproductive health services.

Public interest advocates are hailing the Obama administration's decisions to undo the Bush-era rules, which had been criticized on both substantive and procedural grounds.

Obama issued a memo March 3 calling for the review of a regulation that changed the way the federal government makes decisions about endangered species. Obama instructed the departments of Interior and Commerce (which published the regulation jointly) to review the regulation and "determine whether to undertake new rulemaking procedures."

The rule, published Dec. 16, 2008, allows federal land-use managers to approve projects like infrastructure creation, minerals extraction, or logging without consulting habitat managers and biological health experts responsible for species protection.

Previously, consultation had been required. Now, consultation is at the discretion of the agencies that make decisions on development. The rule went into effect Jan. 15.

In addition to calling for a review of the rule, Obama's memo instructs agencies to ignore the provision of the regulation that allows them to opt out of consultation, rendering that part of the Bush rule toothless. "I request the heads of all agencies to exercise their discretion, under the new regulation, to follow the prior longstanding consultation and concurrence practices," the memo says.

Janette Brimmer, an attorney for Earthjustice, which had sued to stop the rule, called the memo "a crucial and positive first step in reinstating protections for endangered species lost through last-minute actions by the Bush administration," adding, "We're heartened that President Obama intends to return wildlife biologists to their rightful role in determining protections for America's plants and animals."

In another move that may reverse one of Bush's so-called midnight regulations, the Department of Health and Human Services (HHS) has indicated it will revise a rule that gives health care providers the right to refuse to provide women with access to or information about reproductive health services, if the provider objects on moral or religious grounds. The rule went into effect Jan. 20.

"We applaud the Obama Administration for its proposal to rescind the provider refusal regulation that took effect on the final day of the Bush Administration," Debra Ness, President of the National Partnership for Women & Families, said in a statement.

Both the endangered species rule and the provider conscience rule are among those Bush midnight regulations that are controversial not only for their policy implications but for the process by which they were developed.

The Bush White House reviewed a draft of the proposed provider conscience regulation in only hours, a process usually measured in weeks or months. The proposal was published online by HHS later that same day. As a result, the Equal Employment Opportunity Commission, which enforces regulations prohibiting workplace discrimination on the basis of religion, was not adequately briefed, according to Rep. Henry Waxman (D-CA).

On the endangered species rule, public input was sacrificed. According to the final rule, the administration received approximately 235,000 comments on the proposal. The Associated Press reported that agency officials pressured staff to review all the comments in just one week. One calculation estimated the staff assigned to reviewing comments had to review seven comments per minute to meet the deadline.

The Bush administration pushed those rules and others through the usual rulemaking process in order to ensure they were not only final but in effect. By law, agencies must wait either 30 or 60 days after publication before implementing new regulations.

On Jan. 20, new White House Chief of Staff Rahm Emanuel issued a memo setting out the Obama administration's policy for dealing with other regulations left by the Bush administration. The memo asks agencies to "consider extending for 60 days the effective date" of those regulations that are final but not yet in effect.

For those rules that were both final and in effect, it now appears the Obama administration will adopt a rule-by-rule strategy to make any changes or withdrawals it deems necessary.

Work will remain for the Obama administration until new regulations replace the ones finalized under Bush. While Obama's endangered species memo effectively neuters the Bush-era provision that made consultation optional, it makes no mention of the rule's prohibition on considering the effect of global climate change on species survival. The provision, inserted in the late stages of the rulemaking process, restricts the federal government's ability to protect those species whose habitats are or will be affected by climate change.

Similarly, environmentalists praised Interior Secretary Ken Salazar's decision not to lease land in the West for oil shale development – an environmentally intrusive method of energy extraction, but the regulations that permit leasing, finalized in November 2008, remain on the books.

And while HHS has pledged to revise the provider conscience rule, details have yet to be released. The White House is currently reviewing the revision. Once published, it will be subject to a public comment period, according to *The Washington Post*. Meanwhile, the rule remains in effect.

Most of the Bush administration's other midnight regulations have gone unaddressed thus far. OMB Watch has identified 27 controversial regulations finalized between Oct. 1, 2008, and Jan. 20, 2009. Of those, the Obama administration has delayed the effective dates of three, pursuant to the Emanuel memo, and has taken other actions on the endangered species, provider conscience, and oil shale rules.

Experts Vie to Influence Obama on Regulatory Reform

Regulatory experts across the country are angling to change the way federal regulations are written and approved. Since President Barack Obama issued a memo Jan. 30 instructing his administration to rethink the executive order that governs the federal regulatory process, the White House Office of Management and Budget (OMB) has been accepting public comments on ideas for reform and meeting with stakeholders.

On Feb. 26, OMB announced the beginning of an 18-day comment period; OMB will accept comments until March 16. The public can submit comments by emailing them to oira_submission@omb.eop.gov or faxing them to (202) 395-7245. OMB is posting all comments online at www.reginfo.gov/public/jsp/EO/fedRegReview/fedRegReview.jsp. Obama has requested administration officials forward their recommendations to him by mid-May.

Obama's aim is to realign a rulemaking process many observers believe is outmoded. Modern risks like global climate change and the safety of the food supply are not being adequately managed, leaving many to question both the speed and seriousness with which the government can address emerging problems.

Obama is likely to substantially revise or completely replace Executive Order 12866, Regulatory Planning and Review. President Bill Clinton signed E.O. 12866 in September 1993. President George W. Bush made modifications to the E.O. but largely upheld the Clinton framework.

E.O. 12866 requires federal agencies to seek White House approval before publishing regulations. Agencies must submit to the White House Office of Information and Regulatory Affairs (OIRA), a unit within OMB, draft versions of proposed and final regulations. OIRA can require the agency to make changes to the rule before allowing it to move forward. OIRA also funnels the concerns or comments of other agencies inside the federal government.

E.O. 12866 also requires agencies to "assess all costs and benefits" of the regulatory options under consideration.

The process defined by E.O. 12866 has sometimes spawned controversy. For example, during the Bush administration, OIRA stalled for more than 18 months a regulation intended to protect the North Atlantic right whale, a critically endangered species. While under OIRA's control, officials from Vice President Dick Cheney's office and the Council of Economic Advisors questioned the scientific basis for the rule. When the Department of Commerce unveiled the final rule, it was weaker than the proposed version released years earlier.

Critics of the process are now weighing in with ideas for reform. OMB Watch called for an end to rule-by-rule review – a process that has dominated federal rulemaking under E.O. 12866 and its predecessor order. "White House offices do not, and should not, duplicate the expertise of the agencies and, therefore, should not be involved in the review of each significant regulatory proposal," OMB Watch said.

Instead, OIRA should show more deference to agencies. OIRA could continue to facilitate comments from other agencies, but its direct relationship with rulemaking agencies should help, not hinder, according to OMB Watch. OIRA should shift its responsibilities by helping agencies set priorities and identify areas where regulation could address an unmet need. OIRA should also hold agencies accountable for delays in finalizing rules, OMB Watch said.

Other commenters, including the Center for Progressive Reform (CPR), also called for an end to rule-by-rule review.

However, Jim Tozzi of the Center for Regulatory Effectiveness urged a continuation of rule-by-rule review: "OMB review of discretionary regulations should be viewed as indispensable to the President's Constitutional duty to 'take Care that the Laws be faithfully executed,' since rulemaking is in many instances the primary way in which most statutes are implemented."

Comments submitted by law professors Jacob Gersen and Anne Joseph O'Connell focused on the length of the rulemaking process. Using government-provided data, they found the average time between a rule's proposal date and finalization date to be 503.4 days for significant regulations. The calculation does not encompass the time it takes for an agency to study and develop its proposed rule.

Gersen and O'Connell recommend OIRA more frequently "encourage agencies to start and finish rulemakings more quickly."

Some commenters targeted cost-benefit analysis. CPR urged the Obama administration to forego the usual form of cost-benefit analysis, which has traditionally emphasized the conversion of all costs and all benefits to dollars and cents, for comparison's sake. CPR says the focus on so-called monetization leads to the "inability of cost-benefit analysis to measure the benefits produced by regulatory action."

Others called for changes to the way cost-benefit analysis is done. Reece Rushing from the Center for American Progress recommended cost and benefit assessments more accurately identify the parties that are expected to feel a rule's impact, rather than aggregating impacts

into a single cost estimate and a single benefit assessment. Matthew Adler from the University of Pennsylvania also discussed the distribution of costs and benefits and proposed innovative ways for measuring a rule's effect on income inequality or poverty.

Many commenters mentioned the need to improve transparency in the rulemaking process, especially during OIRA's review of rules, if it is to continue. Columbia University law professor Peter Strauss commented, "The legitimacy and acceptability of [OIRA's] role requires a high degree of transparency in its exercise – not just lists of meetings, attendees and submissions, but copies of documents." He added, "If agencies should change their course as a result of coordination activities, they should indicate how and why they were persuaded to do so."

OMB is also taking meetings with outside interests to hear recommendations in person. OMB has held at least three of these meetings, according to the webpage listing comments and meetings. OMB held one meeting with representatives from public interest groups, another with industry lobbyists, and a third with officials representing state and local governments.

(All comments and meeting participant lists are available at www.reginfo.gov/public/jsp/EO/fedRegReview/publicComments.jsp.)

Outside of the OMB-led process for revising the executive order, the Obama administration is taking other steps to reform rulemaking. On March 9, Obama signed a presidential memorandum directing the White House Office of Science and Technology Policy (OSTP) to lead an effort to develop recommendations "designed to guarantee scientific integrity throughout the executive branch."

"The public must be able to trust the science and scientific process informing public policy decisions," Obama said in his scientific integrity memo. In an apparent affront to the Bush administration, he added, "Political officials should not suppress or alter scientific or technological findings and conclusions." Scientific integrity and transparency advocates repeatedly criticized the Bush administration for suppressing science around controversial issues, such as climate change and reproductive health.

Obama provided certain key principles that OSTP must follow in developing recommendations, including the importance of hiring agency scientists on the basis of expertise, not political ideology. Obama highlighted the need for transparency, saying, “Each agency should make available to the public the scientific or technical findings or conclusions considered or relied on in policy decisions,” except where prohibited by law. He added that each agency should also have procedures to “ensure the integrity of the scientific process” and ensure that decision making is not corrupted.

Nonprofits Make Major Impact on DC Voting Rights Legislation

Nonprofits have had an enormous impact on the District of Columbia House Voting Rights Act of 2009 (H.R.157/S.160). The bill passed in the Senate on Feb. 26 by a 61-37 vote and will soon

come before the House. If the bill passes and is signed into law, it will give the District of Columbia a voting member in the House of Representatives for the first time.

Currently, the District's congressional delegate, Eleanor Holmes Norton, can only vote in committee. As part of a compromise, the bill would also temporarily give Utah an additional House seat based on an undercount of Mormon missionaries who worked abroad in 2000. If the 2010 census does not support the new seat, it would possibly go to the state next in line to gain a House seat.

DC Vote, a 501(c)(3) organization that strives for full voting representation for the District of Columbia, has played a huge role in the legislation that passed the Senate. Due to its efforts, as well as local citizens and elected officials, the District is closer to a voting representative than it has been since a constitutional amendment that would have given the District a House representative and two senators passed Congress in 1978. This current effort, however, is considered a more substantial move toward voting rights because the constitutional amendment had no chance of being ratified by the states, and it died as a result.

DC Vote has used a variety of methods to further the goal of securing voting rights for the District. It has produced educational documents on the voting rights issue. It has also engaged in activities designed to educate the American public and legislators around the nation. Recently, DC Vote produced the "Demand the Vote" music video that was shown in February at the Our City Film Festival in Washington, DC. They also held a Veteran's Day Rally in November 2008 to urge support for DC voting rights. Thirteen nonprofits signed on as organizational sponsors, including Common Cause, Friends of the Earth, and Public Citizen.

The National Rifle Association (NRA), a 501(c)(4) organization, has also played a huge role in the bill content as of late, causing the House to put the legislation on hold and possibly derailing a bill that seemed certain to quickly pass through the House. The organization is currently lobbying House members to press for amendments that would overturn DC gun laws. The bill that passed in the Senate already contains gun amendments that weaken DC gun laws.

After the gun amendments were proposed in the Senate, DC Vote organized an effort to have the public call their senators and urge them to vote against the gun amendment. The group set up a toll-free number and provided a sample script to assist people who wanted to make calls. Voting rights advocates were hoping that the House would pass a version without the gun amendments and that the amendments would be omitted when the two chambers met to reconcile the different versions of the legislation.

"Supporters of the vote bill had assumed Democrats would use their majority power to pass a rule that would bar gun amendments," according to *The Washington Post*. However, the NRA is threatening to score any procedural vote Democrats bring to prohibit adding gun amendments to the bill. Scoring procedural votes is a highly unusual move. Normally, legislation is scored on its merits, not on procedural maneuvers. According to Norton (D-DC), “People don’t score rules, they score bills.”

The NRA's threat to score the rule is a big dilemma for some pro-gun rights Democrats from conservative states who do not want to be listed as casting an anti-gun vote. Norton recently told the DC Democratic State Committee that the Leadership Conference on Civil Rights (LCCR), a 501(c)(4) organization, told her that if the NRA scores the procedural maneuver as an anti-gun vote, then the LCCR will score it as a civil rights vote. This may neutralize the NRA's approach, as almost all of the pro-gun Democrats who are being targeted by the NRA have perfect scores on civil rights issues from the Leadership Conference, according to Norton. These legislators do not want to be seen as casting an anti-civil rights vote any more than they want to be seen casting an anti-gun vote.

House Majority Leader Steny Hoyer (D-MD) put the bill on hold on March 3 "after learning that the National Rifle Association was urging its members to use a procedural maneuver to press for amendments that would repeal many of the city's gun laws," according to *The Washington Post*.

Obama Administration Delays Implementation of Controversial USAID Rule

On Feb. 2, the Obama administration announced that it was delaying the implementation of the controversial Partner Vetting System (PVS) rule and opening a 30-day public comment period. The rule is now scheduled to go into effect on April 3.

The U.S. Agency for International Development (USAID) first introduced the proposed rule on the PVS in July 2007. An effort ensued to get the rule withdrawn, but despite objections from the nonprofit sector, USAID made the rule final on Jan. 2. However, the final rule said that it would be up to the incoming Obama administration to decide whether or not PVS would be implemented.

If implemented, PVS would require that all nonprofit groups that apply for USAID grants and contracts provide detailed information on "key individuals." The federal government would then check names and information against intelligence databases that contain data on terrorists.

According to the final rule, "The information collected for these individuals would be used to conduct screening to ensure USAID funds and USAID-funded activities are not purposefully or inadvertently used to provide support to entities or individuals deemed to be a risk to national security."

Despite criticism from nonprofits that the program is burdensome, unwarranted, and dangerous for workers, the substance of the final rule remains largely unchanged. OMB Watch submitted comments in August 2007 and did so again on March 4, calling for the withdrawal of the rule. The comments note that USAID was unresponsive to previous public comments and reiterated some of the original concerns. Other issues OMB Watch addressed include:

- Lack of any evidence that PVS is needed
- Problems with due process
- Safety of aid workers
- Problems with list checking

USAID has insufficiently demonstrated that agency funding has gone to support terrorists or terrorist organizations. The Office of Inspector General (IG) issued a report on Dec. 10, 2007, in response to concerns that USAID provided funds to universities and students in Gaza that were allegedly linked to or controlled by Hamas. The IG found that although procedural violations occurred, none of these grants assisted a designated terrorist organization. The students and universities were vetted more than once, but USAID does not believe it should wait for evidence to implement a vetting system. According to the agency, "USAID does not believe that it should wait for hard proof that our funds are actually flowing to terrorists before implementing additional safeguards to its anti-terrorist financing program. Even the suggestion that our funds or resources are benefiting terrorists is harmful to U.S. foreign policy and U.S. national interests."

The PVS rule disregards the benefits of due diligence nonprofits already engage in that focus on knowing their grantees and knowing how resources are used. Organizations build trust with local communities to ensure that those they work with are not affiliated with terrorist groups. Many organizations already check names against the public list of Specially Designated Nationals and Blocked Persons maintained by the Department of the Treasury's Office of Foreign Assets Control (OFAC).

OMB Watch pointed out that some important details are absent in the final rule. "The assurances listed in the response to comments and background information are not binding, offering no real legal protection to grantees or individuals whose personal information may be submitted. And the final rule leaves many central details to be determined later," OMB Watch said. For example, if a group is denied a grant or contract, USAID will provide a reason and an opportunity for the organization to appeal administratively; however, this appeal process is not described in any way. The OMB Watch comments go on to say, "More information should be made available for comment regarding this appeal process before implementing PVS."

OMB Watch also reiterated the concern about the safety of aid workers and the value of organizations' neutrality, especially in areas of increased conflict. Local populations may consider collecting such information to be compromising the groups' independence, creating the perception that USAID grantees are instruments of the U.S. government, putting aid workers' lives at risk. The final rule overlooks these concerns and simply states that one of the purposes of the PVS is to enhance the safety of personnel.

In comments to USAID, InterAction, a coalition of U.S.-based international relief and development non-governmental organizations (NGOs), noted that "if U.S. NGOs are perceived to be working in concert with the law enforcement or intelligence agencies of the U.S. or a foreign government (friendly or hostile), the risk of violence, which is already significant in some contexts, can only increase." InterAction continued, "Either consequence will likely cause

U.S. NGOs to scale back or end programs in countries where the local populations may not have a favorable opinion of the U.S. Government. Given the role that U.S. NGOs play in showing the best face of America to the world, and the fact that humanitarian and development programs mitigate the poverty and hopelessness that contribute to the violence and extremism that leads to terrorism, such a scaling back of programs is not in the U.S. interest."

Parts of PVS are exempt from the Privacy Act, which governs record keeping by federal agencies. On July 20, 2007, USAID published the proposed rule in the *Federal Register*, exempting portions of PVS from sections of the Privacy Act. During the initial 60-day comment period, USAID received more than 175 comments on these exemptions. InterAction wrote in its comments, "The Privacy Act provides exemptions from its procedures for law-enforcement agencies if and when the use of the information is considered 'routine use.' USAID is not a law enforcement agency, and USAID sharing the collected information with unnamed third parties for investigative purposes is not a 'routine use' within the scope of USAID's mission, as the purpose of the information collection is purportedly to allow USAID to meet its own compliance requirements with law enforcement and counterterrorism mandates. The law enforcement and 'routine use' exemptions, therefore, do not apply to the Rule."

The International Center for Not-for-Profit Law (ICNL) made another interesting distinction in comparing the vetting of individuals associated with charities and those directly receiving government bailout funding. "Other parts of the US Government ('USG') expend significantly greater amounts of taxpayer money than USAID," said ICNL. "As but one example, the amount of taxpayer funding allocated to the 'bailout' of the automobile industry is many times USAID's entire operating budget. We suspect, however, that the officers, directors, and 'key individuals' of automakers and their subcontractors (foreign or domestic) were not required to submit their social security numbers to the USG so they could be vetted against terrorism lists before receiving taxpayer funding."

ICNL also made an important note about the role of USAID: "Countries around the world are monitoring the USG's approach to the regulation of NGOs, seeking precedential support for implementing their own restrictive measures against civil society. In a number of countries, these restrictions take the form of intrusive reporting requirements justified in terms of counter-terrorism objectives. As the lead development agency dependent on NGOs to achieve a host of developmental objectives, it is important that USAID follow Secretary Clinton's advice to 'lead by example' on this critical issue."

Even if the PVS rule is not implemented, the program could come back in another form. A bill has been introduced in the House with almost the exact language as the regulation. On Feb. 13, Rep. Ileana Ros-Lehtinen (R-FL) introduced H.R. 1062, the United States Foreign Assistance Partner Vetting System Act of 2009, which would mandate the PVS. However, unlike the USAID rule, the bill includes a detailed appeals process for grantees. The bill has been referred to the House Foreign Affairs committee, where Ros-Lehtinen is the ranking member.

GAO Reports on Nonprofit Funding through Sub-Award Contracts

A recent report to the chairman of the House Budget Committee shows that the federal government relies on networks and partnerships to achieve its goals, and many of these involve nonprofit organizations. The Government Accountability Office (GAO), the investigative arm of Congress, produced the report.

Rep. John Spratt (D-SC), the budget committee chairman, asked GAO to assess (1) the mechanisms through which federal dollars flow to nonprofits and (2) what is known about federal dollars flowing through government programs to nonprofit organizations in Fiscal Year 2006. To address these objectives, GAO conducted a literature review of funding; analyzed data from several sources, including the Federal Procurement Data System (FPDS) and the Federal Assistance Awards Data System (FAADS); and analyzed nonprofit organizations' roles in 19 federal programs.

GAO found that the federal government uses a variety of funding mechanisms to achieve national priorities through partnerships with nonprofit organizations, and the relationships are sometimes complex and multidirectional. Nonprofit organizations receive federal grant and contract funds both directly and through other entities for performing activities or providing services to particular beneficiaries. Federal grants and contracts may also reach nonprofit organizations by passing through intermediary levels of government, particularly grant funds provided to states or cities that then disburse those funds to nonprofit organizations. Federal funds paid to nonprofit organizations as "fee for service" contracts follow a more complex path, as exemplified by federal health insurance programs that reimburse nonprofit organizations for services they provide to individuals.

Federal loans facilitate nonprofit organizations' access to capital; for example, they finance the construction of systems to improve electric service in rural areas. Other mechanisms, such as loan guarantees, while not directly providing federal funds to nonprofit organizations, increase access to other sources of funds.

For instance, student loans, while provided to individual students, often make funds available that result in revenues to nonprofit colleges and universities. Similarly, some tax policies (known as "tax expenditures") result in benefits to some nonprofit organizations by either reducing their costs or increasing revenues. Some nonprofits may be able to borrow funds at lower interest rates because of access to tax-exempt bond financing or may receive more contributions because the tax code provides an incentive for taxpayers to give.

Each of these mechanisms provides the federal government with differing levels of influence and oversight over nonprofit selection, performance, and accountability. With direct federal grants and contracts, and with some loans and loan guarantees, federal agencies generally select the nonprofit recipient, directly control the amount of funding provided, and generally monitor nonprofit performance. With other mechanisms, such as tax expenditures and fee-for-

service programs, the federal government sets criteria for acceptable recipients but does not directly select or monitor nonprofit performance.

GAO's analysis of the FY 2006 data on federal funding to nonprofit organizations indicates that grants were directly provided to nonprofits under roughly 700 different programs. Types of activities funded through direct grants to nonprofit organizations included social services and research. For example:

- The National Institutes of Health provides grants for extramural research to accomplish its mission related to public health needs. About 84 percent of its budget in Fiscal Year 2007 supported extramural research by researchers at various institutions, including nonprofit colleges and universities, research institutes, and hospitals.

- The Administration for Children and Families in the Department of Health and Human Services provides Head Start grants to nonprofit, as well as for-profit, entities. Public and private nonprofits can receive direct grants to provide educational, health, nutritional, and other services to low-income children and families.

- The Senior Community Service Employment Program, funded by the Department of Labor's Employment and Training Administration, provides grants to nonprofit organizations to provide subsidized, part-time work-based training to older workers through employment in the community service sector. Under this program, nonprofit organizations can also be beneficiaries of this subsidized labor.

Federal agencies also contract directly with nonprofit organizations to provide goods or services for the direct benefit of the federal government. Contracts are tracked in FPDS, which GAO found to be somewhat unreliable in categorizing entities as nonprofit, although suitable for providing some order of magnitude.

Due to limitations and reliability concerns with tracking systems, the data presently collected provide an incomplete and unreliable picture of the federal government's funds reaching the nonprofit sector through various mechanisms, although they suggest these funds were significant in FY 2006. Funding data sources identified the following as approximate amounts of federal funds provided to nonprofits in 2006 under different mechanisms (most sources did not reliably classify nonprofit status of recipients):

- $135 billion in fee-for-service payments under Medicare
- $10 billion in other types of fee-for-service payments
- $25 billion in grants paid directly to nonprofits
- $10 billion paid directly to nonprofits for contracts
- $55 billion in federal funds paid to nonprofits by states from two grant programs, including Medicaid

GAO could not assess other programs.

In addition, approximately $2.5 billion in loan guarantees and $450 million in loans were issued to nonprofits, and approximately $50 billion in federal tax revenues were foregone due to tax expenditures related to nonprofits.

No central source tracks federal funds passed through to an initial recipient, such as a state, and the nonprofit status of recipients was not reliably identified in FPDS or FAADS.

Factors contributing to data limitations include the nonprofit status of recipients being self-reported and no consistent definition of "nonprofit" across data systems. The development of a system to report funding through sub-awards, currently underway, may enable more complete estimates of funding to the sector in the future. However, until the definition of nonprofit status is improved, accurately determining the extent of federal funds reaching the sector is not possible, leaving policymakers without a clear understanding of the extent of funding to, and importance of, key partners in delivering federal programs and services.

To ensure that accurate information on federal funding provided to nonprofit entities is available, GAO recommended that the Office of Management and Budget (OMB), which is responsible for the tracking website USAspending.gov, ensure that its funding information is categorized with a consistent definition of nonprofit organizations. OMB commented that while GAO's recommendation would likely ensure more consistent data, it could be burdensome for states tracking sub-award data. As USAspending.gov is expanded and enhanced, GAO believes this is an opportune time to explore ways to improve the reliability of sub-award data.

OMB also said that using the Central Contractor Registration (a database used to support registration for procurement awards that is now being expanded to include grants and other forms of financial assistance) would likely offer a consistent way to validate IRS tax-exempt status. It noted, however, that this could also increase the resource burden on states.

Foundation Watchdog Releases Report on Enhancing Impact of Philanthropy

The National Committee for Responsive Philanthropy (NCRP), a national foundation watchdog organization, recently released a report titled *Criteria for Philanthropy at its Best: Benchmarks to Assess and Enhance Grantmaker Impact*. The report sets forth four criteria and ten accompanying benchmarks to act as recommendations on how grantmakers should improve their giving and management.

NCRP developed the criteria after "rigorous research, literature reviews, original data analysis and robust debates among some 50 people over 15 months." The criteria are intended to serve as a way for foundations to have the utmost impact on society, with a set of measurable guidelines that funders can use.

Criteria for Philanthropy at Its Best focuses on four criteria; values, effectiveness, ethics, and commitment. Each area has its own set of benchmarks on issues such as payout for grants, general operating support, board composition, advocacy, disclosure, mission investing, and support for underserved communities. The NCRP press release states that the report "is the first ever set of measurable guidelines that foundations and other institutional grantmakers can use to maximize their contributions to society and to make a positive difference in the world today."

The benchmarks include recommendations such as providing 50 percent of grant dollars for general operating support, 25 percent to support advocacy efforts, 25 percent of assets in investments related to the foundation's mission, and disbursing a total of six percent of assets in grants each year.

The benchmark calling for 25 percent of grant dollars to go to advocacy, organizing, and civic engagement is reassuring to a wide variety of nonprofit advocacy organizations. The benchmark's language is strong and direct: "Advocacy and policy work are integral to the country's nonprofits' role of providing a 'voice to the voiceless,' making this work all the more resonant for many institutional grantmakers that seek to impact the structures and systems that can move American society closer to equality of achievement."

In addition, the discussion of advocacy seems to be interchanged with social justice. The authors define social justice philanthropy as "the practice of making contributions to nonprofit organizations that work for structural change and increase the opportunity of those who are less well off politically, economically and socially." However, many causes that groups advocate for do not fit into this description.

Another benchmark, under the "Values" criteria, encourages foundations to provide at least 50 percent of their grant dollars to benefit lower-income communities, communities of color, and other marginalized groups, broadly defined. NCRP defines "marginalized or vulnerable" as groups including "economically disadvantaged, racial or ethnic minorities, women and girls, people with AIDS, people with disabilities, aging, elderly, and senior citizens, immigrants and refugees, crime/abuse victims, offenders and ex-offenders, single parents, and LGBTQ citizens." Thirteen percent of the foundations NCRP examined meet this benchmark.

It is this benchmark that has caused the most controversy. While many see it as necessary and valuable to support underserved communities, especially at a time of economic hardship, they also worry about setting such mandates for all of philanthropy. Many are also concerned about the independence of the sector and the ability of foundations to support issues they care about.

For example, the Council on Foundations has not endorsed the criteria, and president Steve Gunderson issued a press statement regarding the report. "While the Council on Foundations shares NCRP's goal of building a strong sector, we reject the use of a single template to promote effective philanthropy," said Gunderson. "Each foundation is different in its structure, mission, place of work, and pursuit of goals."

Paul Brest, president of the William and Flora Hewlett Foundation, was also critical and wrote an article in the *Huffington Post* to express his frustrations. Brest noted, "Even for someone who shares NCRP's concerns about marginalized communities, its hierarchy of ends is breathtakingly arrogant."

The last three areas of criteria and their benchmarks include:

Effectiveness

- Provides at least 50 percent of its grant dollars for general operating support
- Provides at least 50 percent of its grant dollars as multi-year grants
- Ensures that the time to apply for and report on the grant is commensurate with grant size

Ethics

- Maintains an engaged board of at least five people who include among them a diversity of perspectives – including of the communities it serves – and who serve without compensation
- Maintains policies and practices that support ethical behavior
- Discloses information freely

Commitment

- Pays out at least six percent of its assets annually in grants
- Invests at least 25 percent of its assets in ways that support its mission

Rep. Xavier Becerra (D-CA), a member of the House Ways and Means Committee, supports the recommendations. Becerra said the criteria will help members of Congress examine how foundations are performing, and some members may call for hearings to explore how foundations are spending their money.

NCRP executive director Aaron Dorfman said that the organization is not seeking greater regulation of foundations but will be sending the report to lawmakers. He added that the criteria are meant to start a discussion and to provoke debate. NCRP will also soon have available an online a self-assessment for foundations to use.

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Obama's Agenda Faces Challenges in Congress

President Barack Obama proposed an ambitious agenda when he unveiled his budget outline at the end of February. In addition to significant funding increases for many key public investments including housing, education, and job training, the president also put on the table landmark legislation that would provide universal health care and begin addressing global climate change. There are, however, a number of obstacles that may hinder the implementation of the president's agenda. During the week of March 16, the Congressional Budget Office (CBO) revised its deficit projection upward, and fiscally conservative senators and representatives noted their intent to hamper the president's efforts through parliamentary procedure. As Congress begins drafting its budget plans, it remains uncertain whether it will include all of the president's spending proposals.

Although his proposals to provide universal health care and curb greenhouse gas emissions have garnered much attention in the media and Congress, the rest of Obama's budget would

provide a funding increase to many human needs programs that have seen real (inflation-adjusted) cuts since 2005. The 7.3 percent increase in discretionary funding proposed in the president's budget, while seemingly large, would not represent expansions in these priorities but would largely fill in gaps in funding that have grown since 2005. An analysis by the Coalition on Human Needs of the funding levels for some 100 programs since 2005 shows that only 22 saw real funding increases over that time period. And while these programs greatly mitigate the hardships of many families facing difficulties in the crumbling economy, the din of outcries over the rising budget deficit will hamper Congress's ability to fully fund these investments.

Attention to the scale of the rising federal budget deficit came into sharp focus on Friday, March 20, when CBO released its analysis of the president's budget. Not only did CBO revise its estimate of FY 2009's deficit upward by $481 billion to $1.76 trillion (and that of FY 2010 from $703 billion to $1.14 trillion), but the nonpartisan office's estimates are higher than those enumerated in Obama's budget. While Obama projects a cumulative deficit over 10 years of $6.97 trillion, CBO predicts that number would be $9.27 trillion – a $2.3 trillion discrepancy – should Congress adopt all of the president's proposals. CBO notes that these differences "stem from underlying baseline differences rather than from varying assessments of the effect of the President's policy proposals" and that "[e]conomic and technical factors affecting revenue projections account for the largest part of those baseline differences." Regardless of the causes of the differences, CBO's figures have shifted the national priority-setting debate to potential post-war record-setting deficits.

Senate Budget Committee Chair Kent Conrad (D-ND) began setting expectations for that chamber's Budget Resolution on March 20 by saying, "The reality is we are going to have to make adjustments to the president's budget if we want to keep the deficit on a downward trajectory." Ranking member Judd Gregg's (R-NH) tone was somewhat less moderate as he predicted that the "shocking" levels of debt caused by the president's plan would "devastate future economic opportunities for our children and grandchildren." Although emphatic opposition from Republicans is to be expected, Obama cannot rely on full Democratic congressional support. The 51-member, fiscally conservative House Blue Dog Coalition released a set of budget principles on Thursday, March 19 that would hold domestic discretionary spending growth at the rate of inflation, setting the stage for an uphill battle in Congress for Obama's budget priorities. Yet, Federal Reserve Chairman Ben Bernanke sees the federal budget deficit as the lesser of two evils. Speaking before the Senate Budget Committee on March 3, Bernanke testified that:

> ...our economy and financial markets face extraordinary challenges, and a failure by policymakers to address these challenges in a timely way would likely be more costly in the end. We are better off moving aggressively today to solve our economic problems; the alternative could be a prolonged episode of economic stagnation that would not only contribute to further deterioration in the fiscal situation, but would also imply lower output, employment, and incomes for an extended period.

The president, however, has an ally in grassroots support for his plan. Working together as the Campaign for Rebuild and Renew America Now, over 100 progressive organizations, including OMB Watch, are reaching out to their constituents to "support and build upon the President's budget priorities" and "strongly urge Congress to follow the priorities set forth in the President's blueprint." And in an unprecedented bid to marshal the full support of congressional Democrats, Obama has reconstituted his network of campaign volunteers as Organizing for America. Obama is hoping that this "next phase" of the network created for his campaign will provide a similar level of support for his policies, starting with his budget. A crucial test of these groups' effectiveness will come in the weeks ahead, as Congress begins work on its spending blueprint – the Congressional Budget Resolution.

On March 25, both House and Senate Budget Committees will begin marking up their respective resolutions. Floor action on these resolutions could come as early as the week of March 30. While the president's agenda may be scaled back somewhat, much debate will revolve around a procedural mechanism by which the Senate can pass spending and tax legislation without needing to overcome the usual 60-vote hurdle. The mechanism, called the "Budget Reconciliation Process" or just "reconciliation," would allow Congress to pass contentious budget-related programs like a greenhouse gas-reducing "cap-and-trade" scheme or a universal health care program. The president's budget director, Peter Orszag; House Speaker Nancy Pelosi (D-CA); and Senate Majority Leader Harry Reid (D-NV) refuse to rule out reconciliation as an option, but eight Democratic senators have informed the Senate Budget Committee that they oppose such a move as a vehicle for a cap-and-trade program. While Congress's failure to use the reconciliation process to advance Obama's agenda is by no means a defeat for those programs, it does signal that Congress is not in lock-step with the president and that moving his agenda will take effort, time, and pressure from an engaged citizenry.

The Toxics Release Inventory is Back

On March 11, President Barack Obama signed into law a restoration of the Toxics Release Inventory (TRI), reversing changes made by the Bush administration that had weakened the program. The measure was included deep within the Omnibus Appropriations Act of 2009 and restored the rules that existed before the U.S. Environmental Protection Agency (EPA) weakened them in December 2006.

The change lowers the thresholds for reporting releases of more than 650 toxic chemicals and requires that releases of persistent bioaccumulative toxins (PBTs) always be reported in detail. The EPA is now implementing the new thresholds for reports being submitted for calendar year 2008 and will soon issue a rule revising the regulatory text to reflect the changes.

The restoration of TRI is the culmination of years of efforts by hundreds of organizations and thousands of individuals nationwide. When the Bush administration first proposed raising the amount of pollution companies could release before they had to disclose it, the public's reaction was overwhelmingly in opposition. Of the 122,420 comments received by EPA, 99.97

percent were opposed to the proposed rule. Only 34 commenters expressed some level of support for the proposals. However, the EPA ignored the public's will and finalized the rule change. Soon after, 13 states sued the EPA to eliminate the new rules and return to the previous thresholds.

Sen. Frank Lautenberg (D-NJ) and Rep. Frank Pallone (D-NJ) have previously introduced legislation to overturn the EPA's action, but their stand-alone legislation was never able to reach a full vote. It is likely the Bush administration would have vetoed such legislation even if it had passed. Pallone and Lautenberg included language in the omnibus spending bill to improve the chances of success.

OMB Watch worked in coalition with a host of other organizations to stop the TRI rollback and then to restore the reporting rules following the Bush EPA's decision. Most recently, OMB Watch teamed with U.S. PIRG to send a letter to EPA Administrator Lisa Jackson, urging her to settle the lawsuit and restore the reporting thresholds. The letter was signed by 237 national, state, and local organizations and more than 1,300 individuals.

2007 Data Released to Public

On March 19, one week after the passage of the measure restoring the TRI reporting thresholds, the EPA released the data from 2007 TRI reports.

Jackson announced, "This information underscores the need for fundamental transparency and provides a powerful tool for protecting public health and the environment." Jackson also commented on the TRI reporting rules, saying she is "pleased that Congress under the leadership of Senator Lautenberg took action to restore the rigorous reporting standards of this vital program."

The public release of data from 2006 occurred on Feb. 21, 2008, almost one month earlier than this year's release of 2007 data. EPA officials said they had hoped to release the 2007 data as early as January but wanted to allow the Obama administration and the new EPA administrator time to review the process beforehand. Facilities had until July 2008 to submit their reports of 2007 releases. Many environmental right-to-know advocates have been pushing EPA to release the data to the public sooner.

According to the EPA's analysis, almost 4.1 billion pounds of toxic chemicals were released into the environment or otherwise disposed of in 2007, a decrease of five percent since 2006. Releases to air decreased seven percent, and releases to water decreased five percent.

For 2007, 21,996 facilities reported to TRI. This is the seventh year in a row that the number of facilities reporting their toxic releases declined. It is not clear whether all facilities that should be reporting to TRI have been doing so. TRI program staff have indicated that the EPA will try to identify the driving forces behind this downward trend.

Metal mining and electric utilities account for the majority of releases (53 percent), and since 2006, the two industries have experienced decreases of eight percent and one percent, respectively.

Releases of PBTs increased one percent, driven largely by an increase in releases of lead and by releases from a "handful of facilities." Three metal mines were responsible for the bulk of a 38 percent increase in releases of mercury, a PBT.

On-site releases of toxic chemicals to land accounted for 44 percent of total disposals and other releases in 2007, and releases to air accounted for 32 percent.

The TRI program, instituted in 1987, collects information on disposal and releases of more than 650 toxic chemicals. The program does not require any reductions in releases or use of toxic chemicals but has been credited with reducing releases through pressure from the public disclosure of pollution.

The 2007 TRI data are now available on OMB Watch's Right-to-Know Network.

New FOIA Memo, Hot Off the Press

On March 19, the Obama administration issued a new set of guidelines to federal agencies on implementation of the Freedom of Information Act (FOIA), replacing Bush-era rules that many thought promoted a culture of secrecy in government. Written by Attorney General Eric Holder, the Department of Justice (DOJ) memorandum outlines a spirit of transparency that reflects President Obama's Jan. 21 assertion, "In the face of doubt, openness prevails."

The new memo reflects but builds upon an October 1993 memorandum from Clinton administration Attorney General Janet Reno. Among other things, Holder's memo promises to defend agency decisions to withhold information only if the agency demonstrates a reasonably foreseeable risk of harm to an interest protected by FOIA exemptions or statutory law. Further, the memo focuses on timeliness, declaring that "long delays should not be viewed as an inevitable and insurmountable consequence of high demand."

FOIA guidance is traditionally issued by the attorney general at the beginning of a new administration. For example, guidance was provided in May 1977 by Attorney General Griffin B. Bell, in May 1981 by Attorney General William French Smith, and in October 1993 by Reno. The most recent prior FOIA guidance was issued by former Attorney General John Ashcroft in October 2001.

Ashcroft's memo instructed agencies that in the face of doubt, secrecy was to prevail. Ashcroft guaranteed that the DOJ would defend agency decisions to withhold information so long as they were made on a sound legal basis. Most agencies perceived the language of the Ashcroft memo to support and encourage the application of FOIA exemptions to withhold information.

The Reno memo that Ashcroft replaced called for "presumption of disclosure." The objective Reno wanted to achieve was "a maximum responsible disclosure of government information – while preserving essential confidentiality." Reno also warned the agencies that the DOJ would only defend the withholding of information where "the agency reasonably foresees that disclosure would be harmful to an interest protected by that exemption." In other words, the Reno policy was to disclose information if there was no foreseeable harm, even if there might be an argument to be made that it could legally withhold disclosure under one of the FOIA exemptions. Reno's DOJ further encouraged agencies to make “discretionary disclosures” in order to relieve agency burden in processing FOIA requests.

The Ashcroft memo flipped the Reno standards. Ashcroft noted that compliance with FOIA is only one "value" of importance to DOJ. Other values include "safeguarding our national security, enhancing the effectiveness of our law enforcement agencies, protecting sensitive business information and, not least, preserving personal privacy." Ashcroft described the importance of allowing the federal government to operate outside of public scrutiny and emphasized the importance of FOIA exemptions to withhold such information.

The Ashcroft memo replaced the Reno "foreseeable harm" approach to withholding information with a "sound legal basis" standard for disclosure. The Ashcroft memo was a major blow to transparency. The increased secrecy caused FOIA requests to back up and be processed less efficiently, cost taxpayers millions in review expenses, and hid government waste and other abuses of the public trust.

How are the Obama administration FOIA guidelines different?

The Holder document is a return to the Reno memo in significant ways. Holder has brought back the foreseeable harm clause and also encourages discretionary disclosure. However, Holder is clearly also attempting to do something new to change the culture of secrecy that plagues the federal bureaucracy.

In the Holder memo, the language on enforcement is striking. In response to poor performance reviews on FOIA compliance, Holder mandates that agencies "must address the key roles played by a broad spectrum of agency personnel" in order to reduce "competing agency priorities and insufficient technological support." Moreover, he orders that the chief FOIA officers of each agency recommend adjustments to agency practices, personnel, and funding as necessary. Thus, it appears the administration has recognized that the responsibility for public dissemination of information goes beyond the FOIA offices of each agency and that the chief FOIA officers have the responsibility to respond to inadequate resources. Holder also declares that "unnecessary bureaucratic hurdles have no place in the 'new era of open government' that the President has proclaimed."

The Holder memo also expands on the earlier discretionary disclosure language. Holder encourages agencies to not just make discretionary disclosures, but to do in so in anticipation of the public interest. This language aims to prevent agencies from being able to allege

compliance with the guidance but to do so by releasing irrelevant material. He also encourages the use of technology and publication on the Internet in making this type of disclosure.

The level of transparency secured or diminished by a FOIA memo is cyclical in nature. The instructions of any given memo vary by administration. The Ashcroft memo was not without precedent and reflected the earlier 1981 memo written by Smith. Some advocates believe that legislation is needed to further define and make consistent how agencies are to implement FOIA. However, this could backfire by codifying an interpretation of FOIA that agrees more with the Ashcroft presumption of secrecy than with Holder's presumption of transparency.

Efforts to Reform FDA Begin

President Barack Obama and Congress recently began efforts aimed at shoring up the Food and Drug Administration (FDA), an agency battered by recent consumer safety problems and declining resources. In a March 14 address, Obama named two officials he wants to lead the agency and announced the creation of a working group to propose food safety reforms. Congress is once again trying to craft legislation aimed at providing greater consumer protections and restoring resources to the agency.

Obama named Dr. Margaret Hamburg as his choice to lead FDA and Baltimore Health Commissioner Dr. Joshua Sharfstein as Hamburg's deputy. Hamburg is a former New York City health commissioner and served in President Clinton's Department of Health and Human Services. Industry, public interest groups, and congressional representatives praised Hamburg both for her qualifications and for her status as an outsider, according to a March 15 *Washington Post* article.

A March 14 White House press release states that the Food Safety Working Group "will be chaired by the Secretaries of Health and Human Services and the Department of Agriculture and it will coordinate with other agencies and senior officials to advise the President on improving coordination throughout the government, examining and upgrading food safety laws, and enforcing laws that will keep the American people safe." The need for the group stems from the increased incidents of illness from contaminated food and FDA's inability to inspect the 150,000 food plants and warehouses under its purview. Agriculture Secretary Tom Vilsack has been confirmed and is in place. Obama nominated Kansas Governor Kathleen Sibelius to head Health and Human Services (HHS), the department that houses FDA.

In his address, Obama indicated the agency has been underfunded and understaffed, which hinders FDA's food inspection capabilities. He pledged to "significantly increas[e] the number of food inspectors" at FDA.

FDA has faced the wrath of Congress and the public over problems with food and drug safety. Currently, the agency faces the salmonella contamination of peanut products made by the Peanut Corporation of America (PCA), which has left nine people dead and nearly 700

sickened since September 2008. The peanut product incident follows the salmonella contamination of peppers from Mexico in 2008.

The House Energy and Commerce Committee's Subcommittee on Oversight and Investigations conducted two hearings on the salmonella contamination incident. The first hearing was Feb. 11 and focused on the broad failures by government and private-sector inspectors, individual companies purchasing products from PCA failing to take active measures to ensure the safety of their suppliers, and PCA's failure to report contamination and stop selling its products after learning of the contamination.

The subcommittee held its second hearing March 19 on the role industry plays in regulating food safety in the context of the peanut products contamination. The three witnesses at the hearing represented companies using PCA's products, and all had assurances from PCA that its manufacturing plants passed safety inspections. PCA received superior ratings from the firm it hired to inspect its facilities at announced inspection times and passed the results of the inspections to its customers. All the companies had in place their own safety and quality assurance procedures that met or exceeded industry practices.

However, this system of inspections and quality control programs did not prevent the companies from withdrawing their products from circulation once they learned from government safety inspectors that their products were targets of investigations in the salmonella outbreak. PCA is now under investigation for "knowingly selling" contaminated peanut products, which has resulted in the largest food recall in U.S. history, according to a March 20 *Washington Post* article on the hearing. (A list of the recalled products is available on FDA's website at http://www.fda.gov/oc/opacom/hottopics/salmonellatyph.html.)

One of the witnesses, David Mackay, president and chief operating officer of Kellogg Company, proposed the most far-reaching recommendations during the hearing. The recall of Kellogg's products cost the company between $65 and $70 million, and Mackay argued that cost is a direct result of not being able to manage for the presence of unscrupulous companies that can circumvent quality assurance mechanisms and government oversight. His testimony called for a single food safety agency with broad research and oversight responsibilities complimented by a permanent advisory council of government and industry experts to enhance "science-based food safety policies and standards." He argued that all food manufacturers, in an effort to prevent outbreaks, should be required to conduct risk analyses and develop food safety plans that FDA would review. Also, Mackay said FDA should inspect annually all high-risk food manufacturers and should be given mandatory recall authority so that delays in getting contaminated products off store shelves can be minimized.

Although the other witnesses did not provide specific lists of recommendations, under questioning from subcommittee members, they supported more rigorous regulatory approaches than currently exist. For example, all of the witnesses supported having unannounced inspections and requirements to supply the results of those inspections to FDA. They also supported accreditation of third-party testing companies and mandatory testing of high-risk products and reporting of negative test results. One witness thought FDA had

sufficient resources to carry out its responsibilities, but the other two witnesses did not think the agency had the necessary resources to provide adequate safety.

Many of these recommendations, and many others, are contained in numerous food safety bills that have been introduced in Congress this session. The bills address such issues as creating a single food safety agency, a food tracking system to trace the origins of products, enhanced risk-based inspection systems with mandatory testing and reporting, and enhanced authority and enforcement powers for federal agencies with food safety responsibilities. Congress, the administration, many businesses, and the public are aligned in favor of an enhanced regulatory system to help ensure the safety of the food supply. The costs of inaction are great to both business and the public. It remains to be seen if a set of meaningful reforms will follow from the broad support that currently exists.

OSHA Agenda Will Include Diacetyl, Secretary Says

Secretary of Labor Hilda Solis announced that the Occupational Safety and Health Administration (OSHA) intends to limit workers' exposure to the food flavoring chemical diacetyl. Diacetyl regulation was one of the many worker protection issues left unresolved by the Bush administration.

Diacetyl is a chemical compound used to give foods like microwave popcorn a buttery flavor. Exposure to diacetyl can cause the onset of *bronchiolitis obliterans,* a degenerative and potentially fatal lung disease. In July 2006, labor unions petitioned OSHA to issue an emergency standard to protect exposed workers, but OSHA denied the request.

Pledging faster action on regulation, Solis said March 16, "It is imperative that the Labor Department move quickly to address exposure to food flavorings containing diacetyl." She called deaths stemming from diacetyl exposure "preventable."

Solis also announced that OSHA has withdrawn the Bush administration's early plans for regulating diacetyl. In January, OSHA published an Advanced Notice of Proposed Rulemaking (ANPRM) that merely describes the issue of diacetyl exposure and asks for insight from commenters. The notice does not propose policy solutions for limiting exposure.

Solis said withdrawing the Bush-era document is critical to moving forward on a more aggressive path. By cutting the ANPRM step from the process, OSHA can begin to navigate through other requirements it must satisfy before issuing a formal regulatory proposal.

Workers may witness a renewed and more aggressive OSHA under President Obama. Obama's budget outline, released in February, would increase OSHA funding, "enabling it to vigorously enforce workplace safety laws and whistleblower protections, and ensure the safety and health of American workers."

Obama has yet to announce his nominee to lead OSHA. Solis was formally sworn in as Labor Secretary March 13.

Under President Bush, OSHA made little progress in writing new occupational safety and health regulations. The agency's Unified Agenda of Federal Regulatory and Deregulatory Actions – a semiannual publication federal agencies prepare to announce upcoming and recently completed rules – shows dozens of rules stuck in the regulatory pipeline. (See graphic below.) Some potentially life-saving regulations, like one to protect construction workers in confined spaces or another to limit exposure to silica dust, have languished at the agency for more than a decade.

Meanwhile, new and pressing occupational health and safety issues, such as diacetyl, have lengthened OSHA's queue of regulatory obligations. For example, OSHA in 2008 announced its intent to set new safety requirements for tree care and maintenance workers. Falls and machinery accidents cause dozens of deaths in the industry each year, according to OSHA. Like diacetyl, OSHA issued an ANPRM for tree care safety but has not projected when it will take action.

The slow pace of OSHA rulemaking can at least partially be attributed to the many requirements imposed by overarching laws and executive policies intended to govern federal rulemaking. Like other agencies, OSHA must solicit public comments on rules (under the Administrative Procedure Act), submit rules to the White House for review (under Executive Order 12866), and analyze a rule's impact on a variety of subpopulations, public sectors, and private industries. Unlike other agencies, OSHA has its own hybrid rulemaking process than can add another layer of complexity.

In addition, OSHA (and the U.S. Environmental Protection Agency) is required by the Small Business Regulatory Enforcement Fairness Act (SBREFA) to convene panels of small business representatives to assess a regulation's potential impact on the regulated community. These panels get a sneak peak at regulations under development, and their comments and suggestions are often incorporated before the proposals ever reach the public. The SBREFA panel process can take years.

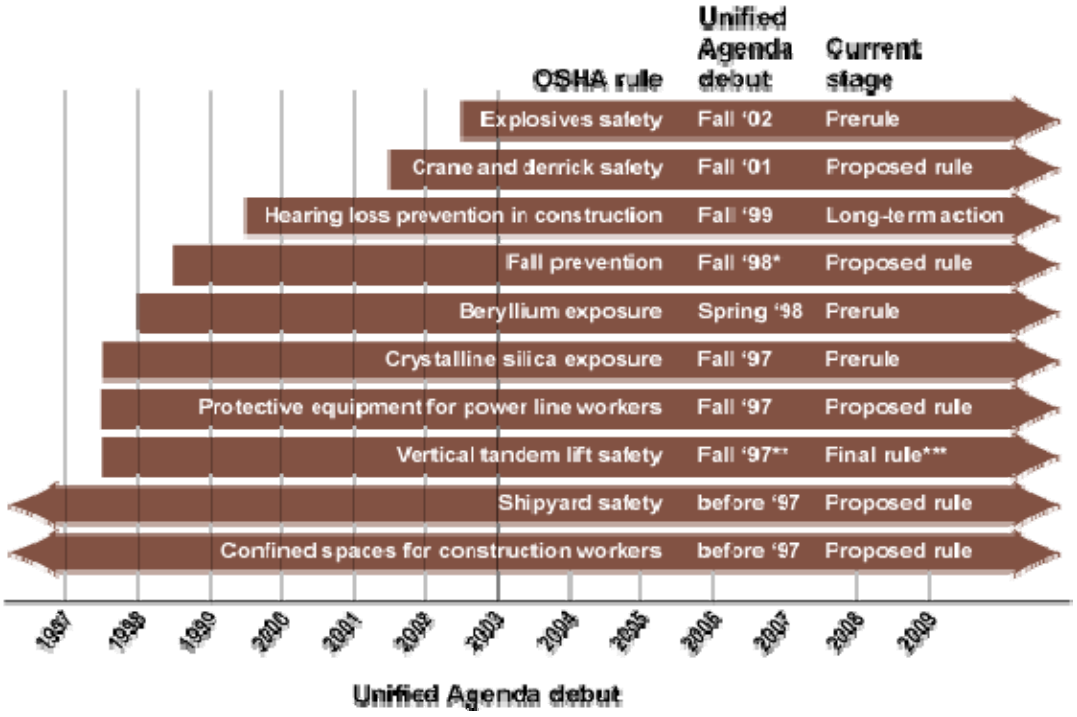
OSHA will conduct the SBREFA panel for diacetyl differently than previous administrations have by making the process more transparent. OSHA will place the advanced copy of the regulatory proposal, usually reserved for the panels, in the public docket. OSHA will also make SBREFA panel meetings open to the general public.

Stuck in the pipeline: OSHA rulemakings six years and older

Twice per year, in the fall and spring, federal agencies publish their Unified Agenda of Federal Regulatory and Deregulatory Actions, which announces regulations in any stage of development and those recently completed. Agencies generally place upcoming rules into one of four categories: pre-rule, proposed rule, final rule, or long-term action.

OSHA has consistently failed to make progress on regulations identified in its Unified Agenda. As a result, OSHA regulations needed to ensure worker health and safety have gone unfinished, as this graphic shows.

All information in this graphic is based on OSHA Unified Agendas from 1995-2008. (Older Unified Agendas are not available online.) The most recent version, which was published Nov. 24, 2008, is available here.



Notes:

- *OSHA first proposed a fall prevention rule in 1990 but allowed the rulemaking to remain dormant. In 1998, the issue again began to appear as an entry in OSHA's Unified Agenda.
- **OSHA addressed vertical tandem lifts by reopening another rulemaking related to longshoring. OSHA's intent to reopen first appeared in the Fall 1997 Unified Agenda.
- ***OSHA published the final rule Dec. 10, 2008.

Court Decision Will Have Impacts on Voting Districts

On March 9, the U.S. Supreme Court issued a decision in *Bartlett v. Strickland* that will impact voting districts nationwide. In *Bartlett*, the Court held in a 5-4 plurality decision that Section 2 of the Voting Rights Act of 1965 does not require state officials to draw election lines to create a crossover district when racial minorities comprise less than 50 percent of the district's voting-age population.

A crossover district is a district in which racial minorities are a significant percentage of the population, although less than 50 percent, and can elect their candidate of choice when some members of the majority population cross over and support their preferred candidate. A plurality decision is one in which some of the justices in the majority agreed with the outcome, but not with the reasoning. In *Bartlett*, three justices formed the plurality, and two additional justices concurred with the outcome but not the reasoning.

In *Bartlett*, the North Carolina legislature created a geographically compact district in which African Americans made up 39 percent of the district's voting age population. The legislature stated that its purpose was to comply with Section 2 of the Voting Rights Act. The district that the legislature drew crossed over county lines, which violated the "Whole County Provision" of the North Carolina Constitution. A federal statute such as the Voting Rights Act, however, takes precedence over the state constitution. The crossover district did, in fact, result in an African American being elected to represent the area in the state legislature. The U.S. Supreme Court affirmed the North Carolina Supreme Court's decision that "a minority group must constitute a numerical majority of the voting-age population in an area before Section 2 requires the creation of a legislative district to prevent dilution of that group's vote."

This narrow view of Section 2 may impact voting districts nationwide. While the "Whole County Provision" is unique to North Carolina, any state that has created a district in which a minority group is less than 50 percent of the population may see that district challenged.

In New Jersey, the state Republican Party is considering filing suit to have New Jersey legislative boundaries declared unconstitutional. Every 10 years, New Jersey redraws its legislative districts to make them equal in population based on the latest Census. The boundaries were last redrawn in 2001. The process was very contentious, as large, urban, heavily minority areas in Newark and Jersey City were combined with suburban areas, which resulted in more Democrats being elected. The state Republican Party filed suit, claiming that the "Democratic map violated the U.S. Constitution and the 1965 Voting Rights Act by 'diluting' the black vote," according to the *Star Ledger*. The state supreme court ruled against them. Mark Sheridan, general counsel to the New Jersey Legislature's Republicans, told the *Star Ledger* that the state map is unconstitutional. Donald Scarinci, Democratic counsel to the last redistricting commission, told the *Star Ledger* that additional court action has little chance of succeeding. He also said the map increased the number of minority legislators.

The biggest impact from the U.S. Supreme Court decision may occur after the 2010 Census, when legislatures across the county will use the Census results to redraw district boundaries. This is when districts that are geographically compact and in which minorities are a significant population, but not the majority, may be redrawn to diminish the possibility of electing a minority representative. Some states may have drawn heavily minority legislative districts solely because they were under the impression that Section 2 required it. However, *Bartlett* makes it clear that states are not required to consider race in drawing legislative districts where racial minorities are not the numerical majority. While they are still permitted to do so (unless it is prohibited for another reason, such as North Carolina's "Whole County

Provision"), it remains to be seen how many states will choose to ensure that minorities are adequately represented without a federal requirement.

Redistricting battles have already begun to heat up in some states, such as Ohio. The board that currently decides Ohio legislative boundaries has five members – the governor, state auditor, secretary of state, a member appointed by the majority party's leaders, and a member appointed by the minority party's leaders – according to the *Cincinnati Enquirer*. This composition currently gives Democrats the majority on the board. Two Republican state senators have introduced a bill that would add more Republicans to the board. This is the type of Census-related redistricting battle that is starting to heat up, even without adding the newly restrictive version of Section 2 into the mix.

As a result of the *Bartlett* decision, it is more important than ever for nonprofits to ensure that underrepresented communities are adequately counted in the 2010 Census. The Nonprofit Voter Engagement Network (NVEN) recently announced the national kickoff of their *Nonprofits Count! 2010 Campaign* initiative. NVEN will soon be launching a website for the campaign, www.nonprofitscount.org, and will be hosting a webinar on April 1 on the role that 501(c)(3) organizations can play in the 2010 census.

Nonprofits and Obama's Lobbying Rules

On Jan. 21, President Barack Obama issued an executive order to stop the influence special interests have had in government and to close the revolving door between government service and financial rewards in the private sector. One aspect of the Obama order puts limits on lobbyists serving in government. These limits appear to be having unintended consequences for employees of nonprofit organizations, specifically those registered as lobbyists and working in the public interest.

For those who register to lobby under the Lobbying Disclosure Act (LDA) within two years of working for the administration, the order prohibits the individual from participating in any matter on which the person lobbied within the previous two years or from working for an agency that the person lobbied within the last two years. The order also includes a provision to allow waivers from these requirements if, for example, the lobbying was in the public interest or if there has been minimal executive branch lobbying.

There are at least three problems that nonprofit organizations have identified. First, there has been no guidance on the definition of executive branch lobbying. Accordingly, it has been rumored that senior nonprofit leadership interested in possibly working for the Obama administration have avoided policy meetings with Obama officials for fear that such meetings might be construed as executive branch lobbying and trigger the two-year waiting period. This deprives the Obama administration of important insight.

Second, many employees within nonprofit organizations have been registered under the LDA even if they are below the required reporting thresholds. Since the LDA is simply a disclosure

law, most nonprofit organizations felt it wise to err on the side of full disclosure, especially since they disclose lobbying information on annual tax forms.

A consequence of the order is that many groups, including nonprofits, are either deregistering or restricting their lobbying activities so that they are eligible to serve in the Obama administration. According to *The Washington Post*, "More than 700 lobbyists or lobbying groups have filed 'de-registration' papers with the House and Senate since Obama took office, including scores of charities and other nonprofits. [. . .] Many of the groups and their representatives feel particularly stung because they registered as lobbyists even when it was not required, either as a demonstration of their influence or to err on the side of caution in complying with transparency rules." Stephen Rickard, Washington director of the Open Society Institute, said, "They were not trying to say that if you were lobbying to stop the genocide in Darfur, you're not going to be able to work for us. . . . If you're in nonprofit advocacy, there is a very good chance you want to work for Barack Obama."

The third problem with the rules is that the Obama administration seems to be using the waiver authority sparingly. In fact, the widespread perception is that the Obama administration does not want to grant waivers in the aftermath of former Sen. Tom Daschle's nomination and withdrawal to run the Department of Health and Human Services.

The Washington Post reported that the administration said three waivers have been issued so far: William Lynn, deputy Defense secretary; Jocelyn Frye, Michelle Obama's director of policy and projects; and Cecilia Muñoz, White House director of intergovernmental affairs. Upon announcing two waivers, Norm Eisen, the president's chief ethics counsel, said in a White House blog posting on March 10 that waivers will be granted because "it is important to have reasonable exceptions in case of exigency or when the public interest so demands."

Even as the administration has identified only three waivers, the *National Journal* (subscription required) found that of 267 Obama nominees and appointees, at least 30 have been registered lobbyists at some point during the past five years.

The focus on registered lobbyists has caused controversy for the Obama administration. For example, consider the numerous registered lobbyists that, according to disclosure reports, do very little direct lobbying. The Center for Responsive Politics (CRP) recently issued a report on such "stealth" lobbying. CRP found "nearly 19,000 reports totaling at least $565 million in payments to firms for their lobbying activities that was almost entirely unaccounted for. Last year, more than one in 10 filings were the equivalent of a single page – no issues listed, no lobbyists named, no government agencies contacted."

This raises an additional problem: a lack of disclosure about the waivers or executive branch lobbying. If waivers were used more and disclosed, the public would know whether the objective of the Obama order – stopping the influence of special interests – is being achieved. Disclosure can also play an important role in addressing executive branch lobbying. A small step to such a requirement came the week of March 16 when Obama announced, "Any lobbyist who wants to talk with a member of my administration about a particular Recovery Act project

will have to submit their thoughts in writing, and we will post it on the Internet for all to see. If any member of my administration does meet with a lobbyist about a Recovery Act project, every American will be able to go online and see what that meeting was about."

It is disappointing that nonprofits may be scaling back their lobbying activities in hopes of working with the administration. The voice of public interest advocates is invaluable in the public policy arena in contrast to the boisterous, well-heeled corporate lobbyists. Possibly, with such disclosure by all parties, guidance on what executive branch lobbying includes, and clarity on when waivers can be employed, the government and the public would be able to tell the difference between public interest lobbyists and those of large corporations.

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House, Senate Pass Budget Resolutions

The House and Senate each passed their budget resolutions on April 2, mostly along party lines, before breaking for a two-week spring recess. The resolutions delineate approximately $3.6 trillion in spending for Fiscal Year 2010 and track closely with the major proposals outlined by President Barack Obama, including estimates of historic budget deficits. Those deficits could become significantly worse due to the adoption of an amendment in the Senate that calls for further cuts to the estate tax, benefiting the richest families in the country.

The House approved its version of the budget resolution on a vote of 233-196, the largest total supporting a resolution in the last twelve years, according to *The New York Times*. The House resolution calls for $1.27 trillion in discretionary spending, slightly less than Obama's budget request, and projects $3.95 trillion in deficits through 2014 – $747 billion less than if current

policies were extended, according to the Center on Budget and Policy Priorities and the Congressional Budget Office (CBO).

The House resolution also opens the door for using budget reconciliation to pass major health care and education reform later in 2009. Budget reconciliation is a fast-track procedure that limits the time for debate and amendment process for future legislation and also protects bills from filibuster in the Senate. The House budget resolution contains instructions for three committees to report legislation using reconciliation procedures.

On the other side of the Capitol, the Senate passed its resolution a few hours after the House by a 55-43 margin, with two Democrats – Sens. Evan Bayh (IN) and Ben Nelson (NE) – and all Republicans opposing the resolution. In total, the Senate plan would allocate $1.21 trillion in discretionary spending – about $60 billion less than the House – and excludes any language allowing for the use of reconciliation in 2009. It also projects $3.822 trillion in deficits through 2014, $878 billion less than if current policies were extended, according to the Center on Budget and Policy Priorities and the CBO.

The final vote on the resolution came after the Senate worked its way through hundreds of amendments, many of which were politically charged. One in particular, offered by Sens. Blanche Lincoln (D-AR) and Jon Kyl (R-AZ), would cut the estate tax for America's wealthiest heirs by increasing the size of estates that can be passed on tax-free to $10 million for a couple (and $5 million for an individual) and reducing the estate tax rate to 35 percent. The Lincoln/Kyl amendment was adopted in a close vote – 51-48. Shortly after, the Senate also passed an amendment from Sen. Richard Durbin (D-IL) that prohibits any estate tax cuts called for in the Lincoln/Kyl amendment unless an equally large tax cut is passed for Americans making under $100,000 per year. That amendment passed 56-43, with Lincoln voting for it.

Obama's budget and both the House and Senate budget resolutions already call for the extension of the 2009 estate tax levels, which allow estates valued less than $7 million for a couple (and $3.5 million for an individual) to pass tax–free, with any amount above that threshold being taxed at a maximum rate of 45 percent. The cost of this extension would not be offset in any of the budget proposals, and it is possible that the requirement to offset the additional and substantial costs of the Lincoln/Kyl amendment will be ignored. This amendment, therefore, could end up substantially increasing already historic deficit projections. The Center on Budget and Policy Priorities estimates the Lincoln/Kyl amendment could increase deficits by as much as $440 billion over the next ten years, compared with current law.

The Lincoln/Kyl estate tax amendment created more than a few seemingly contradictory statements from senators about the relative merits of deficit spending, tax cuts for the affluent, and helping those most in need during this economic downturn. Ironically, Sens. Bayh and Nelson, the two senators who opposed their own party's budget because they felt it was irresponsible, supported the Lincoln/Kyl amendment.

Because the House did not include language similar to the Lincoln/Kyl amendment in its resolution, and because Senate Majority Leader Harry Reid (D-NV) and Senate Budget

Committee Chairman Kent Conrad (D-ND) did not support the amendment, it is unlikely to appear in the final conference report of the budget resolution. That final conference report will need to be negotiated between the House and Senate, a process likely to last at least the next few weeks.

Congress Seeks to Limit National Security Letter Powers

On March 30, Congress took its first step toward reforming the USA PATRIOT Act when Reps. Jerrold Nadler (D-NY) and Jeff Flake (R-AZ) introduced the National Security Letters Reform Act of 2009 (H.R. 1800). The bill is designed to narrow the powers granted to the executive branch under the National Security Letter (NSL) provision of the Patriot Act. Public interest advocates contend that the NSL is only one component of the Patriot Act in need of reform.

The use of NSLs dates back to the Right to Financial Privacy Act of 1978, which gave the Federal Bureau of Investigation (FBI) authority to demand records about American citizens without judicial oversight. When it passed the Patriot Act in 2001, Congress greatly expanded executive branch authority to use the letters. Under the Patriot Act, the federal government may use the letters to collect information on individuals simply because those individuals may be relevant to an investigation. The letters are generally submitted to telephone companies, Internet providers, and financial institutions and effectively serve as subpoenas without the need for a warrant.

NSL Problems

Since the Patriot Act expanded the NSL authority, there have been allegations that the executive branch has abused the power, including imposing gag orders. Department of Justice (DOJ) Inspector General reports released in 2007 and 2008 concluded that the FBI both sought and obtained information "outside of the normal approval process" and that the FBI understated problems concerning the law enforcement agency's compliance with NSL restrictions. In hundreds of cases, poor record keeping prevented the inspector general from being able to tell if proper legal procedure had been followed.

Although the FBI attempted to reform its use of the letters by adding extra review processes and increasing personnel training, the efforts failed to effect any change. The 2008 inspector general report, which reviewed NSL activities for 2006 and assessed the FBI's corrective actions, still found eleven blanket NSLs that did not comply with Bureau policy and eight letters that imposed unlawful nondisclosure requirements. Further, the FBI failed to comply with the narrowed use of gag orders required by the Second Circuit Court of Appeals' ruling in *Doe v. Holder*.

Reforming the Patriot Act

The new legislation would increase judicial oversight of NSLs by limiting the gag order to 30 days and requiring that FBI requests for extensions of gag orders be made to a district court within any district that the investigation is taking place. Gag order extensions would be limited

to a total of 180 days. The legislation also requires that the FBI specially demonstrate how lifting the gag order would endanger evidence, the safety of an individual, or the national security of the United States. Moreover, anyone receiving a NSL would have the right to petition a court to modify or set aside the letter or to suppress the evidence gathered as a result of the letter. The legislation goes even further to require the destruction of information that is wrongly obtained by the FBI pursuant to an NSL request.

Similar legislation was considered by Congress in 2007. That bill was introduced in the Senate by Russ Feingold (D-WI) but never came up for a vote.

Civil liberties and government accountability groups have called for further reforms of the Patriot Act that go beyond addressing the NSL problems. The American Civil Liberties Union (ACLU) recently issued a report, *Reclaiming Patriotism: A Call to Reconsider the Patriot Act*, that calls for reform of the Material Support Statute that criminalizes various activities regardless of whether they are intentionally meant to further terrorist goals. Opponents of the material support statue complain that the provisions have reduced humanitarian aid to the Middle East as charities worry about possible prosecution if some individuals helped are in some way connected to terrorism. Also, the ACLU has sought to remove the ideological exclusion section of the law, which denies admission to foreign nationals who support political or social groups that endorse acts of terrorism. The contention is that such support is an expression of freedom of speech, not an illegal act.

New Energy on TRI at National Conference

The U.S. Environmental Protection Agency (EPA) is taking steps toward improving public access to pollution information and is seeking ideas from the public for improving the Toxics Release Inventory (TRI) program. During a national conference on TRI the week of March 30, the EPA presented several new tools for accessing and analyzing pollution data that will soon be available to the public. The TRI, a bedrock right-to-know program, has not been expanded since 2000, and EPA has been heavily criticized for its management of the program in recent years.

The EPA and the nonprofit Environmental Council of the States (ECOS) held the 2009 Toxics Release Inventory National Training Conference in Maryland. The theme of the conference was "Expanding Partnerships/Expanding Knowledge," and the agency repeatedly sought ideas from the attendees on how to enhance the TRI program, which collects and publishes data on the release or transfer of toxic chemicals by numerous industries nationwide. Discussions at the conference included adding new industries and new chemicals to the TRI program, releasing raw TRI data earlier, and restoring EPA's role as an advocate for reducing pollution.

For the first time since the creation of the TRI program, the EPA administrator addressed the conference. Administrator Lisa Jackson announced that EPA is "back on the job" and spoke to the importance of an open and transparent EPA. Jackson's presence underscored the agency's new attitude toward right-to-know issues.

In her remarks, Jackson mentioned the December 2008 *USA Today* articles that investigated potential health risks from toxic emissions near schools. Jackson presented the newspaper's use of TRI data as an example of the important impact the right-to-know program can have. EPA announced it will begin air monitoring around selected schools, partly in response to the reports. "People need knowledge so that they have the power to effectuate change at home," said Jackson.

Sean Moulton, OMB Watch's Director of Federal Information Policy, delivered the keynote address on the first public day of the event. Moulton outlined three tracks where the TRI program is ripe for improvement.

- First, EPA should increase the amount of information provided through TRI.
- Second, TRI data should be linked to other data, such as health impacts of chemicals and enforcement actions against companies.
- Third, EPA must reinvigorate its role as a pollution prevention advocate.

More details about these recommended enhancements will be available on OMB Watch's blog, *The Fine Print*, beginning April 7.

The risk screening model that EPA uses to identify important emission situations for follow-up action received a lot of attention at the conference. Several commenters, especially among industry representatives, emphasized limitations of the computer-based model. An oil industry-funded study seemed to identify inconsistencies between the model's analyses and real-world measurements. Other attendees appealed to the agency to meet its responsibility to use such tools, however flawed, to find and address potential public health hazards. The EPA administrator seemed to concur with the latter point when she cited favorably the *USA Today* reports, which used the same computer model to analyze TRI data.

New Access Tools

The EPA revealed several new features designed to expand the public's ability to examine and process TRI data.

The EPA has begun a multi-year arrangement with ECOS to develop a new online forum for TRI users to share analyses of TRI and other environmental data. The site, ChemicalRight2Know.org, will be launched publicly later this spring. According to previews of the website available at the conference, ChemicalRight2Know.org will showcase research and analyses using TRI data, new web applications, and "real world stories of people using TRI information." EPA also hopes the website will facilitate collaboration "on solving community chemical-related problems."

Two other new technical tools presented at the conference also look promising. The new TRI.net is a downloadable "data engine" that will allow advanced, ad hoc searches of TRI data and includes extensive mapping capabilities. The TRI Chemical Hazard Information Profile (TRI

CHIP) is a searchable database that contains toxicity data on TRI chemicals from multiple sources.

The EPA also announced plans to begin releasing TRI data much earlier than the agency has in prior years. In the past, it was common for the agency to release the data 15 to 18 months after the end of the calendar year. However, with 97 percent of TRI facilities submitting reports electronically, along with the agency separating the data release from its official analysis, the EPA hopes to release newly reported raw TRI data in late summer, just 7 or 8 months following the calendar year for which the data applies. The agency would update the data several times before it is finalized and processed for analysis. The early release should allow the public to identify troubling releases at local facilities much sooner.

In 2008, EPA surveyed certain public stakeholders about their information access needs. EPA's resulting Information Access Strategy highlights the calls for improving the public's ability to find and understand data and the need for more tools to use the data. EPA cited these responses as a driving force behind its new TRI efforts.

The new TRI-related websites and applications, the early release of raw data, and the outreach to interested groups and individuals signify a major change in the agency's posture toward public access. The Obama administration seems to have broken from the previous administration's approach and is making improving public access to environmental information a high priority.

High Court Rebuffs Environmentalists, Permits Cost-Benefit Analysis

The U.S. Supreme Court recently ruled 6-3 that the U.S. Environmental Protection Agency (EPA) can weigh costs against benefits under parts of the Clean Water Act. The court said EPA was not required to impose the most environmentally protective requirements on power plants that inadvertently kill millions of fish.

Writing for the majority, Justice Antonin Scalia concluded that EPA "permissibly relied on cost-benefit analysis" and noted that "whether it is 'reasonable' to bear a particular cost may well depend on the resulting benefits."

The April 1 ruling allows for the possibility that EPA could apply cost-benefit analysis to future Clean Water Act judgments. In the near term, the Obama administration will be responsible for implementing the Clean Water Act consistent with the ruling.

The EPA rule in question required existing power plants that use natural waters to cool their facilities to reduce the number of fish killed during water intake. In fleshing out the details of its rule, EPA weighed the benefits of fish conservation against costs industry would bear in meeting the new requirements.

In part because EPA attempted to balance costs and benefits, the rule was not as strict as conservationists had hoped. Those calling for a stricter standard cited the Clean Water Act, which calls on EPA to require facilities to adopt "the best technology available for minimizing adverse environmental impact" and faulted the agency for not requiring closed-cycle cooling systems, a technology that would save more fish.

When power plants withdraw water from natural sources, fish can become trapped on a plant's intake screen and die there from lack of oxygen and movement. "Every day, power plants in the United States withdraw over 214 billion gallons from U.S. water bodies to cool their facilities, and kill billions of fish and aquatic creatures in the process," according to Riverkeeper, an environmental group that brought the suit against the EPA.

Closed-cycle cooling systems, which EPA explicitly rejected, "reduc[e] the amount of water withdrawn and the number of fish killed by over 95 percent," according to Riverkeeper. Industry groups objected to a closed-cycle mandate, citing high costs.

Riverkeeper and others charged the rule was further weakened by a provision that would exempt individual facilities if they could show the costs of complying would significantly outweigh benefits to aquatic life. The provision set up a sort of case-by-case cost-benefit analysis.

Richard Lazarus, who argued the case on behalf of environmental groups, said the EPA's cost-benefit strategy was prohibited by the Clean Water Act: "Congress did not authorize EPA to decide that the benefits of minimizing adverse environmental impact did not justify the cost of available technology." He added, "EPA has no authority in any circumstance to decide that fish aren't worth a certain amount of cost."

The Court disagreed, ruling that cost-benefit analysis is an appropriate criterion for determining which technology is the "best" technology. "In common parlance one could certainly use the phrase 'best technology' to refer to that which produces a good at the lowest per-unit cost, even if it produces a lesser quantity of that good," Scalia wrote.

The Court did not rule that cost-benefit analysis is required under the Clean Water Act, only that it is not prohibited.

Scalia was joined in the majority by Chief Justice John Roberts and Justices Anthony Kennedy, Clarence Thomas, Samuel Alito, and in part by Justice Stephen Breyer. The case is *Entergy Corp. v. Riverkeeper, Inc.*

Although the court upheld EPA's use of cost-benefit analysis, the agency will still have to write new regulations to minimize the intake of fish. The Supreme Court's opinion overturned only a portion of an appellate court ruling that sent the rule back to the agency in January 2007. In response to the appellate ruling, EPA suspended the original rule.

Since the Supreme Court ruled that EPA maintains discretion over whether a cost-benefit analysis should guide the regulatory outcome, the Obama administration will have a significant

degree of latitude in deciding what new requirements to impose. "The current administration will now have to issue a new regulation that conforms to the 2007 decision of the U.S. Court of Appeals for the Second Circuit, as modified in one limited respect by [the April 1] Supreme Court ruling," according to Riverkeeper.

The use of cost-benefit analysis in regulatory decision making, especially in the field of environmental regulation, is contentious. Critics say cost-benefit analysis cannot effectively measure the benefits of regulation, especially those that cannot be translated into dollars and cents, while proponents say it prevents the government from moving forward on regulations that aren't worth the cost of compliance.

In an *amicus brief* filed by OMB Watch, Temple University law professor Amy Sinden wrote, "The application of formal CBA to environmental regulation rests on the untenable assumption that complex effects on ecological and human health can be quantified and expressed in dollar terms."

For the fish kill rule, "EPA had no way of valuing most of these broader ecological impacts, both because they involve processes that are only dimly understood by science, and because they involve goods and services not traded in markets," Sinden wrote. "Accordingly, EPA simply left most of these values off the balance sheet altogether."

In a dissenting opinion, Justice John Paul Stevens wrote, "Instead of monetizing all aquatic life, the Agency counted only those species that are commercially or recreationally harvested, a tiny slice (1.8 percent to be precise) of all impacted fish and shellfish."

Deferring to EPA's judgment

In deferring to EPA's judgment that cost-benefit analysis is allowed, the majority cited *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, a landmark case in judicial review of agency regulations, in which the Supreme Court decided that, if a statute is not clear, the Court should not substitute its judgment for that of the agency.

The majority determined that since the Clean Water Act does not expressly prohibit reliance on cost-benefit analysis, EPA deserves what has come to be known as *Chevron* deference. *Chevron* deference is predicated on the ideas that Congress delegates authority to agencies, with some understanding that agencies will need to decipher statutory ambiguity, and that agencies, not courts, possess relevant expertise on substantive policy issues.

However, the rulemaking record indicates that EPA may not have been the decision maker on the fish kill rule. EPA originally intended to require more stringent closed-cycle cooling systems for the nation's largest power plants, but the White House Office of Information and Regulatory Affairs (OIRA), which reviews and approves draft rules, stripped the requirement. OIRA also pressed EPA to include the provision that would allow facilities to opt out of complying with the rule if costs exceed benefits.

When the appellate court heard arguments in the case, OMB Watch argued, in an *amicus brief* by former Georgetown University law professor Lisa Heinzerling, that EPA deserved no deference. Heinzerling wrote, "The paper trail in this case makes clear that the Office of Information and Regulatory Affairs foisted on EPA an interpretation of the Clean Water Act that EPA itself had not developed." She added, "EPA should not be given *Chevron* deference for an interpretation that simply caves in to the will of [OIRA]."

OIRA's role was not mentioned in oral arguments before the Supreme Court or in the Court's opinions. The failure to consider the contentious atmosphere in which the rule was developed allowed the majority to grant EPA deference.

Failures in OSHA Program Linked to Workplace Fatalities

A new Department of Labor report is highly critical of a Bush administration program designed to improve workplace safety. The report links poor enforcement to the deaths of workers at high-risk facilities – the specific targets of the special program. Poor quality data and inadequate training, inspections, and enforcement plagued the program.

Labor's Office of Inspector General (OIG) conducted the program audit and prepared the report dated March 31, entitled *Employers with Reported Fatalities Were Not Always Properly Identified and Inspected Under OSHA's Enhanced Enforcement Program*. The focus of the report was the Occupational Safety and Health Administration's (OSHA) Enhanced Enforcement Program (EEP), initiated in 2003 to target employers who put their employees at risk of injury and death by being "indifferent" to their safety responsibilities. In 2008, the Bush administration modified the program criteria, resulting in fewer facilities being targeted by the program despite their past histories of indifference.

The program originally targeted the facilities because they committed violations that were serious and related to fatalities, they received citations repeatedly, or they failed to abate previously cited hazards. Once the facilities "qualified," they were to be the subjects of additional enforcement actions, such as more inspections and more stringent settlements with OSHA.

The OIG audited 325 federal inspections in the Atlanta, Dallas, and Chicago regions between Oct. 1, 2003 and March 31, 2008. Of those, 282 fell under the enhanced inspection program. The audit also included an analysis of OSHA's inspections from Jan. 1, 2008, through Nov. 19, 2008, after the 2008 criteria modifications.

The report contains nine findings regarding problems with OSHA's enforcement. For example:

- OSHA personnel did not properly classify 149 of 282 (53 percent) facilities in the audit, meaning that the facilities would not receive the proper range of actions under the EEP program, such as additional inspections.
- "OSHA generally did not inspect related worksites when company-wide safety and health issues indicated workers at other employer worksites were at risk for serious injury or

death. OSHA did not properly consider related worksite inspections for 226 of 282 (80 percent) sampled EEP qualifying inspections." Thirty-four of these employers were responsible for an additional 47 deaths at other facilities.

- OSHA failed to conduct required follow up inspections at 52 percent of the 282 qualified facilities. Five of the worksites had subsequent fatalities.

The OIG report addressed the question of whether the 2008 modified criteria actually had an adverse effect on providing worker protections. Under the modified program, the criteria for defining a facility that qualified for the EEP program was changed to include information about past violations and fatalities. Under the modifications, however, the number of facilities included in the EEP program actually dropped "and increased the risk that employers with multiple EEP qualifying and/or fatality cases may not be properly designated due to the lack of quality history data." The report states:

> Analysis of 2008 fatalities revealed 260 cases would not have been designated under the 2008 criteria, but would have qualified under the original EEP criteria. Because the fatalities occurred in 2008, 260 employers would not be subject to EEP activities and their employees may be at risk for injury or death before company-wide safety and health issues are addressed through OSHA enforcement.

According to an April 2 *Washington Post* article, the director of enforcement programs at OSHA sent a memorandum to OSHA's acting director March 19 indicating that the 2008 modifications resulted in a drop in the number of companies targeted by the program, from the peak of 719 in FY 2007 to 475 in FY 2008.

The OIG report concluded that overall, "full and proper application of EEP procedures" may have stopped or deterred hazards in facilities of 45 different employers where 58 deaths occurred. According to the report, an average of 5,680 workplace fatalities occur each year, citing these statistics from the Bureau of Labor Statistics (2008):

Year	**Fatalities**
2003	5,575
2004	5,764
2005	5,734
2006	5,840
2007	5,488

The report recommends the next OSHA administrator establish a task force to improve the program across the range of issues raised, provide better training to OSHA personnel involved in the program, and improve the agency's internal data management systems.

The OIG report should provide a significant benchmark against which to evaluate the Obama administration if OSHA continues the EEP. President Obama has not yet nominated a candidate

to lead the agency.

Recovery Act Memo May Restrict Free Speech Rights

On March 20, President Barack Obama issued a memorandum stating that federally registered lobbyists cannot verbally communicate with executive branch officials regarding specific projects to be funded through the American Recovery and Reinvestment Act of 2009. Instead, lobbyists must submit their views in writing. The goal of preventing stimulus funds from being spent based on influence or "on the basis of factors other than the merits" is widely seen as laudable. However, many are charging that the rules are a violation of lobbyists' First Amendment right to petition the government.

Many advocates say the intentions of the memo are understandable and commendable, ensuring that public funds are spent responsibly and in a transparent manner. On March 20, President Obama announced, "Decisions about how Recovery money will be spent will be based on the merits. They will not be made as a way of doing favors for lobbyists. Any lobbyist who wants to talk with a member of my administration about a particular Recovery Act project will have to submit their thoughts in writing, and we will post it on the Internet for all to see. [. . .] And this plan cannot and will not be an excuse for waste and abuse."

Section 3 of the memo states that executive department or agency officials cannot consider the view of a lobbyist registered under the Lobbying Disclosure Act of 1995 (LDA) regarding "particular projects, applications, or applicants for funding under the Recovery Act unless such views are in writing." In addition, all written communications from a registered lobbyist must be posted publicly by the agency on its recovery website. If a person has not registered under the LDA, he or she is not subject to the provisions of this memo and can communicate in person or over the phone regarding funding under the Recovery Act.

Government officials may communicate verbally with registered lobbyists only if it addresses the Recovery Act generally, meaning that the discussion does "not extend to or touch upon particular projects, applications, or applicants for funding, and further that the official must contemporaneously or immediately thereafter document in writing: (i) the date and time of the contact on policy issues; (ii) the names of the registered lobbyists and the official(s) between whom the contact took place; and (iii) a short description of the substance of the communication. This writing must be posted publicly by the executive department or agency on its recovery website within three business days of the communication."

In response, outrage has grown over the rules for lobbyists seeking stimulus funds, with some alleging that the memo could violate lobbyists' First Amendment rights to petition the government and, in fact, not reduce improper influence on spending decisions. Those who are not registered lobbyists could have the same conversations that lobbyists are prohibited from having and yield influence, but such contacts would not even have to be disclosed.

On March 31, several groups called on the administration to revise its memo to instead require disclosure of all contacts with private interests seeking government funding. The American Civil Liberties Union (ACLU), Citizens for Responsibility and Ethics in Washington (CREW), and the American League of Lobbyists (ALL) sent a letter to White House Counsel Gregory Craig asking him to rewrite new lobbying rules for the stimulus package.

Specifically, the organizations' letter asks that Section 3 be withdrawn because it "is an ill-advised restriction on speech and not narrowly tailored to achieve the intended purpose." The letter notes the counterproductive nature of the memo, referencing "non-lobbyists employed by potential recipients of Recovery Act funds, who are permitted oral contact with executive branch officials, may well have contributed significant funds to the presidential campaign and/or to the campaigns of members of Congress who sit on the committees with oversight jurisdiction over the Department of the Treasury, the Federal Reserve and the expenditure of Recovery Act funds."

The letter goes on to suggest, "A better alternative would be to require disclosure of any and all communications with executive branch officials regarding a particular project, application, or applicant for funding. [. . .] The name and business affiliation of the individual who engages in an oral communication about such a matter, the name of the official contacted, the date of the contact, and the subject of the contact could all be publicly available, perhaps on the Treasury Department's website."

The letter also notes that the rules in the memo ignore the role played by lawmakers, corporate executives, and other non-lobbyists who are free to talk to officials about specific stimulus projects without disclosure requirements. While disclosure is the ultimate goal, the new rules do not catch those who need to be included, such as unregistered lobbyists.

An ALCU press release further illustrated the point. Caroline Fredrickson, the organization's Washington director, said, "If the aim of this provision is government transparency, the focus should not be on those who already disclose their activities publicly. This directive wholly excludes the Goliaths of Wall Street from its applicability and instead restricts the speech rights of those who are dutifully filing quarterly reports of their contacts with the administration and Congress."

Meanwhile, it is unclear how useful the new disclosure rules will be when LDA requirements are currently not abided by and are not entirely understood by those who must report. A report released April 1 from the Government Accountability Office (GAO), entitled *Observations on Lobbyists' Compliance with Disclosure Requirements*, found that some lobbyists had a misunderstanding of the reporting requirements, lobbyists were only "generally able to provide some documentation" for their reports of lobbying activity and political contributions, and some lobbyists had trouble backing up their filings.

As required by the Honest Leadership and Open Government Act of 2007, GAO reviewed a random sample of 100 lobbyist disclosure reports filed during the first three quarters of 2008 and selected a random sample of 100 reports of federal political contributions filed in the middle

of 2008. The report found that "in approximately 14 percent of cases, the documentation provided either was incomplete or contradicted the reported amount of income or expense" and that a dozen filings had to be amended by lobbyists. "Some small firms and sole proprietors indicated they did not understand the requirement for both firms and individual lobbyists to file reports on financial contributions," according to GAO.

In his Jan. 21 executive order on ethics, Obama called upon the Ethics Office and the Office of Management and Budget to identify "steps the executive branch can take to expand to the fullest extent practicable disclosure of ... executive branch procurement lobbying..." Section 4(c)(4) of the order calls for identifying immediate actions the executive branch can take and, if needed, recommendations for legislative changes.

The new Recovery Act lobbying rules could act as an example for future lobbying disclosure reform as envisioned by the ethics executive order. For example, by establishing rules for everyone to disclose their lobbying with the executive branch without regard to whether an individual or entity is registered under the LDA, the public will have a much better picture of special interests influencing implementation of the Recovery Act. The alternative is that lobbyists will be more inclined to send those who are not required to register under the LDA, which will ultimately discourage accurate reporting.

Citizens United Case Offers Insight on Court's Approach to Campaign Finance Law

On March 24, the U.S. Supreme Court heard oral arguments in *Citizens United v. Federal Election Commission* (FEC), a case that could overturn or limit portions of the Bipartisan Campaign Reform Act (BCRA), commonly called the McCain-Feingold campaign finance law. Citizens United, a 501(c)(4) organization, produced a 90-minute film, *Hillary: The Movie*, which was highly critical of then-presidential candidate Hillary Clinton. The case challenges as unconstitutional FEC electioneering communications rules as applied to the movie and to ads promoting the movie. It also challenges as unconstitutional donor disclosure rules as applied to the ads.

BCRA prohibits corporations, including nonprofits, from airing broadcasts that refer to a federal candidate 30 days before a primary election and 60 days before a general election. This electioneering communications rule was modified by the Supreme Court in *Wisconsin Right to Life v. FEC* (*WRTL*) in 2007 to limit the prohibition to ads that are "susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate."

The *Citizens United* lawsuit charges that the ads for the Hillary Clinton film should not be subject to donor disclosure and disclaimer requirements because they are purely commercial. It also argues that the film itself is no different from other journalistic documentaries and therefore is not a political communication. Furthermore, it argues that the film did not

specifically tell viewers how to vote in the 2008 presidential election and thus, the film and its ads should be exempt from any type of regulation.

Citizens United wanted to make the film available for free via a video-on-demand service during the presidential primary campaign and accepted some for-profit corporate funding. Citizens United also sought an order declaring that ads for the movie were not "electioneering communications" within the meaning of Section 203 of BCRA.

The federal district court ruled that the film was not a constitutionally protected discussion of issues, under the test the Supreme Court established in the *WRTL* case, because it was "susceptible of no other interpretation than to inform the electorate that Senator Clinton is unfit for office, that the United States would be a dangerous place in a President Hillary Clinton world, and that viewers should vote against her." Thus, the film and its ads were deemed "electioneering communications." The FEC wants the Supreme Court to uphold the federal district court's ruling, asserting that the film was clearly an appeal against then-presidential candidate Clinton. The government brief also states that a video-on-demand program is nothing more than a political "infomercial," which is banned by BCRA. Oral arguments, however, seemed to indicate that the Court may reject the lower court's ruling.

According to *The New York Times*, "It seemed at least possible that five justices were prepared to overturn or significantly limit parts of the court's 2003 decision upholding the McCain-Feingold campaign finance law, which regulates the role of money in politics."

Furthermore, *SCOTUSblog*, a blog that focuses exclusively on the U.S. Supreme Court, highlighted some of the issues that specific justices raised during oral arguments. Several justices seemed to think that the government's view of the current law could be interpreted to expand beyond ads, to possibly restrict using corporate funding for books.

The justices appeared incredulous when Deputy Solicitor General Malcolm Stewart said, "The government could ban an advocacy group from using its own funds to pay for a 90-minute documentary if only the first minute was devoted to urging voters whom to choose, and the rest was a recital of information about the candidate without further direct advocacy." The justices could possibly create an exception for documentaries. Congress did not specifically address documentaries in BCRA.

SCOTUSblog also mentions that Justice Antonin Scalia outlined that "the First Amendment provides 'heightened' protection when a campaign message involves an exchange between someone wanting to speak and someone willing to listen – as, for example, Citizens United's 'Hillary' film when offered as video-on-demand on cable television." Questioning during oral arguments suggests that the Court could end up adopting this position.

Several justices did question Citizens United's attorney Ted Olson about the movie and expressed the view that the movie is designed to tell viewers how to vote and thus, the implication is that they would be open to regulation. These justices, however, seemed to be in the minority.

Rick Hasen, a Loyola University law professor who runs the *Election Law Blog*, said in a blog posting that the disclosure rules appear to be safe. The only instance Hasen highlighted concerning the disclosure rules was when "Chief Justice Roberts questioned whether the *Brown v. Socialist Workers* exemption for disclosure requirements was too harsh on those seeking an exemption. Under the exemption, a person or group claiming they face threats of harassment if their contributors were disclosed must demonstrate a likelihood of actual harassment. The Chief questioned whether this standard was too harsh on some groups." This, however, was not a topic that the other justices seemed to grasp onto. Citizens United's attorney did not mention the disclosure rules at all during oral arguments.

The Court is expected to rule on the case in late spring or early summer of 2009.

James Madison Center Files Suit Against IRS over Electioneering Rules

The James Madison Center (the Center) filed two federal lawsuits on April 3 challenging the Internal Revenue Service (IRS) definition of "political intervention." In *Christian Coalition of Florida v. USA*, the Center charges that the Christian Coalition of Florida (CC-FL) was denied 501(c)(4) status by the IRS because the agency claimed CC-FL engaged in activities that constitute political intervention. In the second lawsuit, *Catholic Answers and Karl Keating v. USA*, the Center is assisting a 501(c)(3) organization that is challenging a fine imposed by the IRS after the agency determined two "e-letters" posted in 2004 were "political expenditures" that might have influenced the presidential election.

501(c)(3) tax-exempt organizations – charities, educational institutions, and religious organizations, including churches – are prohibited from participating or intervening in any political campaign on behalf of, or in opposition to, any candidate for public office. These organizations cannot endorse candidates, make donations to candidate campaigns, engage in political fundraising, distribute campaign-related statements, or become involved in any other activities that, directly or indirectly, may be beneficial or detrimental to any particular candidate. Activities that encourage people to vote for or against a particular candidate on the basis of nonpartisan criteria also violate the political campaign prohibition governing 501(c)(3) organizations. According to IRS Revenue Ruling 2007-41, "Whether an organization is participating or intervening, directly or indirectly, in any political campaign on behalf of or in opposition to any candidate for public office depends upon all of the facts and circumstances of each case."

According to a press release from the Center, "This vague IRS test has been exploited by some liberal groups to threaten and harass churches and other non-profits, causing many of them to be fearful of IRS retribution if they discussed moral or public policy issues. Non-profits have even shied away from legitimate grass roots lobbying activity in fear that it will be considered political intervention. As a result, the legitimate speech activities of many non-profits have been chilled and their free speech rights infringed."

In *Catholic Answers*, the IRS determined that the two "e-letters" posted by the group's president might have influenced the 2004 presidential election. The IRS assessed a tax on the 501(c)(3) organization for the blog entries and required that organization president Karl Keating reimburse Catholic Answers $900 for the expenditures incurred. Catholic Answers is demanding that this tax be repealed and calls on the court to rule that the group should reimburse Keating. Catholic Answers charges that the blog post was a discussion about who should receive Holy Communion and should not be considered political intervention.

In *Christian Coalition of Florida v. USA*, the group is challenging the IRS determination that the group is not a 501(c)(4) tax-exempt organization. The IRS claimed that the organization's newsletters, voter guides, and legislative scorecards constituted political intervention. According to the complaint, the IRS issued a final determination letter on July 31, 2008, stating the group does not qualify as a social welfare organization. "The IRS summarily concluded that CC-FL is engaged in activities that primarily constitute political intervention on behalf of or in opposition to candidates for public office. The letter fails to indicate how much political intervention is 'too much' and even concedes that CC-FL engages in 'extensive lobbying activities.'" The IRS has not defined how much of an activity constitutes "the primary activity" of an organization.

CC-FL claims that its newsletters, voter guides, and legislative scorecards are educational and do not expressly advocate the election or defeat of any candidate. Furthermore, CC-FL argues that 501(c)(4)s may engage in some partisan activity and that their work was not extensive enough to be their "primary activity."

Both cases argue that IRS rules are far too vague and restrict the First Amendment free speech rights of nonprofits. The groups want the IRS rules and regulations on "political intervention," and the agency's "facts and circumstances" test, to be ruled unconstitutional or "narrowly construed to only encompass speech which expressly advocates the election or defeat of a clearly identified candidate." This appears to be an attempt to move the IRS toward new rules as set forth after the U.S. Supreme Court case in *Wisconsin Right to Life v. Federal Election Commission*. In that case, the Court ruled that an ad can be considered express advocacy "only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."

OMB Watch has also reported some inconsistencies with IRS enforcement on the ban on partisan activities by charities. In a report, OMB Watch noted, "For charities concerned with the policies of the government – whether their focus is on the environment, taxation, children's welfare, or gun laws – the vagueness of the IRS 'facts and circumstances' criteria has left the line between acceptable policy advocacy and unlawful political intervention extremely hazy. Nonprofit leaders' confusion has intensified as the increasing cost of political campaigns has forced many legislators to double as candidates for much of their tenure in office."

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Coalition for an Accountable Recovery Submits Comments on Recovery.gov Guidance Memo

On April 17, the Coalition for an Accountable Recovery (CAR) submitted its comments on the Office of Management and Budget's (OMB) April 3 memo, "Updated Implementing Guidance for the American Recovery and Reinvestment Act of 2009." The memo is a supplement to a previous set of guidelines issued Feb. 18 to federal agencies on the implementation of the Recovery Act. CAR notes that OMB's efforts are laudable and that the guidance is helpful in advancing transparency and accountability with regard to Recovery Act spending. However, the coalition also argues that the guidance still needs modification for meaningful transparency and accountability to be realized.

To enable the level of transparency in Recovery Act spending as described by President Barack Obama when he signed the bill into law, the federal government should collect spending

information, including data about who is receiving Recovery Act money, how much they are getting, and what they are doing with it; this information should be collected directly from Recovery Act funds recipients. The Recovery Act and OMB guidance, however, take a different approach to recipient reporting. Instead of a system in which all recipients (other than individuals but including states) of Recovery Act funds submit expenditure and performance reports, the model described in the act and in OMB guidance would have only those entities that receive Recovery Act funds directly from the federal government report on the use of those funds. Additionally, data from these prime recipients would be reported directly to the federal agency that disbursed the funds, with the disbursing agency making that information available on Recovery.gov. Not only would the public not be able to directly view these recipient reports, recipients of Recovery Act funds that are sub-awardees (e.g., subcontractors and sub-grantees) would not be required to report on the use of their funds. The use of tens of billions of Recovery Act dollars by thousands (perhaps tens of thousands) of Recovery Act funds recipients would be hidden from public scrutiny.

The April 3 OMB guidance would implement such a model of limited transparency, obscuring a substantial portion of Recovery Act expenditures. However, the guidance states that OMB intends to eventually improve this reporting system by requiring that expenditure reports be collected directly from all recipients, including those that receive funds from prime and sub-recipients.

> [T]he current reporting model will not track funds to subsequent recipients beyond these local governments or other organizations. OMB plans to expand the reporting model in the future to also obtain this information, once the system capabilities and processes have been established.

CAR, co-chaired by OMB Watch and Good Jobs First, applauds this move to a system of multi-tier reporting but recommends that OMB not only elaborate on the details of such requirements, but also specify a date by which this will be implemented. Another improvement in the recipient reporting system is also on the horizon. In the revised guidance, OMB states that it "intends to oversee the development a central collection system" that would require recipients to report directly on the use of Recovery Act funds to the federal government. By collecting these reports directly from recipients, OMB would mitigate delays and distortions of data in the reports. And like the eventual requirement of multi-tier recipient reporting, OMB has not specified the details of such a system. CAR has recommended that OMB require all recipients of Recovery Act funds over $25,000, regardless of how many layers removed from the initial federal disbursal that receipt is, to report on their use of Recovery Act funds to the central collection system. OMB has, however, specified a date by which this system will be functional. In its April 3 guidance, OMB states that it is "moving aggressively to develop the capability to centrally collect the recipient reports due on October 10th, 2009."

Although OMB intends to make improvements in requirements of who reports and how, the April guidance neglects to move closer to CAR's vision of a spending tracking system that accounts for the use of Recovery Act funds. The guidance elaborates somewhat on how the number of jobs saved or created is to be reported, but it remains silent on requiring that other

jobs data (e.g., wages paid, types of benefits, and other job quality indicators) be reported. There is also no requirement to track information about the demographics of people who are getting jobs. OMB gives significant leeway to federal agencies in establishing quantitative outputs and outcomes to measure the impact of Recovery Act projects. While CAR recognizes that the programmatic agencies are better suited than OMB to establish theses benchmarks, CAR recommends that OMB work with agencies to ensure that sufficient and relevant performance data are collected and that OMB set a short timeframe to establish which performance criteria will be collected. CAR also makes a number of other recommendations, including suggestions about contract details, weekly agency report details, and data feed specification in its comments to OMB.

In addition to noting critical gaps in recipient reporting requirements, CAR recognizes that OMB appears to moving toward a model of reporting articulated in CAR's Interim Recovery.gov Data Reporting Architecture. The Obama administration has set aggressive and laudable goals for Recovery Act spending reporting and has made improvements since Recovery.gov was launched. By seeking comments from the public, OMB is engaging in an iterative design process that will result in an increasingly improved Recovery Act expenditure tracking system. While CAR recommends that OMB make a number of changes to its guidance, it also notes that OMB appears to be on the right track with this latest revision.

EPA Moves to Require Greenhouse Gas Reporting

The U.S. Environmental Protection Agency (EPA) has taken the first crucial step toward creating a transparent and accountable climate change program by proposing a greenhouse gas registry. The registry would require thousands of facilities from a broad range of industries to record and report their annual emissions of greenhouse gases. A comprehensive registry is a prerequisite for any future efforts to reduce greenhouse gas emissions.

According to EPA, the proposed registry would cover approximately 13,000 facilities, accounting for roughly 85 to 90 percent of greenhouse gases emitted in the United States. The proposed threshold for reporting greenhouse gases is 25,000 tons per year of carbon dioxide equivalent (CO2e). Carbon dioxide is only one of at least six gases covered by the draft rule, but since each gas has a different impact on global warming, the impacts are converted into the carbon dioxide equivalent for consistency. The EPA published the proposed registry rule on April 10 and is accepting public comments on the plan until June 9.

The proposal would cover many energy-intensive industry sectors such as cement production, iron and steel production, and electricity generation, among others. Emissions from cars and trucks would not be covered directly, but motor vehicle and engine manufacturers and transportation fuel suppliers would be covered. Petrochemical production facilities and refineries would also be covered. Emissions from manure management systems at the largest factory farms would be included.

EPA estimates that first-year reporting costs for the private sector would total $160 million, with annual reporting thereafter costing $127 million. EPA's proposal also provides for administrative, civil, or criminal penalties for facilities that fail to monitor or report greenhouse gas emissions under the new rule.

Benefits of Registry

As Congress moves climate change legislation forward and the EPA proceeds with greenhouse gas regulations, a registry becomes more essential. Detailed and transparent data on emissions are crucial for efficiently implementing a cap-and-trade system, which would place a monetary value on each ton of emitted gases and is now being pushed by President Obama and leaders in Congress. A mandatory registry covering all major emitters could provide the transparency to efficiently set prices on emissions and the accountability to ensure their reduction.

Even without mandatory emissions regulations, public disclosure of emissions could serve as an incentive to reduce such pollution. The EPA's Toxics Release Inventory (TRI), which requires reporting of releases of toxic chemicals from specific facilities, has used public disclosure to drive significant reductions in toxic emissions over the years.

Data collected under this proposal might give EPA a better understanding of the relative emissions of specific industries and the distribution of emissions from individual facilities within those industries. These data could be used to evaluate what forces are driving emissions increases and what technologies are succeeding at emissions reductions.

Additionally, a greenhouse gas registry provides a baseline whereby facilities can earn credit for early emissions reductions reached before a mandatory system is implemented. A comprehensive registry of emissions also would enable EPA to use voluntary reduction programs for industries not covered by future legislation.

Missing Pieces

Even though the proposed registry rule represents a major step forward for EPA’s efforts on climate change, there are several facets noticeably absent from the current proposal. It is likely that the agency will receive comments pushing for several of these missing pieces to be addressed before moving forward.

First, the proposed registry does not include a mechanism to track greenhouse gas offsets, which are measures that reduce the amount of global warming gases in the atmosphere. Offsets are likely to play a major role in future climate change legislation. Tracking the creation and verification of offsets would be crucial to an efficient emissions trading scheme.

The proposed rule also does not require third-party certification of a facility's emissions report. Without independent verification, the market for greenhouse gases would be functioning with less certainty and accountability. The draft rule does, however, require electronic reporting, and

EPA intends to use existing reporting programs where practicable – both provisions could improve the accuracy of reported data.

Manufacturers of cars and trucks would need to report emissions rates for greenhouse gases, similar to current reporting for other pollutants. However, the proposed registry would not collect data on emissions from in-use travel. Almost 30 percent of U.S. greenhouse gas emissions come from the transportation sector.

It is also notable that the proposed rule does not address how the new registry will mesh with the assortment of local, state, and regional greenhouse gas registries, some voluntary and some mandatory. The programs are widely varied in both the breadth of reporting sources and methods for tracking emissions. It is unclear if the national program will preempt these programs or if states will be encouraged to alter their existing programs to fit more readily within the new federal program.

EPA's current timetable calls for 2010 to be the first year of emissions reporting, and while efforts to reduce greenhouse gases would benefit from having several years of baseline emissions data, time is of the essence when it comes to enacting climate change mitigation policies. Leaders in Congress hope to pass climate change legislation by the end of 2009, and the final major international meeting to produce a treaty to succeed the Kyoto Protocol will be held in December. It is hoped that the data from the proposed greenhouse gas registry will enhance expected U.S. mitigation policies once they are enacted; such implementation would occur over the course of several years.

Sixth Annual Ridenhour Awards Honor Truth-Telling, Courage

The Sixth Annual Ridenhour Awards were presented April 16 by the Nation Institute and the Fertel Foundation. The awards are presented each year to journalists and whistleblowers in honor of Ron Ridenhour, a former Vietnam veteran who exposed the 1968 massacre at My Lai. The awards are given to those who act to protect the public interest and promote social justice. The 2009 awardees were Thomas Tamm, Bob Herbert, Jane Mayer, and Nick Turse.

Ridenhour, a recipient of the 1987 George Polk Award, led a long and distinguished career as a journalist before passing away in 1998. The awards presented in his name are generally given to top winners in the categories of truth-telling, courage, and authorship. In 2009, an additional prize for reportorial distinction was awarded. A number of past recipients, including Joseph Wilson and Daniel Ellsberg, were in attendance.

Truth-Telling

The award for truth-telling went to former Department of Justice attorney Thomas Tamm. Tamm blew the whistle on the National Security Agency's (NSA) domestic wiretapping program. He had initially brought the issue of questionable legality of the program to his superiors in 2004. After being warned to drop the subject, Tamm proceeded to call *The New York Times*

from a subway pay phone, informing the paper of the NSA program. The *Times* published the story, and the authors of the article wrote books on the subject.

Tamm suffered revenge from the government as a result of his work to expose the program. He was harassed and investigated by the Federal Bureau of Investigation (FBI), his house was raided, and his children were subjected to FBI interrogation. Despite the hardships he has faced after revealing the NSA's illegal activities, Tamm has stood strong on the principles that guided his actions. At the awards ceremony, he said, "We are safer, stronger, and more secure when we support the rule of law." From Tamm's experiences, it is evident that whistleblowers still need greater protections under the law.

Courage Prize

New York Times columnist Bob Herbert won the courage award for the overall fearless truth-telling of his reporting. On the eve of the American invasion of Iraq, Herbert stood out from other journalists in one clear way – he opposed the war. In addition to his unpopular but accurate stance on that issue, Herbert has also taken on the problems of poverty and racism in his work.

In his acceptance speech, Herbert dispelled the belief that working men and women had no responsibility for current events. Herbert stressed that despite the commonly held belief to the contrary, ordinary people do have power and great ability to shape policy.

Book Prize

Jane Mayer of *The New Yorker* won the book prize for her 2008 work, *The Dark Side*. This extensively researched book connects the extraordinary rendition and torture of detainees captured by U.S. forces to top officials in the Bush administration. Mayer shows how these arguably unconstitutional policies implemented during the "war on terror" actually impeded the fight against Al Qaeda. Despite the protests of top intelligence officials, the Bush administration pushed forward with such policies, which ultimately undermined national security.

Reportorial Distinction

This prize, unique to the 2009 awards, was awarded to Nick Turse for his November 2008 article, "A My Lai a Month." Turse built upon Ridenhour's work to demonstrate that My Lai was not a unique event. Ridenhour had expressed that My Lai was "an operation, not an aberration." Turse, simultaneously filling the roles of historian, journalist, and whistleblower, used records at the National Archives, as well as unpublished interviews with Vietnamese survivors and U.S. military officials, to prove Ridenhour's claim. Turse demonstrated that high-level generals authorized the systematic use of "brute force" in Vietnam instead of the use of discriminate and selective firepower.

Vietnam is still seen by many Americans as a war in which U.S. forces were defending the freedom of the South Vietnamese people, rather than an aggressive assault on North Vietnam.

Turse's work teaches us that when records are sealed for generations and abuses of power are effectively hidden for decades, our national memory is altered.

Each of these people is an example of individuals willing to stand up for their country in the face of retribution. They are whistleblowers and journalists seeking to expose abuses of power so that such misconduct is an aberration, not the operative norm.

EPA Moving on Climate Change

In the first major move by the federal government to address climate change, the U.S. Environmental Protection Agency (EPA) has declared heat-trapping greenhouse gas emissions a threat to public health and welfare, setting the stage for potentially major regulations.

According to a notice released April 17, EPA Administrator Lisa Jackson believes "the total body of scientific evidence compellingly supports" the finding that greenhouse gases endanger public health and welfare. Jackson also says cars and trucks contribute to greenhouse gas pollution.

While the so-called endangerment finding does not represent regulatory action in and of itself, it will obligate EPA to limit greenhouse gases in the future. The finding lumps greenhouse gases in with other air pollutants that require regulation under the Clean Air Act.

EPA is already working on regulations and expects to propose them for public comment "several months from now," according to the notice. The initial regulations will target vehicle emissions, but the endangerment finding will eventually require EPA to regulate stationary sources such as power plants or other industry facilities.

Congressional Democrats pushing legislation to address climate change welcomed EPA's announcement and hope to gain added leverage during the debate over a pending cap-and-trade proposal. Rep. Edward Markey (D-MA), one of the principal authors of the cap-and-trade bill, called EPA's notice a "game-changer."

Markey and other Democrats are betting that industry lobbyists and some Republicans will throw their support behind the cap-and-trade bill, viewing it as less onerous than EPA regulations.

The National Association of Manufacturers (NAM), an industry trade group, urged the Obama administration to "defer to Congress," signaling that the Democratic strategy may have some merit.

House Minority Leader John Boehner (R-OH), calling EPA's decision an "energy tax," said, "The Administration is abusing the regulatory process to establish this tax because it knows there are not enough votes in Congress to force Americans to pay it."

The cap-and-trade bill, sponsored by Markey and Rep. Henry Waxman (D-CA), attempts to prevent duplication or contradiction between EPA regulations and the proposed legislative solution by forbidding the agency from moving forward with any efforts to regulate greenhouse gas emissions under the Clean Air Act.

Instead, an economy-wide cap-and-trade program in which polluters haggle for emissions allowances would prevail. The program would set maximum emission levels for the entire U.S. and ratchet the cap down over time. By 2050, the program would reduce emissions 83 percent below 2005 levels, according to the bill.

However, until and unless the bill becomes law, EPA must continue plodding down a regulatory path. The U.S. Supreme Court ruled in April 2007 that EPA must determine whether greenhouse gases warrant regulation, though it did not set a deadline for the agency.

The Bush administration began that process shortly after the Court's ruling but later backed away from any aggressive action. In July 2008, EPA issued an advanced notice of proposed rulemaking, which only solicited comments on the issue of climate change and greenhouse gas regulation. The notice was criticized as a masquerade for real action.

Before publishing the advanced notice, Bush's EPA had prepared an endangerment finding, but White House officials blocked the agency from moving forward. Officials at the Office of Management and Budget (OMB) refused to open an e-mail sent by EPA with the finding attached, leaving the notice in bureaucratic limbo.

The finding prepared under Bush's EPA likely served as the basis for Jackson's finding, allowing the Obama administration to move quickly on the issue.

EPA backed up its finding by saying that the higher temperatures that greenhouse gases cause lead to a higher risk of heat-related deaths and increase the spread of food and water-borne illnesses. EPA says that the U.S. is already experiencing climate change's effects and that those effects "are expected to mount over time."

EPA also noted the negative effects on public welfare, including increases in wildfires, heavy rain, and flooding, as well as risks to crops and wildlife.

Jackson made the endangerment finding under a section of the Clean Air Act that deals expressly with vehicle emissions; the notice does not address stationary sources. However, the Clean Air Act requires EPA to regulate pollutants from stationary sources if the emissions endanger public health and welfare.

"EPA also will soon have to address whether power plants' CO2 emissions 'contribute' in the same way to dangerous global warming pollution," according to David Doniger, a climate change policy expert at the Natural Resources Defense Council.

Limits on stationary sources could have a major impact on the electricity industry. Electricity generation is responsible for 34 percent of U.S. greenhouse gas emissions, according to EPA. Transportation-related emissions account for 28 percent. The remainder is produced mostly by industrial sources, commercial sources, and residential sources, all of which could also be encompassed by stationary source regulations.

The endangerment finding is currently available on EPA's website. Once published in the *Federal Register*, EPA will accept public comment for 60 days. Jackson will likely formally announce her determination shortly thereafter.

Comments on New Regulatory Order Pour into OMB

Approximately 170 groups and individuals submitted comments for the Obama administration to consider as it begins reshaping or retaining the current regulatory structure. Although they varied significantly in many details, the comments reflect a familiar split between business interests and public interests that has characterized the regulatory debate for years.

On Jan. 30, President Barack Obama signaled his intention to issue a new regulatory executive order. He sent to the heads of executive departments and agencies a memorandum charging the head of the Office of Management and Budget (OMB) to work with federal agencies to produce recommendations for a new order and to develop the recommendations in 100 days; this 100-day period ends in early May. The memo outlined several factors that agencies should consider when making their recommendations.

On Feb. 26, the Office of Information and Regulatory Affairs (OIRA) published in the *Federal Register* a request for public comments on revisions to a new regulatory executive order. OIRA is the office within OMB responsible for reviewing significant regulations developed by agencies. OIRA's review function has been in place since President Reagan assigned the duty to the office in 1981. President Clinton, in 1993, issued the current executive order (E.O. 12866) that prescribes how this review takes place.

This was the first time that an administration sought public comment on the development of a regulatory order. In addition, OIRA officials met with several groups to discuss important issues related to designing a new order. Public comments were accepted from the issuance of the *Federal Register* notice through March 31. The notice contained the same list of factors for public consideration as outlined in the presidential memo to the agencies: 1) the relationship between OIRA and the agencies; 2) disclosure and transparency; 3) public participation in the rulemaking process; 4) the use of cost-benefit analysis; 5) concern for distributional considerations, fairness, and future generations; 6) ways to reduce delay in the review process; 7) the role of behavioral sciences; and 8) the best tools to use in the regulatory process.

Not surprisingly, there was significant disagreement between business interests and public health, labor, environmental, and consumer rights groups on two major issues. First, the majority of industry trade groups supported the existing relationship between OIRA and

agencies, citing the need for a central location responsible for coordinating agency activities, identifying duplications or contradictions, and ensuring consistency. The majority urged the administration to preserve OIRA's rule-by-rule review power. In addition, many groups urged OIRA to expand its review to agency guidance documents and rules promulgated by independent agencies (which are currently exempt from E.O. 12866 review).

Most public interest organizations argued that OIRA's role should change to one of planning and coordinating regulatory activity among federal agencies. They urged OIRA to stop reviewing individual rules because the office does not have the necessary expertise, the review adds to the delay in finishing rules, and the responsibility to produce rules is delegated by Congress to the agencies, not to OIRA.

Several groups wrote that public health or environmental considerations, not compliance costs, should be most important in regulatory decision making. The groups said Congress explicitly elevated safety, health, and environmental considerations above cost considerations in many statutes.

Second, the majority of industry groups expressed support for cost-benefit analysis as it is currently performed. Several expressly supported certain aspects of the existing framework such as the use of discounting future benefits, something strongly opposed by many public interest groups. Several groups called for evaluating the costs of regulations once the regulations have been in place. (Under the current approach, cost-benefit analyses include only estimates of compliance costs before rules are in place.) While strongly supporting the importance of cost-benefit analysis, many industry groups called for modifying the ways in which cost-benefit analysis is conducted by the agencies and used in decision making.

All of the public interest groups called for at least modifying, if not replacing, cost-benefit analysis. Some called for cost-benefit analysis to be used only when statutes require its use. Other groups wanted to supplement the analyses with additional quantitative and qualitative analyses such as cost-effectiveness analysis and distributional impact analyses. Others want to replace cost-benefit analysis with either other economic analyses or considerations of "safety first." Although the two sides disagree over the use of cost-benefit analysis, there was broad support for reassessing the way the tool is currently used if it is retained in a new regulatory order.

Several academic scholars and groups submitted comments, and those, too, were split over these two primary issues. Most of the academic comments, however, also called for modifications or supplements to cost-benefit analysis.

There were also areas of agreement among the various commenters. Broad support exists for increasing transparency in the regulatory process. Many industry and public interest groups, individuals, and academics called for more openness within OIRA and the agencies. Of primary concern to most was the need for greater transparency of communications among OIRA, agencies, and outside interests. There was also strong support for having agencies initiate their

online regulatory dockets earlier in the process and for including in those dockets all relevant information, such as scientific and technical studies, communications, and data.

Many commenters also substantially supported increasing public consultation in the process. For example, there was widespread support for expanding and revamping electronic portals to increase public participation and disclosure of information. Agencies and OIRA need to improve their electronic capabilities. There was considerable support for enhancing electronic rulemaking capabilities generally; specific comments focused on improving Regulations.gov, the current government-wide system used for rulemaking activity.

Many comments acknowledged that it takes too much time for rules to be completed, but there was little agreement on solutions to make the process timelier. Some argued that increased coordination and planning by OIRA could speed up the process. Many public interest groups argued that OIRA's review of regulations takes too long and does not appropriately defer to agency expertise. There was substantial support for analyzing the various sources of delay that infect the current process and developing solutions to make the process more responsive.

Many comments addressed distributional considerations generally, but there was little agreement on how this should be done. Few comments specifically addressed the role of behavioral sciences and the best tools to use in the process, the last two topics OMB listed in the request for comments.

The Obama administration has not projected when a new executive order might be completed. On April 20, the administration nominated Cass Sunstein to be OIRA administrator. Sunstein, a colleague of Obama's on the University of Chicago law faculty, is a prolific academic, most recently serving as a faculty member at Harvard University. He is a controversial figure when it comes to administrative law issues and will likely want to have his hand in crafting any executive order. Assuming Sunstein is rapidly confirmed by the Senate, a new order probably will be completed in late summer or early fall.

Lobbying for Recovery Act Funding Restricted

On April 7, the Office of Management and Budget (OMB) issued interim guidance on how to comply with President Barack Obama's March 20 memorandum that restricts contact between registered lobbyists and executive branch officials regarding the American Recovery and Reinvestment Act of 2009.

The OMB guidance clarifies that federally registered lobbyists may only communicate in writing with executive branch officials when it comes to issues about how Recovery Act money is to be spent. However, those not registered under the Lobbying Disclosure Act, including state lobbyists, are permitted to meet or call executive branch officials about Recovery Act spending.

The OMB guidance memo states that government officials should not avoid meeting with lobbyists, and the policy is not meant to ban lobbying communications. Agencies "should

proceed with all communications with Federally registered lobbyists in accordance with the prescribed protocol." The "prescribed protocol" has lobbyists up in arms.

According to the interim guidance, oral communications with federally registered lobbyists are restricted to general and logistical questions related to Recovery Act funding or implementation. Examples of permissible conversations include: how to apply for funding, how to conform to deadlines, to which agency or officials applications should be directed, and requests for information about program requirements. There are also no restrictions on oral communications with federal registered lobbyists at widely attended gatherings, as defined in ethics rules.

However, the interim guidance makes clear that federally registered lobbyists associated with for-profit companies, nonprofit organizations, and state and local government entities are prohibited from conducting oral communications with executive branch officials regarding "particular projects, applications, or applicants for funding." A particular project is considered to be "(i) a discrete and identifiable transaction, or set of transactions (ii) in which specific parties have expressed an interest." OMB's guidance only applies to communications before Recovery Act funding is awarded, which may allow a lobbyist to speak with a government official about changes to a grant or contract.

If a discussion between an executive branch official and a federally registered lobbyist extends beyond generalities and begins to cover restricted topics about the Recovery Act, the official must end the conversation and ask the lobbyist to submit the comments in writing. The written comments must be posted online within three days. The date of contact, the name of the lobbyist's client(s), and a one-sentence description of the substance of the conversation must be disclosed. In addition, all written documents registered lobbyists send to agencies have to be disclosed and posted on the agency's Recovery Act website.

The restrictions on lobbyists were faulted as too broad and raise questions about infringing on First Amendment free speech rights. According to *The Hill*, the American League of Lobbyists (ALL), the American Civil Liberties Union (ACLU), and Citizens for Responsibility and Ethics in Washington (CREW) are considering suing the federal government to block the new policy. The groups argue that the requirements are too burdensome and as a result, officials will not want to meet with lobbyists, creating adverse effects.

Because the rules only apply to *federally registered* lobbyists, state registered lobbyists are free to discuss specific Recovery Act projects with the administration. The policy also does not apply to individuals who used to be but are no longer federal lobbyists. The same concern arises as with Obama's hiring restrictions: the focus on *registered* lobbyists. Some advocates note that registered lobbyists are unfairly singled out in these policies, and anyone else who does not meet the federal definition of a lobbyist can meet with federal officials to discuss projects without having these meetings disclosed. In turn, more nonregistered lobbyists will be meeting with agencies about Recovery Act funding.

Communications between lobbyists and agencies are beginning to appear online, but currently, there are only a handful listed. To get this information, one must go to each agency's separate Recovery Act web page and then locate any lobbying communication. There are multiple inconsistencies between the agencies, and some do not reference lobbying contacts at all. For example, the Department of Energy refers to lobbying contacts as "interested parties," while others list "lobbyist correspondence." Preferably, the lobbying information would reside at one site for all agencies.

Legal Services Corporation Changes Introduced

Momentum is growing for Congress to eliminate severe restrictions on legal aid programs that receive Legal Services Corporation (LSC) funds. LSC programs are currently prohibited from engaging in certain activities such as lobbying, participating in agency rulemaking, and bringing class-action lawsuits. The new congressional efforts come as reports show how the restrictions have harmed home foreclosure prevention efforts.

The LSC is a nonprofit corporation that provides grants to legal aid groups and is funded by Congress through direct appropriations. An appropriations rider containing special conditions has been attached to LSC funding and has been renewed annually since 1996.

On March 26, Sen. Tom Harkin (D-IA) introduced the Civil Access to Justice Act of 2009 (S. 718) that ends the LSC restrictions on the use of non-federal funds, except those related to abortion litigation. "Lifting these restrictions allows individual states, cities and donors the ability to determine themselves how best to spend non-federal funds to ensure access to the courts," said Harkin. The bill also seeks to increase the LSC budget from $390 million to $750 million.

According to a Harkin press release, the Civil Access to Justice Act would remove "many of the restrictions currently placed on legal tools that LSC-funded attorneys can use to represent their clients. [. . .] In the spirit of compromise, the bill does maintain the prohibition on abortion related litigation as well as many of the limits on whom LSC-funded programs can represent, including undocumented immigrants (with limited exceptions such as victims of domestic violence), prisoners challenging prison conditions and people charged with illegal drug possession in public housing eviction proceedings." The measure would also create a program to expand law school clinics.

On April 7, the Brennan Center for Justice released a fact sheet that shows how the LSC restrictions harm foreclosure prevention efforts. Homeowners who are losing their homes to foreclosure are in need of legal help, yet the legal services available to them are limited and underfunded. The fact sheet details accounts of ordinary Americans and how the LSC restrictions have impacted homeowners in their struggle to keep their homes.

During this time of economic recession, there appears to be strong public support for legal services. Reportedly, two-thirds of those polled on behalf of the American Bar Association said they favor federal funding for people who need legal assistance.

A *Washington Post* editorial on March 14 went even further. It asked lawmakers to "unshackle Legal Services from congressionally-imposed restrictions that have kept it from working more efficiently and broadly." For example, unlike most others who represent plaintiffs, Legal Services lawyers who prevail in a civil case are prohibited from seeking legal fees from an opponent. The editorial also called for support of the Harkin bill.

A number of organizations also signed a joint letter that draws upon the current economic crisis to highlight the need to remove the restrictive appropriations rider. According to the letter, "Families and communities across the country are suffering because of the restrictions: victims of consumer fraud and illegal housing practices are placed at a disadvantage because LSC-funded attorneys cannot seek attorneys' fees; efforts to help prisoners reenter society are needlessly postponed; communities are hamstrung in their ability to combat predatory lending practices because legal aid clients cannot participate in class actions; and those most knowledgeable about issues critical to low-income clients cannot engage themselves in legislative and administrative reform efforts."

Supreme Court to Decide on Key Provision of 1965 Voting Rights Act

Northwest Austin Municipal Utility District No. 1 (NAMUDNO) v. Holder, a U.S. Supreme Court case in which a small utility district in Texas is challenging Section 5 of the Voting Rights Act of 1965, is scheduled for oral argument on April 29. Section 5, reauthorized in 2006, applies to all or part of 16 states, and it applies to nine states in their entirety. It requires those states to get federal approval before changing election rules or procedures, due to past laws and practices that discriminated against and disenfranchised racial minorities. This provision is referred to as the "preclearance" provision.

The implications of the NAMUDNO case have raised the level of interest in voting districts nationwide. In California, four counties are covered by the "preclearance" provision, the benefits of which the state has already touted. California Attorney General Jerry Brown "described the Voting Rights Act as 'a safeguard against discrimination' that has worked well ever since it was enacted," according to the *Daily Journal*. The blog reported that, in California, "supporters of Section 5 point out that, as recently as 2002, the U.S. Justice Department questioned proposed changes to the way Chualar Union Elementary School District in Monterey County elects its school trustees." The district wanted to change from electing trustees based on geographical area to electing trustees using an at-large system.

The "Justice Department said the move could have a discriminatory impact on Hispanics because they would be less enabled to vote for their preferred candidate," according to the *Daily*

Journal. Thus, the change did not go into effect due to the Justice Department's belief that it "was motivated, at least in part, by a discriminatory animus."

Six states covered in whole or in part by Section 5 submitted a brief supporting the continuation of the Section 5 "preclearance" provision. The brief, written by North Carolina Attorney General Roy Coope, and joined by the attorneys general from Arizona, California, Louisiana, Mississippi, and New York, says that the "preclearance requirements of Section 5 do not impose undue costs on covered jurisdictions." The brief also argues that the preclearance provision offers benefits to the covered jurisdictions by encouraging districts to "consider the views of minority voters" early in the process to change laws, helping to identify changes that have a "discriminatory effect," and preventing "costly litigation."

Other covered states, notably Alabama and Georgia, disagree with the views espoused by the aforementioned attorneys general. Alabama Gov. Bob Riley (R) says that voting rights discrimination in Alabama is an issue of the past. Thus, he directed state lawyers file a brief to that effect. Attorneys for the governor argue in the brief that Alabama only received two rejections from 1996-2005, out of more than 3,000 instances in which they sought clearance from the Justice Department. This, however, does not indicate that Alabama officials would not disenfranchise voters if they knew that there was no federal government oversight.

According to the *Birmingham News*, Riley said in the brief that "Congress wrongly equated Alabama's modern government, and its people, with their Jim Crow ancestors." Riley also says in the brief that "while several states moved the dates of their 2008 presidential primaries without needing permission from the federal government, it took Alabama four months to do so because of the Voting Rights Act."

The *NAMUDNO* case also impacts nonprofit organizations. The case affects constituents often served by these groups. Nonprofits have been instrumental in helping to ensure that voters are not disenfranchised. The OMB Watch report, *How Nonprofits Helped America Vote: 2008*, illustrates the efforts that nonprofits have taken to protect the electoral process and demonstrates the importance of continued nonprofit voter engagement.

To safeguard the rights of the constituents it serves, the nonprofit NAACP filed a merits brief. Other nonprofits, including the Constitutional Accountability Center, the Asian American Legal Defense and Education Fund, the Leadership Conference on Civil Rights, and the Brennan Center for Justice, filed amicus briefs in the case.

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Congress Passes FY 2010 Budget Resolution

On April 29, exactly 100 days into the Obama administration, the House and Senate each passed a final version of the Fiscal Year 2010 budget resolution. The final resolution outlines $3.56 trillion in spending and tracks closely with President Obama's major proposals, including key investments in health care, education, and energy.

The final resolution includes a total of $1.086 trillion in discretionary spending for the House and Senate Appropriations Committees to divide up within 12 appropriations bills. This is $10 billion less than President Obama had originally requested, which Congress plans to cut from non-defense discretionary programs. The president's request for $556.1 billion for defense programs was included in the resolution.

The resolution includes $529.8 billion for discretionary programs outside of defense. Although Congress cut $10 billion from Obama's request for these programs, the level in the budget resolution represents a $29.8 billion increase (six percent) over the FY 2009 funding level after adjusting for inflation, according to the Center on Budget and Policy Priorities.

On the tax side, the final budget assumes the extension of a large portion of the Bush tax cuts that benefit the middle class, including extending the patch to protect certain taxpayers from the Alternative Minimum Tax (AMT). In all, the resolution assumes tax revenues will be $764 billion below levels under current law. These tax cuts primarily impact those making less than $250,000.

Congressional leaders also decided against including language from a Senate amendment that would make further cuts to the estate tax. Offered by Sens. Blanche Lincoln (D-AR) and Jon Kyl (R-AZ) during debate on the Senate version of the resolution, the amendment would have cut the estate tax for America's wealthiest heirs by increasing the size of estates that can be passed on tax-free to $10 million for a couple and $5 million for an individual (from $7 million for a couple and $3.5 million for an individual) and reducing the estate tax rate to 35 percent (from 45 percent).

The House and Senate also agreed to include the option of using the reconciliation process later in 2009 to move health care reform legislation through Congress. Budget reconciliation is a fast-track procedure that limits the time for debate and amendment process for future legislation and also protects bills from filibuster in the Senate.

The House passed the resolution by a 233-193 margin. No Republicans supported the resolution, and 17 Democrats voted against it, all but four of whom represent districts that supported Sen. John McCain (R-AZ) in the 2008 presidential election, according to an analysis by Congressional Quarterly. The Senate passed the measure 53-43. As in the House, no Senate Republicans voted for the budget, while Democrats Evan Bayh (IN), Ben Nelson (NE), and Robert Byrd (WV) voted against the budget. Arlen Specter (D-PA), who recently switched his party affiliation, also voted against the budget.

The budget resolution is not signed by the president; it simply serves as a blueprint for Congress. However, the Obama administration is preparing to release more details about its FY 2010 budget request, which are expected May 7.

The aforementioned appropriations bills, which implement the budget resolution, will need to be signed by the president. According to *The Hill*, legislators are optimistic that all appropriations bills can be completed by Oct. 1, the start of the next fiscal year. If this occurs, it will mark the first instance since 1996 that all appropriations bills have been completed on time.

Recovery Act Transparency in 51 Flavors: A Sample of State Recovery Act Websites

An informal OMB Watch survey of eight state-level Recovery Act websites reveals that the access to and quality of information on Recovery Act expenditures varies widely from state to state.

Federal agencies have committed and are distributing Recovery Act funds at a rapid pace, through either formula allocations or a bidding process. Since the enactment of the act on Feb. 17, some $72 billion has been committed by federal agencies to fund myriad Recovery Act projects. The vast majority of these funds, of which $15.4 billion has already gone out the door, are disbursed to state governments that then distribute the money to individuals, private organizations, and local governments.

Like Recovery.gov, state Recovery Act websites should clearly answer four basic questions:

- What Recovery Act funds are available to the state?
- How can individuals or organizations apply for Recovery Act funds?
- Which organizations received Recovery Act funds?
- What did those organizations do with those funds?

Unfortunately, there is not a single state website that can provide the answer to these basic questions of spending transparency. OMB Watch conducted an informal review of eight state-level Recovery Act websites (Connecticut, Louisiana, Maine, Maryland, Nebraska, Texas, Virginia, and Washington State). While all of the surveyed sites provide a breakdown of Recovery Act funds by category (e.g., health care, infrastructure, education, etc.), most are limited in more detailed data.

For example, the Maryland and Washington State Recovery Act websites have user-friendly, interactive maps showing county-by-county breakdowns of Recovery Act funding by category. Yet neither allows users to perform a simple search such as typing in a ZIP code to find a list of all Recovery Act projects within a given neighborhood. Louisiana's site is a particularly striking example of limited information, listing program names with allocated funding amounts with no further information, such as descriptions of the programs. The Frequently Asked Questions section of the Maine website reveals an unsettling aspect of that state's allocation information availability.

> Until the funding is distributed by the Federal government to states and local governments, and eventually to your community, we won't be able to determine exactly where all of the funding will go. Over the next few weeks and months, there's going to be a lot of data coming in, as we coordinate with different agencies. As soon as the first dollars start to go out, you'll be able to track where the money is going.

Although data on the distribution of Recovery Act funds in Maine is needed and welcome, distributing that information after the money has been spent will significantly diminish the

usefulness of those data to groups seeking to apply for Recovery Act grants and contracts. It will also limit the ability of organizations and citizens to use the information on the sites to hold those responsible for implementation and funding accountable.

In addition to creating visibility of who received the money, another key aspect of Recovery Act transparency is visibility in the process of how groups or individuals get the money. State and local service providers not familiar with their state's grant or contract processes may be locked out of receiving Recovery Act funds. Texas's site is notable for its list of Recovery Act grant and loan opportunities. The available awards are grouped by category and include links to the administering agencies (state and federal). But like other state sites, information on how to apply for or bid on grants and contracts is not immediately apparent. Washington State's website also has a useful list of programs that are providing funding for state projects, but it is also thin on details about how to apply for funds. Nebraska provides similar information on its website, but it is grouped by category. Connecticut's site provides a link to federally administered grants available in the state but gives no information on grants or contracts that will be available directly from the state government. Louisiana's site, which was, by far, the least informative of any state site reviewed, contains no information on Recovery Act grants or contracts that are available in the state.

Unsurprisingly, no state website surveyed contains Recovery Act data reported by recipients. No state site details who has received the funds for grants or contracts that have already been awarded. However, recent OMB guidance to federal agencies on Recovery Act implementation indicates that the first recipient reports are to be available by Oct. 10, making this information gap expected. It is notable, however, that not a single state has been more aggressive than the federal government with respect to collecting recipient spending reports.

As recipients begin expending funds, it is doubtless that some waste, fraud, and abuse will occur. Unfortunately, whistleblowers seeking to expose malfeasance may be at a loss on how to report it. While there are established hotlines for waste, fraud, and abuse at the federal level, the same is not immediately apparent for most of the surveyed states. Maine's and Texas's websites are the exceptions. Prominently displayed on the Maine Recovery Act homepage is information on how to report fraud. Texas's site has this information as a sub-menu item, making it less obvious but otherwise easy to find. The other six sites had no information readily available about reporting waste, fraud, and abuse. Although an exhaustive search of the other state sites might reveal such contact information, this information should be prominently displayed to potential whistleblowers to facilitate waste, fraud, and abuse reporting.

This survey of eight states' Recovery Act websites reveals an uneven landscape in a critical component to track the use of Recovery Act funds. And while it is too early to judge the ultimate quality of spending data that may be available on these sites, this sample indicates that it will likely vary as much as the quality of information today. This unevenness should not be surprising in that the federal government has not provided resources for or guidance on developing websites. In many respects, the states, where the initial batch of Recovery Act funds is flowing, are in the center of the mix. This indicates that the federal government should take the lead in offering not only funds to assist states in enabling Recovery Act transparency, but in

providing technical assistance and advice. Without national leadership and widely promulgated standards, Recovery Act transparency will be severely hindered, as data within some states are incomplete, and data among states are incomparable.

EPA Back in the "Fishbowl"

In a recent memorandum to employees, the head of the U.S. Environmental Protection Agency (EPA) outlined broad principles of transparency that will govern the agency's interactions with the public. By promising to operate EPA as if it were "in a fishbowl," Administrator Lisa Jackson reinstated a principle many considered ignored by the previous administration. Jackson also announced measures to promote transparency in EPA's economic stimulus activities.

Jackson's April 23 transparency memo explains that to gain the public's trust, the EPA "must conduct business with the public openly and fairly." Jackson pledges that all agency programs "will provide for the fullest possible public participation in decision-making," including groups that have been historically underrepresented, such as minorities and those affected disproportionately by pollution. The memo also details an EPA commitment not to favor any particular special interest and to review outside recommendations critically and independently.

Presumption of Openness

In accordance with President Obama's recently announced policy regarding Freedom of Information Act (FOIA) compliance, the memo directs EPA staff to presume that information should be disclosed whenever possible. Only where a protected interest would be harmed or where the law prohibits disclosure should staff refuse to make information available. The memo does not detail what steps will be taken to conform to the administrator's instruction to "make information public on the Agency's Web site without waiting for a request from the public to do so." However, government transparency advocates have long sought such an approach to pushing information out to the public.

Rulemakings

In the memo, the administrator calls on EPA employees involved in rulemakings to ensure that all public correspondence is submitted to the public docket, including summaries of oral communications. The instruction falls short of guaranteeing that all meetings with non-EPA staff are disclosed, but rather, it requires only those that contain "significant new factual information regarding a proposed rulemaking" to be posted. The memo also instructs rulemaking staff "to provide all interested persons with equal access to EPA." Greater transparency in the rulemaking process is sought by open government and regulatory reform advocates.

The administrator does not provide detailed guidance on how to ensure all relevant communications with the public are disclosed in the rulemaking docket. The memo does, however, encourage the use of a variety of media and technologies for communicating with the

public. Internet-based dialogues are highlighted as one useful form of public participation, in addition to the more traditional public hearings and the *Federal Register* public comment process. The memo encourages EPA staff "to be creative and innovative in the tools we use to engage the public in our decision-making."

Schedules

The memo includes a commitment from the administrator to post her daily schedule online, allowing the public to see what groups and individuals are meeting with her. Other senior officials are also directed to post their appointment calendars on the EPA website. The administrator's and acting deputy administrator's calendars currently appear online, but only the current day's appointments are available. Schedules from previous days or upcoming days are not accessible.

Restoring a Tradition

In 1983, following the resignation of EPA Administrator Anne Gorsuch Burford amidst scandal, President Reagan brought back the first EPA administrator, William Ruckelshaus. To restore confidence in the agency, Ruckelshaus vowed to a Senate committee to operate the agency as if it were in a fishbowl, where agency actions were transparent and included open public participation. His subsequent memo set forth principles of transparency for agency employees.

Rep. John Dingell (D-MI) and Bart Stupak (D-MI) of the House Committee on Energy and Commerce sought such a memo from Bush administration EPA Administrator Stephen Johnson, noting in a December 2007 letter that every administrator from 1983 to 2001 had issued a memo detailing the openness principles. Johnson never produced a fishbowl memo during his time as EPA administrator.

The EPA administrator's office is now in the process of creating guidance and policies for implementing the principles set forth in Jackson's memo. The agency has stated that additional guidance governing public communications will be available to the public once it is formulated.

Other transparency issues the agency will be working on include the review of information alleged to be confidential business information and guidance on how program staff should coordinate with the agency's public affairs office when communicating with the public. The previous administration was criticized because expert staff were infrequently available to answer questions from the public.

Recovery Act Transparency

In testimony before a House committee on April 29, Jackson announced measures being developed to provide transparency and accountability in the disbursement of billions of Recovery Act dollars provided to EPA. Jackson stated, "Transparency will be achieved through regular reporting to the Agency's Recovery Web site, as well as the government-wide Recovery

site." To date, transparency on Recovery Act activities has been spotty, according to numerous watchdog groups.

The Recovery Act provides $7.22 billion for EPA-administered programs, including the Clean Water State Revolving Fund, the Drinking Water State Revolving Fund, Superfund, Brownfields, Underground Storage Tanks, and Clean Diesel programs. The EPA has already distributed $1.5 billion to 49 states, plus the District of Columbia and American Samoa, mostly for the clean water programs.

According to Jackson, EPA is working to make all Recovery Act activities "transparent to the public, the public benefits of these funds are reported clearly, accurately, and in a timely manner." The agency has appointed a "Senior Accountable Official" who will lead and coordinate all EPA actions under the Recovery Act. Jackson also announced a "Stimulus Steering Committee comprised of senior managers from across the Agency" that monitors stimulus activities weekly. So far, no public information is available about this committee's composition or findings.

The Recovery Act also provides EPA's Office of Inspector General (OIG) with $20 million to oversee stimulus activities. The OIG's activities and findings to date are available online.

Justice Department Clarifies FOIA Policy

On April 17, the Office of Information Policy (OIP) at the Department of Justice (DOJ) issued new guidance on agency implementation of the March 19 Freedom of Information Act (FOIA) memo written by Attorney General Eric Holder. Despite the clarifications, public interest groups continue to notice a wide difference between the new policy and agency actions on FOIA.

The memo describes the impact of Holder's guidelines as "a sea change in the way transparency is viewed across government." The new guidance gives agencies specific frameworks within which to interpret FOIA exemptions. The OIP also placed new emphasis on agency requirements recognizing that transparency and accountability are inherently linked.

Discretionary Disclosure

One of the biggest changes Holder's memo brought to the executive branch interpretation of FOIA was urging greater use of discretionary disclosure. The OIP explains that just because material could be legally withheld under a particular exemption does not mean that agencies should automatically withhold it. The guidance instructs personnel that upon finding a record technically exempt under FOIA, staff must make a separate determination on whether a record is suitable for discretionary disclosure because of possible importance to the public interest.

This approach has significant implications for implementation of several exemptions. For instance, under Exemption 2, which deals with agency personnel rules and practices, there are two categories. The "Low 2" exemption refers to records that contain control markings that

agencies contend are of little or no interest to the public and used solely for internal purposes. The OIP virtually removed "Low 2" as a proper exemption under the FOIA, stating that "there would be no reasonably foreseeable harm from release, and discretionary release should be the general rule."

The discretionary release standard will also affect Exemption 5, records considered to be pre-decisional or interagency communication, in a major way. The OIP establishes specific criteria to consider when evaluating the discretionary release potential of records under this exemption: age of the record, sensitivity of its content, nature of the decision at issue, status of the decision, and the personnel involved. In the past, the government often argued that disclosing such records could discourage open and frank discussions on policy. The OIP, however, appears to change the official position and asserts that release would "make available to the public records which reflect the operations and activities of the government."

Some exemptions, however, remain protected from the new push for discretionary disclosure. In particular, with regard to Exemption 1, national security information, the OIP argues, "no discretionary disclosure is appropriate." Thus, all information concerning the foreign relations of the United States can still be withheld as long as it is properly classified, regardless of the public interest in the material.

Foreseeable Harm

The OIP guidance also elaborated on Holder's call to apply a standard of "foreseeable harm" for withholding decisions. The principle would require agencies to reasonably foresee harm to interests protected under an exemption before withholding information from requestors. This requirement is identical to that established in the October 1993 FOIA memo by Attorney General Janet Reno. This determination, however, is to be made based on the age, content, and character of the record rather than "speculative or abstract fears."

Oversight

The OIP places strong emphasis on Chief FOIA Officers being held accountable for agency progress. They are responsible for recommending adjustments to "agency practices, personnel, and funding." All Chief FOIA Officers are mandated to report annually to the DOJ on the steps that they have taken to improve transparency in their agencies. DOJ also requires that the Chief FOIA Officer at each agency conduct a comprehensive review of FOIA practices for timeliness and to identify other problems, such as backlog issues and resource requirements.

Criticism

The new openness policies of the administration have been met by critics who particularly focus on the slow pace of actual implementation by agencies. The Electronic Frontier Foundation noted recently that the Federal Bureau of Investigation is still using the "Low 2" exemption to withhold records. Additionally, a summary of recent court decisions posted to the OIP website shows that other agencies are also withholding information under the Low 2 exemption and

successfully defending themselves in court. The same is true for the use of Exemption 5. Agencies are still applying it widely, and the courts are taking a black-and-white approach ruling along the letter of the law.

Courts, which often favor agencies in FOIA cases rather than aggressively applying the spirit of FOIA, are unlikely to challenge continued broad use of exemptions, even if they differ with the newly stated policies. The U.S. Supreme Court has even turned down its opportunity to review the threshold of Exemption 5. Therefore, strong efforts from the White House, OIP, and each agency's Chief FOIA Officer will be key in changing the federal culture of secrecy.

Under Obama, Sun Setting on Bush Midnight Rules

The Obama administration continues to reverse policies left by the Bush administration, including many controversial regulations finalized near the end of President Bush's term. Administration officials are employing different strategies with the goal of overturning or significantly altering some of the Bush administration's so-called midnight regulations.

The Interior Department has pushed back against three Bush midnight regulations without undertaking new rulemakings, relying instead on openings Congress and the courts have given it.

Interior Secretary Ken Salazar announced April 28 that the administration would withdraw a December 2008 regulation limiting the role of science in Endangered Species Act decisions. Critics say the rule was designed to make species protection more difficult.

The rule, issued jointly by the departments of Interior and Commerce, allows federal land-use managers to approve projects like infrastructure creation, minerals extraction, or logging without consulting federal habitat managers and biological health experts. Previously, consultation had been required. The rule also forbids global warming from being considered as a factor in species decisions.

Congress gave the Obama administration the authority to withdraw the rule in a FY 2009 spending bill (H.R. 1105). Without the bill, the administration would have had to undertake a lengthier process, including a public comment period.

In a March 3 memo, President Obama instructed Interior and Commerce to review the Bush rule and "determine whether to undertake new rulemaking procedures." In the interim, Obama instructed land-use managers to exercise their discretion in favor of continuing scientific review. As a result, it is unlikely the rule ever had any practical effect.

On April 27, Salazar announced his intent to back away from a Bush midnight rule allowing mountaintop mining operations to dump waste into streams. Calling the rule "legally defective," Salazar said, "I have asked the Department of the Justice to file a pleading in the U.S. District

Court requesting that the rule be vacated due to this deficiency and remanded to the Department of the Interior for further action."

Environmentalists applauded the move but emphasized that, without more aggressive enforcement, mountaintop mining waste will continue to degrade waterways and threaten communities. Joan Mulhern, senior legislative counsel for the environmental group Earthjustice, called for "a firm commitment to enforce the law as it applies to mountaintop removal and valley fills," noting that Interior had historically failed to enforce the old regulations.

Interior now awaits the court's decision. The rule was challenged in federal court by two different coalitions of environmental groups.

The third Interior Department rule turned back by the Obama administration had sought to permit the carrying of loaded weapons in national parks. Interior has said that it will accept a judge's decision that sent the rule back to the agency for an assessment of the rule's impact on wildlife. The ban on loaded weapons, first set in 1983, remains in effect.

Other regulatory agencies are reversing Bush midnight regulations more methodically, using traditional notice-and-comment rulemaking.

The Department of Labor published a notice April 21 proposing to withdraw a rule that would have increased reporting requirements for unions. The rule, finished under the Bush administration but not published until Jan. 21, the day after President Obama was sworn in as president, had yet to take effect.

The administration has also proposed withdrawing a November 2008 rule changing services covered by Medicaid. The rule limits the kinds of outpatient services, like vision or dental, Medicaid recipients can access. The Department of Health and Human Services (HHS) is taking comment on the proposed withdrawal from May 6 to June 1. Meanwhile, the Bush rule remains in effect.

Other midnight regulations may be addressed soon:

- The U.S. Environmental Protection Agency (EPA) has asked a federal court to delay a lawsuit over a December 2008 rule that deregulates tons of hazardous waste, allowing it to be burned as fuel instead of disposing of it properly. EPA said it is reconsidering the rule and expects to propose a withdrawal notice in November.
- EPA is also reconsidering a change to the definition of solid waste that critics charge exempts tons of hazardous waste from regulation under the Resource Conservation and Recovery Act, instead allowing the waste to be recycled. EPA will hold a public meeting on the regulation sometime in May.
- HHS proposed March 10 a withdrawal of a regulation giving health care providers the right to refuse services that they believe do not comport with their personal beliefs. Critics say the rule is aimed at limiting access to reproductive health services and

information. HHS accepted comment on the withdrawal notice until April 9. A final withdrawal notice is expected soon.

The Bush administration's midnight regulations campaign was more methodical and effective than that of any previous administration. Bush officials pushed to have many rules finalized well before Jan. 20 in order to give those rules time to take effect. By law, agencies must wait at least 30 or 60 days before allowing rules to take effect.

As a result, the Obama administration was unable to quickly or easily undo most Bush-era regulations. Without congressional or judicial intervention, the Obama administration has been left to undertake entirely new rulemakings, an often time-consuming process.

Meanwhile, many Bush rules remain in effect and have yet to be addressed, including rules that ease environmental regulations on factory farms and a rule that allows trucking companies to force drivers to work more hours and longer shifts. For a list of controversial midnight regulations and updates on efforts to overturn them, visit www.ombwatch.org/node/9739.

Senators Stall Obama's Agency Nominees

As President Barack Obama continues the process of nominating officials to fill agency positions in his administration, some senators have stalled the nominations over policy differences. The senators have targeted nominees to regulatory agencies that have responsibility for a range of environmental policies.

Sen. John Barrasso (R-WY) has placed a hold on the nomination of Gina McCarthy as the U.S. Environmental Protection Agency's (EPA) Assistant Administrator for Air and Radiation. (A hold is an informal action intended to keep a measure or nomination from reaching the floor for a vote.) The air and radiation office would have some responsibility for regulating greenhouse gases under the Clean Air Act, if Congress does not pass legislation addressing climate change. McCarthy was nominated March 16; she is a former commissioner of the Connecticut Department of Environmental Protection.

According to an April 30 press release, Barrasso is concerned about EPA's potential to use the act to regulate and the impacts of the regulations on businesses and consumers. “The nominee has failed to address serious concerns regarding the implementation of the Clean Air Act with regards EPA’s recent endangerment finding,” Barrasso said. The EPA issued an endangerment finding that will require the agency to act on climate issues if Congress does not supplant that responsibility with new legislation. The press release also indicates that Sen. James Inhofe (R-OK), the ranking member of the Senate Environment and Public Works Committee, supported Barrasso's hold.

Department of Interior nominees are also targets of Senate holds. Sens. Robert F. Bennett (R-UT) and Lisa Murkowski (R-AK) have placed holds on David Hayes, Obama's choice for deputy secretary at Interior. Bennett has delayed Hayes's nomination pending a departmental review of

77 oil and gas leases that Interior Secretary Ken Salazar cancelled Feb. 4. Salazar agreed to review the decision at Bennett's request and asked Hayes to lead the review team. Hayes indicated in a letter to Bennett that he thought the reviews would be completed May 1 and he and his staff would have a final report for Salazar by May 29.

Murkowski added her name to the hold on Hayes because of her objection to the administration's decision to overturn President George W. Bush's midnight regulation changing the way the Endangered Species Act is implemented. The rule allowed federal land-use managers to approve projects like infrastructure creation or minerals extraction without consulting federal habitat managers and biological health experts responsible for species protection. Consultation was required under the previous version of the rule.

According to an April 30 press release, Murkowski disagreed with "Interior's decision to unilaterally overturn an existing rule" without going through the normal rulemaking process. The release also noted her disappointment in Obama's decisions on other environmental and energy-related matters, but none of these objections are specifically related to Hayes.

However, under Section 429 of the Omnibus Appropriations Act of 2009, Congress authorized the secretaries of Interior and Commerce to withdraw or reissue the rule "without regard to any provision of law that establishes a requirement for such withdrawal." In addition, Obama issued a memo to the two agencies urging them to review and determine the appropriate approach to revising the rule.

Bennett also has a hold on Interior's solicitor nominee, Hilary Tompkins, over concern that Tompkins avoided clearly answering questions about the department's position on the Utah Wilderness Settlement Agreement. According to an April 30 *Salt Lake Tribune* article, the 2003 settlement agreement freezes the state's designated wilderness study areas at 3.2 million acres, thus restricting Interior's ability to designate additional areas of Utah as wilderness. Bennett is seeking assurances from Salazar and Tompkins that the settlement will remain in place because removing the freeze could hurt Utah's energy industry, the article noted.

The Senate was able to confirm Tom Strickland as Interior's Assistant Secretary for Fish and Wildlife and Parks April 30. Strickland, like Salazar, is from Colorado and will retain his position as Salazar's chief of staff while serving as assistant secretary.

Obama named two people to another critical regulatory agency May 5. In a press release, Obama announced that he will nominate as commissioners to the Consumer Product Safety Commission (CPSC) Inez Moore Tenenbaum and Robert S. Adler. Tenenbaum will be nominated to chair CPSC and Adler to one of two new commissioner positions. Tenenbaum is a former superintendent of education in South Carolina and an advocate for families and children. Adler is a law professor in North Carolina, a former advisor to CPSC staff, and has consumer protection experience, according to the press release. In addition, the statement indicated Obama's intent to expand the commission from three to five members, so one position remains to be filled.

Another Obama nominee, Cass Sunstein, will sit for his Senate confirmation hearing on May 12. Sunstein has been nominated to run the White House Office of Information and Regulatory Affairs, an office that has been deeply involved in regulatory review and other regulatory process issues since the Reagan administration.

Oral Arguments Indicate Court May Strike Down Key Voting Rights Provision

On April 29, the U.S. Supreme Court heard oral arguments in *Northwest Austin Municipal Utility District No. 1 (NAMUDNO) v. Holder*, a case in which a small utility district in Texas is challenging Section 5 of the Voting Rights Act of 1965. Section 5 was reauthorized in 2006 and applies to all or part of 16 states, including nine states in their entirety. It requires those states to seek federal approval before changing election rules or procedures due to past laws and practices that discriminated against and disenfranchised racial minorities.

NAMUDNO argued that under Section 5, it can "bail out" of the approval provision, known as "preclearance." NAMUDNO further argued that even if it could not get out from under the provision, Congress' extension of preclearance was unconstitutional because Congress did not have adequate evidence that an extension was necessary.

The high court spent considerable time on the evidence and constitutionality Congress used to support its decision to reauthorize Section 5 in 2006. Justice Stephen Breyer elaborated on the evidence, noting that the act has served as a deterrent to voting discrimination and that thousands of discriminatory election changes have been prevented as a result of Section 5.

Justices Samuel Alito, Antonin Scalia, and Anthony Kennedy seemed to be bothered that some states are subjected to preclearance when others are not. Their questions focused on the supposed inequality of requiring preclearance for some states and not for others.

Kennedy stated that Congress has found that the sovereignty of one state is less than another. "The sovereignty of Alabama, is less than the sovereign dignity of Michigan. And the governments in one are to be trusted less than the governments in another," he said. Kennedy later added that due to Section 5 preclearance, "a minority opportunity district is protected in covered jurisdictions and not in non-covered jurisdictions."

The arguments and the evidence from the *Congressional Record* supporting preclearance were not enough to sway the course of the justices' questions. Alito, Scalia, and Kennedy, in particular, questioned why Congress did not compare the states that are covered by the preclearance provision to the states that are not covered by the provision to show that the covered states are more likely to discriminate.

"Whether Congress could have written a different or even better Voting Rights Act in 2006—making pre-clearance voluntary for the entire nation (as suggested by Justice Scalia) or extending pre-clearance requirements to jurisdictions not previously covered (as Justices Alito

and Kennedy seemed to find intriguing)—is thus the wrong inquiry," said Elizabeth Wydra, Chief Counsel of the Constitutional Accountability Center, in a blog post. "Here, Congress held 21 hearings, interviewed more than 90 witnesses, amassed a 15,000 page record, and found that jurisdictions required to pre-clear had engaged in thousands of discriminatory electoral practices between 1982 and 2006," Wydra said.

While a decision in this case is not expected until June, oral arguments indicate that Section 5 is receiving considerable attention. Prior to oral arguments, it appeared that Justice Kennedy would be the swing vote. It is assumed that the high court's conservative block of Alito, Roberts, Scalia, and Thomas will vote to strike down Section 5. Justices Souter, Ginsburg, and Breyer seem poised to uphold it. Stevens did not say much during oral arguments, making it difficult to anticipate even a cursory view of his potential vote.

Recent FEC Rulings May Indicate Growing Leniency in Enforcement

The Federal Election Commission (FEC) recently issued a series of rulings that may represent a move toward a more lenient interpretation of election laws. The commissioners have repeatedly split along party lines over whether to pursue possible campaign finance violations involving organizations charged with acting as political committees.

A "political committee" is defined in the Code of Federal Regulations as "any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year." In *Buckley v. Valeo*, the U.S. Supreme Court said political committees are "organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." The FEC has the responsibility of determining whether groups in question engaged in behavior intended to support the election of a candidate.

In 2007, Public Citizen filed complaints against Americans for Job Security (AJS), charging that AJS violated its 501(c)(6) tax-exempt status by airing messages intended to influence an election. The complaints argued that AJS should be considered a political committee and therefore have to disclose funding and limit contributions to $5,000 annually per contributor. After a split 3-3 decision, the FEC decided against moving forward with an investigation into the group's activities.

According to the organization's website, AJS has spent more than 95 percent of the $40 million it receives in membership dues on "direct issue advocacy," which includes television commercials, radio ads, direct mail, and telephone calls. A sampling of its recent television and radio ads is also available on its site.

According to The Campaign Finance Institute report on the 2008 election, AJS spent over $8 million in electioneering communications. 501(c)(6) organizations may engage in some partisan

activity and help to influence an election, but influencing the outcome of elections cannot be the organization's primary purpose.

Public Citizen decided to file a lawsuit on April 24 to overturn the FEC's dismissal of the AJS case. Since then, FEC commissioners have released statements of reasons regarding the dismissal. The Democratic commissioners concluded that "there is reason to believe" that some of the AJS messages appeared to contain express advocacy and therefore may be subject to campaign finance laws. They supported the factual and legal analysis prepared by the Office of General Counsel (OGC). The Republican commissioners rejected the OGC conclusions and decided that AJS did not engage in any express advocacy.

A 527 organization, the American Leadership Project (ALP), was charged with failing to file as a political committee. The group released ads during the 2008 Democratic primary disapproving of then-candidate Barack Obama. At issue was whether the group expressly supported candidate Hillary Clinton and opposed Obama. The FEC once again had an insufficient number of votes to move forward with the case.

OMB Watch submitted comments to the FEC in January 2009 regarding the harm that occurs with the vague definition of express advocacy and the difficulty in determining when an organization is acting as a political committee. OMB Watch's comments note that as a result of the lack of definition, "the FEC cannot fairly or adequately enforce the rule defining express advocacy. As a practical matter, this makes it impossible for citizen groups that want to communicate with the general public to judge whether their form of communication is allowable or not, which threatens a risk of sanctions."

Effective enforcement is not possible when the FEC rules are so vague, and with recent votes to drop numerous cases, the question remains: What will it mean for upcoming campaigns?

The OMB Watch comments added, "The FEC must clarify the line between express advocacy and issue advocacy. For the sake of future enforcement cases and for continued citizen engagement in genuine issue advocacy, FEC regulations should outline in distinct language what is electoral and non-electoral activity."

Lobbying Restrictions Generate More Criticism

It appears that the Obama administration's restrictions on lobbying are drawing criticism even as the administration defends the policies. The controversy surrounds two policy documents: one addresses restrictions on hiring lobbyists and others as political appointees, and the other focuses on communications by lobbyists about use of Recovery Act funds.

On May 5, the White House counsel for ethics and government reform, Norm Eisen, spoke at a half-day conference hosted by George Washington University's Graduate School of Political Management. He strongly supported President Obama's executive order on ethics (E.O. 13490), noting that the order is a tool to help ensure the American people "will not be subjected to the

influences ... that have waylaid good policy, but really will attempt to be guided by that point on the horizon that represents the best thing for the country."

The January 21 executive order on ethics prohibits, for two years, an individual registered under the Lobbying Disclosure Act from working in an agency that he or she lobbied. Additionally, the political appointee may not participate in "any particular matter" that the person lobbied on within the past two years and may not participate in the specific issue area in which the particular matter falls. There is also a restriction on all potential employees – regardless of whether they are lobbyists or not – from working on "any particular matter" that is "directly and substantially related" to former employers or former clients, again for two years. Finally, when an appointee leaves government service, there is a ban on lobbying high-level executive branch officials for the remainder of the administration. The director of OMB, in consultation with the White House counsel, may grant a waiver of these restrictions if the "application of the restriction is inconsistent with the purposes of the restriction" or it is in the "public interest" to grant a waiver.

At this time, only three waivers have been granted for lobbyists to work within the administration. A fourth waiver was granted on May 1 for White House advisor Valerie Jarrett. Jarrett was given permission to work on Chicago's bid for the 2016 Olympics, even though she was previously the vice chair of a nonprofit organization working to bring the Olympics to Chicago.

Eisen also argued that there is no "flat ban" on lobbyist communications on Recovery Act spending. "There is a requirement that lobbyist communications about particular applications, applicants, or projects be put in writing. The rationale is that we wanted every American ... to be able to evaluate those proposals on their merits." He was referring to a requirement that the written communications must be posted to the agency's website.

The controversy is over a March 20 presidential memo that restrictions communications by federally registered lobbyists with executive branch employees on use of Recovery Act funds. The memo, and subsequent guidance from OMB, allows federally registered lobbyists to communicate on general issues about the Recovery Act as well as to ask specific questions in public forums. However, the moment the conversation switches to specific comments about how money should be spent, the communication must be put in writing. The guidance calls on agencies to post all written communications with lobbyists to the agency website within three days of the communication.

This can create unusual situations. For example, a state registered lobbyist or someone who is not a lobbyist can speak orally to an executive branch official about how Recovery Act money should be spent, but a federally registered lobbyist cannot. In response to questions from the audience about this situation and the administration's desire for more transparency, Eisen suggested he was reviewing various options for modifications to the rules, including requiring disclosure of all communications from lobbyists and non-lobbyists who are seeking to influence how money is spent under the Recovery Act.

Other panelists at the event thought the administration had gone too far in targeting and restricting lobbyists. Several pointed out that the real problem isn't lobbyists but the corrupting influence of money. For example, Bob Edgar, the president of Common Cause, said, "Most lobbyists are good people who perform a valuable service sharing their expertise on issues with Members of Congress. The problem is our corrosive system of funding political campaigns that makes lobbyists a conduit between Members of Congress and money. We need to change that."

Eisen has been hosting a series of listening sessions, including one on May 6 that included a range of nonprofit organizations, to identify possible modifications and improvements to these policies.

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Agency Plans Add Another Element of Accountability to Recovery Act Spending

On May 17, the Obama administration released the next wave of Recovery Act information, this time by posting Agency Recovery Plans on Recovery.gov. These plans, which are mandated by the Recovery Act, include broad, agency-wide plans and program-specific plans on how each federal agency intends to expend its appropriated Recovery Act funds. Like other Recovery Act-related data dissemination, this latest phase in Recovery Act spending transparency marks another move in the right direction but needs some refinement.

All agency-wide plans contain four sections:

- **Broad Recovery Goals** - Essentially a recovery mission statement and contains a declaration of each agency's goals for the recovery

- **Competition on Contracts** - Information on how much that agency's Recovery Act funds will be awarded through contracts
- **Contract Type** - A discussion of the extent to which that agency will rely on competitively bid contracts
- **Accountability Plan** - A narrative description of how that agency plans to implement accountability policies

Agency Recovery Plans also include separate "Program Plans," which detail the programs the agencies are implementing as part of their Recovery efforts, and include the following sections:

- **Objectives**
- **Measures**
- **Schedule and Milestones**
- **Projects and Activities**
- **Review Process**
- **Cost and Performance Plan**
- **Energy Efficiency Spending Plans**
- **Program Plan Award Types**

There are some 270 Program Plans, spread across 28 of the federal agencies that have received Recovery Act funds. Although the reporting format is consistent for all plans, the programs detailed in the plans range from simple expansions or extensions of old programs, such as the Early Head Start Recovery Plan, to complex new programs, such as the State Fiscal Stabilization Fund Recovery Plan, which will provide funds to the states to "avoid reductions in education and other essential public services."

Each of these Program Plans has detailed information about the program, such as objectives, timelines, measurement criteria, review processes, and award types. And while a comprehensive survey of the nearly 300 program-specific plans would provide insight into how well each agency is formulating and promulgating Recovery Act spending plans, a sampling of plans reveals unevenness of information quality both between and within agencies.

For example, the Department of Energy lists several programs for which "No Data Available" appears under most of the major section headings, while the U.S. Army Corps of Engineers' Program Plans consistently lack information under the "Measures" section. These two agencies are the outliers, however, as other agencies are fairly comprehensive in completing section detail. However, for all program plans, nowhere is the total appropriated amount clearly stated. Although one can view this information in each agency's Weekly Report in another section of the Recovery.gov website, this basic but important information should be included in each Program Plan.

While information in the plans is uneven, it is easy to find. Links to Agency Plans are prominently displayed on the Recovery.gov website. Not only can one browse by agency, but also by Objectives, Public Benefits, Types of Programs, and Measures of Performance to find

different programs. While increased functionality is certainly welcomed, browsing by the latter four options produces a seemingly-random list of agency programs.

One interesting feature within these four sections is a word cloud of top keywords used in each of the sections that is clickable and will pull up the specific section of the program plans that mention those words. This allows both instant understanding for users of the topic areas most cited in agency plans, but also allows for a quick search that narrows the list of programs to just those related to "construction" or "health" – topics that cut across programs and agencies.

Finally, like most websites that seek to disseminate information as broadly as possible, Recovery.gov includes RSS feeds for all the agency and program plans. Unfortunately, while a Program Plan RSS feed is available on Recovery.gov, each agency does not have its own Program Plan feed, forcing the user to subscribe to a feed that contains information on all Recovery Act Project Plans.

Despite some need for improvement, that these Agency and Program Plans are available in a single location and in a user-friendly format is laudable. And while they can sometimes be just vague summaries of programs whose specifics are months away from being released, the promulgation of these plans is yet another step in the right direction by an administration seeking to make Recovery Act spending transparent and accountable. Citizens, government watchdogs, program advocates, and the news media have another criterion by which to evaluate Recovery Act spending.

Congress Meekly Moves toward DOD Acquisition Reform

Both the House and the Senate unanimously passed legislation in early May to overhaul the Department of Defense's (DOD) acquisition process for major weapons systems. While the goal of this legislation is to reform and strengthen the procurement process used at DOD to limit cost and schedule overruns, many of the provisions included in the Senate bill fall short.

The Weapon Systems Acquisition Reform Act of 2009 (S. 454) was introduced by the two top members of the Senate Armed Services Committee, Sens. Carl Levin (D-MI) and John McCain (R-AZ), on February 23 and has moved rapidly through the Senate. The Levin-McCain bill seeks to strengthen the 1981 Nunn-McCurdy Provision, an amendment inserted into the FY 1982 Defense Appropriations bill. Nunn-McCurdy currently requires the Secretary of Defense to notify Congress if a project exceeds 30 percent of its original cost and certify that a program exceeding 50 percent of its original estimate is essential for national security, is the only option available, and is adequately structured to prevent future cost growth.

Rather than simple notification, the Levin-McCain bill calls for any weapons program experiencing "critical" cost growth, defined as over 50 percent, to be terminated unless the Secretary of Defense certifies that the project is "essential to the national security of the United States." Additionally, even if the program receives certification from the secretary, the Defense Department would cancel the most recent certification granted to the project and require it to

obtain a new one that guarantees timeframes and costs for the remaining work before the project continues.

While these standards are tougher than the 1981 law, the Senate bill still contains significant limitations, some of which were added to the bill as it moved through committee mark-up and the amendment process on the floor. First, allowing a project to be classified as "essential to national security" creates a loophole for the Defense Department to continue with business as usual. Second, the establishment of the Director of Independent Cost Assessment (DICA) – an important position – did not create a sufficiently wide jurisdiction for review, as the DICA can only review those programs that receive their certification to move forward from the Under Secretary for Acquisition, Technology and Logistics. Finally, the legislation does not do enough to encourage competition in the different stages of development for a weapons program because Congress can simply grant a waiver, again based on "national security," or if it is believed that competition would not provide an ample amount of cost savings.

The Levin-McCain bill also continues to allow defense contractors to develop multiple parts of a weapons project. Reform advocates, such as Travis Sharp at the Center for Arms Control and Non-Proliferation, claim that this allows contractors to "grade their own tests," as the company responsible for the engineering or technical assistance of a project also works on the development or construction of the weapons system. In order to bring more scrutiny to weapons acquisition, an independent assessment of the progress made during development of weapons systems is needed.

It is not surprising that this legislation is insufficient to truly reform DOD's acquisition process. Introduced in late February, the measure coasted through the legislative process because some legislators are averse to truly reforming a broken system that still provides their districts with high-paying defense contracting jobs. Evidence of this aversion is an amendment to the Levin-McCain bill introduced by Sen. Patty Murray (D-WA). The amendment would require the Pentagon to notify Congress of the impact of the cancellation of a major weapons program on the industrial base. Murray originally wanted the amendment to automatically prohibit the cancellation of a weapons program if it would have a significant impact on the industrial base, but that requirement would essentially protect all major weapons programs and negate the intent of the review process.

With the legislation currently in conference, House and Senate members are attempting to hash out the few differences between the two versions of the bill. Despite the shortcomings of the legislation, it is still possible a properly structured conference agreement will emerge in time for President Obama to sign the legislation before the Memorial Day recess. If the final product includes an independent cost analyst, stringent criteria for cancelling a program with endemic cost overruns, and more thorough measures to prevent organizational conflicts of interest at different stages of weapons development, the bill will take a meaningful, if small, step toward reforming the procurement process at the Department of Defense.

Congress Seeks Hidden Truth on Torture

On May 13, a Senate Judiciary subcommittee led by Sen. Sheldon Whitehouse (D-RI) held a hearing on the treatment of terrorist suspects in the custody of U.S. government personnel. The hearing was the first to formally discuss torture after the release of four key Bush administration memoranda that established broader interrogation policies. The hearing prompted the Justice Department to release two additional documents concerning internal Bush administration deliberations over policy.

The four Bush-era torture memos recently released by the Justice Department and authored by the Office of Legal Counsel (OLC) framed much of the hearing's discussion. Whitehouse stated during the hearing, "We were told that waterboarding was determined to be legal, but were not told how badly the law was ignored, bastardized and manipulated by the [OLC] nor were we told how furiously government and military lawyers rejected the defective OLC opinions." The memos authored between 2001-03 and released by the OLC on April 16 gave President George W. Bush exclusive authority over detainees and restricted Fourth Amendment rights.

The Subcommittee on Administrative Oversight and the Courts heard testimony in an attempt to better understand the development of Bush administration policies on the treatment of suspected terrorists who were detained by American forces. Testimony demonstrated the negative impact of torture on national security and the reaction of several agencies to the memos shortly after they were written. The record seems to show that high-level officials dissented against OLC interrogation policies but were quieted by the Defense and Justice Departments.

Ali Soufan, a key witness and former FBI agent, testified that the Bush administration's policy allowing allegedly unlawful interrogation methods impaired intelligence gathering. Soufan stated that the more aggressive tactics were "ineffective, slow and unreliable, and as a result harmful to our efforts to defeat al-Qaida." Soufan cited the interrogation of Abu Zubaydah in March 2002 as an example. Soufan, who was present for the questioning, recounted that FBI methods aimed at establishing a rapport with Zubaydah quickly led to actionable intelligence. However, when the Central Intelligence Agency (CIA) stepped in, according to Soufan, and used harsh techniques, Zubaydah stopped talking. The Bush administration had argued that Zubaydah stopped talking because he was trained to resist interrogation methods.

Philip Zelikow, formerly a counselor for the Bush State Department, testified concerning his attempts in 2005-06 to prohibit "cruel, inhuman, and degrading" interrogation methods. Zelikow mentioned two documents not previously published. In these 2005 documents, Zelikow proposed the creation of an alternative legal framework that would secure standardization of interrogation policy on a level at or above those of coalition partners and define "humane treatment." Zelikow had argued that American handling of detainees under OLC memos was not in compliance with Geneva standards (and thus U.S. law) and made specific recommendations to establish military commissions. While well received by State Department Secretary Condoleezza Rice, Zelikow's position was outright rejected by Defense Secretary Donald Rumsfeld. Zelikow went on to report that orders were given for his memos to be collected and

destroyed. Despite the order, the State Department has retrieved the documents and is currently reviewing them for possible declassification.

Although Congress has set out on a fact-finding mission to uncover the truth behind past American torture practices, the Obama administration seems to be moving in the opposite direction. Although the administration moved to release the OLC memos in an effort toward transparency, it has refused to hold accountable those who created and carried out these policies. The president also went back on previous statements that he would release photographs of detainees tortured while in U.S. custody, stating that to do so "can serve no public good."

Congress Attempts to Restore Teeth to Whistleblower Protections

On May 14, the House Committee on Oversight and Government Reform held a hearing on H.R. 1507, the Whistleblower Protection Enhancement Act of 2009. The bill is Congress' most recent attempt to reform whistleblower protections after failing to pass substantively similar bills in the previous two sessions and abandoning a bipartisan whistleblower amendment to the American Recovery and Reinvestment Act.

Rep. Edolphus Towns (D-NY), chairman of the committee, hailed the legislation as "a landmark step in restoring Congress' intent to protect employees from retaliation." The legislation closes several loopholes in the current protections for whistleblowers by expanding protections to include contractors and national security and intelligence employees, as well as improving the procedures for responding to charges of retaliation.

Rajesh De, Deputy Assistant Attorney General at the Office of Legal Policy within the Department of Justice offered testimony before the committee for the administration. De expressed support for many changes the legislation proposes. However, De raised concerns that the law "not inadvertently make it more difficult for civil servants in supervisory roles to discipline employees who themselves engage in such acts or whose job performance is otherwise inadequate." All indications are that this concern is unfounded. Other civil service legislation has neither clogged the courts nor restricted managers from firing employees for justifiable reasons.

A second concern from the administration pertains to national security. While agreeing that "whistleblowers in the national-security realm must have a safe and effective method of disclosing wrongdoing without fear of retaliation," the administration is concerned that the bill could result in the release of classified information. De suggested "an extra-agency avenue within the Executive Branch for federal employees who wish to make classified disclosures to Congress." Individuals would first seek approval for any disclosure to Congress from the Inspector General and head of their agency. If they decline to do so, employees could appeal to the extra-agency board "composed of senior presidentially-appointed officials from key agencies within and outside of the intelligence community." Such a mechanism would likely prevent

agencies from wrongfully withholding information from Congress but could fail if the desire for secrecy derived from the White House and was supported by appointees.

Michael German of the ACLU refuted some of the administration's concerns in his testimony, stating, "By providing safe avenues for agency employees to report waste, fraud and abuse to the appropriate authorities and to Congress, there will be less of a need to anonymously leak information in order to have serious problems adequately addressed." German added that "FBI and other intelligence community employees have the training and experience required to responsibly handle classified information and the severe penalties for the unlawful disclosure of classified information will remain intact after this legislation passes." Congress must have sufficient capability to perform its constitutional duty of overseeing the executive branch and respond in the case of misuse of funds or other misdeeds.

Angela Canterbury of Public Citizen also testified about the urgent need for the reforms contained in the legislation. Canterbury presented a letter that 286 organizations, including OMB Watch, signed, calling on President Obama and Congress to take "Swift Action to Restore Strong, Comprehensive Whistleblower Rights." The Whistleblower Protection Enhancement Act of 2009 satisfies all of the recommendations from the letter save one: it does not neutralize the government's use of the state secrets privilege.

Currently, H.R. 1507 is being studied by both the House Committee on Oversight and Government Reform and the House Committee on Homeland Security. The Senate has a similar bill of its own, S. 372, which is comparable in substance, though it lacks the same protections for employees at national security and intelligence agencies.

White House Role in Rulemaking Could Improve, Report Says

The White House is a major player in agency rulemakings, affecting both the content of regulations and the length of time needed to complete them, according to a recent Government Accountability Office (GAO) report. The report comes as advisors to President Barack Obama consider reforms to the regulatory process.

GAO examined the speed and transparency of agency rulemaking activity, as well as the role of the Office of Information and Regulatory Affairs (OIRA). Under Executive Order 12866, Regulatory Planning and Review, agencies seek the approval of OIRA before proposing or finalizing major regulations.

GAO examined 12 rules reviewed by OIRA and published between January 2006 and May 2008. The examination found that OIRA made "significant changes" to four of the rules, including changes to the actual text of regulations. In four other cases, OIRA made less significant changes to the regulations' explanatory preambles.

GAO found that agencies generally document the outcome of OIRA reviews, including changes made at OIRA's behest, but the quality of documentation and methods for public disclosure

vary. The report says that internal documents could be difficult to put into context, noting, "[A]gencies did not always clearly attribute changes made at the suggestion of OIRA, and agencies' interpretations were not necessarily consistent regarding what constitutes a substantive change." GAO also cited difficulties using the government's online rulemaking docket, Regulations.gov, to find relevant documents.

GAO notes, "Executive Order 12866 does not specify how agencies should document the changes made to draft rules after their submission to OIRA, nor is there any governmentwide guidance that directs agencies on how to do so."

To improve transparency, GAO said both agencies and OIRA should begin "better identification of when agencies made substantive changes to their rules as a result of the OIRA review process, attributing the sources of changes made during the review period, and clarifying the definition of substantive changes."

GAO's critiques could alter political and policy calculations in an ongoing effort to revise the way rules are written and approved at the federal level. White House officials, tasked with developing ideas for reform, are likely to seriously consider the comments and recommendations from GAO, whose reports are widely considered to be fair and accurate audits of government activity.

In a Jan. 30 memo, Obama asked the White House Office of Management and Budget (OMB), OIRA's parent agency, to consult with rulemaking agencies and develop recommendations that could serve as the basis for an executive order replacing Executive Order 12866. OMB later asked the public for its ideas and posted public comments online.

In its comments, OMB Watch called for OIRA to play a different role in agency rulemakings. OIRA should be less of an editor and gatekeeper and instead focus on assisting agencies in identifying priorities and areas where new regulations could benefit the public. OMB Watch also called for greater transparency at all stages of the rulemaking process.

Obama instructed OMB to gather the thoughts of rulemaking agencies and develop recommendations within 100 days. Since the deadline, May 10, the Obama administration has given no indication as to whether recommendations have been sent to Obama or when next steps should be expected. The administration has not released the comments federal agencies submitted to OMB.

Cass Sunstein, the lead advisor to Obama and OMB Director Peter Orszag on regulatory issues and the presumptive OIRA administrator, has yet to be confirmed by the Senate. He currently serves as a senior advisor to Orszag. Sunstein appeared May 12 before the Senate Homeland Security and Governmental Affairs Committee (see related article). Sunstein will be largely responsible for implementing any reforms to the process, especially changes to the relationship between OIRA and agencies.

The GAO report addresses issues outside of the OIRA-agency relationship, including the analytic requirements imposed on agencies and their effect on the length of rulemakings. GAO identified

22 different laws and executive orders that require agencies to assess a regulation's potential impact on different economic and social sectors or subpopulations.

In addition to the Administrative Procedure Act, which outlines the basic steps for the rulemaking process, including public notice and opportunity for comment, GAO found that agencies most commonly had to address requirements set by Executive Order 12866, the Paperwork Reduction Act (PRA), and the Regulatory Flexibility Act (RFA). The PRA requires agencies to seek OMB approval when attempting to collect information from ten or more people, among other things. The RFA requires agencies to assess the potential impact of a regulation on small businesses and to consider lower-impact alternatives.

The requirements in the numerous other laws and orders were seldom triggered in the rules GAO studied.

OIRA is also a factor in the time it takes for an agency to complete a rulemaking. In addition to OIRA's formal review – which typically lasts 60 days but may last 120 days or longer – agencies take additional steps to preemptively stem White House critiques. According to GAO, "[R]ules that require OIRA and interagency review typically need additional time for the external review process and, according to some agency officials, trigger additional internal scrutiny."

Agencies spent an average of approximately four years developing the rules GAO examined. One Food and Drug Administration rulemaking lasted 13 years, the report says.

The report also recommended agencies improve methods for keeping track of the amount of time and resources spent on rulemaking. "Agency officials were unable to identify the staffing or other resources (such as contracting costs associated with preparing expert analyses or convening public meetings) for regulatory development," according to GAO. The lack of information can make it more difficult for managers to identify slow points in the process.

GAO released the report May 11, though it is dated April 2009. GAO prepared the report in response to a 2007 request from then-Chairman of the House Oversight and Government Reform Committee Henry Waxman (D-CA). The report, titled, *Federal Rulemaking: Improvements Needed to Monitoring and Evaluation of Rules Development as Well as to the Transparency of OMB Regulatory Reviews*, is available online at www.gao.gov/new.items/d09205.pdf.

OIRA Nominee Sunstein Promises Law and Pragmatism Will Guide Decisions

During his May 12 confirmation hearing, President Barack Obama's choice for regulatory czar, Cass Sunstein, portrayed himself as a pragmatist, one who will not use economic analysis as a straitjacket for regulations. In pledging to look to the law first for regulatory guidance, Sunstein tried to distance himself from past regulatory czars who strongly supported economic analysis to judge the adequacy of health, safety, and environmental rules.

Obama nominated Sunstein April 20 to lead the Office of Information and Regulatory Affairs (OIRA), the small office within the White House Office of Management and Budget (OMB) that reviews proposed and final regulations and paperwork requirements. The office also has responsibilities over federal statistics, dissemination of information, and general information resources management.

Sunstein is a highly respected legal scholar who authored a number of provocative writings on regulations and the regulatory process in his decades in academia. He worked briefly in the Department of Justice's Office of Legal Counsel before embarking on an academic career. Thus, his hearing before the Senate Homeland Security and Governmental Affairs Committee was the first opportunity to hear how he would approach the practical task of implementing Obama's regulatory agenda.

The committee's chair, Sen. Joseph Lieberman (I-CT), and ranking member Sen. Susan Collins (R-ME) both asked pointed questions about Sunstein's approach to managing OIRA and certain specific policy areas. Lieberman asked Sunstein, an ardent supporter of cost-benefit analysis (CBA), to distinguish himself from President George W. Bush's first OIRA administrator, John Graham, another advocate of using CBA in regulation.

Graham's nomination received substantial opposition from the public interest community and from within the Senate for his consistent hostility to protections for public health, safety, and the environment. Many of these same groups have voiced concern that Sunstein would be too much like Graham in his approach. Lieberman opposed Graham's nomination because he worried that Graham's advocacy for cost-benefit analysis and risk tradeoffs would be used to frustrate the development of regulations – a worry that proved well founded. Lieberman asked Sunstein why a senator who opposed Graham should support him.

Sunstein responded that his approach to using CBA was "inclusive and humanized," meaning that agencies should take qualitative considerations into account. Moral and distributive values, for example, should be considered in regulatory decision making. CBA should not be used, he argued, to put regulations into an "arithmetic straitjacket" and that it should be subordinate to laws that mandate agencies' regulatory actions. CBA is not an appropriate tool to use when regulating under the Americans with Disabilities Act, for example, Sunstein noted.

Lieberman also asked the nominee about two controversial articles Sunstein wrote questioning the constitutionality of the Clean Air Act and the Occupational Safety and Health Administration (OSHA). The two articles were prompted by court opinions in which these legal questions were raised. Sunstein noted that the conclusions in both articles are that the law and the agency are constitutional, and he was setting out the roots by which both the act and OSHA's authority should be judged constitutional.

In Collins' opening statement, she acknowledged concerns about the nominee's intentions regarding government-wide privacy policies, a concern also expressed by Sen. Daniel Akaka (D-HI), the only other senator in attendance.

In addressing the privacy protection issues the two senators raised, Sunstein noted the need for OIRA to work with other executive branch offices in implementing the provisions of the range of statutes that have privacy implications. For example, new information technology challenges may require the 1974 Privacy Act to be updated, but Sunstein said that he had not drawn conclusions about the need for changes and would work with others to review relevant laws such as the privacy statute and the Freedom of Information Act.

Sunstein was less forthcoming in his answers to questions about the relationship between OIRA and the agencies. Both in the hearing and in response to questions submitted to the nominee by the committee prior to the hearing, Sunstein avoided specifics about what he would like to see changed about the rulemaking process.

When asked, "Do you believe that OIRA should be an activist office, steering regulation in particular directions?" Sunstein sidestepped the question, writing, "I believe that OIRA has a role to play in promoting compliance with the law and with the President's commitments and priorities – and that it can do so in a manner fully consistent with its mission."

His answers highlighted the need to look to statutory direction and presidential priorities, improve transparency at OIRA, and the importance of collaboration with both agencies and other executive branch offices. He expressed no opinion about the need to amend OIRA directives to agencies (such as the Graham-era directive about the use of CBA), nor about whether the actions of independent regulatory commissions (for example, the Securities and Exchange Commission and the Federal Communications Commission) should be subject to OIRA oversight and review. Both of these topics are issues he has written about, but he deferred these matters to others in his answers to the committee. As a result, the public does not have a clear indication of Sunstein's views regarding these two important regulatory topics.

Lieberman indicated at the end of the hearing that he intended to support Sunstein's nomination. According to the *Clean Air Report* (subscription required; no link available), Collins told reporters after the hearing that Sunstein had addressed many of her concerns. The committee is expected to vote on the nomination soon. If approved by the committee, the nomination would be forwarded to the full Senate for a vote.

Disclosure of Recovery Act Lobbying Far from Comprehensive

President Barack Obama's March 20 memo restricts communications between federally registered lobbyists and executive branch employees on use of Recovery Act funds and requires disclosure of written communications. A closer examination of the summaries of lobbyist contacts with federal agencies shows that there are few online postings of those communications; some agencies have not posted any contacts at all. According to a review of the 29 agencies receiving stimulus money, only 110 contacts had been disclosed as of May 18.

The memo and subsequent guidance from the Office of Management and Budget (OMB) call on agencies to post all written communications and summaries of any meetings with registered lobbyists to agency websites within three business days of the communication.

There is currently a minimal amount of reporting on agency websites, with 16 out of the 29 agencies thus far listing lobbying contacts. There may very well be a lot of lobbying taking place, given the $787 billion total in stimulus funds, but current public disclosure suggests either that this is not the case or federally registered lobbyists are not involved.

For example, the Energy Department is distributing more than $40 billion of stimulus money, but as of press time, only seven lobbyist contacts had been listed on the agency's website.

Additional examples of this disclosure follow:

- The Army Corps of Engineers listed 18 stimulus contacts from lobbyists
- The Health and Human Services Department has posted nine
- The Transportation Department has listed one
- The Department of Education has disclosed five
- The Department of Justice divided lobbyist communications between two offices – the Office of Justice Programs and Office on Violence Against Women, and the Office of Community Oriented Policing Services – with 20 postings between them

Agencies Reporting Communications with Federally Registered Lobbyists

Agency	Number of Lobbying Notices	The amount the agency is currently committed to spend
Corporation for National and Community Service	1	$38.45 million
Department of Agriculture (USDA)	9	$1.83 billion
Department of Commerce	2	$333.97 million
Department of Education (ED)	5	$25.443 billion
Department of Energy (DOE)	7	$3.876 billion
Department of Health and Human Services (HHS)	10	$29.066 billion
Department of Justice (DOJ): 2 Offices: Office of Justice Programs and Office on Violence Against Women (OJP/OVW) and Office of Community Oriented Policing Services (COPS)	20	$640.479 million
Department of Labor (DOL)	3	$15.937 billion
Department of Interior (DOI)	3	$74,000
Department of Transportation (DOT)	1	$11.736 billion
Environmental Protection Agency (EPA)	1	$2.103 billion
Federal Communications Commission (FCC)	21	$24.421 million

General Services Administration (GSA)	2	$174.708 million
National Aeronautics and Space Administration (NASA)	1	$0
Small Business Administration (SBA)	2	$89.891 million
U.S. Army Corps of Engineers (USACE)	18	$61.712 million

Those agencies that have not reported any lobbying contacts include the Defense Department, the Department of Homeland Security, the Department of Housing and Urban Development, and the Department of Veterans Affairs. There are some agencies – for instance, Homeland Security – that say they have not been contacted by lobbyists, while others do not reference lobbying contacts at all. Still others simply reference online locations where the information will eventually be placed.

Overall, there is a vast amount of inconsistency among agencies. Some refer to lobbying contacts as "interested parties," while others list "lobbyist correspondence." The General Services Administration has two pages, one for "written communications" and one for "other communications."

According to *The Washington Post*, Norm Eisen, White House counsel for ethics and government reform, "attributes the paucity of lobbying contacts on agency Web sites to the stimulus still being in its early stages and to agency meetings attended by mayors or corporate executives."

Another possible reason for the apparent lack of disclosure has been largely ignored until recently. Major corporations are not restricted from requesting federal aid under the Recovery Act memo. One of the ways they can do so is by sending in non-registered lobbyists or non-lobbyist executives: the restrictions contained in the memo only apply to those registered under the Lobbying Disclosure Act (LDA).

Because non-registered lobbyists and non-lobbyist staff are unrestrained by Obama's memo, executive branch staff who meet with such people are free from any reporting requirements; disclosure simply does not apply to these contacts. As the Recovery Act memo is currently fashioned, company executives, lawyers, consultants, clients, or state-registered lobbyists can meet with federal officials to discuss particular projects and related funding, and no one has to disclose anything.

Another point of concern that open government boosters have raised is the lack of a "one-stop shop" on the Web for lobbying disclosure data. To obtain any of this information, one must go to each agency's Recovery Act webpage and then locate any lobbying communications. Instead of this haphazard, scattershot method of disclosure, advocates have requested that all lobbying information be placed in one easily accessible, fully searchable centralized database that covers all agencies. Without waiting for the government to act, the news service ProPublica has created a centralized location for such lobbying information.

There is a 60-day evaluation period for the stimulus lobbying restrictions, which closes May 19. Eisen says he is reviewing various options for modifications to the rules, including requiring disclosure of all communications from lobbyists and non-lobbyists. However, those who have met with the administration to discuss their concerns have not heard information about any possible changes. OMB is expected to issue a report to the White House on how various agencies are responding to the rules. Ideally, modifications will be made that create greater transparency and encompass the intent of the rules.

Surge of Voter Reform Efforts Spreads Across the Nation

There is a new surge of voter reform efforts sweeping the nation. Some of these efforts are designed to stimulate voter participation by easing barriers to voter registration through use of electronic mediums such as the Internet and e-mail. Other measures seek to impede the voting process in response to allegations of voter fraud during the 2008 elections, despite research indicating that voter fraud cases are rare and greatly exaggerated.

Gov. Mitch Daniels (R) of Indiana recently signed a bill allowing online voter registration; the bill makes Indiana the fourth state to allow voter registration via the Internet. Supporters of the legislation believe that it will increase voter turnout by providing an additional avenue for citizens to register to vote. Indiana Secretary of State Todd Rokita, who is supportive of the measure, told *The [Indiana] Times*, "We use technology in every one of our other transactions in life." But, "for some reason, we're afraid to use technology in our most sacred civic transaction – voting," he said.

Kansas is attempting to use technology to assist U.S. soldiers and diplomats by allowing them to vote by e-mail. Currently, the state allows overseas soldiers and diplomats to fax their ballots; however, overseas personnel have greater access to e-mail than fax machines, according to the *Wichita Eagle*. The e-mail provision has wide support in the Kansas House, but the bill faces stronger opposition in the State Senate due to a "provision that would make it harder for those back home to have a friend or relative deliver their absentee ballot to county election officials," according to the *Wichita Eagle*. Opponents of the provision requiring numerous signatures to deliver an absentee ballot worry that the stringency will result in an increase in rejected ballots.

Oregon is another example of a state attempting reforms to ease the voting process for military and overseas voters. State legislators recently introduced a bill that would allow military and overseas voters to vote by fax; the legislation has already passed a state House committee. The bill would make an exception to a state law that requires an original signature to verify identity by allowing "election officials to compare the signature on a fax with the signature on a voter registration card to verify an identity," according to KTVZ.com, the website of central Oregon's NBC affiliate.

On the flip side, other states are attempting to create more obstacles to the voting process. For example, Georgia recently passed a law requiring proof of citizenship to register to vote, which is subject to review by the U.S. Department of Justice. Opponents of the law fear that it may

disenfranchise low-income and minority voters. A survey by the Brennan Center for Justice indicates that up to 13 million American citizens lack documentation. The study also notes that those in the lowest-income bracket are more than twice as likely to lack documentation of citizenship as those in higher-income brackets. The law "has been enacted even though there is no indication that non-citizen voting is a problem in the state," according to the Progressive States Network.

This law makes Georgia only the second state, after Arizona, to require residents to prove citizenship before they can register to vote. Since Georgia is one of the states that is required to get "preclearance" under Section 5 of the Voting Rights Act (VRA) of 1965 before enacting new election laws, the Justice Department must approve this measure.

In a related matter, a decision is expected in June in *Northwest Austin Municipal Utility District No. 1 (NAMUDNO) v. Holder*, a case challenging the constitutionality of Section 5 of the VRA. This case will decide whether Georgia and other covered states need to get "preclearance" in the future.

Texas is also attempting to add more obstacles to the voting process with a state House bill that would require a photo ID to be presented at polling places. Those without a photo ID would be forced to cast a provisional ballot; such ballots are often not counted. Supporters of the bill claim the measure is necessary to prevent undocumented immigrants from voting, but opponents claim the bill will disenfranchise low-income, minority, elderly, and disabled citizens, according to the *El Paso Times*. The Texas Senate passed a photo ID bill along partisan lines, but the Texas House is more evenly split between Democrats and Republicans. If it does pass, it will need approval from the Justice Department before it is enacted, since Texas is also subject to Section 5 of the VRA.

On the federal level, Sen. Charles Schumer (D-NY), chairman of the Senate Rules and Administration Committee, wrote a letter to Attorney General Eric Holder urging the Justice Department to sue states that are not complying with the National Voter Registration Act (NVRA), also called the Motor Voter Act. NVRA requires public assistance agencies and other select agencies to offer voter registration materials. According to a press release from Schumer's office, at least 18 states are not complying with the requirement. Schumer's letter highlighted *Voter Registration: Assessing Current Problems*, a study presented to the Senate Rules Committee in March. The study noted that "one of the key concerns is that eligible individuals are not offered the option to register and vote at state motor vehicle agencies, public assistance agencies, and agencies that provide services to people with disabilities."

Schumer also wrote a letter to President Obama asking him to designate the Department of Veteran Affairs (VA) as a voter registration agency under NVRA. The letter states, "During the debate over the Veterans Voting Support Act, we heard from veterans groups, state election officials, disability advocates and voting rights organizations. They all urged a greater role in voter registration for the VA."

During the 2008 election season, the VA was opposed to allowing nonpartisan groups to register veterans on VA property. Many groups faced barriers when attempting to conduct nonpartisan voter registration and were also restricted from providing logistical information.

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USAspending.gov Adds Recovery Act Spending Data Months before Recovery.gov

In late May, USAspending.gov started posting data that identified grants and contracts given out under the Recovery Act. This is in addition to the regular data on government spending on the site. Up until now, there has been a disappointing lack of specific data made available about Recovery Act spending, particularly on the Recovery.gov website – the main vehicle created for information on implementation of the act.

The Recovery.gov website has plenty of general information, such as the recently released agency program plans, which provide descriptions of the programs each federal agency will be implementing as part of their Recovery Act efforts. But it does not yet have any recipient data, such as details about which contractors or subcontractors receive funds. What's more, officials

at the Recovery Accountability and Transparency Board have said such information will not be available on the site until October, which is the first time recipients of Recovery Act funds are required to report on use of the funds. This type of information is equally as important as the program information itself, since it helps ensure taxpayer money is being well spent.

Strikingly, some of this data is already on USAspending.gov, a website on government spending created at the end of 2007 in response to a law sponsored by Sens. Barack Obama (D-IL) and Tom Coburn (R-OK). The data on USASpending.gov is limited to only those grants and contracts given out directly by the federal government; it does not include sub-awards. Moreover, there is not very much of it yet (only a handful of departments have submitted data so far: Recovery contracts by departments; Financial assistance (e.g., grants) by departments).

While the standard data fields used on the USAspending.gov website are included in the Recovery Act data, almost none of it can be used to match those contracts and grants up with their corresponding program plans on Recovery.gov. Instead, we are left with simple identification details, such as the date the grant or contract was awarded, how much has been spent, to whom the funds were awarded, what congressional district recipients are in, and an esoteric description of the project. The contract description field is particularly useless as the quality of the information within that field is very poor.

OMB Watch did manage to link up one Department of Energy contract to its corresponding program plan, but that only happened because the contract and its plan were the only ones that mentioned work at the Hanford nuclear plant. If you do not have time to read all 270 program plans or browse through the literally tens of thousands of contracts and grants, matching up the contracts is simply impossible.

That said, the Recovery Act contract data on USAspending.gov is not entirely useless. As mentioned before, the site does identify contractors receiving Recovery Act funds. Using resources like the Project On Government Oversight's (POGO) Contractor Misconduct Database and the Center for Responsive Politics' Open Secrets database, one can start to take a closer look at the contractors who are receiving Recovery Act funds, their past performance records, and their campaign contributions and lobbying expenditures.

Indeed, a quick search of the contractors turns up some interesting data. Of the top five Recovery Act contractors on USAspending.gov, which collectively account for 98 percent of the contracts awarded thus far, three are listed in POGO's Contractor Misconduct Database for recent violations. Two of them, CH2M Hill Companies, Ltd and Ut-Battelle, have entries from the past year *for the very same work at the very same place* where they were just awarded new Recovery Act contracts. (The third company was URS Corporation.)

Ut-Battelle, in particular, was cited by the Department of Energy's Inspector General for incurring "unreasonable" costs at the Oak Ridge National Laboratory in 2008, and yet it received a $73 million contract under the Recovery Act for continued operations at Oak Ridge. The three companies, despite their track records, received $1.3 billion of the $1.8 billion in

Recovery Act contracts, or about 75 percent of *all* the Recovery Act contracts which have been awarded to date.

Additionally, according to OpenSecrets.org, these same companies have given millions of dollars in campaign contributions to federal candidates and spent even more on lobbying activities. URS Corporation, which received a $203 million contract, spent well over $1 million during the 2008 election season, in addition to $2 million on lobbying expenses (one of the firms URS hired to lobby for it was PMA Group, a lobbying firm which is currently embroiled in a pay-to-play investigation).

Ut-Battelle, on the other hand, contributed to only one legislator during the 2008 cycle: Congressman Zack Wamp, a Republican who represents the Third District of Tennessee. Over the past ten years, Ut-Battelle has given Wamp over $100,000 in campaign contributions. Coincidentally, the one contract Ut-Battelle received under the Recovery Act will be performed in Oak Ridge, TN, in the heart of the Third District.

Despite this, none of what these companies did is illegal. Companies can legally lobby and contribute to campaigns, and the companies' misconduct was not flagrant enough to get any of them put on the federal debarment register. But it is disappointing that so much of the first round of Recovery Act money is going to what ProPublica aptly calls "scofflaw companies," or companies that have histories of violations of federal law and poor performance. This problem is most likely a result of the speed and urgency many placed on getting the Recovery Act funds out the door, and hopefully there will be improvements in the next round.

These limited examples reinforce why transparency and access to good spending information is so crucial. While it is wonderful that USAspending.gov has added a feature to allow subdividing Recovery Act spending, there is no reason this information should not also be available on Recovery.gov right now. There is also no reason federal spending and performance data should not inform future contract and grant decisions.

With its mission to help make implementation of the Recovery Act as transparent as possible, Recovery.gov should be providing the same information – both raw spending data and performance information – in a timely fashion. More directly, each agency and Recovery.gov should be providing machine-readable feeds on detailed spending so the public has access to the underlying data.

Administration Seeks Public Input on Open Government

Starting May 21, the Obama administration began to make good on the president's goal of "work[ing] together to ensure the public trust and establish a system of transparency, public participation, and collaboration," as expressed in his Jan. 21 memorandum on transparency and open government.

The memo called for recommendations to the president for an Open Government Directive that will instruct federal agencies how to implement the administration's transparency principles. The memo established a May 21 deadline for the recommendations, but delay occurred due to vacancies among the key appointees responsible for the recommendations' development, most notably the Chief Technology Officer, Aneesh Chopra. On the deadline, the administration instead formally outlined the process by which those recommendations will be crafted.

Spearheaded by the Office of Science and Technology Policy (OSTP), the administration initiated a project called the "Open Government Initiative." In announcing the initiative, the administration stated, "Consistent with the President's mandate, we want to be fully transparent in our work, participatory in soliciting your ideas and expertise, and collaborative in how we experiment together to use new tools and techniques for developing open government policy."

Phase One began on May 21 and was scheduled to run for one week. This first phase consisted of a brainstorming session in which individuals could post ideas and vote on one another's suggestions on a website hosted by the National Academy of Public Administration. So far, more than 1,400 ideas for improvement have been posted across several categories, including transparency, participation, collaboration, capacity building, and legal and policy challenges.

Phase Two, an online discussion of "the most compelling ideas from the brainstorming," is scheduled to begin June 3. According to the administration, the discussion is "designed to dig in on harder topics that require greater exploration or refinement." The discussion will also include ideas generated in an online dialogue with federal agency employees. Comments from federal employees are available to the public on the OSTP website.

June 15 will see the beginning of the third phase: the collaborative drafting of recommendations through a wiki. Once this process is complete, OSTP will craft formal recommendations, followed by a traditional *Federal Register* notice and comment period.

A major criticism of the process as a whole has been that with such a compressed schedule, reasonable ideas may not be raised, especially considering the first stage lasted only one week and included the long Memorial Day weekend. The administration addressed these concerns on May 28 – the original date for the last day of the brainstorming – by deciding to keep the brainstorm website open until June 19, after the start of the drafting phase. However, it is already selecting the ideas for the next discussion phase and has made clear that ideas submitted after May 28 might not be included.

The administration explained that the rapid process "is designed to ensure that your ideas inform the development of open government recommendations ... as soon as possible" and reassured the open government community that "the process of crafting open government policy ... is an ongoing effort, and your participation has been and will continue to be essential to its success."

The short time frame for the Open Government Initiative is not the only criticism of the administration's process. There has been an overall lack of clarity about the process as the

administration determines how it will work as it goes along. It is unknown at this point whether this is the first iteration of what could be a new model for rulemaking or if this process merely will be tacked on to existing procedures.

Initially, participants in the open government dialogue were not informed of what the effect of voting was going to be. Because registration was not required for voting and people could vote multiple times for their ideas, participants were concerned about the process being used to select the topics for further discussion. The administration later clarified that the voting would be "instructive, [but] it will not determine which topics are discussed in the second phase." This response raised questions of its own: is this a good way to make policy, or is there a better model to reconcile an impetus for greater democratic involvement with expert opinions?

Moreover, the open government dialogue website itself is lackluster. Its search capability is extremely limited, making it difficult to compare similar ideas. If this were improved, it would be easier to build off of the ideas of others, rather than repeating something that had already been posted. Also, little guidance is provided concerning the content of the suggestions, leading to numerous ideas that are complete *non sequiturs* and others that, while worthwhile ideas for improving transparency and accountability, are not substantively related to executive branch policy.

As of the close of May 28, the top items had little to do with what the executive branch could do to strengthen transparency, participation, or collaboration. The top-rated item was that Congress should have a 72-hour waiting period with public disclosure before considering spending bills. The second-rated item related to making state and local governments more open. The third- and sixth-rated items related to legalizing marijuana. And the fourth-rated item was listed as “End Imperial Presidency.” These results raised the question of whether the brainstorming phase should have been moderated.

While criticism within the openness community was widespread and consistent, the same community also praised the administration for experimenting with a participatory process. This new experimental process may result in more people becoming engaged, eliciting new ideas, and creating strong momentum in developing government-wide policies for transparency, participation, and collaboration.

New Transparency Websites

In addition to the open government dialogue site, two new federal websites have been created. The OSTP Open Government Initiative website allows the submission of longer reports and policy papers. The White House has its own website dedicated to open government, including a blog with updates on the Open Government Initiative, as well as an Innovations Gallery, which highlights some of the independent efforts taken by executive branch agencies toward transparency, participation, and collaboration.

Among the featured sites in the Innovations Gallery is Data.gov. Launched May 21, this website consists of a collection of government datasets and tools for analyzing them. Numerous federal

datasets have been difficult to find and access, but through this site, open government boosters hope an increasing number of datasets will be more easily accessible to the American people.

Much remains to be seen regarding what concrete policies will emerge from the Open Government Initiative. However, transparency as an issue is now front and center, and through this flexible and innovative process of soliciting public opinion, new ideas and new voices can be brought to the debate and the policymaking process.

EPA Plans to Listen to Scientists Again

The U.S. Environmental Protection Agency (EPA) recently announced it will increase the influence of scientists and the level of transparency in setting standards for common air pollutants, a reversal of a Bush administration policy that politicized scientific analyses. Clean air advocates are welcoming the policy reversal as a restoration of the role of science in crafting policies that impact environmental and public health.

In a letter to an independent science advisory group, EPA Administrator Lisa Jackson described the new process for reviewing the National Ambient Air Quality Standards (NAAQS) and stated her belief that the process "will ensure the timeliness, scientific integrity, and transparency of the NAAQS review process." The new process restores the use of a key document that assessed the scientific foundation for air quality policy options.

Every five years, the EPA is required to review the standards for emissions of six common pollutants, including those that contribute to acid precipitation and smog, as well as the science undergirding the standards. The agency most often fails to meet this deadline. Advising the EPA is a panel of non-EPA scientists know as the Clean Air Scientific Advisory Committee (CASAC).

In prior years, EPA scientists produced a "staff paper" during the NAAQS reviews that analyzed the scientific basis for policy options that considered whether to raise or lower a standard or leave it unchanged. In a purported effort to streamline the review process, in 2006, the Bush EPA made several changes, including replacing the staff paper with a policy assessment that reflected the views of EPA senior management and was published as an Advance Notice of Proposed Rulemaking (ANPR). An ANPR usually announces the beginning of a rulemaking process. However, the 2006 change placed it at the end of a comprehensive public review process, creating more delay and possibly undermining the work of the scientists.

Many clean air advocates criticized the change and sought to restore the influence of staff scientists and undo the added bureaucracy of the ANPR. Significantly, the CASAC strongly objected to the change, decrying the marginalization of scientists in the review process and the increased influence of political appointees. The CASAC claimed that in practice, the document that replaced the staff paper was "*both unsuitable and inadequate as a basis for rulemaking*" and served to "*undermine* the scientific foundation of the NAAQS reviews" (emphasis in the original).

The newly announced review process for air quality standards will once again include the staff paper. The use of the ANPR policy assessment will cease. The staff paper (also referred to as the "policy assessment") will serve to "bridge the gap" between the science and the policy options available to the administrator. The draft document will be available for public comment.

The EPA administrator will not jettison all of the Bush-era changes to the NAAQS review process. The process as described by Jackson will retain parts of the prior administration's changes and will add new features. Every phase of the review process prior to the interagency review will include public comment and participation by the CASAC.

The NAAQS review process for each pollutant will kick off with a public workshop to create a strategic plan for the review that will identify the purpose and approach the agency will use. The draft review plan will be open for public comment.

When creating an assessment of the relevant science, and during the assessment of human health risks, Jackson has instructed EPA scientists to reach out to other federal scientists, such as at the Centers for Disease Control and Prevention (CDC), for their input. It is not clear whether comments from federal scientists will be disclosed to the public during the review process. Allowing the public to evaluate disagreements and discussions among federal scientists is a crucial aspect of government transparency.

Concerns also remain over the role of the Office of Management and Budget (OMB) during the interagency review process. OMB has previously been criticized for interfering with science-based policy decisions, including during the review of standards for ozone.

Additionally, Jackson will continue to pursue the development of an electronic database to identify and prioritize scientific studies, known as Health and Environmental Research Online (HERO). It is not clear to what degree such a database would be accessible to the public.

Overall, Jackson's air quality review process provides a respectable level of public participation and transparency at important stages of the process – that is, before policy decisions have already been made. If the review process is implemented in accordance with the Obama administration's recent rhetoric upholding the value of scientific integrity, then the EPA will once again be assessing the best available science in a transparent manner when setting standards for air quality.

Administration Orders Interagency Review of Classification and CUI

On May 27, the Obama administration released a memorandum requiring reviews of overclassification and the current Controlled Unclassified Information (CUI)/Sensitive but Unclassified (SBU) process. The memorandum establishes separate 90-day interagency review processes to advise the administration on actions it should take to advance previous efforts to reform problems associated with these issues.

Whether or not the interagency processes will be transparent and include public participation is unknown. The memo does not dictate any new procedures on how agencies must handle such designated material.

Overclassification

On overclassification, the administration ordered a review of Executive Order 12958, originally authored by President Clinton in 1995 and amended in 2003 by President Bush. The review, to be completed by the Assistant to the President for National Security Affairs, will issue recommendations concerning:

- Establishment of a national declassification center
- Measures such as restoring a presumption against classification
- Changes necessary to facilitate greater classified information sharing among appropriate parties
- Prohibition of reclassification once documents have been declassified.

The right-to-know community has been calling for a national declassification center for a long time; open government advocates say such a center is needed to improve the efficiency of records processing. Most importantly, creation of a declassification center was a key recommendation made by the Public Interest Declassification Board in 2007.

Further, the Obama administration also seems to seek a clear prohibition of reclassification in response to the Bush administration's systematic review and restriction of access to documents once available to the public in the National Archives and the presidential library system. Some have criticized the Obama memorandum for not adequately recognizing important classification problems such as the role of "need to know" restrictions and antiquated classification criteria. Without more substantive changes to classification policy, it is uncertain if a centralized declassification center will just produce the same results as before.

CUI/SBU

To address the CUI problem, the administration has ordered the creation of a task force composed of senior representatives from a broad range of agencies both inside and outside the information-sharing environment. The group will address issues including whether the scope of CUI should remain limited to terrorism-related information or expand standardization to all SBU categories and identify measures to track and enhance agency implementation of a CUI framework. Whatever the recommendations are, the administration gave clear orders that it will balance a presumption of openness with an understanding of the value of standardizing SBU designation procedures and the need to prevent public disclosure where it would compromise privacy.

Some groups have expressed concern that the administration's memorandum does not adequately recognize all the negative issues related to CUI. Meredith Fuchs of the National

Security Archive stated, "On CUI, it seems like there is very little focus. It does not commit to scope or reduction in labeling or protection of access. These are serious problems."

The memorandum does not offer actual change or even the promise of it, nor does it ask the task force to address all the relevant problems that right-to-know advocates have been highlighting for years. As early as April 1993, President Clinton issued his own directive for classification reform. The Clinton memo illuminated problems that the Obama administration memo does not acknowledge, even though they remain unaddressed.

EPA Regains Control of Toxic Chemical Studies

The U.S. Environmental Protection Agency (EPA) is changing the way it studies the health effects of industrial chemicals in an attempt to quicken the pace at which new assessments are completed and to limit political interference in the scientific process.

Every year, hundreds of new chemicals are introduced into commerce, but chemical manufacturers and users rarely provide detailed health information. EPA's Integrated Risk Information System (IRIS) studies those chemicals and posts final risk assessments on the EPA website at cfpub.epa.gov/ncea/iris/index.cfm.

EPA announced May 21 that it is removing procedural steps to shorten the time frame for completing assessments. A memo from EPA Administrator Lisa Jackson says, "While still robust, the assessment development process will be shortened to 23 months, speeding the availability of IRIS assessments to the risk assessor community and the public."

Delay has plagued the IRIS program in recent years. EPA expects to complete five assessments later in 2009 (one was completed in February). All five have been in development for several years, with timeframes ranging from four years to over ten years, according the IRIS website.

In part because of the length of the process, EPA has made little progress in finishing new assessments. From 2004 through 2008, the agency completed assessments for only 16 substances.

To shorten the process, EPA is removing several steps added during the Bush administration. In 2004, the White House Office of Management and Budget (OMB) began reviewing draft assessments both before and after the studies underwent an external peer review. EPA calls the phases "interagency review" since OMB shares the draft assessments with other agencies inside the federal government.

The review gave the White House and other agencies an opportunity to block new assessments. According to a Government Accountability Office (GAO) report released in March 2008, OMB forced EPA to halt work on five IRIS assessments because it disagreed with the agency's decision to study the health effects of short-term exposure to those chemicals.

The interagency review also delayed the IRIS process. Recent interagency reviews have typically taken six months to one year.

In 2008, the Bush administration again revised the process to empower other agencies. If EPA assessed a chemical deemed critical to the mission of another agency, that agency could demand further review of the substance. Critics feared agencies like the Department of Defense, a major user of industrial chemicals, would have an incentive to delay or suppress conclusions showing a substance's risks.

EPA will no longer allow other agencies to receive special treatment if they believe a chemical is mission critical.

However, EPA is preserving a role for the White House in the revised process, giving it two opportunities to review IRIS assessments before they are officially finalized.

EPA did not indicate why it believes White House review is necessary. It is unclear what value, if any, a White House review adds to the process, particularly after the assessment has been peer reviewed. It is also unclear who will lead the review for the White House. OMB may continue to review drafts, or other offices, such as the Office of Science and Technology Policy, may play a bigger role.

In the past, employees inside the IRIS program have expressed concern with OMB's involvement. Comments on the 2008 GAO report complained that the OMB review delayed the completion of assessments and said OMB's comments "can be very extensive and troubling to address."

To mitigate concern, EPA insists it will maintain control over the process, including the White House review, at all times. The revised process also sets a time limit of 45 days for each review phase. EPA also says that comments on draft assessments should focus solely on science.

EPA is also making the process more transparent: Written comments submitted to EPA during the White House review will be made public. The disclosure requirement may help fend off any potential political manipulation.

Rep. Brad Miller (D-NC), Chairman of the House Science and Technology Committee's Subcommittee on Investigations, applauded the revisions, but added, "The assessment of the health effects of environmental exposures should be entirely scientific, not at all political. Scientific peer review is useful, political review is not." Miller plans to hold a hearing on the revisions to the IRIS process June 11.

In addition to the process changes, Jackson said she hoped to infuse more resources into the agency. Jackson noted that President Obama's FY 2010 budget request calls for an additional $5 million and 10 new employees to help the program reduce the backlog of substances awaiting study.

MSHA Provides Test of Obama's FOIA Policies

Despite the Obama administration's consistent theme of creating a new, more open government, the Mine Safety and Health Administration (MSHA) has yet to prove it will comply with the administration's Freedom of Information Act (FOIA) policies. In its response to a 2008 FOIA request, MSHA refused to release information that has been consistently released in the past. An appeal of that response provides a test of the administration's approach to implementing its openness policies.

On his first full day in office, President Barack Obama issued a memorandum about the use of FOIA, writing that the presumption regarding government disclosure should be: "In the face of doubt, openness prevails." Subsequently, Attorney General Eric Holder issued a memo to executive branch department and agency heads implementing Obama's directive. The Holder memo states, "The Department of Justice will defend a denial of a FOIA request only if (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) disclosure is prohibited by law."

The memo further states, "[A]n agency should not withhold information simply because it may do so legally. I strongly encourage agencies to make discretionary disclosures of information. An agency should not withhold records merely because it can demonstrate, as a technical matter, that the record falls within the scope of a FOIA exemption."

According to an article in *Mine Safety and Health News* (subscription), a mine safety attorney, Tony Oppegard, filed a FOIA request Oct. 28, 2008, to MSHA for a client's investigation file, including witness statements. He had filed 135 such requests in similar cases, and MSHA had supplied witness statements. In its Nov. 24, 2008, reply, however, MSHA withheld every witness statement under the FOIA exemption related to law enforcement purposes and cited fear of disclosing confidential sources.

MSHA withheld the witness statements under Exemption 7 (information compiled for law enforcement purposes), and specifically under section 7(C) (an unwarranted invasion of personal privacy) and section 7(D) (disclosure of the identity of a confidential source).

The Department of Justice's Office of Information Policy (OIP) issued guidance to the agencies about implementing the new administration's presumption of openness. The guidance offers specific examples to agencies of how they should apply their discretion in releasing information. It states that discretionary releases are reasonable under Exemption 7. "Documents protected by the remaining Exemptions, Exemptions 2, 5, 7, 8, and 9, can all be subjects of discretionary release," the guidance notes. In addition, the guidance addresses sections C and D of Exemption 7 specifically and notes that discretionary releases are possible under both.

In Oppegard's April 16 appeal letter to Mark Malecki, MSHA's counsel for trial litigation, Oppegard called MSHA's position on withholding the witness statements "the most disappointing response to a FOIA request regarding a safety discrimination case that I have ever

received." He called MSHA's decision to withhold the information under the two reasons cited in MSHA's letter "utter rubbish."

”Miners can only hope – and trust – that when the new Assistant Secretary takes office, he will put a quick end to the agency’s blatant attempts to protect operators who have been charged with discrimination by miners," Oppegard wrote. He asked Malecki to review, under the Obama administration’s new FOIA policies, MSHA's decision to withhold the information that the agency had routinely provided for the past 25 years.

Mine Safety and Health News (MSHN) reports that it, too, has had difficulty extracting information from MSHA through FOIA requests and largely placed the blame on the Bush administration's approach to FOIA. An editorial in the same issue of its newsletter notes, "MSHA is offering ridiculous redactions and refusing to divulge information which, previous to 2002, was openly shared with the public."

In one instance, MSHN requested the tape of a one-day training seminar MSHA held on the use of FOIA. The request was made four years ago and has never been answered. In another instance, MSHN asked for information regarding how MSHA made a legal determination of what constituted a haul road. MSHA supplied a response heavily redacted based on a FOIA exemption regarding trade secrets.

Lastly, MSHN has appealed another FOIA response from MSHA because of heavy redactions. In the appeal for a full report issued by the agency's inspector general, MSHN received another heavily redacted version, but this time, some of the redactions were made based on different FOIA exemptions. In its editorial, MSHN writes, "Regarding FOIA, MSHA is spewing red tape and accomplishing nothing, except alienating the American people – miners, their families, industry and the press."

According to the Department of Labor's (DOL) website, initial FOIA requests to MSHA are handled by the agency's district offices, and appeals are centralized in DOL's Office of the Solicitor in Washington, DC.

As OMB Watch noted in a May 5 article, agencies have been slow to implement the administration's openness policies. The change in the mindset of agencies will have to come from the president, OIP, and agency FOIA officers who have the responsibility for changing the kind of secrecy-first approach that MSHA and other agencies display.

Tax-exempt Organizations’ Involvement in Hot-Button Issues Spurs IRS Complaints

The recent involvement of tax-exempt organizations in hot-button political issues has caused watchdog groups to question if the organizations are engaging in prohibited campaign intervention. The tax code prohibits certain organizations, including charities and churches, from intervening in any political campaign on behalf of, or in opposition to, any candidate for

public office. The involvement of these organizations in political causes reflects the nonprofit sector's valuable interest in social issues and public affairs. However, that interest is hampered by the uncertainty of what is allowed in many election-related activities.

Liberty University (LU), a private, tax-exempt university founded by the late Rev. Jerry Falwell, dropped official recognition of the university's College Democrats club due to the National Democratic Party's platform on abortion and marriage equality, according to LU's Chancellor Rev. Jerry Falwell, Jr. Without official recognition, the club cannot receive funding from the university or use the university's name on anything affiliated with the club.

Mark Vine, LU's Vice President for Student Affairs, sent the LU College Democrats an e-mail on May 15 revoking recognition for the club. The e-mail says that the "Democratic Party Platform is contrary to the mission of LU and to Christian doctrine (supports abortion, federal funding of abortion, advocates repeal of the federal Defense of Marriage Act, promotes the 'LGBT' agenda, Hate Crimes, which include sexual orientation and gender identity, socialism, etc)."

Americans United for Separation of Church and State (AU) sent a letter to the Internal Revenue Service (IRS) asking the agency to review Liberty University's tax-exempt status. AU's letter highlights that the university provides the College Republicans club with official recognition and funding. In an AU press release, Executive Director Rev. Barry W. Lynn said, "Liberty University is a tax-exempt institution and isn't allowed to support one party over another. If the school insists on pushing policies that favor Republicans over Democrats, it should have to surrender its tax exemption." There is a gubernatorial primary in Virginia on June 9, which raises the question about whether LU's action could be intended to affect the outcome of an election.

Liberty University announced in a press release on May 28 that it had plans to file a complaint on June 1 against AU, alleging that AU is politically biased and files "these letters to silence churches and other conservative organizations by intimidating them."

There are also complaints that the Maine Diocese of the Catholic Church is violating tax law by helping push a referendum that would repeal same-sex marriage in the state. According to *SFGate.com*, an online affiliate of the *San Francisco Chronicle*, the Empowering Spirits Foundation filed an IRS complaint against the Diocese, alleging that it is "engaging in political activity by collecting signatures for the referendum [and, thus,] violating IRS rules applying to nonprofits." The referendum is designed to overturn Maine's recently enacted marriage equality law, which expands civil marriage to same-sex couples.

By participating in the referendum, the Maine Diocese is engaging in direct lobbying, according to IRS regulations. Support or opposition to a referendum is considered lobbying because the general public is considered the legislative body in this case. The Diocese, a 501(c)(3) organization, can legally engage in direct lobbying as long as it is not a "substantial part" of its activities. Thus, the Diocese is not prohibited from participating in the referendum process as long as it is not supporting or opposing a candidate. However, Leonard Cole, an attorney who specializes in tax and nonprofit issues, told the Associated Press, "It's hard for me to imagine how you seek someone's signature on a petition without it arguably at least being an attempt to

influence their vote once the measure was on the ballot." Presumably, Cole is challenging the legitimacy of IRS regulations that make actions on referenda a lobbying activity, not a political intervention.

Leaders of tax-exempt organizations have also been extremely vocal about the Washington, DC, City Council's passage of legislation on May 5 to recognize valid same-sex marriages from other jurisdictions. Some religious leaders have vowed to target city council members who supported the legislation, according to the *Washington Post*.

AU warned that DC pastors who target politicians for supporting the marriage equality legislation risk their institutions' tax-exempt status. "Religious leaders have the right to speak out for or against same-sex marriage, but they cannot use the resources of their churches to elect or defeat candidates," said Lynn in another press release.

A pastor can make an endorsement as an individual but not as a representative of a church. IRS Rev. Rul. 2007-41 states, "Leaders cannot make partisan comments in official organization publications or at official functions of the organization." AU says it will monitor the DC situation and will report any tax-exempt organization to the IRS that violates the prohibition against campaign intervention.

Many complaints might never be filed if the IRS guidance for tax-exempt organizations was less ambiguous. Clarifying ambiguous IRS voter engagement rules would not only prevent organizations from unknowingly participating in prohibited activities, but it would also enable organizations to engage in issue advocacy without the fear of unintentionally violating rules that are too vague for many organizations to understand.

Report, Comments Reveal Need for Regulatory Clarity at IRS

Every year, the Department of the Treasury and the Internal Revenue Service (IRS) request public comments on recommendations for their Guidance Priority List to identify tax issues that should be addressed through regulations, revenue rulings, revenue procedures, notices, and other guidance for the year. OMB Watch recently submitted comments that urge the IRS to prioritize the creation of a bright-line definition of prohibited political activity for tax-exempt charities and religious organizations. Such clarity is particularly important given recent findings that IRS agents have not properly differentiated between permissible advocacy and activities that are considered partisan election intervention.

501(c)(3) tax-exempt organizations – charities, educational institutions, and religious organizations, including churches – are prohibited from participating or intervening in any political campaign on behalf of, or in opposition to, any candidate for public office. However, IRS regulations do not clearly define political intervention. The IRS relies on a "facts and circumstances" test to determine, on a case-by-case basis, what is and is not permissible. Consequently, groups are left with little precedent to guide their decision making. In 2004, the

IRS began the Political Activities Compliance Initiative (PACI) program, targeting alleged illegal political activity by 501(c)(3) organizations.

In its recent comments to the IRS, OMB Watch recommends the creation of a rule that unambiguously defines prohibited political intervention activities to protect basic constitutional rights of free speech and association. OMB Watch's submission notes the downside to the current uncertainty: "groups feel more comfortable vacating their issue advocacy prior to an election rather than inadvertently violating the law. It is necessary to remove the chilling effect of the current vague facts and circumstances test so that 501(c)(3) organizations can become fully engaged in activities that support election reform and the goals of the Help America Vote Act." The comments continue, "If IRS employees do not understand the difference between permissible and impermissible activities, nonprofit organizations certainly can not be expected to understand the overly vague standard of when partisan activity has occurred."

The OMB Watch comments also suggest that the IRS take into account the U.S. Supreme Court's 2007 decision in *Federal Election Commission v. Wisconsin Right to Life* (*WRTL*) in providing clarity on permissible election activities. In *WRTL*, the Court exempted genuine issue advocacy from the "electioneering communications" ban on corporate-funded broadcasts that refer to federal candidates within 60 days of a general election or 30 days of a primary.

The IRS could use the Federal Election Commission (FEC)-approved regulation for permissible issue advocacy as a starting point for guidelines. According to the FEC rules, if the focus of a broadcast or other advertisement is on a legislative issue, and an officeholder is urged to support that legislation or the public is called upon to support a position and contact an officeholder, that ad is not an electioneering communication. However, the FEC regulation is also problematic in that it does not draw a specific standard and, as a result, deciding whether a communication is permissible is subjective.

Further evidence supporting the need for regulatory clarity is provided in a new Treasury Inspector General for Tax Administration (TIGTA) audit report on the IRS PACI program for the 2004 election season. TIGTA found that the IRS overstated the number of cases with confirmed prohibited political activity. Specifically, TIGTA notes the confusion that the IRS places on nonprofits when the agency does not communicate whether political intervention occurred. Fifteen of the closing letters TIGTA reviewed "did not specifically state whether the IRS determined that the prohibition against political intervention had been violated, which can be confusing for tax exempt organizations that spend resources on a lengthy examination." Furthermore, TIGTA reviewed 99 cases and found that 14 of them were incorrectly classified as a violation of the prohibition.

TIGTA recognized the difficulty organizations face while going through the arduous examination process. Its report said, "When organizations have not violated the prohibition on political activity, clear feedback is needed to notify the tax exempt organization that it may continue to operate consistent with its tax exempt status and to provide assurance that the alleged political actions did not violate prohibited political activity guidelines. Similarly, when tax exempt organizations have violated the prohibition on political activity, clear feedback is needed to

ensure that prohibited activities are stopped and that corrective actions are taken to prevent these types of activities in the future."

Other interesting points from the review of the 2004 cases include:

- Most organizations were investigated for a violation of a single prohibition
- The investigations included questionable activities in the form of printed and electronic material and verbal statements
- Three cases from the 2004 election remain open
- Most of the examinations involved local organizations
- Approximately half of the cases involved churches

The report made two recommendations: 1) closing letters should clearly state whether a violation was confirmed, and 2) IRS examiners should have guidance on the use of the correct disposal code when political intervention is not substantiated.

Currently, the facts and circumstances test does not bode well for any effective enforcement of the law. The majority of cases where the IRS determined political campaign intervention had occurred were resolved by issuing a written advisory with a warning and no penalty. In only six cases did the IRS revoke an organization's tax-exempt status, and in no case did the IRS impose the excise tax penalty provided in the law.

The IRS is responsible for releasing a PACI report on cases from the 2008 election season. However, it is unclear when that report will be complete.

White House Announces Changes to Recovery Act Lobbying Memo

In a blog post on May 29, Norm Eisen, Counsel to the President for Ethics and Government Reform, announced changes to President Obama's March 20 memorandum that placed restrictions on communications between federally registered lobbyists and executive branch employees regarding the use of Recovery Act funds. After completing a 60-day review, the administration modified the oral communications ban to include not just federally registered lobbyists, but everyone who contacts government officials. However, that ban appears to only apply to competitive grant applications that have been submitted for review.

Through the changes, the administration has essentially removed the ban on federal lobbyists communicating orally with agency officials on specific projects related to the Recovery Act. Now oral communications are only prohibited once a competitive grant application has been filed, and the ban lasts until the grant is awarded. However, the restrictions apply to everyone, not just federally registered lobbyists. Further, everyone can communicate with agency officials in writing, and those communications will be posted on the Internet. Eisen wrote, "For the first time, we will reach contacts not only by registered lobbyists but also by unregistered ones, as well as anyone else exerting influence on the process."

Eisen describes the competitive grant applications for Recovery Act funds as "the scenario where concerns about merit-based decision-making are greatest. Once such applications are on file, the competition should be strictly on the merits. To that end, comments (unless initiated by an agency official) must be in writing and will be posted on the Internet for every American to see."

The change in the lobbying restrictions hones in on one particular step in the process of acquiring funding under the Recovery Act and significantly recognizes that not only registered lobbyists can gain influence. However, the changes seem to ignore the influence that can be generated prior to submitting a competitive grant application. More to the point, most of the Recovery Act funds are not distributed through competitive grants but through formula grants, contracts, loans, and tax expenditures. The policy change is silent about disclosure regarding influence-peddling where more money is at stake.

The announcement also made clear that disclosure of contacts with federally registered lobbyists and agency officials will continue to be posted online. "Third, we will continue to require immediate internet disclosure of all other communications with registered lobbyists. If registered lobbyists have conversations or meetings before an application is filed, a form must be completed and posted to each agency's website documenting the contact." This provision seems unclear. It appears to be referencing the earlier sample guidance from the Office of Management and Budget (OMB) that instructed agencies to disclose any contacts with federally registered lobbyists, even when those communications were about procedural issues.

Criticism of the restrictions rested on their reliance on the Lobbying Disclosure Act (LDA) and how they set a double standard on speech. Those registered under the LDA were the only ones who had their oral communications restricted. Critics charged that to avoid the ban on oral communications, organizations and corporations could use a non-registered lobbyist to communicate with agencies on Recovery Act funding.

Now, many of those who decried the March 20 memo are praising the changes. For example, Citizens for Responsibility and Ethics in Washington (CREW) Executive Director Melanie Sloan stated, "By requiring everyone – not just lobbyists – to communicate in writing after grant applications have been filed, the WH is ensuring real merits-based decision-making. For the first time, not just lobbyist communications but also communications by the ubiquitous class of deliberately vaguely titled 'consultants' will be reported."

Public Citizen issued a press release stating that the new rule "levels the playing field between wealthy corporations and non-profit organizations as well as those who can afford hiring an insider lobbying firm and those who cannot. Everyone who requests an earmark must request it in the same way."

Some groups remain opposed to the speech limitations still found in the memo. None of the “good government groups,” save OMB Watch, have expressed concern that the focus is on the smallest share of Recovery Act funds – competitive grant awards – and often the least contentious. The Associated Press quoted an anonymous White House official who said, "The

new prohibition against conversations would apply to about $60 billion worth of spending." The Recovery Act provides $787 billion.

Questions still remain about the administration's policy. The updated regulations were announced rather informally via the White House blog. The blog stated that detailed guidance will be issued on the changes. Hopefully, such guidance will provide more clarity and definition to the scant six-paragraph announcement. Perhaps further changes can be made in the future to tweak the rules. The simplest solution is for all communications that attempt to influence federal spending under the Recovery Act to be disclosed.

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Congress Inches Closer to Final War Supplemental Vote

Legislation appropriating over $100 billion for continued war funding (H.R. 2346) is moving closer to a final vote in Congress, despite significant delays and recent disagreements during conference committee negotiations. The main issues of contention include the release of detainee photos, a funding provision for the International Monetary Fund, and overall concerns related to the bloated cost of the bill. President Obama originally requested $90 billion for the legislation, but that figure has grown to $106 billion.

Perhaps the most controversial issue in the legislation was an amendment introduced by Sens. Joe Lieberman (I-CT) and Lindsey Graham (R-SC) that sought to prohibit the release of photos of detainees being tortured. There was a heated debate about the relative merits of the need for government transparency versus the potential endangerment of U.S. soldiers who are serving in

high-risk areas abroad. The conference committee eventually agreed to drop the amendment, assuaging a number of liberal House Democrats.

The president's $80 million request to close the Guantanamo Bay prison and transfer detainees was also modified. In its altered form, the bill would prohibit the relocation of detainees to the U.S. and would require the president to report on the specific destination and security risk of each individual before the release of any funds for transport.

In addition to funds for U.N. peacekeeping dues ($721 million) and military personnel shortfalls ($534 million), the conference agreement also allocates funds for items such as the Pakistan Counterinsurgency Capability Fund ($400 million), which is meant to assist Pakistan's security forces as well as provide funds for humanitarian relief and necessary reconstruction.

Some items may appear to be funded at lower or higher levels relative to the previous fiscal year, but the final figures need to be analyzed in conjunction with the administration's baseline budget figures. Earlier in 2009, the administration vowed to rely more on baseline budget figures instead of supplemental spending bills and some increases/decreases were subsequently reflected in the current bill. The administration has stated that this will be "the last planned war supplemental."

The bill also requires the president to submit two reports about the ongoing efforts in Afghanistan and Pakistan, including the United States' policy objectives and benchmarks for evaluation, as well as an assessment of the Afghani and Pakistani governments' roles in anti-terrorist efforts.

In addition to war funding, the bill contains some unrelated supplemental funding. The president requested and conferees included a provision that provides an additional $5 billion to the International Monetary Fund (IMF) for the organization's lending programs. These additional funds are meant to help the IMF combat economic situations that may continue to arise due to the global economic environment, but some Republicans protested its inclusion, indicating that the provision should not be attached to a war funding bill. Given the recent disharmony among Democrats regarding some of the bill's proposed and included provisions, it may be tough to rally enough votes to pass the legislation if Republicans decide to vote against it based on the IMF provision.

The conference agreement also includes $1 billion for a "cash-for-clunkers" program, where consumers can receive a $3,500-$4,500 voucher to trade in their existing cars for more fuel-efficient vehicles, and an additional $4 billion on top of Obama's request of $3.7 billion for fighting pandemic flu outbreaks.

The House is expected to vote on the conference report as soon as June 16, with the Senate following shortly thereafter.

Senate Likely to Confirm First-Ever Chief Performance Officer

On June 16, the Senate Homeland Security and Governmental Affairs Committee (HSGAC) voted to approve the nomination of Jeffrey Zients to serve as the nation's first Chief Performance Officer (CPO), moving the issue to the full Senate.

On June 10, HSGAC held a confirmation hearing for Zients, where senators questioned him about his private sector background and a host of topics he will be responsible for overseeing, such as excessive outsourcing, lack of use of performance data, government overpayments, waste and mismanagement in IT projects, federal workforce development, and overburdened acquisition employees. In response, Zients acknowledged up front that the private sector and government are inherently different types of structures, and he generally promoted some ideas already developed within the new administration, such as curbing the Bush administration's competitive sourcing initiative.

Zients will oversee four statutory offices at the Office of Management and Budget (OMB) – Information and Regulatory Affairs, Federal Procurement, E-government and IT, and Federal Financial Management – and fulfill two roles: the deputy director for management at OMB and advisor to the president on performance issues.

This will be Zients' first foray into government service, and his comments at the hearing focused on the need to strengthen performance metrics and emphasized the challenges of measuring success in the public sector. Among other things, Zients will face the challenge of improving government performance in the face of an aging federal workforce, a patchwork of information technology systems that overlap and are not compatible with each other, and the trend toward outsourcing government functions.

In response to questions from senators, Zients agreed that the government's outsourcing policies needed to be reexamined to make sure that agencies still retain control and accountability for outsourced work. He also stated that work should not be outsourced if it falls within government's expertise or can achieve savings by being adapted elsewhere in the government.

Overall, Zients reiterated the president's desire to increase transparency and acknowledged the need to improve tools such as the Program Assessment Rating Tool (PART) in order to improve resource allocation decisions and increase the use of reliable and unbiased performance data among policymakers. He also vowed to work closely with the committee on issues related to acquisition employees, an overloaded security clearance system, and government overpayments.

While the Zients nomination is not controversial, it may get delayed because some Republicans are upset with the Democrats' decision to move forward with July hearings on U.S. Supreme Court nominee Sonia Sotomayor. A number of nominations have been tied up in the Senate because of this, and Senate Majority Leader Harry Reid (D-NV) recently criticized Republicans for holding up the process. What impact these events will have on the timing of the Zients confirmation remains unclear.

Commentary: Defense Acquisition Reform -- Where Do We Stand?

Recent events are pointing to a shift in the way the Department of Defense (DOD) will implement future government contracts. The passage of a new law, the planned addition of much-needed acquisition personnel at DOD – by far the government's largest contracting agency – and an intended top-to-bottom overhaul of the Air Force's procurement process are all geared toward reforming a system ripe with waste, fraud, and abuse. Despite significant progress, these reforms face critical challenges ahead.

On the morning of May 22, President Obama signed into law a major weapons procurement reform – the Weapon Systems Acquisition Reform Act (WSARA) of 2009 – which represents a small step toward fixing the chaotic and troublesome weapons acquisition process at DOD.

One of the main goals of this law is to try to foster more competition within different parts of the DOD weapons contracting process, thereby harnessing the theoretical power of the free market. This is a much-needed reform, as six industry giants have, at the urging of the Clinton administration long ago, gobbled up most of the competition within the world of defense contracting. The six companies – Boeing, General Dynamics, Lockheed Martin, Northrop Grumman, Raytheon, and United Technologies Corp. – represented 29 percent of the total DOD contracting dollars spent in FY 2008, according to USASpending.gov.

Despite the requirement in WSARA that obligates the Secretary of Defense to "preserve the option of competition" throughout the life of a weapons program through the use of ten competition-promoting measures, there may not be enough companies to make sure that true competition exists to meet the requirements. Because of this, what is more likely is that the Pentagon will use a national security waiver in the law to skirt the intent of the reform. This loophole will allow wasteful weapons programs to slip by the prospective knife of Congress. However, to be fair, that knife is not always competently, if at all, wielded by congressional members.

The creation of a Director of Cost Assessment and Program Evaluation (DCAPE), a presidentially appointed and Senate-confirmed oversight position created under WSARA, is the second important aspect of the reform law. DCAPE will provide independent cost assessments to the Secretary of Defense of some, although not all, of DOD's major weapons programs. One of the vital tasks of this new position will be to make recommendations, through the Secretary of Defense, for Congress to eliminate a program after it exceeds the newly strengthened cost overrun rules. The success in completing that task assumes that Congress can see beyond parochial interests, sit on its hands, and not interfere to rescue a weapons program that the Defense Department may say it does not want or need. Unfortunately, if the recent efforts by congressional members to save the few programs Obama and Secretary of Defense Robert Gates have recommended cutting – including the F-22 fighter jet, the C-17 cargo plane, and the VH-71 presidential helicopter – is any indication, then prospects look bleak.

Another goal of the new law is to eliminate conflicts of interest in the weapons procurement process. Because the Pentagon relies on so few manufacturers for the nation's aircraft, missiles, ships, and other weapons systems, there often are conflicts of interest during the multiple phases of the production process. Firms that construct a weapon, and, consequently, are responsible for the evaluation of the contracting process up to that point, may have been responsible for the design of the same program. It is questionable that employees of a company would find fault with anything previously done by their own colleagues.

WSARA takes steps to eliminate these organizational conflicts of interest by preventing a contractor from working on multiple stages of a program; precluding the awarding of a contract to a subcontractor whose parent company is the prime contractor for the same weapons program; and requiring advice on systems engineering from sources independent of the prime contractor.

In addition to the important reforms contained within this new law, the Pentagon announced in early April that it plans to beef up its acquisition personnel by hiring 20,000 new procurement officers. Eleven thousand of these new posts will be former contracting positions converted to civilian jobs. This expansion, with an intended completion date of 2015, will represent a 15 percent increase in acquisition personnel, a sorely neglected part of the Pentagon for years.

What is even more important is the conversion of acquisition jobs from contracting to civilian posts. The sheer amount of DOD contract work for procurement tasks creates an unnecessary potential for conflicts of interest. A contracting company advising the Pentagon on procurement issues, and therefore with insider knowledge of the process, could theoretically take on another contractor as a client to advise on winning contracts from the Defense Department.

Finally, the Air Force has recently released a plan to restructure its entire procurement process, which could end up as a model for the rest of the DOD and perhaps the entire federal government. Spurred by previous contracting failures, this restructuring calls for revitalizing the Air Force acquisition workforce, demanding more specific systems requirements, instilling budget and financial discipline, and establishing clearer lines of authority and accountability within the acquisition process. The key, Air Force officials stress, is to get the best people possible and provide them with sound training to complement their experience. The Air Force realizes that this problem requires a long-term approach and has stated that these reforms will take three to five years to bear results.

While these changes and reforms are a good start, the true test of whether the defense contracting process will become streamlined and efficient is whether these stakeholders follow through with their recent actions. Do the White House, Congress, and the Pentagon consider their tasks for reforming the defense acquisition process complete, or do they rightly regard these efforts as the start of a much longer process? Without proper follow-through – meaning a continuous monitoring of the reform effort – the limited increase in oversight and regulations, the addition of personnel, and the plans for internal reform will do little to transform the defense procurement process.

Torture Photo Disclosure Ban out of War Spending Bill but Still Possible

During the week of June 8, an amendment seeking to block disclosure of photos of abused detainees in U.S. custody was removed from the Supplemental Appropriations Act of 2009 (H.R. 2346). However, Sens. Joseph Lieberman (I-CT) and Lindsay Graham (R-SC), sponsors of the amendment, have pledged to insert the language into other legislation. Moreover, the release of the torture photos is the subject of a lawsuit that may reach the U.S. Supreme Court.

In September 2008, the U.S. Court of Appeals for the Second Circuit ruled in favor of the American Civil Liberties Union (ACLU) in its lawsuit against the Department of Defense concerning a Freedom of Information Act (FOIA) request for records and photos of abused detainees. The court wrote, "It is plainly insufficient to claim that releasing documents could reasonably be expected to endanger some unspecified member of a group so vast as to encompass all United States troops, coalition forces, and civilians in Iraq and Afghanistan." In response to an April 27 court order for the release of the photos, the Obama administration initially agreed to turn over the material by May 28. At the urging of some in Congress and elsewhere, however, President Obama has since changed his mind.

The administration now argues that releasing the photos could "further inflame anti-American opinion." However, Amrit Singh, an attorney for the ACLU, said that there is value in releasing the torture photos. Singh stated, "Recently released legal memos elucidate the Bush administration's torture policies, but as long as the photos are being suppressed, the public will not know the full horror of the policies' consequences."

Lieberman and Graham attempted to prevent the release of the photos by creating a new specific exemption for them under FOIA. The senators offered the exemption as an amendment to the bill for supplemental war funding. The amendment would have withheld any "photograph relating to the treatment of individuals engaged, captured, or detained after September 11, 2001, by the Armed Forces of the United States." There was no requirement that the Defense Secretary justify the withholding of documents, such as explaining how the photos may endanger personnel or provide evidence of foreseeable harm in the classified certification. The lack of a requirement for such justification runs contrary to Obama's promise in his May 21 speech that, "I will tell the American people what I know and don't know, and when I release something publicly or keep something secret, I will tell you why."

Both the House and Senate passed versions of the supplemental bill with the amendment removed, but only after Obama assured Democratic members of Congress that he would appeal the Second Circuit's decision to the Supreme Court. This gave Democrats assurance that the Supreme Court would rule on the merits of disclosure. On June 12, a conference committee produced a compromise version of the supplemental bill that is due to be voted on shortly by the House and Senate.

Regardless of the president's plans or action by the courts, Graham promised to continue inserting the provision into subsequent legislation, arguing, "Every photo is a bullet for our

enemy." Lieberman pledged the same, declaring, "... and then we'll continue to do everything we can to attach it to other legislation, to slow up the process."

The appellate court paved the way for the administration to appeal the ACLU case to the Supreme Court when it recalled its order on June 10. It is unknown how the Supreme Court might rule; however, a decision against the ACLU may be more harmful than a legislative prohibition on the release of the torture photos, as legislative measures are often easier to reverse than Supreme Court decisions.

Bills Would Require Disclosure of "Fracking" Chemicals

Bills recently introduced in both the House and Senate seek to force natural gas drilling companies to disclose what chemicals are pumped into the ground in a practice known as hydraulic fracturing, or "fracking." Although the process has been linked to drinking water contamination and other harms to public health and the environment, companies are currently allowed to conceal the toxic chemicals they use.

Hydraulic fracturing is a process where sand and fluids are pumped underground at very high pressure to cause tiny fissures in rock and force natural gas to the surface. Although most of the fluid is water, numerous chemicals, many of them toxic, are typically added to the mixture. Fracking fluid is known to often contain benzene, toluene, and pesticides, among other harmful substances.

Currently, the industry enjoys an exemption from regulation under a federal drinking water statute that permits companies to maintain secrecy around the chemicals used. Gas drillers and the companies that supply them are attempting to fend off Congress' efforts to close the loophole and to preserve the confidentiality of the chemicals used, claiming the mixtures are trade secrets. Without the information about the chemicals, scientists are unable to research the potential health effects of hydraulic fracturing.

The legislation, known as the Fracturing Responsibility and Awareness of Chemicals Act, or FRAC Act, specifies that drillers must disclose the identities of the chemicals used in the fracturing fluids. In medical emergencies, even trade secrets must be disclosed, with or without a written statement of need. The Senate version of the bill is sponsored by Pennsylvania Sen. Robert Casey, Jr. (D) and New York's Charles Schumer (D).

According to Rep. Henry Waxman (D-CA), whose Energy and Commerce Committee is moving the House bill (H.R. 2766), "The current exemption for the oil and gas industry means that we can't even get the information necessary to evaluate the health threats from these practices."

The bills remove the oil and gas industry's exemption from regulation under the federal Safe Drinking Water Act (SDWA), which was granted in a previous, Republican-controlled Congress. The SDWA authorizes the U.S. Environmental Protection Agency (EPA) to regulate the injection of fluids underground and limits pollution levels in drinking water. The exemption, known as

the "Halliburton loophole" for the company that pioneered the process and the influence of its former CEO, Dick Cheney, was inserted into the Energy Policy Act of 2005. No other industry enjoys such a blanket exemption from SDWA regulation. Without the authority of the SDWA, EPA scientists are powerless to analyze the chemicals, processes, and dangers of hydraulic fracturing.

Chemicals used in fracking enter the environment in three main ways. Up to one-third of the fracking fluid is left underground during the process, and this can seep into underground drinking water supplies and the source waters for rivers and lakes. Spills and accidents on the surface can also contaminate water supplies. Finally, the two-thirds of the fluid that is retrieved after being injected underground is waste water that must be disposed, presenting another potential avenue for release into the environment.

Rep. Maurice Hinchey (D-NY), one of the House bill's cosponsors, said, "It's time to fix an unfortunate chapter in the Bush administration's energy policy and close the 'Halliburton loophole' that has enabled energy companies to pump enormous amounts of toxins, such as benzene and toluene, into the ground that then jeopardize the quality of our drinking water." Hinchey added, "The bill also lifts the veil of secrecy currently shrouding this industry practice."

Another House cosponsor, Rep. Diana DeGette (D-CO), announced, "When it comes to protecting the public's health, it's not unreasonable to require these companies to disclose the chemicals they are using in our communities – especially near our water sources."

In DeGette's home state, Colorado, gas drilling has greatly expanded over the last eight years, and nine Colorado municipalities have already passed resolutions similar to the proposed federal legislation. New state rules in Colorado require gas drillers to give the inventory of chemicals to medical personnel when requested, as well as to state officials. The general public remains barred from access to the information, however.

The federal bills do not require reporting of quantities of fracking fluids used, the amounts of the toxic chemicals used or disposed of, or where the chemicals end up. However, with knowledge of the chemicals themselves and the authority to regulate the process, EPA scientists would be able to track the fate of the fracking fluids and analyze impacts to the environment.

In cases of medical emergencies caused by exposure to fracking chemicals, the legislation gives companies that were forced to disclose proprietary chemical formulas the right to require a confidentiality agreement from the treating nurse or doctor after the emergency. However, it is not clear if the patient must sign a confidentiality agreement, or if the physician is barred from telling the patient what chemicals they have been exposed to. The legislation's focus on medical emergencies fails to consider or address chronic exposure to fracking chemicals, which could create non-emergency medical situations where disclosure of the chemicals is important.

The industry contends that oil and gas production would drop considerably – threatening the economy and the country's goal of energy independence – if the legislation becomes law. This argument is made despite industry assertions that the value of the natural gas in just one

geologic formation in the Northeast would be worth up to one trillion dollars. Opponents of federal regulation also claim that state regulators provide sufficient oversight of fracking operations.

Food Safety Legislation Progresses Slowly

The first steps on real food safety reforms were the subject of a House hearing June 3 in the Energy and Commerce Committee's Subcommittee on Health. The subcommittee unveiled the Food Safety Enhancement Act of 2009, a synthesis of several different bills that had been introduced earlier this session.

In 2007, the Government Accountability Office (GAO) designated protection of the nation's food supply as a high-risk area requiring immediate attention. The high-risk designation is saved for those policy areas that require transformational change. In testimony before the Energy and Commerce Committee in April 2007, GAO's Lisa Shames, Acting Director of Natural Resources and Environment, told Congress that "limitations in the federal government's food recalls heighten the risk that unsafe food will remain in the food supply and ultimately be consumed. Food recalls are largely voluntary, and federal agencies responsible for food safety have no authority to compel companies to carry out recalls in these cases." There are 15 agencies that have responsibility for food safety under approximately 30 different laws, according to her testimony.

Since GAO designated food safety as a high-risk area, Congress has held 24 hearings on the issue, according to testimony at the June 3 hearing by Caroline Smith DeWaal of the Center for Science in the Public Interest, who was testifying on behalf of members of the Safe Food Coalition. The Food Safety Enhancement Act Discussion Draft unveiled May 26 was a combination of many of the more narrowly focused bills that have been introduced in Congress in recent years. It was aimed at the Food and Drug Administration (FDA), which oversees roughly 80 percent of the U.S. food supply. The bill contains provisions that:

- Focus on prevention of, not reaction to, foodborne illness outbreaks;
- Shift responsibility for the safety of products to manufacturers;
- Require both domestic and foreign food suppliers to register with FDA annually and implement safety plans that identify and protect food from hazards;
- Give FDA the power to set minimum safety plan specifications and the power to audit the plans;
- Require registered facilities to pay a $1,000 registration fee, as well as pay for re-inspections, recalls, and, possibly, export certificates;
- Set minimum inspection frequencies based on the level of risk of the facilities, with the goal of inspecting high-risk facilities at least once in every six to 18 months;
- Enhance FDA's ability to trace the origin of tainted foods by requiring industry to develop an interoperable record to ensure an effective and timely traceback of the distribution chain; and
- Provide FDA with enhanced authority to mandate recalls and detain unsafe foods

Dr. Margaret Hamburg, the newly-confirmed FDA commissioner, testified at the hearing, calling the legislation "a major step in the right direction." From FDA's perspective, an effective food safety system needs to focus on prevention, give FDA the legal enforcement tools to match its responsibilities, and provide the agency with sufficient resources to match the responsibilities. According to Hamburg, the bill accomplishes most of these goals. FDA has suffered budget cuts, lost staff, and been heavily criticized for its failure to adequately protect the public during a host of food safety incidents leading up to and following GAO's designation of food safety as a high-risk topic.

Surprisingly, as a result of many of the operational problems FDA has, Hamburg testified that the inspection frequencies outlined in the bill would "far exceed" the resources available to the agency. "It would be difficult, if not impossible, for FDA to hire and train thousands of additional staff so quickly – even while relying on inspections by state, local, and other federal and foreign government officials. As a result, FDA would support modification of these provisions to take into account the operational challenges involved, such as by changing these inspection frequencies," Hamburg said.

Food industry witnesses largely supported the bill but took issue with details of provisions addressing traceability, country-of-origin labeling, the size of the registration fees, and some of FDA's expanded powers, especially the extent of mandatory recall powers the agency would be given. They were largely supportive of more resources for FDA to meet its responsibilities. In complaints about the size of the fees on registered facilities, Pamela Bailey, President and CEO of the Grocery Manufacturers Association, presented a somewhat contradictory argument, noting, "Our industry is ultimately responsible for the safety of its products, but securing the safety of the food supply is a government function which should be largely financed with government resources."

Several Republicans on the committee focused on the size of the registration fees and targeted those as a potential stumbling block for bipartisan support. They voiced objections to expanding FDA's powers to force recalls and use subpoenas, two powers that FDA does not have under current law.

Food safety advocates generally supported the bill. DeWaal, for example, called it "a strong bill" that addresses critical components in building a new framework for a modern food safety system. The preventive approach, coupled with inspections, traceability of foods, enhanced research and surveillance, more resources, and better enforcement tools, can lead to major improvements, she argued. She also claimed that better oversight by FDA helps the food industry by protecting it from damage suffered by recalls and outbreaks of pathogens. The $1,000 registration fee pales in comparison to the millions of dollars industry spends on advertising and the economic impacts of outbreaks.

Rep. John Dingell (D-MI) formally introduced the bill June 8. The subcommittee completed a markup June 11 and subsequently referred the bill without amendments to the full committee.

Several bills addressing food safety improvements were introduced in the Senate early in the 111th Congress but have languished in the Agriculture, Nutrition, and Forestry Committee and the Health, Education, Labor, and Pensions Committee.

OIRA's Role in the Obama Administration Examined

A panel of regulatory policy experts discussed how the White House Office of Information and Regulatory Affairs has been functioning during the Obama administration and how reforms could benefit the public. The discussion came as the White House prepares to issue a new executive order that could alter the way regulations are written.

The American Bar Association's Administrative Law and Regulatory Practice Section held the discussion June 10. Michael Fitzpatrick, associate administrator of the White House Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs (OIRA), gave an insider's account of OIRA's role in the Obama administration.

Rulemaking agencies submit to OIRA drafts of proposed and final regulations before publishing those regulations for the public to see. OIRA comments on, and sometimes edits, agency regulations. OIRA also shares draft rules with other agencies for their comment. The office also checks the cost-benefit analyses agencies prepare in support of their regulations. For the most part, OIRA has maintained this role during the Obama administration, Fitzpatrick said.

Fitzpatrick said that since Jan. 21, the first full day of the Obama administration, OIRA has completed reviews of 136 regulations. Thirty-eight of those regulations are considered by the administration to be "economically significant," imposing an economic impact of $100 million or more, either through compliance costs or improved social welfare. Fitzpatrick's statistics covered regulations approved by OIRA through June 5.

Of the 136 regulations, 37 were withdrawn from OIRA review. On Jan. 21, White House Chief of Staff Rahm Emanuel instructed rulemaking agencies to halt their work on all regulations under development during the Bush administration, including those that had been sent to OIRA. Fitzpatrick cited Emanuel's memo as the reason for the withdrawals.

The remaining 99 regulations were approved by OIRA, in some cases after the agency agreed to make changes.

Fitzpatrick said the average length of the review periods was 32 days for the 38 economically significant regulations and 28 days for all other regulations. He called the pace "expeditious," citing longer review times during the first few months of the Bush administration. Fitzpatrick said, under President Bush's OIRA, the average length was 52 days for economically significant regulations and 64 days for all other regulations approved from Jan. 21, 2001, to June 5, 2001.

However, an OMB Watch analysis of the data shows faster paces for both administrations. In his analysis, Fitzpatrick included regulations submitted to OIRA during the Bush administration

and, when analyzing the Bush years, regulations submitted during the Clinton administration. In both cases, most of these holdover regulations were withdrawn. Many of these regulations had languished at OIRA for months during the presidential transitions.

OMB Watch chose to include only those regulations submitted to and approved by OIRA after each administration began (Jan. 21, 2001, and Jan. 21, 2009, respectively). According to OMB Watch, under President Obama's OIRA, the average length was 21-22 days for economically significant regulations and 20-21 days for all other regulations. Under President Bush's OIRA, the average length was 14-15 days for economically significant regulations and 25-26 days for all other regulations. (Times are presented as ranges due to rounding.)

Under the Obama administration, OIRA has quickly approved several high-profile regulations, including a U.S. Department of Agriculture rule barring downer cows from entering the food supply (reviewed in seven days), a Department of Transportation regulation requiring stronger vehicle roofs in order to protect passengers during accidents (reviewed in 22 days), and a U.S. Environmental Protection Agency finding that declares greenhouse gases a threat to public health and welfare (reviewed in 24 days).

Statistical analyses do not paint a complete picture of OIRA's role in rulemaking, panel member and OMB Watch Executive Director Gary D. Bass noted. The small but powerful office can have a great impact on the substance of the regulations that effect Americans' everyday lives. Bass called on the Obama administration to improve the regulatory process by reducing the time it takes to complete rules, ensuring that agencies are allowed to produce regulations in an environment of limited political interference, requiring more transparency, stimulating public participation, and providing agencies with the means to enforce rules in effect.

Another panel member, former OIRA Administrator Susan Dudley, disagreed, saying that little, if any, change is needed in the way OIRA operates. Dudley, who worked at OIRA from 2007 to 2009, said the office plays a salutary role and its powers should be preserved. She also supported the use of cost-benefit analysis in rulemaking but has urged improvements. In the Summer 2009 issue of the journal *Regulation*, Dudley lamented, “Although analytical tools for estimating benefits and costs are getting more and more sophisticated, our analysis doesn’t seem to be getting better at predicting actual outcomes.” Dudley also identified “Engaging the public to be more aware of the actual effects of regulation” as an upcoming challenge.

Sid Shapiro, an administrative law expert at the Wake Forest University School of Law, also focused on cost-benefit analysis. Shapiro said current methods of cost-benefit analysis – which focus on assigning dollar values to regulatory benefits, such as injuries reduced or lives saved, and then compare those benefits to compliance costs – do not help the government or the public make informed decisions. Shapiro said the government should do a better job of accounting for benefits that are difficult or impossible to "monetize."

OIRA is still operating under Executive Order 12866, Regulatory Planning and Review. President Clinton signed E.O. 12866 in September 1993, and President Bush continued using it throughout his administration.

President Obama has indicated his intent to replace E.O. 12866 with a new order governing the regulatory process. On Jan. 30, Obama called on OMB Director Peter Orszag, as well as the federal agencies responsible for writing rules, to present him with recommendations on a new executive order within 100 days.

OIRA solicited public comment on the existing state of the regulatory process and published the comments online – an unprecedented action in the development of executive orders. Fitzpatrick said the most common topic covered in comments was the role of cost-benefit analysis. The second most common topic was the role of OIRA, specifically, its relationship with rulemaking agencies.

Although the deadline for the OMB and agency recommendations has passed, the administration has given no indication of its plans. The administration has not released OMB or agency comments.

The process may be moving slowly because Obama's nominee to lead OIRA has yet to be confirmed. Obama nominated Harvard Law Professor Cass Sunstein in April. His nomination was approved by the Senate Homeland Security and Governmental Affairs Committee on May 20, but the full Senate has yet to schedule a vote.

Grassley Seeks Disclosure of Ethics Waivers

Sen. Charles Grassley (R-IA) is determined to make public every ethics waiver issued to former lobbyists who now work in the Obama administration. A Jan. 21 executive order put in place restrictions on lobbyists who work for the federal government. The order included a waiver process, allowing exemptions if the "application of the restriction is inconsistent with the purposes of the restriction" or if it is in the "public interest." Grassley is prodding the administration to disclose all waivers granted under the policy. Grassley has also requested information on every letter of recusal that waived employees have on file.

Grassley recently requested a complete list of waivers and letters of recusal, including the names of all individuals and the agencies they are employed with, the reason for granting the waiver, and the issues the employees are disqualified from working on. Grassley's June 10 letter to Robert Cusick, the director of the Office of Government Ethics (OGE), stated, "The American people deserve a full accounting of all waivers and recusals to better understand who is running the government and whether the administration is adhering to its promise to be open, transparent and accountable."

According to *Politico*, "[Cusick] did not know definitively how many ethics waivers had been granted, but he said 'there's been no great surge of waivers.' Unlike waivers, which have to be approved by White House ethics lawyer Norm Eisen and are on file at the White House, letters of recusal are kept at the agency employing the official and are more difficult to track, Cusick said."

While there is no one place to find all the waivers and letters of recusal, public statements by the White House reveal that only four waivers have been issued to date. The administration has been quite guarded about the exceptions it has granted. According to Grassley's letter, he also wrote in February 2009 asking for details on the waivers from the White House's budget office. Grassley was told that this information will not be available until the annual report required by the executive order is released in 2010. Grassley retorted, "That is unacceptable, and the American people deserve this information in real time."

Further, Grassley wrote that the current system of granting waivers "has created a situation where the transparency and accountability touted by the White House are lost because there is no comprehensive database of the waivers and recusals granted."

As Grassley called for instant disclosure of waivers, so did the executive director of OMB Watch, Gary D. Bass, in an op-ed published in May. Bass stated, "All granted waivers, along with information about the individuals receiving the waivers, should be immediately disclosed. The government should create a comprehensive website that lists any waivers, as well as related lobbying and campaign contribution information pertaining to waived individuals, in easy-to-use, searchable formats."

Meanwhile, new examples to fuel the argument for more transparency continue to pop up. For example, Charles Bolden was recently nominated as administrator of the National Aeronautics and Space Administration (NASA), and he may require a waiver because of his work as a lobbyist for a NASA contractor, ATK. According to the *New York Times*, "Bolden would be issued a limited waiver to the administration's ethics policy that states appointees cannot take part in matters 'directly and substantially related' to their former employers for two years."

In addition, Andrew McLaughlin, Director of Global Public Policy for Google, has reportedly been nominated for the position of Deputy Chief Technology Officer in the White House. The nomination has not yet been formally announced. Two consumer groups, the Center for Digital Democracy and Consumer Watchdog, have said the appointment would violate the intent of Obama's ethics rules.

As Grassley noted, "I am concerned that Section 3 [of the executive order] could be used to gut the ethical heart of the Order. Each day, new nominees to key Government positions are reported. Many of these nominees have been nominated despite the fact that they have previously served as lobbyists or in a manner that would preclude their participation under the Order absent a Section 3 waiver."

Even though the order requires appointees to sign a pledge stating that they will not work on any issues related to their former clients for two years, the administration continues to be bombarded with criticism for nominating appointees whose past work appears to violate the policy. Meanwhile, nonprofit groups continue to call for timely disclosure and clarity of all waivers *before* the annual report due out in 2010.

Questions about LDA Guidance Remain

New congressional guidance on lobbyist reporting and registration termination under the Lobbying Disclosure Act (LDA) has sparked concerns over accuracy and potential conflicts with current law. The guidance addresses filing requirements for lobbyists, as well as criteria for deregistering as a lobbyist, particularly important given President Barack Obama's hiring rules that place restrictions on those who have lobbied in the past two years. The deregistration rules may create enormous loopholes that could result in non-reporting of lobbyist activities.

On June 9, the Clerk of the House and the Secretary of the Senate released updated guidance on compliance with the LDA. The congressional offices also answered five questions about terminating a lobbyists' registration. An individual is required to register if he or she has two lobbying contacts or if 20 percent or more of his or her time is dedicated to lobbying. Also, each individual that "is registered or required to register" must file Form LD-203, a new semi-annual reporting requirement on campaign contributions. The only way for an individual that "is registered or required to register" to avoid filing LD-203 is to stop being a registered lobbyist.

According to the new guidance, a lobbyist can deregister if the person has had fewer than two lobbying contacts over two consecutive quarters. However, the LDA says that even if there are fewer than two lobbying contacts in a quarter, if an individual spends 20 percent of more of his or her time lobbying, the individual cannot deregister.

Many worry that if the guidance is implemented, a number of active lobbyists would deregister. They couldn't lobby two or more people, but they could direct others to make actual contact with covered officials, similar to a conductor in front of an orchestra. Even if a person spent 100 percent of his or her time on lobbying, as long as the person only has one contact with covered officials in each quarter, he or she could escape lobbying disclosure.

Attorneys at Caplin & Drysdale stated in their *Political Activity Law Bulletin* that they believe the notice was intended to convey that "an individual can deregister if he or she has never met the 'two contacts' test, does not meet that test in the current quarter and does not expect to meet it in the upcoming quarter." They also indicated that "this new guidance seems to create a discrepancy with the plain meaning of the statute."

The guidance may have been issued as a response to the mass of federal lobbyists deregistering in the wake of the strict requirements under Obama's executive order on ethics, which prohibits, for two years, an individual registered under the LDA from working in an agency that he or she lobbied. Additionally, a political appointee may not participate in "any particular matter" that the person lobbied on within the past two years and may not participate in the specific issue area in which the particular matter falls. A question that remains unanswered is whether lobbyists, who have retroactively amended their lobbying reports, will be able to join the administration.

The Hill reports that the two congressional offices plan to review the guidance they just issued in light of the possible inconsistencies with the law. The article also notes that many major law

firms are advising their clients not to deregister until the congressional offices complete their review. Improperly deregistering and not reporting under the LDA carries severe penalties.

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Analysis of New Recovery Act Reporting Guidance

On June 22, the Office of Management and Budget (OMB) issued new guidance to federal agencies on implementing recipient reporting requirements under the American Recovery and Reinvestment Act, commonly called the Recovery Act. The guidance comes roughly four months after President Obama signed the Recovery Act into law and puts in place new requirements for the first quarterly reports that will start flowing in from grantees Oct. 10. According to the Coalition for an Accountable Recovery (CAR), "While this guidance is a step in the right direction, there is still much room for improvement."

Responsibility for implementation of the Recovery Act is shared by two government bodies – the Recovery Accountability and Transparency Board (RAT Board) and OMB. The RAT Board, chaired by Earl Devaney, oversees how funds are distributed in order to prevent fraud, waste,

and abuse. The RAT Board also has responsibility for developing and maintaining Recovery.gov, the website that Obama said will serve as the vehicle for tracking "how we're spending every dime." OMB has responsibility for instructing federal agencies on implementing the law, including what needs to be collected from those receiving Recovery Act funds, as well as what should be disclosed by federal agencies. OMB also has responsibility over the quality of the information that is disclosed.

The June 22 OMB guidance is the third from the office, all of which instruct agencies on implementing the law. The most recent guidance focuses solely on data reporting requirements under Section 1512 of the Recovery Act and only applies to recipients of grants, loans, tribal agreements, cooperative agreements, and other forms of financial assistance made available under the Recovery Act. OMB does not have authority to issue regulations or instructions on contracts that come directly from federal agencies. That authority rests with three federal agencies that comprise the Federal Acquisition Regulation (FAR) council. The FAR is expected to release regulations to implement the data reporting requirements soon.

In essence, there are two types of reporting requirements under the Recovery Act. The first is what federal agencies are to provide in weekly reports given to the RAT Board. These weekly reports are to include information about grants, contracts, loans, and other forms of payments made under the Recovery Act. That information is to be made publicly available through agency websites and through Recovery.gov. While overall information on funds obligated and paid out are on the Recovery.gov website, no other detail, such as who has received the money, is provided. To some extent, USAspending.gov provides information about who is receiving the federal funds. Overall, this part of the reporting requirements has been widely criticized by Congress and public interest observers.

The second reporting requirement concerns those who receive the federal funds. The June 22 guidance clarifies that only the prime recipient and the first-tier recipient below the prime recipient (called the sub-recipient) will need to report. In other words, if a state receives a grant and sub-grants a portion to a city, and the city sub-contracts to five entities to carry out the work, only the state and the city will need to report information. There will be no requirement to collect information from the five entities doing the actual work.

OMB notes a new website, called FederalReporting.gov, will be created to allow prime recipients and sub-recipients to submit information. OMB allows the prime recipient to either report information to FederalReporting.gov for itself and its sub-recipients or to allow its sub-recipients to report directly themselves.

However, when it comes to reporting on information about jobs created or retained, OMB only allows the prime recipient to report to FederalReporting.gov for itself and its sub-recipients. OMB states that data on jobs can either be estimates or real numbers but should not include figures for indirect or induced jobs. Indirect or induced estimates will be developed by the White House Council of Economic Advisors based on statistical models. Additionally, OMB allows prime recipients to decide for themselves what constitutes a full-time equivalent (e.g., 30 hours or 40 hours per week).

Reporting to the FederalReporting.gov website is flexible, allowing users to report directly through the web or by sending Excel files or other files in XML formats. The website will incorporate a service developed by the U.S. Environmental Protection Agency, called the Central Data Exchange, to handle data submitted in different formats and put it into a common format for the federal government. Once the data is parsed, checked for quality, and presumably standardized, it will be shared with Recovery.gov for public disclosure.

For more detailed information, see the Coalition for an Accountable Recovery website. OMB Watch is a co-chair of CAR.

House Hearing Questions Whether PAYGO is Enough to Control Spending

The House Budget Committee held a hearing on June 24 on the Statutory Pay-As-You-Go (PAYGO) Act of 2009, which was recently introduced by Rep. Steny Hoyer (D-MD). During the hearing, House members focused on the enforcement mechanisms in PAYGO, the significant exemptions granted under the proposed legislation, and whether the bill is the appropriate method to reinstate fiscal discipline in Congress.

The hearing was headlined by Peter Orszag, Director of the Office of Management and Budget (OMB); it also featured testimony from Douglas Holtz-Eakin, former Director of the Congressional Budget Office (CBO), and Robert Greenstein, Executive Director of the Center on Budget and Policy Priorities. All three witnesses testified that PAYGO is not a panacea and that additional, difficult decisions about health care spending reform and an overall re-examination of spending priorities will be necessary to combat a sustained decline in the American economy.

Orszag emphasized the primary purpose of the legislation is to avoid making the structural deficit any worse and to complement congressional PAYGO rules. Orszag also stated that PAYGO is designed to apply to both spending and to taxes because "a reduction in a revenue dollar can have the same impact [on the deficit] as an increase in spending."

As written, the act would use the threat of sequestration to force lawmakers to balance any new mandatory spending with increased revenue (taxes) or a reduction of mandatory spending elsewhere. If Congress passed legislation that did not meet these requirements (and hence was not deficit-neutral), then sequestration would result in automatic, across-the-board spending cuts to mandatory programs.

One of the major and unresolved criticisms of this version of PAYGO is its exemption of many of the provisions of the 2001 and 2003 Bush tax cuts, the Alternative Minimum Tax (AMT) patches, the expected growth in physician payment rates under Medicare, and estate tax reforms. Rep. Paul Ryan (R-WI), ranking member of the committee, was particularly perturbed by what he felt were shortcomings in the act, including the lack of annual discretionary spending caps, the exemption for expensive policies that could be deemed "emergency," and the overall growth in federal spending that he felt was unsustainable and irresponsible.

Ryan is not the only one who feels this way. Three of the exempted policies (the Bush tax cuts, the AMT patch, and the Medicare physician payment rates) were recently mentioned in a CBO report about the long-term budget outlook. The CBO report stated that without serious re-evaluation, these policies would contribute to a potentially "explosive fiscal situation." During the hearing, some members of the committee expressed concern that these exemptions gave unnecessary privileges to the policies. Orszag testified that these exemptions are necessary in order to ensure that PAYGO rules will not be waived in the future. In the past, PAYGO rules were waived for the purpose of political expediency, and the budget discipline the rules attempt to enforce never materialized. Orszag felt that by exempting these costly tax and entitlement provisions, PAYGO would be applied more consistently.

There was also discussion during the hearing about who would judge the cost of legislation that would be required to comply with the new PAYGO rules and how that analysis should be conducted. The "scoring" methodology of the act would allow the passage of legislation that is budget-neutral over a ten-year period, even if it may not be budget-neutral in a specific single fiscal year. Some members of the committee questioned the length of this scoring window and worried that unavoidable inaccuracies in projections over such a long time-frame would decrease the impact of the rules to begin with.

Several committee members also voiced concerns about who would do the scoring. The legislation would require OMB to review proposed legislation and determine violations based on the OMB's budget baseline. A few members were not comfortable with putting OMB in charge of scoring, but the U.S. Supreme Court has found that allowing the legislative branch to trigger sequestrations is unconstitutional since it allows Congress to interfere with the execution of the laws, an executive branch power. Therefore, under the structure of this PAYGO legislation, OMB must determine PAYGO violations based on the OMB baseline and then enforce sequestrations when necessary.

The hearing also sent the clear message that rising entitlement costs are being driven by a startling growth in health care costs and that this is the primary driver of the government's long-term fiscal issues. Orszag stated that health care reform is necessary in order to avoid a long-term fiscal disaster and emphasized that point throughout the hearing.

With an aging population and rising health care costs, any delay in addressing health care would result in a rise in government debt, more tax revenue diverted to pay for interest on the federal debt, and greater uncertainty about the strength and resolve of the American economy. While PAYGO is not able to solve these long-term problems, it can help to prevent the outlook from getting worse.

Open Government Directive Experiment Wraps up July 6

On Monday, July 6, the Obama administration plans to conclude the third and final phase of its innovative online process to solicit public participation in the creation of an Open Government

Directive. The process is the first of its kind for public involvement in executive branch policymaking.

The ultimate goal of this collaborative online effort is to create recommendations for the Open Government Directive, a policy document that will guide agency transparency. The effort combines the online process with a traditional input process, enabling interested organizations and individuals to provide ideas and feedback to the Office of Science and Technology Policy (OSTP) as it works to develop recommendations for the directive. Numerous parties, including technology firms such as Google, have utilized the new online tools to provide their open government recommendations to OSTP.

The first phase of the process was an online "brainstorming" session, which utilized a new media tool designed by the National Academy of Public Administration (NAPA) to solicit ideas from the public and rank them with votes. According to an analysis published by NAPA, the website received over 1,100 ideas and 46,000 votes.

The second phase was a "discussion" session that occurred on the OSTP blog. The week-long process centered on daily topics for which the public was invited to give feedback and discuss the ideas generated during Phase I.

The third and final phase involves an online collaborative writing tool – the MixedInk wiki – that allows users to submit proposals and edit the proposals of others into new versions. The site also allows the rating of developed recommendations. This phase was initially scheduled to run one week and end on June 28, but the administration extended it seven days due to increased participation late in the week.

The third phase is more targeted than any of its predecessors and includes increased moderation. The online tool breaks down each of the administration's open government principles into specific subtopics – five on transparency, five on collaboration, and three on participation. OSTP poses pointed questions for each subtopic and allows for additional ideas in each area to be submitted in open discussion forums. Off-topic recommendations can be flagged, reviewed, and subsequently moved to a different site. These are features that were not present in the previous phases, suggesting that the administration is improving its use of online tools.

The administration is expanding its use of social media tools in several other areas of policymaking, as well. On June 29, the Public Interest Declassification Board (PIDB) launched a week-long Declassification Policy Forum blog to gather public input on other transparency policies, such as declassification. PIDB is utilizing the OSTP website for this purpose.

The usefulness of new media tools for policy discussions is debatable. The forums have attracted individuals who are adamantly focused on a single transparency issue, such as securing the release of records pertaining to UFO's, while other comments are completely off-topic, such as those that focus on the legalization of marijuana or investigating the president's birth certificate. Beth Noveck, the government's Deputy Chief Technology Officer, insists, however, that with the

right framework, these tools can adequately keep the discussion on track and provide a useful forum for those inside and outside the Beltway to engage in the public policy process.

Chemical Security Legislation Begins to Move Through Congress

The House Homeland Security Committee passed legislation June 23 that would greatly reduce the risks and consequences of a terrorist attack on a chemical facility. The bill also includes small but important improvements in the accountability of the nation's chemical security program. However, industry-sponsored amendments and the continued risk of excessive secrecy during implementation diminish the value of the bill.

The legislation, the Chemical Facility Anti-Terrorism Act of 2009, would reauthorize and enhance existing security rules that are due to expire in October. The current security rules, the Chemical Facility Anti-Terrorism Standards (CFATS), were developed following passage of the Department of Homeland Security (DHS) Appropriations Act of 2007. Section 550 of the appropriations act required DHS to develop a temporary program for instituting security performance standards for high-risk chemical facilities.

Thousands of chemical facilities around the country represent potential terrorist targets – storing and processing chemicals that, if released, could become deadly clouds of gas drifting through communities. For many of these plants, there are safer alternatives to the chemicals and processes now in use.

The new legislation requires chemical facilities to assess safer chemicals and processes that would reduce the harms caused by chemical releases. The bill also provides for worker participation in identifying vulnerabilities at plants and writing security plans. The facilities that put the most people at risk would be required to implement safer alternatives, provided doing so is feasible, cost-effective, and does not shift risks to other localities. Funding is authorized to help facilities convert.

Transparency advocates view the bill's accountability measures as a significant improvement to the current CFATS, striking a better balance between withholding information that would pose a threat if disclosed and making public information whose disclosure is vital to ensuring the program is working properly. Some of the accountability measures include:

- Government-held information that is currently publicly available would remain available
- A publicly available annual progress report to Congress is required
- The DHS is directed to create a procedure whereby anyone can anonymously report vulnerabilities and other problems to the appropriate authorities, who must review and, if needed, act on the report
- Whistleblower protections are clearly spelled out in the bill

Nevertheless, transparency advocates remain concerned that too much discretion is left to the secretary of DHS on what information can be disclosed. The language of the bill could be

interpreted as allowing DHS to conceal basic regulatory data critical to evaluating the success of the program and the safety of communities near chemical plants.

Despite having won approval of four substantial amendments, no committee Republicans voted to support the bill. Several advocates supporting the bill criticized the Republican-sponsored amendments for weakening crucial features of the legislation.

The successful Republican amendments could exempt a large portion of the highest-risk plants from implementing safer alternative technologies if they are classified as a "small business concern." Other adopted amendments could slow the process and exempt facilities by requiring redundant analyses of the costs of converting to safer technologies, without consideration of their benefits, such as reduced liability, cost savings, jobs created, and reduced risks from terrorist attacks.

Republican members of the committee unsuccessfully attempted to strip from the bill the requirements for assessing and implementing safer technologies and processes. Minority amendments also sought – and failed – to limit the provision allowing citizens to sue the government or a facility for failure to meet their obligations under CFATS.

The House Energy and Commerce committee, another body with jurisdiction over the bill, will consider the legislation over the next several weeks. An additional title that adds water treatment facilities will be considered as well. So far, there has been limited activity on chemical security in the Senate, but the chamber is expected to take up the legislation once it passes the full House. The bill's supporters have stressed the importance of passing the legislation prior to the October expiration date for the current security rules.

Consumer Product Agency under New Leadership

The Senate recently confirmed Inez Tenenbaum, President Obama's pick to chair the Consumer Product Safety Commission (CPSC), the federal regulator of everything from toys to toasters. Tenenbaum's presence will likely cause a shift in the way the agency operates, including a greater focus on public protection.

The Senate confirmed Tenenbaum by voice vote on June 19. Tenenbaum is a former superintendent for education in South Carolina. She was also the co-chair of Obama's presidential campaign in that state.

Tenenbaum has pledged to operate CPSC "in an open, transparent, and collaborative way." Testifying before the Senate Commerce Committee, Tenenbaum said, "As the new Chairman, I will reassure America's families that their government can and will protect them from unknown or unforeseen dangers in the products they use." She also highlighted the safety of imported products as an issue in need of the commission's attention.

Tenenbaum takes the reins of CPSC at a pivotal time in the agency's history. In addition to the challenge of regulating imported products, the CPSC is in the midst of enforcing the Consumer Product Safety Improvement Act (CPSIA), which was passed by Congress in 2008. The bill tightens safety standards on lead in toys, all-terrain vehicles, and a class of chemicals called phthalates, which have been linked to developmental problems. CPSC's budget has risen in recent years and is scheduled to continue to increase.

Tenenbaum follows Nancy Nord, who served as acting commissioner under President George W. Bush. Currently, Nord remains at CPSC as a commissioner.

Nord's tenure at CPSC was checkered with controversy. For example, a November 2007 *Washington Post* investigation revealed that Nord and former Chair Hal Stratton had taken nearly 30 trips financed by some industries that CPSC regulates. According to the investigation, "The airfares, hotels and meals totaled nearly $60,000, and the destinations included China, Spain, San Francisco, New Orleans and a golf resort on Hilton Head Island, S.C."

Nord also opposed the CPSIA, even though it granted the agency greater authority to protect consumers and more resources to carry out its duties. The bill had broad bipartisan support and was hailed by advocates as a victory for consumers.

In May, Nord abdicated her position as acting chair and was replaced by fellow commissioner Thomas Moore. Moore, appointed by President Clinton, served as acting chair until Tenenbaum took over.

The CPSC will soon expand to a commission of five members. The expansion is set to occur one year from the date of enactment of the CPSIA, which Bush signed into law Aug. 14, 2008.

Obama has also nominated Robert Adler to serve as a commissioner. Adler is a professor at the University of North Carolina's business school. Before his career in academia, Adler served as legal counsel at both the CPSC and the House Energy and Commerce Committee.

However, since CPSC has its full compliment of three commissioners until Aug. 14, the Senate will likely wait before considering Adler's nomination.

California Seeks to Add New Chemicals to Prop. 65 List

California's Office of Environmental Health Hazard Assessment (OEHHA) is proposing to add 30 chemicals linked to reproductive harm and cancer to the state's Proposition 65 list. Proposition 65, a statute passed by California voters in 1986, requires the state to list chemicals known to cause public health problems and bars some actions that could expose people to the substances.

Under Proposition 65, the Safe Drinking Water and Toxics Enforcement Act of 1986, OEHHA is supposed to add substances annually to its list of chemicals known to the state to cause cancer,

birth defects, or other reproductive harm. The program also updates toxicity information for numerous listed chemicals each year. That list now includes approximately 775 chemicals, according to OEHHA's website.

The statute requires businesses to label products they sell with information about the chemical contents of the products and to disclose the release of chemicals into the environment. According to the website, the law also prohibits businesses from "knowingly discharging significant amounts of listed chemicals into sources of drinking water."

There are different ways that chemicals are proposed for Proposition 65 listing. OEHHA has a scientific advisory board that consists of two committees that may propose chemicals for listing. In addition, if an "authoritative body," as recognized by one of these two committees, identifies a substance as a carcinogen or a cause of birth defects or reproductive harm, OEHHA can list the chemical. Authoritative bodies include the U.S. Environmental Protection Agency, the Food and Drug Administration, the National Institute for Occupational Safety and Health, and the National Toxicology Program. The chemical may also be listed if it is identified by the California Labor Code as causing cancer or reproductive harm.

The proposal to list the additional chemicals comes after court challenges from environmental and labor groups and from industries affected by the statute, according to a June 16 BNA article (subscription required). Environmentalists claimed OEHHA has been too slow to list chemicals. Industry opposed the listing method that relies on the labor code to identify chemicals. The cases were then consolidated. BNA reports that the Alameda County Superior Court in *Sierra Club v. Schwarzenegger* upheld the legality of listing chemicals through the labor code. Therefore, the state did not need to conduct additional scientific review, the court said.

OEHHA is now required to move forward with additional rules to clarify how and what chemicals can be listed annually under the labor safety standards, according to a press release by the Natural Resources Defense Council, a party to the suit. OEHHA's announcement June 12 is the first result of the court's decision.

OEHHA's has proposed to list 30 new chemicals. The list contains both carcinogens and reproductive toxins. Among the carcinogens to be added are: styrene, marine diesel fuel, a category of herbicides, vinyl acetate (used in the production of plastics, paints, and adhesives), and wood dust.

The proposed chemicals impacting reproduction include chloroform, toluene, several types of ethers, ethylene oxide (an industrial gas used in the production of chemicals for medical sterilization), carbaryl (a common pesticide), and the refrigerant methyl chloride, according to BNA.

California could soon list bisphenol-A (BPA) as well, according to a June 18 *Los Angeles Times* blog post. BPA is a compound used in hard plastics and the lining of food cans that has been linked to developmental disorders. The state Senate has passed a bill that bans the use of BPA in

children's food and drink containers, and a July public hearing will explore whether the chemical should be on the Proposition 65 list.

In the case of BPA, however, California is following in the footsteps of some other state and local governments that have already moved to ban the substance. For example, Connecticut passed a law June 4 with similar children's food and drink container provisions. The law is scheduled to go into effect Oct. 1, 2011. Minnesota became the first state to ban BPA in children's products when it passed a bill in May requiring BPA-free containers by 2011. In addition, Chicago and Suffolk County, NY, have passed BPA bans.

Although many manufacturers have voluntarily stopped using BPA in their products, some industry groups insist that the evidence against BPA is too uncertain to justify regulations and have begun a marketing campaign to thwart the movement by state and local governments, according to a *Washington Post* article. As more jurisdictions begin to limit or prevent products containing BPA from entering the marketplace in the absence of federal action, the historical trend of business supporting one federal standard (versus multiple standards) is likely to be repeated. California's decision to add BPA to the Proposition 65 list could be a significant trigger to federal action. Moreover, the Food and Drug Administration has already begun a scientific review of its policy on BPA, according to the *Post*.

Obama Administration Asks for Public Views on E-Rulemaking

The Obama administration is asking for feedback on its efforts to include the public in regulatory decision making. E-rulemaking allows citizens and stakeholders to comment on regulations and other government documents online, but existing challenges have limited public participation.

The federal government launched its e-rulemaking program in 2002. The intent of e-rulemaking is to give interested citizens and stakeholders a one-stop location to view documents related to a pending regulation and to file comments on regulations. Almost every federal rulemaking agency has incorporated its online rulemaking docket into the government-wide system.

Despite its potential to expand and facilitate participation, the e-rulemaking system has fallen short of expectations. One of the major challenges has been public education: many citizens simply are not aware of how regulations affect them or do not know where and how to comment on regulations.

The public site for accessing documents and commenting on regulations, Regulations.gov, has already gone through several changes, most as a result of usability issues. However, problems remain. For example, the search and sort functions are limited, making it difficult for users to easily find what they are looking for. Regulations.gov also does not provide adequate options for users to be notified of new information about a proposed rule or about updates posted online.

The Obama administration has launched a site to preview upcoming changes on Regulations.gov and to solicit more ideas on ways to improve the site. Regulations.gov/Exchange allows users to submit their ideas and feedback in a blog format.

Comments on Regulations.gov/Exchange have given the administration's reform effort mixed reviews. Some commenters praised the proposed changes, while others said they do not go far enough to make Regulations.gov more user-friendly.

The White House also included e-rulemaking as one topic in its Open Government Initiative – an effort that allows users to post ideas online and rate the ideas of others.

The comments on the e-rulemaking post in the Open Government Initiative received a relatively low number of comments, 31, compared to some other posts on different transparency and participation issues, which exceeded 100 comments. Several commenters encouraged the administration to expand participation in rulemaking by adopting interactive web tools such as wikis or rating systems that would allow users to endorse others' comments. Commenters also called on agencies to improve outreach efforts so more citizens are notified when an agency undertakes a rulemaking.

The Open Government Initiative is in its final phase – users are now able to collaboratively craft policy recommendations online. Thus far, comments on the "Improving Online Participation in Rulemaking" topic generally call on the government to do a better job of publicizing rulemaking activity and the rationale for decisions. Comments have focused less on the mechanics of how users access and comment on regulations.

The final drafting phase of the Open Government Initiative lasts through Monday, July 6. Regulations.gov/Exchange will continue to take comments through July 21.

In 2008, the American Bar Association (ABA) released a report calling for an overhaul of the federal e-rulemaking system that would be more aggressive than what has been previewed on Regulations.gov/Exchange. The report includes some recommendations made by users during the Open Government Initiative but also includes many others.

The report, *Achieving the Potential: The Future of Federal e-Rulemaking*, was written by regulatory and open government experts from outside the government. The authors wrote the report to provide the administration and Congress with a comprehensive roadmap for reforming e-rulemaking.

Among other things, the report recommends:

- An improved search function that allows users to better define search parameters and sort results
- The use of innovative techniques such as wikis and blogs to stimulate participation
- The creation of comment portals on individual agency sites in addition to the current, centralized portal found at Regulations.gov

- The formation of a public committee to advise the federal government on the status of, and changes to, the e-rulemaking system
- Greater and more consistent funding for e-rulemaking efforts (currently, a dedicated funding source does not exist, requiring agencies to divert funds from other activities)

Supreme Court Upholds "Preclearance" Provision in 1965 Voting Rights Act

The U.S. Supreme Court upheld the "preclearance" provision in *Northwest Austin Municipal Utility District No. 1 (NAMUDNO) v. Holder*, a case in which a small utility district in Texas challenged Section 5 of the Voting Rights Act of 1965. Section 5, reauthorized by Congress in 2006, applies to all or parts of 16 states. It requires those states to get federal approval before changing election rules or procedures, due to past laws and practices that discriminated against and disenfranchised racial minorities. This provision is referred to as the "preclearance" provision.

The Court concluded that NAMUDNO had the ability to seek a statutory exemption from the preclearance requirements of Section 5 of the Voting Rights Act. The Court's decision preserved all aspects of Section 5, but it overruled a lower court decision that NAMUDNO was ineligible for the exemption. The preclearance requirement has been one of the most successful provisions of the Voting Rights Act, deterring and preventing many voting changes that would have harmed minority electoral participation and representation.

The utility district wanted a bailout, but Section 5 says that only a state or political subdivision that registers voters can petition for a bailout. The utility district does not register voters, so the statutory language indicates that it cannot seek an exemption, or "bail out," of the provision.

The decision to allow the utility district to petition for an exemption allowed the Court to uphold Section 5 while avoiding constitutional questions surrounding Congress's reauthorization of the provision. Instead of directly addressing whether it was constitutional for Congress to reauthorize the provision, the Court, by an 8-1 majority, agreed that the utility district in Texas was entitled to petition for an exemption. The decision came as a relief to civil rights groups and can be seen as a temporary victory for proponents of Section 5, particularly after oral arguments seemed to indicate that Section 5 could be struck down.

"The Court avoided the constitutional question whether Section 5 exceeds congressional power because there's not enough evidence of intentional discrimination by these covered jurisdictions through a holding that the utility district is entitled to ask for bailout," according to Rick Hasen, a Loyola law professor and moderator of the Election Law Listserv.

Justice Clarence Thomas was the only justice to dissent, but his dissent, which was based on constitutional grounds, still may be a precursor to how the Court ultimately decides the constitutionality of Section 5. "The violence, intimidation and subterfuge that led Congress to pass Section 5 and this court to uphold it no longer remains," Thomas claimed.

Thomas' words, which suggest that Section 5 is not needed in today's political climate, serve as an indication that in future cases, the Court may narrow or even overturn a pivotal finding in *City of Boerne v. Flores*, a 1997 case concerning the scope of Congress's enforcement power under the fifth section of the Fourteenth Amendment. The current decision by the Court not to consider the key constitutional issue may also serve as notice to Congress to produce evidence that covered jurisdictions still engage in discriminatory acts or would do so if they were not covered by Section 5. Chief Justice Roberts wrote in the majority opinion, "The statute's coverage formula is based on data that is now more than 35 years old, and there is considerable evidence that it fails to account for current political conditions."

Civil rights groups, however, believe that Section 5 is still important. "Without [Section 5's] protections, our nation would unnecessarily face the grave risk of significant backsliding and retrenchment in the fragile gains that have been made," said John Payton, Director-Counsel for the NAACP Legal Defense Fund, one of the groups that argued before the Court to keep Section 5's provisions intact.

The outcome of this case is important to nonprofits because it affects constituents often served by nonprofit organizations. Nonprofits have been instrumental in helping to ensure that voters are not disenfranchised and that underrepresented groups are adequately counted in the Census. Supporters of the law have noted that by avoiding the constitutional issue, the Court ensured that Section 5's "provisions probably will be in place to guide the electoral redistricting plans required by the 2010 census," according to the *Washington Post*.

Supreme Court Decides to Rehear Citizens United Case

On the final day of its 2008-2009 term, the U.S. Supreme Court decided not to issue a ruling in *Citizens United v. Federal Election Commission (FEC)*. Instead, the Court will rehear the case Sept. 9, before the next term officially starts in October. The case challenges the Bipartisan Campaign Reform Act's (BCRA) prohibition on corporate electioneering communications.

Citizens United, a 501(c)(4) nonprofit organization, charges that ads for its 90-minute film, *Hillary: The Movie*, should not be subject to donor disclosure and disclaimer requirements. The rehearing will address whether the Court should overturn *Austin v. Michigan Chamber of Commerce* and related sections of *McConnell v. FEC*, two cases that upheld restrictions on electioneering communications. The case has now expanded and could have major implications for nonprofit groups and other corporations who want to weigh in on policy before an election.

Electioneering communications are broadcast messages that refer to a federal candidate 30 days before a primary election and 60 days before a general election. Section 203 of BCRA prevents corporations (including nonprofits) and labor unions from funding electioneering communications out of their general treasury funds. Any group airing an electioneering communication must identify anyone who contributed at least $1,000 since the beginning of the previous year. Citizens United says a lower court erroneously applied the campaign finance law

to its film and organization. The group also argues that BCRA "imposes sweeping restrictions on core political speech."

Citizens United wanted to make the film available for free via cable video-on-demand service during the 2008 presidential primary and accepted some for-profit corporate funding. A federal district court ruled against the group and found that the movie was "susceptible of no other interpretation than to inform the electorate that Senator Clinton is unfit for office."

The Supreme Court's rehearing order states, "The parties should address the following question: 'For the disposition of this case, should the Court overrule either or both *Austin v. Michigan Chamber of Commerce* and the part of *McConnell v. FEC* which addresses the facial validity of Section 203 of the Bipartisan Campaign Reform Act of 2002?'"

The Court has asked that both sides file their opening briefs by July 24. The new briefs have to address the ruling in *Austin*, which upheld a state law prohibiting the nonprofit Michigan Chamber of Commerce, funded by dues from for-profit corporations, from running print ads supporting a candidate. The Court found a compelling state interest in preventing corruption or the appearance of corruption by reducing the chance that corporate treasuries influence the outcome of an election.

Citizens United's original brief called for *Austin* to be overturned, arguing that the case was "wrongly decided and should be overruled because it is flatly at odds with the well-established principle that First Amendment protection does not depend upon the identity of the speaker."

The electioneering communications rule was revised by the FEC in 2007 after the Supreme Court decided *Wisconsin Right to Life (WRTL) v. FEC*. The revisions limit the electioneering prohibition to ads that are "susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate." In *WRTL*, Justices Kennedy, Scalia, and Thomas argued that *Austin* should be overruled.

If the electioneering communications provision is struck down, there could be major consequences for the political landscape and the ads voters see during future election seasons. Instead of ruling narrowly as expected, the Court decided to broaden the case, with a new focus on whether two previous rulings on spending restrictions in BCRA should be overturned. The case may now be used to address the constitutionality of campaign finance laws, as well as broader free speech questions.

Scott E. Thomas, a former FEC chairman, told *CQ Politics*: "[T]he Supreme Court will consider whether corporations and unions can go ahead and can spend unlimited amounts of their shareholders' money or union dues on hard-hitting, negative attack ads that are full-fledged express advocacy. That has to have the American public a little frightened of what they're going to see on their television sets. They're already sick of the saturation that they already see."

The composition of the Court may be different by the time it rehears the case, with the possible inclusion of President Obama's nominee, Judge Sonia Sotomayor. According to SCOTUSBLOG,

if the Senate approves Sotomayor, "she could be on the bench for the Sept. 9 argument. [I]f she is not however, she could participate in reviewing the case by reading the briefs and listening to the audiotape of the oral argument."