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In This Issue

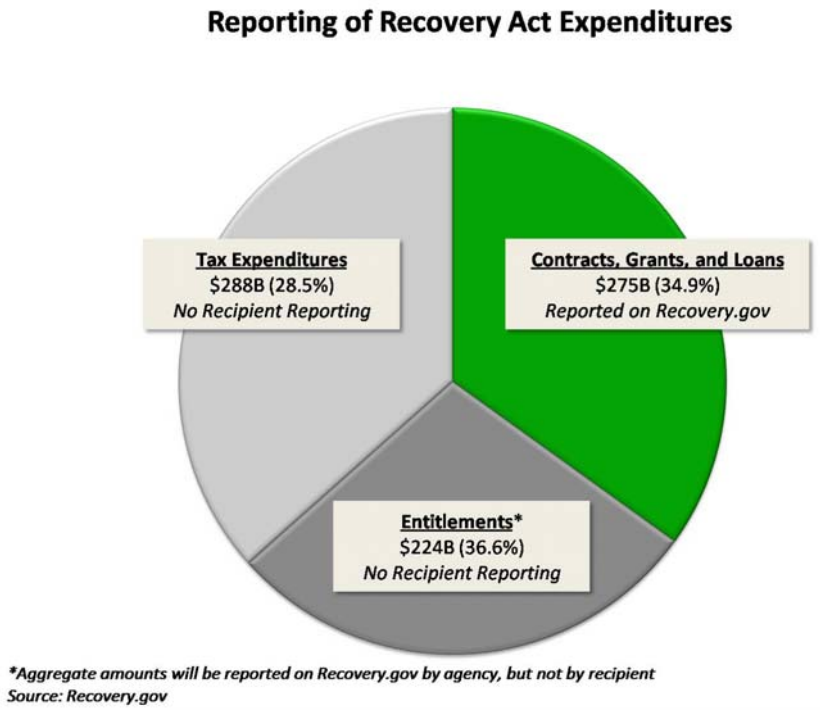
The Recovery Act Spending That Wasn't There

Recovery Act recipient reporting has received a great deal of attention in the media, and while some of this coverage has been critical (reporting on non-existent congressional districts or ZIP codes, unreliable job creation numbers, etc.), many news articles portray comprehensive oversight of the act because of transparency requirements in the law. However, approximately two-thirds of the spending in the Recovery Act bypasses these requirements, leading to a dearth of information about how the money is being spent. As time passes and Recovery Act spending continues, this lack of data is becoming more apparent, as highlighted by a recent Internal Revenue Service (IRS) report showing that millions of dollars in Recovery Act tax breaks are vulnerable to tax fraud.

About one-third of Recovery Act spending, the discretionary funding, is subject to the tight reporting requirements and provides monetary resources for infrastructure, research, green energy, and other projects. Recipients of discretionary spending must report to the federal government on the use of their funds, reports which can be found on Recovery.gov and OMB

Watch's FedSpending.org. These reports provide unprecedented details on federal spending, containing information on recipient location, place of performance, a project description, number of jobs created, and the five highest-paid employees.

The other two-thirds of Recovery Act spending include entitlement spending and tax expenditures. Entitlements are direct payments to people, such as unemployment insurance, COBRA health insurance benefits, and one-time Social Security payments; tax expenditures are the tax credits and deductions authorized by the act. Congress exempted these entitlement payments and tax cuts from the Recovery Act reporting requirements largely for privacy reasons. This means that recipients of unemployment benefits or the Making Work Pay tax credit, for instance, do not report any information to Recovery.gov, and none is displayed.



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Accordingly, there is little information available on Recovery Act tax expenditures or entitlement spending, making debate on spending efficacy difficult. As policy experts and lawmakers vigorously debate the effect of the discretionary spending – thanks to the more than 130,000 recipient reports on discretionary spending released in October – they remain largely silent on the effectiveness of tax expenditures and entitlement spending.

One recent report helped highlight this disparity. In November 2009, the Treasury Inspector General for Tax Administration (TIGTA), the inspector general for the IRS, released a report warning that the IRS does not know if the $288 billion in Recovery Act tax expenditures are being claimed legitimately and cannot know without extensive auditing.

The problem is that the IRS did not require additional documentation for the new credits and deductions. For instance, the Recovery Act provides funding for the First-Time Homebuyer

Credit, which provides a fully refundable $8,000 tax credit for first-time homebuyers, but the IRS does not require additional documentation for this credit, such as a HUD Settlement Statement, nor does it check the return against any third-party source, such as a housing database. Tax filers can claim the housing credit without providing any proof that they actually have purchased a house or even that a purchased house is a first-time purchase for the taxpayer. The only way the IRS can catch such fraudulent claims is through an audit.

The IRS claims requiring documentation on tax credits and deductions is too "burdensome" on businesses and individuals, because filing documentation precludes electronic filing; the IRS notes that this would prevent some two million First Time Homebuyer Credit claimants from filing electronically. But detecting fraud after federal funds have been disbursed (i.e., through an audit instead of before a return is processed) usually results in a lower rate of return on tax enforcement, since audits are a lengthy and relatively costly process compared to requiring upfront documentation.

This problem exists because Congress did not enact any transparency provisions for the tax expenditures and entitlement spending. The lack of transparency and accountability provisions in these sections of the Recovery Act is apparent now that the first round of recipient reports has been released. While Recovery.gov users can track the precise details of some $275 billion in discretionary spending, down to the location of the material suppliers for some projects, next to nothing is known about the recipients of the remaining two-thirds of Recovery Act spending.

The privacy rights of citizens should be protected, but more information on Recovery Act tax expenditures and entitlement spending is needed. Currently, there is very little information available, and accordingly, little debate. The TIGTA report caused little reaction outside of a few, tax policy-focused blogs. The most attention the issue received was in the form of a short *New York Times* article, published almost a month after TIGTA released the report. Additional data, if available, would help shed light on how this money is being used.

Chemical Secrecy Increasing Risks to Public

Excessive secrecy prevents the public from knowing what chemicals are used in their communities and what health impacts might be associated with those substances, according to a recent analysis of government data by the nonprofit Environmental Working Group (EWG). The growing practice of concealing data alleged to be trade secrets has seemingly hobbled regulators' ability to protect the public from potential risks from thousands of chemicals.

Calling the situation "a regulatory black hole, a place where information goes in – but much never comes out," EWG's analysis, *Off the Books: Industry's Secret Chemicals*, criticizes the nation's primary chemical statute, the Toxic Substances Control Act (TSCA), and highlights excessive secrecy as one of the law's biggest flaws.

By literally locking up the data within a few offices at the U.S. Environmental Protection Agency (EPA), the agency prevents researchers, in and out of government, from identifying risks and

problems with the use of the rapidly growing number of chemicals in commerce. Moreover, without the information, the public is unable to make informed decisions regarding the safety of everyday activities – from what cleaning products to use to what bedding to sleep on.

The data obtained by EWG under the Freedom of Information Act (FOIA) partially reveals the extent to which EPA is allowing chemical manufacturers to hide chemical names, the chemicals' characteristics, and often even the identity of manufacturers. EWG also found that for two out of every three chemicals that entered commerce in the past 30 years, their identity remains secret. Of the more than 83,000 chemicals in commerce, information on 20 percent is kept secret. These secret chemicals include substances that have shown a substantial risk of injury to health or the environment. The list of secret chemicals also includes those used in products specifically designed for children.

The 33-year-old TSCA includes provisions to protect information that manufacturers claim would hurt their profits if it were disclosed. Businesses can claim that such information is confidential business information (CBI) when they submit it to the agency. If the government does not raise an objection to the claim, it must protect the information from disclosure. Many offices don't have sufficient staff to review all of the CBI claims made by companies in their submissions. In the case of chemicals, the EPA does not share information claimed as CBI with other agencies, state or local officials, emergency personnel, or even within EPA itself, except under certain, highly restricted circumstances.

The use of CBI claims by chemical companies has been increasing. The EPA data show that secret chemicals make up a much greater proportion of widely used chemicals than they did 15 years ago. Secret chemicals increased five to six times by volume produced from 1990 to 2006.

According to the EWG report, "Hiding the identity of these chemicals could significantly delay or completely prevent actions to reduce exposures to compounds that by definition require an open and transparent evaluation of their risks."

The refusal to disclose chemical information can have serious consequences for public health. In 2008, a spill of fluids used in natural gas drilling sent a drilling worker to the hospital. The worker recovered quickly, but one of the nurses treating him was also exposed to the chemicals on the worker's boots, and her health gradually deteriorated. As the nurse's health declined, her physicians struggled to get the needed information on the drilling chemicals she was exposed to because the information was considered a trade secret.

The EWG study did not evaluate how frequently EPA challenges claims of CBI or what outcomes such challenges produce. However, a 2005 report by the Government Accountability Office (GAO) stated that only about 14 CBI claims were challenged per year, and that in almost every instance, the industry capitulated and agreed to disclosure of the information. The GAO report found that 95 percent of manufactures' new chemical registrations with EPA contain some information alleged to be trade secrets.

Back in December 2000, the EPA began a process to revise its regulations for dealing with confidentiality claims throughout the agency. This agency effort was geared to replace a 1994 attempt, which was abandoned due to "the complexity of the issues raised in the public comments." The 2000 initiative was also abandoned before completion.

There is some indication that the Obama administration may take action to reduce the amount of secrecy that prevents the public from understanding what chemical threats surround them. In July 2009, shortly after assuming leadership of EPA's Office of Prevention, Pesticides, and Toxic Substances, Assistant Administrator Steve Owens ordered the disclosure of 530 identities of substances produced in large amounts. Also, in a recent *Washington Post* article, Owens stated, "People who were submitting information to the EPA saw that you can claim that virtually anything is confidential and get away with it."

Although the EWG report focuses on the treatment of alleged trade secrets under TSCA, the use of CBI claims allows EPA to hide other types of industry data, such as information about pesticides, which are regulated under a different law. Recently, EPA concealed information on the inspection and enforcement histories of coal ash impoundments. These impoundments contain billions of tons of toxic waste generated from burning coal for electricity. In December 2008, the catastrophic failure of one such impoundment sent 5.4 million cubic yards of toxic coal ash flowing over 300 acres and into rivers in Tennessee. The EPA also manages alleged trade secrets under the Clean Air Act, Clean Water Act, Safe Drinking Water Act, and many other statutes.

Advocates for greater transparency of chemical information have offered numerous suggestions for reforming what they and the EPA recognize to be excessive and harmful levels of secrecy. The CBI regulations under TSCA have helped create an agency culture that is geared toward secrecy, with criminal penalties for unauthorized disclosure of CBI by agency personnel and the imposition of huge resource burdens if the agency attempts to challenge a company's trade secrets claims. Among other changes, reformers call for a narrower, clearer definition of what information may legitimately be claimed as a trade secret, greater up-front substantiation of the claims, and periodic reviews to remove outdated or unjustified CBI determinations.

Administration Revises Classification and Declassification Systems

On Dec. 29, 2009, President Obama signed an executive order (E.O. 13526) to prescribe a uniform system of classifying and declassifying government information. The new order was welcomed by open government advocacy groups and will go into effect on June 27.

The order was a result of recommendations from National Security Advisor James Jones, which were formulated by interagency review pursuant to President Obama's request in May 2009. The order was followed by a memorandum to agency heads on implementation and a presidential order clarifying authority to label records "top secret" or "secret" under E.O. 13526.

This executive order effectively revises an existing order, E.O. 12958, issued by President Bill Clinton in 1995 and amended by President George W. Bush in 2003. Among the changes the Obama executive order brings about are new declassification goals for historical records, the use of new technologies to expedite declassification, and a reduction in the number of original classification authorities.

The administration intends to reduce the backlog of records with historical value by devising a system to permit public access to backlogged records by no later than Dec. 31, 2013. The current backlog of federal records consists of more than 400 million pages. This process would be expedited by limiting the number of referral reviews these records would need before declassification unless they contain intelligence sources or design concepts concerning weapons of mass destruction. Currently, the declassification of records often requires referrals to several agencies with interests in the subject material. To ensure compliance, the Archivist of the United States is required to publicly report on the status of the backlog every six months.

Traditionally, declassification has been a paper-based review system, and it remains well behind the curve in use of new technologies. Government as a whole continues to struggle to incorporate new online technologies that the private sector has utilized for years. However, the potentially sensitive nature of the material being reviewed has created even greater hesitancy to experiment with such tools in the declassification process. The order requires that new technologies be pursued to better deal with the volume and complexity of the review process and keep the public better informed of decisions.

Over the years, the ability to classify a record has been delegated and extended to more and more people in agencies, which has been accompanied by, not too surprisingly, a considerable growth in the amount of material being classified. The order instructs agencies to reduce the number of people able to classify records in an effort to eliminate unnecessary classifications and reduce the total amount of information being classified. Eventually, such reductions should translate into smoother declassification reviews and fewer backlogs.

Additionally, the new order and the implementation memo establish:

- A policy that no document may remain classified indefinitely. The new order says records must be designated for declassification at 10 or 25 years unless they include certain types of confidential or intelligence information, which may be classified for up to 50 years. In extraordinary cases, the information may be classified for up to 75 years. The order adds higher standards for agencies to meet in order to exempt a record from declassification. It also creates enforceable deadlines for declassifying information exempted from automatic declassification at 25 years. In no case can information be classified for more than 75 years.

- A new National Declassification Center, which has already been created within the National Archives and Records Administration. The new center will develop declassification priorities after seeking public input and taking into account researcher

interest and impact of declassification.

- It eliminates a Central Intelligence Agency (CIA) veto of declassification decisions made by the Interagency Security Classification Appeals Panel that was established by the Bush administration.

Reportedly, the order had been subject to significant controversy and was delayed due to pressure from the intelligence community.

E.O. 12958 required the release of all classified documents 25 years or older unless a department or agency exempts them from disclosure. The limited resources that agencies have committed to preview information for possible disclosure have been overwhelmed by the amount of material being requested under the Freedom of Information Act (FOIA) or as part of the disclosures required under E.O. 12958. As a result, many agencies have enormous backlogs of documents awaiting review, as noted above.

The new order was needed to reduce these burdens and streamline the declassification process. To alleviate stresses, the order outlines how the new National Declassification Center should centralize the process to make more records available to the public more quickly and in a way that does not overly burden individual agencies. Currently, the National Archives and Records Administration is working with the Defense Change Management Organization to study how this can be done. Public input can be sent to NDC@nara.gov.

The process to revise the executive order included an unprecedented system for public input during the drafting phase. At the request of the Obama administration, the Public Interest Declassification Board (PIDB), a congressionally established advisory committee, solicited recommendations from the public. That was followed by a blog discussion in July to obtain additional public input on recommendations for a new order. The resulting order reflects many of the recommendations the public submitted to the PIDB. Meredith Fuchs of the National Security Archive stated that "the impact of the public on the final order demonstrates that, even in the national security realm, there is a role for an informed public."

As with many of the Obama administration's new government openness policies, implementation is the next hurdle for the new classification/declassification effort. Agency buy-in will be an important factor in making the new system effective in bringing down the backlog. It remains to be seen if those intelligence agencies that resisted the direction of the new executive order will embrace the new program and its goals or remain reluctant participants.

Hundreds of Rules May Be Void after Agencies Miss Procedural Step

Regulatory agencies are routinely violating federal law by not submitting final regulations to Congress, according to a recent Congressional Research Service (CRS) report. Any rule agencies have not submitted to Congress could be susceptible to a lawsuit.

According to CRS, in FY 2008, 28 federal agencies and cabinet departments failed to send copies of 101 final rules to the Government Accountability Office (GAO), the investigative arm of Congress. As of Oct. 26, 2009, 96 of the 101 rules still had not been submitted, raising questions about their legality.

The rules in question cover a broad range of regulatory policy issues. Among the 96 rules still not submitted:

- A February 2008 regulation changing the rules for leasing and management in the Alaska National Petroleum Reserve.
- A June 2008 rule changing procedures for employee drug and alcohol testing in the transportation sector.
- Multiple habitat preservation rules for species covered under the Endangered Species Act.

Typically, when agencies publish final rules in the *Federal Register*, they also identify a future date when the rule will take effect, often 30 or 60 days after the publication date. When the rule takes effect, it is considered to have the full force of law. However, the Congressional Review Act (CRA), passed in 1996, added another step that requires that final rules "shall be submitted to Congress before a rule can take effect." The act also requires submission to the Comptroller General, the head of GAO. The law's intent is to give Congress an opportunity to review regulations. If Congress objects to the regulation, the act spells out procedures for congressional disapproval of the rule.

According to the CRS report, agencies' failure to submit rules to Congress was not limited to FY 2008. On five separate occasions from 1999 to 2009, the GAO compared its log of submitted rules to those published in the *Federal Register* and found significant discrepancies. For example, in 2005, GAO identified 460 regulations that had been published but that GAO had not received. Overall, "GAO said that it (and presumably Congress) did not receive more than 1,000 final rules during 7 of the past 10 years," the report says.

CRS more recently reviewed GAO's data for the early part of FY 2009 and identified 22 rules that had not been submitted. GAO's log of rules it has received is available online at www.gao.gov/fedrules.

The repeated failure of agencies to submit rules raises questions as to why a seemingly simple problem has not been rectified. Agencies should be aware of the problem: GAO has regularly transmitted its findings to past administrations, according to the CRS report, and has mentioned the problem in congressional testimony.

After each of its five reviews, GAO wrote to the Office of Information and Regulatory Affairs (OIRA), a branch of the White House Office of Management and Budget (OMB) in charge of executive branch regulatory policy. The letters discussed the implications of CRA compliance and included lists of rules not submitted to GAO.

Although OIRA oversees agency rulemaking activity, it has failed to respond to GAO's concerns. "GAO and OIRA officials said they were not aware of any effort by OIRA to contact federal agencies regarding the missing rules during the time periods covered by" four letters sent between 1999 and 2008, the CRS report says.

The most recent GAO-to-OIRA letter was sent May 26, 2009, and included the list of 101 rules not submitted to GAO during FY 2008. When contacted by CRS, OIRA denied having received the letter. "Subsequently, however, on November 12, 2009, the Deputy Administrator of OIRA sent an e-mail to federal agencies saying that it 'had come to my attention that your agency may not have submitted final rules to Congress and to [GAO] as required by the Congressional Review Act,'" the report says. "He urged the agencies to 'contact the GAO to determine which rules they have not yet received from your agency'," but did not include the list of rules prepared by GAO.

OMB spokesperson Tom Gavin told BNA news service (subscription required), "We take very seriously our statutory responsibilities and encourage agencies to follow the law, including the Congressional Review Act. Agency compliance is not something we have direct control over. When we do hear of problems, we try to encourage agencies to follow the law."

The fate of rules that have been published in the *Federal Register* but not submitted to Congress is uncertain. Under the CRA, agencies' responsibility and ability to submit a rule does not expire. Submitting the rule now, even if it had been published years earlier, should, from a purely legal standpoint, cause it to go into effect immediately.

However, if agencies fail to submit rules, they will be susceptible to judicial review. Because of the plain language of the act, any regulated entity could make a case that it need not comply with a rule that has not been submitted to Congress. Regulated entities could also use an agency's failure to submit a rule as an argument for defying enforcement action, such as a fine or lawsuit, under that rule.

Despite the requirement that rules "shall be submitted to Congress before a rule can take effect," a separate section of the CRA injects confusion into judicial review of the effectiveness of a rule. Section 805 of the act states, "No determination, finding, action, or omission under this chapter shall be subject to judicial review."

Case law for the act is both limited and inconsistent. At least two U.S. district courts, citing Section 805, have ruled that courts may not decide whether a rule can be enforced based on its submission status under the act. However, a different court rejected those courts' interpretation and found that the judicial review exception does not apply to an agency's failure to submit a rule to Congress. That court placed a greater weight on congressional intent, citing a statement by then-Sen. Don Nickles (R-OK) printed in the *Congressional Record* after passage of the bill; the statement says, "The limitation on judicial review in no way prohibits a court from determining whether a rule is in effect." (For further discussion, see the May 2008 CRS report, *Congressional Review of Agency Rulemaking: An Update and Assessment of The*

Congressional Review Act after a Decade, available at, www.fas.org/sgp/crs/misc/RL30116.pdf).

According to the CRS report, "The issue of whether a court may prevent an agency from enforcing a covered rule that was not reported to Congress has not been resolved conclusively."

The CRS report, *Congressional Review Act: Rules Not Submitted to GAO and Congress*, was written by specialist Curtis W. Copeland and published on Dec. 29, 2009. A copy of the report obtained by OMB Watch (with an incomplete appendix) is available at www.ombwatch.org/files/regs/PDFs/CRS122909.pdf.

Improving Implementation of the Paperwork Reduction Act

On Oct. 27, 2009, the White House Office of Information and Regulatory Affairs (OIRA) opened a public comment process on ways to improve implementation of the Paperwork Reduction Act (PRA). The PRA covers a range of information resource management issues and topics, although it is best known for creating OIRA and establishing a paperwork clearance procedure. The law was passed in 1980 and last reauthorized in 1995, well before current technological capabilities that allow for greater public participation and streamlined information collection and reporting.

Under the PRA, agencies are required to send to OIRA for its approval all proposed or renewed information collection requests affecting more than nine people, as well as all forms used for statistical purposes. OIRA's review is premised on whether the information collection is necessary for the proper performance of the functions of the agency, including whether the information has practical utility.

The PRA (and OIRA in its implementation) treat all information collection requests the same, regardless of how many people or organizations are impacted by an information collection activity or the importance of the agency's need for the information. OIRA does not assign personnel to reviews based on how many "burden hours" an agency creates. However, OIRA may choose certain requests for special scrutiny based on burden-hour estimates. As a result, critics have argued that OIRA has periodically politicized the process by using its review power to delay and frustrate agencies' efforts to collect information essential to informed rulemaking.

The *Federal Register* notice announcing the request for comments asked the public to focus on several aspects of PRA implementation. For example, commenters were asked to address ways to improve how agencies calculate the burden imposed on the public when they collect information, whether these burdens should be monetized, and how government can maximize the usefulness of information collected by agencies.

The comment period closed Dec. 27, 2009, and about 20 different comments were submitted for OIRA's consideration. Those commenting included business associations and individual companies, foundations, public interest groups, individuals, and state and local public health organizations. The comments are available online.

OMB Watch's comments focused on three broad areas. First, the comments addressed flaws in OIRA's review of agency information collection requests and burden-hour estimates and called on the administration to provide agencies with more flexibility so that not every information collection request is reviewed by OIRA.

Second, OMB Watch argued that information collection under the PRA could be substantially different in light of the rapid technological and web-based improvements in recent years and urged the administration to capitalize on those improvements to increase transparency, enhance citizen engagement, improve data quality, and minimize unnecessary burdens.

Third, the comments urged OIRA to reorient itself toward PRA responsibilities other than information collection and to focus more on those functions, most importantly information dissemination and information resources management.

OMB Watch's recommendations for improved PRA implementation included:

- OIRA should more frequently delegate to agency chief information officers the responsibility for approving certain classes of information collection requests.
- OIRA should allow and encourage agencies to implement pilot programs for managing information collection request review.
- The focus on burden calculations is misapplied and inefficient. The Office of Management and Budget (OMB) and agencies should, therefore, work together to develop an overarching view of information collection that places an emphasis on electronic reporting and transparency as means to hasten citizen interaction with the government.
- OIRA should work with agencies to begin considering a one-stop reporting source.
- OMB should work with agencies to identify best practices for information resources management and dissemination.
- OIRA, along with the Office of the Chief Information Officer, should provide leadership on establishing identifiers, starting with organizational identifiers, in order to take advantage of new web-based data integration, aggregation, and interpretation tools.

Several themes were repeated in the comments by other organizations, especially the need to streamline aspects of the information collection and dissemination processes. For example, groups across the political spectrum called for OIRA to delegate at least routine information collection approvals (especially voluntary collections) to agencies and allow agencies to use pilot programs to determine new ways to engage the public. Another common theme was a call for OIRA to find ways to expedite information reporting and at least certain types of reviews and approvals. To reduce duplicative reporting, several groups called for "one-stop" information reporting sites.

A poignant example of how OIRA currently implements the PRA was provided by state and local public health agencies. They cited how OIRA's data collection approval process hinders HIV-related surveillance activities. Two projects funded by the Centers for Disease Control and Prevention (CDC) designed to collect information about the behaviors of people at risk or

already infected with HIV are jeopardized. The surveillance surveys collect information to monitor and evaluate health trends. One commenter noted that OIRA review of these data collection requests has sometimes exceeded a year, severely impacting CDC's ability to revise health information based on reporting from state and local agencies.

The comments make clear that OIRA's focus on improving PRA implementation is important. The comments also make clear that OIRA needs to manage its PRA responsibilities more efficiently and effectively, updating its implementation to reflect current paperless capabilities and providing agencies with increased flexibility to manage their responsibilities.

Federal Court Rules on Voting Rights of Incarcerated Felons

A 9th Circuit Court of Appeals panel ruled 2-1 that Washington State felony inmates are entitled to vote under Section 2 of the Voting Rights Act of 1965. The court held that current restrictions, which strip convicted felons of the right to vote while incarcerated or under Department of Corrections supervision, unfairly discriminate against minorities.

In *Farrakhan v. Gregoire*, six "minority citizens of Washington state who have lost their right to vote pursuant to the state's felon disenfranchisement provision, filed [suit] in 1996 challenging that provision on the ground that, due to racial discrimination in the state's criminal justice system, the automatic disenfranchisement of felons results in the denial of the right to vote on account of race, in violation of Section 2 of the Voting Rights Act," according to the appeals court's opinion.

Section 2 of the Voting Rights Act (VRA) states that "No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color."

The lawsuit focuses on the disparate impact that felon disenfranchisement laws have on racial minorities. It contends that because "nonwhites make up a large percentage of the prison population, a state law prohibiting inmates and parolees from voting is illegal because it dilutes the electoral clout of minorities," according to the Spokane *Spokesman-Review*.

The 9th Circuit agreed, finding that "the discriminatory impact of Washington's felon disenfranchisement is attributable to racial discrimination in Washington's criminal justice system" and therefore violates Section 2 of the VRA.

The decision is a major victory for nonprofit organizations that advocate on behalf of incarcerated individuals. Ryan Haygood, co-director of the NAACP Legal Defense Fund, which participated in the suit, told the *Seattle Post-Intelligencer* that the "disparities aren't reflective of the actual participation in crime. They're reflective of the discrimination in the criminal justice system."

Lawrence A. Weiser, a Gonzaga University law professor involved in the case since the mid-1990s and director of Gonzaga's clinical law program, told the *Post-Intelligencer* that "the disenfranchisement law has always been used to disenfranchise minority communities." Weiser also said that "attorneys for the prisoners turned to a series of studies conducted in Seattle and elsewhere in the state showing that racial minorities were charged with crimes at rates far higher than could be explained by differences in levels of criminal activity."

If the decision stands, it could have a major impact on felon disenfranchisement statutes nationwide. Felon disenfranchisement laws vary from state to state. According to the *Spokesman-Review*, nearly 40 states and the District of Columbia have less restrictive felon disenfranchisement laws than Washington. Only two states, Maine and Vermont, allow incarcerated felons to vote. Kentucky and Virginia deny the right to vote to all individuals convicted of a felony.

Felon disenfranchisement was a big issue during the 2000 and 2008 presidential elections. Grassroots and nonprofit organizations urged eligible ex-offenders to vote. They also educated ex-offenders, who often erroneously thought they were barred from voting.

During the 2008 election season, a *Washington Post* article focused on efforts to urge ex-offenders in Florida to vote. Ex-offenders in Florida with felony convictions are eligible to vote thanks to a law passed in 2006, which allows nonviolent ex-offenders with felony convictions to vote if they have completed probation, paid restitution, and do not have any charges pending. The *Post* article focused on the efforts that nonprofits, such as the ACLU and People for the American Way, played in "reaching out to ex-offenders through Web sites that help people figure out whether the state [of Florida] has acted on their cases."

According to the *Post-Intelligencer*, "Attorneys for [Washington State] have two weeks in which to request a hearing by the 11-judge [*en banc*] Circuit Court panel. Should they decide instead to request a review by the Supreme Court, that petition must be filed within three months."

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Commentary: Deficit Commissions Unlikely to Produce Results

On Jan. 26, the Senate rejected an amendment sponsored by Sens. Kent Conrad (D-ND) and Judd Gregg (R-NH) that would have created a bipartisan deficit commission. Due to the complex nature of the proposal, there is a low probability that such a commission would succeed in its goal to slow the growth of the national debt. Despite the improbability of success, there is much speculation that the president will now create a similar deficit commission through executive order.

There is still debate among economists about short- versus long-term federal deficits and their impact on the federal debt. However, there seems to be a growing consensus within Congress that the projected national debt needs to be addressed. One of the solutions put forward as far back as 2007 was a deficit commission proposed by Conrad and Gregg that covers all spending and tax issues. However, progressives argue there is no need for a commission, that debt

reduction strategies can be addressed through the regular order of congressional business. Conservatives have wanted a one-sided debt reduction commission, aimed at spending cuts and excluding revenue increases. Others have wanted their particular concern, such as Social Security, off the table in any commission.

The recently rejected Conrad/Gregg commission called for an 18-member panel comprised of eight congressional Democrats, eight congressional Republicans, and two officials from the Obama administration. The commission would have developed proposals to report to Congress. Fourteen out of 18 members would have had to agree on any given proposal before the commission could present the solution to Congress. No lawmaker could amend any of the proposals once submitted to Congress, and each chamber would have to approve a solution with a two-thirds majority. These mathematical hurdles would likely prevent any bills from making it to the president's desk.

OMB Watch opposes these deficit commissions for several reasons. First, they would have Congress abdicate its most essential functions: authorizing spending and levying taxes. Leaving these decisions to non-legislative bodies raises a second concern. The fast-track, non-amendable procedures to consider these recommendations prevent citizens from affecting the shape of legislation that will have enormous consequences for their lives. Finally, while OMB Watch concurs that long-term deficits are not sustainable, short-term deficits in an economy as fragile as ours are actually a good thing. Any responsible approach to debt reduction must sort out the structural problems and address those head-on through the regular business of Congress. However, as demonstrated by President's Obama proposed three-year freeze on domestic spending (exclusive of Recovery Act funding), there is a tendency among politicians to tackle items with the least potential impact because those tend to be the easiest to address.

Tasking a single commission to look at every possible solution to reducing deficits and bringing back a balanced budget or proposals to reduce the debt is quite a daunting task. Theoretically, the taskforce would have examined everything from reducing mandatory and discretionary spending to raising taxes and reducing tax expenditures. Yet solving the long-term fiscal imbalances of entitlement programs such as Medicare and Social Security could easily necessitate commissions of their own. Committing sitting lawmakers to incorporate those issues into the larger problem of annual budget deficits is a recipe for gridlock.

Requiring 14 out of 18 members of the commission to agree on any one solution further reduced the probability the taskforce would report policy options. In addition, asking two-thirds of both chambers of Congress to agree to any solution without amendment is a sure way to stymie action on difficult policy questions. (See, for example, the health care bills currently stuck in Congress despite large majorities of a single party.)

In the days before the final vote on the amendment, both Republicans – claiming that the commission would be a backdoor approach to raising taxes – and Democrats – arguing the same for cuts to vital entitlement programs like Medicare and Social Security – hammered the proposal. President Obama will face this same environment with the deficit commission he is likely to create. Additionally, an Obama taskforce will not have statutory authority, which means

that Congress is not required to take up any of the commission's recommendations. While recommendations from the presidential taskforce will be finalized after the 2010 midterm elections, it would appear that Congress does not have the political courage to make the tough choices that reducing deficits and slowing the growth of the national debt require.

The End of TARP to Be Met with Controversy

The Troubled Asset Relief Program (TARP) began with a single, basic idea: prevent imminent economic collapse. With that premise, then-Treasury Secretary Henry Paulson convinced Congress and President Bush to authorize $700 billion of emergency spending to undertake actions to avert such disaster. Now, with economic catastrophe averted but with the nation's economy still struggling, a new report turns policymakers' focus to the end of TARP.

Over the coming year, as TARP's mandate expires, Obama administration officials will have to make tough choices about whether to prioritize the program's original mandate – maintaining economic stability – or safeguarding taxpayer money. The two goals are supposed to be coequal, but in practice, Treasury has ignored the second priority – maximizing return on taxpayer investments.

The Congressional Oversight Panel (COP), which is charged with oversight of TARP, released its latest quarterly report during the week of Jan. 18, examining Treasury's TARP exit strategy. The report notes that while Treasury's authority to undertake actions using funds allocated under TARP expires on Oct. 3, TARP investments will continue for at least another year. Indeed, on Oct. 3, Treasury is expected to still be holding billions of dollars' worth of TARP assets.

Most of the COP report focuses on the dueling TARP priorities, which are laid out in the authorizing legislation, the Emergency Economic Stabilization Act of 2008 (EESA). The law states that the Treasury Secretary must "hold the [TARP] assets to maturity or for resale for and until such time as the Secretary determines that the market is optimal for selling such assets, in order to maximize the value for taxpayers." This single sentence contains both priorities noted above. The first, maximizing taxpayer return, is plainly stated, but the second, ensuring economic stability, is more subtle. Treasury has chosen to interpret the word "optimal" in the law to mean “when market conditions are optimal.” However, as the COP report states, "'optimal' timing might therefore not be the most profitable, but timing that best forwards Treasury's goals" of overall economic stability. Trying to ensure economic stability could mean that Treasury has to take a loss on an asset to stabilize the financial markets or prevent a too-big-to-fail bank from collapsing.

In practice, Treasury has had difficulty ensuring that the two goals are equal in priority. In particular, Treasury has opted to more frequently err on the side of protecting economic stability. Indeed, COP's report provides several examples of how Treasury is failing its statutory obligation to provide maximum return on investment.

The prime example of this is American International Group (AIG), the investment giant which almost collapsed in 2008. While Treasury has repeatedly stated that "taxpayers will be made whole" in the government's assistance to AIG, Treasury's actions indicate that it is in fact more focused on maintaining economic stability. In testimony leaked to *The New York Times*, the Special Inspector General for TARP (SIGTARP) estimates that taxpayers will lose almost $30 billion on the over $182 billion the government has invested in AIG, in large part because of bad choices the government made when bailing out the company. Instead of forcing AIG creditors to take a loss, Treasury insisted that they be paid in full. The COP report notes that Treasury said that it would rather reduce its AIG assets in an orderly manner, avoiding a premature sell-off, which could disrupt the economy, "than [make] a lot of money on it." This example does not bode well for when Treasury fully divests itself from AIG and the rest of TARP.

In its defense, Treasury has been driving a hard bargain when banks have tried to buy back their warrants, documents the banks gave to the government in exchange for financial support during the recession, which give the holder the right to purchase stock in the company. A recent *Wall Street Journal* article reported that Treasury has received $2.9 billion from warrant repurchases, well above third-party valuations of between $2.2 billion and $2.7 billion, indicating that Treasury has forced banks to pay top dollar for their warrants. However, one could argue that Treasury had no choice but to drive these bargains, since Treasury's warrant acquisitions are one of the most public aspects of the department's bank support, and anything less than a full repayment of the warrants would have stirred public anger toward the government. Regardless, the revenue from warrant repurchases falls far short of compensating for the cost of the other TARP programs.

Perhaps to help fill that gap, the administration has recently proposed the "Financial Crisis Responsibility Fee." The proposal is intended to repay the costs of TARP by making larger banks pay a fee based on the riskiness of their portfolios. The fee would be in place for ten years, although it could be extended if it had not yet covered the costs of the bailout.

The fee would seem to be an optimal solution to the problem of the competing TARP goals. By covering the cost of TARP itself, it would leave the Treasury free to divest itself of TARP assets in such a way as to ensure the greatest economic stability possible. By no longer having to worry about maximizing the return on investment, Treasury would be able to sell off its TARP assets whenever the market was most "optimal." This would save Treasury the excruciating back-and-forth process of asset sales to make sure taxpayers are made whole, or even earn a profit, as TARP would be paid for through the new fee.

The problem is that the fee is based on the state of a financial institution's books, not how much money they received from TARP. The more debt an institution has relative to its assets, the greater the fee it would have to pay. Therefore, organizations which greatly benefited from TARP, such as AIG, would only pay as much as other institutions with similar balance sheets. AIG could receive tens of billions of dollars in aid while paying mere hundreds of millions dollars back to Treasury. If Treasury is not concerned about maximizing taxpayer return when it is divesting its TARP assets, this problem will be exacerbated.

Ideally, the proposed fee would allow Treasury to continue to elide its statutory obligation to ensure maximum return on taxpayer investments. It has already ignored this obligation several times in pursuit of the competing goal of greatest economic stability. The greater-than-expected revenue from the warrants are a positive sign that the administration is willing to put safeguarding taxpayer money before corporate well-being, but considering TARP's past performance (with AIG losses indicating that TARP will still have significant costs), it is clear that TARP's demise will be, like its life, fraught with controversy and questionable outcomes.

Agencies Make Data More Widely Available Through Data.gov

On Jan. 22, executive agencies posted hundreds of datasets onto Data.gov as required under the Open Government Directive (OGD). Many transparency advocates have lauded the administration's efforts while at the same time raising questions about how well this first initiative under the OGD actually worked. The release of the datasets has triggered discussions about the value of the data, how individual privacy rights are protected, whether the datasets being released are new, and the quality of the data that has been released.

Under the OGD, published Dec. 8, 2009, executive branch agencies had 45 days to release at least three "high-value" datasets on their websites and register them with Data.gov. These datasets were to be information "not previously available online or in a downloadable format" and were to be published "online in an open format." All together, about 300 new datasets were uploaded to Data.gov, with 175 labeled "high-value." The topics of datasets released varied widely across the agencies, from population counts of wild horses and burros to hate crime statistics.

Despite the short deadline for this disclosure, several executive agencies released more than the required three datasets. The Departments of Defense, Energy, and Labor led the pack by releasing six high-value datasets each. Numerous independent agencies, such as the National Transportation Safety Board and the Equal Employment Opportunity Commission, also released datasets, despite the fact that the OGD does not appear to apply to them.

A sticking point is the definition of "high-value." According to the OGD, the definition covers information "that can be used to increase agency accountability and responsiveness; improve public knowledge of the agency and its operations; further the core mission of the agency; create economic opportunity; or respond to need and demand as identified through public consultation." A review of the datasets that have been released seem to indicate a limited number of datasets targeting agency accountability. Most agencies did not provide a justification for why the released dataset was considered "high-value."

The datasets that were released are supposed to be just the first installment. By April 7, each federal agency is required to develop an Open Government Plan that includes an inventory of high-value information available for download and identifies high-value information not yet available to the public. For such information, the agency is to provide specific target dates for making the material publicly available.

Some of the new sets that were released on Jan. 22 improve public access while others are simple data that has been released in the past but in raw formats. For example, instead of publishing the data in PDF format, the underlying data is available. Some changes will likely be perceived as very positive. In one case, the Center for Medicare and Medicaid Services, part of the Department of Health and Human Services, chose to publish for free Medicaid information that previously was only available by purchasing a CD-ROM from the agency. Several datasets offer increased insight into inspections and safety ratings, including two on housing inspection scores from the Department of Housing and Urban Development, a tire grading system and child car seat scores from the Department of Transportation, and chemical hazard information from the U.S. Environmental Protection Agency.

However, not all of the data appear to be new data not previously released. Instead, many of the datasets, while already available elsewhere, were being published in new, machine-readable formats that can be more easily manipulated by the public into useful tools. According to the Sunlight Foundation, of the 58 datasets released by the executive agencies, only 16 were previously unavailable in some format online.

The sheer scope of topics made it difficult for any one organization to evaluate the usefulness or value of the new data. Heather West of the Center for Democracy and Technology wrote, "There are some data sets that are clearly high value to the public. Hopefully, this is the start of a process to release all the data sets that are valuable, no matter how valuable or to whom."

A complication to the release is that some of the datasets that were originally posted by agencies have already been taken down. All three sets posted by the Peace Corps were removed, as well as two from the Nuclear Regulatory Commission. Additionally, a Department of Education set about expenditure data in public schools that was already available through the National Center for Education Statistics was removed from the list of OGD data sets on Data.gov. In fact, the data policy on Data.gov does not mention anything that would guarantee permanent public access, meaning the agencies can take down information just as easily as they can put it up. These actions have reportedly been taken largely due to concerns over individual privacy rights.

In order to improve Data.gov and the range of data included on the site, the administration is welcoming comments on its blog, *Join the Dialogue*. Additionally, Data.gov allows users to rate each dataset for ease of access, usefulness, data utility, and an overall ranking. Several of the new datasets have already received numerous votes, including the Department of Veteran Affairs data on patient satisfaction with hospitals that currently has 47 votes but low scores and the Department of Homeland Security's data set on the Federal Emergency Management Administration's disaster declarations that has 10 votes and top marks in each category.

Overall, the effort demonstrated that if the government can push out this much data in 45 days, then what it is able to accomplish is quite promising. It should be noted that most of the datasets are only available in raw formats, and some of the files are quite large, ranging upward to several hundred megabytes. The general public will find them of limited use. The hope is that public interest groups, reporters, academics, and others will review the information, build interfaces, and report on findings. As agencies move forward with this process, it will be important for

them to identify the most important and useful datasets and develop their own interfaces to allow broader public review of the information. The administration's ongoing dialogue with partner groups and the public will likely be key in identifying these top datasets.

Bite Taken Out of Chemical Secrecy

The U.S. Environmental Protection Agency (EPA) announced on Jan. 21 a new practice that will prevent chemical manufacturers from hiding the identities of chemicals that have been found to pose a significant risk to environmental or public health. The policy is a small step to increase the transparency of the nation's chemical laws, and it highlights both the problem of excessive secrecy and the power of the executive branch to make government more open – even without action by Congress or the courts.

The new practice, which took effect immediately upon publication, changes how the agency handles information submitted by chemical companies under the Toxic Substances Control Act (TSCA), the primary statute regulating chemicals. Under TSCA Section 8(e), chemical companies must notify EPA of any information indicating a chemical substance or mixture presents a substantial risk of injury to health or the environment. In numerous cases, EPA has allowed companies to hide the identity of the chemical in these reports as a trade secret. Under the new policy, EPA will reject confidentiality claims for a chemical's identity if the name is already publicly disclosed on TSCA's inventory of chemicals in commerce (a list of more than 83,000 chemical substances). The TSCA inventory does not include chemical substances subject to other statutes, such as food additives, pesticides, drugs, and cosmetics.

Businesses submitting information to the agency are allowed to claim all or part of the information as confidential business information (CBI). Information labeled CBI by companies is kept secret from the public by EPA. As reported in the previous *Watcher*, by hiding chemical information from the public, and even from other EPA offices, the agency greatly hinders the research and accountability needed to ensure public safety and protect the environment.

Although the agency's action is a step in chipping away at excessive secrecy, the move should not have been necessary based on a reading of the existing CBI regulations. According to the rules already on the books, a company can legitimately claim information is CBI only "if the information is not, and has not been, reasonably obtainable without the business's consent by other persons ... by use of legitimate means." In other words, the identities of chemicals publicly available in the TSCA inventory should never have been allowed to be hidden in the "substantial risk" reports.

Moreover, health and safety data are prohibited from being hidden as CBI. When evaluating the health and safety of chemicals, the identities of the chemicals are crucial data. EPA has repeatedly confirmed this in its TSCA regulations, stating, "Chemical identity is part of, or underlying data to, a health and safety study," and also stating, "Chemical identity is always part of a health and safety study." Despite these proclamations, EPA has allowed the labeling of chemical identities as CBI for years.

The agency's regulations under TSCA do exempt from disclosure information in the health and safety data category that would "disclose processes used in the manufacturing or processing the chemical substance or mixture" or "disclose the portion of the mixture comprised by any of the chemical substances in the mixture." Despite EPA's previous practices to the contrary, this does not exempt chemical identity.

To address the handling of alleged trade secrets, EPA has the authority to issue a "class determination," which defines certain types of business information as either public or entitled to confidential treatment. Such determinations would reduce the time and resource burden on the agency caused by case-by-case evaluations of CBI claims. The agency's recent action seems to lack the force of a class determination.

It is difficult to quantify the impact of illegitimate CBI claims or the impact this new agency practice will have on reducing those claims. According to *Chemistry World*, "The new policy covers the approximately 63,000 chemicals that are on the public portion of the TSCA inventory. Approximately 17,000 chemicals are on an undisclosed, confidential list." EPA has not disclosed the extent of CBI claims, what types of information are labeled as such, how many times the agency has challenged a CBI claim, or the results of such challenges.

Proponents of greater chemical disclosure have criticized the chemical industry for abusing the trade secrets provisions in TSCA by submitting excessive and illegitimate claims of CBI. A recent report from the nonprofit Environmental Working Group found that in the first eight months of 2009, industry concealed the identity of chemicals in more than half the reports submitted under TSCA Section 8(e). Without enforcement of the rules and without penalties for illegitimately making confidentiality claims, businesses have felt free to label information as secret that should be disclosed. EPA states that its change in handling CBI claims is "part of a broader effort to increase transparency ... by identifying programs where non-CBI may have been claimed and treated as CBI in the past."

The new practice restricting CBI claims is limited to one statute – TSCA – and to only health and safety data submissions under one section of that statute. However, EPA receives information with CBI claims under numerous other statutes as well, such as the Clean Air Act, Clean Water Act, and the Federal Insecticide, Fungicide, and Rodenticide Act (the statute regulating pesticides). It is unclear if EPA will review CBI policies under these statutes as well.

In the announcement of the TSCA CBI changes, the agency stated, "In the coming months, EPA intends to announce additional steps to further increase transparency of chemical information." No further details about the pending actions were released.

Among the other transparency problems afflicting TSCA is the difficulty accessing the data. According to EPA's website, the TSCA inventory changes daily and "EPA does not provide searches of the non-confidential TSCA Inventory." The inventory data must be purchased as a CD-ROM from the National Technical Information Service (NTIS) for $360, with an updated version available every six months.

FDA Shifts Position on BPA but Says Its Hands are Tied

In its long-awaited decision on the dangers of bisphenol-A (BPA) exposure, the Food and Drug Administration (FDA) announced that it believes there is some concern about the effects of BPA on children. This is a shift from the agency's recent position that BPA is safe. The agency says its ability to regulate the chemical, however, is limited by FDA's outdated regulatory authority.

On Jan. 15, FDA announced the results of a year-long review process of scientific studies on low-dose exposure to BPA. The agency expected to announce the results of that review in November 2009 but delayed the announcement until this month. FDA and other federal agencies are still assessing the dangers of exposure to the chemical, which is most commonly found in hard plastics and metal food containers. Products that can contain BPA include baby and water bottles, medical equipment, non-metal dental fillings and sealants, thermal paper used for receipts, and more.

In its announcement of the policy shift, the agency said, "FDA shares the perspective of the National Toxicology Program that recent studies provide reason for some concern about the potential effects of BPA on the brain, behavior, and prostate gland of fetuses, infants and children." As a result, FDA is taking several interim steps:

- Working with industry, FDA is supporting efforts to reduce exposure to BPA by searching for substitutes for its use and minimizing the amount of the chemical in use currently.
- FDA is seeking "a shift to a more robust regulatory framework for oversight of BPA."
- The agency is seeking more scientific information to help address the uncertainties it believes exist. According to the announcement, FDA will open a docket on Regulations.gov to ask for public comment and submissions for agency consideration.

In addition, the Department of Health and Human Services (HHS), the National Institutes of Health, and FDA announced a new website for parents to learn more about BPA and its effects. The message provided on the website is confusing. It states, "While BPA is not proven to harm children or adults ... newer studies have led federal health officials to express some concern about the safety of BPA."

The website encourages parents to take several actions to "minimize your infant's exposure to BPA." Discarding scratched baby bottles and cups and avoiding the overheating of formula or food placed in polycarbonate containers are some of the steps suggested.

Several other government agencies are stepping up research on the effects of BPA. According to the HHS website, FDA and the Centers for Disease Control and Prevention (CDC) are conducting new research on the chemical's health effects. The U.S. Environmental Protection Agency is preparing action plans for a variety of chemicals, including BPA. The action plans will summarize scientific studies on BPA and propose a plan for addressing the risks associated with exposure to the chemical, according to a Dec. 17, 2009, BNA article (subscription required).

The National Institute of Environmental Health Sciences is providing $30 million over two years for private and public research. The agency also held an October 2009 meeting of scientists receiving government funding to launch an integrated research effort on BPA.

The federal research focus constitutes a change from prior years in which FDA argued, as recently as August 2008, that BPA was safe. Other research from multiple sources led other governments and private corporations to change their policies and practices regarding BPA. Bottle manufacturers like Nalgene and retailers such as Wal-Mart began to find alternatives to BPA-laced plastic and pulled products from commerce. Health Canada conducted a risk assessment that concluded there was concern about neurological development problems from exposure of infants and small children to BPA. As a result, Canada banned the use of BPA in baby bottles and infant formula cans.

According to FDA's Jan. 15 announcement, BPA is considered a food additive and is subject to regulations issued more than 40 years ago. Under this framework, "Once a food additive is approved, any manufacturer of food or food packaging may use the food additive in accordance with the regulation. There is no requirement to notify FDA of that use. For example, today there exist hundreds of different formulations for BPA-containing epoxy linings, which have varying characteristics. As currently regulated, manufacturers are not required to disclose to FDA the existence or nature of these formulations," the announcement adds.

If FDA wished to regulate BPA, it would have to initiate a new rulemaking. Any regulatory decision would have to be based on clearer scientific evidence than the agency believes exists currently. Although FDA cannot compel industry to submit data on the chemical, it intends to ask manufacturers to voluntarily submit information about food contact uses. For years, industry has ignored questions from Congress and refused to turn over information to FDA, according to a Jan. 17 *Milwaukee Journal Sentinel* article.

Dr. Joshua Sharfstein, Principle Deputy Commissioner of FDA, told the *Journal Sentinel* that the agency may need to ask Congress to provide it with the necessary authority to collect data on BPA uses and impacts before the agency issues standards. There is frustration within the agency with the antiquated regulatory framework that applies to BPA, especially when the agency has had the ability to regulate new food additives since 2000.

According to the *Journal Sentinel*, the agency's inability to regulate should help convince Congress to pass new legislation. The article quotes John Peterson Myers, Chief Scientist of Environmental Health Sciences, who favors banning BPA, as saying, "Industry always uses the argument that the chemical is regulated ... This shows that it is not. State and federal lawmakers need to consider that. They can't rely on this agency to regulate it if they don't have the tools to do so."

Several bills have been introduced in Congress either to ban BPA in certain uses or to label products containing BPA so that consumers are free to choose which products to buy. The bills remain in committee.

Lead Standards for Children's Products Challenge CPSC

The Consumer Product Safety Commission (CPSC) is struggling to interpret and enforce standards intended to limit children's exposure to lead, the agency's commissioners reported to Congress Jan. 15.

CPSC has been enforcing new general lead standards for the content of children's products for nearly one year, and a standard for lead in paint and coatings for nearly six months. Those standards were mandated by the Consumer Product Safety Improvement Act (CPSIA) – a sweeping bill signed into law Aug. 14, 2008 – which gave CPSC a host of new powers and responsibilities. The law set strict standards to protect children from exposure to lead, a neurotoxin that impairs brain development and leads to IQ loss, and gives the CPSC little leeway to deviate from the letter of the law.

Echoing concerns voiced by manufacturers and retailers, CPSC's Jan. 15 report identifies several problems with the enforcement of the lead standards. CPSC believes the scope of the lead limits, which cover all children's products, is too broad. The report complains that everything from bicycle frames to zipper pulls are subject to the limits. CPSC is asking Congress to give it more flexibility to exempt certain products from the ban.

CPSC already has the authority to exempt products but has not yet exercised it: "[N]o exemption has been granted by the Commission to date because in each instance the manufacturer admitted that an amount of lead was present in the product that could be handled by the child, however infrequently, leading to hand to mouth ingestion of lead," the report says.

Additionally, the report says the retroactive application of the lead limits has put CPSC in a situation where it is regulating thrift store and used bookstore inventories. The report says regulators have focused on education, not punitive enforcement.

CPSC's February 2009 "Statement of Commission Enforcement Policy on Section 101 Lead Limits" carves out certain classes of products, including books printed after 1985, that the commission believes are unlikely to contain lead in excess of federal standards. (Section 101 refers to the section of the CPSIA limiting lead content.) CPSC will forego enforcement of lead standards for these products unless firms or persons "had actual knowledge" that a product violated the standard or unless they continue to sell such products after being notified by CPSC.

The report also relays firms' complaints that the costs of third-party testing and accreditation are too high. Under the CPSIA, children's products must be tested by CPSC-approved laboratories and certified as compliant with the lead standards.

CPSC has taken two actions to limit the number of products currently subject to third-party testing. First, CPSC developed a list of products which, "by their nature, will never exceed the lead content limits" and are therefore exempt. CPSC mentions cotton and wool as examples. Second, CPSC announced that firms would not have to test for the general lead content standard for children's products, except jewelry, until Feb. 10, 2011. Testing for lead paint and testing of

children's jewelry is still required. CPSC detailed its third-party testing requirements in a Dec. 28, 2009, *Federal Register* notice.

CPSC staff has been cracking down on children's products contaminated with lead paint, the report says. CPSC identified 117 violations in FY 2009 using X-ray technology. "The vast majority of these violations were found by CPSC staff screening children's products at the ports," according to the report.

The CPSIA lowered the standard for lead in paint to 90 ppm (parts per million), from 600 ppm. The report says most of the 117 violations were detected before the new 90 ppm limit took effect on Aug. 14, 2008.

The CPSIA set for the first time a separate lead standard for the content of children's products. The law set a limit of 600 ppm to take effect in February 2009. The law ratcheted the limit down to 300 ppm beginning Aug. 14, 2009, one year after the CPSIA was signed into law. Although CPSC has delayed the third-party testing requirement, it is still illegal to sell, distribute, or import products in violation of the lead content standard. CPSC will again tighten the standard, down to 100 ppm, in August 2011.

The CPSIA was passed in response to a rash of toy recalls in 2007. The recalls brought to light CPSC's inability to protect children from lead-contaminated toys: the commission enforced no limit on lead content nor could it pull contaminated products from store shelves. Eighty-three senators and 424 House members voted in favor of the bill, and President George W. Bush signed it into law.

Complaints from manufacturers and retailers – and from the CPSC itself – are building momentum behind possible alteration of the law. Rep. Henry Waxman (D-CA), chair of the powerful House Energy and Commerce Committee, is considering a legislative amendment that would give CPSC more flexibility, the *Wall Street Journal* reported in December.

In a statement accompanying the Jan. 15 report, CPSC Commissioner Robert Adler further discussed the challenges of enforcing the CPSIA's lead limits. "I hope that Congress will consider these concerns in any modifications it makes to section 101(b)," Adler said. "Doing so, however, should not take precedence over a demonstrable health risk to children."

Citizens United: The Supreme Court Decision and Its Potential Impacts

The long-awaited decision in *Citizens United v. Federal Election Commission* was issued on Jan. 21. With a 5-4 ruling, the U.S. Supreme Court decided that corporations and unions may now directly and expressly advocate for the election or defeat of candidates for federal office, as long as they do not coordinate their efforts with campaigns or political parties. Many predict the impacts of the decision will be immense and far-reaching, both for nonprofit voter engagement and political discourse as a whole.

The majority opinion authored by Justice Anthony Kennedy argued that limits on so-called "independent expenditures" by corporations violate the First Amendment right to free speech. The Bipartisan Campaign Reform Act (BCRA), which the *Citizens United* decision partially invalidated, prohibited corporations (including nonprofit organizations) and labor unions from airing any "electioneering communications" – broadcast messages that refer to a federal candidate 30 days before a primary election and 60 days before a general election. Older law also barred corporations from using monies from their general treasuries for "express advocacy," to directly urge the election or defeat of a candidate for federal office.

The opinion stems from a controversy caused by a clash between Citizens United, a 501(c)(4) nonprofit organization, and regulations crafted by the Federal Election Commission (FEC). The nonprofit group wanted to release a film on a cable TV video-on-demand service about former Democratic presidential candidate Hillary Clinton during the 2008 presidential primary. The group also wanted to promote the film with several ads. The critical movie was partially funded by corporate contributions, in violation of BCRA and FEC regulations.

Before the Supreme Court ruling, *Hillary: The Movie* and the ads promoting the film were considered a prohibited electioneering communication. Citizens United challenged these campaign finance laws, charging that the provisions enforced by the FEC were an unconstitutional violation of the organization's free speech rights. The group also felt it should not be subject to donor disclosure and disclaimer requirements for its 90-minute film.

The case was first heard by the Court in March 2009. A few months later, the Court decided to not only rehear the case, but to expand the scope of the review to include broader First Amendment concerns. The new briefs had to address whether the 1990 decision in *Austin v. Michigan State Chamber of Commerce*, as well as parts of the 2003 decision in *McConnell v. Federal Election Commission* that dealt with BCRA, should be overturned. Both of those opinions held that restrictions on direct corporate and union spending in campaigns were justified and upheld the government's right to limit corporate expenditures on electoral activity. The Supreme Court met in special session on Sept. 9 for the second hearing of *Citizens United*, and since then, many had fervently anticipated how the Court would rule.

After months of waiting and speculation, the Court overturned long-standing precedent, ruling that banning corporations from using money from their general treasuries for express advocacy was an unconstitutional violation of First Amendment political free speech rights. The majority opinion also struck down the electioneering communications rule as it applies to corporations. As a result, corporations and unions may now spend as much as they want on independent expenditures, in a way that could help the candidate of their choice, right up until Election Day.

This historic decision specifies that the First Amendment protects corporations and unions the same as individuals with regard to the ability to spend money to influence elections. Kennedy wrote that there was "no basis for the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored speakers."

Citizens United argued that its film was not electioneering because it did not advocate for or against any particular candidate, but rather that it was simply a documentary about Clinton. However, the Supreme Court agreed that the film was in fact an electioneering communication and "contained pejorative references to her [Clinton's] candidacy." Kennedy wrote, "The movie, in essence, is a feature-length negative advertisement that urges viewers to vote against Senator Clinton for President."

While the Court did not agree with Citizens United's argument that the film and its messages were not electioneering communications, it ruled that applying such prohibitions to corporations is censorship and a "ban on speech." The Court affirmed that such rules constraining speech are unconstitutional. The Court opinion stated, "The law before us is an outright ban, backed by criminal sanctions."

The Court rejected the argument that corporate money in elections will distort the political debate. It also found that regulations meant to level the playing field are not enough to justify campaign finance laws that restrict certain corporate campaign spending.

Justice John Paul Stevens wrote a scathing 90-page dissent, joined by Justices Stephen Breyer, Ruth Bader Ginsburg, and Sonia Sotomayor. Stevens wrote that the "ruling threatens to undermine the integrity of elected institutions across the Nation. The path [the Court] has taken to reach its outcome will, I fear, do damage to this institution." In a Jan. 26 speech, former Justice Sandra Day O'Connor also cautioned that the ruling may impact state judicial elections, allowing corporations to increasingly influence those who are supposed to be unbiased arbiters of the law.

Importantly, the decision does keep in place disclosure and disclaimer requirements. All of the justices except Clarence Thomas ruled against Citizens United's challenge to disclosure rules. These requirements involve reports that have to be filed with the FEC on electioneering communications, and the ads themselves must carry a disclaimer stating who is responsible for the content. The opinion states that "transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages."

Kennedy said disclosure and disclaimer provisions regarding those funding such ads are constitutional unless there is a specific threat of harassment of donors. This may leave open the possibility for future court challenges and ultimately reverse the disclosure provision if a group can successfully prove that donors did face mistreatment.

Nevertheless, the Court's endorsement of the Internet and meaningful disclosure is something to applaud. According to the opinion, "[With] the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters."

Unfortunately, as the Sunlight Foundation notes, "The disclosure system they describe doesn't yet exist. The current disclosure system is insufficiently 'rapid and informative' and does not make effective use of modern technology."

Additionally, some predict that to protect their image with consumers and to avoid being associated with a particular candidate, corporations may now contribute more to trade associations or 501(c)(4) organizations to fund campaign advertising. This may ultimately weaken the disclosure argument that the Court makes, considering that Internal Revenue Service (IRS) rules and Supreme Court precedent provide for donor confidentiality for such tax-exempt organizations.

Reaction to the decision was swift and often passionate. Shortly after the opinion was released, OMB Watch issued a press release that stated, "The corporate voice will now be more powerful than ever." Lateefah Williams, a nonprofit speech rights analyst at OMB Watch, added, "Our fear is that the voices of large portions of our citizenry and the charities that advocate on their behalf will be drowned out in the process."

President Obama criticized the ruling, calling it "a green light to a new stampede of special interest money in our politics. It is a major victory for big oil, Wall Street banks, health insurance companies and the other powerful interests that marshal their power every day in Washington to drown out the voices of everyday Americans."

The FEC issued a press release announcing that it will be "considering the impact of the opinion on its existing regulations, as well as its ongoing enforcement processes, and will be providing guidance to the public as soon as possible regarding what steps will be taken to comply fully with the opinion."

Many nonprofits are working to respond to the *Citizens United* decision, with various strategies either to shape legislation or craft other reforms to campaign finance regulations. Lawmakers have also reacted with ideas for addressing the impacts of the decision.

The ruling will certainly alter corporate and union spending on future elections, most immediately the 2010 midterm elections and the 2012 presidential election. Just how large of an impact the case will have remains to be seen, but many advocates and election law experts warn that the impending influx of corporate money could go far beyond the exercise of free speech and ultimately allow moneyed interests to wield disproportionate influence on both elections and the lawmakers whose campaigns such corporate spending will supplement.

Citizens United: Nonprofit Calls to Action and the Legislative Response

In response to the *Citizens United v. Federal Election Commission* opinion announced on Jan. 21, many nonprofits and political leaders are mobilizing to address the impact of the decision. Nonprofits, in particular, are taking the lead in ensuring that the voices of ordinary Americans are not diminished by an influx of corporate money into electoral politics.

In the highly anticipated opinion, the U.S. Supreme Court overturned a long-standing precedent, which had stated that corporations can be prohibited from using money from their

general treasuries to pay for their own campaign-related advertisements. Justices also struck down parts of the Bipartisan Campaign Reform Act (BCRA), also known as the McCain-Feingold bill, which prohibited unions and corporations from running issue ads before primary and general elections.

The Court determined that current campaign finance regulations on corporate spending violate the First Amendment protection of political speech. The opinion applies only to independent expenditures and leaves in place a prohibition on direct corporate contributions to candidates and national party committees. It also upholds disclosure requirements for organizations that conduct advertising campaigns that promote or oppose candidates. More details about the decision are available in this issue of *The Watcher*.

The following examples illustrate the scope of the nonprofit community's response to the *Citizens United* opinion:

- Following the announcement of the Court's opinion, People for the American Way (PFAW) launched an action alert to diminish the impact of the decision. PFAW's action alert is an electronic petition urging Congress to pass a constitutional amendment granting Congress the authority to limit corporate influence in electoral politics.

- Common Cause also initiated a campaign for a constitutional amendment. The group hosted an online presentation on Jan. 26 that outlined the efforts that it plans to undertake to push for a constitutional fix.

- The Alliance for Justice (AFJ) held a conference call on Jan. 25, where it discussed the impact of the decision, its effect, and its implications. In a fact sheet, AFJ posed questions concerning the case's implications. The organization also stressed why it is important for nonprofits to be involved in political advocacy. "Even if you think the case was wrongly decided, 501(c)(4)s and other nonprofit corporations (except for 501(c)(3)s) should take advantage of it – use it to strengthen democracy by increasing your public communications about the candidates and what's best for the future of our country," said AFJ.

- Organizing for America, the successor organization to Obama for America and a project of the Democratic National Committee, has circulated an electronic letter to members in its database and visitors to its website, asking them to send the electronic letter to their congressional representatives to inform the representatives that the American people support fair elections and limits on corporate spending.

- To further explore nonprofit reactions to the decision, OMB Watch and the Hudson Institute will host a panel discussion on February 16, entitled "Nonprofits Divided About *Citizens United*?" The panel will examine the ruling and the varying approaches used to either counter the effects or capitalize on opportunities it presents.

Nonprofits have also been using the decision as a springboard to address other issues related to nonprofit advocacy. For example, a coalition of nonprofit organizations that engage in public policy advocacy, including OMB Watch, is seeking to ease restrictions on nonprofit lobbyists in the wake of *Citizens United*. The organizations sent a joint letter to President Obama addressing their concerns. "The solution [as it relates to lobbying and ethics reform] should focus on issues like campaign finance reform and the disproportionate influence that large financial interests have over our nation's politics and public policies. The Supreme Court's decision in *Citizens United v. FEC* has increased the urgency of such actions," said the organizations.

On the legislative side, there has also been interest in addressing the influence of money in politics. Even before *Citizens United* was decided, Sen. Dick Durbin (D-IL) and Rep. John Larson (D-CT) introduced the Fair Elections Now Act (S. 752 and H.R. 1826), which attempts to limit the impact of corporate funds on elections by offering a public financing alternative. "The bill would allow federal candidates to choose to run for office without relying on large contributions, big money bundlers, or donations from lobbyists, and would be freed from the constant fundraising in order to focus on what people in their communities want," according to Public Campaign, a campaign finance reform organization.

After the *Citizens United* opinion was announced, Rep. Leonard Boswell (D-IA) introduced a constitutional amendment that would prohibit corporations and labor unions from using general treasury funds in connection with a federal election campaign. Sen. Charles Schumer (D-NY), chairman of the Senate Rules Committee, also said he would "hold hearings to explore ways to limit corporate spending on elections," according to *The Hill*.

In a statement following the Supreme Court's decision, House Speaker Nancy Pelosi (D-CA) said, "We will review the decision, work with the Obama Administration, and explore legislative options available to mitigate the impact of this disappointing decision." Rep. Chris Van Hollen (D-MD), chairman of the Democratic Congressional Campaign Committee, said the House would also take measures similar to the Senate to limit corporate spending, according to *The Hill*.

The House Administration Committee, which has jurisdiction over campaign finance law, will hold a hearing in February in response to the *Citizens United* ruling. House Administration Committee Chairman Robert Brady (D-PA) "indicated he would be working with fellow lawmakers and the Obama administration to shape new legislation in time to affect this year's congressional campaigns, but he provided no details about what such a measure would provide," according to BNA (subscription required).

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

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In This Issue

Commentary: Celebrating One of the Recovery Act's Legacies: Transparency

Feb. 17 marked the one-year anniversary of the American Recovery and Reinvestment Act, commonly called the Recovery Act. Both political parties celebrated the occasion with partisan attacks. Democrats heralded the act as having saved the nation's economy, while Republicans savaged it for being an expensive government program with little to show by way of jobs. While the two parties can argue over how effective the act actually has been, both can agree on one thing: the lasting legacy of the Recovery Act's transparency provisions.

While the act might have included too many tax cuts, too few tax cuts, or not enough infrastructure projects, or the Democrats might have undersold the stimulus, or oversold it, the one thing that cannot be denied is that the act has substantially advanced the cause of fiscal

transparency. While the act is far from perfect, without it, advocates would have nothing to gripe about. The debate would be stuck on whether timely recipient reporting is a feasible goal or not.

In this sense, the Recovery Act provided a convenient pilot program for fiscal transparency. Now, one year later, the act has not only proved that broad-based recipient reporting is feasible, it has shown that the reporting is useful. By showing how multiple levels of recipients (although not all levels of sub-recipients) have used their federal funding, the Recovery Act has provided the government and its citizens an unprecedented ability to see where its money has gone.

There are also the Agency Reports, which provide weekly updates of spending levels for every Recovery Act program. These reports have received very little attention and are largely overshadowed by the recipient reports. But these agency reports, along with the agency and program plans, provide citizens with a timely snapshot of what the federal agencies are doing. These reports, if they were presented better and expanded to include all federal spending, could evolve to become powerful transparency tools by linking spending and performance measures.

This is not to say that the act is without flaws. As mentioned before, the reporting requirements only extend to second-tier recipients, not all recipients, limiting the reach of the act's transparency. Despite new guidance from the Office of Management and Budget (OMB), recipients are still left to decide what constitutes a "full-time equivalent" job, making it difficult to compare jobs across states and industries. Moreover, due to the way the data are collected, it is next to impossible to add reports from one quarter to another, making it extremely difficult to track cumulative spending or jobs. Add in that Recovery.gov does not effectively display the recipient reports, nor does it link the recipient data to other federal spending data sources such as USAspending.gov. Finally, beyond the information collected about jobs, there is little in the way of performance data or information about who benefited from the stimulus spending.

More importantly, the act is hobbled by bad data quality, a problem which plagues many government datasets. The first round of recipient reporting resulted in many news articles about bad data, from phantom congressional districts to recipients who did not understand how to count jobs created or saved under the act. But the problems with data quality go further than that and include issues such as incorrect addresses, bad unique company identifiers, erroneous dollar amounts, and other data entry issues. These data quality problems can serve to undermine support for the act itself and future federal spending if the public believes the government is being less than fully honest about how it spends taxpayer dollars.

Transparency under the Recovery Act is also hobbled by limited disclosure. Only about one-third of stimulus spending is disclosed. None of the details about the $288 billion in tax breaks or the $224 billion in entitlement spending will be disclosed through Recovery.gov. We will never know who benefited from the tax cuts, for example.

Despite these problems, the act has shown that there is a demand for spending transparency. At its height, Recovery.gov, the act's homepage, had millions of visitors a day and still receives significant levels of traffic. Journalists and analysts, in addition to average citizens, routinely use the site as a resource. The site could benefit from improvements, but it is a marked departure

from the status quo and will serve as the starting point on the road to better fiscal accountability, following a pattern established by USAspending.gov.

The Federal Funding Accountability and Transparency Act of 2006, which created USAspending.gov, helped advance federal spending transparency. When FedSpending.org, OMB Watch's first attempt at a federal spending website and the basis for USAspending.gov, was first released, it relied solely on existing databases that were out of date; now, USAspending.gov has more timely spending data from many federal agencies and is an important part of federal fiscal transparency. Appropriately, the focus for USAspending.gov has shifted to improving data quality and complying with the law's requirement to collect sub-recipient information. Indeed, only four years after its authorizing legislation, USAspending.gov will certainly be a vital part of any spending transparency reform that comes from President Obama's recent Open Government Directive.

As time passes, and the transparency community moves on from the Recovery Act to new challenges, open government advocates from both sides of the aisle will likely look back at the act as continuing USAspending.gov's transparency mission. The act is not perfect, and it may be a contentious political issue, but its effect on the drive for an open, accountable government is a real reason for celebrating its anniversary.

President Obama's Progressive Tax Initiatives

When President Obama rolled out his Fiscal Year 2011 budget in early February, many focused attention on the potential negative effects of the administration's proposed three-year freeze on non-security discretionary spending. Moreover, the possible effects of the president's hawkish rhetoric toward the federal budget deficit dismayed those in the progressive community who are concerned with social equity. However, a detailed examination of the tax section of the president's budget reveals several progressive proposals designed to aid in the fight against poverty and bolster the middle class.

While media attention on President Obama's proposed tax cuts, or tax expenditures, has focused on the extension of certain small business or green industry credits, many of the proposed tax reductions benefit low- and moderate-income people. These include temporary extensions of certain measures of the American Recovery and Reinvestment Act of 2009 (Recovery Act) and the modification of existing tax expenditures.

Proposed extensions of a pair of Recovery Act tax credits would be vital for working families and families that have fallen victim to the dismal economy. The first is a temporary extension of the Making Work Pay (MWP) credit. A temporary provision of the Recovery Act slated to expire at the end of 2010, the MWP credit provides a refundable income tax credit of up to $400 for individuals and $800 for married couples making less than $75,000 and $150,000 a year, respectively. The government quickly phases out the credit for those making more than the top limit. Those eligible receive the credit through reduced withholdings from their employers, which means that most of the money goes into the pockets of low- and middle-income families

right away rather than after the end of the tax year. President Obama has proposed extending the provision through calendar year 2011 at a cost of roughly $61 billion.

The second provision of the Recovery Act that the White House has proposed extending is COBRA premium assistance. COBRA requires certain employers to offer former employees the opportunity to pay for continued coverage provided under the employers' group health plan. The Recovery Act provided COBRA-eligible recipients that lost their jobs during the height of the recession with a reduced premium rate of 35 percent while allowing employers a credit against payroll taxes for the remaining 65 percent of the premium. The assistance is currently available for 15 months. COBRA is often the only choice for families to retain health coverage after a head-of-household loses his or her job, but the coverage rates can be too expensive. The rate assistance under the Recovery Act has helped many distressed families retain needed health insurance at a lower cost. At a cost of roughly $5.5 billion, the Obama administration is proposing that all COBRA-eligible employees that lose their jobs up through 2011 qualify for the reduced rate for 12 months.

Of the proposals to modify existing tax expenditures, three also merit remark. The first is a $15 billion expansion (over ten years) of the Earned Income Tax Credit (EITC) for families with three or more children. Enacted in 1975 and expanded dramatically under the Clinton administration, the EITC provides low- and moderate-income working people with a refundable income tax credit based on the individual's income, marital status, and number of children. For 2010, the maximum credit for families with three or more children is $630 higher than the maximum for those with one or two children, and, due to a provision in the Recovery Act, the phase-in rate – where each additional dollar of earned income results in a larger credit – for three-child families is higher. By encouraging and rewarding work, the EITC has been one of the most successful anti-poverty measures in history and has lifted more children in working families out of poverty than any other single program.

The second existing tax expenditure that the White House has proposed modifying that would provide much-needed support to low- and moderate-income families is the child and dependent care tax credit. The child and dependent care tax credit allows families to deduct up to 35 percent of up to $3,000 in eligible childcare expenses for one child and up to $6,000 for two or more children. Currently, the tax credit begins to phase out for families making more than $15,000 a year and provides no benefit for those making more than $43,000 a year. The president has proposed raising the phase-out point from $15,000 to $85,000 a year and has proposed indexing the credit for inflation, which would prevent time from eating away at the benefits of the tax expenditure. This modification would cost roughly $12.5 billion over 10 years.

Lastly, President Obama proposes to maintain the 10 percent tax bracket, which was enacted with the Bush tax cuts of 2001. This lowest bracket applies to those earning less than $7,000 ($14,000 for married couples). The 10 percent bracket, however, also keeps a portion of all workers' incomes from being taxed at higher rates. Obama would also extend lower tax rates currently in effect for other working families (those earning less than $200,000 per year).

The White House plans to offset the costs of these proposals through the modification and cessation of several other tax expenditures, including a Financial Crisis Responsibility Fee on financial institutions, reforms of the international tax system, elimination of certain oil and gas subsides, and expiration of the 2001 and 2003 Bush tax cuts for the wealthiest of Americans, those making more than $250,000 per year. According to calculations from the White House, the above provisions would generate over the course of 10 years $90 billion, $122 billion, $39 billion, and $969 billion, respectively. While some of these revenue raisers seem less than likely to pass Congress, especially the Financial Crisis Responsibility Fee, the use of savings from closing loopholes for the oil and gas industry, cracking down on overseas tax avoiders, and raising taxes on the wealthy to provide benefits to low- and moderate-income families makes the president's budget that much more progressive.

Despite the salutary effects of the Recovery Act, unemployment and underemployment continue to plague millions of families, and most economists believe that the situation will continue for several years. Although the president's proposed spending freeze will not help families struggling through this bleak economy, an expansion of the tax expenditures noted here can mitigate their plight.

Leaders and Laggards in Agency Open Government Webpages

Complying with requirements of the Open Government Directive (OGD), federal agencies launched transparency pages on their websites Feb. 6. The content and functionality of the pages varied from non-compliant to barely compliant to above and beyond expectations. OMB Watch conducted an assessment of the webpages between Feb. 15 and 22, based on factors that make for sound accountability and transparency.

The OGD required agencies to create open government webpages as the first step toward Open Government Plans, which are required by April 7. The transparency webpages are intended to serve "as the gateway for agency activities related to the [Directive]." A standard for these webpages was set at www.[agency name].gov/open.

OMB Watch's review sought to be more expansive then the administration's grading through the White House's recently launched Open Government Dashboard. The dashboard assesses the state of progress on initial deliverables required by the OGD. The dashboard does not grade the quality of the products produced by the agencies; instead, it is simply a check-off on whether the agency has complied. Thus, for the requirement to establish the open government webpage, the dashboard simply indicates whether the agency has a webpage and does not provide any information about the quality or usefulness of the page. The administration did issue some content recommendations for agency open government webpages, but it remained limited in specifics and has not evaluated the agencies' performance on content. OMB Watch's assessment is the first to review how well the agencies did in creating their pages.

Methodology

Since the administration has offered agencies limited guidance on what components should be included in an open government page, OMB Watch developed criteria that cover basic information that should be provided in a central space on an agency's openness page. We have included all requirements of the OGD, such as the designation of a Senior Accountable Official for the quality of spending data. Additionally, OMB Watch included some items that were not specifically identified by the administration but that fall within a reasonable and logical application of the OGD. Therefore, OMB Watch identified several basic disclosure functions that would make agency open government pages more useful to the public.

In assessing the information available to the public, OMB Watch utilized a simple method of locating specified information on the site. First, the information must be accessible from the agency.gov/open page and not require the use of a search engine to find. Second, the information must be located in an intuitive manner, requiring no more than three mouse clicks to access. If those requirements were not met, then the website was deemed to not have the information and received no points. An agency could receive half points for the criteria if it attempted to comply. For example, if the agency did not list the Senior Accountable Official for the quality of spending data on the website, but did list another contact person, it would receive half points. The maximum score an agency could receive was 57.5.

Leaders

While agency scores varied greatly in the review, some agencies made clear efforts to go beyond the required minimum stated in the OGD. The top five open government webpages were the National Aeronautics and Space Administration (NASA), the General Services Administration (GSA), the State Department, the Department of Education, and the U.S. Agency for International Development (USAID) (see Table 1 below). These agencies scored highest because they attempted to integrate the new open government webpages into each agency's existing disclosure policies and activities.

Table 1. Top Five Open Government Webpages – Scores

Agency	Score
National Aeronautics and Space Administration	40.5
General Services Administration	37
State Department	36.5
Department of Education	35.5
U.S. Agency for International Development	35

For example, all five lead agencies had easy links from new open government pages to their already existing agency-wide contact systems that allow users to find any employee and get his

or her contact information. Some agencies, such as the U.S. Environmental Protection Agency, had such an employee locator feature but did not make it easy to find from the open government page. Linking to pre-existing reports, such as Inspector General reports, budget justifications, and reports to Congress, were other areas that many of the higher-scoring agencies seemed to gain ground over their counterparts.

Some agencies led in specific areas, garnering points that almost no other agencies received. For instance, NASA is the only agency that has communication and disclosure policies easily found from its open government page. Similarly, USAID was the only agency that not only included a summary of where agency funds were spent but provided information on top vendors, as well as spending by program area. Additionally, the Nuclear Regulatory Commission, though low-scoring in the review overall, was the only agency to not only link to Freedom of Information Act (FOIA) reports and plans but to also list the FOIA requests received in the last month. Further, some, such as the State Department and the Department of Health and Human Services, even went so far as to list information on their records management and declassification programs, as called for in the OGD.

Laggards

While agencies did generally meet the minimum requirements of the OGD for the new webpages, several scored particularly low in this review. The bottom five agencies, excluding those that failed to put up any open government page, were the Office of Management and Budget (OMB), the Department of Agriculture, FDIC, the Department of Health and Human Services, and the Department of Justice (see Table 2 below). These agencies scored poorly for the exact opposite reason the leaders succeeded – failure to integrate the new open government page into existing agency information and activities – or not having adequate information on their pages. For instance, none of the bottom agencies' have Inspector General reports, a link to Recovery Act data, reports to Congress, budget justifications, or performance results that can be easily found from the new webpages. Similarly, several laggard agencies, including FDIC, Department of Health and Human Services, OMB, as well as others, failed to link to public participation tools for collecting input and open government ideas as mandated by the OGD.

Table 2. Bottom Five Open Government Webpages – Scores

Agency	Score
Office of Management and Budget	6
Department of Agriculture	15
FDIC	16.5
Department of Health and Human Services	18.5
Department of Justice	18.5

In some cases, however, agencies lost points and fell behind others because the information provided was outdated. The Defense Department's backlog report for its FOIA responsibilities is from the 2008 fiscal year, not from Fiscal Year 2009. Further, the Department of Veterans Affairs presented both outdated performance and financial reports. This could represent a significant problem if the administration is not considering the quality and timeliness of information disclosed when determining if the agencies are meeting OGD requirements.

The OMB and White House webpages are somewhat unique. Even though OMB is charged with overseeing much of the OGD, it is not clear whether the agency views itself as covered by the requirements of the directive. It does have an open government webpage and done a dashboard for its regulatory work. But, OMB has no directory of its employees, and its openness webpage is sparse, at best. In fact, it doesn't even link to its own regulatory dashboard. The White House does not view itself as an agency and has used its openness webpage to describe what all agencies are doing and to blog on progress on the OGD. The White House may produce an Open Government Plan, but no official decision has been made yet.

Missing in Action

Some federal agencies are lacking openness pages entirely. These include the National Transportation Safety Board, the Federal Election Commission, and the Consumer Product Safety Commission. These offices all collect data, the public release of which could benefit citizens.

There were some areas of information that were omitted by almost all agencies throughout the government. This included communications policies that govern how information can be disclosed by employees, senior officials' calendars that would offer a window into the agency's priorities, lists of FOIA requests received that indicate demand for information, and visitor logs that would indicate with whom agencies are meeting. Many agencies also fail to provide the public with basic organization information such as organizational structure or employee and leadership contact information.

Several items reviewed are ones that are not required by the OGD but that each agency can easily undertake to enhance the usefulness of its openness portal to the public. Oftentimes, information that is important to the public was buried in other sections of an agency's website, requiring tedious searching to locate. Instead, the openness pages should serve as easy-to-use portals to information of public interest.

Ultimately, these issues reinforce the paramount importance of public participation in the OGD implementation process. The agencies utilize a collaborative online tool to solicit public input in their progress. Through this tool, the public is able to push the administrative agencies to further their efforts to be more open.

Public Speaks on Ideas to Open Up Environmental Agencies

Agencies, including those dealing with environmental and public health issues, are seeking ideas on how to improve transparency, public participation, collaboration, and innovation, and the agencies are receiving numerous suggestions. The challenge for individual agencies is to shape the diverse ideas into the strategies and goals that will comprise their Open Government Plans.

Under the Open Government Directive (OGD), the government began rolling out new agency webpages earlier in February to serve as hubs for their open government activities. As part of these pages, each agency includes a forum for the public to submit ideas, comment on others' ideas, and cast "votes" for or against specific ideas. The agencies are soliciting and grouping ideas among categories generally labeled "Transparency," "Participation," "Collaboration," "Innovation," and a category for ideas on improving the forum website.

A review of the ideas submitted by the public to four agencies with environmental or public health missions reveals that although there are numerous ideas for greater openness, they are often narrow in focus and do not consider actions that would apply across the agency. This leaves it to each agency to translate the public's recommendations into strategies that address broader issues. The open government discussion forums for the U.S. Environmental Protection Agency (EPA), Department of the Interior (DOI), U.S. Department of Agriculture (USDA), and Department of Energy (DOE) were reviewed for this article.

The open government websites allow users to cast votes for ideas by selecting "I agree" or "I disagree" with each posted idea. Among the ideas with the most agreement are live webcasting of EPA meetings associated with rulemakings, improving public access to Geographic Information System (GIS) data, calculating and reporting the lifecycle costs of environmental problems, improved warning labels to identify harmful chemicals in household products, publishing more research data online, and publishing the list of chemicals in commerce for free online.

U.S. Environmental Protection Agency

The EPA is among the top agencies in terms of volume of ideas and comments received from the public, many of which are insightful and aggressive ideas for improving transparency that will impact the public. For example, EPA received a suggestion to require public notice by a municipality that dumps untreated sewage into any waterway. Although legislation has been proposed to address this gap in the public's right to know, the commenter's idea challenges the agency to use its existing authority to find new ways to communicate health threats to the public.

Another suggestion on the EPA site called for a "One-Stop-Shop model" for data. "Right now the data is all there, you just have to go to three to five different places within the site to find out all the information about a particular [Superfund] site or a group of sites," the submitter noted.

One commenter to EPA's forum explained his belief that agencies can better communicate with the public by creating an intimate connection between the public and the data, as well as providing the tools to make that connection:

> I'd start by focusing on things that are tangible to the public ...Water quality comes to mind. To start with, the public needs to know that (1) water is only tested for a limited set of pollutants, etc. (2) Then they need to be informed of what the EPA is doing about it. And (3) then they need to have access to tools that will help them to learn about the subject and take on personal measures if desired.

The commenter cites the nonprofit Environmental Working Group's (EWG) online databases as excellent examples of useful tools that relate well to citizens' concerns. EWG's website provides useful information on popular concerns such as drinking water quality, health hazards of cosmetics, and chemical threats to children.

Department of Interior

At the Interior Department, the issue of management of wild horses by the Bureau of Land Management (BLM) has so far dominated the discussion. Despite the large volume of single-issue comments, many ideas are giving the agency much to consider while developing its Open Government Plan. Commenters are especially concerned about a "culture of secrecy" that has taken hold at the BLM. One commenter suggested that the agency should ensure that "[BLM] employees who resist this culture must have a safe and secure pathway to report grievances, and be rewarded rather than punished for their courage and integrity."

Another popular idea at the Interior Department calls for a "database of databases" – an easy-to-access public registry of all DOI databases. The commenter believes, "When citizens go to these databases, they will be able to decide for themselves whether each division is addressing subjects they care about, and living up to it's mission statement." Other commenters went beyond calling for a simple directory of databases (many of which are now available through www.data.gov) and suggested linking datasets across programs and across agencies, as well as making the data easy to search and understand.

Department of Agriculture

One suggestion to the USDA is to provide easier access to data on violations of the Wilderness Act of 1964, which prohibits various human activities such as motor vehicle use on public lands designated as wilderness (USDA houses the U.S. Forest Service). This particular issue goes beyond USDA because wilderness lands are managed by several units within the Department of the Interior as well, which highlights a challenge of the Open Government Plans – cross-agency issues and data.

The suggestion to disclose the dataset of Wilderness Act violations also highlights another challenge agencies face – identifying which datasets are of high value to the public. The USDA,

and other agencies, should consider those datasets mentioned most or even voted most popular for disclosure. In many cases, the public might not be aware of what datasets the government possesses. The USDA Open Government Plan should address how to provide not just the dataset specified by this commenter, but all datasets possessed by the agency and ways to work across agencies to link related datasets.

Department of Energy

The discussion forum for the Department of Energy's Open Government Plan is poorly moderated. Whereas at EPA and DOI, the forum moderators actively keep discussions on topic and encourage productive discussion threads, the DOE site is allowed to be populated primarily by off-topic ideas.

Despite sound, relevant suggestions to publicly webcast DOE meetings and restore access to the unclassified technical report library at Los Alamos National Laboratory, most comments seek to win support and federal funding for the "next big thing" in renewable energy technologies rather than address how DOE can be a more open and collaborative agency. With posts titled "I have an idea for an electric car. However no funding" and calls to "Kill DOE" because the agency is "a worthless enterprise," the forum is not being exploited as successfully as in other environmental agencies.

Although most of the postings by the monitor of the EPA's online forum merely explain why a particular idea or comment was moved to the "off-topic area" of the site, the agency's active use of a forum moderator has helped spread crucial information. One commenter suggested EPA be more involved in online social media, such as Facebook. The moderator replied, "EPA has been involved in FaceBook and other Social Media for some time now" and directed the participants to the EPA's social media website.

Common Themes

Each environmental agency also received calls for greater fiscal transparency, including ways to easily track where grants and contracts are awarded and what goals were met or missed by the recipients. Other ideas that were common to more than one agency include training agency workers in new technologies and methods for public outreach ("The entire DOI workforce needs to be brought up [to] speed from the Managers and Directors at the top down to the employees in the field"), greater release of agency e-mail communications, and improved monitoring of environmental trends and agency progress toward meeting goals.

Expanding use of GIS systems and the public's ability to use such systems also is a popular idea among the several discussion forums. According to one commenter, "As they say, 'a picture is worth a thousand words,' so why not disseminate information contained in the hundreds and hundreds of stove-piped DOI databases, systems & applications, etc. to the public through more complete cross-cutting spatial viewers and portals."

The agencies are accepting ideas until March 19. Users must create an account, which requires an e-mail address and password, before comments, ideas, or votes will be accepted. Each Open Government Plan is to be published on the agency's open government webpage by April 7.

SEC Guidance Addresses Disclosure of Climate Change Impacts

The Securities and Exchange Commission (SEC) took a significant step last month toward expanding the scope and quality of corporate disclosures as they pertain to the environment. On Jan. 27, the SEC voted to provide guidance "clarify[ing] what publicly-traded companies need to disclose to investors in terms of climate-related 'material' effects on business operations, whether from new emissions management policies, the physical impacts of changing weather or business opportunities associated with the growing clean energy economy."

Periodically, the SEC provides guidance to public companies subject to federal securities laws and SEC regulations interpreting disclosure rules established to provide their investors with a sense of the true financial health of the corporation. In the climate change disclosure guidance, the SEC cited the impact of legislation and regulation, the impact of international accords, indirect consequences of regulation or business trends, and physical impacts of climate change as areas that should be considered by companies in preparing their disclosures to investors. Rather than establish any new reporting requirements, the SEC is attempting to clarify the responsibility companies have under existing disclosure requirements. Since the guidance applies to ongoing disclosure processes, it is immediately in effect.

SEC Chair Mary Schapiro clarified the reporting guidance: "We are not opining on whether the world's climate is changing, at what pace it might be changing, or due to what causes. Nothing that the Commission does today should be construed as weighing in on those topics. Today's guidance will help to ensure that our disclosure rules are consistently applied." The new reporting is, however, an acknowledgement that climate change and a company's contribution to it are being recognized as genuine investment risks that should be considered.

Pressure on the SEC and on individual companies to disclose climate-risk information – a component of what are referred to as environmental, social, and corporate governance (ESG) issues – began to mount in 2007. After failing to receive a response from the SEC to prior entreaties, environmental and investor groups, as well as several state treasurers, attorneys general and other officials, filed a formal petition asking that the Commission require companies to disclose this information.

In October 2008, the Investor Network on Climate Risk (INCR), a coalition of 80 institutional investors with combined assets of $8 trillion, issued comments in response to the SEC's 21st Century Disclosure Initiative, an effort to modernize its disclosure system in a more transparent manner. This initiative is focused primarily on modern technology, but INCR noted:

> Because ESG information is increasingly of interest to investors and other stakeholders, companies are already disclosing it in their annual reports, in

> sustainability reports, and on their websites. Just as companies have been modernizing their reporting to include ESG issues, it is incumbent upon the SEC to catch up with these trends in order to provide timely, relevant disclosure and to ensure the competitive position of U.S. investors .... For the U.S. disclosure system to remain competitive – and for U.S. investors to be as well informed as investors in other markets – the SEC should integrate reporting of material ESG risks into its new disclosure system.

Concurrent with the efforts of environmental and investor groups to pressure the SEC, in response to subpoenas issued by New York State Attorney General Andrew Cuomo, several energy companies agreed to voluntarily release their climate risk information. Their efforts finally came to fruition with the SEC's decision in January.

Next on the agenda for those groups advocating for increased ESG disclosure? "[A]s rising populations, rapid economic growth in developing countries, climate change and growing regulation are triggering growing water availability concerns in the U.S. and abroad," a new report from the Ceres investor coalition, UBS, and Bloomberg "builds on the SEC's [climate-risk disclosure] guidance with specific recommendations for companies to improve their water-related disclosure."

Patchwork Improvements Continue for E-Rulemaking

Several federal government websites have recently incorporated changes that better highlight regulatory issues and expand online access to rulemaking information. However, the changes appear independent of one another, not parts of a conscious effort by the Obama administration to transform the government's beleaguered e-rulemaking systems.

On Feb. 16, the White House announced a new effort it claims will shed more light on the activities of the White House Office of Information and Regulatory Affairs (OIRA). The so-called OIRA Dashboard, www.reginfo.gov/public, "will make it easier for people to identify the rule or category of rules they are interested in, and will allow them to monitor progress," Office of Management and Budget Director Peter Orszag wrote in a blog post. "Simply put, the Dashboard democratizes the data."

The launch of the OIRA Dashboard does not add new data to RegInfo.gov, which has for years provided users with online access to information about OIRA activities. RegInfo.gov indicates which draft proposed rules, final rules, and information collection requests are under review at OIRA, as well as the status of all previously reviewed rules and requests.

OIRA reviews agencies' significant rules under the authority of Executive Order 12866 and, under the Paperwork Reduction Act, must approve all agencies' attempts to collect information from ten or more people. The information on RegInfo.gov gives the public a partial look at how OIRA fits into the overall regulatory process.

The new OIRA Dashboard page on RegInfo.gov includes graphical representations of the number of draft proposed and draft final rules currently under review at OIRA, organized by agency, stage in the rulemaking process, length of the review period, and economic significance (those rules expected to have an annual impact of $100 million or more). Additionally, the launch of the dashboard coincides with a sitewide aesthetic redesign.

In addition to the updates to RegInfo.gov, the administration announced on Feb. 2 minor changes to the federal government's main e-rulemaking website, Regulations.gov. While RegInfo.gov illuminates OIRA activities, Regulations.gov is an online portal where users can find information about, and comment on, all agencies' rules. Among the changes to Regulations.gov, the homepage now includes an instructional video for using the site, and the site has added an alphabetical index of topics covered by regulation.

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. Partly because of prior success with its own e-rulemaking portal, the U.S. Environmental Protection Agency (EPA) was tasked with managing Regulations.gov.

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.

Regulations.gov has already gone through several changes, most recently in July 2009, aimed at making the site's functionality and navigation more useful and intuitive. 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. Also, the online rulemaking docket is not necessarily identical to the authoritative paper docket housed in agency offices, undermining user confidence in the reliability of the online system.

Also on Feb. 2, the EPA announced an online forum for discussing changes to Regulations.gov, Regulations.gov/Exchange. Regulations.gov/Exchange solicits user feedback on the most recent batch of changes to Regulations.gov and identifies opportunities to expand new features.

This is the second iteration of Regulations.gov/Exchange. In May 2009, EPA launched Regulations.gov/Exchange to gather feedback on changes it was proposing for the main site. That version was taken down and has now been re-launched with new content. In both instances, the site has focused on receiving feedback on site upgrades the EPA has already decided to pursue.

While minor changes are being made to the government-wide e-rulemaking websites of RegInfo.gov and Regulations.gov, at least one agency has taken unilateral action to improve access to its own rulemaking process. On Feb. 18, EPA launched its Rulemaking Gateway, an

online portal for tracking EPA rulemakings, learning more about issues EPA covers, and participating in the process. The "Rulemaking Gateway provides information as soon as work begins and provides updates on a monthly basis as new information becomes available," EPA says. "Time-sensitive information, such as notice [*sic*] of public meetings, is updated on a daily basis."

Each EPA rulemaking now has its own webpage with basic information about the rule, including an abstract and timeline for the rulemaking with projected milestones where appropriate. Users can search for rules by stage in the rulemaking process or topic, as well as by a variety of economic and social sectors the rule is expected to impact.

The Rulemaking Gateway also gives users an opportunity to comment on EPA rulemakings. Typically, rules are only open for public input during a legally required comment period immediately following publication of a notice of proposed rulemaking. On the Rulemaking Gateway, users can comment on rules at any time outside of the formal comment period.

EPA notes that comments submitted outside the formal comment period will not carry the same legal weight as those filed with the agency in the usual fashion. By law, agencies must respond to comments filed after publication of a notice of proposed rulemaking, but EPA may or may not respond to comments filed through the gateway.

EPA's online Rulemaking Gateway is integrated with Regulations.gov, which the agency also runs, but the gateway includes only EPA documents and issues. If information on EPA rulemakings is already available on Regulations.gov, or if a rule is open for public comment on Regulations.gov, the gateway includes links that give users quick access to relevant pages on Regulations.gov.

Missing from the recent flurry of activity is an overall framework for the Obama administration's approach to e-rulemaking. While administration officials have indicated a desire to transform e-rulemaking practices and, more generally, to make government information more accessible and expand public participation, the administration has failed to articulate its intentions.

It is unclear if such a strategy is in development. The White House's Open Government Directive, released in December 2009, references "transparency initiative guidance" on e-rulemaking. No announcements or documents about e-rulemaking have been issued. However, the launching of the OIRA Dashboard reflects the principles of the Open Government Directive, Orszag says.

Some e-rulemaking advocates, including OMB Watch, have called on the administration to adopt the framework detailed by the American Bar Association (ABA) in a November 2008 report. 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)

The recent changes to the e-rulemaking system only begin to address the greater reforms identified by the ABA report. Absent the adoption of an administration-wide e-rulemaking strategy, further reforms are likely to lack the cohesiveness necessary to achieve an effectively managed system.

FDA Announces New Approach to Inspections of Imported Products

On Feb. 4, the Food and Drug Administration (FDA) announced a new approach to regulating imported products – including food and medical devices – to enhance the agency's ability to respond to the increased globalization of commerce. The new risk-based approach to inspections and product tracking will be in place nationally in 2010.

Dr. Margaret Hamburg, FDA's commissioner, announced the new approach in a speech at the Center for Strategic and International Studies, a Washington, DC, policy and research organization. The new safety strategy shifts the agency from one that reacted to problems after they occurred to one that tries to prevent product safety problems.

During the Bush administration, FDA was criticized for its inability to respond to crises afflicting the public because the number of imported products outstripped the agency's ability and willingness to protect the public. Although the Obama administration has increased the budget for FDA, "FDA-regulated products are currently imported from more than 150 countries, with more than 130,000 importers of record, and from more than 300,000 foreign facilities. This year, we expect that nearly 20 million shipments of food, devices, drugs, and cosmetics will arrive at U.S. ports of entry. Just a decade ago, that number was closer to 6 million, and a decade before only a fraction of that," according to Hamburg's speech.

FDA has fewer than 500 inspectors to handle the 20 million shipments. As a result, the agency inspects less than one percent of imported products and only about eight percent of foreign drug manufacturers, Hamburg said. FDA has begun to shift its approach to the growing burden it faces by, for example, setting a goal of dramatically increasing inspections of overseas food facilities and hiring new inspectors.

The plan that Hamburg described in her speech has several dimensions. First, FDA's overall strategy to import safety is changing. Hamburg described it this way in her speech:

> To assure the safety of imported products and fulfill our public health mission in a global age, the FDA must adopt a new approach ... an approach that takes into account the entire supply chain and its complexity; and an approach that will address product safety by preventing problems at every point along the global supply chain ... from the raw ingredients ... through production ... and distribution ... all the way to U.S. consumers.

Second, FDA has developed several new objectives. The agency is focusing on point of production issues by working with manufacturers, suppliers, and foreign governments to create collaborative networks and build the regulatory capacity of countries without well established regulatory infrastructures. According to Hamburg, for example, "We now have permanent FDA offices in Beijing, Shanghai and Guangzhou, China, in New Delhi and Mumbai, India, in San Jose, Costa Rica, Mexico City, Santiago, Chile, and—soon—Amman, Jordan." FDA now has more than 30 agreements with countries with more sophisticated regulatory systems to share information and provide inspection data.

FDA also intends to hold importing companies responsible for their supply chains by requiring them "to effectively demonstrate that safety, quality and compliance with international and U.S. standards are built into every component of every product and every step of the production process," Hamburg said.

To maximize its inspection resources, Hamburg announced that FDA is putting in place a new system called PREDICT (the Predictive Risk-Based Evaluation for Dynamic Import Compliance Targeting). This new risk assessment tool will allow the agency to rank the public health risks posed by various products so FDA can target more carefully its inspections to those products. PREDICT has been used in Los Angeles and is being implemented in New York. Hamburg said FDA intends to have it implemented nationwide by the end of summer.

According to materials prepared for industry and available on FDA's website, the new ranking tool will use compliance histories, shipper and producer information, inspection results, and other entry data to identify which products pose fewer risks, thus allowing goods to be imported more quickly. If sufficient information is not available, or if anomalies appear that could indicate fraud, FDA will require additional information before products are released for shipment throughout the U.S.

The shift by FDA to a preventative approach is consistent with food safety legislation Congress is debating. The Food Safety Enhancement Act of 2009 (H.R. 2749) establishes risk-based preventative controls and hazard analyses while giving FDA expanded authority to set high-risk triggers and issue regulations in a range of food safety areas. The House passed the bill in 2009 and referred it to the Senate, which has not acted.

Citizens United: Additional Legislative Responses

Multiple legislative responses have followed the U.S. Supreme Court's ruling in *Citizens United v. Federal Election Commission*, a decision that permits independent election spending by corporations, including certain nonprofit organizations. Following three rigorous congressional hearings, lawmakers have expressed a sense of urgency and the intent to continue working on legislation to curtail the impacts of the ruling, even as some critics charge that reaction to the decision is inflated.

On Feb. 11, Sen. Chuck Schumer (D-NY) and Rep. Chris Van Hollen (D-MD) released a summary of their proposed legislation to address issues raised in the hearings. Reportedly, Schumer and Van Hollen will introduce their bill during the week of Feb. 22.

Schumer and Van Hollen's extensive proposal includes a ban on expenditures by foreign interests, as well as corporations that have federal contracts and those that received funds through the Troubled Asset Relief Program (TARP). They also call for new disclosure rules on corporate spending, both to the government and to shareholders.

Specifically, the Schumer-Van Hollen bill would:

- Ban corporations from spending money on U.S. elections if they have a foreign ownership of 20 percent or more, a majority of their board of directors is foreign principals, or their U.S. operations are under the control of a foreign entity.
- Prohibit government contractors, including TARP recipients, from making political expenditures.
- Require corporations that release political ads to have their CEOs appear on camera to say they "approve this message." The "top funder" of the ad must also record a stand-by-your-ad disclaimer, and the top five contributors that donate for political purposes will be listed on the screen at the end.
- Require the creation of separate "political broadcast spending" accounts and require that the finances of these accounts be reported to the Federal Election Commission (FEC). All funds spent or transferred from the accounts would have to be publicly reported to the FEC.
- Require all political expenditures made by a corporation to be disclosed within 24 hours on the corporation's website and to be disclosed to shareholders in quarterly reports and in the corporation's annual report.
- Require federally registered lobbyists to disclose information on all campaign expenditures over $1,000.
- Strengthen current coordination rules for House and Senate campaigns by banning coordination between a corporation or union and candidates on ads referencing a congressional candidate within 90 days of the beginning of the primary-through-general election season. For all federal elections, coordination would be prohibited, regardless of timing, when the ads promote, support, attack, or oppose a candidate.

While it remains to be seen if the Schumer-Van Hollen plan will receive bipartisan support, there is a very real possibility that certain provisions could be challenged in court. For example, if the proposal moves forward to ban political commercials paid for by corporations that receive government funding, it may face a constitutional challenge.

Other criticism of the Schumer-Van Hollen proposal abounds from both opponents and supporters of the *Citizens United* decision. Some consider it only an initial step and offer suggestions for improvement. The Sunlight Foundation, while expressing pleasure that many of its "disclosure-related recommendations appear to have been embraced," also highlights the inefficiencies of the FEC reporting structure and the need for lobbyist disclosure to go further.

"The enhanced disclosures of lobbyists' campaign expenditures is a good start, though again we would note that to be meaningful, the disclosures must be in real time, online and publicly available and a user-friendly, searchable database," said the Sunlight Foundation in a recent blog post. The post further stated that "while the Schumer/Van Hollen framework rightly strengthens the ban on coordination to prevent such anti-democratic behavior, without a new disclosure requirement mandating that lobbyists report who they met with, there is no effective way to discern the possibility that such coordination took place."

An editorial in the *Washington Post* warns, "The prohibition on government contractors is so broadly worded as to sweep in nearly every major corporation that sells goods to the government; at the very least, some significant dollar threshold should be applied here."

In a press release from the Center for Competitive Politics (CCP), CCP President Sean Parnell expressed further concerns, saying that "[a]ny legislative attempt to dismantle the Court's ruling in *Citizens United* must be narrowly tailored and backed up by evidence of a compelling government interest." Parnell further stated that "[t]his rush to ram a bill through before such a record could possibly be established does neither."

Some of the proposals in the Schumer-Van Hollen legislative framework have been introduced already as standalone bills. Between the Jan. 21 ruling and today, 14 bills have been introduced in the House, including two proposed constitutional amendments, and three in the Senate to address the Court's decision.

With regard to disclosure requirements for independent campaign spending:

- The Corporate and Labor Electioneering Advertisement Reform (CLEAR) Act (H.R. 4527), sponsored by Rep. Steve Driehaus (D-OH), would require communications related to campaigns to include a statement identifying the corporation's CEO or the president of the organization.
- The Stand By Your Ad Act of 2010 (H.R. 4583)," sponsored by Rep. John Boccieri (D-OH), would require that campaign-related communications paid for by certain tax-exempt organizations or political organizations include a statement naming their five largest donors."

Bills that seek to limit corporations receiving government funding from spending money on elections include:

- No Taxpayer Money for Corporate Campaigns Act of 2010 (H.R. 4550), introduced by Rep. Niki Tsongas (D-MA), would prohibit corporations from using any federal funds to contribute to political campaigns or participate in lobbying activities.
- H.R. 4617, sponsored by Timothy Walz (D-MN), would prohibit TARP recipients from using any TARP funds for political expenditures or electioneering communications.

The Pick Your Poison Act of 2010 (H.R. 4511) introduced by Rep. Alan Grayson (D-FL), would prohibit corporations that employ registered lobbyists from making expenditures or disbursements for electioneering communications.

A few bills call for shareholder approval before a corporation spends money on any campaign-related message:

- H.R. 4487, also introduced by Grayson, would "require the approval of a majority of a public company's shareholders for any expenditure by that company to influence public opinion on matters not related to the company's products or services."
- Similarly, Rep. Michael Capuano (D-MA) introduced H.R. 4537, which amends the Securities Exchange Act to require the authorization of a majority of shareholders before a company makes political expenditures.
- In the Senate, S. 3004, introduced by Sen. Sherrod Brown (D-OH), requires that political expenditures be approved by the shareholders of a public company.

Multiple bills introduced echo President Barack Obama's publicly expressed concerns regarding the possible role of foreign-controlled corporations making independent expenditures. Seven bills, five in the House and two in the Senate, have been introduced to address these concerns. All of them seek to "amend the Federal Election Campaign Act of 1971 to apply the ban on contributions and expenditures by foreign nationals to domestic corporations" in certain circumstances. The circumstances covered in the different bills include when foreign principals have control or an ownership interest, when shareholders include any foreign principals, and when domestic corporations are subsidiaries of foreign principals. One bill specifically seeks "to protect Federal, State, and local elections from the influence of foreign nationals."

Examples of these bills are:

- H.R. 4510, another Grayson bill, would "amend the Federal Election Campaign Act of 1971 to apply the ban on contributions and expenditures by foreign nationals to domestic corporations in which foreign principals have an ownership interest."
- H.R. 4517, introduced by Rep. John Hall (D-NY), would "amend the Federal Election Campaign Act of 1971 to apply the ban on contributions and expenditures by foreign nationals to domestic corporations which are owned or controlled by foreign principals, to increase the civil penalties applicable to foreign nationals who violate the ban, and for other purposes."

- S. 2959, introduced Sen. Al Franken (D-MN), would "amend the Federal Election Campaign Act of 1971 to protect Federal, State, and local elections from the influence of foreign nationals."

Legislators have also proposed two amendments to the U.S. Constitution. H.J.Res.68, sponsored by Rep. Leonard Boswell (D-IA), would prohibit "corporations and labor organizations from using operating funds for advertisements in connection with any campaign for election for Federal office." H.J.RES.74, sponsored by Reps. Donna Edwards (D-MD) and John Conyers (D-MI), would permit "Congress and the States to regulate the expenditure of funds by corporations engaging in political speech."

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In This Issue

Commentary: Security Contracting and the Dilemma of Defining an Inherently Governmental Function

Later in March, the Obama administration plans to release new guidance to federal agencies on which jobs the government can and cannot outsource to the private sector. The federal government's latest effort to better define what qualifies as an inherently governmental function should theoretically have significant consequences for reconstruction efforts in Iraq and Afghanistan, specifically regarding security contracting. However, change is unlikely.

The Federal Acquisition Regulation, the body of rules that regulate government contracting, defines an inherently governmental function as one "that is so intimately related to the public interest as to mandate performance by Government employees." Application of the definition, however, is extremely complicated.

Introduced in 1992 and revised in 1998, the inherently governmental standards describe five broad areas where the government should not outsource its work. The law states that any function is inherently governmental if it involves "the interpretation and execution of laws of the [U.S.] so as to:

- "Bind the [U.S.] to take or not to take some action by contract, policy, regulation, authorization, order, or otherwise;
- "Determine, protect, and advance [U.S.] economic, political, territorial, property, or other interests by military or diplomatic action, civil or criminal judicial proceedings, contract management, or otherwise;
- "Significantly affect the life, liberty, or property of private persons;
- "Commission, appoint, direct, or control officers or employees of the [U.S.]; or
- "Exert ultimate control over the acquisition, use, or disposition of the property, real or personal, tangible or intangible, of the [U.S.], including the collection, control, or disbursement of Federal funds."

The guidelines also describe what falls outside of the inherently governmental category. In addition to the general tasks of "gathering information for or providing advice, opinions, recommendations, or ideas to Government officials," the standards specifically delineate tasks such as "building security, mail operations, operation of cafeterias, housekeeping, facilities operations and maintenance, warehouse operations, motor vehicle fleet management operations, or other routine electrical or mechanical services."

These guidelines would seem to ban many of the jobs the federal government has controversially outsourced in Iraq and Afghanistan, including security detail work, military and police training, interrogation, and intelligence. A loophole in the standards that prevents them from applying to overseas conflicts, however, has allowed contingency contracting to become a morass of private military and security contractors handling everything from reconstruction to intelligence. Even if the standards were applicable, though, they would produce a "squishy" middle where one agency's inherently governmental task is another's viable option for outsourcing, just as they do domestically.

Recent reports have suggested the Obama administration intends to improve upon the current problematic guidelines by breaking down inherently governmental functions into three categories: those that are inherently governmental, those that are closely associated with inherently governmental, and those that are critical in nature. The reports also note that the White House will provide an expanded list of tasks that fall within the inherently governmental framework. These improvements, however, will likely not apply to contingency contracting, as the Office of Management and Budget (OMB) will probably not scrap the current loophole regarding overseas conflicts.

The government created the loophole to prevent the vast array of contracting bureaucracies from hindering the Department of Defense while utilizing the private sector to carry out military actions. The length and complexity of the wars in Iraq and Afghanistan, however, will necessitate for the foreseeable future a continued reliance on contractors for security and

reconstruction efforts. In the case of reconstruction, the government should continue to improve oversight and hold contractors accountable for their work. But there are some functions performed in overseas wars that the government must make a determined effort to move away from outsourcing entirely.

Companion bills recently reintroduced by Rep. Jan Schakowsky (D-IL) and Sen. Bernie Sanders (I-VT), entitled Stop Outsourcing Security, would address this issue. The legislation seeks to delineate "mission critical or emergency essential functions" performed in a war zone. The legislation defines "mission critical or emergency essential functions" as "activities for which continued performance is considered essential to support combat systems and operational activities," or "activities whose delay, absence, or failure of performance would significantly affect the broader success or failure of a military operation."

The bill's most valuable component is the list of specific tasks that the government would not be able to outsource, including "the provision of protective services; the provision of security advice and planning; military and police training; repair and maintenance for weapons systems; prison administration; interrogation; and intelligence." Without better guidance from the federal government, or even the determination to apply existing standards to overseas contingency contracting, the only option seems to be legislative.

Some analysts argue that the current mix of security contractors in overseas environments is here to stay and that any attempts to better define an inherently governmental function ignores "the far greater number of people and money in logistics or reconstruction efforts" compared to "the relatively minor number of security contractors." This seems to be a false dichotomy at best. The former demands increased oversight where the latter calls for a better attempt by government to control its resources. Neither of these has to be achieved at the expense of the other.

More Action Is Needed to Improve Recovery Act Data Quality

The Recovery Act may be a great step forward for spending transparency, but it is also exposing the problems of obtaining quality recipient reporting. Two new government reports show that recent revisions and additions to Office of Management and Budget (OMB) rules on recipient reporting are not necessarily "magic bullets" for addressing reporting errors. The reports also make clear that ensuring that recipients have a clear understanding of existing guidance is a crucial aspect of any data quality improvement effort.

The first report is from the Government Accountability Office (GAO) and comes in the form of one of its regular Recovery Act oversight reports. The report's main focus is on how a select group of states spent Recovery Act funds, but a significant portion is devoted to recipient report data quality.

In December 2009, only a month before the second recipient reporting cycle began, OMB, which is responsible for writing the rules for the recipient reporting process, published a new Recovery

Act guidance document. The new guidance addressed data quality issues and tried to simplify some reporting processes. The GAO report found that there are far fewer recipient reporting errors following the release of this guidance, but there are still many problems.

According to GAO, "The second round of reporting appears to have gone more smoothly as recipients have become more familiar with the reporting system and requirements." At the same time, GAO noted, "Data errors, reporting inconsistencies, and decisions by some recipients not to use the new job reporting guidance for this round compromise data quality and the ability to aggregate the data."

The new jobs reporting guidance GAO refers to was published by OMB and says that any work paid for with Recovery Act dollars should be reported. Yet only 56 percent of prime recipients reported paying anyone with Recovery Act funds. Sixteen percent of the prime recipient reports showed jobs created or saved despite having received no funding from the government. The GAO report does note that some of these unusual numbers could be explained by the time lag involved in the reimbursement of government funding.

In trying to ascertain how these recipient errors arose, the GAO found a disturbing trend. Some recipients, according to the GAO, did not use the new formula for reporting FTEs, which OMB outlined in the December guidance. Instead, these recipients used the old formula, which was used in the first reporting quarter. Under the old formula, recipients were to identify the full-time equivalents that they created or saved, which left some ambiguity of what a "saved" job was. GAO noted that without interviewing every single recipient, there is no way to tell which method each recipient used in his or her report. However, when it came to education, which was the largest category of jobs reported, GAO found that a number of states reported job numbers using the old methodology.

This means that analysts and policymakers will not be able to rely on the numbers from this last quarter because of a lack of consistency in what is being reported. Additionally, the change in defining jobs between the first and second quarters means it will be impossible to compare data over the two quarters or to get cumulative data. GAO remains hopeful that the changes that have been made in the jobs reporting guidance and other reporting system enhancements will "ultimately result in improved data quality and reliability."

The second report further emphasizes how the current reporting problems cannot be simply solved with new guidance. The report came from the Recovery Accountability and Transparency Board (Recovery Board), which is tasked under the Recovery Act with overseeing recipient reporting and Recovery.gov. As part of its one-year assessment, one of the Recovery Board's members, the inspector general of the Department of Transportation, led a study on Recovery Act data quality. While the Board's report has substantially fewer specific examples and figures than GAO's voluminous publication, the Board's report does efficiently analyze types of recipient errors. The Board categorized the errors it found into four distinct groups:

- Recipients misinterpreting OMB and agency guidance
- Technical challenges
- Recipients not knowing or having incorrect codes or numbers
- Human error

Unfortunately, the report does not provide a detailed definition of these various error types. For instance, one Department of Justice office the Board contacted found that 31 percent of its data inaccuracies came from incorrect DUNS numbers, which are company identifiers provided by Dun & Bradstreet. This could either be the result of human error (e.g., typing errors) or recipients having the wrong DUNS numbers. Nevertheless, having these categories allows the government to begin to identify possible data quality solutions, and they indicate that more guidance from OMB may not prevent future recipient errors.

The Recovery Board indicates that rather than a dearth of OMB guidance, recipients are having difficulty understanding what exactly the existing guidance requires. To mitigate the rate of those errors falling under the first three categories, the Recovery Board recommends OMB and the agencies should increase communication between themselves and recipients. Similarly, addressing errors described by the fourth category – human error – requires tighter coordination among the Recovery Board, OMB, and the agencies. While the agencies could catch project-specific errors, limiting the number of human errors soon after they are reported by recipients, the Recovery Board can also work to limit these errors from even being entered.

Indeed, the Board is already implementing solutions that do just that, with so-called "hard checks." These checks prevent recipients from inputting clearly erroneous information. For example, by checking to see if the "Amount Received" field is larger than the "Award Amount" field, and by preventing recipients from filing if the numbers don't add up, recipients are prevented from entering incorrect data. In fact, by using these kinds of checks, the Board completely eliminated the "phantom" congressional district problem from the first cycle. Similarly, the GAO found that while 133 records in first quarter reported receiving more than the award amount, none in second quarter did so.

The nature of the problems found by both the GAO and the Recovery Board indicate that more recipient guidance won't necessarily help improve data quality. What does seem to help, as the success of the Recovery Board's hard checks shows, is increased attention by federal agencies and the implementation of mechanized data validation. Whether it is external efforts, such as agencies helping recipients understand the existing reporting rules, or internal efforts, such as hard checks, more action is needed to improve recipient report data quality.

White House Seeks More Transparent Environmental Reviews

The Obama administration has proposed new guidance intended to increase transparency and public involvement in the implementation of one of the nation's oldest and most important environmental laws. The 40-year-old National Environmental Policy Act (NEPA) creates a

process where federal agencies must review the environmental impacts of their actions and evaluate alternatives while working to include public participation in the process.

Recognizing the 40th anniversary of NEPA, the Council on Environmental Quality (CEQ) – the White House office in charge of monitoring federal NEPA compliance – issued draft guidance in February to all federal departments and agencies. The guidance is designed to ensure transparency and openness as agencies evaluate ways to mitigate the environmental impact of their proposed actions. The new guidance is available for public comment.

For many federal activities, the NEPA process provides for public participation in identifying potential alternative actions and commenting on environmental impacts. Under certain circumstances, agencies may proceed with their actions if they commit to steps that "minimize, rectify, reduce, or compensate" the adverse impacts resulting from their actions. However, in the past, these mitigation efforts have often lacked monitoring and frequently failed.

The CEQ draft guidance sets three goals for improving transparency: 1) consideration of mitigation efforts throughout the NEPA process and clear documentation of the mitigation commitments; 2) creation of monitoring plans for the mitigation actions; and 3) greater public participation through "proactive disclosure" of NEPA records.

Although these actions do not create any new regulations and the language still grants agencies much discretion, they regardless represent the first major enhancements of the NEPA process in years. As the office in charge of NEPA, CEQ wields considerable sway in determining how other agencies comply with the law and regulations. Increasing transparency and chipping away at the culture of government secrecy that has flourished over the years requires, among other actions, the reaffirmation of existing openness policies and commitment from the top to enforce these measures.

The draft guidance makes several valuable recommendations for transparency. It recognizes that public engagement is a key feature of NEPA and "should be fully integrated into agencies' mitigation and monitoring processes." While recognizing the importance of the Freedom of Information Act (FOIA), the CEQ calls on agencies to make NEPA reports, documents, and responses to public questions "readily available to the public through online or print media, as opposed to being limited to [FOIA] requests made directly to the agency." The CEQ stresses the need to document important aspects of the NEPA process, such as goals, timelines, and funding, which improves accountability. Moreover, the draft guidance endorses the fundament that citizens have vital, substantive contributions to make to government decisions: "In addition to advancing accountability and transparency, public interest and input may also provide insight or perspective for improving any mitigation activities as well as providing actual monitoring assistance."

The new draft guidance from CEQ also includes a case study from the Department of the Army that showcases robust public involvement and monitoring in the NEPA process. By providing this example, CEQ shows other agencies that the goals they have set for NEPA can be achieved and highlights one way to do so.

Ensuring transparency is especially crucial in the NEPA process. NEPA places agencies in charge of preparing an impact assessment that could challenge their own proposed actions, creating strong potential for conflicts of interest that only transparency can counter. By forcing agencies into a transparent assessment process, the law empowers the public and the courts to demand sufficient environmental protections.

Other New Draft Guidance

In addition to the draft guidance on mitigation measures, CEQ also released draft guidance on how agencies should consider the impacts of climate change in their environmental assessments and on the use of "categorical exclusions." Categorical exclusions cover types of federal actions that are generally considered to "not individually or cumulatively have a significant effect on the human environment," and therefore, agencies need not assess their environmental impacts.

According to CEQ, "An inappropriate reliance on categorical exclusions may thwart the purposes of NEPA, compromising the quality and transparency of agency decisionmaking as well as the opportunity for meaningful public participation and review." Categorical exclusions are the most frequently employed method of complying with NEPA.

The draft guidance on categorical exclusions emphasizes the requirement to involve the public in the process, and although it creates no new requirements, the guidance encourages agencies to go beyond the customary *Federal Register* public-notice-and-comment practice. The CEQ suggests agencies use "public involvement techniques such as focus groups, e-mail exchanges, conference calls, and web-based forums [to] stimulate public involvement." Agency websites should be used to communicate proposed changes to the agency's NEPA process because, according to CEQ, "Not only is this another method for involving the public, an agency website can serve as the centralized location for informing the public about agency NEPA implementing procedures and their use, and provide access to updates and supporting information."

Granddaddy of Environmental Laws

Before the law was signed by President Richard Nixon in 1970, the Senate passed NEPA on a unanimous vote, and the House of Representatives passed the bill by a wide and bipartisan margin of 372-15. The Clinton White House examined the effectiveness of NEPA in 1997 and concluded that:

> Partly as a result of NEPA, public knowledge of and sophistication on environmental issues have significantly increased over the last 25 years. So too have public demands for effective and timely involvement in the agency decision-making processes. The success of a NEPA process heavily depends on whether an agency has systematically reached out to those who will be most affected by a proposal, gathered information and ideas from them, and responded to the input by modifying or adding alternatives, throughout the entire course of a planning process.

During the administration of George W. Bush, NEPA came under increasing attack by the White House, Congress, and even the courts. The current administration has presented a very different take on the law.

In a New Year's Eve proclamation recognizing the 40th anniversary of NEPA's enactment, President Obama affirmed that, "my Administration will recognize NEPA's enactment by recommitting to environmental quality through open, accountable, and responsible decision making that involves the American public." The president also called upon executive branch agencies "to promote public involvement and transparency in their implementation of the National Environmental Policy Act. I also encourage every American to learn more about the National Environmental Policy Act and how we can all contribute to protecting and enhancing our environment."

The People Speak

As part of the Obama administration's Open Government Directive, agencies are accepting public comments through website forums dedicated to generating ideas for increasing government openness. A number of individuals have suggested ways to improve the NEPA process, including calls to address the monitoring of mitigation efforts. Other ideas from the public include using new technology to improve public participation and making the scientific data mappable.

The public may comment on the draft guidance until May 24.

Plans for National Broadband Access May Be in Danger

The Federal Communications Commission (FCC) is gearing up to release its plan for national broadband access on March 17. The FCC is required under the American Recovery and Reinvestment Act to develop a plan to connect an estimated 93 million Americans and present it to Congress. Early releases of the plan indicate a broad vision, but problems concerning funding and net neutrality threaten its success.

On Feb. 18, the FCC gave the public an idea of what will be in the plan by releasing its national purposes update, which outlines what the commission will present to Congress. The plan embraces a broad vision of public connectivity that some public interest groups consider long overdue. The vision includes increased public education programs to bridge the digital divide, efforts to utilize broadband to improve energy and health care efficiency, and plans to provide first responders with radio interoperability.

Open government advocates have hailed the plan's prerogative to increase civic participation in government policymaking. John Wonderlich of the Sunlight Foundation wrote that the FCC seems "committed to the sort of government policies that can help turn Internet access into a transformative tool for citizenship." If, to paraphrase Thomas Jefferson, a democracy requires an informed citizenry, then broadband enables the masses to reach government information

faster with fewer barriers to access. Further, national broadband access increases the capacity for tools that enable citizens to better interact with government information.

A major part of the plan seeks to use broadband to improve government efficiency, to enable citizen-centric online services, and to utilize existing government assets to improve broadband deployment. According to the Feb. 18 document, existing social media and cloud computing can be used to reduce costs, and services such as enabling citizens to access personal data held by government agencies can be better centralized. The blog on FCC's Broadband.gov approaches the question of citizen engagement in five primary areas:

- Transparent government information
- Increased access to media and journalism
- The use of social media to communicate with the public
- Developing innovation in communal digital space that advances government
- Digitizing democracy by enabling such things as online voter registration and enabling overseas members of the military to vote online

Further, there have also been reports that the federal government may also look into creating an online archive of agencies' web content and recommend that Congress change the Copyright Act to allow media companies to contribute their archival content to this national archive.

Presently, federal broadband policies that encourage citizen interaction with their government are almost nonexistent or poorly implemented. The executive branch has made some recent inroads to civic engagement by launching online forums to solicit public input in policymaking, but these efforts have been limited. The federal government's efforts to get public input on the Open Government Directive is a prime example, and its subsequent efforts to encourage such engagement on individual agency openness plans was a further step in that direction. However, the E-Government Act of 2002 has never been fully implemented in such basic areas as agency website standards; thus, it is unknown whether such an ambitious plan can be fully realized.

Funding for the FCC's plan is a potential roadblock for the effort. Currently, the FCC subsidizes telephone services to poor and rural areas through its Universal Service Fund and plans to establish its broadband-focused Connect America Fund within the existing program. The $8 billion Universal Service Fund is paid for out of surcharges affixed to consumer and business long-distance bills. To pay for extended broadband services, the FCC plans to propose several options to Congress, including a gradual phase-out of the Universal Service Fund telephone service to a focus entirely on broadband. However, the FCC is expected to request another $9 billion from Congress in addition to the $7.2 billion that legislators already provided for broadband lines in the economic stimulus package.

Another potential problem is that cost cuts may give an advantage to big business that could then undermine competition. Blogs on both Verizon's and AT&T's websites praised the agency's efforts. Verizon's vice president for regulatory affairs even called the FCC's plan "bold and practical." However, corporate support may stem from FCC not requiring companies to share

broadband lines with rivals, thus favoring big companies and violating the principles of net neutrality. Both companies have ardently opposed any regulation related to net neutrality.

The pricey and expansive vision is what critics contend will be the plan's failure. Most reports indicate that without being broken up, the plan is too large to make it into an omnibus bill. Currently, there are fears that the plan is so big that Congress is unlikely to do anything with it at all.

Regulatory Lapses Inflate Health Care Costs, Reports Find

A new report has found that foodborne illnesses take a $152 billion toll on the American economy each year. Other hazards that regulators keep tabs on, such as air pollution, can increase medical costs if the public is not adequately protected.

A portion of the economic impact of foodborne illnesses, more than $9 billion, takes the form of health care costs, the report finds. The nation sees almost 82 million cases of foodborne illness annually, and the average cost of each case is $112, the report says. The report counts physician services, pharmaceutical costs, and costs associated with hospitalization.

The March 3 report, *Health-Related Costs from Foodborne Illness in the United States*, was sponsored by the Produce Safety Project at Georgetown University, an initiative of the Pew Charitable Trusts.

The remainder of the $152 billion economic impact is attributable to deaths and losses in quality of life. The report's author, former Food and Drug Administration (FDA) economist and current Ohio State University professor Robert L. Sharff, used typical cost-benefit analysis methods to determine these values. The Make Our Food Safe Coalition, of which Pew Charitable Trusts is a member, said it "does not necessarily endorse any single method to develop such estimates, [but] coalition members agree that this study highlights the magnitude of the problem and the need for action to reduce foodborne disease."

Major food recalls have raised public awareness of food safety and foodborne illness risk. Peanuts, peppers, and ground beef are among the many foods that producers have recalled in recent months after consumers became ill. The Centers for Disease Control and Prevention (CDC) estimates that foodborne illnesses hospitalize more than 300,000 people every year and kill 5,000. An ongoing salmonella outbreak, traced back to a line of meats seasoned with red and black pepper, has sickened 245 people in 44 states and the District of Columbia, according to the CDC.

Calls for reform have grown louder, too, as the public has lost confidence in the ability of regulators, especially those at the FDA, to detect and solve foodborne illness outbreaks or prevent them in the first place. A December 2009 CBS News poll asked more than 1,000 Americans, "How would you grade the U.S. on ensuring the safety of the food supply in the

U.S.?" 34 percent of respondents said "C." 33 percent said "B" while only seven percent said "A." 18 percent said "D" while six percent gave the U.S. an "F."

Pew Charitable Trusts seized on the findings of Sharff's report to renew calls for reform. "This report makes it clear that the gaps in our food-safety system are causing significant health and economic impacts," Erik Olson, Pew's director of food and consumer product safety, said in a statement. "Especially in challenging economic times we cannot afford to waste billions of dollars fighting preventable diseases after it is too late."

Olson called on the Senate to quickly consider and pass a food safety bill. In November 2009, a Senate panel approved the FDA Food Safety Modernization Act (S. 510), but the bill has yet to be taken up on the Senate floor. A similar bill passed the House in July 2009, 283 to 142.

In another study released March 2, the Rand Corporation determined that air pollution can have a significant impact on health care and health insurance industries, particularly when air pollution exceeds levels deemed safe by regulators.

"Meeting federal clean air standards would have prevented an estimated 29,808 hospital admissions and ER [emergency room] visits throughout California over 2005-2007," the report says. The admissions cost almost $200 million, leading Rand to conclude that "improved air quality would have reduced total spending on hospital care by $193,100,184 in total."

Rand studied air pollution and hospital admissions trends in California from 2005-2007. The report links air pollution levels that exceeded federal standards to hospital admissions for problems such as asthma attacks, pneumonia, and bronchitis. The admissions included in the report are attributable to violations of the U.S. Environmental Protection Agency's (EPA) standards for particulate matter and ozone. The report acknowledges that exposure to particulate matter and ozone can also lead to heart attacks and premature mortality, but those health endpoints were not included in the study.

The majority of air pollution's health effects are indirectly paid for by taxpayers, the report emphasizes. Medicare covered more than $100 million of the hospital care costs included in the report, and government-provided health care for low-income individuals (Medicaid at the federal level and Medi-Cal in California) covered more than $27 million, Rand said. Private insurers spent almost $56 million, according to the report.

Like the report on the costs of foodborne illness, the Rand report adds yet another dimension to the debate over health care policy and President Obama's desire to reform the system. "Dirty air is the forgotten topic when it comes to health care reform," Clean Air Watch's Frank O'Donnell told the EPA in 2009.

While the health care costs associated with regulatory failures are likely a small fraction of the more than $2 trillion spent on health care in the U.S., they remain significant. Preventable workplace injuries and illnesses, injuries and illnesses associated with consumer products, automobile crashes, and water quality degradation, to name a few, can lead to both short-term and long-term health care costs.

Scientists Recommend Ways to Restore Scientific Integrity to Government

On March 3, the Project on Scientific Knowledge and Public Policy (SKAPP) released the results of a two-year research effort to explore the working environment of federal scientists in the public health and environmental fields. The results showed that not only is there political interference in their work, but that scientists also faced a series of obstacles that delay the study and dissemination of scientific information that affects the public every day.

SKAPP is a project of the George Washington University's School of Public Health and Health Services. The researchers at SKAPP interviewed 37 scientists representing 13 federal agencies from May 2008 through January 2009 to discern the issues of most importance to scientists. SKAPP then conducted an online follow-up survey in July and August 2009 to see what effects, if any, the Obama administration had on agencies' work environments.

The report, *Strengthening Science in Government: Advancing Science in the Public Interest*, contains recommendations in eight topic areas plus one overarching recommendation. The study describes details of many agencies' policies and practices regarding how scientists get approval for research topics and communicate among themselves and with the public, as well as the extent of political interference by executive branch employees and members of Congress.

The recommendations address topics such as improving the management of science within agencies, opportunities for scientists to provide feedback on policies, interagency data sharing and communication, and opportunities for professional development. Many recommendations focus on two broad issues: bureaucratic delay in approving proposed research studies, and disseminating research results through cumbersome approval processes.

For example, the authors of the report note, "Many of the scientists interviewed felt that the time and effort required to obtain agency approval for research projects is excessive—and these resources could be better spent on conducting the research, rather than writing lengthy research proposals."

In addition to internal agency processes, the need for White House Office of Management and Budget (OMB) approval also delays research. Scientists who want to survey the public must have their information collection requests approved by OMB's Office of Information and Regulatory Affairs (OIRA) under the Paperwork Reduction Act. Many scientists in the study considered this step to be "excessively burdensome." This criticism of OMB's information collection review

process is consistent with other scientists' experiences. OMB's review can require scientists to revise and resubmit their research proposals, causing further delay.

The report recommends both agencies and OMB streamline their respective approval processes so that research can be conducted in a more timely manner.

Once research is completed, scientists are often frustrated by the processes for clearing the results for publication or other dissemination methods. "Some scientists suggested that their agencies have used the clearance process to delay or even prevent the publication of findings that could ignite controversy," according to SKAPP's report. Many agencies have written policies that outline procedures for information dissemination, but the scientists participating in this study often said that there was a difference in what those policies required and what actually happens within an agency. Managerial, procedural, and political considerations can affect not just when but whether some research results are released.

OMB also can play a role in hindering the release of scientific information. Agencies were required to establish information quality guidelines under the 2001 Data Quality Act. OMB added to this requirement additional scientific peer review requirements (even if the research may have already been peer reviewed) for "influential" and "highly influential" scientific assessments. According to the SKAPP report, "When the OMB regulations were first developed, many agencies were concerned that they introduced additional, time-consuming layers of review. In addition to the bureaucratic requirements, these regulations were potentially a means to challenge or delay findings that had regulatory implications."

The recommendations about disseminating scientific work call for an end to using the clearance process to slow or stop the dissemination of scientific information, for consistent and timely application of the review policies, and for agencies to "have processes for expedited clearance of time-sensitive materials."

One overarching recommendation applies to all the recommendations in the report. The White House Office of Science and Technology Policy (OSTP) and OMB "should ensure that agencies adopt the policies described in this report's recommendations, and that the policies are generally consistent across agencies and appropriate within each agency's mission and scope. These policies should be clearly and actively communicated to agency leadership, scientific managers, and the federal scientific workforce." These two White House offices can help ensure that scientific integrity policies are adopted and implemented within agencies.

On March 9, 2009, President Barack Obama issued a memo aimed at restoring scientific integrity in the federal government. The memo stated, "Science and the scientific process must inform and guide decisions of my Administration on a wide range of issues ... The public must be able to trust the science and the scientific process informing public policy decisions." Obama assigned to the director of OSTP "the responsibility for ensuring the highest level of integrity in all aspects of the executive branch's involvement with scientific and technological processes." The memo identified six principles OSTP should consider when producing recommendations to

the president. To date, these recommendations, which OSTP was to produce in 120 days from the date of the memo, have not been publicly released.

In SKAPP's follow-up survey of scientists, the majority of the respondents perceived no change in the way their agencies dealt with the issues raised in the report. Although there were a few bright spots in scientists' views of the changes that had occurred in some agencies, most believed that change would be hard to achieve. Entrenched managers, processes, and cultures and funding concerns led few scientists to expect significant change. The follow-up interviews were conducted six months after Obama had taken office, and many agency heads were not yet in place.

In the report's conclusion, the authors note that the concerns over political interference and the politicization of science reached its peak during the administration of George W. Bush. The pessimism expressed by most of the scientists in the follow-up survey about their agencies' ability to change presents the Obama administration with considerable challenges if it is to meet the scientific integrity goals the president outlined.

Supreme Court Hears Charities' First Amendment Challenge to Patriot Act

On Feb. 23, the U.S. Supreme Court heard arguments in *Humanitarian Law Project v. Holder*, a case challenging parts of the USA PATRIOT Act (Patriot Act). The Humanitarian Law Project (HLP) and other charities allege that sections of the law violate the First Amendment.

Under federal law, it is a crime to provide money and weapons to an organization designated as a terrorist group by the United States, but the definition of such "material support" is broad enough to include activities such as providing advice on fostering peace. HLP and others argue that the material support statute is unconstitutionally vague and that American citizens or nonprofit organizations can be convicted of crimes for engaging in lawful activity.

The law barring material support to designated terrorist organizations was first adopted in 1996 and was subsequently strengthened by the Patriot Act. It prohibits providing money and weapons to designated terrorist groups, and it also bans U.S. organizations from providing any "training," "personnel," "service," or "expert advice or assistance," including advice on facilitating peace-building programs. The only exemptions are for medicine and religious materials.

HLP works to mediate international conflicts. Specifically, HLP wanted to provide human rights and conflict resolution training to the Kurdistan Workers' Party (PKK) and the Liberation Tigers of Tamil Eelam (LTTE), both designated terrorist organizations. The Patriot Act's broadening of the definition of material support significantly expanded prospects to prosecute anyone deemed to have provided assistance to a designated organization. Subsequently, HLP stopped working with these groups out of fear it would be considered criminal under the material support statute.

Georgetown University professor David Cole, the attorney representing HLP, argues that the human rights advocates are only interested in supporting lawful activities, urging foreign groups to avoid violence and to take their disputes to the United Nations. Cole's brief states that the material support statute "imposes criminal liability on speech and association without any showing that the speaker intended to incite or promote terrorist activity in any way." He argued that the First Amendment protects those who speak out on behalf of or advise foreign terrorist organizations, as long as they advocate only peace and nonviolence. Cole makes a distinction between aid that is intended to further lawful activity and aid that is intended to further illegal activity.

Meanwhile, during oral argument at the Supreme Court, Solicitor General Elena Kagan stressed that the material support statute is one of the most valuable tools in the fight against international terrorism. Kagan gave examples of prohibited conduct, including helping designated groups by petitioning international bodies or filing a friend-of-the-court brief.

Advocates for change note that the legal regime is broader than Kagan made it sound, allowing prosecutors to target individuals and charities for doing nothing more than providing humanitarian assistance in an area where a designated terrorist organization operates. Ahilan Arulanantham of the American Civil Liberties Union (ACLU) has first-hand knowledge of how the law affects human rights activity. He worked in Sri Lanka after the 2004 tsunami and witnessed humanitarian organizations that could not help victims because they lived in areas controlled by the LTTE.

The ACLU filed an amicus brief on behalf of nine humanitarian groups who teach conflict resolution, provide aid, and engage in various activities that require them to work with designated groups or in areas controlled by such groups. The brief explained that they may be forced to severely limit their nonviolent work because of the material support law.

The Court could either rule to uphold the law or create an exception for peaceful activity. A decision is expected by June or July.

Prior to the oral argument, the Charity and Security Network, along with the Constitution Project, held an informative briefing on the case; the event can be viewed online.

For more on the case, including briefs and information on the issue of material support, visit the Charity and Security Network's website.

Nonprofits Are Making a Major Impact on Redistricting Reform

Redistricting reform efforts have emerged as a key issue that could significantly impact our democracy in 2010 and beyond. While it does not appear that there will be nationwide redistricting reform, efforts are moving forward in several states. Nonprofits have taken a lead role in advocating for a process that is independent, nonpartisan, and fair while also ensuring that their constituencies' interests are represented.

Americans for Redistricting Reform (ARR) is a nonpartisan, nonprofit organization that bills itself as "committed to raising public awareness of redistricting abuses and promoting solutions that benefit voters and strengthen our democracy." Its website allows visitors to learn about redistricting reform efforts in jurisdictions across the country. The site also contains fact sheets, court cases, research studies, and state and federal legislation on redistricting reform efforts.

ARR was launched by the Campaign Legal Center and includes major nonprofit organizations as advisory committee members, including the Brennan Center for Justice, the Campaign Legal Center, the Committee for Economic Development, Common Cause, Fair Vote, the League of Women Voters, the Reform Institute, the Republican Main Street Partnership, and U.S. PIRG.

According to the nonprofit Campaign Legal Center (CLC), ARR and its advisory committee members believe that there are two key elements necessary for redistricting reform. "The first is changing the procedures that states use to draw legislative districts, including the establishment of independent commissions, transparency and effective opportunity for participation by all segments of the general public. The second is establishing uniformly accepted standards for how to draw and evaluate districts, including adherence to the commands of the Constitution and the Voting Rights Act, respect for political subdivisions and communities of interest, competitiveness, partisan fairness, and compactness."

ARR has created several fact sheets on redistricting reform efforts, including one titled "Notable Redistricting Efforts in the States." This fact sheet focuses on efforts in Florida, Pennsylvania, New Mexico, Kansas, and Texas.

In Florida, the state legislature controls both congressional and state redistricting decisions. These decisions usually result in the creation or maintenance of districts that avoid competition for incumbents.

A set of state constitutional amendments, proposed by FairDistrictsFlorida.org, would prevent legislative districts from being "drawn to favor or disfavor an incumbent or political party" or to "deny racial or language minorities the equal opportunity to participate in the political process and elect representatives of their choice." The amendments would also require legislative districts to be "contiguous" and "compact, as equal in population as feasible, and where feasible must make use of existing city, county and geographical boundaries." The slate of proposed amendments will be on the November 2010 ballot in Florida.

ARR has created a separate fact sheet on Proposition 11, which in 2008 "amended the California Constitution to transfer responsibility for drawing district lines for legislative seats from the Legislature to a new 14 member Citizens Redistricting Commission," according to ARR. Nonprofit organizations were on both sides of the Proposition 11 debate, and many of the organizations that took opposite views on the ballot measure are traditional allies.

"Supporters say the proposition's purpose was to create a more transparent, inclusive and representative process that would be responsive to the testimony of communities and neighborhoods," according to ARR. Supporters include California Common Cause, AARP, the

Los Angeles Chamber of Commerce, the League of Women Voters of California, the California Chamber of Commerce, the California NAACP, the California Police Chiefs Association, and the ACLU of Southern California.

Opponents of Proposition 11 believe that it "will give power to bureaucrats who will select the redistricting commission based on a partisan agenda. Opponents also have expressed concern that this measure does not ensure that the 14 member independent commission will reflect the gender, racial, or geographic diversity of the state's 36 million people, or of the current legislative body." Opponents include the California Correctional Peace Officers Association, the National Association of Latino Elected and Appointed Officials, the Mexican American Legal Defense and Education Fund, the NAACP Legal Defense Fund, and the Asian Pacific American Legal Center.

The redistricting commission will "begin drawing lines after the 2010 Census is conducted. The first election under a reformed system of drawing legislative districts in California will be held in 2012," according to ARR. The initiative also "applies new standards to congressional redistricting, but the power to draw congressional lines will remain with the legislature."

The League of Women Voters (LWV) has also played a major role in redistricting reform efforts and raising awareness of the issue in the states. In New York, LWV hosted a forum on redistricting with the Nelson A. Rockefeller Institute of Government. During the forum, one of the panelists, Gerald Benjamin, a political science professor and director of the SUNY New Paltz Center for Regional Research, Education and Outreach, stated that an independent panel should handle redistricting, according to the *Jamestown Post-Journal.*

New York State Assemblyman Bill Parment (D-North Harmony), who was also a panelist, told the *Post-Journal* that "[o]bviously, the legislature is suspect because we have an interest in the outcome, and so people like the League of Women Voters and others who, I guess, would probably not object to being called good government groups, favor a panel being independent from the legislature."

Parment, however, expressed why he believes that the legislature, not an independent panel, is the body best suited to handle redistricting issues. The "people who know the most about their communities and have been chosen by their communities to represent them are the same ones that are best positioned to create a plan for redistricting that reflects community interests and concerns. If we didn't fight for our communities in redistricting, we would be held in very low esteem, I think, by the public," Parment said.

LWV has also been active in other states. "In Ohio, the league worked with Democratic Secretary of State and Senate candidate Jennifer Brunner to run a contest last year allowing citizens to submit redistricting plans," according to *CongressDaily*. In Illinois, LWV "has teamed with good government groups to attempt to place the question of creating an independent redistricting commission" on the ballot in November, the subscription-only publication noted. According to the same article, LWV's referendum in Illinois "would only apply to state legislative districts, not congressional seats."

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The Watcher

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In This Issue

Commentary: Why Discretionary Budget Caps Are Fiscally Irresponsible

With many families around the country facing financial hardship, fiscal hawks on Capitol Hill have begun ramping up their rhetoric: If America's families are forced to make hard decisions and cut back, they argue, why shouldn't their elected leaders do the same? During the week of March 15, Sens. Jeff Sessions (R-AL) and Claire McCaskill (D-MO) introduced an amendment to H.R. 1586 that aimed to give teeth to that rhetoric. The amendment's effects on the nation's long-term debt would have been minimal, while its impacts on millions of Americans would have been severe. The amendment ultimately failed on the Senate floor.

The Sessions-McCaskill amendment would have capped discretionary spending for three fiscal years in an effort to reduce federal spending and lower the federal budget deficit. While the amendment would have had minimal effect on the country's long-term debt, it would have cut

funding for programs that are helping millions of Americans weather poor economic conditions and would have put a drag on the economic recovery. Though the amendment failed, the vote was very close; this will likely encourage its supporters to bring the amendment back at a later date.

The amendment would have enforced spending limits on both defense and non-defense discretionary spending. For fiscal year 2011, the amendment would have set a discretionary cap of $1.1 trillion – $564 billion for defense spending and $530 billion for non-defense. This limit would inch up to $1.125 trillion by FY 2013 – almost $150 billion lower than the budget President Obama proposed in February, which was criticized for failing to fully fund the public structures that are vital to the well-being of millions of Americans.

The caps would have severely limited the ability of Congress to pass any bill that would increase spending beyond the amount specified by the caps. If such a bill came to the floor, any member of Congress could object to it and effectively kill the bill. To override the cap, supporters in the Senate (and presumably the House, if it were to pass a similar bill) would need to muster an astonishing two-thirds supermajority, or 67 votes, virtually guaranteeing that the caps would stay unbroken. Alternatively, if a bill was declared "emergency" legislation, only three-fifths of each chamber would have to agree to the spending increase.

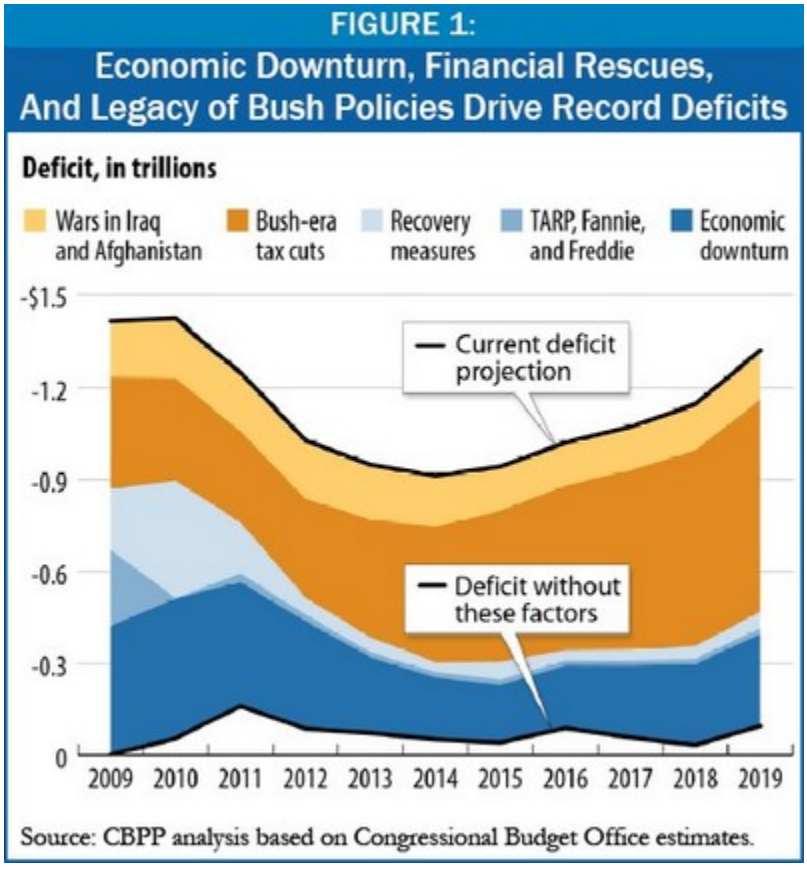
Although the caps were introduced in the name of "fiscal responsibility," they actually are the exact opposite. There is no economic or budgetary reason to limit spending at the levels called for in the bill, save the expressed desire by supporters to reduce the federal budget deficit. The caps grow at an average yearly rate of 1.8 percent, an amount not guided by economic growth, inflation, or program growth. This sort of arbitrary reduction in program funding limits the ability of Congress to respond to the constantly changing needs of the nation.

Program cuts are warranted in some cases. For example, if repeated attempts to improve an ineffective program fail, or if lawmakers deem the targeted problem solved, then funding reductions are viable budget options. Arbitrary spending limits disregard the many factors that congressional appropriators should consider when allocating funding to federal programs and agencies. By restricting the ability of Congress to fully fund all of the nation’s priorities, budget caps leave lawmakers faced with trading the welfare of one population for the good graces of supporters of another program, all the while ignoring the effectiveness of the programs under consideration.

The caps would also adversely affect the nation's economic recovery. Many economists agree that immediately reducing the federal budget deficit would result in slowing – or even reversing – the recent trend in economic growth and reduction of the unemployment rate. A number of estimates, in fact, suggest that spending that raises the short-term deficit, such as the stimulus law, has raised the nation's gross domestic product (GDP) by several points. Had discretionary budget caps been in place, the Recovery Act would likely not have passed, and the nation would be significantly worse off than it is today. And if budget caps were enacted now, the nascent recovery would be strangled before it could take hold, as federal spending would be slowed to a trickle.

Nor would the Sessions-McCaskill amendment address the long-term fiscal imbalances caused by the rapid growth of health care costs. As these costs outpace the growth of the economy, Medicare and Medicaid will continue to consume ever-larger portions of the federal budget. In 2013, Medicare and Medicaid spending will be about 5.1 percent of the size of the economy – a manageable sum. But in 2050, that number is projected to more than double to 12.7 percent. The massive growth of these programs (along with other factors) will cause the amount of debt held by the public to explode from 68 percent of GDP to 457 percent. By comparison, the Sessions-McCaskill amendment would reduce federal spending by an average of 1.2 percent of GDP annually over its three-year lifespan and would have a negligible impact on long-term debt.

There are many ways to address growing long-term fiscal imbalances, solutions which do not disproportionally affect the well-being of tens of thousands of families, the safety of our food supply, or the environment. While there may be a case for cuts in discretionary spending, increases in revenue will significantly improve the short- and medium-term fiscal outlooks. Two of the largest budget issues, according to the nonpartisan Congressional Budget Office and the Center on Budget and Policy Priorities, are the Bush-era tax cuts and the wars in Iraq and Afghanistan. Ending the wars and enacting progressive tax reform to make the tax code fairer would help balance the budget while protecting the nation's citizens.



Fortunately for the millions of Americans impacted by the weak economy, the amendment failed to pass the Senate, 56-40 (the amendment needed 60 votes for procedural reasons). However, discretionary caps will likely come up again, as supporters recognize that that the amendment

failed by such a small margin. While the growing budget deficit may eventually threaten economic prosperity, arbitrary discretionary caps are not the answer, especially now.

Recent GAO Reports Show Need for Better Data on Tax Expenditures

Two recent reports released by the Government Accountability Office (GAO), which examine the effectiveness of tax credits that target poverty and unemployment in economically distressed areas, show that Congress must require better data collection to properly assess tax expenditure programs.

Congress does not often require extensive data collection on tax expenditures, and, as shown by the recent passage of the HIRE Act, a jobs bill composed mostly of business tax credits, business tax expenditures often receive zero scrutiny.

The first GAO report, released in January, examines the New Markets Tax Credit (NMTC), which investors receive when investing in qualified Community Development Entities (CDEs) that aid low-income communities. The CDEs help finance projects such as mixed-use facilities, housing developments, community facilities, and other business activities. The report found that the governing fund that distributes the tax credits does not collect enough data to allow the GAO to come to a definitive conclusion on whether the projects supported through these tax expenditures would have existed absent the credit. As GAO noted, "Projects with NMTC financing likely contribute employment and other outcomes to low-income communities," but "[l]imitations with available data make it difficult to isolate project impacts."

The second report, released in March, looks at the Empowerment Zone (EZ), Enterprise Community (EC), and Renewal Community (RC) programs. The programs, created by Congress through various pieces of legislation between 1993 and 2000, sought to reduce unemployment and generate economic growth in certain economically depressed rural and urban Census tracks. Through the three programs, these Census tracts received grants, tax incentives, or a combination of the two from various federal agencies, including the Department of Health and Human Services (HHS), the Department of Housing and Urban Development (HUD), and the United States Department of Agriculture (USDA). As the programs evolved, the government moved away from grants and toward tax incentives, which were used almost exclusively in later years.

Like the NMTC program, the EZ, EC, and RC programs do not provide enough data for the GAO to make a conclusive determination on whether the tax incentives are having the desired effect within these specific communities. Although the GAO found that "improvements in poverty, unemployment, and economic growth had occurred" in certain targeted Census tracts, data limitations made it difficult "to accurately tie the use of the credits to specific designated communities." Though the administering federal agencies have made improvements in data collection after earlier GAO reviews of the programs, a basic data collection goal – being able to follow the use of the tax incentives through Internal Revenue Service (IRS) records – remains

unaccomplished. "It is not clear how much businesses are using other EZ, EC, and RC tax incentives," the GAO report states, "because IRS forms do not associate these incentives with the programs or with specific designated communities."

A lack of data on the use and effectiveness of tax incentives is not unique to the programs above. In fact, as noted earlier, Congress often does not even require any study or follow-up to the tax credits it provides. And, although tax expenditures – which focus on encouraging a specific activity or rewarding a particular group of people through the tax code – are a form of spending, Congress rarely scrutinizes them like it does traditional federal budget outlays. This is despite the fact that, at $1.1 trillion, tax expenditures rival the size of the entire discretionary budget. The GAO, along with nongovernmental organizations, have long called on the government to, at the very minimum, periodically review the performance of tax expenditures to help ensure that taxpayer money is spent as efficiently as possible.

The data deficiency hides a more pervasive problem, one highlighted by the new HIRE Act. To many, it appears that Congress disproportionately scrutinizes the distribution of funds to lower-income communities and individuals. For instance, the public will never see a report on the HIRE Act similar to the two recent GAO reports, because Congress did not mandate one when it passed the act.

This disparity shows up in other tax expenditures for low-income groups. A quick glance at the IRS's audit rate of those who qualify for and accept the Earned Income Tax Credit (EITC), compared to audit rates of higher-earning taxpayers, is another example. In a report on the tax gap in 2008, OMB Watch found that "[EITC] audits constituted about 40 percent of all audits performed on individual tax returns in FY 2006, even though EITC errors account for only three percent of the tax gap."

As the OMB Watch report demonstrates, it is not as if one can attribute Congress' disparity in tax expenditure oversight to a reasonable expectation that a low-income community would defraud the government while the business community would not. Indeed, economists have been questioning the merits and expected effectiveness of the provisions of the HIRE Act for some time now. It is the lack of a systematic tax expenditure data collection system that would prevent one from assessing the effectiveness of the HIRE credits, or, for example, understand the relationship between the roughly $3.3 billion in oil and gas drilling tax credits the government handed out in FY 2009 and their impact on energy production.

Tax expenditures have become exceedingly popular among lawmakers, as Citizens for Tax Justice noted in a 2009 report, not because they are good policy – indeed, when put under a spotlight, tax expenditures fail on sound tax policy grounds – but because they are easy to enact, difficult to track, and almost impossible to end.

The GAO points out that Congress has plenty of lessons to heed when requiring data collection on tax expenditures. If Congress chose to utilize these recommendations, it would not be difficult to imagine a system that allows for the routine examination of all tax expenditures. However, Congress is not likely to reverse or stop a political tool that provides such benefits, and

change on this issue will not come easily. However, the gross lack of oversight of tax expenditures, which often guarantees rank budgetary and economic inefficiencies, indicates that Congress should implement systematic examinations of the tens of thousands of tax expenditures that drain much needed revenue from the government each year.

Sunshine Week 2010 Concludes with a Number of Federal Initiatives

Each year, advocates of open and accountable government celebrate the birthday of former president James Madison, a founding father and advocate of open government, by hosting a week of events and increased public advocacy called Sunshine Week. In 2009, Attorney General Eric Holder released a memo during Sunshine Week regarding Freedom of Information Act (FOIA) implementation that encouraged disclosure of agency records. This year, transparency was highlighted through public events, legislative initiatives, and op-eds.

Sunshine Legislation

Several important new legislative initiatives at the federal level marked the open government week. In the Senate, Sens. Patrick Leahy (D-VT) and John Cornyn (R-TX) reintroduced the Faster FOIA Act (S. 1111), which they first sponsored in 2005. If passed, the bill would create a congressional advisory panel to identify problems related to agency FOIA backlogs and processing delays and then recommend legislative changes to Congress, as well as advise on possible executive actions the president could take to reduce the processing time for records requests.

Another Sunshine Week bill, the Public Online Information Act (POIA) (H.R. 4858), was introduced in the House by Rep. Steve Israel (D-NY) on March 16. The bill creates a new standard in government, calling for public information to be posted online. Several transparency advocacy groups signed a joint letter calling for congressional hearings on the bill.

In addition to making most public records permanently available on the Internet, the bill would also establish an advisory board to determine best practices. However, the bill permits agencies to seek exclusions from the requirement to post public records online, should their online availability be deemed dangerous despite the records already being public under laws such as FOIA. Such exclusions would need authorization from the E-government administrator within the White House Office of Management and Budget (OMB). This is the first time the bill has been introduced.

Also in the House, a bill to reform the Federal Advisory Committee Act began to move forward. The bill to amend the act (H.R. 1320), introduced in June 2009, was expected to be considered via expedited procedures for noncontroversial bills. The bill would expand the requirement on government agencies to publicly report accounts of federal advisory committee meetings. The bill would also increase public knowledge of who the government gets advice from and the specific issues that are discussed. The legislation was pulled from the expedited track when Rep.

Darrell Issa (R-CA) objected on procedural grounds to changes that were made to the bill without bringing it under a rule. Issa has asked for a committee vote on the bill before it is taken up by the full House.

During Sunshine Week, the House also passed the Plain Writing Act of 2010 (H.R. 946) and sent it to the Senate. The legislation would require agencies to use plain language in any document issued to the public other than a regulation. This bill would reduce the overly legalistic and difficult-to-understand language that is confusing to many Americans. The bill calls for agencies to submit proposals on how they intend to train employees and ensure compliance with the act and establishes a central point person in the agencies who is responsible for implementation. The bill was introduced by Rep. Bruce Braley (D-IA) on Feb. 10, 2009, and passed with strong bipartisan support on a vote of 386 to 33.

Finally, measures in the Electronic Message Preservation Act (H.R. 1387), introduced on March 9 by Rep. Paul Hodes (D-NH), would require the preservation of certain electronic records by federal agencies. Further, the National Archives and Records Administration would be required to establish standards for the management, retrieval, and preservation of agency and presidential electronic records. This bill is aimed at addressing the problem of e-records management that has plagued the executive branch for decades. The bill passed the House by voice vote on March 17 and was received by the Senate on March 18.

Sunshine Reports

The need for new legislation concerning government openness was underscored by several reports and releases that emerged during Sunshine Week. In particular, the National Security Archive released an audit report concluding that only a third of federal agencies have made significant strides toward complying with the Obama administration's new FOIA policies. The Archive filed FOIA requests with 90 agencies requesting any records that demonstrate how the new policies are being implemented. The report noted that 38 agencies had either circulated the new FOIA guidance, launched new training efforts, or implemented concrete changes in practice. However, 35 agencies responded that they had no records about changes to their implementation of FOIA, and 17 didn't respond or withheld their records. The report also noted that several agencies had reduced their backlogs of outstanding requests, though some agencies continue to have requests as much as two decades old. So far, only four agencies, according to the report, show both increases in releases and decreases in denials under FOIA. The Archive noted that it is "too early to render a final judgment" but that "more pressure and leadership will be necessary."

Unlike previous administrations, the Obama White House addressed Sunshine Week directly in public statements. The administration disagreed with the Archive's findings of limited progress, contended that agencies have already made significant strides on FOIA, and noted that the most recent data support such a conclusion. In a post on the White House blog by administration counsel Norm Eisen, a brief memorandum by Chief of Staff Rahm Emanuel, and a statement by President Obama, officials lauded the successes of the administration such as releasing visitor logs and data reporting through Recovery.gov and Data.gov. Further, Eisen stated that "we

believe that the first-year Chief FOIA Officer Reports that are forthcoming from the agencies will show progress on FOIA..."

The Justice Department posted these FOIA officer reports on its website on March 17. The data that is publicly available from the FOIA Annual Reports shows that while full granting of FOIA requests is down, as the Archive demonstrates, the combination of both full and partial granting of FOIA requests is on par with previous years. Further, the data from the reports also show a clear drop in agency backlogs to a level consistent with the level of backlogs that existed under the Clinton administration. These data are collected on a fiscal year basis, meaning that data collection ended September 30, 2009, roughly six months after the Obama FOIA policies were announced. Given this brief timeframe, it is surprising that the data is already showing some change.

Sunshine Events

Several open government events occurred throughout the week and focused on federal transparency.

- The Freedom Forum kicked off Sunshine Week with its 12th annual National Freedom of Information Day Conference, which explored the status of freedom of information with speakers from the administration as well as Congress.
- The OpenTheGovernment.org coalition hosted its annual Sunshine Week webcast featuring three panels on embedding transparency into government, improving the ability of citizens to request information through FOIA, and using government data in innovative ways.
- The Collaboration on Government Secrecy at American University's Washington School of Law held a one-day conference covering a wide array of government transparency issues.
- The Sunlight Foundation launched a transparency campaign around the principle that public records should be posted online.

OSHA Proposal Cuts Workers' Right to Know about Chemical Risks

A recent proposal by the Occupational Safety and Health Administration (OSHA) would endanger workers by reducing the amount of information on chemical hazards provided to them, according to several public interest groups. OSHA's proposal is part of its effort to make its Hazard Communication Standard conform to a United Nations system for classifying chemicals. The effort has been criticized by several public interest groups who view portions of it as an unnecessary contraction of workers' right to know and as contrary to the rhetoric of transparency and movement toward greater disclosure seen elsewhere in the Obama administration.

Considered to be a powerful tool for informing workers about chemical risks and safety measures, the Hazard Communication Standard (HazCom) is referred to as the "Workers' Right to Know." OSHA's HazCom standard requires chemical manufacturers and importers to evaluate chemicals they produce or import and determine if they are hazardous. Manufacturers must provide information on the hazards and safety measures to "downstream" users – employers, employees, and other chemical users – through Material Safety Data Sheets (MSDS).

According to the nonprofit government watchdog, Public Employees for Environmental Responsibility (PEER), "OSHA's plan would be a reversal in the right-to-know approach to chemical handling that would also mislead workers about actual hazards."

As part of the agency's effort to conform to the United Nations standard, OSHA has proposed to eliminate a longstanding requirement that chemical manufacturers include certain information on chemical hazards in the MSDS. Specifically, OSHA wants to remove the requirement to include chemicals' Threshold Limit Values (TLVs), which are quantitative judgments of chemical exposure levels that are hazardous to humans and are developed by the American Conference of Governmental Industrial Hygienists (ACGIH), an independent, nonprofit scientific research group focusing on workplace safety issues. OSHA has also proposed removing a requirement that chemical manufacturers include in the MSDS cancer hazard evaluations by the International Agency for Research on Cancer (IARC). Critics likewise view the proposed elimination of the IARC information as detrimental to workers' right to know.

In place of the TLV requirement, OSHA would require a different set of exposure limits developed by the agency. These OSHA hazard figures, called Permissible Exposure Limits (PELs), have been criticized as being decades out of date, biased by economic rather than scientific analyses, developed with little transparency, and less protective of worker safety. Moreover, there are no PELs developed by OSHA for thousands of chemicals handled by workers.

The proposal to reduce the required information on MSDS was originally proposed by the Bush administration in 2006 with strong industry support.

According to the Center for Progressive Reform, a nonprofit think tank, the proposed HazCom changes are not necessary to conform to the U.N. standard, called the Globally Harmonized System of Classification and Labeling of Chemicals (GHS). The GHS was designed to be flexible enough to allow authorities to adapt to their own nations' needs. Moreover, the changes would not meet the requirements of the Occupational Safety and Health Act and could be challenged in court as being "arbitrary and capricious."

In testimony submitted at a public hearing on the issue, the Center for Progressive Reform determined that "the [MSDS] serve as a critical vehicle for conveying hazard information to workers. Accordingly, the protection of workers is best served by including more – not less – information in the [MSDS]."

The proposed changes to the HazCom standard would eliminate certain requirements to provide information to workers and others through the MSDS. However, the MSDS have long been regarded by many as ineffective for informing the public about the hazards of chemicals. MSDS have been criticized for containing incomplete, inaccurate, or contradictory information.

In 2004, the U.S. Chemical Safety and Hazard Investigation Board (CSB), an independent federal agency that investigates major industrial chemical accidents, found that deficient MSDS were a cause or contributing factor in 10 of 19 major accidents the board had investigated. The then-head of the CSB, Carolyn Merritt, testified before the Senate that, "Deficiencies in hazard communication and Material Safety Data Sheets are among the common causes of major chemical accidents that result in loss of life, serious injures, and damage to property and the environment."

OSHA originally planned three public hearings across the country to gather comments on its HazCom proposal. A hearing in California has been cancelled, and a hearing in Pittsburgh, PA, is scheduled for March 31.

Auto Safety Regulator under Scrutiny after Toyota Fiasco

Incidents of sudden acceleration that led to the recall of millions of Toyota vehicles have sparked a debate over whether the National Highway Traffic Safety Administration (NHTSA), the federal agency in charge of auto safety, needs enhanced powers and resources.

Lawmakers and advocates have criticized NHTSA's response to the acceleration defects in Toyotas. Since 2003, NHTSA has opened investigations into sudden acceleration in response to driver complaints but closed the cases without taking remedial action. Eventually, Toyota recalled floor mats from certain models, blaming the mats for sticking accelerator pedals, but as problems persisted, the company issued a larger recall.

The Toyota controversy has thrust auto safety onto Congress's agenda. On March 11, the House Energy and Commerce Committee's Subcommittee on Commerce, Trade, and Consumer Protection held a hearing to critique NHTSA and discuss ways to improve its performance in the future. Panel members signaled that they will consider new legislation modifying or increasing NHTSA's authority, but they did not discuss specifics.

Though it already has the authority to do so, NHTSA has not ordered a recall in more than 30 years. NHTSA Administrator David Strickland told the committee that recalls are negotiated with automakers, who conduct them voluntarily, all but eliminating the need for NHTSA to use its mandatory recall authority.

Manufacturers also conduct recalls without any input from NHTSA. Of the 492 recalls announced in 2009, 340 were conducted entirely at manufacturers' discretion, Dave McCurdy of the Alliance for Automobile Manufacturers testified. "The remaining 152 recalls were 'influenced' by NHTSA," he said.

NHTSA should be able to levy greater fines on delinquent automakers, witnesses said. The current statutorily imposed limit on civil penalties is $16.4 million. "This amount might be considered by a large, multi-billion dollar manufacturer as just the 'cost of doing business,'" Amy Gadhia of Consumers Union, publisher of *Consumer Reports*, told the committee. "We recommend removing this cap on civil penalties to act as a deterrent for future violations of the law."

NHTSA has not come close to exercising the penalty authority it has now. A $1 million fine of General Motors in 2004 was the largest in NHTSA's history. "The agency did not impose any penalties from 2004 to 2008," according to the testimony of Joan Claybrook, who served as NHTSA administrator under President Clinton.

Nor has NHTSA adequately tapped its rulemaking capabilities. According to the *Unified Agenda*, a listing of agencies' pending and recently completed regulations, the agency has issued only four major auto safety regulations in the past five years: a rule requiring greater roof strength, a rule modifying side impact standards, a rule requiring electronic stability control, and a rule requiring warning lights for under-inflated tires.

During the hearing, panel members credited NHTSA and its regulations with improving auto safety. In 2009, traffic fatalities reached their lowest level since 1954, according to NHTSA. Still, almost 34,000 people died in traffic accidents in 2009.

Claybrook and Gadhia both listed new standards NHTSA could adopt to improve auto safety. A rule mandating brake override systems, the kind that could prevent sudden accelerations such as those in Toyotas, should be on NHTSA's rulemaking agenda, they said. Secretary of Transportation Ray LaHood told lawmakers in a previous hearing that NHTSA will consider developing such a standard.

In addition to new authorities and stronger regulations, NHTSA needs corresponding increases in resources, witnesses said. President Obama's FY 2011 budget plan requests $133 million for NHTSA's vehicle safety program, a cut of more than $7 million from current levels.

Of the $133 million, $23 million would be dedicated to rulemaking, and $18 million would be directed to enforcement. According to the committee, NHTSA's Office of Defects Investigation (ODI) would receive $10 million from the enforcement pot. The office maintains 57 employees responsible for reviewing 30,000 complaints per year.

During the hearing, Strickland defended his agency's record and the FY 2011 budget request. He emphasized that the request will allow the agency to hire 66 new employees. A fraction of those employees will be assigned to ODI, but Strickland has yet to determine exactly how many.

Witnesses also criticized NHTSA's Early Warning Reporting system, a database for manufacturer reports on production and safety information. The agency does not disclose the majority of information in the database.

Claybrook and Gadhia recommended the database be made public. "As the Toyota cases make clear, even excellent letters or defect investigation petitions from consumers that cause the agency to take a look at an issue can be dismissed by NHTSA, but without the early warning information the public cannot weigh in and be effective advocates in response," Claybrook said.

Modernizing the Occupational Safety and Health Act

On March 16, a House subcommittee held a hearing on proposed legislation to modernize the Occupational Safety and Health Act (OSH Act). The House bill, the Protecting America's Workers Act (PAWA), would update civil and criminal penalties and provide enhanced protection to workers who report unsafe working conditions.

Rep. Lynn Woolsey (D-CA), chair of the Workforce Protections Subcommittee of the House Education and Labor Committee, introduced the bill in April 2009. The recent hearing focused mainly on changes to civil and criminal penalties and to modernizing worker protections. The OSH Act has not been significantly revised since it was enacted in 1970, according to Woolsey's opening statement.

In addition to revising penalties, PAWA would extend occupational safety and health protections to state and local workers. The bill would also strengthen whistleblower protections by prohibiting retaliation against workers who report workplace hazards, illnesses, and injuries, or who refuse to work under conditions the worker believes could result in serious injury or illness.

Among those testifying at the hearing was the Assistant Secretary of Labor for the Occupational Safety and Health Administration (OSHA), Dr. David Michaels, who told the subcommittee that the Obama administration "strongly supports" PAWA. He noted that, although workplace injuries and illnesses have declined by 65 percent since 1973 as a partial result of the OSH Act, "the workplaces of 2010 are not those of 1970: the law must change as our workplaces have changed. The vast majority of America's environmental and public health laws have undergone significant transformations since they were enacted in the 1960s and 70s, while the OSH Act has seen only minor amendments."

Michaels emphasized that OSHA has a limited ability to inspect the many workplaces throughout the country and, therefore, the agency needs to have penalties large enough to create incentives for companies to comply with OSHA regulations. According to his written testimony, "Swift, certain and meaningful penalties provide an important incentive to 'do the right thing.' However, OSHA's current penalties are not large enough to provide adequate incentives. Currently, serious violations – those that pose a substantial probability of death or serious physical harm to workers – are subject to a maximum civil penalty of only $7,000. Let me emphasize that – a violation that causes a 'substantial probability of death – or serious physical harm' brings a maximum penalty of only $7,000. Willful and repeated violations carry a maximum penalty of only $70,000 and willful violations a minimum of $5,000." The average OSHA penalty is approximately $1,000, he told the subcommittee.

Woolsey's bill would increase the penalty for willful and repeated civil violations, for example, from $70,000 to $120,000; it would increase the maximum civil penalty from $7,000 to $12,000. The bill adds an additional penalty for violations that result in the death of an employee by allowing OSHA to fine the violator $50,000 to $250,000. The bill would also allow OSHA's penalties to be adjusted according to inflation. Michaels noted that penalties for violations "have been increased only **once** in 40 years despite inflation during that period." He added that penalties under the Clean Air Act could be 50 times higher than what OSHA could impose for the same incident.

OSHA's criminal penalties have not been updated in the history of the OSH Act and "are weaker than virtually every other safety and health and environmental law," according to Michaels' testimony. "The maximum period of incarceration upon conviction for a violation that costs a worker's life is six months in jail, making these crimes a misdemeanor," he noted. In Woolsey's opening comments, she said that the Justice Department told the subcommittee that Justice rarely prosecutes these criminal misdemeanors because the violations aren't felonies.

Support for increasing OSHA's civil penalties came from another witness, John C. Cruden, Deputy Assistant Attorney General in the Environment and Natural Resources Division of the Justice Department. Cruden supervises attorneys prosecuting environmental crime cases in which violations have resulted in death or in which defendants knowingly put workers at risk of death or injury. He told the subcommittee that the successful prosecution of environmental crimes has rested on stiff criminal penalties in environmental statutes, not the criminal provisions in the OSH Act. He said, "[T]he Department of Justice supports the strengthening of the OSH Act's criminal penalties to make those penalties more consistent with other criminal statutes and further the goal of improving worker safety."

Eric Frumin, health and safety coordinator for Change to Win, a coalition of five major labor unions, also supported increased penalty authority for OSHA. Although the agency can only impose small fines, he criticized OSHA for its lax enforcement. Frumin cited the small number of inspections OSHA conducts compared to a growing workforce, weak enforcement programs, and the low fines levied against violators. In FY 2007, for example, the final median penalty (after negotiation and settlement) for workplace fatalities was $3,675.

Although supportive of the PAWA's proposed increased penalties, Frumin noted, "The penalties proposed by PAWA are *very* modest. The new criminal sanctions are equally modest. Even with these improvements, we all recognize that if passed, PAWA will not put the OSH Act on an even par with the sanctions that negligent employers have already faced for years under our environmental laws."

The final witness at the hearing was a representative of the U.S. Chamber of Commerce, an association of business groups. Jonathan Snare is a partner in the Washington, DC, office of the Morgan Lewis & Bockius law firm and a former head of OSHA and the Department of Labor's Solicitor's Office during the Bush administration. Snare argued that PAWA was misguided by focusing on penalties, sanctions imposed after injuries and illnesses occur. OSHA has "sufficient

penalties and enforcement tools" and should instead focus on compliance assistance programs and working with companies to ensure illnesses and injuries are avoided.

A companion bill (S. 1580) with the same title was introduced in the Senate by the late Sen. Edward Kennedy (D-MA) in August 2009 and has been referred to the Committee on Health, Education, Labor, and Pensions.

Commentary: A Call for Change on Legal Services Corporation Funding Restrictions

For the past 14 years, the Legal Services Corporation (LSC), which funds legal services for the poor, has been forced by Congress to place severe restrictions on legal aid programs that receive LSC funds. These restrictions also extend to non-federal funds raised by legal services programs. Since their passage, the restrictions have been plagued by repeated First Amendment questions and have sparked calls for change.

Background on the LSC Funding Restrictions

The LSC Act specifically prohibits organizations receiving LSC funding from using LSC or private funds to engage in: political activities; most criminal cases; "challenging criminal convictions against officers of the court or law enforcement officers; organizing activities, including training for – or encouraging of – political or labor activities"; litigation to receive "non-therapeutic abortions" or "compel the provision of abortion services over religious or moral objections"; and "proceedings involving desegregation of public schools, military service or assisted suicide."

In 1996, Congress expanded the LSC restrictions to apply to funds from all sources, including federal, state, local, and private funds, with the exception of tribal funds. It also prohibited additional activities, including: class actions; all abortion-related litigation; representing prisoners; representing people who are being evicted from public housing for allegedly distributing illegal drugs; redistricting activities; lobbying governmental bodies, with limited exceptions; and representing non-U.S. citizens, with limited exceptions.

Current LSC rules also require legal aid programs that wish to lobby, spend private dollars on class action lawsuits, comment on proposed regulations, or represent certain types of clients, such as prisoners or certain immigrants, to set up physically separate offices with separate staff.

A Brief History of Judicial Efforts to Remove LSC Funding Restrictions

The first legal challenge to these restrictions was brought by the Legal Aid Society of Hawaii (*LASH v. LSC*) and several other LSC-funded programs in 1997. LSC then revised its regulations in May 1998 to set up conditions under which private funds could theoretically be used for advocacy. Known as the "program integrity regulation," the rule requires physical separation

between LSC-funded recipients and any organizations that engage in restricted activities. (45 C.F.R. 1610)

After this change, the U.S. Court of Appeals for the Ninth Circuit found that the new rule was not a violation of the First Amendment protection of free speech. LASH and the other plaintiffs filed a petition asking the U.S. Supreme Court to review the case, but that petition was denied. Since 1998, a legal services program that wants to engage in restricted advocacy must set up a separate organization, with separate physical facilities and separate executive directors, staff, and budgets.

The next legal challenge to the LSC restrictions addressed a rule barring lawyers from using federal funding to challenge welfare reform laws in the course of representing clients seeking welfare benefits. *Legal Services Corporation v. Velazquez* was filed in the U.S. District Court for the Eastern District of New York in 1997 on behalf of legal aid lawyers, clients, and funders. In February 2001, the U.S. Supreme Court struck this provision down as an unconstitutional restriction of free speech.

In 2001, a coalition of lawyers, low-income clients, and New York City officeholders filed *Dobbins v. Legal Services Corporation*, arguing that it is unconstitutional for the government to regulate the privately funded activities of legal services programs.

In December 2004, the U.S. District Court for the Eastern District of New York struck down application of the rule imposing the restrictions on private funding. The court also issued a preliminary injunction against the physical separation requirement. The court ruled that the LSC violated the plaintiffs' First Amendment rights by requiring too great a degree of physical separation between federally funded approved activities and privately funded restricted activities.

The government had argued that shared facilities and staff create public confusion about what is LSC-funded activity and what is not. The court said the government's concerns can be met by having legally separate programs with strict accounting for shared facilities and staff to ensure LSC funds are not spent on restricted activities and having separate public areas for LSC and privately funded activities.

After an appeal by the government, the U.S. Court of Appeals for the Second Circuit held in December 2006 that the district court had used the wrong legal standard and lifted the preliminary injunction.

In 2007, the Supreme Court declined a request to review the *Dobbins* case, returning the case to the District Court for application of the new legal standard described by the Court of Appeals. Under the rule, the only way for a legal aid office to use non-federal dollars on certain work, such as representing clients in class action lawsuits or providing assistance to certain categories of legal immigrants, would be to establish a physically separate facility with separate staff.

Recent Legislative Efforts to Lift LSC Funding Restrictions

Legislative efforts to overturn the LSC funding restrictions have increased in the past year. In March 2009, Sen. Tom Harkin (D-IA) introduced the Civil Access to Justice Act of 2009 (S. 718) that ends the restrictions on the use of non-federal funds by LSC grantees, except those related to abortion litigation and a few other activities. "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.

Public sentiment also appears to be on the side of providing legal access to those in need. Since the Reagan administration, conservatives have sounded a drumbeat of opposition directed at the LSC. The Reagan budgets annually proposed elimination of legal services, only to have those services protected by Congress. Over the years, LSC funding has limped along. However, with the recent economic downturn, there has been a noticeable uptick in support for legal services. According to the Associated Press, two-thirds of those polled in 2009 on behalf of the American Bar Association said they favor federal funding for people who need legal assistance. Notably, Congress increased funding for the LSC in the last appropriations cycle.

A *Washington Post* editorial in March 2009 added to the calls for change, asking lawmakers to "unshackle Legal Services from congressionally-imposed restrictions that have kept it from working more efficiently and broadly." The editorial also called for support of the Harkin bill.

Also in 2009, a number of organizations signed a joint letter that draws upon the current economic crisis to highlight the need to remove the funding restrictions. According to the letter, "Families and communities across the country are suffering because of the restrictions" and "those most knowledgeable about issues critical to low-income clients cannot engage themselves in legislative and administrative reform efforts." The letter made clear that restrictions that may seem like technicalities to some have direct, real-world impacts on the most vulnerable Americans.

Despite public support and recent legislative efforts on the issue, most of the restrictions on LSC-funded grantees remain. Though most of these restrictions were lifted by the Senate version of the FY 2010 Commerce, Justice, and Science (CJS) appropriations bill, that language was stripped out by the conference committee that handled the FY 2010 omnibus appropriations bill, of which the CJS appropriations were a part. The only restriction that Congress ultimately lifted during the FY 2010 appropriations process was that covering the award of attorneys' fees.

The Need for Legislative Support of the Civil Access to Justice Act of 2009

At this critical time in our nation, legislative support for the Civil Access to Justice Act of 2009 is crucial. The harsh economic times and the foreclosure crisis that we are currently experiencing make it more necessary than ever to provide low-income individuals with access to legal aid

services and skilled advocates. The current, unduly burdensome LSC restrictions only serve to limit access to the legal system to those who need it most.

The Civil Access to Justice Act would change all that by addressing the most problematic restrictions on LSC grantees: those that prevent the use of non-federal funds to advocate on behalf of the neediest of our communities. The Act would lift most of the restrictions listed above except those related to abortion, prisoners challenging prison conditions, and people convicted of illegal drug possession in public housing eviction proceedings.

The act also "increases the yearly LSC authorization to $750 million, which matches the amount (adjusted for inflation) appropriated in 1981, the high-water mark for LSC funding. LSC's current $390 million appropriation is well below the amount needed to adequately fund the program," according to a press release from Rep. Bobby Scott (D-VA), who introduced the House version of the bill in October 2009.

The Civil Access to Justice Act would expand access to justice to low-income populations by lifting those restrictions and helping to ensure that federally funded legal services providers are able to assist their clients in the most effective way possible. The battle over LSC restrictions has been going on for far too long. It is time to pass and implement the Civil Justice Act of 2009 and end LSC restrictions on the use of non-federal funds for advocacy.

National Broadband Plan Seeks to Increase Civic Engagement

On March 16, the Federal Communications Commission (FCC) released its 376-page National Broadband Plan, setting forth a strategy to expand access to broadband Internet services to millions of people. Chapter 15 of the broadband plan is specifically intended to make it easier for Americans to actively participate in civil society and hold their government accountable.

According to experts, broadband services for all Americans is “the” infrastructure challenge of the 21st century. Like the highway systems created more than 80 years ago, broadband is the next way to stimulate the economy, create jobs, and increase quality of life for the majority of citizens, advocates say.

More specifically, the Internet is an extremely valuable tool for individuals and groups to engage in advocacy, and ultimately, increased online access will strengthen the level of citizen participation in our democracy. High-speed access to the Internet enables more citizens to gain a magnitude of information, from the skills to use the information effectively to opportunities to engage with others in their community to solve problems. People can find information about government performance, services the government provides, and in some cases can even register to vote online.

In 2009, as part of the American Recovery and Reinvestment Act, Congress directed the FCC to develop a National Broadband Plan to ensure that every American has "access to broadband capability." The broadband plan recommendations include faster Internet speeds (up to 25

times the current average), freeing airwaves for mobile broadband services, and putting billions of dollars into subsidized service for poor and rural communities. The plan is rather broad and includes increased public education programs to narrow the digital divide, ways to improve energy efficiency and health care, and plans to integrate broadband to improve economic conditions.

Notably, the FCC sees the connection between Internet access as a vehicle for meaningful engagement with government officials and the many other opportunities it provides to improve Americans' civic participation. The introduction to the chapter on civic engagement states, "Civic engagement is the lifeblood of any democracy and the bedrock of its legitimacy. Broadband holds the potential to strengthen our democracy by dramatically increasing the public's access to information and by providing new tools for Americans to engage with this information, their government and one another."

Civic Engagement Recommendations

There are five recommendations within the civic engagement chapter:

1. Create an open and transparent government
2. Improve access to media and journalism, including increased funding to public media for broadband
3. Use social media to increase civic engagement
4. Increase innovation in government
5. Modernize the democratic process through such means as online voter registration.

Good government advocates say these recommendations are commendable because the availability of government data will allow the public and advocacy organizations to more easily and actively participate in their communities and our democracy. The Internet has already become one of the primary sources for learning about and communicating with the government and elected representatives in Congress.

In calling for a more open and transparent government, the FCC recommends that all public information, such as those responses given under the Freedom of Information Act, as well as all legal documents, should be available for free online in searchable formats, as well as machine-readable formats. The plan also calls on government to improve the quality and accuracy of information given to the public, and it urges government to embrace new ways of inviting public participation and collaboration, including broadcasting all town hall meetings.

The plan recognizes social media as a growing opportunity to engage with the government and others, with social networking sites and the user-generated videos on YouTube as just two examples. The FCC's plan states, "Government must take advantage of these trends and adopt broadband-enabled tools to encourage citizens to communicate with government officials more often and in richer ways – and to hold these officials more accountable."

For example, a short YouTube video details some interesting statistics on social media and how it is shaping our society. It also compares other forms of media to demonstrate just how fast the social media sphere is growing. Consider that radio took 38 years to reach 50 million users, TV took 13 years to reach 50 million users, the Internet took four years to reach 50 million users, and Facebook added 100 million users in just nine months.

The broadband plan also recommends modernizing the election process. One of the simplest ways to be active in our democracy is through the ballot box. Nonprofit organizations have traditionally been active in ensuring the protection of Americans' voting rights. If the system was improved, it might alleviate some of the burden these groups currently shoulder.

The FCC report states, "By bringing the elections process into the digital age, government can increase efficiency, promote greater civic participation and extend the ability to vote to more Americans." The FCC questions a paper-based system for voter registration and recommends modernizing the election process with electronic voter registration, portability of voting records, and automatic updates of voter files with the most current address information available. The agency also suggests that the Department of Defense develop a secure Internet-based project that allows members of the military serving overseas to vote online.

It is not clear when the broadband plan's civic engagement recommendations will be addressed, but the FCC is scheduled to hold its next open meeting on April 22. Many of the recommendations will require action from the FCC, the communications industry, Congress, and other outside stakeholders.

The Need for Greater Broadband Access

Vigorous advocacy on the issue of broadband access and the FCC's plan has already begun. For example, the Center for Media Justice (CMJ) and the Media Action Grassroots Network (MAG-Net) have launched a campaign that includes calling for universal broadband access.

Organizations have issued statements in support of the FCC's broadband plan, but many also have critical questions that need to be answered. The American Library Association (ALA), for instance, "applauds the plan's focus on a more open and transparent government. The use of the Internet to provide government information and services certainly enhances access to the government – for those who have ready Internet access from their homes or workplaces." However, the ALA notes a very important issue: "Access to government information and services is not as enhanced for those Americans without ready Internet access, especially for vulnerable populations. Many of these people come to libraries for broadband access and librarian assistance to enable them to obtain what they need from the government."

From raising awareness about important local issues to gathering people for community events, inexpensive and easy web tools are helpful ways to organize in communities. However, those without access do not benefit and are ultimately left out of the conversation. A survey by the Census Bureau for the National Telecommunications and Information Administration recently found that minorities, seniors, the less-educated, the unemployed, and low-income households

are still much less likely to have broadband service in their homes. Universal broadband access would help to level the playing field for these communities.

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The Watcher

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In This Issue

Administration Initiative to Eliminate Improper Payments Starts to Come into Focus

On March 22, the Office of Management and Budget (OMB) released new guidance for implementing President Obama's recent Executive Order 13520, which instructs the federal government to reduce improper payments to individuals and businesses. The initiative attempts to use transparency, public participation, and executive branch accountability to reduce "payment errors" and eliminate "waste, fraud, and abuse" in major federal programs. The guidance, however, is incomplete, and OMB will have to work to fill out the program's details.

An improper payment can consist of any funds wrongly disbursed by the federal government to an individual or business as a program beneficiary, grantee, or contractor. The government improperly distributes billions of dollars every year – it improperly expended nearly $100 billion in Fiscal Year 2009, according to the recently released guidance – for reasons ranging from a basic data entry mistake to a failure to verify a beneficiary's qualification for funds. The

administration's initiative, which builds upon reforms made in 2002, targets "high-priority" programs, or those that repeatedly report improper payments above a certain percentile threshold. The guidance, however, fails to specify that threshold.

The Improper Payments Information Act of 2002 (H.R. 4878), along with the Recovery Auditing Act passed the same year, requires federal agencies to account for the root causes of error in programs susceptible to "significant improper payments" in their annual performance reports to OMB. The Obama administration's program goes further by requiring all federal agencies with a "high-priority" program to set a goal to reduce improper payments to an acceptable percentage of disbursements or total disbursed funds and publically report on that goal semi-annually. Each agency is also to designate a Senate-confirmed official who will answer for the agency if it fails to meet its goal.

The Nov. 22, 2009, executive order lays out several new public disclosure requirements, greatly enhancing accountability in federal payments to private entities. By May 20, OMB, acting in conjunction with the Treasury and Justice departments, is required to begin publishing certain information online, including the names of the designated agency officials, the current and historical amounts of improper payments, their proportion to total agency payments, and the successful recovery rates and amounts of those payments. OMB will also have to publish the causes of the improper payments, each agency's targets for reducing and recovering improper payments, and the entities that have received the greatest amount of outstanding improper payments.

Along with this catalog of information on the administration's initiative, the head of each agency will have to make public a report submitted to the agency's inspector general each quarter on any improper "high-dollar" disbursements. The guidance unfortunately fails to specify what constitutes a "high-dollar" disbursement, but the report will include any actions the agency has taken or plans to take to recover the funds, as well as what steps the agency will take in the future to prevent a similar occurrence. To further engage the public, OMB, again acting in conjunction with the Treasury and Justice departments, is required by the end of May to establish a central Internet database for collecting and sorting public tips on the suspected fraud, waste, or abuse of government-disbursed funds. Each agency will have to provide a clearly marked link on its homepage for the public to access this database.

With project due dates still a few months away, it is hard to tell whether OMB will be ready to implement the requirements in time. Indeed, the new guidance released in March is more of a skeletal structure for the implementation of E.O. 13520, with many details left to flesh out before the executive order’s full transparency measures can be put into place.

Treasury's Rush to Sell Citigroup Shares Could Cost Taxpayers

On March 29, the Treasury Department announced that it would begin selling the 7.7 billion Citigroup shares it owns, which represent the government's 27 percent stake in the company. The move is the most significant step Treasury has taken so far in the long process of winding

down the Troubled Asset Relief Program (TARP). Since selling the stock will generate more than $30 billion, a profit of at least $7 billion, many news reports are claiming it proves the bailout was a "great business" for the government. However, Treasury's sale may be in conflict with one of TARP's statutory goals: maximizing taxpayer returns.

In a *Watcher* article published in January, OMB Watch detailed how the TARP legislation imposes two imperatives on Treasury: 1) maximize the return on taxpayer money and 2) ensure economic stability. According to TARP's authorizing law, Treasury must take both goals into account in deciding when to sell assets acquired through the bank bailout program. However, Treasury's actions do not necessarily mean that it is following both of these guidelines.

A look at Citigroup's current and historical market valuations calls into question the government's seriousness about maximizing return on the taxpayers' investment. When Treasury announced it would sell its Citigroup shares, the stock price was about $4 per share. Three years ago, at $50 per share, it was more than ten times as high as it is today, a price that would give the government about a $325 billion profit if the stock were to return to its record high price. To put that in perspective, it would be about three times the projected ultimate cost of TARP. Citigroup's stock price has not been this low since the beginning of 1993. Given the substantial drop in Citigroup's share price, it would appear that the firm's stock is greatly depressed and may increase significantly with time. Alternatively, the top share price occurred when Citigroup was earning massive profits on the peak of the housing bubble, giving weight to the argument that the bank's share prices will not reach that level for years, if ever again.

Additionally, while Treasury hasn't announced when it will start selling the stock, the process will take at least the rest of the year. During that time, the current price ($4.18 per share as of March 29) could fall below the "break-even" price of $3.25 a share. In the last three months alone, the price has fallen as low as $3.15, well below the break-even price. So while the stock price may be above $4 per share today, even a relatively small price slump could jeopardize the sale's profit margin. Unless Treasury chooses to stop the stock sale in such a situation, it could even result in taxpayers losing money on the sale.

But another factor appears to be at work: politics. The Obama administration has indicated its discomfort with maintaining a presence in the private sector, and it wants out as soon as possible. Treasury Secretary Timothy Geithner gave voice to this concern during an interview with CNBC on April 5, saying, "We don't want to be in the business of owning a share in a private company a day longer than necessary." Additionally, Treasury's announcement of the share sale came only two weeks after March 16, the earliest date Treasury could sell the stock in 2010.

President Obama also has expressed misgivings about direct ownership of corporations by the federal government, underscoring the haste to divest the government of such arrangements. But while the merits of government ownership of equity in private firms are debatable, the TARP legislation excludes these arguments as an acceptable reason for Treasury to exit the financial sector.

The bailout as a whole, and the Citigroup support specifically, are perceived as unpopular. Indeed, President Obama said that the bailout was as "popular as a root canal" during his 2010 State of the Union address. From the administration's perspective, the sooner the bailout ends, and the sooner it no longer has an ownership stake in a large bank, the better. These concerns, the attitude within in the administration to dump all ownership of American corporations, and the intention to sell at a relatively low price, suggest that Treasury is primarily interested in untangling itself from Citigroup, rather than strictly adhering to TARP's twin goals.

Treasury has not publicly stated whether it would stop selling Citigroup stock if the price falls significantly, but *BusinessWeek* quoted one bank analyst as saying, "If we get to the summer and the stock is down at $3, I think the government will continue to sell as long as the market absorbs it. The government just does not want to own the equity of these companies." If this prediction is true, the government's political unwillingness may end up costing the taxpayer over the coming year, as it leaves the potential for hundreds of billions of dollars of profit on the table.

Open Government Day Arrives April 7

Several key requirements of the Open Government Directive are due on April 7, turning the day into a critical moment for government transparency. The main materials being released are specialized Open Government Plans that federal agencies are mandated to produce based on stakeholder input. There will also be a document to address federal spending transparency, as well as a review of policies that impede open government efforts.

The plans will state the individual agency's strategy for improving transparency, public participation, and collaboration. Meanwhile, open government groups are gearing up to evaluate the strategies. Expectations are that the plans will be quite substantive, both in scope of issues addressed and goals being set, at least for the major agencies. At the same time, it is also widely expected that there will be wide variations in the plans, with some being in an advanced state of implementation and others in very early stages. Numerous independent agencies are also developing Open Government Plans, though their obligation to do so under the directive is unclear.

Agencies across the federal government have been collecting input and ideas from the public for weeks through online discussions on their newly launched open government webpages, also required under the directive. The process has elicited hundreds of ideas from the public, with thousands of votes to help agencies prioritize the proposals. Many agencies have described their online discussions around open government as huge successes and announced intentions to keep the dialogue going beyond the launch of the agencies' plans on April 7.

Chief Information Officer Vivek Kundra recently elaborated on the additional content of the upcoming plans during a Senate hearing on government secrecy. In his testimony, Kundra stated that the plans would include details of "internal controls implemented over information quality, including system and process changes, and the integration of these controls within the

agency's existing infrastructure." Although the spirit of the directive is to make information useful to the public widely accessible, Kundra noted that information controls would also need to exist to protect personally identifiable and security-related information.

Open government organizations are poised to assess the plans as soon as they come out. Working together under the OpenTheGovernment.org coalition, these organizations are auditing individual agency plans based on preset criteria through a Google Wiki. The criteria for this initial assessment are basic and based on the Open Government Directive requirements, but also allow for additional points to be awarded for agencies that go above and beyond the call of duty.

The Office of Information and Regulatory Affairs (OIRA) will also produce materials from a review regarding policy impediments to open government. The Open Government Directive required that OIRA, along with the Federal Chief Information Officer and Federal Chief Technology Officer, review existing policies of the Office of Management and Budget (OMB). The overall purpose of this process is to create an improved policy framework that enables open government. The OIRA policy materials are expected to identify impediments to open government and either propose revisions to eliminate the impediments or clarify interpretation to reduce confusion.

Open government advocates have been calling for policy changes in several areas that would increase government transparency. Many of these recommendations are included in a November 2008 report, *Moving Toward a 21st Century Right-to-Know Agenda*. Such problems include the lack of resources and accountability for implementation.

Additionally, OMB's Deputy Director for Management is required to release a long-term comprehensive strategy for federal spending transparency that includes requirements from the Federal Funding Accountability Transparency Act (FFATA) and the American Recovery and Reinvestment Act. The plan will require quarterly reports from agencies on their progress toward improving the quality of federal spending information.

Finally, the Open Government Dashboard on the White House website is also expected to be updated in the near future to include access to all agency Open Government Plans. Currently, the dashboard is only an assessment of whether an agency has completed a task required under the Open Government Directive, and that is likely to remain the case in this update. Ultimately, however, this dashboard is expected to be revised to include aggregate statistics and visualizations that provide an assessment of the state of openness within the federal government.

EPA's New HERO Defends the Public's Right to Know

The U.S. Environmental Protection Agency (EPA) recently launched a new online database that provides access to the scientific studies used in making key regulatory decisions. The EPA released the Health and Environmental Research Online (HERO) database on March 24.

According to the agency, this action "is part of the [Obama administration's] open government directive to conduct business with transparency, participation, and collaboration."

In a press statement, EPA Administrator Lisa Jackson asserted, "The HERO database strengthens our science and our transparency – two pillars of our work at EPA ... Americans have a right to know the background of decisions that affect their lives and livelihoods. We're taking a big step forward in opening government to the people."

The HERO database, containing more than 300,000 scientific articles, is free, searchable, and open to the public. The database is intended to open the doors on the science EPA uses to create regulations impacting environmental and public health. HERO includes information on the key studies EPA uses to develop environmental risk assessments. EPA uses risk assessments to characterize the nature and magnitude of health risks to humans and the ecosystem from pollutants and chemicals in the environment.

By improving access to this research, the agency is helping the public to analyze and understand the same information being used by agency scientists. New studies will be regularly added to the database, and the agency is accepting suggestions from the public on additional scientific studies that should be included.

Searches in the HERO database may be conducted using keywords or by searching by author or publication title, among other parameters. Users may also narrow their searches to particular topics, such as environmental effects and health effects, or by particular substances such as mercury or asbestos. Each document in the database is assigned a HERO identification number with which users may search as well. Overall, the website appears to provide a comprehensive method for the public to sort through the thousands of scientific research documents used by EPA personnel.

A search conducted in the HERO database provides the title, authors, date, abstract, and other information about a scientific article. Where available, there is a link to the journal or publisher's website for access to the article itself. Not all publishers provide free access to entire articles, so some users may encounter an economic barrier to accessing the information. The HERO database is currently limited, typically, to abstracts, without the ability to see full articles or raw data that would allow users to analyze article content. However, this summer, the agency plans to expand the analytic capacity of the system by adding a feature highlighting objective, quantitative data extracted from high-profile studies.

According to the director of EPA's National Center for Environmental Assessment, John Vandenberg, the database is already heavily used in-house by agency staff as they assess the potential ecological and public health threats of numerous substances. Although the majority of the HERO documents are highly technical research articles that would be most valuable to trained scientists, there is abundant information useful for non-scientists, as well. One search provided links to several informational EPA web pages, a link to the Environmental Working Group's 2009 sunscreen guide, and numerous science articles from publications for a general audience.

The EPA's poor use of scientific data was heavily criticized during the George W. Bush administration. Numerous instances of political manipulation and suppression of science eroded public confidence in the integrity of the agency's actions. The Bush administration was also criticized for closing several publicly accessible EPA libraries and failing to account for many of the documents that were removed. The scientific articles in HERO are the same types of documents that generally have been available in EPA libraries around the country.

The new online HERO database is a strong step toward rebuilding collaboration with the public, ensuring the agency acts in a scientifically sound manner, and continuing EPA's momentum on transparency and science. Several additional steps by the Obama administration would take EPA – and other agencies – even further down the road toward improved scientific integrity.

For example, following through on President Obama's memo calling for recommendations to guarantee scientific integrity and establishing a written policy on how agency scientists may communicate with the media, the public, and other scientists would greatly strengthen the free exchange of scientific ideas.

The EPA plans to broaden both the features and scope of information included in HERO. According to the HERO website, agency scientists will link all scientific references used in their assessments to the HERO database. Future improvements could include additional data sets, environmental models, and services that connect data and models. The agency is seeking input from the public on ideas for improving HERO.

EPA to Limit Mountaintop Mining

The U.S. Environmental Protection Agency (EPA) announced new guidance April 1 that should limit the impacts of mountaintop coal mining in Appalachia. The agency issued the guidance to clarify EPA's expectations regarding legal and scientific interpretations when issuing permits for the destructive surface mining practice.

The practice of mountaintop mining involves blasting off the tops of mountains to access coal seams hidden below. The debris from blasting is pushed down the mountainsides into the valleys below. This "valley fill" not only covers miles of streams but also damages rivers, water sources, and aquatic life downstream when the fill leaches pollutants.

A summary of EPA's guidance describes the damage from this practice: "Since 1992, nearly 2,000 miles of Appalachian streams have been filled at a rate of 120 miles per year by surface mining practices. A recent EPA study found that nine out of every 10 streams downstream of surface mining operations exhibit significant impacts to aquatic life." Health impacts result from highly toxic pollutants such as selenium leaching into downstream water sources.

One of the "midnight regulations" completed by the George W. Bush administration made it legal for mining companies to dump this fill. The rule became effective on Jan. 11, 2009, just days before Barack Obama was inaugurated. The Obama administration has struggled with how

to approach overturning or revising the rule. The agency conducted reviews of the permitting process and the scientific impacts of the mining practice before announcing the new policy.

EPA had been under pressure from environmentalists, coal companies, and even Sen. Robert Byrd (D-WV), who had met with EPA Administrator Lisa Jackson several times, to provide clarity on the permitting process. Byrd's office released a press statement April 1 saying, "I am pleased that EPA Administrator Jackson took our concerns about the need to provide clarity very seriously and has responded with these guidelines."

In announcing the new guidance, Jackson noted the extensive scientific study and review the agency had conducted. She said that the agency would also begin focusing on the "emerging evidence of the potential health impacts" of mountaintop mining. "Let me be clear: this is not about ending coal mining. This is about ending coal mining pollution. Coal communities should not have to sacrifice their environment, or their health, or their economic future to mountaintop mining. They deserve the full protection of our Clean Water laws," Jackson said.

The policy change comes on the heels of an announcement March 26 that EPA was proposing to significantly reduce or stop mining at the Spruce No. 1 surface mine in Logan County, WV, one of the largest surface mining operations ever proposed, according to EPA's press release. The mining proposal "would bury over 7 miles of headwater streams, directly impact 2,278 acres of forestland and degrade water quality in streams adjacent to the mine," EPA said. Spruce mine received a permit in 2007, but the permit was challenged in court, thus delaying any mining. EPA and the mine's owners could not reach an agreement that would have significantly mitigated the environmental impacts of the mine.

The new guidance applies to all pending and new mountaintop mining permit requests and to permit renewals. The policy was sent to EPA's regional administrators in regions 3, 4, and 5, covering Appalachian states from Pennsylvania south to Georgia, Alabama, and Mississippi. Under the Clean Water Act (CWA), states have the responsibility for issuing permits to discharge pollutants into waterways. The guidance is intended to provide the regional and state offices with a framework for evaluating individual permit applications consistently and in keeping with the requirements of the CWA, the National Environmental Policy Act, and the Environmental Justice Executive Order (E.O. 12898).

The guidance contains the latest scientific information important to determining compliance with the CWA, clarifies how the law applies to mountaintop mining and its debris to achieve water quality protection, and enhances opportunities for members of coal mining communities affected by potential mining activity to participate in reviewing proposed new actions.

The policy also calls for a greater emphasis on numerical standards to measure the electrical conductivity of streams, the first time EPA has used a conductivity standard. By measuring electrical conductivity, regulators can determine the extent of pollutants in water. Specifically, the conductivity measure is the amount of salt in the water which results from mine debris and runoff, essentially turning fresh water into salt water and damaging aquatic life.

Reaction to the new guidance by environmental groups was laudatory. Earthjustice, one of the environmental groups that sued on behalf of Appalachian conservation groups to overturn the Bush midnight regulation, issued a statement quoting its president Trip Van Noppen, saying, "We commend Administrator Jackson and the EPA for recognizing that the people of coal communities deserve the full protection of our clean water laws, and we're glad to see that EPA is back on the job."

Rob Perks of the Natural Resources Defense Council said, "At long last, the EPA is committing to protecting Appalachian communities from the world's worst coal mining. Today's action to protect waterways from the impacts of mountaintop removal is restoring science to its rightful place and reinforcing the agency's commitment to the Clean Water Act.... For every ton of coal extracted, another 20-25 tons of mining waste is disposed of in so-called valley fills. Strict enforcement of scientific requirements in the Clean Water Act is a much-needed step in the right direction."

Bruce Watzman of the National Mining Association expressed the displeasure of mining companies, saying, "America's coal mining communities are deeply concerned by the impact of policy announced today by EPA on coal mining permits, employment and economic activity throughout Appalachia.... The policy was announced without the required transparency and opportunity for public comment that is afforded to policies of this magnitude."

EPA will take public comment on the guidance, which is effective on an interim basis pending completion of the comment process. According to EPA's press release, the agency will consider revising the guidance after the comment process and after the agency's Science Advisory Board completes its review of EPA's scientific studies.

New Vehicle Standards Take Aim at Climate-Altering Emissions

The Obama administration recently announced new standards that will improve fuel efficiency in new vehicles starting in 2012. The standards mark the first time in U.S. history that the federal government has crafted regulations aimed specifically at reducing greenhouse gas emissions and stemming the impact of global climate change.

In a joint rulemaking unveiled April 1, the U.S. Environmental Protection Agency (EPA) and the Department of Transportation (DOT) established standards that will apply to vehicles in model years 2012 through 2016.

EPA's portion of the regulation will limit greenhouse gas emissions from tailpipes. By model year 2016, the average car will emit no more than 250 grams of carbon dioxide per mile. The standards will reduce emissions by 960 million metric tons, "equivalent to taking 50 million cars and light trucks off the road in 2030," according to EPA's press release.

DOT's National Highway Traffic Safety Administration (NHTSA) will update its Corporate Average Fuel Economy (CAFE) standards to comport with EPA's emissions limits. The average

model year 2012 vehicle will be required to achieve a fuel efficiency rate of 29.7 mpg (miles per gallon). The standard ratchets up the fuel efficiency level each year through 2016, when the average vehicle will need to reach 34.1 mpg.

The standards are the culmination of a compromise President Obama brokered shortly after assuming office. In May 2009, the Obama administration agreed to model regulations after a California vehicle emissions program supported by environmentalists and adopted by 13 other states and the District of Columbia. These standards had never been implemented because the Bush administration did not grant the required waiver under the Clean Air Act that California needed in order to act. Automakers signed on to the plan, preferring the standards be set at the federal level, instead of at the state level, to achieve a uniform national standard.

On March 31, the president announced that the federal government will double the size of its fleet of hybrid vehicles, according to BNA (subscription required). According to the administration, a car manufactured in 2016 could save consumers $3,000 over the life of the vehicle. The administration estimates the standards will conserve 1.8 billion barrels of oil. "This is a significant step towards cleaner air and energy efficiency, and an important example of how our economic and environmental priorities go hand-in-hand," said EPA Administrator Lisa Jackson.

EPA's regulatory impact analysis (RIA) for the final rule estimates that the benefits of the rule far outweigh the costs. The estimated lifetime costs of the rule are $51.5 billion dollars, while the lifetime discounted benefits are more than $240 billion. According to the RIA, "EPA estimates that the additional technology required for manufacturers to meet the GHG standards for this final rule will cost on average $948/vehicle. This cost is roughly $100 lower than that projected" in the agencies' proposed rule issued in September 2009. The difference in costs between the proposed and final rule is due to revisions in the costs of new technologies expected to be used by manufacturers to comply with the rule.

The vast majority of consumer benefits will come from fuel savings. According to NHTSA's fact sheet on the final rule, "the lifetime benefits of the CAFE standards will total over $182 billion," which accounts for the bulk of the total benefits. "NHTSA attributes most of these benefits—about $157 billion—to reductions in fuel consumption."

Both agencies explained that there were many benefits they expect from the rule that are not counted in their analyses. For example, NHTSA's fact sheet indicates that the agency "has not monetized reductions in toxic air pollutants due to the standards (a benefit), nor potential reductions in vehicle performance or utility (a cost) that might result from the standards. However, by any metric, NHTSA expects that the benefits of the standards will vastly outweigh the costs."

Environmentalists and the automotive industry are cheering the new standards. "These standards are a grand slam: billions of dollars in consumer savings at the pump, a huge reduction in oil use, significant cuts in pollution, and they will help a more sustainable domestic auto industry thrive," said Michael Brune, Executive Director of the Sierra Club.

The auto industry has also provided its support. "Today, the federal government has laid out a course of action through 2016, and now we need to work on 2017 and beyond," Alliance of Automobile Manufacturers President and CEO Dave McCurdy said April 1.

SpeechNow.org Decision May Expand the Role of Independent Groups

On March 26, the U.S. Court of Appeals for the District of Columbia issued a unanimous opinion in *SpeechNow.org v. Federal Election Commission*. The court decided that the Federal Election Commission (FEC) could not limit donations to independent political groups that will spend money to support or oppose candidates. This is the first major court ruling to apply the U.S. Supreme Court's holding in *Citizens United v. FEC*.

Organized under Section 527 of the tax code, SpeechNow.org can now receive unlimited contributions from individuals, but it must register as a political committee and disclose its financial information to the FEC. The appeals court found that because 527s operate independently of candidate campaigns, there is no chance for corruption. The opinion expands the impact of *Citizens United* by extending the rationale in that decision from campaign spending to campaign donations.

In November 2007, SpeechNow.org sought approval from the FEC for its plan to collect unlimited contributions from individuals to conduct "express advocacy." The group wants to air messages in support of federal candidates who favor free speech and oppose those who back legislation that restricts the rights to speech and association.

After the FEC informed the group that it would be deemed a political committee and could not accept unlimited contributions from individual donors, SpeechNow.org filed suit. The organization's challenge charged that limits on annual contributions from individuals were an unconstitutional violation of free speech and association rights. Under the FEC rules, individual donations to 527s for express advocacy were limited to $5,000 a year.

The decision announced on March 26 concluded that the 527 can receive unlimited contributions from individuals but must register with the FEC as a political committee. The ruling follows the judgment of the Supreme Court's January *Citizens United* decision, which found that corporations and unions can spend as much as they like in advocating for or against candidates as long as they disclose their activities and do not coordinate with candidates' campaigns.

The ruling in *SpeechNow.org*, written by Chief Judge David Sentelle, said that since the Supreme Court ruled in *Citizens United* that political expenditures do not corrupt the political process, neither do contributions to groups that make such expenditures. According to the appeals court's opinion, if there was no reason to limit independent spending, donations to groups that would be doing so should not be restricted. The appeals court said the government simply had no interest in limiting contributions to independent groups.

During oral argument, the FEC argued that large contributions to groups that broadcast such independent expenditures may "lead to preferential access for donors and undue influence over officeholders." The court responded that those arguments "plainly have no merit after *Citizens United*."

The FEC also maintained that the *Citizens United* case did not apply because that decision involved spending limits, not contribution limits. According to BNA Money and Politics (subscription required), during arguments, FEC attorney David Kolker noted that limits on contributions to political parties have not been changed. "Similar restrictions on non-party groups also should remain, the FEC lawyer said, because such groups can act as 'shadow parties' and be used to circumvent limits on contributions to candidates."

The appeals court did uphold disclosure requirements and decided that SpeechNow.org still has to organize as a political committee and fulfill financial reporting requirements. However, those restrictions were not heavily challenged; SpeechNow.org was primarily concerned with being able to collect unlimited donations for its political advocacy. The group also claimed that it had no objection to more limited reporting requirements the Internal Revenue Service (IRS) places on 527 organizations.

The court found that complying with reporting rules would only place a minimal burden on SpeechNow.org's First Amendment rights. The opinion states that "the public has an interest in knowing who is speaking about a candidate and who is funding that speech, no matter whether the contributions were made towards administrative expenses or independent expenditures." Information on contributors, which candidate the expenditure supports or opposes, expenditures of $1,000 or more made in the 20 days before an election, and any expenditures of $10,000 or more made at any other time must be disclosed to the FEC.

SpeechNow.org, its president David Keating, and four potential contributors were represented by attorneys from the Center for Competitive Politics and the Institute for Justice. Supporters of the ruling consider this another boost to the free speech rights of Americans and those who join together to engage in advocacy. Steve Simpson, an attorney for the Institute for Justice, said, "This decision ensures that all Americans can band together to make their voices heard during elections."

SpeechNow.org emphasized the decision in *EMILY's List v. FEC* as support for its challenge. In the *EMILY's List* case, regulations were struck down that limited donations to nonprofit political action committees used for campaign activity. However, the D.C. Circuit Court questioned the constitutionality of limits on contributions to independent political committees, even though those issues were not directly challenged in the *EMILY's List* lawsuit. After the *EMILY's List* decision, many predicted that SpeechNow.org had a good chance of winning its appeal.

In another case, *Republican National Committee v. FEC*, the U.S. District Court for the District of Columbia upheld provisions of the Bipartisan Campaign Reform Act that limit "soft money" contributions to political parties. The law prohibits political parties from accepting unlimited contributions from individuals, companies, and unions. The court said it does not have the

authority to overturn a Supreme Court ruling upholding the ban on soft money fundraising by national party committees. The Republican National Committee (RNC) wanted to raise soft money for state elections, congressional redistricting, and other activities outside of federal elections. On April 2, the RNC filed an appeal to the Supreme Court.

The result of this patchwork of rulings is that currently, political parties cannot seek unlimited contributions from donors, but independent groups can. This has created an environment that favors contributions toward largely unregulated "independent" political organizations, rather than to candidates or political parties. Some observers worry that this will have exactly the effect that the Supreme Court and the appeals court denied it would: an increase in corruption and a decrease in disclosure about the activities of these groups due to the lack of a 21st-century reporting infrastructure.

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In This Issue

Commentary: The Rocky Path toward a Budget Resolution

Regardless of which party is in power, springtime in the nation's capital always means one thing: budget debates. After the president submits his budget proposal in February, Congress has until April 15 to pass a budget resolution, a non-binding plan for the spending and revenue levels that congressional appropriations committees are to follow when creating the spending bills for the coming fiscal year. However, in election years, members of Congress are reluctant to go on record as increasing the federal budget deficit, especially since budget resolutions are not absolutely necessary to fund the federal government.

Since 2000, Congress has only passed a concurrent budget resolution (a budget resolution passed by both houses) once during an election year. Here in 2010, with congressional Democrats expecting a hard fight in November, there has been talk of skipping the FY 2011 budget resolution and simply proceeding to the year's appropriations bills. Congressional leadership is reportedly even considering pushing off votes on the appropriations bills until after

the elections. But the budget resolution is a powerful tool in the spending process, and not passing it now could make it more difficult to spend more responsibly down the line.

The main function of the budget resolution is to prescribe spending levels, not to actually authorize spending. The resolution sets spending limits for the entire discretionary budget, for each appropriations committee, and for any other committee with jurisdiction over spending (budget resolutions also include revenue floors, meaning taxes cannot fall below a certain level). Any bill violating these levels could trigger a point of order, a procedural hurdle that could remove the bill from consideration, although the point of order can be waived by a majority vote in the House or a three-fifths vote in the Senate.

The second function of the budget resolution is that it allows for a procedure known as "budget reconciliation." In the budget resolution, there can be instructions for certain congressional committees to change current law so that overall spending and/or revenue levels conform to the limits set out in the budget resolution.

Most importantly, reconciliation lowers the voting threshold in the Senate to only a simple majority, down from the three-fifths normally needed to overcome a filibuster. Additionally, reconciliation instructions limit debate on the ensuing changes to twenty hours and also limit amendments to those ruled as “germane” to the budget. While this provision is not important in the House, which routinely sets limits on debate and amendments, it means that revenue and spending bills included in the reconciliation instructions in the Senate are not subject to filibusters. However, reconciliation can only be used to pass provisions that lower the federal budget deficit. For instance, a provision addressing how the military should try suspected terrorists would trigger a point of order. These rules are intended to prevent non-budget items from avoiding Senate filibuster rules.

Therefore, from the standpoint of the majority party, reconciliation can be a potent tool. Without reconciliation, congressional leadership must find 60 votes to pass spending bills and face mountains of amendments, which can be difficult. Faced with this high hurdle, the leadership might make compromises and deals to win more votes, deals such as the ones used to round up votes for the recent health care reform package. But with the lower vote threshold provided by reconciliation, congressional leadership can afford to lose a few votes. Instead of making these side deals, leadership can push a cleaner bill, without carve-outs or loopholes. By limiting debate on the budget, reconciliation can lead to better policy, as the necessity of so-called horse-trading is reduced significantly.

On the other hand, the reconciliation process has been used in highly partisan ways to push the president’s agenda. For example, it was used in 1981 to push President Reagan's budget. Just when it appeared the Reagan budget was dead, an omnibus spending bill was moved under reconciliation rules. Similarly, the Bush tax cuts of 2001, 2003, and 2006 all were done through the reconciliation process.

The FY 2011 budget resolution is already late. By law, Congress must pass it by April 15, although there is no consequence to missing the deadline. On April 21, the Senate Budget

Committee will begin marking up its budget resolution, and both Sen. Kent Conrad (D-ND) and Rep. John Spratt (D-SC), the chairs of the two budget committees, have publically stated their support for completing the resolution. But in today's atmosphere, with Democrats facing possible losses at the ballot box in November and partisanship ramping up to new heights, passing a budget resolution in either chamber will require that Congress make the difficult decisions that it was ultimately elected to make.

GAO: Contractors Overseeing Other Contractors in a Contingency Environment Problematic

Of the $38.6 billion worth of contracts and grants obligated to Iraq and Afghanistan during fiscal year 2008 and the first half of fiscal year 2009 by the Department of Defense (DOD), the Department of State (State), and the U.S. Agency for International Development (USAID), roughly $1 billion went to contractors to help administer some of the contracts and grants. A recent Government Accountability Office (GAO) report finds that DOD, State, and USAID often enter into these administration contracts haphazardly without checking for potential conflicts of interest or ensuring adequate oversight.

The government's extensive reliance on contractors throughout the wars in Iraq and Afghanistan is nothing new. DOD, State, and USAID have used contractors for everything from reconstruction efforts to providing security for government officials, all with mixed success. As this most recent GAO report shows, sometimes the government even turns to contractors to help with administering other contracts and grants. This can include "on-site monitoring of other contractors' activities, supporting contracting or program offices on contract-related matters, and awarding or administering grants."

Clearly, conflicts of interest could arise, as government decisions on contract and grant administration, which represent "the government's primary mechanism for assessing whether it is getting the expected products or services from contractors or whether grantees are performing in accordance with grant programs," might be "inappropriately influenced by, rather than independent from," a contractor's actions.

GAO found that these three agencies lacked any sort of overarching strategy in deciding when to use contractors to support contract and grant administration. It turns out that more often than not, "individual contracting or program offices within the agencies" made the decision "on a case-by-case basis." Moreover, contracting officials within DOD, State, and USAID often chose to outsource administration functions because they lacked a sufficient number of government personnel or in-house expertise to oversee the contract or grant.

Because none of the three agencies has a strategic workforce plan that incorporates how, when, or why they should outsource the administration of a contract or grant, GAO also found that DOD, State, and USAID often did not do enough to mitigate conflicts of interest or oversight risks. Although the three agencies "generally complied" with statutory and policy guidelines,

they often did not utilize their broad discretionary powers to limit these risks as much as they could.

One example cited in the GAO report is illuminating:

> Joint Contracting Command - Iraq/Afghanistan (JCC-I/A) awarded a $1 million contract to support the Armed Contractor Oversight Directorate in Afghanistan. The contractor, which itself was a private security contractor, was assigned a number of responsibilities related to oversight of private security contractors...[N]o clauses were included in the solicitation or contract that precluded the contractor from bidding on other contracts. After the support contract had been awarded and performance begun, the support contractor competed for and won a separate contract to provide armed guard services in Afghanistan.

Eventually, JCC-I/A counsel became aware of the situation – that a contractor would be responsible for its own oversight – and canceled the administration support contract, but the event sheds light on the lack of effort by the agencies to prevent conflicts of interest.

The other problem that GAO found with DOD, State, and USAID not employing a strategic workforce plan that reflects the outsourcing of contract and grant administration was a lack of sensitivity to contractors performing tasks closely related to inherently governmental functions. Without adequate oversight, administering contracts or grants can inappropriately influence the "government's control over and accountability for decisions that may be based, in part, on contractor work." Not only can performing those functions present a conflict of interest for a contractor, but the government can easily lose control of critical decision making processes, as well.

GAO also found that the three agencies have made improvements to their lackluster policies on outsourcing administration duties. DOD is currently working on policies to better address both organizational and personal conflicts of interest for contractors. DOD acknowledged that the Army's contracting workforce is 55 percent of what it was in the mid-1990s, while the amount of work outsourced has jumped from $11 billion to $165 billion. On April 19, DOD told the Commission on Wartime Contracting that it would hire more contracting specialists and increase training for those overseeing contracts. State is examining a better policy on organizational conflicts, and USAID already has a decent system for addressing a contractor's personal conflicts. But the bigger question seems to be whether the government can ever adequately control accountability and oversight risks when outsourcing functions like this.

The Office of Federal Procurement Policy is currently reviewing a change to the inherently governmental policy. Good government groups like OMB Watch would like to see tasks so closely related to inherently governmental functions like contract and grant administration in-sourced by default, if not completely removed from the list of tasks the government can outsource. It seems that the government only perpetuates its inability to in-source a function by continuing to outsource it. Moreover, there is too fine a line between performing an inherently

governmental action and one that is only closely associated. Bringing contract and grant administration under the "inherently governmental" umbrella would bring much-needed oversight to government contracting.

Open Government Plans Seek Revamp of Culture and Structure

On April 7, federal agencies released their individual plans to be more transparent, participatory, and collaborative, pursuant to the Obama administration's Open Government Directive (OGD). The plans varied in scope and quality, but several interesting trends were noticeable. As agencies update their plans, these trends may become baselines for open government or may be abandoned, depending on how successful key agencies' plans prove to be.

While a comprehensive evaluation of the plans has not been completed, initial reviews of plans from major agencies revealed numerous interesting trends and conclusions, and this article covers five of them.

Experience and Resources

The first overall trend developed out of the wide variation that was quickly noticeable in agency Open Government Plans. While differences between the plans may seem to be the opposite of a trend, the way the plans differed was revealing. The OGD instructed agencies to pursue transparency, participation, and collaboration. The agencies that excelled and stood out in terms of the scope, detail, and innovation within their plans were those that had both the resources and the previous experience with pursuing these issues. Agencies that regularly deal with very engaged public audiences, such as those that handle issues of health and environment, took the lead here. Both the Department of Health and Human Services and the U.S. Environmental Protection Agency had impressive plans that creatively sought to engage the public with new information and tools.

Fitting well into the trend with both resources and experience with engaging interested stakeholders, the National Aeronautics and Space Administration (NASA) open government plan is also exceptional in terms of scope and detail. The agency provides specific goals for three months, six months, one year, and two years for all 13 ongoing activities related to open government, as well as five new initiatives and three flagship initiatives. For example, NASA lists short-term open government goals, such as updating website reading rooms within the next three months with documents for which three or more requests have been made. It also includes longer-term goals of substantially decreasing FOIA backlogs and switching over to a web-based FOIA database within the next two years.

At the other end of this trend were agencies with fewer resources and significantly less experience with open government efforts, whose plans lacked the vision and depth of their more experienced counterparts. For instance, the Small Business Administration, a smaller federal agency, selected as its flagship initiative a plan to overhaul its website. While the agency lists inclusion of mapping tools, interactive web chats, and community discussion forums on its site,

the lack of details on these features leave the impression of a basic website redesign that might include one or two innovations. Similarly, the Department of Housing and Urban Development's plan frequently lacks concrete deliverables or specific details on the agency's goals, giving the impression that it is a plan to plan.

Even some of the largest federal agencies with significant resources but less familiarity with transparency had a noticeable lack of innovation. The Departments of Defense and Homeland Security contain few transparency programs unique to those agencies and rely largely on working with already existing government-wide programs, such as Recovery.gov, USAspending.gov, and the federal IT dashboard. Many of the agencies that were less experienced with transparency focused greater attention on collaboration with other agencies.

The missing details from the initial plans for some agencies might be attributable to lack of resources, lack of experience on open government issues, or lack of interest in achieving real open government changes. Only time will tell which agencies fall into which categories.

Governance

The second trend is the level of effort by numerous agencies to establish clear governance structure for the ongoing open government efforts. Several agencies realized the difficulty of simply adding the open government responsibilities to existing positions or structures, which might treat the new requirements as secondary to their more long-standing priorities. Instead, these agencies wrote into their plans whole new structures of governance to oversee implementation of the initiatives and develop future projects. Such action enables greater accountability and increases the likelihood that deliverables will be produced.

For instance, the Department of Transportation proposed what it called a "sustainable governance structure" that incorporates open government principles into "every-day principles." Included in this structure are several councils, including the Chief Information Officer Council, the Technology Control Board, and a Data.gov Group, among others. As another example, the Department of the Treasury has already convened an Open Government Steering Committee representing each of its bureaus and has established several subcommittees on data, communications, and its web presence.

Culture

The third notable trend among the plans was the effort to directly address the need for changing the climate within agencies in order to foster transparency, participation, and collaboration. The agencies that made significant effort to address these cultural changes emphasized that such a focus was important not only to achieving initial goals, but also critical to the long-term sustainability of the open government effort.

There were two common elements of culture change that many agencies included in their plans. First, several agencies sought to link openness to their core mission and goals, the theory being that if openness efforts are recognized as methods to improve agency functions, then employees

will continue to pursue them without the need for requirements. The Department of the Treasury, for example, seeks to align its open government strategy with the agency's existing strategic plan and core mission areas.

The second culture change method that seemed quite prevalent was exploring the use of awards or prizes for openness to encourage employees to embrace transparency. Making open government a part of individual recognition gives employees a personal stake in agency efforts to lift the shroud of secrecy. For instance, the Department of Health and Human Services (HHS) is launching a Secretary's Innovation Awards program, which will recognize and reward HHS employees who innovate how HHS operates, with those who harness transparency, participation, or collaboration being leading candidates.

Technology

The fourth clear trend was the emphasis on technology in the agency plans to address all three principles of open government – transparency, participation, and collaboration. Many agencies announced plans for wikis, new online tools, intranet forums for officials to share ideas, online dialogs with the public, and more. In the Internet age that we live in, and with the Web 2.0 revolution in full swing, this focus is understandable.

The General Services Administration stands out for its plan to develop a citizen engagement platform, as well as a challenges and prizes platform for other agencies to use in pursuit of open government improvements. The agency is also planning to further improve the idea discussion forum used by agencies to develop their Open Government Plans. Interestingly, NASA also deserves credit for pushing the technology boundaries with its flagship initiatives. Among its flagship initiatives were the plans for open source software development and the "Nebula" cloud computing platform. The technology products and leadership in innovation from these two agencies, if successful, could have significant repercussions for open government across federal agencies.

Dashboards

A fifth notable trend, a subset of the overall technology focus, is the increasing use of web-based dashboards to provide the public with information concerning agency progress toward certain goals that help both the agency and the public identify potential problems and solutions. Of all the information technology being proposed in the plans, the dashboards seemed to consistently get the highest profile, often listed as flagship initiatives. For instance, the Justice Department presented plans for a Freedom of Information Act (FOIA) dashboard to monitor and track agency progress in responding to public requests for information. The Office of Management and Budget selected enhancing its Office of Information and Regulatory Affairs (OIRA) Dashboard, which provides information on regulatory actions, as the flagship initiative of its plan. The White House Office of Science and Technology Policy is also planning a dashboard that tracks research and development progress across agencies, similar in scope to the existing IT dashboard, which is part of USAspending.gov.

While dashboards are tools with great potential, they are only as good as the information within them; without substantive and detailed data, these dashboards will fail to measure up to expectations of most open government advocates.

The current Open Government dashboard on the White House's website is a good example of a dashboard that does not yet provide metrics to make it truly informative. Currently, the Open Government dashboard simply reports compliance, progress, or non-compliance by agencies on a handful of OGD requirements. This is in sharp contrast to the flexibility and usefulness of information on the federal IT spending dashboard that identifies agency spending on technology programs and helps identify where those programs are stalled or ineffective. This same criticism can be leveled at the OIRA dashboard, which provides new graphics but no criteria on which to judge performance.

Further information on how agencies fared in complying with the OGD will be available in a forthcoming audit being coordinated by the OpenTheGovernment.org coalition.

EPA Plan Seeks to Instill Transparency into Agency DNA

The U.S. Environmental Protection Agency (EPA) has released its plan for improving the agency's transparency as part of the Obama administration's Open Government Directive (OGD). The EPA was an early proponent of the new openness agenda, with EPA Administrator Lisa Jackson calling for the agency to operate "as if it were in a fishbowl." The agency's new Open Government Plan documents numerous ongoing and future actions that should continue the agency's advance toward transparency and accountability.

The Dec. 8, 2009, OGD instructed federal agencies to create, among other things, "a public roadmap" detailing how each agency will incorporate the principles of openness laid out in President Obama's Jan. 21, 2009, transparency memo. Each plan is required to address how the agency will improve transparency, public participation, and collaboration with the public and other governmental offices. Additionally, each plan must include at least one "flagship initiative" that describes a specific initiative being implemented to advance the openness principles.

The EPA Open Government Plan chronicles numerous openness actions the agency had taken prior to the Office of Management and Budget's (OMB) release of the directive. The agency plan also lays out many additional actions planned for the next several months. Throughout the document, EPA affirms its intent to instill an agency-wide culture of openness and learn from these early actions, identify what works, and spread the best practices throughout the agency. Overall, the plan depicts an agency that is making transparency a true core value of its operations and supports this assertion with numerous examples and laudable plans for future community engagement.

Flagship Initiative

EPA has chosen to undertake as its flagship initiative a broad set of actions under the theme of community engagement. According to the plan, EPA chose this theme because of its "wide applicability – potentially influencing nearly every part of the Agency." The components of the initiative include plans to push out to the public information about environmental impacts to urban waterways; air and water test results; the pollution permitting process; and the rulemaking process. Two additional projects will use new technology to create mobile phone applications that provide human health advisories and product information. An agency work group will identify ways to inform and engage communities that lack electronic access to information, as well.

EPA's approach to the flagship initiative is multifaceted, covering several agency programs, reaching different types of audiences, and addressing several aspects of agency operations. This is a prudent approach that should provide the agency with ample case studies with which to identify what works and what does not and why. It should also allow EPA to scale up the successful strategies across the agency.

OpenEPA Online Forum

In February 2010, EPA, in accordance with OMB instructions, launched a website, OpenEPA, an online forum designed to gather comments and ideas from the public on what should be included in the agency's plan. EPA, as well as many other agencies, has decided not to close the forum now that the plan is released. Rather, the agency is keeping the forum open and will report on its progress in implementing the ideas on a quarterly basis. To date, the forum has received more than 200 ideas from the public.

The online forum channeled a large amount of public input to the agency, giving staff much to work with as they move ahead with greater transparency. One reason the forum functions as well as it does is the active involvement of the forum moderator. The moderator works to ensure postings are relevant to the agency's open government activities and answers basic questions. The moderator can also serve the useful purpose of pushing information about the agency's work out to the public, directing them to the new open government actions, data sets, and tools, and communicating what progress has been made so far. Such back-and-forth communication is crucial to building public trust in the forum. Including comments and responses from additional agency staff and senior officials may also improve the forum's standing as a reliable tool for public engagement.

The agency plans to add to the OpenEPA website a section that asks the public to share innovative ways EPA data are being used. The posts will then be ranked by the public.

Measuring Success

The EPA is hoping to gather public comment on ways to judge how well its transparency initiatives are working. The agency's Open Government Plan includes some ideas on what

metrics may be used to evaluate the initiatives, such as the number of electronic town hall meetings, number of data sets and tools published, and the number of opportunities for public input on EPA actions. EPA recognizes that the criteria for measuring success will evolve as the initiatives advance. Many of the openness initiatives have never been tried before, and the tools for evaluating the implementation of government openness are neither fully developed nor tested.

Collaboration

EPA has included a number of ongoing and planned actions to expand its collaborations with other governmental offices and the public. One such action is the EPA's work with the Securities and Exchange Commission (SEC) and the Occupational Safety and Health Administration (OSHA) to link datasets for facilities that are regulated by each of the agencies. Such connections will help the public see a broader picture of the environmental, economic, and social performance of companies.

Other collaborations include a wiki for watershed managers to share best practices and learn about grant opportunities; a new mobile phone application that provides threat information to emergency responders; and a project with regulators in Massachusetts that provides real-time air quality data.

Access to Experts

The EPA has long been criticized for limiting the public's access to program staff, especially program scientists with the expertise to comment in depth on pressing issues, such as the hazards of specific toxic chemicals or the impacts of climate change. The agency's public affairs office has been regarded as an obstacle to journalists and other members of the public getting the information needed to ensure accountability.

The EPA's plan does not adequately address the degree of openness warranted to agency scientists. According to the advocacy organization Union of Concerned Scientists (UCS), the Open Government Plans "would not have prevented even the most flagrant examples of censorship of scientists during the previous administration." UCS's criticism, which is not limited to EPA, further notes that "many federal scientists are still not protected by policies that would allow them to speak freely with the public and the press." The idea receiving the most votes on EPA's forum calls for the development of a media policy that ensures EPA scientists can share their expertise with the public and not fear retaliation by their supervisors or political staff at the agency.

The EPA's plan only proposes to develop a "formal network of EPA staff experts to connect and respond to public inquiries." Otherwise, there is no mention of an agency-wide communications policy that would provide greater access to staff scientists and encourage the freer exchange of ideas between staff scientists and the public.

Other Potential Weaknesses

The agency's plan also does not mention how EPA will address the widely acknowledged problem of excessive trade secrets. Businesses submitting information to EPA frequently choose to hide all or part of the information under the label "confidential business information," which prompts the agency to conceal the data from the public. This privilege is overused by industry to inappropriately hide data, such as health risks from industrial products, from the public. Although EPA has taken important recent steps to address this, the agency should devise a plan to comprehend the scale of the problem and correct it.

Additionally, the agency recognizes the importance of informing stakeholders about its open government projects, but the plan's strategy for disseminating information about the openness actions is sparse. The initiatives in the plan must be publicized throughout the agency, including regional offices, to state and local governments, and to the public, especially to those citizens who may not already have experience using EPA tools or participating in EPA programs. Many noteworthy initiatives either have commenced or are planned for the near future. Their success depends to a large degree on how well the abundant stakeholders become familiar with them. The EPA's plan for the wide adoption of openness principles relies largely on the 2003 Public Involvement Policy. The addition of plans for more specific actions that mesh the 2003 policy with the 2010 Open Government Plan could prove useful.

EPA plans to review its Open Government Plan every six months, making revisions as necessary, which is far more frequently than the every two years called for by OMB. The public is encouraged to comment at www.epa.gov/open.

What's Next for Coal Mine Safety?

In the wake of the latest coal mining disaster that killed 29 miners at the Upper Big Branch Mine in West Virginia, calls for safety reforms and enhanced regulatory powers echo once again. While mine safety has improved since the recent high death toll of 2006, it remains to be seen if this incident will result in significant changes or if deaths and injuries will continue to be perceived as a cost of doing business.

On April 5, an explosion at the mine killed 25 miners and filled the mine with toxic gases that prevented rescue teams from searching for four miners not immediately accounted for. In the days that followed, as the toxic gases were ventilated and rescue efforts resumed, evidence indicated that all 29 miners feared caught in the explosion at the Upper Big Branch mine had died. Two other miners were hospitalized as a result of the blast. It was the worst mine disaster since 1984.

Recent mine disasters have resulted in calls for new safety rules and enhanced powers for the Mine Safety and Health Administration (MSHA), the office within the Department of Labor responsible for regulating mine safety. MSHA has seen budget and staffing cuts over its lifetime and struggles to fulfill its mission as a result.

In 2006, 47 coal miners died in mining incidents. Congress passed the Mine Improvement and New Emergency Response Act (MINER Act) to respond to some of the immediate issues raised by the Sago, Aracoma Alma, and Darby mine disasters, for example. Many health and safety provisions discussed after those accidents were not included in the MINER Act. In 2008, Congress tried to pass additional legislation to provide improvements to safeguard miners' health and safety. The legislation passed the House but died in the Senate.

In 2007, a mine collapse at the Crandall Canyon coal mine in Utah, which trapped six coal miners and led to the deaths of three rescue workers, again called into question MSHA's ability and willingness to regulate mines and the questionable practices of mine owners. The Upper Big Branch explosion raises many of these same issues about safe mining practices and MSHA's effectiveness.

Although the investigation into the causes of the explosion at the Upper Big Branch mine is just getting started, Labor Secretary Hilda Solis and MSHA's two top officials, Joseph Main and Ken Stricklin, briefed President Obama April 15 on the disaster. In the briefing, the officials laid out the pattern of violations at the mine, owned by Massey Energy Company, including above-average numbers of violations and the failure to address significant violations. "Massey mines have been placed onto potential pattern of violation status, the first step in the pattern of violation process, 13 times," according to the briefing.

The pattern of violation program identifies the worst mining companies and invokes enhanced MSHA enforcement efforts. Companies can escape this status, however, by contesting citations to the independent Federal Mine Safety and Health Review Commission (FMSHRC), which has a backlog of approximately 16,000 cases. The briefing noted, "In short, this was a mine with a significant history of safety issues, a mine operated by a company with a history of violations, and a mine and company that MSHA was watching closely."

According to an April 10 *Washington Post* article, Massey challenged 34 percent of its citations in 2009, more than any other coal company. Filing challenges has been a normal business practice in recent years because the backlog at FMSHRC means companies will not pay fines for contested citations, or MSHA will choose to settle the proposed penalties.

The presidential briefing further explained gaps in MSHA's regulatory authority and proposed reforms that could enhance the agency's ability to deal with chronic violators and protect miners who disclose unsafe working conditions.

In a strongly worded statement after the briefing, Obama said the tragedy was a failure "first and foremost of management, but also a failure of oversight and a failure of laws so riddled with loopholes that they allow unsafe conditions to continue."

He directed Labor officials to continue the investigation into the disaster at Upper Big Branch, to give extra scrutiny to mines that have "troubling safety records," to work with Congress to improve enforcement and close loopholes in current laws, and to review MSHA's policies and practices to "ensure that we're pursuing mine safety as relentlessly as we responsibly can."

Obama acknowledged that the industry and regulators know how to prevent these types of explosions, saying, "I refuse to accept any number of miner deaths as simply a cost of doing business."

On April 16, Solis requested an independent analysis of MSHA's internal review of the disaster by the National Institute for Occupational Safety and Health (NIOSH) and announced that both MSHA's review and NIOSH's analysis would be made available to the public. The announcement came on the heels of criticism MSHA received for appointing MSHA personnel to lead the agency's investigation instead of naming people independent of the agency to study the causes of the explosion. (The state of West Virginia is conducting its own independent evaluation of the disaster.)

On April 19, MSHA announced that it was immediately initiating a quality impact inspections program aimed at coal mine operators who are "frequent violators," according to an e-mail from *Mine Safety and Health News* editor Ellen Smith. MSHA defines a frequent violator as "an habitual violator of health and safety standards above the national average." A quality impact inspection will include monitoring conveyor belts, methane monitors, and ventilation controls, among other factors related to mine explosions. The inspections will be conducted by several inspectors at once depending on the size of the targeted mine.

Congress is also preparing to deal with mine safety again. On April 14, Rep. George Miller (D-CA), chair of the House Committee on Education and Labor and a vocal supporter of mine safety reform, released a list of the 48 mining companies MSHA targeted in 2009 for the pattern of violations program but which contested numerous violations in order to escape being listed in the program.

Sen. Tom Harkin (D-IA), chair of the Health, Education, Labor and Pensions Committee (HELP), said that the committee would hold a hearing April 27 to assess how to change a system that encourages mining companies to avoid penalties by contesting them. A future hearing will assess whether Labor's mine safety agencies have sufficient resources to process appeals from operators and will discuss legislation to enhance MSHA's enforcement capacity that the HELP committee let die in 2008.

That bill, H.R. 2768, the S-MINER Act, called for additional powers for MSHA. President Bush threatened to veto the legislation. The S-MINER bill would have:

- Expanded MSHA's ability to deal with mine owners and operators who are in violation of federal regulations by allowing penalties to be imposed that could not be reduced by FMSHRC and would hold corporate officers and operators liable
- Allowed the Secretary of Labor to halt production at mines if operators refuse to pay civil penalties
- Provided MSHA with subpoena power
- Required MSHA to take interim steps to improve emergency response technologies while permanent regulations, required by the MINER Act, were being developed

- Required mine operators to use better technology for measuring coal dust exposure and cut in half the federal exposure limit for coal dust

Given the other items on the congressional agenda in an election year, it is unlikely that major mine safety reforms will be passed in 2010. A more likely scenario that could impact attitudes toward miner safety may be unfolding in the courts, where the first wrongful death suit against Massey was filed April 15, according to the *Charleston Gazette*.

In addition, a Raleigh County, WV, prosecutor said that a state homicide investigation was possible pending the results of the state's investigation into the causes of the accident. West Virginia has an involuntary manslaughter statute that would allow such a prosecution.

Unfortunately, both of these legal scenarios require miners to die before companies are held accountable.

At Agencies, Open Government and E-Rulemaking Go Hand in Hand

Several agencies are highlighting their rulemaking activities as part of the Obama administration's push to improve government transparency and public participation. The Department of Transportation (DOT), U.S. Environmental Protection Agency (EPA), U.S. Department of Agriculture (USDA), and Department of Labor (DOL) all recognized the importance of regulation by including rulemaking and regulatory innovations in their Open Government Plans.

The plans, released April 7, show an increased emphasis on e-rulemaking, the term used to describe electronic public access to rulemaking documents and participation in the regulatory process, at the agency level. For several years, the government-wide Regulations.gov website has been the primary arena for e-rulemaking activity. However, the individual agency initiatives reflect a growing need for agencies to tailor rulemaking outreach and participation to their own policy areas and needs.

DOT launched Regulation Room, a pilot project experimenting with new and more innovative ways to educate the public about rulemaking and spur participation. Regulation Room, at regulationroom.org, is hosted by the Cornell e-Rulemaking Initiative (CeRI), DOT's partner in the project. Regulation Room is one of DOT's Flagship Initiatives. (The Obama administration's Open Government Directive required all agencies to include a "flagship" transparency initiative in their Open Government Plans. Background is available at www.ombwatch.org/node/10626.)

Regulation Room currently only applies to one DOT rulemaking, a proposed regulation to restrict truck drivers from text messaging while driving. CeRI will continue to experiment with web-based technologies during future rulemakings and report its results to DOT, according to the plan.

Regulation Room presents information on the DOT texting rule in traditional formats – for example, displaying the *Federal Register* notice of proposed rulemaking – as well as in novel ways. The Rule Dashboard displays information in a question-and-answer format. For example, the "Which drivers are covered" heading communicates to users, in plain language, the classes of drivers that would be covered by the proposed rule's definitions and estimates on the number of drivers it would impact. Other headings include "What penalties" for information on failure to comply with the rule and "What costs & benefits" for estimates of the costs to industry and gains in motorist safety.

The website also experiments with new means of participation in rulemaking. The site emphasizes collaboration, encouraging users to discuss the decisions the agency will need to address and to respond to one another in a blog-like format. Then, Regulation Room's moderators will summarize the discussion and ask users to collaborate in developing joint comments for submission to the agency. This process occurs concurrently with the official public comment period hosted by the agency.

EPA also included an e-rulemaking innovation among its Flagship Initiatives. EPA's new Rulemaking Gateway was launched in February but is also highlighted in the agency's Open Government Plan.

Each EPA rulemaking now has its own webpage with basic information about the rule, including an abstract and timeline for the rulemaking with projected milestones where appropriate. Users can search for rules by stage in the rulemaking process or topic, as well as by a variety of economic and social sectors the rule is expected to impact.

The Rulemaking Gateway also gives users an opportunity to comment on EPA rulemakings. Typically, rules are only open for public input during a legally required comment period immediately following publication of a notice of proposed rulemaking. On the Rulemaking Gateway, users can comment on rules at any time outside of the formal comment period.

EPA's online Rulemaking Gateway is integrated with Regulations.gov, which the agency also runs, but the gateway includes only EPA documents and issues. If information on EPA rulemakings is already available on Regulations.gov, or if a rule is open for public comment on Regulations.gov, the gateway includes links that give users quick access to relevant pages on Regulations.gov.

The U.S. Department of Agriculture is focusing on one particular rulemaking in its Open Government Plan with the launch of a website dedicated to the development of a new national forest plan, a rule detailing the USDA's overall approach to forest management. "[W]e believe this effort will increase agency credibility and public understanding of the planning rule and lead to a planning rule that endures over time," USDA said in its plan.

The planning rule website is a central hub for all information related to the rulemaking, including information on public meetings and background information for new users. It also includes participation mechanisms. The agency says, "Our planning rule Web site provides the

latest information and opportunities to participate in the conversation via our planning rule blog." Like EPA's Rulemaking Gateway, USDA's planning rule website was launched before the release of its Open Government Plan, in December 2009. It is also a Flagship Initiative.

The Department of Labor's Open Government Plan addresses the enforcement side of regulation. The Department's new online enforcement database contains information on inspections the department conducts to ensure businesses are complying with the nation's worker rights and safety laws and regulations. The database covers enforcement activity at DOL's Employment Benefits Security Administration, Mine Safety and Health Administration, Office of Federal Contract Compliance Programs, Occupational Safety and Health Administration, and Wage and Hour Division.

Currently, shortcomings in the search and sort functions limit users' ability to find information. For example, users are not currently able to search by the name of a business or facility. However, the website provides important information that had been difficult to obtain. For example, users can find information on enforcement actions at Massey Energy, a company that has recently been in the national news because of the 29 people who died in one of their mines in West Virginia. DOL says it will continue to make improvements to the site.

Agency-by-agency changes are occurring in the absence of a broader, administration-wide e-rulemaking policy. While administration officials have indicated a desire to transform e-rulemaking practices, the administration has failed to describe how e-rulemaking fits into its goals of making government information more accessible and expanding public participation – goals embodied in the Open Government Directive and plans.

The White House has taken steps to address particular e-rulemaking issues. In conjunction with the release of agency Open Government Plans, White House Office of Information and Regulatory Affairs (OIRA) Administrator Cass Sunstein issued two memos related to e-rulemaking.

One memo encourages agencies to consistently use Regulation Identifier Numbers, or RINs, to tag documents. Currently, agencies assign a RIN to every rulemaking, and the RIN appears in the proposed and final rules published in the *Federal Register*. Under Sunstein's memo, agencies will now need to display the RIN on all documents associated with the rulemaking, such as cost-benefit analyses and information collections. The move will allow the public to more easily link rules to their supporting evidence and, in turn, could promote public participation, the White House says.

The other memo relaxes agency obligations under the Paperwork Reduction Act (PRA) to seek White House approval to use web-based interactive technology. The memo says that voluntary social media and other web-based forums – for example, blogs, wikis, or message boards – will not be considered information collections under the PRA. The memo is intended to stem concern that agencies need to comply with the PRA before including comment sections on their websites or using online services like Facebook and Twitter.

The White House is expected to continue to find ways to improve e-rulemaking practices and foster innovation. Both the White House and individual agencies emphasized that the plans, documents, and websites released April 7 were only first iterations and that the open government process is ongoing.

Grassroots Lobbying Disclosure Laws and the First Amendment

On April 15, the Institute for Justice (IJ) filed a lawsuit on behalf of two volunteer groups challenging part of Washington State's grassroots lobbying disclosure law as a violation of their First Amendment rights to free speech, assembly, and petition. In *Many Cultures, One Message v. Clements*, the groups claim that having to register as grassroots lobbying organizations is burdensome, and revealing information about their financial supporters could leave donors open to threats from opponents.

The groups challenging the law are Many Cultures, One Message, which opposes the use of eminent domain for redevelopment in southeast Seattle, and Conservative Enthusiasts, a 501(c)(3) nonprofit volunteer organization that promotes small government and opposes taxes. According to IJ, "Each face the dilemma of registering with the government or halting their efforts to urge their fellow Washingtonians into political action."

The defendants in the lawsuit are Jim Clements, chairman of the state's Public Disclosure Commission, and several other members of the commission. The commission enforces disclosure and campaign finance laws.

Grassroots lobbying activities seek to encourage the public to take specific positions on legislative matters or public policies and typically feature forms of communication that request the recipients to contact their lawmakers regarding a specific issue. These communications are directed at the general public or at selected groups on organization mailing lists. Currently, federal law does not require the registration of people or groups that solely engage in grassroots lobbying, nor does it require disclosure of such activities.

The State of Washington is one of 36 states that have some sort of law addressing disclosure of grassroots lobbying. In Washington, the law requires that any person or entity that spends more than $500 in one month or $1,000 in three months making grassroots lobbying expenditures must file with the state's Public Disclosure Commission and disclose his or her/its name, address, business, and occupation. The law also requires disclosure of the names and addresses of anyone or any group such a person or entity is working with, as well as anyone who contributes more than $25 to the group's grassroots lobbying efforts.

Many Cultures, One Message and Conservative Enthusiasts sought an exemption from the law in December 2009. In March 2010, the Public Disclosure Commission ruled that the groups would still have to file disclosure reports as grassroots lobbying organizations if they made expenditures exceeding the amounts specified in the law. The commission's response letter to IJ stated, "These statutes enable the voters to 'follow the money' in lobbying and campaigns,

including grassroots lobbying." The letter asserted that the citizens of Washington State passed the law by initiative in 1972 to "maintain openness and transparency in lobbying and financial efforts to affect legislation."

The groups' lawsuit claims that the state law creates "expensive, complex, and time-consuming administrative requirements that interfere with, and chill Plaintiffs' ability to exercise, their right to engage in political speech and association." In addition, the registration and reporting rules are vague, and prohibit them from "exercising their right to engage in anonymous political speech," according to the suit. They further argue that grassroots lobbying disclosure laws and the cost for violating them may discourage small groups from becoming active in politics and public policy. In Washington State, the maximum penalty is $10,000 per violation.

An IJ press release on the case announced, "Washingtonians from both sides of the political spectrum filed a lawsuit today [April 15] to stop their state from monitoring, collecting and publicly disseminating information about the political activities of private citizens who do nothing more than urge their fellow citizens to take political action."

IJ's lawsuit cites the recent U.S. Supreme Court decision in *Citizens United v. Federal Election Commission* as support for the finding that onerous rules can amount to a ban on speech. The Associated Press quoted IJ executive director Bill Maurer as being "encouraged" with the Court's "less regulatory direction regarding campaign finance laws." However, in *Citizens United*, disclosure laws were upheld as constitutional, and the decision stated that "transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages."

The lawsuit also reveals the groups' concern with the state gathering personal information and making it available on the Internet, which they charge may leave donors and others vulnerable to harassment. A case that will soon face the U.S. Supreme Court addresses similar issues.

In *John Doe No. 1 v. Reed*, petition signers challenged the constitutionality of Washington's Public Records Act, which requires state and local governments to make public the identities of those who sign a referendum or initiative petition. Those challenging the law argue that petition signing is political speech subject to First Amendment protections, while Washington Secretary of State Sam Reed asserts that signing a referendum or initiative petition is a legislative act and that petitions to add measures to the ballot are public records. The Ninth Circuit has ruled that disclosure of such signatures serves an important government interest and promotes government accountability.

A Congressional Research Service (CRS) report notes that grassroots lobbying disclosure regulations have been deemed constitutional in the past. A 2008 report points out that the "Supreme Court of the State of Washington in 1974, for example, upheld very detailed lobbying disclosure provisions of State law concerning 'grassroots' lobbying activities in *Young Americans for Freedom, Inc. v. Gorton*." In that case, the court held, "To strike down this portion of the initiative would leave a loophole for indirect lobbying without allowing or

providing the public with information and knowledge re the sponsorship of the lobbying and its financial magnitude."

A further suggestion in the CRS report hypothesizes that a law that only requires disclosure and reporting, only covers paid grassroots lobbying, and does not prohibit any activity, would stand up against court challenges. Such a law would exclude "volunteer organizations, volunteers, and individuals who engage in such activities on their own accord out of the coverage and sweep of the provisions." The law would have to be "drafted in such a manner so as not to be susceptible to an overly broad sweep bringing in groups, organizations and other citizens who do no more than advocate, analyze and discuss public policy issues and/or legislation."

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In This Issue

Commentary: Fiscal Hawks Shaping Focus of Debt Commission

On April 27, President Obama's fiscal commission convened its first meeting, kicking off a seven-month discussion among 18 panelists on ways the federal government can reduce the federal budget deficit and shrink the national debt. The next day, many of those same panel members, including co-chairs Erskine Bowles and former Sen. Alan Simpson (R-WY), attended a "Fiscal Summit" organized by the Peter G. Peterson Foundation to discuss the same issues. Talk about how to overcome deficits and the debt at the Peterson event, which centered on eviscerating the nation's social safety net, mirrored discussion at the commission meeting.

The inaugural meeting of the president's deficit commission lasted close to three hours and included testimony from Federal Reserve Chairman Benjamin Bernake, Office of Management and Budget (OMB) Director Peter Orszag, and former Congressional Budget Office (CBO) directors Rudolph Penner and Robert Reischauer, along with statements from each of the panel members. Throughout the meeting, most commission members – with the notable exceptions of

Sen. Richard Durbin (D-IL) and Reps. Xavier Becerra (D-CA) and Jan Schakowsky (D-IL) – regurgitated the new conventional wisdom on Capitol Hill that current deficits and long-term debt are the same problem and that Congress must act immediately by attacking "entitlements," including Medicare, Medicaid, and Social Security.

The April 28 Peterson event, nicknamed the "Deficit Fest" by *Huffington Post* columnist Dan Froomkin, featured some of the same unexamined assumptions and misguided ideas thrown around by politicians of both parties the previous day. While there has been some talk about keeping all options on the table, as Froomkin notes, "the pillars of the Washington establishment" have only one "fully developed policy proposal," which "is that America's most successful social program needs to be scaled back so that it provides fewer people less money over a shorter period of time."

According to economist Dean Baker, Peter Peterson "is a Wall Street investment banker who has ... committed over $1billion of his wealth to this effort ... to cut Social Security and Medicare." Baker was part of a group brought together by the Campaign for America's Future – the political action arm of the Institute for America's Future, a progressive policy research institute – the same day as the president's fiscal commission meeting to highlight the ostensible level of Peterson's influence over the debt panel's priorities. Ironically, C-SPAN, the cable network of Congress and the executive branch, grouped the video of the president's fiscal commission meeting with the videos of the morning and afternoon sessions of the Peterson fiscal event together under the same post.

There are a few voices of moderation. Froomkin labeled Center on Budget and Policy Priorities (CBPP) Executive Director Robert Greenstein and Economic Policy Institute (EPI) President Lawrence Mishel as insurgents at the Peterson event. The columnist sympathetically notes that the former "repeatedly reminded the audience of the enormous cost of tax giveaways to the wealthy and corporations," and the latter "argued that cutting Social Security benefits, for instance by increasing the retirement age, would unduly affect lower-income people."

While support for Social Security and Medicare have always been robust, the "tinkering around the edges" approach of raising the age limit a little here and cutting a few benefits there has an exaggerated effect on the poor and minorities. As Mishel noted during the Peterson function, while "life expectancy grew a lot over the last few decades ... it only really grew for people in the upper half of the income distribution. People in the bottom half of the income distribution are not living longer." This means that lower-income folks, who usually lack the funds to adequately represent themselves in government, will get cut out from the social safety net, leaving middle- and upper-income individuals with the benefits.

Moreover, the problem with long-term debt growth is rooted in medical costs, not Social Security. Despite scaremongering rhetoric about the impending “insolvency” of Social Security, remediation of its funding issues would do little to pull the federal budget off its unsustainable course. If Congress takes no action, Social Security will continue to pay retirees their promised benefits until 2037, after which they are projected to receive 76 percent of their promised benefits. To correct this, Congress could increase the Social Security payroll tax from 12.4

percent to 14.4 percent. An even better solution, far more progressive in nature, would be to increase the limit on taxable earnings. Currently, the Social Security tax is paid only on the first $106,800 of each employee's taxable earnings; increasing this amount could substantially mitigate the problem.

However, growth in health care costs, which the CBO projects to outpace economic (GDP) growth, will cause Medicare and Medicaid expenditures to increase from 9 percent of the size of the economy (in 2007) to 19 percent in 2082. While the combination of fully financing Social Security, Medicare, and Medicaid through deficit spending will cause the federal debt to equal over 1,100 percent of GDP in 2080, the CBO notes that Medicare and Medicaid will account for 80 percent of spending increases between now and 2035, and 90 percent of spending growth between now and 2080.

Amendments Bring Policy Debates to the Budget Resolution

On April 22, the Senate Budget Committee approved its Fiscal Year 2011 budget resolution, moving the chamber one step closer to setting spending limits for the coming appropriations process. The resolution provoked controversy, as it would cut spending levels below those in President Obama's budget request, which itself mandated a significant spending freeze on discretionary spending outside of defense and homeland security. The measure also frequently attracts contentious, policy-related amendments, and the current resolution is no exception.

Possibly the most significant amendment passed by the committee would create a new point of order should the Senate consider a provision or amendment under the reconciliation process that would "create gross new direct spending that exceeds 20 percent of the total savings" in the provision. Sen. Judd Gregg (R-NH) introduced the amendment, which would require 60 votes to overcome a point of order, effectively counteracting the procedural advantages that reconciliation provides. His objective was to ensure that legislation passed under reconciliation is largely used for deficit and debt reduction. Had this point of order been in effect this spring, it would have prevented reconciliation fixes for the recent health care legislation, according to Gregg. Going forward, the provision will make it difficult to use reconciliation on the pending climate bill and could have a lasting effect on the budget process.

Another noteworthy amendment was offered by Sen. Russ Feingold (D-WI), who actually ended up voting against the overall budget resolution. Feingold's amendment would force Congress to pay for future war spending by requiring any such funding be offset over a ten-year period. To date, despite calls for "responsible" budgeting, Congress has funded the wars in Iraq and Afghanistan through yearly supplemental appropriations, which allow the spending to avoid budget limits set out in the budget resolution while creating larger budget deficits. By requiring that this spending be paid for over a ten-year window, Feingold's amendment helps to put war funding on equal footing with other government spending. Feingold's amendment passed on a 15-8 vote, with two Republicans joining all thirteen Democrats in voting for the amendment.

The committee also approved an amendment from Sen. Lindsey Graham (R-SC), which reduced the overall amount obligated under the Troubled Asset Relief Program (TARP). Passed in 2008, the Bush administration intended to use the $700 billion in TARP funding to purchase "toxic" assets, mostly the billions of dollars in subprime loans and other housing-related securities that helped bring about the financial crisis and to help improve the health of the nation's struggling financial institutions. However, the program never fulfilled its grand intentions and ended up using far less of the $700 billion authorized to it. As of March 31, only about $500 billion was allocated to be spent, of which about $185 billion was repaid by entities receiving bailouts. That leaves some $385 billion in unallocated funding under TARP. Graham's amendment would reduce the TARP authorization by $44 billion to get rid of some of this unallocated money.

As it does not appear that any more financial institutions will be in dire need of support, the Obama administration had been planning on using some of the remaining TARP funds to create a small business loan program, a move which would require congressional authorization. Sen. Mark Begich (D-AK) introduced an amendment to authorize these loans, but the committee instead narrowly approved Graham's alternative in a 12-11 vote, rebuffing the administration.

The committee also passed an amendment offered by Sen. Sheldon Whitehouse (D-RI) that took aim at the U.S. Supreme Court's decision in *Citizens United v. Federal Election Commission* that allowed unlimited corporate spending on political campaigns (see related story). The amendment creates a reserve fund that will allow legislators to change assumptions in the budget resolution that would remove certain hurdles for authorization of funding for the Securities and Exchange Commission (SEC), FEC, and other agencies to regulate corporate involvement in elections.

The committee's budget resolution was also notable for amendments it rejected. Among others, it voted down an amendment from Sen. Jeff Sessions (R-AL), who once again tried to institute particularly strict discretionary budget caps for the next three fiscal years. Sessions introduced a similar amendment to three other legislative vehicles (which OMB Watch strongly opposed), and the Senate voted it down every in every instance. Sessions' amendment would have instituted substantial discretionary budget cuts, far below the levels asked for by either the president's budget request or the budget resolution put forward by the Budget Committee's chairman, Sen. Kent Conrad (D-ND). The amendment failed on a party line vote (10-13), possibly because the chairman's budget represented a safe middle ground between the president's request and Sessions' budget caps, giving centrist Democrats on the committee the political cover they needed to avoid implementing severe spending cuts.

While the amendments detailed above are some of the more significant ones passed by the Senate Budget Committee, there are many more amendments in the resolution's future. It must pass the entire Senate, the House Budget Committee, and the entire House, and it will pick up (and probably drop) more amendments at each stage of the process. This, of course, is assuming the leadership of either chamber decides to continue pushing forward with the budget resolution. According to the Congressional Budget Act of 1974, which dictates the steps of the budget process, the House may begin considering appropriations bills after May 15 if a budget resolution has not been passed. Since the House Budget Committee has not yet scheduled a

markup, odds are Congress will not meet that deadline.

Open Government Advocates Grade Federal Agency Openness Plans

On May 3, a group of open government experts, including OMB Watch, released a review of federal agencies' initial Open Government Plans that were published on April 7. Overall, the independent audit organized by OpenTheGovernment.org found that agencies did good work, but much remains to be done.

Under the Obama administration's Dec. 8, 2009, Open Government Directive (OGD), all agencies were required to produce Open Government Plans within four months. Agencies met the deadline but with inconsistent levels of success. While many agencies went beyond the requirements of the OGD for certain aspects of the plans, others failed to address basic requirements in the directive.

OpenTheGovernment.org identified key differences between plans that excelled and those that underperformed. The coalition cited each plan's level of specificity, ease of accessing information, identification of key audiences, and the quality and sustainability of flagship initiatives as the critical scoring areas that most often made the difference between strong and weak plans. However, the report also noted that many of the deficiencies in these areas can be easily fixed.

The April 7 plans were graded based on the specific requirements set forth in the OGD. The requirements were judged on a 0 to 2 scale, with 0 assigned for requirements that were unaddressed, 1 assigned for partial progress on a requirement, and 2 assigned for satisfactorily meeting the requirement. Bonus points were awarded for exceeding the requirements. The total score possible, excluding bonus points, was either 58 or 60 depending on whether an agency has original classification authority. This is because the OGD had special declassification requirements for those agencies, increasing their total possible points. Agency plans that were awarded bonus points may have exceeded the maximum score of 58 or 60.

Overall, most agencies scored at 70 percent of total points or higher. Fewer than half of all agencies received 80 percent or higher. The top three agencies, which scored above 100 percent, were the National Aeronautic and Space Administration (NASA), the Department of Housing and Urban Development (HUD), and the U.S. Environmental Protection Agency (EPA). It should be noted that no agency achieved 100 percent compliance with the OGD criteria, as can be seen in the agencies' basic scores (scores that did not include any bonus points). Those agencies that scored over 100 percent overcame minor point deductions by earning bonus points.

The report separated the plans' scores into three groups. The strongest plans included eight agencies that had the most detailed, deadline-specific, and innovative plans. The middle set was the largest, composed of agencies that made strong efforts on the plans but still needed

improvements on several requirements. Five agencies made up the weakest set, with plans that were significantly lacking in several components.

The five lowest scores, in order from lowest to highest, went to the Department of Justice (DOJ), the Department of Energy, the Office of Management and Budget (OMB), the Department of Defense, and the Department of the Treasury. Of particular disappointment to many of the evaluators was the poor performance by OMB and DOJ. Given that OMB has responsibility for overseeing portions of the OGD and DOJ has long overseen federal implementation of the Freedom of Information Act (FOIA), evaluators expected these agencies to seize this opportunity to lead by example.

For instance, OMB could have taken this opportunity to make its new contractor accountability database – the Federal Award Performance and Integrity Information System (FAPIIS) – accessible to the public. DOJ's ranking at the bottom of the stack was also disappointing given Attorney General Eric Holder's guidance to federal agencies in 2009, which stated his strong support for President Obama's commitment to open government.

The open government community and the administration both recognize that the Open Government Plans are evolving, "living documents." Kate Beddingfield, a spokesperson for the White House, commented on the OpenTheGovernment.org evaluation, stating, "We also agree that much remains to be done on this unprecedented effort to make government more transparent, and we look forward to continuing to work together with open government advocates and the public on the evolution and implementation of these plans."

The Department of Transportation has already produced a new version of its plan. The department refers to its plan as "a living document" that will change and improve over time. This second plan was not scored by the audit, which was restricted to only reviewing the initial plans, but it addresses many of the areas for which the initial plan was found to be deficient. The White House Office of Science and Technology Policy has also announced its intention to develop another version of its plan, demonstrating significant interest in the effort coming from federal agencies.

Agencies also conducted self-assessments of their own plans, the results of which are summarized on the White House's Open Government Dashboard. Comparing OpenTheGovernment.org's independent evaluation to the self-assessments reveals different perspectives on what the agencies have achieved so far. The White House provided a similar list of 30 specific criteria on a checklist and graded plans on a three-tiered scale: green for fully satisfying the requirement; yellow for partial progress on the requirement; and red for failing to meet the requirement. The dashboard summarizes performance on the criteria in five categories: formulating the plans; transparency; participation; collaboration; and flagship initiative, along with an overall plan score derived from the scores in the five main categories.

The White House assessment shows that three agencies scored green in all five main categories, as well as for the overall plan: the Department of Health and Human Services (HHS), the

Department of Transportation (DOT), and NASA. In OpenTheGovernment.org's independent audit, both NASA and DOT scored very high and were ranked 1st and 6th, respectively.

However, HHS ranked 20th in the independent audit, which placed it near the bottom of middle group. Although HHS was applauded by evaluators for its specific commitments to identifying and publishing high-value data sets in 2010, it did not score well in all areas. HHS was found lacking in demonstrating the sustainability of its initiative and failed to identify specific timelines for the reduction of its Freedom of Information Act request backlog. The most evident reason for the discrepancy between the White House and independent assessments is that the White House gave credit for compliance even if an agency included an aspirational reference to the requirement without concrete steps for meeting its goals. This only merited one point in the independent audit.

In some respects, the independent audit is the embodiment of the OGD in that it has established a new type of collaborative interaction between the public and federal agencies, aimed at improving government openness. Many of the federal agencies have reached out to the independent evaluators to better understand and respond to the assessments. Building on this, the openness community plans to revisit agency plans in June to see what progress, if any, agencies have made on satisfying all of the OGD requirements.

Currently, the open government community is also developing standards for what information each federal agency should, at a minimum, disclose. This "floor" on government openness is important because it can ensure consistency between agencies, which can enable the public to obtain certain information across the government, regardless of which agency website is visited. The floor criteria will focus on providing basic information and actions designed to achieve agency accountability and promote informed public participation. Once these standards are completed, the openness community will begin assessing whether agencies are meeting them.

The evaluators view the agency plans and the audit as the beginning of a process to make government more transparent, participatory, and collaborative. Future audits will eventually transition from focusing on planning to actual progress on taking action to accomplish their specified goals. As agencies move forward in coming months, their efforts to act on their plans will garner increased attention from the openness community.

EPA Puts More Environment Online

Several new online tools developed by the U.S. Environmental Protection Agency (EPA) are now available to provide the public with a variety of environmental information collected by the agency. The tools provide access to information about enforcement actions against polluters in the Chesapeake Bay watershed and across the nation, plus information about health risks from toxic chemicals and the ongoing oil spill disaster in the Gulf of Mexico. These online information access tools follow the recent release of the EPA's Open Government Plan, which makes public access to information a priority for the agency.

Clean Water Act

The EPA recently launched a new set of online tools, data, and interactive maps containing information on violations of the federal Clean Water Act. The web tools are part of EPA's Clean Water Act Action Plan. The agency has made enforcement of water quality laws a priority and in 2009 invited public participation on the creation of the action plan. In response to public comments, the EPA made data use a key feature of the plan.

According to the head of EPA's enforcement office, Cynthia Giles, "Making this information more accessible and understandable empowers millions of people to press for better compliance and enforcement in their communities."

The new web page provides interactive information from EPA's 2008 Annual Noncompliance Report, which pertains to about 40,000 permitted Clean Water Act polluters across the country. The site includes information on how many permits have been issued, how frequently sampling data is reviewed to determine if violations occurred, the frequency of violations, and the frequency that formal enforcement was taken in 2008. The information on the website is also available in HTML format, as a PDF document, and as a data table.

Despite the website's numerous useful features, a significant amount of information remains missing. Many states control their own water quality programs, and the new website cautions users that "states are not required to enter the data in the federal data systems." The agency therefore estimates how much information for a particular state is available through the web page. Some states do not even provide information to the EPA database on serious violations.

Summary data for each state's enforcement actions are only available for 2008 and for non-major permittees. The new website also does not count large major facilities, general permits, or wet weather permits. Detailed information, information from additional years, and reports from larger facilities are available on EPA's Enforcement and Compliance History Online (ECHO) database website.

Chesapeake Bay

Similar to the Clean Water Act Annual Noncompliance Report, EPA recently launched an online map that shows the locations of federal air and water enforcement actions in the Chesapeake Bay watershed and airshed.

EPA Administrator Lisa Jackson stated in a press release, "Transparency and accountability are essential to the work we're doing to clean up the Chesapeake and restore these treasured waters. The community now has new tools it needs to see where EPA is taking action to improve water quality and protect the bay."

The interactive map provides information on EPA enforcement actions and cases since 2009 under the Clean Air Act, Clean Water Act, and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, also known as Superfund).

Again, similar to the Clean Water Act Annual Noncompliance Report, some data from state governments are not available. The map does not show environmental enforcement actions taken by state or local environmental agencies.

Clicking on the flag for a specific facility on the map will open the enforcement case report for that facility. From this page, a user can click to retrieve more detailed facility data. In some cases, a settlement has been reached, and the details are available via links on the website.

EPA developed a draft Chesapeake Bay Compliance and Enforcement Strategy following a May 12, 2009, executive order from President Obama. The draft strategy seeks to target the greatest sources of pollution impairing the bay and its tributaries. The draft strategy is a multi-state plan for addressing violations of federal environmental laws and will be finalized in May as part of the evaluation of progress in meeting the goals of Obama's Chesapeake Bay Executive Order.

Both the Clean Water Act Annual Noncompliance Report website and the Chesapeake Bay enforcement map draw their compliance information from EPA's ECHO database. ECHO contains a large amount of enforcement and compliance data, but navigating and understanding the significance of the data in ECHO remain challenges.

For example, one facility found in the Chesapeake Bay watershed is the Oxford Waste Water Treatment Plant in Oxford, MD. According to the new online map, this water treatment plant exceeded its effluent permit 27 times over a three-year period. Clicking on the facility's flag on the map of Maryland produces a detailed report from the ECHO database. However, it is still far from intuitive to identify from the ECHO report what the exceedances were and what the consequences were – both for the facility in terms of fines or changes to operations and to the environment in terms of impacts to water quality or damage to habitat.

The public is well served by online tools that not only provide useful statistics, but also empower citizens by placing the information into a useful context. If a facility has violated federal law repeatedly, what have been the consequences? Is the facility changing its operations to be more in compliance? Has there been any ecological damage, and if so, what mitigation has occurred? These are basic questions of accountability, and the data must help state and federal regulators and the public answer these questions and hold polluters accountable. The two new online tools take strong steps in this direction, but more could be done with the ECHO database to make it more effective. A more versatile search feature and expanded downloading capabilities would help many users. All users would benefit from having the data placed into meaningful context.

Oil Spill and Toxics Data

Part of the agency's ongoing response to the disastrous oil spill in the Gulf of Mexico has been to create a web page through which users can learn about EPA's response and the impacts on the region's air and water quality. Users of the new page can see the agency's plan for sampling and testing air, water, and sediment quality in the Gulf and track air quality monitoring data in real time.

One other recent addition to EPA's online data array is the release of "ToxRefDB," which allows the public to search and download thousands of toxicity testing results on hundreds of chemicals. Users may search by a chemical's name or identification number. The detailed information includes a diagram of the chemical and its basic characteristics and links to relevant animal studies on the health threats of the chemical. The database contains pesticide registration toxicity data that used to be stored as hard-copy and scanned documents.

The new online tools continue a trend started early in 2009 with the release of the EPA's MyEnvironment program. The MyEnvironment tool allows the public to enter a place name or zip code and receive a diverse amount of environmental information linked to that geographic region. MyEnvironment incorporates geographic information with local air and water quality data, cancer risk estimates, pollution reports from local facilities, and other environmental data.

Environmental, Health, and Safety Agencies Set Rulemaking Agendas

On April 26, federal agencies published their updated rulemaking agendas outlining past, present, and future regulations. The agendas provide insight into the Obama administration's plans and expectations in the coming months.

Each spring and fall, the executive branch publishes the *Unified Agenda of Regulatory and Deregulatory Actions*, commonly called the *Unified Agenda*. The agenda includes the individual rulemaking agendas for all executive branch agencies, including independent commissions. Agencies post online brief descriptions of their rules and projected timetables for milestones and completion. The agendas include proposed rules, final rules, recently completed rules, and long-term actions.

EPA

The U.S. Environmental Protection Agency (EPA) led all individual agencies with 342 agenda items. EPA added 43 new entries since its last agenda was published. Among them are a proposal to limit greenhouse gas emissions from heavy-duty vehicles, an update to the Chemicals of Concern list to include the consumer product chemicals bisphenol-A and phthalates, and proposed standards for the use of nanoscale materials.

EPA's agenda also indicates the agency is on track to finalize new greenhouse gas regulations for stationary sources such as factories and refineries. The agency expects to issue a final rule in May. A draft of the final rule was sent to the White House Office of Information and Regulatory Affairs for review on April 20. EPA announced in April new standards to limit greenhouse gas emissions from vehicles, and a companion rule for stationary sources has been expected.

EPA also says it will continue to update national air quality standards. EPA expects to issue final rules strengthening regulation of sulfur dioxide and ozone, or smog, in June and September, respectively. In November, EPA will consider whether to tighten controls of carbon monoxide

and will review existing regulations for particulate matter in December. EPA has said it will review, and revise if necessary, by the end of 2011 the standards for all six major air pollutants (sulfur dioxide, ozone, carbon monoxide, particulate matter, nitrogen dioxide, and lead) covered under the Clean Air Act.

Department of Labor

The Department of Labor has placed several new initiatives on its rulemaking agenda. The Occupational Safety and Health Administration (OSHA) announced its intent to launch the Injury and Illness Prevention Program which, if finalized, will require employers to maintain and follow safety plans that incorporate best practices and aim to protect workers from hazards they may face on the job. The program would be a departure from the hazard-by-hazard approach the agency has traditionally taken.

The Mine Safety and Health Administration (MSHA) is planning a rule to address a major procedural flaw that has drawn attention in the wake of the Massey Energy Upper Big Branch mine explosion that killed 29 workers in April. The agency will attempt to close a loophole whereby mine operators keep themselves off MSHA's pattern-of-violations list by challenging safety violations.

The Labor Department does not expect to finish work on many high-profile rules in 2010. For example, an OSHA proposal to limit workers' exposure to silica dust is not expected until February 2011. The rule has been on the agency's agenda since 1997. MSHA projects it will propose the new pattern-of-violations rule in January 2011.

David Michaels, the head of OSHA, acknowledged that many rules, particularly exposure standards, take too long to complete. "There are so many hoops we go through with every standard," Michaels said, referring to both public participation requirements and analytical requirements such as risk assessments. "We are working very hard to move [standards] more quickly," Michaels said.

Seth Harris, the Deputy Secretary for Labor, said that the Labor Department will take the timetables in agencies' agendas more seriously than it has in the past. Harris said the agencies should consider their agendas "a production schedule," adding, "I'm holding them accountable for meeting their deadlines." Michaels and Harris spoke April 29 at an event at the Center for American Progress where the department's agenda was discussed.

The agenda, though broad in scope and varied in issues, reflects the Labor Department's new philosophy of "plan, prevent, protect," Harris said. "Plan, prevent, protect aims to change the calculus so that employers and other entities regulated by the Labor Department will take responsibility for employment law compliance." The philosophy is intended in part to counter the "catch me if you can" attitude some employers have, in which they view workplace law violations as a cost of doing business, he said.

Other Agencies

The Department of Transportation (DOT) faces similar challenges. DOT's National Highway Traffic Safety Administration (NHTSA) says it will propose in December new regulations for accelerator control systems, which could potentially address the unintended acceleration defect that caused Toyota to recall millions of vehicles earlier in 2010. However, the rule has been on NHTSA's agenda since 2008. NHTSA is also behind schedule on a rule to create a 10-year-old test dummy needed to develop additional child restraint regulations. Congress directed the agency in 2002 to improve car safety for children weighing more than 50 pounds.

The Food Safety and Inspection Service (FSIS), the arm of the U.S. Department of Agriculture responsible for meat and poultry safety, added no new rules to its agenda. The agency says it will propose or finalize 12 new rules in the next few months. However, FSIS has already missed target dates for most of those rules, based on timetables in past agendas. FSIS is currently operating without a Senate-confirmed head, possibly complicating efforts to write new rules.

Some agencies' agendas reflect a focus on specific issues or problems confronting those agencies. The Food and Drug Administration (FDA), part of the Department of Health and Human Services, will direct much of its rulemaking capacity toward implementing the Family Smoking Prevention and Tobacco Control Act signed into law in 2009. The law gives FDA jurisdiction over tobacco for the first time. FDA added six new tobacco-related rules to its agenda. The agency expects to issue this summer proposals on cigars and smokeless tobacco products and to propose in November new regulations for cigarette pack warning labels.

The Consumer Product Safety Commission (CPSC) will continue to set standards under the Consumer Product Safety Improvement Act, the product safety overhaul Congress passed in 2008 largely aimed at protecting children. The act set a number of deadlines for new rules and programs. In the coming months, CPSC's commissioners will make final decisions on infant walker safety standards and take steps necessary to create an online database where the public can file complaints and incident reports about potentially dangerous products.

The Department of Energy (DOE) continues to update energy efficiency standards for appliances and other consumer products. DOE will soon propose energy efficiency standards for refrigerators and home furnaces. In 2010, DOE has already finalized new efficiency standards for small motors and for commercial clothes washers. The agenda includes several new items, including an energy conservation standard for televisions, expected to be proposed in December 2012.

Historically, the agenda has not been a useful tool. Agencies often miss timelines and milestones, and agencies have been subjected to long procedural delays due to the complexity of the regulatory process. However, the agenda can be a useful planning and accountability tool to measure the Obama administration's efforts to solve long-neglected health and safety problems if, as Labor's Harris suggests, it is used more as "a production schedule."

The entire Spring 2010 *Unified Agenda* is available at www.reginfo.gov/public/do/eAgendaMain. The next *Unified Agenda* is due to be published in October.

DISCLOSE Act Seeks to Blunt Impacts of Citizens United

To blunt the impacts of the U.S. Supreme Court decision in *Citizens United v. Federal Election Commission*, Rep. Chris Van Hollen (D-MD) and Sen. Charles Schumer (D-NY) recently introduced companion bills, both called the DISCLOSE Act (the Democracy Is Strengthened by Casting Light On Spending in Elections Act). The legislative response would create new, rigorous campaign finance disclosure requirements meant to prevent moneyed interests from drowning out the voices of citizens and smaller advocacy organizations.

The *Citizens United* decision in January struck down parts of the Bipartisan Campaign Reform Act (BCRA), which prohibited corporations (including nonprofit organizations) and labor unions from airing any "electioneering communications" – broadcast messages that refer to a federal candidate in the weeks before a general election or primary. The Court also ruled that corporations can use unlimited funds from their general treasuries to expressly advocate for the election or defeat of candidates for federal office as long as the actions are independent of campaigns.

During a press conference held outside the Supreme Court on April 29, Schumer said, "No longer will groups be able to live and [be] spending in the shadows." To offset the January ruling, the DISCLOSE Act (S. 3295) would strengthen financial disclosure and establish disclaimer requirements while setting new limits on political involvement by government contractors and foreign-controlled corporations. 39 Democratic senators and one independent have co-sponsored the bill thus far.

All corporations and 501(c)(4), 501(c)(5) (unions), 501(c)(6) (trade associations), and 527 organizations that spend money on independent expenditures or electioneering communications to influence a federal election are "covered" under the bill. The legislation expands the definition of an independent expenditure to include both express advocacy and the functional equivalent of express advocacy "because it can be interpreted by a reasonable person only as advocating the election or defeat of a candidate."

The companion bill in the House, H.R. 5175, was announced with two Republicans signing on as co-sponsors, Reps. Mike Castle (R-DE) and Walter Jones (R-NC). Upon releasing the bill, Van Hollen stated, "Every citizen has a right to know who is spending money to influence elections, and our legislation will allow voters to follow the money and make informed decisions."

Specifically, the DISCLOSE Act would require more explicit disclaimers. The CEO or highest-ranking official of a corporation would be required to appear on camera to say that he or she "approves this message." The top funder of the ad would also have to record a "stand-by-your-

ad" disclaimer, and the top five donors to an organization that purchases campaign-related TV advertising would be listed on the screen at the end of the message.

Part of the goal of the bill is to provide the public with complete information regarding the funding sources of campaign-related expenditures and rein in entities that try to hide their activities by donating to an intermediary. This is done, in part, by increasing the information that has to be disclosed to the Federal Election Commission (FEC).

If an organization such as a 501(c)(4) or 527 group spends more than $10,000 in a 12-month period on independent expenditures or electioneering communications (including transferring funds to another organization for the purpose of influencing an election), all donors who have given $1,000 or more to the organization during that period would have to be disclosed.

Expenditures of $10,000 or more made more than 20 days before an election, and expenditures of $1,000 or more made within 20 days before an election, would also have to be reported to the FEC within 24 hours.

Additionally, the DISCLOSE Act would allow a donor to specify that a contribution may not be used for campaign-related activity. An organization would then be restricted from using the donation for that purpose and would not disclose the donor's identity.

Other provisions include:

- Corporations can establish a separate "Campaign-Related Activity" account to receive and disburse political expenditures
- Federally registered lobbyists must disclose any election spending costing more than $1,000, as well as the name of the candidate or campaign supported or opposed
- All campaign-related expenditures must be disclosed on an organization's website with a link on the homepage within 24 hours of reporting the information to the FEC
- Expenditures must also be disclosed to shareholders and members of the organization in periodic or annual financial reports
- Political parties can spend unlimited amounts of their own funds in support of the party's candidates, as long as a candidate or group of candidates does not "control" the spending

The DISCLOSE Act goes beyond disclosure and would prohibit corporations that receive federal contracts worth more than $50,000 from spending money to influence federal elections. Companies that have received and not paid back funds from the federal Troubled Asset Relief Program (TARP) would also be forbidden from spending money on elections, as would companies that have 20 percent foreign voting shares, a majority of foreign directors, or foreign nationals controlling U.S. operations of foreign-based corporations.

The Senate version also includes two provisions that are absent from the House bill. First, senators would be required to file their campaign finance reports electronically to the FEC. House and presidential candidates have had to file electronically since 2001. Second, if an

organization spends $50,000 or more on airtime to run ads that support or oppose a candidate, the targeted candidate would be entitled to lower rates for broadcast ads.

Many have criticized the legislation for requiring "too much" disclosure. Numerous reactions suggest that the bill will effectively infringe upon First Amendment rights and ultimately chill speech. Some advocacy groups are also concerned that, if enacted, the DISCLOSE Act could potentially deter donors who do not want to be identified in television ads.

For example, the U.S. Chamber of Commerce promised to fight the legislation even before it was introduced. U.S. Chamber President and CEO Thomas J. Donohue said, "Stifling free speech is an abuse of the legislative process and is unconstitutional. It will not stand."

However, the Court in *Citizens United* upheld disclosure requirements as constitutional. Specifically, the majority opinion said that "disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages."

President Obama, who has criticized the *Citizens United* decision, issued a statement noting that with the DISCLOSE Act, "The American people can follow the money and see clearly which special interests are funding political campaign activity and trying to buy representation in our government." Obama also urged Congress to act quickly. "Passing the legislation is a critical step in restoring our government to its rightful owners: the American people," he said.

Sponsors hope Congress can pass the bill before the July 4 recess in order to have a new law in place for the upcoming 2010 congressional elections. However, this is an ambitious schedule, as the legislation is already facing tough opposition. House Administration Committee Chairman Robert Brady (D-PA) announced that the committee will hold a hearing on the bill on May 6. The legislation lacks bipartisan support in the Senate, but Schumer predicted it will ultimately be enacted with backing from some Republican senators.

Supreme Court Hears Arguments on State Disclosure of Petition Signatures

On April 28, the U.S. Supreme Court heard oral arguments in *Doe v. Reed*, a lawsuit filed by a political action committee in Washington State. The case could decide whether public disclosure of referendum petition signatures is permitted or if signing such a petition is a private political act protected by the First Amendment.

Doe v. Reed centers on the public's right to know who signed petitions related to Referendum 71, a 2009 attempt to overturn Washington's expanded domestic partner law, which gives gay and lesbian couples the same rights as married couples.

Protect Marriage Washington, an anti-marriage equality political action committee, submitted 138,500 petition signatures to place Referendum 71 on the ballot. The names of the petition signatories are a matter of public record based on Washington's Public Records Act.

The petitioners in *Doe v. Reed*, including Protect Marriage Washington and several signatories, are arguing that if the petition signatures are released, the signatories will be subjected to harassment and abuse. As a result, they argue, the public will be discouraged from signing petitions in support of placing referenda and initiatives on the ballot, and this will have an adverse effect on free speech.

The State of Washington is arguing that the names should be disclosed upon request, as required by the state's Public Records Act. Such disclosure helps to sort out whether fraudulent names were used on the petition to reach the required number of signatories to qualify an initiative or referendum for the ballot.

The state's Attorney General, Rob McKenna, who argued in support of disclosure, told the *Seattle Times* that the "state's disclosure laws impose a 'modest burden' on petition signers, compared with the 'very compelling, very strong government and public interest in transparency, accountability and fraud protection.'"

Protect Marriage Washington succeeded at the district court level when a judge blocked the release of the signatures. The case then moved to the U.S. Court of Appeals for the Ninth Circuit, which reversed the lower court's decision. The Ninth Circuit noted that "the signatures are collected in public and shown to public officials and that the release of the names furthers the important governmental aim of preserving electoral integrity." Protect Marriage Washington then appealed to the Supreme Court, which blocked the release of any signatures until it could hear and decide the case.

The outcome of this case could impact referendum and initiative petitions nationwide. If the Court rules that disclosing the names would discourage free speech and thus violate the First Amendment, it would likely keep all referendum and initiative petitions in Washington private. The same effect would possibly be seen in two dozen other states, as well.

Twenty-three states submitted a joint amicus brief in support of the State of Washington. The states argued that public disclosure of referendum petitions "imposes minimal burdens on protected speech" and "furthers Washington's compelling interests in preventing election fraud, preserving ballot integrity, and promoting open government."

The states argued that petition fraud has become more common in recent elections. "In Washington specifically, there was a 'rapid transformation . . . from volunteer to professional signature gatherers' in the 1990s. In conjunction with this shift, scholars now conclude that there may be as much, if not more, corruption in initiative campaigns than representative elections." Disclosing the names will allow the public to verify the validity of the signatures.

Several media organizations, including Reporters Committee for Freedom of the Press and Gannett Company, also submitted a joint amicus brief in support of Washington. They argued that if "the Court allows referendums to be placed on the ballot without disclosing the identities of the government actors/citizens who petitioned for the referendum, the general public has no way of holding the government accountable for the legislation."

Several members of the Court seemed skeptical of arguments seeking to keep the signatures secret. Justices Antonia Scalia, Ruth Bader Ginsburg, Sonia Sotomayor, and John Paul Stevens asked James Bopp, attorney for the petitioners, some pointed questions, poking holes in Bopp's arguments in support of keeping the signatures private.

Scalia told Bopp that "running a democracy takes a certain amount of civic courage. And the First Amendment does not protect you from criticism or even nasty phone calls when you exercise your political rights to legislate."

When discussing the possibility of threats, Scalia said, "The threats should be moved against vigorously, but just because there can be criminal activity doesn't mean that you – you have to eliminate a procedure that is otherwise perfectly reasonable."

Sotomayor focused on the implications of this ruling beyond the case at hand. She asked Bopp, "You don't think that putting aside this kind of referendum, just a hypothetical referendum having to do with a certain tax scheme – you don't think the voters would be interested in knowing what kinds of people in what occupations are interested in that particular tax benefit or not?"

Bopp responded that a "few might be, but we think this is marginal information." He also said that "the petition signature and distribution is only for a very limited governmental interest."

Chief Justice John Roberts and Justice Samuel Alito asked McKenna questions that indicate that they may support keeping the petition signatures a secret from the public. They questioned McKenna on how far disclosure will go if it is allowed.

Roberts asked whether "having your name revealed on a petition of this sort might have a chilling effect on whether you sign it."

Alito and Roberts also asked McKenna questions focusing on the possibility of violence, harassment, and intimidation against petition signatories. Roberts asked McKenna, "Do you think that the disclosure of the names, pending the resolution of their as-applied challenge, would subject them to incidents of violence and intimidation?"

Doe v. Reed is part of a recent pattern to eliminate disclosure laws. This case draws parallels to *Many Cultures, One Message v. Clements*, a lawsuit on behalf of two volunteer groups challenging part of Washington State's grassroots lobbying disclosure law as a violation of their First Amendment rights to free speech, assembly, and petition. Washington is one of 36 states that have some sort of law addressing disclosure of grassroots lobbying.

The organizations seeking to prevent grassroots lobbying disclosure are making similar arguments as the petitioners in *Doe v. Reed*. They argue that the registration and reporting rules prohibit them from "exercising their right to engage in anonymous political speech," according to the suit. They further argue that grassroots lobbying disclosure laws and the cost for violating them may discourage small groups from becoming active in politics and public policy.

The Supreme Court is expected to decide *Doe v. Reed* by the end of June.

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In This Issue

Senate Passes Limited "Audit the Fed" Amendment

During the ongoing Senate debate on the financial reform bill, Federal Reserve transparency briefly took center stage. Sen. Bernie Sanders (I-VT) introduced an "Audit the Fed" amendment to the bill during the week of May 16, which the Senate approved in a 96-0 vote after the amendment was greatly scaled back. The amendment would instruct the Government Accountability Office to "conduct a one-time audit of all loans and other financial assistance provided during the period beginning on December 1, 2007 and ending on the date of enactment of this Act."

Supporters of the Audit the Fed movement, led by Rep. Ron Paul (R-TX), are disappointed that the amendment would not require full, regular audits of the Fed, which would include audits of the setting and execution of monetary policy, communications among or between employees of the Fed, and transactions with foreign banks. Instead, the amendment the Senate passed is a

narrowly focused accounting of the Fed's actions during the financial crisis, specifically its use of so-called Section 13(3) powers.

Section 13(3) of the Federal Reserve Act gives the Fed broad powers. The important sentence in the statute reads, "In unusual and exigent circumstances, the Board of Governors of the Federal Reserve System" may provide discounted "notes, drafts, and bills of exchange," provided they are properly secured (collateralized), and the institution in question could not obtain credit from another bank. In other words, so long as the Fed believes there are "unusual and exigent circumstances," the Fed can decide to lend money to almost any financial institution, even non-depository institutions (not all of the Fed's emergency actions were under Section 13(3), but the most controversial actions were).

Beginning in 2008, the Fed began to use these powers for the first time since the 1930s. The Fed set up several programs, with names such as the Asset-Backed Commercial Paper Money Market Mutual Fund Liquidity Facility, the Term Asset-Backed Securities Loan Facility (TALF), and the Commercial Paper Funding Facility, all of which were variations on the same theme: the programs were all designed to function as the lender of last resort. If no other institution will lend to a financial firm, it can turn to the Fed and receive loans. While the rates provided by the Fed through these programs were not very favorable compared to market rates, they provided important lifelines to struggling firms that rely on open market borrowing for their daily business.

However, there is virtually no oversight over these programs. The Fed can choose to declare "unusual and exigent circumstances" whenever it wants to, and it can lend as much money as it wants to almost any institution it wants, so long as the loans are collateralized. Congress has no oversight over these actions. Also significantly hindering oversight of the Fed's actions is the fact that the Fed is not required to disclose which institutions receive aid from Section 13(3) programs. Outside of the Fed, no one knows who is receiving public funds through these programs. There is no guarantee, for instance, that firms receiving these loans were struggling because of liquidity problems and not because they were on the brink of collapse due to over-exposure to subprime loans. The Fed is supposed to be helping the former institutions, not the latter.

Supporters of the Audit the Fed movement were hoping to use the recent exercise of Section 13(3) powers to bring about a full audit of the Fed. Capitalizing on populist distrust of the Fed, Paul's Audit the Fed bill, which mandates a full audit, had over 300 cosponsors in 2009 when it passed the House as part of that chamber's financial reform package, far more than it has garnered in sessions past. That momentum died in the Senate, where Sanders' companion bill had far fewer cosponsors, and Sanders eventually had to pare back his amendment in order to gain enough support. The Senate version is a step back from the House version; specifically, it would not audit the Fed's monetary policy decisions, one of Paul's main targets. Both chambers' versions would, however, require an audit of the Fed's international currency swaps, which are outside of the Fed's Section 13(3) powers but have garnered criticism.

Importantly, the Senate amendment does include a provision the House version does not. It requires the Fed to publish information on recipients of Fed emergency support, such as name, amount of support, type of support, and rationale for providing the support. As noted earlier, who received the Fed's support to troubled financial institutions is a closely held secret, as the Fed argues that releasing this information would constitute a black mark against the firms, hurting their ability to borrow in the open market. Only firms in danger of collapsing would need such help, the argument goes, so announcing which firms were receiving aid would be like announcing which firms are on the brink of collapse, making it even harder for them to recover.

Transparency advocates and members of the media have long fought for disclosure of the identities of these institutions, arguing that the public has a right to know how its money is being used. Bloomberg News is in the process of suing the Fed for these names.

While the House bill calls for an audit of the Fed's emergency lending actions, it does not require publishing information on recipients of the aid. This addition will bring significant transparency to the Fed's actions over the past several years and will help give a better picture of the financial crisis.

Observers say even this limited Audit the Fed amendment is meaningless if the Senate does not approve the larger financial reform package. Senate Majority Leader Harry Reid (D-NV) filed cloture on the bill late on May 17, setting up a final vote on May 19. It looks likely that the bill will pass the Senate, setting up a conference committee between the House and Senate. The recipient disclosure provisions from the Senate's version will likely stay in, but it is unclear how broad the final audit will be. It seems that the president and Fed officials have been persuasive, at least in the Senate, where they have successfully lobbied for Sanders' weaker amendment, and Rep. Barney Frank (D-MA), chair of the House Financial Services Committee, was initially reticent to support a wide-ranging audit. These factors make it more likely the Senate's narrow audit will be the version that comes out of the conference committee later in 2010.

Long-Delayed Senate Climate Bill Considers Need for Transparency

Sens. John Kerry (D-MA) and Joe Lieberman (I-CT) recently introduced long-awaited Senate climate change legislation. The bill seeks to reduce greenhouse gas emissions in the United States by 17 percent of 2005 levels by 2020 and 83 percent by 2050, matching targets set in a House bill passed in 2009. The bill includes several provisions calling for transparent and participatory policies, especially relating to measures that would create new financial markets for buying and selling the right to pollute. How well such transparency would be implemented is a major question, and the success of the emissions reductions may depend on the level of openness that is built into the nation's climate change policy.

A lack of transparency in key parts of the financial sector is considered to be a major contributing factor to the ongoing economic hardships now afflicting the U.S. and other nations. Numerous recent market crises, such as the 2008 petroleum price spike, the crash of the

subprime mortgage and credit default swap markets, and the Bernard Madoff Ponzi scheme have raised significant concerns about the transparency and stability of financial markets. The proposed climate legislation would create enormous new financial markets in an attempt to reduce greenhouse gas emissions. Many are concerned that a lack of transparency in U.S. climate policies would undermine progress in reducing emissions, resulting in the loss of precious time.

The Kerry-Lieberman bill, known as the American Power Act (APA), calls for an expanded greenhouse gas registry to track emissions, public disclosure of key data sets related to emissions reductions, and stresses the need for transparent and participatory design and implementation of market-based programs, which provide greater flexibility to polluters seeking emissions reductions, among other transparency measures. Requiring openness and accountability from the early stages of climate policy development would help ensure the policies make real emissions reductions and would help identify poorly performing measures.

The APA includes market-based policies for reducing emissions, such as the creation of a carbon exchange that uses quarterly auctions to trade the right to emit decreasing "allowances" of greenhouse gases, and the use of "carbon offsets," which allow polluters to meet some of their required reductions by paying for emissions reduction projects elsewhere in the U.S. or in foreign countries. According to the Pew Center on Global Climate Change, "Congress has the opportunity to design the carbon trading market oversight framework at a point in time before long-standing carbon trading practices and systems have been fully established."

Greenhouse Gas Registry

One fundament of a transparent, accountable climate change program is a clear and accurate system for reporting who is emitting greenhouse gases and how much. As a result of language inserted into a 2008 appropriations bill, the U.S. Environmental Protection Agency (EPA) created a mandatory greenhouse gas reporting rule for thousands of large emitters across the U.S. economy. The first reports from facilities are due in 2011. The APA calls for EPA to build on this program to meet the bill's expanded information needs.

The APA would amend the Clean Air Act to expand the existing registry by covering additional sources such as vehicle fleets, requiring reporting on the capture and sequestration of greenhouse gases, requiring more frequent reporting, and placing limits on what information can be withheld from the public by claiming it as a trade secret. The revised registry would also authorize EPA to collect data from 2007 forward, whereas the existing registry only collects emissions data from 2010 onward.

Carbon Offsets Transparency

Carbon offsets are a mechanism whereby a polluter can meet a portion of its required emissions reductions by investing in a project that reduces emissions or sequesters carbon elsewhere. For example, a cement factory could pay to have trees planted or a refinery could pay for citizens to install solar panels. Offsets theoretically allow more flexibility for polluters to comply with the

law because paying others to reduce emissions can be cheaper than reducing the polluters' own emissions.

Transparency is again critical to realizing real emissions reductions through offsets. The U.S. Forest Service advises that to be legitimate, offsets must be real, measurable, verifiable, and additional (meaning the offset would not have occurred under a business-as-usual scenario). In a 2008 study, the Government Accountability Office (GAO) determined that "any use of offsets for compliance that lack credibility would undermine the achievement of the program's goals." GAO emphasized the need for transparency to ensure the offsets projects are creating reductions that are real, measurable, and would not have otherwise happened.

The Kerry-Lieberman bill establishes criteria to assure that offset credit is earned only for real and permanent actions that would not have occurred otherwise. The APA includes requirements for the public disclosure of the government's approval or disapproval of specific offsets projects and the information relevant to making the decision. Additionally, the APA calls for audits of offsets projects; however, the results of the audits would be aggregated before being disclosed, likely denying the public information about specific projects.

The transparency of offsets projects in foreign countries receives special attention in the APA. There are many opportunities for offsets projects in developing countries, such as reforestation projects. Questionable practices surrounding past voluntary offsets programs have drawn criticism of their accountability and veracity. One section of the APA requires that "local communities (particularly the most vulnerable communities and populations in the communities and indigenous peoples in areas in which any activities or programs are planned) are engaged through adequate disclosure of information, public participation, and consultation, including full consideration of the interdependence of vulnerable communities and ecosystems to promote the resilience of local communities." Similar language calling for transparency and public participation appears elsewhere in the offsets provisions of the bill.

Scientific Review

The EPA and other relevant agencies are required to make periodic reports to Congress on new scientific information, on whether the U.S. program is meeting its goals, and on whether the nation's efforts are sufficient to avoid the most devastating impacts of climate change. For example, a new technical advisory committee will be created to analyze carbon capture and sequestration technologies. All of this committee's studies must be made public.

Auctions

The Kerry-Lieberman bill authorizes the U.S. Commodity Futures Trading Commission to create rules for the transparent operations of a carbon allowance market, including the public disclosure of carbon market participants. Bidders in auctions must disclose whom they are bidding for, and the identity of winning buyers and the final carbon price must be disclosed. The bill specifies that a greenhouse gas allowance tracking system must be available to the public on the Internet.

Other Transparency Provisions

One controversial feature of the APA calls for expedited and expanded licensing and construction of nuclear power plants. The bill calls on the Nuclear Regulatory Commission (NRC) to report to Congress on ways to move forward on this nuclear expansion. The bill states that the NRC's recommendations must provide ways for "interested parties that have standing" to have their "legitimate concerns" heard.

Another significant measure in the APA is the requirement that companies drilling for natural gas that use a common yet controversial technique known as hydraulic fracturing must publicly disclose the identities of the chemicals used in the drilling process. Hydraulic fracturing has been linked to numerous cases of drinking water contamination, but the chemicals used in drilling, many of which are known to be toxic, are concealed from the public by drilling companies that claim the information is proprietary.

The prospects for the Senate bill are unclear. The House passed its bill in June 2009. Little time remains for the Senate to act on its bill, which technically is considered a "discussion draft." Climate change legislation must get through the Senate, conference committee, and a full congressional vote before the end of the session. Otherwise, a new Congress must take up the matter anew in 2011.

Public Online Information Act Introduced in Senate

On May 6, Sen. John Tester (D-MT) introduced the Public Online Information Act (POIA) (S. 3321) to require the federal government to post currently available public information on the Internet. Although this legislation would increase the amount of federal information that is posted online, some open government groups have concerns regarding certain provisions in the bill.

According to Tester, the purpose of POIA is to "make sure that transparency is keeping up with online technology." POIA seeks to ensure faster and more complete access to records held by the executive branch. To accomplish this, the bill requires federal agencies to post public government records on the Internet. This includes records such as reports disclosing lobbying activities and filings by high-level government officials concerning their financial interests.

The bill would impose several specific mandates on federal agencies. The bill first requires agencies to establish clear accountability by appointing a designated person to be responsible for implementation of the law. The bill also requires agencies to provide for permanent online access to the public records they post, so that once posted, the records cannot be removed at a later time. Rulemaking authority on the format of published records and the publication timeframe is granted to the E-Government Administrator at the Office of Management and Budget (OMB).

Each agency would also be required to publish on the Internet a comprehensive, searchable, machine-readable list of all records it makes publicly available. This list must include a description of the records, where they can be found, and whether the records are available to the public at no cost or for a fee. Agencies must also maintain a list of records not made available on the Internet and must publish that list online.

In addition to making most public records permanently available on the Internet, the bill would also establish an advisory board to determine best practices. The board would consist of 19 members with five-year, renewable terms. The board members would represent a range of perspectives, including those from nonprofit organizations and relevant subject areas, with not more than six government employee members. The board would meet at least six times per year and would provide recommendations on how to make public records available on the Internet. The bill also mandates that the E-Government Administrator take the recommendations of the committee into consideration in its rulemaking process.

Although the board is not subject to the Federal Advisory Committee Act (FACA), the bill includes several measures to enhance its transparency. The board must still publish transcripts, documents, and any video recordings of its proceedings. Further, it must publish a report on its activities at least every two years.

The legislation is limited to posting public information online, and it provides an exception to its posting requirements. The bill is clear than any information that is withheld under the Freedom of Information Act (FOIA), for reasons such as privacy, national security, and confidential business information, shall not be made available online. For information that is public, whether through FOIA or other means, another provision in the bill allows agencies to petition the E-Government Administrator at OMB (or, if an independent agency, the appropriate designated agency official) to prevent online disclosure when they can present "clear and convincing evidence" demonstrating "harm of disclosure significantly outweigh[ing] the public's interest." The bill does not state why certain information, not covered by any of the standard FOIA exemptions, may be harmful if disclosed on the Internet.

The Senate bill was preceded by similar legislation (H.R. 4858) introduced in the House on March 16 by Rep. Steve Israel (D-NY) and cosponsored by Rep. Jared Polis (D-CO). The bills contain some key differences but are similar overall. The House bill does not define the membership of the advisory committee to include nonprofit organizations and area experts. The Senate bill expands the House bill's definition of records that must be made available on the Internet to include the contracts for those entities acting as agents of the government and the records of such government contractors. Further, the Senate bill expands the limitation on agencies seeking exemptions to posting records on the Internet by requiring "clear and convincing evidence" as opposed to a "clear and convincing reason" in the House bill.

Although the aim of the bills is simple, the exception provisions may complicate their overall mission to make government more open. Open government groups have been divided on this issue. The Sunlight Foundation has consistently referred to the exceptions in the bill as "commonsense" measures. However, other groups argue that they legitimize an unproven idea

that information can be public but not releasable for online publication. Patrice McDermott of OpenTheGovernment.org told OMB Watch that the "provisions in POIA cause some concern in the government openness community by presuming a need that has not been clearly proven to exist."

Such exceptions to online publication, while extremely rare, are not entirely unprecedented. The one clear example is in the Chemical Safety Information, Site Security, and Fuels Regulatory Relief Act (CSISFRA) of 1999, which restricts public access to certain Risk Management Program (RMP) information. RMP data is collected under amendments to the Clean Air Act to inform the public about safety risks at chemical facilities throughout the United States. Under CSISFRA, the Off-Site Consequence Analysis (OCA) section of RMP information, also known as the worst-case scenario, is prohibited from electronic distribution and only available through public reading rooms. However, even though this restriction was limited to only one section, since shortly after the Sept. 11, 2001, terrorist attacks, none of the RMP data has been available on any federal websites. OMB Watch has argued against this for years, because the public safety interest rests in disclosure since no threat has been proven. Additionally, OMB Watch has continued to publish RMP data without interruption since 2000.

As was learned in the aftermath of the 9/11 terrorist attacks, even when federal agencies remove public information from agency websites, such information surfaces on non-government websites. Once information is public, it will likely make its way to the Internet, regardless of agency actions.

Neither bill defines the threshold of a "clear and convincing reason" or "clear and convincing evidence," nor do the bills define what is meant by "harm." However, Steven Aftergood of the Federation of American Scientists noted to OMB Watch that the impact of the exception may, in the end, be negligible. Aftergood stated, "Personally, I can't think of a justifiable exception, because I cannot conceive of a category of government information that would be subject to FOIA but that should also be kept offline on policy grounds." Overall, Aftergood asserted that the bill is still positive from a public access standpoint because it places the burden on agencies "to justify any departure from the norm of online publication."

The House bill was referred to the Committee on Oversight and Government Reform the same day as its introduction. A coalition of organizations quickly released a letter concerning POIA that called for hearings to explore the implications of the bill, but none have occurred, and it is unknown whether any will be scheduled. The Senate bill has been referred to the Homeland Security and Governmental Affairs Committee. It is unclear if either chamber will move soon on the legislation.

Commentary: White House Misadventures in Coal Ash Rule

Developments behind the scenes of a new EPA proposal to regulate coal ash undermine several core tenets of the Obama presidency, conflict with pledges to reform the way government works, and expose the flaws in a regulatory process that too often does not do enough for the public.

On May 3, the U.S. Environmental Protection Agency (EPA) released a proposed rule that would, for the first time, regulate the disposal of coal ash. Calls for regulation of coal ash, a byproduct of coal combustion that can contain arsenic, lead, chromium, and other heavy metals, began in earnest after an impoundment in Kingston, TN, failed, releasing 5.4 million cubic yards of coal ash. Reports have linked exposure to the toxic components in coal ash to cancer and other health problems.

EPA proposed two options for regulating coal ash under the Resource Conservation and Recovery Act (RCRA). The first proposal would list coal ash as a hazardous waste under subtitle C of RCRA, requiring federal monitoring and control of coal ash's handling, transportation, disposal, and any potential reuse. (Coal ash can be recycled into other products, including cement and wallboard. Subtitle C regulation would continue to allow beneficial reuse, EPA says.) The other proposal would regulate coal ash under subtitle D, which has typically been used to control solid wastes such as household garbage. Under the subtitle D option, EPA would have little authority over coal ash management.

Environmentalists see a clear choice between the two options. The subtitle D option "treats this hazardous waste as if it were not loaded with high levels of arsenic and other toxic metals," Scott Slesinger, legislative director for the Natural Resources Defense Council, said in a statement. "We expect EPA to choose the option that adequately protects the public, particularly our precious groundwater, and treats this hazardous waste as a hazardous waste."

Just days after unveiling its proposed rule, EPA released other documents showing significant changes that were made to the proposal while under review at the White House Office of Information and Regulatory Affairs (OIRA). (See sidebar at right.) EPA's original plans, prepared in 2009, did not include the subtitle D option.

One document, made available in EPA's online rulemaking docket at Regulations.gov, shows all the edits that were made during the OIRA review. Large tracts of text were moved or deleted and hundreds of new paragraphs added. The document shows changes made at any time during the six-month review with no indication of when the edits were made or who made them.

Observers have assumed a cause-and-effect relationship: the proposal was changed while under OIRA review – OIRA must have made the changes. Of course, it is possible that EPA changed its mind in light of some new evidence or upon greater reflection, but that scenario is only plausible if EPA's original draft was flawed or haphazardly crafted. Both EPA and OIRA have kept quiet about what happened during the review, but OIRA maintains that agencies remain in control of all decisions during the review process. However, neither EPA nor OIRA has offered any new factual evidence that would have led to the inclusion of the subtitle D option.

The original draft, sent to OIRA on Oct. 16, 2009, included language asking for public comment on possible subtitle D regulation. It did not, however, go so far as to include the subtitle D option as a co-proposal and clearly showed that EPA's first preference was to regulate coal ash under subtitle C.

In the past, OIRA has said its review process – in which the office circulates throughout the executive branch drafts of agencies' proposed and final rules before they are released to the public and makes edits or suggestions it deems appropriate – improves rules. The argument in favor of OIRA review says that the additional perspectives offered by OIRA and other agencies make rules more efficient and more defensible – legally, scientifically, or otherwise. OIRA maintains the same is true with the coal ash rule.

Yet from the perspective of many in the environmental and public health community, the coal ash proposal represents all that is wrong with the rulemaking process. The proposal came out worse, meaning the draft may lead to a less protective rule even before the public comment process begins. Even if some other agency or some other corner of the White House made the changes, both OIRA and EPA need to accept responsibility. OIRA Administrator Cass Sunstein has been part of President Obama's team of officials attempting to bring more openness and accountability to government, but, for the coal ash rule, his office failed to live up to this administration's lofty expectations.

The rule was not without controversy; unquestionably, powerful corporate interests opposed the focus on regulating coal ash under subtitle C. During the pre-public OIRA review, opposition to subtitle C regulation came from far and wide within the federal government, the documents also show. The Departments of Energy, Interior, Transportation, and Agriculture (USDA) all encouraged EPA to avoid designating coal ash a hazardous waste under subtitle C. The departments fear a hazardous designation will limit the amount of coal ash that can be beneficially reused, despite EPA's attempt to carve out reuse in the proposed rule. Some, including USDA, objected to the stigma that the hazardous designation carries. The Agricultural Research Service asked, "What farmer would want to apply 'hazardous waste' to his fields?"

The White House Council on Environmental Quality (CEQ) also opposed subtitle C regulation, the document shows. Despite being an environmental office, CEQ cited economic concerns as a reason to avoid the hazardous designation.

In a truly perverse turn of events, OIRA allowed the Tennessee Valley Authority (TVA) to comment on the pre-public proposal. TVA, a government-owned corporation that was created by Congress as a public works program during the Great Depression, is the owner of the Kingston Fossil Plant responsible for the 2008 coal ash spill. Not surprisingly, TVA also opposed subtitle C regulation.

It's almost as though the process is designed to create less protective rules. An agency spends months, sometimes years, writing regulations consistent with statute and responsive to some public need, only to be second-guessed by those without the substantive or technical expertise possessed by the agency that proposed the rule. It's like replacing all the plumbing in your brand-new house after the walls are painted and the carpets installed – and your plumber is actually an electrician!

EPA's coal ash rulemaking illustrates exactly how the public can get snookered in OIRA's process. Issues were debated, alterations were made, and tones were set during a process that completely shuts out the public.

What's so wrong with edits made during an OIRA review? That's a valid question, especially in this instance, when a second regulatory option was added for the public to comment on. It's not as though EPA's original idea was supplanted by a weaker version; it was supplemented by another option. And in the face of political pressure from corporate interests, this seems like a reasonable compromise, especially since EPA still has to write the final rule.

However, the way the second option was added, and the impetus for its addition, should worry the public. In an opaque process that only Washington insiders can possibly access, changes were made, or at least encouraged, to an environmental protection rule that seem to weaken the overall regulation. Years of similar activity have left the public distrustful of its government's ability to make decisions in the public interest, and even if the Obama administration's motives in the coal ash case are pure, the controversy only feeds into a culture of mistrust born of years of decisions made in secret.

The time that elapsed during OIRA's review impacts the public as well. The coal ash proposal's review lasted more than six months. According to longstanding policy, OIRA reviews are to be completed within 90 days. If the rulemaking agency agrees, OIRA may extend the rule once by 30 days, for a total of 120 days. OIRA reviewed the coal ash rule for 200 days. By comparison, the public's opportunity to comment in the formal process is only expected to last 90 days.

Ultimately, EPA will be free to finalize a rule fully protective of public health and the environment. Nothing occurring during the OIRA review, or even the public comment process, can force EPA to choose a certain option.

The changes can, however, alter the debate. The addition of a second, weaker regulatory option tilts the proposed rule away from public and environmental protection. Advocates at groups like the Natural Resources Defense Council, Earthjustice, and Ohio Citizen Action have a steeper hill to climb in making their case that coal ash ought to be regulated as hazardous waste. Opponents of the regulation now have a decided advantage.

Moreover, since these decisions are made in a black box, without transparency, what is to stop the same interests that changed the draft proposed rule from altering the final rule?

All of these issues are symptomatic of a faulty process that has survived for decades because those who operate it see too many risks to their power to reform it. On Jan. 30, 2009, President Obama issued a memo asking the Office of Management and Budget (OMB) for recommendations on a new executive order to replace the order that currently governs the OIRA review process (E.O. 12866, signed in 1993). OMB then asked the public for its views. More than 170 groups and individuals submitted comments.

OMB Watch and others called for an end to the myopic, rule-by-rule review OIRA currently engages in and instead encouraged the office to transform itself into a facilitator and a resource for agencies. Since the public comment period ended, Obama administration officials have given no indication as to the status of the recommendations or the replacement order. OIRA and others seem content to continue to operate the same old process.

While the process has remained the same, the regulatory landscape has changed in other ways. One of the starkest changes witnessed during the Obama administration has been in personnel, specifically, agency heads. Top agency posts are no longer filled with people who come through a revolving door, regulating the same interests they had been employed by for years. Strong and dedicated leaders like EPA's Jackson have shown a willingness to make tough and sometimes unpopular choices when they believe the public's interest would be well served.

The coal ash rulemaking has been an uncharacteristic turn of events for Jackson. After moving aggressively in the face of great anti-regulatory and industry pressure on issues like climate change and smog emissions, Jackson allowed the proposed coal ash rule to be co-opted by OIRA's review process.

That begs the question of whether other officials in the White House were involved, officials with more clout than Cass Sunstein or even Lisa Jackson. Coal ash regulation is one element in a complex suite of legislative and regulatory issues the Obama administration faces in trying to reform energy policy in the United States. One of the Obama administration's top priorities, climate change legislation, is bound to be an important consideration in any related decision making.

We may never know the answer because the OIRA review process offers little transparency. EPA is one of the few agencies to provide detailed information on the review of its rules. While disclosure of the changes made is helpful in promoting accountability, too many questions are left unanswered when OIRA and agencies fail to disclose who made what changes and for what reasons.

Determining the reasons for the changes made to EPA's coal ash proposal, and assigning motive more broadly, is nearly impossible. Was the White House overly sensitive to the reactions of industry-friendly congressional Democrats whose support is necessary on climate change legislation? Was it a philosophical shift at the urging of Cass Sunstein, or was it something else entirely?

Many have pointed to industry's potential influence on the coal ash rulemaking. While the rule was under review, OIRA and EPA met with outside stakeholders on at least 43 different occasions. 30 of those meetings were with representatives of a variety of industries opposed to or fearful of coal ash regulation. These included electric utilities, chemical companies, and many whose businesses rely on the beneficial reuse of coal ash. (The remaining meetings were with environmental groups and citizen advocates.)

Even if the changes to EPA's coal ash proposal were made completely independent of industry opposition, the appearance of impropriety can be just as damaging, both to the administration's credibility and public confidence. President Obama came into office pledging to stem the influence of special interest lobbyists and has taken steps toward that end. The coal ash rulemaking is a blemish on an otherwise positive record.

The OIRA review process clearly does not always comport with some of President Obama's stated goals and priorities. It is time for Cass Sunstein and OIRA to come to this realization and urge Obama to recommit himself to regulatory reform. In the case of coal ash, if the rule is not legally or scientifically defensible, let the public see that debate through the notice and comment period. If other agencies have additional evidence about why the original EPA draft was unacceptable to them, that evidence and feedback should be part of the public record, not provided behind closed doors in what looks to the public like some cloak-and-dagger maneuver designed to evade accountability. Instead of providing an open and accountable exchange of data and ideas that would benefit all stakeholders, the current process makes it possible for special interests to influence a rule long before the public even has an opportunity to comment.

Let's keep an eye on how the final rule is developed. If it runs counter to scientific information about the health dangers of coal ash and the substance remains unregulated under subtitle C, the public loses – and the Obama administration should be held accountable.

Minerals Management Service Acted More like Agent than Regulator

The federal agency responsible for regulating oil and gas extraction let oil companies like BP write their own safety regulations, ignored or downplayed the environmental threats from drilling, and issued drilling permits before fully consulting with other regulatory agencies. The Obama administration has launched an overhaul of the agency and has sent to Congress a legislative proposal to address the looming disaster in the Gulf Coast region.

The Minerals Management Service (MMS), the Department of Interior (DOI) agency responsible for regulating energy and mineral resources, has badly mismanaged the oil and gas permitting process. The agency has abdicated its responsibility for ensuring that energy extraction is done safely, according to numerous sources investigating the BP oil spill in the Gulf of Mexico.

The April 20 BP Deepwater Horizon oil rig explosion left 11 workers missing and the subsequent oil spill continues to spew thousands of gallons of oil into the Gulf. Investigations of the explosion are beginning to show that BP and its partners in the Deepwater Horizon project did not implement safe oil drilling practices that are used in other areas of the world. MMS left decisions about drilling practices to the companies rather than issuing strong regulatory requirements that may have prevented the explosion.

On May 12, the Oversight and Investigations Subcommittee of the House Committee on Energy and Commerce held a hearing to begin assessing what committee chair Rep. Henry Waxman (D-

CA) called "a calamitous series of equipment and operational failures." The hearing focused on the actions by BP; Transocean Limited, the operator of the oil rig; and Halliburton, an oil services company responsible for a critical seal designed to stop the flow of oil.

The Senate's Energy and Natural Resources Committee and the Environment and Public Works Committee also held hearings on the spill in which executives associated with the Deepwater Horizon rig testified.

President Obama also named MMS as a culpable party in this disaster. On May 14, for example, after getting another briefing on the federal government's response to the spill, Obama said, "For too long, for a decade or more, there has been a cozy relationship between the oil companies and the federal agency that permits them to drill. It seems as if permits were too often issued based on little more than assurances of safety from the oil companies. That cannot and will not happen anymore."

In a scathing August 2008 report by the agency's inspector general, MMS employees were found to have accepted gifts from oil industry representatives, improperly socialized with lobbyists, engaged in unauthorized business activities, and flaunted the agency's ethical standards. The report summarized MMS's royalty-in-kind program personnel as lacking professional conduct standards and believing the rules of ethics did not apply to them.

Obama asked DOI Secretary Ken Salazar to reform MMS so that the part of the agency responsible for collecting oil and gas royalties is separated from an office with regulatory safety and enforcement. The separation is intended to reduce conflicts of interest within an agency responsible for both managing a revenue stream and developing and enforcing regulations.

On May 17, amid the criticism of MMS, associate director for offshore energy and minerals management Chris Oynes announced his retirement, effective May 31. Before being named associate director, Oynes oversaw oil and gas leasing in the Gulf of Mexico. A May 17 *Washington Post* article reported that Oynes had been criticized by former MMS officials as being too close to industry.

A May 13 *New York Times* article highlighted the importance of creating a new office with regulatory powers. According to the *Times*, MMS:

- Issued dozens of permits to oil companies to drill in the Gulf without the approval of the National Oceanic and Atmospheric Administration, which oversees dangers to endangered species;
- Ignored staff scientists who raised concerns about engineering and environmental impacts and threatened retaliation if the scientists continued to voice concerns;
- Gave BP and other oil companies exemptions from requirements to file environmental impact statements;
- Silenced agency scientists and changed reports that raised the specter of oil spills; and
- Issued at least five permits for new drilling projects since Salazar announced a moratorium on new permits May 5.

The article quotes one former MMS scientist as saying, "You simply are not allowed to conclude that the drilling will have an impact ... If you find the risks of a spill are high or you conclude that a certain species will be affected, your report gets disappeared in a desk drawer and they find another scientist to redo it or they rewrite it for you."

Scientific integrity issues at DOI have been a concern for years. An April 29 report by the agency's inspector general found that DOI has never had a scientific integrity policy despite a mandate from 2000 to produce one. The report documents a variety of problems the agency experienced during the Bush administration. The report recommends an agency-wide policy be established and a person assigned the primary responsibility for its implementation.

The *Washington Post* reported that MMS liberally applied "categorical exclusions" to reduce its NEPA workload and give companies a pass on the rigors of environmental review. MMS granted such a waiver to BP's Deepwater Horizon operation. BP had appealed to the White House Council on Environmental Quality as recently as April 9 to use categorical exemptions more broadly, according to the *Post*.

On May 12, the administration also put forward a legislative proposal to enhance its ability to address the Deepwater Horizon spill. According to a White House fact sheet, the proposal calls for additional funding to several agencies to pay for current expenses resulting from the spill and to monitor the impacts. It would provide additional funding for DOI to conduct additional inspections and enforcement while slowing the pace of issuing permits so that relevant issues are explored more thoroughly. The proposal also calls for additional federal support to states to supplement unemployment assistance programs to those on the Gulf Coast who lose wages as a result of the spill. Additional assistance may be provided if Congress approves provisions for additional economic development efforts within affected communities. The proposal would also raise liability caps on those held responsible for the disaster and raises the tax on oil companies to fund the federal Oil Spill Liability Trust Fund.

Members of Congress have introduced numerous bills to address some of the issues contained in Obama's more comprehensive legislative proposal. To date, there has been no progress on the bills as Congress awaits more information from different investigations into the causes of the explosion and spill.

House Hearings Highlight Criticisms of DISCLOSE Act

During the first House hearings on the DISCLOSE Act, disagreements and debate arose over the scope and potential impacts of a bill that sponsors say is designed to create new disclosure requirements for various corporate entities that are promoting or opposing candidates for federal office. As Congress continues to move forward with the bill, controversy will likely follow.

On April 29, Rep. Chris Van Hollen (D-MD) and Sen. Charles Schumer (D-NY) introduced the DISCLOSE Act (the Democracy Is Strengthened by Casting Light On Spending in Elections Act),

and two House hearings have occurred since that time. The DISCLOSE Act seeks to diminish the impact of the U.S. Supreme Court decision in *Citizens United v. Federal Election Commission*, which allows corporations (including certain nonprofit organizations) and unions to use general treasury funds to directly and expressly advocate for the election or defeat of candidates for federal office.

The Committee on House Administration held both hearings, during which distinct ideological differences indicated that the bill will face a tough road in Congress. The first hearing was held on May 6. In his opening statement, Chair Robert Brady (D-PA) said, "The DISCLOSE Act recognizes that American voters are at minimum entitled to full and accurate reporting of campaign spending so that voters may know who is attempting to influence their vote."

The committee held the second hearing on May 11, and witnesses included two former Federal Election Commission (FEC) commissioners, Trevor Potter and Michael Toner, both of whom served in Republican slots on the commission. The panel also included Harvard Law School professor John Coates and attorneys Elizabeth Lynch and William McGinley.

A largely partisan divide emerged quickly after the bill was introduced and was clearly revealed during the hearings. Some on the committee showed support for the Supreme Court decision and expressed skepticism of any attempt to reign in the ruling. They and other critics charge that the DISCLOSE Act is meant to protect Democratic incumbents and deter speech.

Discriminatory Impact?

All corporations, 501(c)(4) nonprofit organizations, 501(c)(5)s (unions), 501(c)(6)s (trade associations), and 527 organizations that spend money on independent expenditures or electioneering communications to influence a federal election are "covered" under the bill. However, some skeptics are concerned that the DISCLOSE Act does not treat all of these entities the same.

During both hearings, committee Republicans contended that the bill creates special protections for labor unions. This argument stems from provisions that limit certain corporations from spending money to influence federal elections. Those that received Troubled Asset Relief Program (TARP) funding and have not yet paid the government back, and corporations that receive federal contracts worth more than $50,000, would not be able to spend any money on elections. This provision may indeed affect certain for-profit corporations more, considering that financial services companies are more likely to have received TARP funding, though it is unclear whether this would rise to the level of "discrimination."

Supporters of the bill argue that all types of corporations, including unions, are treated equally. In addition, the DISCLOSE Act would subject all corporations, including nonprofit organizations, to the same disclosure rules.

Controversy Surrounding Donor Disclosure Provisions

The bill's donor disclosure requirements are another major issue of contention. These provisions include the following:

- The top funder of the ad would be required to record a "stand-by-your-ad" disclaimer, and the top five donors to the organization would be listed on the screen at the end of the message.
- If an organization spends more than $10,000 in a 12-month period on independent expenditures or electioneering communications (including transferring funds to another organization for the purpose of influencing an election), all donors who have given $1,000 or more to the organization during that period would have to be disclosed.

Many fear that donors, who might have an interest in becoming more involved in political advocacy, may not want to do so if the bill passes as currently written. These concerns remain even though a donor can specify that a contribution may not be used for campaign-related activity. If a donor makes such a request, an organization is prohibited from using the donation for that purpose and would not disclose the donor's identity.

Committee debate notwithstanding, eight members of the Court agreed on the need for disclosure when *Citizens United* was published. Potter noted in his statement on May 11 that Justice Kennedy "made two things very clear: First, it is generally constitutional to require disclosure of the sources of funding for spending in federal elections, whether or not that spending 'expressly advocates' the election or defeat of a federal candidate. Second, he and seven other Justices were clear that they thought such disclosure was entirely appropriate and useful in a democracy."

Toner, on the other hand, expressed opposite views on the bill and said it should not be enacted. Toner specifically criticized the bill because its requirements would take effect 30 days after enactment, even if the FEC does not write clarifying regulations.

Other Points of Contention

Opponents have additional concerns about the DISCLOSE Act, including that the bill could stifle speech by creating expensive obstacles. For example, critics charge that the time it would take for groups to make statements standing by their ads would end up being overly burdensome.

During the May 11 House hearing, McGinley said that the DISCLOSE Act could lead to regulation of Internet communications and blogs. Craig Holman of Public Citizen fired back in a blog post the next day. Holman stated that the DISCLOSE Act "leaves in place the carefully worked out provisions of FEC regulations that exclude blogging and similar internet activity from the definitions of 'expenditure' and 'public communication' under campaign finance laws. The additional reporting requirements of the DISCLOSE Act do not change the existing exemptions for Internet communications and blogging under federal campaign finance law at all."

Despite the intense opposition from some quarters, others have suggested that the DISCLOSE Act does not go far enough and should also include provisions for public financing of congressional elections and shareholder approval of corporate campaign expenditures. For instance, advocacy groups such as Public Citizen and the Brennan Center for Justice would like the bill to incorporate provisions from the Shareholder Protection Act sponsored by Rep. Michael Capuano (D-MA), but there is some concern that those provisions could threaten passage of the DISCLOSE Act. That legislation would require companies to hold a shareholder vote to approve annual corporate political spending.

The House Administration Committee is expected to mark up the bill soon. It remains unclear when the full House or Senate will vote on the measure, despite an earlier push to have the bill signed into law in time for the general election in the fall.

Nonprofits Work to Restore Ex-Offender Voting Rights

Voting is a fundamental right and a cornerstone of our democracy, yet millions of Americans have had their right to vote revoked for periods ranging from the time spent incarcerated to a lifetime. Nonprofit organizations are playing a major role in efforts to restore voting rights to ex-offenders with felony convictions, and recent developments in Virginia and Washington State highlight the importance of nonprofit involvement in the issue.

In Virginia, there is a huge backlog of ex-offenders seeking to have their voting rights restored. Virginia's current governor, Robert McDonnell (R), inherited approximately 650 of those cases from the previous administration, according to *The Washington Post*. The *Post* also asserts that McDonnell's office has received additional applications from 213 nonviolent and 55 violent ex-offenders.

Groups working on the issue told the *Post* that Virginia has not restored the voting rights of any ex-offenders since McDonnell took office in January. Those that have filed applications have not heard anything regarding their applications. McDonnell said during his gubernatorial campaign that his goal is to have applications processed within 90 days from time of receipt.

Many nonprofits in the state are helping ex-offenders restore their voting rights. The Hampton Roads Missing Voter Project, created to increase voter participation among underrepresented groups, including ex-offenders, has played a major role in those efforts. It has been involved in grassroots efforts to educate ex-offenders and encourage them to complete an application to have their voting rights restored.

Other nonprofits have played a continuing role in efforts to restore ex-offender voting rights in Virginia, as well. The American Civil Liberties Union, the NAACP, the Virginia Interfaith Center for Public Policy, and Citizens United for Rehabilitation of Errants met with Janet Polarek, Secretary of the Commonwealth of Virginia, to discuss the process to restore voting rights.

Nonprofit organizations have also been instrumental in efforts to ensure that the process is not too difficult for ex-offenders to manage. Some civil rights groups have complained that adding a requirement for ex-offenders in Virginia to write a letter seeking to restore their rights will have a disparate impact on minorities and the poor. In most states, voting rights are automatically restored after an individual finishes a prison sentence, parole, or probation.

Nonprofit organizations have also been involved in efforts to restore ex-offender voting rights in Washington State. In *Farrakhan v. Gregoire*, a Ninth Circuit Court of Appeals panel held that current restrictions, which strip individuals convicted of felonies of the right to vote while incarcerated or under Department of Corrections supervision, unfairly discriminate against minorities and violate Section 2 of the Voting Rights Act of 1965.

The NAACP Legal Defense and Education Fund (LDF) and the ACLU both played roles in that case. LDF played a key role as part of the litigation team representing a group of African American, Latino, and Native American ex-offenders who allege that Washington's felon disfranchisement statute disproportionately denies racial minorities the right to vote. The ACLU also filed an amicus brief in the case.

"Plaintiffs' evidence showed that the rate at which Blacks, Latinos and Native Americans are convicted of felony offenses and then disqualified from voting is not reflective of their actual participation in criminal behavior," said Ryan P. Haygood, Co-Director of LDF's Political Participation Group, in a press release.

On April 28, the Ninth Circuit ordered a rehearing of the case by an *en banc* panel of 11 judges.

In addition to litigation, LDF has also sought to educate the public about felon disenfranchisement issues. In April, LDF released *Free the Vote: Unlocking Democracy in the Cells and on the Streets*, a report highlighting the impact that felon disfranchisement laws have on communities of color. "[N]ew efforts to reform felon disfranchisement policies suggest that many lawmakers are beginning to understand that felon disfranchisement is not only discriminatory in its application, but also undermines the most fundamental aspect of American citizenship: the right to participate in the political process," said Haygood.

This issue has not gone without attention in Congress. The Democracy Restoration Act was introduced by Sen. Russ Feingold (D-WI) and Rep. John Conyers (D-MI) as S. 1516 and H.R. 3335 on July 24, 2009. The Democracy Restoration Act would allow ex-offenders to vote in federal elections. Resistance to the bill comes from concerns that the legislation would unconstitutionally violate the rights of the states, since most re-enfranchisement issues are dealt with under state law.

Felon disenfranchisement played a significant role in the 2000 and 2008 presidential elections. However, nonprofit organizations throughout the country served to balance the effects, with grassroots and nonprofit organizations educating ex-offenders about their legal rights and urging eligible ex-offenders to vote.

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In This Issue

How Would Enhanced Rescission Authority Affect the Budget Process?

The Obama administration recently caused considerable controversy when it sent a proposal to Capitol Hill on May 24 asking for enhanced authority to cut spending already approved by Congress. Fiscal hawks like Rep. Paul Ryan (R-WI) hailed the president's proposal for "enhanced rescission authority" as "an important tool to target wasteful spending," while congressional appropriators from both parties argued that the proposal would give the president too much power over the spending process. Questions remain about the proposal's potential effects on deficit reduction.

Currently, the president can withhold funding for a spending program for 25 days and ask Congress to rescind the spending, but the legislature is under no obligation to take up the spending cuts. After 25 days, the president must restore the funding. The administration's

enhanced rescission authority proposal would provide the president with 45 working days after Congress passes an appropriations bill to cull unwanted spending from the measure. The president would then send all cuts back to Congress as a legislative package for a mandatory up-or-down vote. Congress would have 25 working days to vote on the bundle of spending cuts, which would not be amendable and would be shielded from Senate filibusters.

In a blog post announcing the proposal, Office of Management and Budget Director Peter Orszag said the proposal would "reduce unnecessary or wasteful spending" because "we should never tolerate taxpayer dollars going to programs that are duplicative or ineffective and because, especially in the current fiscal environment, we cannot afford this waste."

Since the proposal only applies to items in appropriations bills, it would exempt entitlement spending and tax expenditures. Tax expenditures, for example, contribute over $1 trillion to the federal budget deficit and represent about the same amount of spending as the cash outlays resulting from discretionary appropriations.

If presidents were granted enhanced rescission authority, the impact would likely fall on congressional earmarks and programs without powerful constituencies. Most likely, spending on homeland security and the military would be protected, while non-security discretionary spending would quickly be bumped to the front of the line for cuts. These programs, like nutrition and housing assistance, consumer and environmental protection agencies, and scientific research, which compete against each other for funding during the annual appropriations process, would become even more vulnerable to cuts.

This is not to say that security spending will remain untouched. The Obama administration earlier in 2010 proposed a $156 million cut to the Coast Guard's FY 2011 budget. Although the recent BP oil spill disaster has drawn heavy scrutiny to this cut, in an enhanced-rescission-authority world, had Congress disregarded Obama's initial Coast Guard budget request prior to the spill, it is possible that such funding would have seen a red line via Obama's enhanced rescission authority, leaving the Coast Guard short of resources to deal with the catastrophe.

Cutting programs popular with Congress may lead to intense legislative-executive conflicts. The current dispute between the administration and Congress over the C-17 cargo plane and the F-35 alternate engine are illustrative examples. In 2009, President Obama and Secretary of Defense Robert Gates asked Congress not to fund these two programs because, in the opinion of the Pentagon, the military did not need them. Despite this, Congress included funding to keep both programs going.

Spending programs like the C-17 and the alternate engine for the F-35 employ people throughout the country, often in areas that would lack any manufacturing presence if it were not for these defense programs. It is not hard to imagine all of the representatives and senators from each state represented in the building process of one of these programs to band together or make deals with other representatives and senators to fight off a rescission attempt. The more rescissions a president includes, the more a diverse, bipartisan coalition may coalesce against them.

Giving the president more power over the spending process has appropriators very concerned. A president's decision to target wasteful and duplicative programs that are draining resources away from other, more effective programs is often a political judgment call, one that has traditionally rested with Congress and that the legislative branch is not likely to give up without a fight.

Some have felt that the rescission authority proposal is similar to earlier gambits to give the president line-item veto authority. That concept was struck down by the U.S. Supreme Court as violating separation of powers in 1998 after Congress granted the power to President Bill Clinton. The current proposal, however, may pass constitutional muster since it requires Congress to vote on the president's proposals for spending cuts, thereby obviating the obvious separation of powers issues raised by the line-item veto.

Enhanced rescission authority bills were introduced in the Senate by Sen. Russ Feingold (D-WI) and in the House by Rep. Paul Ryan (R-WI) prior to the announcement of the president's proposal.

GAO: Recovery Act Reporting Getting Better, But Still Room for Improvement

When Congress passed the American Recovery and Reinvestment Act (Recovery Act) in early 2009, the legislation's transparency provisions represented a significant step forward for government openness. While select agencies and programs have been using recipient reporting for years, the Recovery Act represented the first time such reporting had been attempted across all agencies at once and presented to the public online. Thus, bumps in the road toward transparency and accountability, including data quality problems, were inevitable. A new Government Accountability Office (GAO) report shows that while there are fewer reporting errors as time passes, there is still room for improvement in both data quality and implementation details.

Understandably, the first battles over the Recovery Act revolved around implementation details, as the Obama administration tried to turn the law into a working framework for reporting. After the first round of recipient reports were released, though, the public's attention turned to data quality, as high-profile mistakes, such as "phantom" congressional districts, dominated news coverage.

The GAO report moves beyond these issues, with the main focus being an examination of how states and local governments are using and administrating their Recovery Act funds, with emphasis on education, transportation, and public housing funds. The GAO publishes a report like this every two months to help give a sense of how Recovery Act money is being used, whether the spending is meeting the act's dual goals of recovery and helping those most in need, and how federal agencies are managing the act's transparency provisions.

In this report, the GAO also fact-checked a selection of third-round recipient reports, looking for errors. In previous examinations of recipient reports, the error rate was not exceptionally high, but it was enough to add caveats to any analysis of Recovery Act data, according to GAO. And while previous GAO analyses, and select data from Recovery.gov, indicated that the error rate was dropping, having only two sets of recipient reports made it difficult to establish a trend.

In its examination of the third round of reports, GAO confirmed this trend, finding that while recipients are still reporting flawed information, they are doing so with far less frequency than in the previous two quarters. For instance, compared to the second quarter of recipient reporting, reports incorrectly marked as finished fell by almost 60 percent, and errors in reporting the Treasury Account Symbol (TAS) code and Catalog of Federal Domestic Assistance (CFDA) numbers fell by 40 percent.

In other words, recipients are learning how to report. It appears that the more often recipients report, and the more time agencies have to communicate to recipients how to report, data quality improves. Unfortunately, the report does not give overall numbers for data quality, making it difficult to gauge how serious the data quality problems are.

In an effort to address the lingering data quality problem, the GAO met with a handful of outside groups to "solicit feedback from data users about their use of recipient reported data and suggestions they had for improving the recipient reporting process and the data." Groups interviewed included transparency organizations such as OMB Watch, news media such as ProPublica, quasi-governmental groups such as the Council of State Governments, and research entities such as the Federal Funds Information for States. The GAO report conveys a wide range of critiques and improvements suggested by the groups.

The most prominent critique from these groups concerned data quality, which fits well with the report's focus on the quality of the recipient reports. The groups were particularly concerned with the "capacity of recipients to report correctly, difficulty with determining the flow of awarded funding through state capitals or state agencies down to the local level, and the difficulty using the data across quarters because of the FTE calculations." To help fix these problems, the groups suggested that Recovery Act information be provided at the county level instead of at the congressional district level; agencies allow more time to review reports so that they can spend more time correcting errors; and a move toward ultimate-recipient reporting instead of the current two-tier model, to give a more comprehensive picture of where the money is going.

It is important to note that the GAO is not officially recommending any of these changes and has decided to not evaluate the effectiveness of any of the suggested improvements. Most of the report's recommendations are either agency-specific, such as recommendations for the Department of Education on how to report certain education jobs, or are focused on improving agencies' single audits. Since the GAO is an auditing office, it is not surprising that its recommendations are so narrowly focused. However, observers say instituting something such as ultimate-recipient reporting would help the GAO accomplish its mission of investigating the uses of Recovery Act funding.

Despite lingering data quality problems, the GAO found that recipient reporting is relatively well received by states. Although some state officials complained that the reporting requirements demand precious resources, many expressed optimism. According to the GAO, "when asked about the perceived costs and benefits of the recipient reporting exercise, state officials reported benefits resulting from the reporting requirements." States found that the recipient reports gave them a trove of new data, which they could then use to help educate their citizens, revamp websites, and overhaul internal cost controls. While data quality may still be an issue, this positive reception indicates that recipient reporting has been a positive development and will likely continue to be an aspect of federal spending transparency in the future.

As EPA Takes Action, Trade Secrets Continue Threatening Health and Safety

The U.S. Environmental Protection Agency (EPA) has taken a significant step toward making more chemical health and safety information available to the public even as trade secrets claims continue to conceal such information elsewhere. A new EPA policy will reject most industry claims that chemical identities included in health and safety studies are trade secrets. Meanwhile, the oil and gas industry continues to use trade secrets privileges to thwart attempts to disclose chemical information related to the BP oil spill and controversial natural gas drilling operations.

On May 27, the EPA announced a new "general practice" where the agency will review all claims by manufacturers that a chemical's identity should be treated as confidential business information (CBI) when the identity is part of a health and safety study or the study's underlying data. The agency expects that unless the disclosure of the chemical identity explicitly reveals how the chemical is produced or processed, the secrecy claim will be rejected, allowing the public to link the chemical to its health and safety information.

This is the third recent major action by EPA to rein in overuse of trade secrets claims by the chemicals industry under the nation's primary chemicals statute, the Toxic Substances Control Act (TSCA). Earlier, the agency announced that chemical identities that were public in the TSCA inventory (a list of more than 83,000 chemical substances) could not be claimed as trade secrets and that the agency would provide free access to the inventory, which had only been available for a fee.

According to EPA, the new practice "is part of a broader effort to increase transparency and provide more valuable information to the public by identifying data collections where information may have been claimed and treated as confidential in the past but is not in fact entitled to confidentiality under TSCA." By late August, EPA plans to begin reviewing new and existing confidentiality claims for chemical identities found in health and safety studies, as well as associated data.

TSCA generally prohibits chemical health and safety information from being withheld from the public. Up to this point, however, the public might have had access to the health studies but not

the identity of the chemicals the health studies referred to, rendering the studies and data practically useless. The practice of claiming chemical identity as CBI has been widespread at EPA despite regulatory language that clearly states that "chemical identity is part of, or underlying data to, a health and safety study" and also states, "Chemical identity is always part of a health and safety study."

EPA "believes that Congress generally intended for the public to be able to know the identities of chemical substances for which health and safety studies have been submitted." EPA announced that it "believes these actions will make more health and safety information available to the public and support an important mission of the Agency to promote public understanding of the potential risks posed by chemical substances in commerce."

EPA further acknowledges that TSCA was not intended "to limit the uses of information from a health and safety study" by keeping the public – including a chemical company's competitors – in the dark about chemical identities. Manufacturers have argued that their competitors could use disclosed chemical identities to learn about the proprietary manufacturing processes. EPA has rejected this argument, stating that "[disclosing] the end product of a process (i.e., a chemical identity) is not the same thing as disclosing the process to make that end product."

Oil and Gas Drillers Push for Secrecy

Despite EPA's actions, the disclosure of chemical identities remains a major issue on other fronts. At a recent House Energy and Commerce Committee mark-up, an amendment to the Safe Drinking Water Act that would have required the disclosure of the identities of chemicals used in a near-ubiquitous natural gas drilling process called hydraulic fracturing was withdrawn by its sponsor following strong industry criticism.

Hydraulic fracturing (or fracking) is a process where water, chemicals, and other materials are pumped under high pressure into a well to create and prop open fissures in underground rock, thus allowing trapped natural gas to flow out and be recovered. Fracking chemicals may include known carcinogens and other toxins.

Hydraulic fracturing, which was exempted from federal regulation in 2005, is linked to numerous cases of groundwater contamination. Fracking fluids may also leak or spill on the surface, creating additional ecological and public health threats. The House measure, sponsored by Rep. Diana DeGette (D-CO), only would have required the chemical constituents used in hydraulic fracturing to be posted on the Internet, with no other federal regulations placed on the process.

Another fracking disclosure measure is included in the discussion draft of climate change legislation now pending in the Senate. The language in the climate bill and other measures would only require disclosure of chemical constituents, imposing no other regulation of natural gas drilling. Regardless, the oil and gas drilling industry has fought vociferously against the disclosure of the chemicals being pumped underground, claiming the information is proprietary.

The day after the House mark-up, during which DeGette withdrew her disclosure amendment, a subcommittee of the same House Energy and Commerce Committee held a hearing to examine the BP oil spill catastrophe in the Gulf of Mexico. The poor flow of information to the public and Congress was a topic of concern.

Significant concerns have been raised regarding the use and identity of chemical dispersants on the BP oil spill. The dispersants are chemicals that attempt to break down oil before it can reach the shoreline. So far, BP has used more than 980,000 gallons of dispersants. The identities of the chemicals being poured into the Gulf of Mexico are considered to be trade secrets, and the EPA has not released this information to the public. The toxic effects – both short-term and long-term – of the dispersants are not fully understood. Scientists remain concerned about the ultimate fate of the chemicals and how they travel and interact with marine life and other chemicals in the Gulf.

EPA states, "All the information EPA can make public about these dispersants can be found on the Product Schedule. Some of the ingredients are listed as confidential. This is because the manufacturer has chosen to keep this information proprietary, and as a result EPA is obligated to withhold this information."

Both the general rules EPA uses to make CBI determinations and the specific rules that apply to TSCA's CBI determinations contain emergency provisions that allow the EPA to disclose CBI under conditions where public health and the environment face "imminent and substantial danger" or "an unreasonable risk of injury."

The chemical reportedly being used by BP to disperse the oil is banned in Britain but approved for use in the United States and Canada. Recent reports of fishermen becoming ill after possibly being exposed to the dispersants, combined with the unprecedented quantities of dispersants being used and the unique situation involving their use at extreme ocean depths, would seem to qualify the situation for the same level of openness that EPA is applying to chemical identities elsewhere. As the EPA made clear in describing its new TSCA CBI policy, without knowing what the chemicals are, researching their impacts is considerably more difficult.

EPA is First Agency Heard on Spending Data Quality

On May 18, the U.S. Environmental Protection Agency (EPA) became the first agency to release its plan to ensure that federal spending information from the agency is current and of high quality. While the plan details the agency's current quality procedures, it seems lacking in several areas. Data quality plans for federal spending information were mandated by the Open Government Directive (OGD), but most have not been made public.

The current economic difficulties and the large government programs designed to counter them, including the bank bailout and the Recovery Act, have brought federal spending under increased scrutiny. Transparency of government actions is only one component needed for effective oversight of this spending. Ensuring the quality of the data being made available to the public is

another vital aspect. Currently, challenges to data quality include the duplication of data, missing transactions, inaccurate data, and untimely data. These problems and their associated risks vary by agency and depend on variables, such as the types of data a particular agency collects, and thus require agency-specific solutions.

Plan Requirements

The OGD, issued on Dec. 8, 2009, instructed each agency to create a data quality plan that enhances the transparency of how the agency spends federal funds. Office of Management and Budget (OMB) Deputy Director Jeff Zients issued a memorandum on Feb. 8 outlining a timeline for public release of the plans, as well as what information should be contained in the plans. Data quality plans were due to OMB by April 14. OMB was to work with agencies to improve their plans and finalize them by May 14.

Zeints' memo requires agencies to be accountable for the quality of federal spending information that is publicly disseminated through venues such as USAspending.gov and similar websites. The memo prescribed a data quality framework for the agency plans, requiring them to define measures for assessing the quality of data and its collection, reporting on data quality, identifying risks that could misstate or misrepresent data, and monitoring data quality. Further, the memo requires compliance with the public participation and collaboration elements of the OGD by mandating a communications strategy to engage the public in the solicitation of feedback via websites and social media.

The Zeints memo also requires specific plans to address spending information submitted for inclusion on USAspending.gov and evaluation of information on grants, loans, contracts, and other forms of assistance. Agencies are required to discuss compliance, review, and monitoring of data quality and identify if improvements are necessary. If improvements are needed, the agency is also supposed to establish a timeline and milestones for implementation.

OMB clarified these instructions in a subsequent April 6 memo. The second memo notes that by Oct. 1, USAspending.gov will begin disclosing information about recipient and sub-recipient reports on use of federal awards. Currently, only agency award information has been available through USAspending.gov, so the public has only been able to obtain information about who the prime recipient has been, but not how they have used the money. The new Oct. 1 system is premised on the experience from disclosure under the Recovery Act. This new procedure of recipient and sub-recipient reporting will increase agency responsibility for data quality. Zeints wrote that "the goal is to move toward 100% of awards data being reported on time, complete, and accurate (free of error) by the end of the fourth quarter of FY 2011, with interim milestones." For each metric of timeliness, completeness, and accuracy, agencies are required to achieve a 10 percent improvement each quarter beginning in FY 2011.

EPA's Plan

EPA is the first agency to publish its plan. EPA's plan complies with many of OMB's requirements. EPA makes significant effort to explain its governance process and structure. In

particular, the agency has developed a Spending Information Quality (SIQ) working group to develop the plan and integrate it into a long-term agency strategy to ensure the integrity of federal spending information. The plan also describes in detail the procedures and systems employed by the agency to address data quality. For instance, the plan explains in depth the existing audit process for the Federal Procurement Data System (FPDS) and includes the results of the latest audit in the plan's appendix.

However, the plan fails to identify substantial changes needed to comply with the transparency, collaboration, and participation elements of the OGD. The plan appears to be lacking in three main areas: plans to improve accuracy, recipient and sub-recipient reporting, and mechanisms for public participation.

The EPA document provides little detail on how the agency will accomplish the data accuracy goals stated in the OMB memos. EPA reports that the accuracy of key contactor spending data from FPDS is between 86.5 percent and 96.5 percent. While this may seem to be a relatively strong degree of accuracy, it falls short of OMB's goal of error-free reporting to be met by the last quarter of FY 2011. The agency briefly announces the impending implementation of a new electronic acquisition system that is expected to improve the accuracy of FPDS data. However, EPA does not describe how the features of its new acquisition system will address the known deficiencies.

Additionally, the agency fails to provide any quantifiable metrics for the deficiencies of assistance awards data in the Financial Award Assistance Data System (FAADS). EPA does identify FAADS deficiencies, including missing data, misspelled names, incorrect use of codes, and mistyped numbers from recipient-submitted information. However, the plan provides no proposals to address these issues or any process underway to develop a solution.

EPA also does not present concrete milestones to fix problems that are identified by the agency, as required by OMB guidance. According to the Zeints memo, OMB is to monitor progress through "potential" dashboards that will be publicly available. To do this, the memo states it will require periodic updates to the plans and use portions of the plans to facilitate the measurement of progress. However, it is unknown how OMB will be able to monitor the progress of EPA and other agencies if the plans lack concrete goals and milestones to implement improvements.

EPA's plan contains little discussion of the likely difficulties in ensuring strong data quality for the newly expanded data from recipients and sub-recipients. The plan does note, however, that current federal acquisition regulations require that agencies recognize the lack of "privity of contract," or a direct relationship, between themselves and sub-contractors. EPA claims that these rules would prevent the agency from placing any requirements, such as reporting on funds received, directly on sub-contractors. The EPA indicates that forthcoming requirements for sub-recipient reporting will be included in future contract language and passed on to sub-contractors in the agreements between them and prime recipients. However, the agency says that the lack of a direct relationship between the agency and sub-contractors will prevent the government from directly confirming submitted data with sub-recipients. How EPA plans to deal with this apparent data quality hurdle is not specified in the plan.

Beyond the brief acknowledgment of the difficulties reviewing or confirming new recipient and sub-recipient data, the EPA plan does not identify any specific expected data quality problems, nor what steps could be taken to minimize and track these problems. The problems with inconsistency in spelling, codes, format, and completion of data fields that the agency noticed in the data submitted to FAADS are likely to also be problems in forthcoming recipient reports.

The EPA plan also does not comply with the OMB guidance on agency communications efforts. EPA states that the agency sought internal "EPA participation." However, the OGD defines participation in terms of public engagement, not simply the engagement of agency employees. The plan makes no mention of public collaboration but only notes that the agency's spending data will be made available to the public by OMB through a dashboard. There is not enough information in the plan to indicate any attempt to involve the public in the data quality process.

There are several ways EPA's plan could include more participation and collaboration. The agency could commit to receiving outside input for future versions of the plan, such as the agency does with its Open Government Plan. Similarly, EPA could utilize the same IdeaScale collaboration tool used to solicit public input to develop its Open Government Plan. Further, outside participants could provide an independent source of data quality auditing. Many corporations track spending information and may have solutions to data quality problems.

Currently, it is unknown how other agencies will implement OMB guidance, as the plans are not yet public despite the expiration of the May 14 deadline. However, since the plans are approved by OMB prior to release, EPA's plan may be representative of the scope and content that can be expected from other agencies.

Obama Administration Starts Reforms at MMS

In the wake of the worst oil spill disaster in the country's history, the Obama administration has begun to restructure the federal agency charged with the development of energy resources and oversight of the oil and gas industry. Critics argue the changes do not go far enough.

On May 19, Department of Interior (DOI) secretary Ken Salazar issued a formal order restructuring the department's Minerals Management Service (MMS). MMS is the agency that both collects revenues from extraction industries such as oil and gas companies and oversees safety and environmental processes of these same industries.

MMS came under fire after BP's Deepwater Horizon oil rig exploded on April 20, killing eleven workers and causing the largest oil spill in U.S. history, according to both government and independent estimates. The Offshore Energy and Minerals Management program oversees resources management on the Outer Continental Shelf, which includes the Gulf of Mexico. The program has been widely cited since the explosion as having given cursory review of and exemptions from filing safety and environmental quality plans submitted by oil and gas companies it regulates.

Salazar's order divides MMS into three separate offices to make the functions of MMS independent of each other. First, the order creates the Bureau of Ocean Energy Management to exercise the traditional energy management tasks associated with developing both renewable and oil and gas resources. Second, the order establishes the Bureau of Safety and Environmental Enforcement to "inspect, investigate, summon witnesses and produce evidence, levy penalties, cancel or suspend activities, and oversee safety, response, and removal preparedness."

These two offices will be led by directors and report to the DOI assistant secretary for land and minerals management. The reorganization leaves these two functions and lines of authority in the same part of DOI as MMS.

Third, the order creates the Office of Natural Resources Revenue to conduct activities related to both the onshore and offshore collection of revenues, compliance auditing, and investigations and enforcement. This office will also have a director but be under the supervision of the assistant secretary for policy, management, and budget.

There is no timetable for the reorganization. The two assistant secretaries are responsible for implementing the order, in consultation with the Office of Management and Budget (OMB) and relevant congressional committees and are required to report a plan for achieving the changes to Salazar within 30 days.

The head of MMS at the time of the explosion, Elizabeth Birnbaum, resigned May 27 under pressure from the administration, according to *The Washington Post*. Birnbaum was appointed by Salazar in July 2009. Bob Abbey, the director of the Bureau of Land Management, is the new acting director of MMS and will have much of the responsibility for implementing the reorganization plan.

There was mixed reaction to Salazar's restructuring plan. For example, Public Employees for Environmental Responsibility (PEER) criticized the plan because it merely raises the conflict-of-interest issues that have characterized MMS up one level within DOI. "Conflicts between resource protection and promotion are merely elevated, not eliminated, as the new entities are supervised by political appointees with energy and revenue production mandates," according to PEER's press release.

The Center for Biological Diversity's (CBD) executive director, Kierán Suckling, said in a press release on the restructuring, “It is only a baby step forward, but at least it is in the right direction." CBD's statement went on to criticize Salazar for not changing the substantive processes that helped lead to the BP Deepwater disaster, such as issuing environmental impact waivers and approving drilling and production applications without having legally required permits in place. According to the *Post* article, Suckling also noted that Salazar had appointed a former BP executive, Sylvia Baca, to be the deputy assistant secretary for land and minerals management, the office that oversees MMS and will oversee two of the new offices created by Salazar's order.

President Obama and Salazar have made changes to the substantive processes used by MMS. In his May 27 report to the president on immediate and long-term steps that could improve the safety of offshore drilling, Salazar makes several recommendations. The recommendations include mandatory inspections of the blowout preventers that are used on mobile drilling rigs to see that they meet design specifications and improving the testing and inspections process for blowout preventers. Failure of the blowout preventer on the Deepwater Horizon rig was one of the leading causes of the explosion and spill.

Other recommendations addressed a systems-based approach to improve safety. According to the report, "The Department [DOI] is committed to moving to finalize a rulemaking that would require operators to adopt a systems-based approach to safety and environmental management. This rule would require operators to incorporate global best practices regarding environmental and safety management on offshore platforms into their operating plans and procedures. In finalizing this rulemaking, the Department will analyze carefully the current circumstances in the Gulf of Mexico and lessons learned from the ongoing investigation into the causes of the BP Oil Spill."

The report also recommended a six-month moratorium on permits for new wells being drilled using floating rigs. The moratorium was not limited to the Gulf. In addition, Salazar called for a halt to drilling operations for six months on all 33 deepwater wells that are currently being drilled from floating rigs in the Gulf.

In accepting Salazar's recommendations at a press conference May 27, Obama announced additional steps to address the oil spill, including the suspension of oil exploration off the coast of Alaska and the cancellation of pending and proposed lease sales in the Gulf and off the coast of Virginia.

Whether these changes will lead to long-term safety and accountability improvements in managing and overseeing offshore resource extraction remains to be seen. The many investigations into the causes of the oil disaster may help identify the many fixes that need to occur to avoid another human and environmental catastrophe of this type. It is likely that DOI will be reacting to this event for years to come.

Commentary: Changes to Coal Ash Proposal Place Utility's Concerns above Public Health

An internal administration document shows the U.S. Environmental Protection Agency (EPA) may have weakened a proposal to regulate toxic coal ash at the behest of the Tennessee Valley Authority (TVA), owner of a Kingston, TN, power plant where a dam break spilled 5.4 million cubic yards of coal ash in 2008.

Catastrophes like the one that occurred at the Kingston facility, as well as shoddy storage practices that allow coal ash to escape into water supplies, make coal ash a public health and ecological risk. TVA's comments could have struck a blow to EPA's efforts to mitigate that risk.

TVA Makes Comments Like a Government Agency

TVA, a major coal-burning utility as well as a manager of coal combustion residuals like coal ash, should have waited until the public comment period, just like citizens, environmental groups, and other businesses must do. The fact that TVA exercised its influence behind the scenes, before EPA released the proposal to the public, makes for a troubling situation.

In fact, TVA should have had the decency to recuse itself from commenting during the review stage of the rulemaking process if it considers itself a government agency. Not only would TVA be regulated by the EPA proposal, its failures in the Kingston coal ash disaster represent one of the driving forces behind EPA's push to regulate. (Crews are still not finished cleaning up the December 2008 spill.) This indicates serious conflict-of-interest issues that should have been addressed.

Instead, TVA filed comments recommending an approach easier on utilities and less protective of public health and the environment. TVA criticized EPA's original draft, in which the agency concluded the most appropriate course of action was to treat coal ash as a hazardous waste. In the May 4 version, EPA proposed hazardous waste regulation but also included an alternative, a weaker approach that would relinquish more authority to state and local governments and rely in part on citizen enforcement to curb pollution. TVA's comments say it is concerned with the impact hazardous waste regulation "could have on our, and other utilities', daily operations." In fairness to EPA, other agencies, such as the Departments of Agriculture and Interior, also argued against EPA's hazardous waste designation.

TVA also raised concerns about EPA's seemingly problematic definition of "new" and "existing" landfills as they relate to coal ash disposal. Among those concerns was the notion that EPA's definitions create regulatory uncertainty for utilities that are attempting to determine if they're dealing with or operating a new or existing landfill. This uncertainty could have real-world public health and environmental impacts, as described in greater detail later in this article.

Where was the public during all this? Waiting. Waiting for the EPA to publish its proposal and begin the comment period. Little did we know that a regulated interest was first getting a sneak peek at the proposal during the interagency review process.

EPA and OIRA Both Responsible for Debacle

Both EPA and the White House Office of Information and Regulatory Affairs (OIRA), the office responsible for managing the review process and collecting government-wide comments, share the blame. President Obama promised to curb the corrosive influence of special interests in Washington, but neither EPA nor OIRA lived up to that promise in this case.

EPA should have flatly ignored TVA's comments, and while it may be plausible to assume that they did, and that the edits to the landfill definition were mere coincidence, it's more than plausible to assume a cause-and-effect relationship. EPA made the wrong decision from both a policy and a political standpoint. However, the agency still insists the review process was

valuable. "EPA believes that the interagency review significantly improved this rulemaking package," the agency told OMB Watch.

OIRA should have known better, too. Under Executive Order 12866, which gives OIRA the authority to conduct an internal review of agency draft proposed and final rules, all government agencies are to be given an opportunity to comment. TVA, as a government-owned corporation, falls into that category. But at some point, common sense needs to take hold. OIRA Administrator Cass Sunstein should have recognized the situation and, in his position as a Senate-confirmed presidential appointee and high-ranking White House official, politely informed TVA officials that their comments simply weren't welcome this time around.

TVA's comments were uploaded to Regulations.gov, the central site for agencies' regulatory material, on May 17, along with other documents relevant to the development of the proposed rule. While EPA generally discloses the nature of the comments received on draft proposals, it is unusual for the public to have access to specific comments attributed to specific agencies.[1]

Real-World Impacts of TVA Comments

The comments show that TVA is trying to have it both ways: it wants to enjoy the perks of its government ties while maintaining the anti-regulatory mindset of a private polluter. Applying its expertise as a regulated utility to attempt to undermine technical details of an environmental standard, like the definitions the EPA wants to apply to utility-owned facilities, is an inappropriate use of TVA's quasi-government-agency status.

Here's a prime example of how TVA's comments appear to have influenced the content of EPA's definitions for new and existing landfills. According to EPA's original draft, the agency planned to designate as "existing" those landfills operating at the time the rule is finalized and designate as "new" those landfills that begin operation after the rule takes effect. New landfills will be subject to a number of requirements from which existing landfills will be exempt.

In the proposed rule released to the public May 4, EPA used the effective date of the rule, not the finalization date, as the threshold for the definition of existing landfills, consistent with TVA's comments. This means that more coal ash landfills could be exempt from the rule's more stringent requirements.

The change made to the definition of "existing landfill" could have real consequences. Under EPA's proposal, unlike new facilities, existing landfills will not be required to:

- Install liners intended to prevent or limit coal ash, and the pollutants in it, from leaching into the ground on which the landfill sits;
- Install a collection system for any leaching that does occur;
- Abide by EPA's location restrictions intended to keep new landfills away from wetlands and unstable areas, including areas susceptible to earthquakes, and above the water table.

Existing landfills would have to meet other requirements that apply to new landfills, including groundwater monitoring. (Unlike landfills, surface impoundments, such as the one that failed in Kingston, TN, would have to retrofit liners and leachate collection systems under the rule, or close, within seven years.)

In an appendix to EPA's notice of proposed rulemaking, the agency included a list of proven cases where coal ash containment facilities have harmed the environment. Of the 16 cases when coal ash has leached into the groundwater supply, four occurred at unlined landfill sites. In these cases, leaching has led to unsafe levels of lead, boron, and arsenic in groundwater. The risk posed by unlined landfills is real.

Process Let the Public Down

As a resident of Meigs County, OH, a hub for coal ash disposal, Elisa Young knows the human toll coal ash exposure can take. Young told *The Huffington Post* that she blames coal combustion residuals for a cancer epidemic in her community. At least six of her neighbors have died from cancer in the last ten years. Young is working with Ohio Citizen Action to advocate for coal ash regulation.

The regulatory process is complex and laden with details and definitions that can overwhelm even the most ardent observers. Those details are important – important to agencies and important to the businesses and other organizations they regulate. However, they are absolutely critical to the public. Details determine the level of protection government gives to citizens, including the most vulnerable among us. The public deserves to have regulations developed openly and with its interests in the forefront.

In the case of the coal ash proposal, the Obama administration let the public down. Special interests wedged their way into the process and undermined confidence that the proposal was developed fairly. EPA must see to it that its final rule meets the public's needs and takes Americans' concerns into account.

The public comment period for the proposal will remain open for 90 days after EPA publishes it in the *Federal Register*.

[1] After realizing it had disclosed the interagency comments, EPA removed the document from Regulations.gov, saying it had been "inadvertently posted." In a statement to OMB Watch, EPA said, "Interagency comments on draft rules by federal agencies under Executive Order 12866 are part of a deliberative process." However, on May 20, EPA reposted the document, explaining, "Because this document was inadvertently disclosed, EPA has decided, in this instance and with the agreement of the agencies, to allow the document to remain in the docket."

Citizens United Decision Spurs State Campaign Finance Legislation

State legislators across the nation are introducing campaign finance legislation to mitigate the impact of the *Citizens United v. Federal Election Commission* decision, in which the U.S. Supreme Court ruled that corporations and unions may now directly and expressly advocate for the election or defeat of candidates for federal office.

Recently, attention has focused on the DISCLOSE Act (the Democracy Is Strengthened by Casting Light On Spending in Elections Act), federal legislation sponsored by Rep. Chris Van Hollen (D-MD) and Sen. Charles Schumer (D-NY) to blunt the impacts of the *Citizens United* decision. The DISCLOSE Act would create new, rigorous campaign finance disclosure requirements meant to prevent moneyed interests from drowning out the voices of citizens and smaller advocacy organizations.

States have also come up with various pieces of legislation to minimize the impact of the *Citizens United* decision. Here are some examples:

Colorado

In Colorado, Gov. Bill Ritter (D) signed legislation (S.B. 203) in May mandating new campaign finance disclosure requirements. The bill requires corporations and labor unions that make independent election expenditures exceeding $1,000 to register with the state.

The law also prohibits foreign corporations from making independent expenditures on elections. "Prior Colorado law was silent on foreign corporations because all corporations in the state were barred from making independent expenditures," according to BNA (subscription required). The *Citizens United* decision does not prevent localities from instituting bans on donations from foreign corporations.

The law also requires that election-related communications must disclose the person or entity that paid for the communication. "The new state law also requires that persons who accept donations for independent expenditures maintain such funds in a separate bank account. It requires the Colorado secretary of state to post information relating to independent expenditures on its web site," according to BNA.

Nonprofit leaders are applauding the efforts in Colorado. Colorado Ethics Watch Director Luis Toro told BNA that the legislation is a "worthwhile improvement to Colorado law" but "there is more that can and should be done in future legislative sessions to improve Colorado's campaign finance laws, including even stronger disclosure requirements and a voluntary public financing system for state campaigns."

Michigan

There are also legislative efforts in Michigan to diminish the impact of the *Citizens United* decision. Michigan Common Cause, which was instrumental in crafting parts of the legislation authored by six state House Democrats, told *Michigan Live* that the bills would:

- Require that corporations that make independent campaign expenditures disclose the names and addresses of their top five contributors.
- Require that printed communications, TV, and Internet ads include a disclaimer stating they were paid for with corporate funds, as well as the name and photo of the president of the corporation. Radio ads must include a disclaimer read by the president of the corporation.
- Require that corporations receive consent from their shareholders and notify them at least 30 days before making independent campaign expenditures.
- Ban the following groups from making independent campaign expenditures: corporations that receive state grants, tax credits, or incentives; corporations that apply for, submit a bid for, or obtain a state contract; corporations that have accepted federal bailout money; semi-public corporations, including utility and insurance companies.
- Prohibit foreign and foreign-controlled corporations from making independent campaign expenditures.
- Ban the funneling of corporations' independent campaign expenditures through other sources, including individuals and businesses.
- Penalize shareholders, officers, or members of a corporation who knowingly consent to an independent expenditure that violates the Michigan Campaign Finance Act with a civil fine of as much as $1,000.

Michigan officials understand the challenges that they face in getting the legislation passed. Rep. Tim Bledsoe (D-Grosse Pointe), a former political science professor and the author of one of the pieces of legislation, told *Michigan Live* that he believes "it will be a huge challenge to get this legislation passed. When you are talking about substantial campaign finance reform legislation, it is usually a multi-year struggle."

There are others in Michigan who do not believe that *Citizens United* will have the impact that many fear. Rich Robinson of the Michigan Campaign Finance Network told the *Detroit Free Press* that he doubts that major corporations "would risk alienating customers to advocate one candidate" when they can funnel money into issue ads that praise or critique the candidate without telling the audience which candidate to vote for. "They're not going to start doing express advocacy because they are able to eviscerate a candidate figuratively with issue ads," Robinson said.

New Hampshire

In New Hampshire, state Sen. Maggie Hassan (D) sponsored legislation (HB 1459) that would require businesses and nonprofits other than charities to register with the state if they spend

$10,000 during an election cycle on advertisements that identify a candidate or evaluate a ballot item, according to the *Concord Monitor*.

The Center for Competitive Politics (CCP) asserts that the legislation requires "corporations, partnerships, and non-profits to register with the Secretary of State's office within 48 hours of launching a political advertisement – regardless of whether the advocacy is political or issue-based in nature." CCP further states that, "In its original form, the bill would have required non-profits to disclose their donors and corporations to disclose the maximum amount that the corporation would spend on political activity."

The bill was later modified by a New Hampshire House-Senate Committee of Conference. As part of the negotiation, legislators agreed "to drop a proposal requiring groups to identify donors who had given $10,000 toward political advertising. They decided that corporate shareholders would not be required to approve spending for political advertisements and that directors of organizations would not be required to report a maximum budget for the spending. They also exempted nonprofit charitable organizations, eliminated a small filing fee for affected groups and lowered the penalty for violations to $250 from $1,000," according to the *Concord Monitor*.

Both Republican and Democratic legislators have spoken out against the legislation. Conservative and liberal groups have spoken out against it, as well. CCP referred to the legislation as "an attempt by the New Hampshire legislature to stifle political speech." The New Hampshire Center for Nonprofits (NHCN) believes that the legislation will negatively impact nonprofits. "The amendment appears to be unconstitutional. It would curtail 1st Amendment free speech rights, free association rights, and privacy rights for nonprofits," according to NHCN.

Hassan and supporters of the legislation argue that "disclosure requirements are necessary to prevent corporations from unleashing unlimited and anonymous ads in order to sway New Hampshire elections," according to New Hampshire Watchdog.

"We're not saying they don't have a right to advocate. We're just saying we want to know who's behind the advocacy. If out-of-state or even foreign companies want spend a lot of money to influence New Hampshire elections, we want the voting public to know who they are," Hassan told the *Union Leader*.

More Efforts Likely

As the fight over the DISCLOSE Act heats up on the federal level and state and federal candidates begin to endure the ramifications of *Citizens United*, more state-level efforts to blunt the decision's impacts are likely. As in Colorado, Michigan, and New Hampshire, these legislative measures will have to strike a tricky constitutional balance if they are to survive brutal legislative and courtroom fights.

Nonprofit advocacy could play a key role in all of these legislative approaches, and many in the sector are calling on organizations to keep a close eye on any proposed legislation to make sure

that it works to diminish the potential damage that a flood of corporate money could do to our democracy while preserving the First Amendment rights of nonprofits and the people they serve.

Nonprofits Tell Subcommittee about Impact of Ineffective Counterterrorism Rules

On May 26, representatives from the nonprofit sector testified before a subcommittee of the House Financial Services Committee to address how anti-terrorist financing laws impact charities. The hearing marked the first time an oversight panel has considered how the Department of the Treasury's policies impact charitable groups and was a major step in bringing attention to the largely ignored challenges facing charities and foundations since the Sept. 11, 2001, terrorist attacks.

While some members of the committee and some of the panelists expressed support for the government's ability to shut down entities suspected of providing "material support" to terrorist groups, critics charge that the laws are too vague and have had a chilling effect on legitimate charitable giving. Nonprofit officials testified about the need for greater transparency and due process.

The hearing, "Anti-Money Laundering: Blocking Terrorist Financing and Its Impact on Lawful Charities," featured testimony from Daniel Glaser, deputy assistant secretary for terrorist financing and financial crimes at the Department of the Treasury (Treasury). Kay Guinane, director of the Charity and Security Network, a project of OMB Watch, also testified at the hearing. Other witnesses included American Civil Liberties Union (ACLU) Policy Counsel Michael German and Mathew Levitt, director of the Stein Program on Counterterrorism and Intelligence at the Washington Institute for Near East Policy.

Since 2001, efforts have been made to reform federal laws and policies that have targeted American charities, particularly Muslim charities, and donors. The nonprofit sector has been adamantly countering the charge that charities are a "significant source of terrorist financing," as suggested by government officials. This hearing was one of many requests for congressional oversight and reform.

Executive Order 13224, issued by President George W. Bush on Sept. 24, 2001, directed Treasury to designate Specially Designated Global Terrorists (SDGT) and take action to freeze all assets subject to U.S. jurisdiction. If Treasury finds a group has provided material support to an SDGT, or to be "otherwise associated" with an SDGT, the entity can be "designated" and have its assets frozen by the government.

In effect, an organization can be shut down without notice or hearing and without any judicial review. No criminal charges ever need to be filed in order to close a charity, and the charity may never be told what evidence or allegations led to its termination. The statistics undergird this reality: Treasury has designated nine U.S. charities, three of which faced criminal prosecution; only one has been convicted on terrorism-related charges.

Glaser acknowledged that the agency's work has "had the unfortunate and unintended consequence of causing a chilling effect on well-intentioned donor activity within Muslim American communities." But Glaser defended Treasury and argued that the designation process has safeguards to avoid unfairly targeting groups.

Glaser also highlighted that Treasury officials have met frequently with U.S. Muslim organizations to improve relations. However, charitable groups describe a more strained relationship. Guinane detailed various communications with Treasury in her written testimony. "While Treasury officials have made efforts to reach out to the charitable sector by speaking at events and meeting with charities, these efforts have not been productive," wrote Guinane. "There continues to be substantial disagreement about the nature of the problem and the proper way to address it."

Overall, Guinane and German highlighted the lack of basic due process rights designated charities face. Guinane stated that the hearing "is a critical first step in calling attention to an often overlooked and serious problem: barriers current national security laws and policies create for legitimate charitable, development, educational, grantmaking, peacebuilding, faith-based, human rights and similar organizations."

German, a former FBI counterterrorism instructor and recognized expert in terrorist group behavior, told the panel that "at a time when humanitarian aid is needed the most, the Treasury Department's capricious, arbitrary and discriminatory enforcement of overbroad US anti-terrorism financing laws has made it far more difficult for nonprofit organizations to provide critical aid and service."

Guinane noted that the Charity and Security Network has identified specific changes Treasury could make, such as giving charities more opportunity to correct mistakes before they are shut down. Her testimony states, "Changes are needed in the areas of transparency, accountability, proportionality and humanity."

Meanwhile, Levitt defended the government, saying that charities are "especially susceptible to abuse by terrorists and their supporters for whom charitable or humanitarian organizations are particularly attractive front organizations." This was a sentiment also expressed by Treasury's Glaser.

Levitt argues that nonprofits should conduct even "greater due diligence" and the government should carry out "information campaigns." He said that the problem is not the laws, but rather the unintended impact on charitable giving.

The U.S. charitable sector does engage in extensive due diligence and has taken steps to address the threat of terrorism. For example, the Treasury Guidelines Working Group (a group of U.S. charitable organizations, foundations, and experts) published the *Principles of International Philanthropy*, and the Council on Foundations and Independent Sector released the *Handbook on Counter-Terrorism Measures: What U.S. Nonprofits and Grantmakers Need to Know*.

Most committee members did not seem to be alarmed about any negative impact on charities. However, Rep. Keith Ellison (D-MN) expressed an understanding of the experiences of charities and donors. Ellison asked about what happens to the frozen funds of charities and the lack of an appeal process for groups whose money has been frozen. Guinane responded that the estimate of funds being held range from $3-$7 million, with no process or attempt by government to distribute funds to other, similar charitable causes.

Upon questioning, Guinane said that the Obama administration has been more open to dialogue with charities, but it had not introduced any new policies or made other changes.

In a June 2009 speech from Cairo, Egypt, President Obama addressed the importance for American Muslims to be able to fulfill their religious donation, or zakat, and promised to "ease the hurdles to charitable giving." One year after he pledged to reform charitable giving laws, there have yet to be any policy changes. On May 12, 2010, a group of thirty charities, including OMB Watch, wrote to Obama, asking him to fulfill the commitment made in Cairo.

Advocates hope this oversight hearing is just a first step and that the unique position charities face will be considered more in-depth by legislative and executive branch policymakers. They note that anti-terrorist financing programs have indeed negatively affected the U.S. nonprofit sector with long-term consequences, such as decreased international giving and program cutbacks. Many American groups have even reduced their work in conflict zones where terrorist groups operate and where humanitarian aid is needed most. For more information, see the testimony from the Charity and Security Network.

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The Watcher

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In This Issue

Obama Begins 2012 Budget Process with Eye toward Doing More with Less

On June 8, Office of Management and Budget (OMB) Director Peter Orszag rolled out details of the administration's FY 2012 budget guidance for federal agencies. The budget request will again attempt to strike a balance between fiscal austerity and adequate funding for government programs. In addition to the continuance of a three-year freeze on non-security discretionary spending, Orszag revealed two new initiatives that the administration hopes will help agencies achieve more with less: a government-wide initiative to improve federal acquisition and information technology (IT) processes and a requirement for agencies to identify programs that are the "least critical to advancing their agency missions."

In a six-page memorandum directed to the heads of federal agencies, Orszag lays out the administration's FY 2012 budget request guidance. And, in a second, two-page memo, Orszag

requests that agencies "identify the programs and subprograms that have the lowest impact on [each] agency's mission and constitute at least five percent of [its] discretionary budget."

The budget guidance memo is divided into two sections: budget and performance targets and government-wide initiatives. The first section provides specifics for agencies to take into consideration when submitting their budget proposals, including policy and funding priorities; terminations, reductions, and savings; and tax and spending policy integration.

Perhaps the most notable request from the president to the agencies is that their FY 2012 budget requests be at least five percent less than the discretionary total provided for each agency in the FY 2011 President's Budget Request. Obama's FY 2011 request would impose for three years a freeze in non-security discretionary spending; the five percent cut asked for by the administration is below that level. In remarks at the Center for American Progress (CAP) announcing the budget guidance, Orszag stressed that the administration is implementing the initiative to help agencies "live within the three-year freeze," meaning that while some agencies will see nominated cuts take effect, others will see funding boosts for other, more critical programs. This will allow the administration to freeze overall spending on non-security discretionary items. Agencies are also asked to include at least five significant terminations, reductions, and administrative savings initiatives that reduce costs below FY 2011 levels.

Orszag's memo also specifies a slew of other rules for agencies in preparing their FY 2012 budget requests. Agencies are also asked to:

- Include specific FY 2012 performance targets for each High Priority Performance Goal (HPPG) (HPPGs were established in 2009 to help agencies execute their missions and improve the efficiency in which they do so)
- Include information showing the performance gains associated with any proposed increases above the FY 2011 Budget
- Highlight the methods used to allocate base funding, such as cost-benefit analysis or other merit-based or competitive criteria
- Use their budget submissions to reconsider the basic design of their programs to institutionalize the use of evidence, to foster innovation rooted in research, and to encourage rigorous evaluation
- Consult with each other during the budget planning process so that resources are allocated to maximize their impact and avoid inappropriate duplication

The administration also appears to be moving toward taking a more comprehensive approach toward measuring program performance by including tax expenditures as programs that should be evaluated on the basis of their effectiveness and equity. Orszag's memo requests that agencies include an "analysis of how to better integrate key tax and spending policies with similar objectives and goals."

The second section of the memorandum covers the administration's broader efforts to modernize and reform government through smarter IT investments and changes in federal acquisition policies. (Some of these directives were outlined in a previous memo released in

March 2009.) The administration requests that agencies include in their FY 2012 budget requests:

- Specific actions for contributing to the FY 2012 government-wide goals of reducing improper payments by $20 billion and recapturing $2 billion in improper payments to vendors
- Specific actions and goals to reduce the agency's reliance on high-risk contract vehicles, including contracts awarded noncompetitively, procurements where only one bid is received, and cost-reimbursement and time-and-materials contracts
- Appropriate funds for the continued execution of the agency's plan for development of the agency's acquisition workforce
- Funding for the timely execution of agency plans to consolidate data centers developed in FY 2010

In the second memorandum co-authored with White House Chief of Staff Rahm Emanuel, Orszag sets out specific additional FY 2012 budget request guidance for agencies that asks them to identify programs that have the "lowest impact" on each agency's mission, totaling at least five percent of the agency's discretionary budget. Indentifying these programs is part of the Obama administration's "priority of identifying and cutting unnecessary and wasteful spending." But, as the memo mentions, the identification of these programs is a "separate exercise from the budget reductions necessary to meet the target for [each] agency's FY 2012 discretionary budget request." While agencies are asked to identify low-impact programs, it is not certain that these programs will be cut. If the administration implements all of the cuts specified in an agency's base budget request *and* if the administration eliminates all of the low-impact programs specified by an agency, then that agency would see a 10 percent total budget cut (from the FY 2012 number that was initially requested in the president's FY 2011 budget). However, this scenario is highly unlikely.

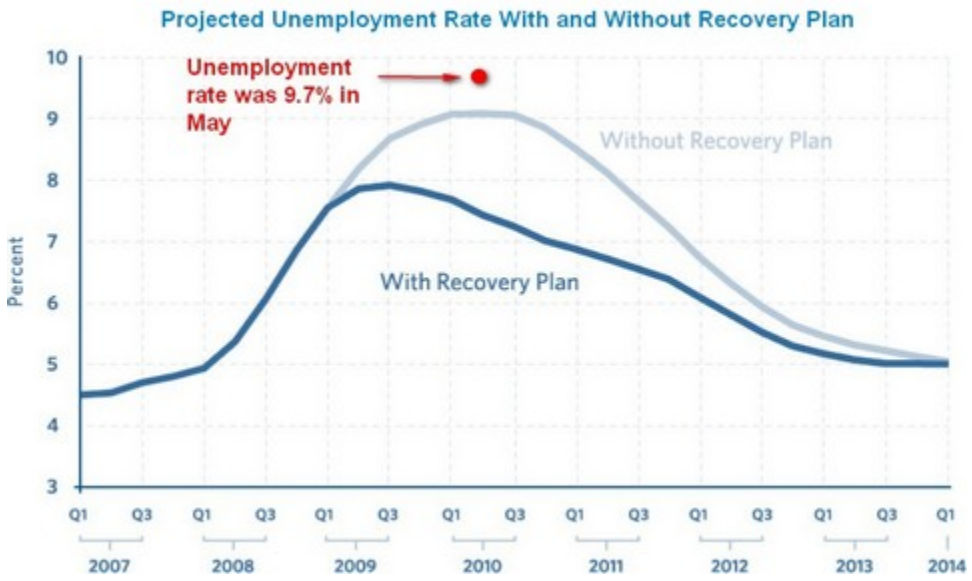
The administration has instructed both security and non-security agencies to target programs that have "an unclear or duplicative purpose, uncertain Federal role, completed mission, or lack of demonstrated effectiveness," and to stay away from "across-the-board reductions" and "incremental savings in administrative costs."

In a recent article in the *Federal Times*, some budget experts worried that without "good data and tools to measure program performance," agencies may allow "political considerations [to] trump the desire to improve efficiency." Moreover, with the administration directing agencies to "disregard statutory, regulatory, or administrative challenges to actually eliminating or reducing a program," budget analysts further fret that agency heads that want to "short-circuit the administration's efforts" might suggest "programs that have strong political backing on Capitol Hill" for cuts.

Commentary: Budget Cuts Imperil Vital Federal Role

Around the time that the American Recovery and Reinvestment Act (the Recovery Act) was being developed, a report co-authored by Christina Romer and Jared Bernstein indicated that passage of such an economic stimulus package could avert economic calamity. Yet now, with the unemployment rate hovering close to 10 percent, the president is setting about cutting federal spending by hundreds of billions of dollars in the coming years. The president's cuts are imprudent in the short run, given their potential to smother the burgeoning economic recovery before it can fully take hold, and could impair the federal government's ability to respond to economic or environmental disasters.

When Congress was debating the Recovery Act in early 2009, the fear was that unemployment could potentially hit nine percent, necessitating large federal outlays to combat the failing economy. The nation blew past that mark soon after passage of the bill, and yet somehow, those earlier arguments no longer apply. Does Congress no longer believe that kick-starting the economy through an expansion of the deficit is as fiscally responsible as it was in early 2009? Has the president quit caring about the plight of the unemployed?



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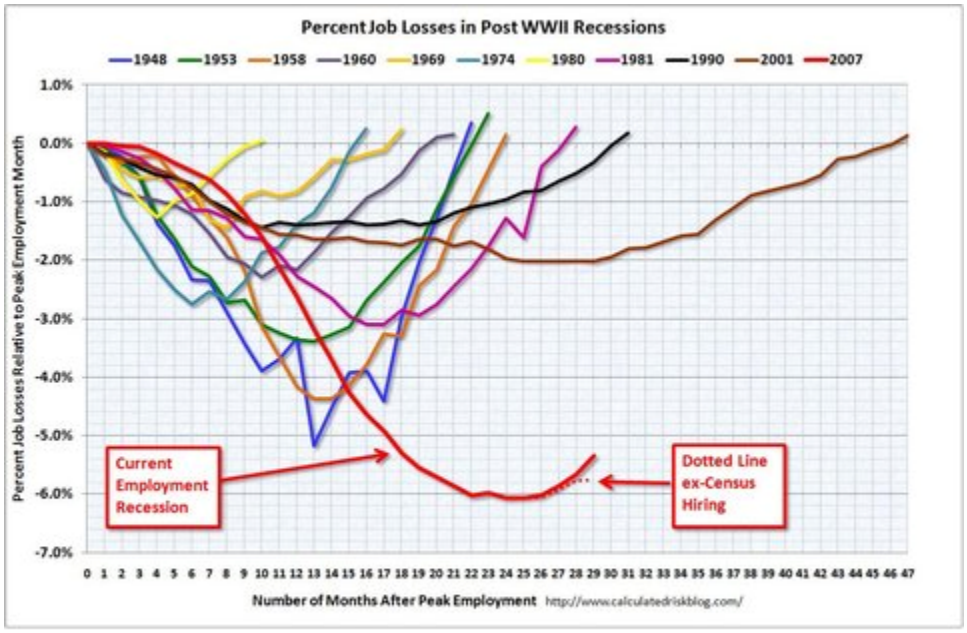
A letter from Obama to Congress sent June 12 suggests that this is not quite the case. In it, the president asks Congress to move $50 billion in aid to state and local governments to stay layoffs of thousands of teachers, firefighters, and police officers. Congress is attempting to approve a bill that would extend Unemployment Insurance funding for millions of unemployed workers. And although it dropped critical funding for health insurance assistance, there is some glimmer of recognition that Americans are struggling. It remains a mystery, however, why Congress and President Obama refuse to do more.

The economic outlook is still bleak; even the Office of Management and Budget (OMB) predicts unemployment to remain above eight percent until 2013. But not only is the number of

unemployed seriously high, the duration of their unemployment is also startling. According to the Bureau of Labor Statistics, those seeking employment for more than 27 weeks is at the highest level since data have been available (1967). Another measure of the unemployed – one that includes workers marginally attached to the labor force and those employed part-time for economic reasons – is also remarkably high. In other words, we are in the midst of a deep employment crisis. Meanwhile, President Obama wants to give in to the deficit hysterics by pushing for real spending cuts (see our companion piece in this week's *Watcher*.)



Source: Calculated Risk

(click to enlarge)

The fiscal austerity game is a dangerous one. The president has taken up the mantle of spending restraint, but his proposed cuts will do little to reduce the short-term federal budget deficit and nothing to avert the looming crisis in the long-term fiscal outlook. The proposed cuts ignore the simple fact that the non-security areas of the federal government that are vital for the nation's well-being have been living off of table scraps for years.

The president should be congratulated for putting emphasis on performance improvements and program evaluation. This makes government more effective and can result in modest savings through reduction of waste and fraud. Additionally, we acknowledge that the budget is on an unsustainable path. In the long term, there will be a need for progressive tax hikes and spending cuts across the board, including cuts to military spending.

However, the agencies and programs that will be slated for spending reductions in the short-run are those that protect our country, from a struggling economy to lead in our children's toys to offshore oil drilling. Today, we are confronted by a devastating oil spill disaster and by a recession that has buffeted millions of families. Tomorrow's crises are unpredictable, and

cutting back on federal spending will mean that we will be left ill-prepared to cope with the next disaster, economic or otherwise.

The Minerals Management Service (MMS) used to be a relatively unknown federal office, charged with regulating the nation's natural gas, oil, and other mineral resources. MMS is now in the public eye, thanks to the BP Deepwater Horizon disaster in the Gulf of Mexico. Although mismanagement at MMS surely contributed to its failure to properly oversee BP's operations, MMS officials could have performed more rigorous onsite inspections with additional resources.

Regulatory oversight, through federal offices such as MMS, costs money but provides important protections to the American people. While MMS will likely benefit from increased scrutiny as well as increased funding, other public protection agencies that have remained out of the spotlight will not fare as well in the coming fiscal years.

Cuts to the U.S. Environmental Protection Agency (EPA) could result in fewer inspectors for its air or water quality programs. The Department of Health and Human Services (HHS) could cut Food and Drug Administration inspectors, making it more likely that the nation suffers another *E. coli* outbreak. As the president and Congress pursue budget cutbacks, we are left to wonder: when will the next Deepwater Horizon occur, what will it be, and will we as a nation be prepared to respond to the disaster without the adequate resources to do so?

Lack of Transparency Afflicts Oil Spill Response

Adding insult to injury, the worst oil spill in U.S. history has been plagued by a lack of transparency that is hindering the response to the disaster and may impact responses to future spills. Reports of restrictions on media access to the spill site, the delayed disclosure of information on dispersants, and frustrations with BP's overall lack of transparency have confounded efforts to hold the company and government agencies accountable.

Both the administration's and the oil industry's response to the oil spill in the Gulf of Mexico have drawn criticism over the slow pace of release of information to the public. As congressional investigations and continued public outcry bring attention to the lack of openness, the federal response seems to be slowly moving toward greater transparency.

Confusion about Size of Spill

In the first weeks of the catastrophe, conflicting, inaccurate, or missing information regarding the amount of oil leaking into the Gulf of Mexico created confusion. Despite initial, unofficial estimates of up to 64,000 to 110,000 barrels of oil per day, the U.S. government and BP initially estimated up to 1,000 barrels of oil per day were leaking from the crippled Deepwater Horizon rig. Later, relying on estimates from BP, federal officials raised the estimate to 5,000 barrels per day. Weeks later, the interagency Flow Rate Technical Group, after analyzing data and reviewing undersea video footage of the leak, estimated a range of 11,000 to 25,000 barrels per day. On June 10, another revised estimate placed the range at 25,000 to 30,000 barrels of oil a day.

The task of quantifying the amount of oil gushing out of the broken pipe was made more difficult by BP's delay in providing scientists a high-definition video of the leak for computer analysis, as well as by the company's resistance to permit a direct measurement of the flow rate. The National Oceanic and Atmospheric Administration (NOAA), the scientific agency that produced the government's 5,000 barrel-per-day estimate, refused to provide more detailed information on the mathematics behind its figure.

Getting a clear, accurate understanding of the flow rate of the oil leaking from the destroyed wellhead is important for numerous reasons. Understanding the ecological impacts of the spill depends on a clear picture of the size of the leak. Planning for the prevention of and response to future deep-sea oil spills will be also informed by clear understanding of the characteristics of the Deepwater Horizon spill. In addition to learning about the root causes of the accident, the public and government regulators will need to know the consequences in order to plan for the next catastrophe.

Moreover, the amount of fines faced by BP will likely depend on the amount of oil released into the Gulf. In an interview with *The New York Times*, Rep. Edward Markey (D-MA), whose House Subcommittee on Energy and the Environment is investigating the spill, noted that under the Oil Pollution Act of 1990, companies face fines of up to $1,000 per barrel spilled, or up to $3,000 per barrel in the case of gross negligence. The need for accurate figures will have a major impact on potential fines. "I think they were hoping they could fix it before they would be forced to allow the world to measure it," Markey said.

Markey's subcommittee also compelled BP to release underwater video footage of the leak. In response to the company's lack of transparency during the spill response, Markey stated, "We cannot trust BP. It's clear they have been hiding the actual consequences of this spill."

Media Access Restricted

According to numerous reports, BP and its contractors have turned journalists and photographers away from impacted sites, and local law enforcement, the Coast Guard, and other government officials have also restricted media access to important areas affected by the spill. In addition, BP initially directed its cleanup workers to not speak with the media. The company has since rescinded that order.

Many reporters trying to cover the spill complain that access, even when granted, is strictly controlled by BP or BP contractors, frequently with the complicity of local or federal government officials. Markey commented on BP's role in restricting media access, "I think they've been trying to limit access. It is a company that was not used to transparency. It was not used to having public scrutiny of what it did."

On June 6, Coast Guard Admiral Thad Allen, the National Incident Commander, announced that he had issued orders granting the media "uninhibited access" to cleanup efforts, except if the access is "a security or safety problem." According to a BP spokesman, "From the beginning, we have tried to provide information, data and access to government officials, the news media

and the public. But we always are striving to enhance and improve our lines of communication and our responsiveness."

Secret Chemicals

More than 1,262,000 gallons of dispersants have been used on the oil spill to date. Numerous concerns have been raised about the long-term consequences of using such unprecedented quantities of dispersants and the unique conditions of their application under thousands of feet of water. Scientists and environmentalists had been calling for the disclosure of the ingredients to allow the public to analyze the possible human and ecological health impacts and what worker safety measures are needed. The chemical ingredients in the dispersants were kept secret until June 4, when the U.S. Environmental Protection Agency (EPA) quietly disclosed the ingredients on the agency's website.

The chemical components had been kept secret because the manufacturer had claimed the information was confidential business information, and therefore, it qualified for special protections by the EPA. Open government advocates had asserted that because of the clear emergency situation and the potential health and safety consequences of keeping the information secret, the EPA had the legal authority to disclose the chemical identities. EPA disputes that it had such authority, saying that the agency is subject to possible criminal penalties in the event of unauthorized disclosure of confidential business information, even in a situation as dire as the Gulf disaster.

Reflecting the concerns about the toxicity of the dispersants, EPA ordered BP to analyze alternative dispersants that were less toxic than the products the company had been using. BP, with help from the Coast Guard, conducted toxicity tests of alternative dispersants, but the results were neither released nor shared with the EPA. The company refused to select an alternative, claiming its current product was the most appropriate for the situation. EPA is now conducting its own toxicity tests of dispersants.

The data gaps related to the use of dispersants is emblematic of a chemicals policy that allows chemicals into commerce before the public has an adequate understanding of the chemical's hazard. One researcher who has studied dispersants used on oil spills lamented, "There's such limited funding out there to do this research. Would I would have liked to screen six dispersants? Yes, but there wasn't money."

Federal Transparency Efforts

Despite the numerous concerns raised about the quantity, quality, and access to information about the spill, there have been several government efforts to provide the public with data. The EPA created its own website providing water and air quality monitoring data, along with information on the agency's activities in the Gulf. The interagency command center, known as the Unified Command, provides extensive online updates on cleanup activities, as well as live video feeds from underwater remotely operated vehicles and telephone numbers for incident reports from the public.

After several weeks of inadequate transparency from BP, EPA Administrator Lisa Jackson and Department of Homeland Security Secretary Janet Napolitano called on BP to release more data about the spill and increase the company's transparency.

On June 14, NOAA launched a new website that provides information about the BP oil spill via an interactive map. Described as a "a one-stop shop for detailed near-real-time information about the response to the Deepwater Horizon BP oil spill," the interactive map includes data from DHS, the Coast Guard, the U.S. Fish and Wildlife Service, EPA, NASA, the U.S. Geological Survey, and the Gulf states.

The Obama administration is also calling for a high level of transparency in the awarding and disbursement of public claims against BP. Adm. Allen of the Coast Guard recently wrote to BP chief executive Tony Hayward demanding greater disclosure of compensation payments. Allen wrote, "We need complete, ongoing transparency into BP's claims process including detailed information on how claims are being evaluated, how payment amounts are being calculated, and how quickly claims are being processed."

House Moves to Increase Oversight of Intelligence Community

On May 28, the House approved an amendment to the defense authorization bill that requires the Office of the Director of National Intelligence (DNI) to cooperate with audits and investigations conducted by the Government Accountability Office (GAO). The measure was passed despite threats by the White House to veto what the Obama administration perceived to be an expansion of GAO authority.

The amendment to the National Defense Authorization Act for Fiscal Year 2011 (H.R. 5136) was introduced by Rep. Anna Eshoo (D-CA) and cosponsored by a group of Democrats including Reps. Howard Berman (D-CA), Jane Schakowsky (D-IL), Rush Holt (D-NJ), John Tierney (D-MA), and Mike Thompson (D-CA). Ultimately, it passed by a bipartisan vote of 218-210.

The GAO is an office of the legislative branch, authorized by statute to investigate all matters relating to the receipt, disbursement, and application of public funds. Only congressional committees may request the GAO to open an investigation. Although the GAO currently has some access to intelligence records, the amendment would statutorily mandate intelligence community cooperation.

The DNI is a component of the executive branch serving as the point office of the 16-agency intelligence community. Generally, legislative branch oversight of this body is limited to the two congressional intelligence committees. Although the GAO does have a relationship with the DNI, its authority to review intelligence activities would be considerably expanded under this amendment.

The executive branch has consistently maintained that GAO has no authority to investigate any intelligence activities. The argument stems from a 1988 opinion by the Justice Department's

Office of Legal Counsel, which stated that the creation of congressional intelligence oversight structure implicitly exempts reviews of intelligence activities from the scope of GAO's existing audit authority. In years since, this has been expansively applied by administrations to preclude GAO investigation of activities that extend into the realm of traditional intelligence activities.

The amendment states that the DNI "shall ensure that personnel of the [GAO] designated by the Comptroller General are provided with access to all information in the possession of an element of the intelligence community that the Comptroller determines is necessary for such personnel to conduct an analysis, evaluation, or investigation of a program or activity of ... the intelligence community." The amendment also expands the authority to request an investigation to any congressional committee. Currently, only the intelligence committees of Congress may make inquiries into the activities of the DNI. The amendment would require that the requesting committee inform the intelligence committees of the request.

The amendment would allow the DNI to redact portions of GAO investigations related to intelligence sources or methods but requires DNI to notify Congress that it has done so. Further, it instructs GAO and DNI to enter into procedural discussions prior to any investigation. DNI is allowed to suggest modifications to investigative procedures within five days of the initial discussion. GAO employees handling the investigation would be subject to the same statutory penalties for unauthorized disclosure as employees of the intelligence community.

Congressional supporters of the amendment made strong statements that the amendment is necessary for them to exercise their constitutional powers as elected officials. After the bill passed in the House, Tierney stated, "Oversight is an essential responsibility of the legislature and the Government Accountability Office, as Congress' investigative agent, is essential to that role. The Intelligence community should not be insulated from oversight. The amendment was crafted carefully to protect sources and methods and I am glad that the red herring of fear of disclosure was not 'bought' by the majority voting."

The amendment may find similar support in the Senate. In 2008, Sen. Daniel Akaka (D-HI) stated that Congress must "redouble its efforts – that is what we are trying to do – to ensure that U.S. intelligence activities are conducted efficiently, effectively, and with due respect for the civil rights and civil liberties of Americans."

Previously, the Obama administration threatened to veto the 2010 Intelligence Authorization Act due to a similar amendment expanding GAO's authority to review intelligence activities. On March 15, Office of Management and Budget (OMB) Director Peter Orszag wrote to the senior members of the intelligence committees, stating that the new requirement would "undermine the president's authority and responsibility to protect sensitive national security information." The White House argued that expanding GAO authority would adversely affect oversight relationships between intelligence committees and the DNI.

However, GAO pointed out that the administration's veto threat was based on an erroneous interpretation of law. In a March 18 letter to senior committee members, the acting GAO Comptroller General, Gene Dodaro, wrote that Orszag made "several misstatements of law and

fact." In particular, Dodaro argued that such an amendment would only reinforce GAO's already existing oversight authority and not substantially alter GAO's current mandate as stated by Orszag. Dodaro wrote, "GAO acknowledges and does not seek to displace the special relationship between the congressional intelligence committees and the [intelligence community]."

It is unknown how the intelligence community leadership will react to the current amendment. As a congressman, Leon Panetta, current director of the Central Intelligence Agency (CIA), proposed the CIA Accountability Act in 1987. That bill would have increased GAO's oversight authority of the CIA. However, President Obama's recent nomination of Gen. James Clapper to succeed outgoing DNI Dennis Blair may result in a resistance to the legislation. Clapper reportedly has tense relationships with some members of Congress. Rep. Pete Hoekstra (R-MI) stated that Clapper is "not forthcoming, open, or transparent."

The amendment does not include any requirement that the public be informed of GAO findings concerning the DNI. While standard GAO practice is to publish the results of its findings free to the public, it often withholds reviews that concern issues of national or homeland security.

Although the bill passed the House, it must be voted on in the Senate. The Senate received the legislation on June 9.

As Senate Defeats Challenge to Climate Finding, EPA Faces Additional Trials

Opponents of climate change regulation are attempting to dismantle the regulatory framework the U.S. Environmental Protection Agency (EPA) has crafted thus far under the Obama administration. The Senate unsuccessfully attempted to overturn a scientific determination in which the agency found that greenhouse gases threaten public health and welfare. However, EPA still faces court challenges by industry groups on regulations limiting emissions from both vehicles and industrial sources.

On June 10, the Senate defeated a resolution (S.J. Res. 26) introduced by Sen. Lisa Murkowski (R-AK) that would have canceled EPA's endangerment finding for greenhouse gases. The Dec. 7, 2009, endangerment finding declared climate-altering emissions a threat to "the public health and welfare of current and future generations" under the Clean Air Act. A procedural vote that would have brought the resolution up for a vote failed, 47-53, effectively killing it.

Critics accused the Senate of attempting to interfere with an agency scientific determination and hailed the defeat of the resolution as a victory not only for the environment, but also for scientific integrity. "It's deeply disturbing that some senators thought they could wave a magic wand and make the entire body of climate science disappear," Kevin Knobloch, president of the Union of Concerned Scientists, said in a statement. "The EPA determined that global warming emissions endanger public health," he added. "Fortunately a majority of the Senate stood up to this attack on science."

Murkowski introduced the resolution under the Congressional Review Act (CRA), a 1996 law that allows Congress to veto agency regulations and gives privileged consideration to resolutions introduced in the Senate if sponsors meet certain deadlines. Murkowski missed a deadline under the CRA; however, Senate Majority Leader Harry Reid nonetheless allowed her to bring the resolution to the floor. Some benefits of moving a resolution under the CRA include limited time for debate, a prohibition of amendments or filibusters, and the need for just a simple majority to pass any such resolution of disapproval.

"[I]n the face of the worst environmental disaster in our nation's history, Senator Murkowski's resolution never should have even reached the Senate floor," former Vice President Al Gore said in a statement, referring to the BP oil spill disaster in the Gulf of Mexico. "The fact that we had to work to defeat this legislation is a testament to the continued strength of the fossil fuel lobby."

The resolution drew significant Democratic support, with six Democrats joining all 41 Republicans to vote in favor. Even if the resolution had cleared the Senate, it was unlikely to pass the House, and President Obama had threatened to veto it.

EPA's decision to explore an endangerment finding was first prompted by the U.S. Supreme Court. In 2007, the Court ruled in *Massachusetts v. EPA* that greenhouse gases were eligible for regulation under the Clean Air Act pending an EPA examination of whether emissions posed public health risks.

The endangerment finding is not only EPA's most definitive statement to date on the link between greenhouse gas emissions and global climate change, but it also serves as a legal trigger for future regulation. EPA recently finalized two regulations supported by the endangerment finding, one limiting emissions from passenger vehicles and the other targeting stationary sources.

The vehicle emissions rule, finalized in April in partnership with the Department of Transportation (DOT), sets new fuel economy standards for vehicles from model years 2012 through 2016. The standards will require new cars to reach an average fuel economy level of 34.1 miles per gallon by 2016, resulting in 1.8 billion barrels of oil saved over the life of the vehicles, according to administration estimates.

A coalition of industry groups is suing EPA and DOT over the joint rule. The coalition includes, among others, Massey Energy, the owner of the West Virginia mine where an explosion killed 29 miners in April, according to BNA news service (subscription required).

Auto makers support the EPA/DOT rule and have filed in court on behalf of the administration. The standards were set after Obama brokered a deal among the auto industry, environmental groups, and states. The industry agreed not to challenge stricter fuel economy standards as long as those standards were consistent across all 50 states. Environmental groups have also filed in court on the agencies' behalf.

EPA faces a more serious challenge to its standards for stationary sources such as power plants and oil refineries. The rule, finalized in May, requires new and existing facilities emitting greenhouse gases above certain thresholds to obtain permits and upgrade pollution control technology beginning in 2011. EPA says the rule covers only major facilities but will still allow the agency to oversee 70 percent of greenhouse gases emitted from stationary sources. At least 14 lawsuits have been filed against EPA over the stationary source rule, according to BNA. Plaintiffs include the U.S. Chamber of Commerce and the National Association of Manufacturers. The Center for Biological Diversity, an environmental group, is also challenging the rule, hoping to force EPA to move up the implementation schedule.

Additional legislative challenges are also expected. Sen. Jay Rockefeller (D-WV) has introduced legislation (S. 3072) that would delay for two years implementation of EPA's stationary source regulation. The bill would not impact vehicle emissions standards. Some Democrats who opposed the Murkowski resolution said during the debate that they would support Rockefeller's bill and hoped to bring it to the floor for a vote.

Both Obama administration officials and environmental advocates hope that the continued presence of EPA regulation will prod Congress into more quickly passing comprehensive climate change and energy legislation. The House passed a bill (H.R. 2454) in June 2009 that would establish a cap-and-trade program for greenhouse gases, but action has stalled in the Senate, where different proposals, likely without cap-and-trade provisions, are being considered.

Senators from both sides of the aisle have said they prefer legislation to EPA regulation, and supporters of the Murkowski resolution assailed EPA over what they characterized as an administrative attempt to usurp Congress's power. "Many of the senators who voted for the resolution say they want Congress, not the administration, to address climate change," Knobloch said. "That position has integrity only if the Senate moves swiftly to pass a strong climate and energy bill."

Senate Democrats say they hope to consider and pass a comprehensive bill before breaking for the August recess. However, the BP oil disaster has further complicated both the politics and the timing of the legislation. Obama is scheduled to address the nation Tuesday evening (June 15) and will likely continue his push for comprehensive energy and climate policy.

White House Issues Guidance on E-rulemaking and Paperwork Practices

On May 28, the Office of Information and Regulatory Affairs (OIRA) issued two memoranda to federal agencies that impact key features of the regulatory process. The memos direct agencies to change practices related to electronic rulemaking dockets and to paperwork clearances that agencies request when collecting information from the public.

On Jan. 21, 2009, President Obama charged the director of the Office of Management and Budget (OMB) to develop an Open Government Directive (OGD) outlining actions executive

departments and agencies needed to take to encourage transparency, public participation, and collaboration. OMB issued the directive on Dec. 8, 2009.

The OGD requires OIRA, the office within OMB that oversees federal regulatory policy, to review its policies and procedures and issue revisions to them, if necessary, "to promote greater openness in government." The two May memos are among several issued by OIRA Administrator Cass Sunstein in accordance with the OGD.

The memo on Increasing Openness in the Rulemaking Process – Improving Electronic Dockets urges agencies to make more and better rulemaking information available on Regulations.gov, the main centralized public site for tracking regulations. Specifically, the memo calls for agencies to make their paper-based and electronic dockets consistent with each other. To date, many agencies have had more complete paper dockets available to the public in agency reading rooms physically located at the agencies. The memo urges agencies to put the paper dockets and the electronic dockets on equal footing.

Agencies should also make the electronic dockets more complete. The memo states that "supporting materials (such as notices, significant guidances, environmental impact statements, regulatory impact analyses, and information collections) should be made available by agencies during the notice-and-comment period by being uploaded and posted as part of the electronic docket." Public comments, regardless of the form in which agencies receive them, are to be posted to the dockets in "a timely manner."

The memo also instructs the U.S. Environmental Protection Agency (EPA), which manages and operates Regulations.gov, to develop within six months best practices for classifying documents and establishing data protocols. Changes to the consistency and completeness of data should help alleviate some of the problems that have made Regulations.gov difficult to use and the site's search results unreliable.

The memo on Paperwork Reduction Act – Generic Clearances addresses changes to certain types of information collections that agencies use to gather information from the public and regulated entities. Under the Paperwork Reduction Act (PRA), agencies are required to seek OMB approval when they wish to collect information from 10 or more people.

Agencies have been given "generic clearances" by OMB when the information collected is voluntary (that is, the respondents are not required to submit the information to the requesting agency), uncontroversial, or easy to produce. Generic information collections "can be used for a number of information collections, including methodological testing, customer satisfaction surveys, focus groups, contests, and website satisfaction surveys," according to the memo.

Besides making agencies aware of and encouraging the use of these generic clearances, the memo describes the process agencies should use to request generic clearances from OIRA. Once approved, the clearance may remain in effect for three years, the maximum time under the PRA that any information collection can be approved.

Although the memo is intended to provide the agencies with a "significantly streamlined process" for receiving OIRA's approval for the plans to collect generic information, OIRA still maintains its control over the substance of the information collections. Once the generic clearance plans are approved, the agencies must still submit "specific information collections (e.g., individual focus group scripts, test questions, surveys) to OMB for review, in accordance with the terms of clearance set upon approval of the plan." Should the specific information collections an agency submits fall "outside the scope" of the clearance, OIRA may require "further consideration" by the agency or force the agency to skip the generic clearance process and go through the complete information collection request outlined in the PRA.

The full list of OIRA's memos to agencies issued pursuant to the OGD is available on OIRA's website under the heading "OIRA Focus."

BP and Environmental Nonprofits: Conflicts and Complaints

Nonprofit organizations are working diligently to counter the effects of the catastrophic oil spill that followed the failure of BP's Deepwater Horizon rig in the Gulf of Mexico. Groups are aiding in cleanup efforts, protesting, raising money, and engaging in various other activities to turn anger into action. However, some nonprofits are also facing harsh criticism for accepting donations and other gifts from the oil company, and the worst oil spill disaster in the country's history has jeopardized partnerships between energy companies and environmental nonprofits.

BP and some of the largest environmental organizations formed relationships in the past, which the oil company used to create an Earth-friendly image while helping the groups pursue their causes. Now, after the spill, nonprofits that are connected to BP, either through funding or any other work affiliation, are facing intense disapproval from their supporters.

The fact that organizations with ties to BP are facing scrutiny highlights the perpetual debate regarding the relationships between for-profit businesses and nonprofits and how a nonprofit should react when a donor becomes involved in scandal. More importantly to many is whether that relationship affects a group's ability to speak out against or criticize the sponsoring business.

Some insist that there must be a separation between industry and nonprofits, while others see value in some type of partnership. In this case, an environmental group may believe that working with a corporation will advance better corporate environmental policies.

The Nature Conservancy, America's third-largest nonprofit based on assets, has received the most media attention for its connections to BP. In late May, *The Washington Post* reported that the group "has given BP a seat on its International Leadership Council and has accepted nearly $10 million in cash and land contributions from BP and affiliated corporations over the years."

The Nature Conservancy's website has been inundated with complaints from donors upset about the group's decision to work with and accept donations from BP. CEO Mark Tercek posted a

statement defending the organization. "Anyone serious about doing conservation in this region must engage these companies, so they are not just part of the problem but so they can be part of the effort to restore this incredible ecosystem," he said. The group stresses that contributions from BP and other corporations make up only a portion of the organization's total revenue.

The Nature Conservancy's chief scientist, Peter Kariva, also responded with a blog post defending the group's collaboration with BP. "In fact, although we have never engaged with BP or other energy companies on their offshore Gulf drilling, maybe we should have — we might have been able to help site their activities to reduce the risk to the Gulf's globally significant habitats." Commenters fired off many angry responses to Kariva's post.

Reportedly, BP also provided $2 million in donations to Conservation International. In response to the spill, the group plans to review its relationship with BP. Conservation International Vice President Justin Ward said, "Reputational risk is on our minds."

Further, the Sierra Club and Audubon, along with other energy and environmental groups, joined with BP Wind Energy in 2007 to form the American Wind and Wildlife Institute. *The Economist* also reports that the Environmental Defense Fund helped BP develop its internal carbon-trading system.

Another example involves funding for an aquarium in California. The Aquarium of the Pacific in Long Beach recently opened a new sea otter habitat, which was funded by a $1 million donation from BP. However, the *Los Angeles Times* reports that the aquarium has no desire to distance itself from the oil company. There has also been no question of changing the exhibit's name, which will remain the BP Sea Otter Habitat. The aquarium's president said, "The aquarium is still open for future partnership with BP."

Paul Dunn, an expert on corporate ethics, told the *Times* that how these situations are dealt with "depends largely on whether the donor's scandalous acts are directly at odds with the recipient's mission. [. . .] People can see a direct link there. Aquatic animals are being harmed by the disaster."

The Economist notes the intricate relationships that many nonprofits have with large corporations and their possible repercussions. "The spill also highlights the question of whether NGOs should accept money for the advice they give to companies," according to the publication. "For organisations [*sic*] such as the Nature Conservancy, which protects ecologically sensitive spots by buying them or persuading others to set them aside, businesses are a big source of income. But partnerships with grubby firms risk turning off its million-odd individual donors."

Nancy Schwartz, a marketing consultant who works with charities, said in an interview on Katya's Non-Profit Marketing Blog, that in order to rebuild its reputation, the Nature Conservancy should recognize that accepting money from BP was a mistake. Schwartz said, "The fact of the Nature Conservancy's taking funding from BP for years, no matter how small a percentage it is of the overall organizational budget, is a very bad sign of organizational values gone missing or soft. And once those values are endangered, resultant policy decisions are too."

These issues address important questions for nonprofits – for example, whether or not a collaboration can thrive when the two entities have very different values and priorities. Such associations endanger a nonprofit's ability to question or criticize the business or industry. Whether a group can advocate around the corporation's work may also come under question when a group accepts contributions or other gifts from that company. Therefore, some believe that environmental groups should not be associated with businesses whose work may harm the environment.

Wrangling over DISCLOSE Act Slows Bill Down, but Deal May Be Near in House

Some members of Congress have started to explore exempting certain nonprofits from the DISCLOSE Act, the bill developed by Democrats to respond to the *Citizens United v. Federal Election Commission* decision from the U.S. Supreme Court. While some nonprofits are concerned about donor disclosure requirements in the bill, other groups are concerned that exemptions or changes to the bill would render the legislation ineffective. These organizations worry that without strong disclosure requirements, the bill would allow political ads sponsored by anonymous sources to flood the airwaves at election time.

A few nonprofits, mostly those supporting the legislation, have been playing a key role in negotiations concerning development of the DISCLOSE Act (the Democracy Is Strengthened by Casting Light On Spending in Elections Act), federal legislation sponsored by Rep. Chris Van Hollen (D-MD) and Sen. Charles Schumer (D-NY) to blunt the impacts of the *Citizens United* decision. In *Citizens United*, the Supreme Court ruled that corporations and unions may now directly and expressly advocate for the election or defeat of candidates for federal office through independent expenditures paid for by general funds.

Other groups, such as the AFL-CIO and the National Rifle Association (NRA), a 501(c)(4) organization, have raised concerns about the legislation. Responding to the NRA, Rep. Heath Shuler (D-NC), a "gun rights advocate and a co-sponsor of the package, has drafted a change that would exempt the gun lobby – and all other groups organized under 501(c)(4) of the tax code – from the disclosure requirements in the measure," according to *Roll Call*.

Shuler proposed the amendment because "the gun lobby has objected to the bill's provision requiring a group to identify its top donors in its political ads, charging it would force the group to turn its membership list over the government," *Roll Call* noted.

At least some of what Shuler wants has reportedly been wrapped into a manager's amendment by House leadership, though the official language of the proposal was not available at press time. According to *Politico*, "The proposal would exempt organizations that have more than 1 million members, have been in existence for more than 10 years, have members in all 50 states and raise 15 percent or less of their funds from corporations." This has been confirmed to OMB Watch by sources who have reviewed the manager's amendment. Citing unnamed Democratic sources, *Politico* indicates that the NRA may be the only organization that qualifies under the

criteria. In a press statement issued June 15, the NRA said that if the manager's amendment is included in the bill, the group "will not be involved in final consideration of the House bill."

Far more hostile is the U.S. Chamber of Commerce, which is threatening to "score" the bill. The threat poses a big dilemma for some Democrats who are vulnerable in the 2010 midterm elections and who do not want to be listed as supporting a bill that the Chamber opposes.

The National Right to Life Committee, which opposes the DISCLOSE Act, also sent a letter to lawmakers informing them that it would use their vote on the legislation in evaluating their records.

Other nonprofits favor disclosure requirements but do not want them to be overly broad. Abby Levine, deputy director of advocacy for the Alliance for Justice (AFJ), told the *Washington Independent* that AFJ is "in favor of meaningful disclosure" and that the group wants "the relevant information without casting too wide a net."

Lisa Gilbert, U.S. Public Interest Research Group's (U.S. PIRG) democracy advocate, told the *Washington Independent*, "The thing about this bill is that there is disclosure that wasn't required before of all entities' in the politically active tax-exempt world. These are things people aren't accustomed to doing."

Other nonprofits support the DISCLOSE Act in its original form, are strongly opposed to Shuler's original (c)(4) exemption, and are seeking to narrow the exemption. According to a press release from the Campaign Legal Center, the group joined Democracy 21, the League of Women Voters, and Public Citizen in a letter to House members asking them to vote for the DISCLOSE Act.

In the letter, the groups wrote, "The Supreme Court stated in *Citizens United* that disclosure and disclaimer requirements 'do not prevent anyone from speaking,' and disclosure 'permits citizens and shareholders to react to the speech of corporate entities in a proper way.'" They also urged House Members to "oppose any efforts to undermine or weaken the provisions in the legislation."

Nan Aron, president of AFJ, came out strongly against the manager's amendment version of the (c)(4) exemption. According to *CQ Politics*, Aron said, "This outrageous attempt to garner support for the bill does nothing more than make the already powerful even more powerful and undermines both the stated purpose of the legislation and fundamental Constitutional principles."

During the last week of May, just before the House Rules Committee was set to consider the DISCLOSE Act, the committee session was canceled. Some have blamed the lobbying efforts of groups opposed to the bill for disrupting the committee's schedule. Though a House deal may nevertheless be near, the legislation faces a tough road in the Senate, and the longer the bill is delayed, the less likely it will pass in time to affect the 2010 midterm elections.

Editor's Note: Due to the rapidly evolving nature of the DISCLOSE Act, we urge readers to visit The Fine Print for breaking news and changes that may have occurred after press time.

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In This Issue

Congress Burdened By Must-Pass Legislation

With fewer than 30 working days left before Congress adjourns for its August recess, the legislative branch is once again faced with a pile of must-pass legislation and a ticking clock. Before the end of 2010, Congress must pass a spate of bills to renew a set of expiring tax provisions, prevent stiff pay cuts for Medicare doctors, fund the wars in Iraq and Afghanistan, and prevent the expiration of the Bush tax cuts for the middle class. Congress is likely to truncate its legislative calendar so that members can return to their districts to campaign for this year's elections, lowering the odds of passing other "big-ticket" legislation like climate change policy and immigration reform.

The most prominent bill giving Congress difficulties is the so-called tax extenders bill, which is a collection of miscellaneous tax provisions like biodiesel and R&D tax credits that must be renewed every year. While the extension of these core tax provisions would cost about $32 billion, other provisions, such as an extension of unemployment insurance and continued

increased Medicaid funding to states, pushed the total cost of the Senate version to $109 billion. Many Democrats strongly back the unemployment insurance and Medicaid spending to continue fighting the effects of the recession, but fiscal conservatives in the Senate continue to balk at the bill's cost.

Also proving contentious are provisions in the bill added to offset its ultimate cost. Most controversial is a loophole-closer that changes treatment of investment fund managers' income from being taxed at the capital gains rate of 15 percent to the regular income tax rate (up to 35 percent for high-earners). Bowing to the demands of Wall Street, real estate, and venture capital lobbyists, the Senate bill would only partially close this "carried interest" loophole by taxing only a little more than half of fund managers' income at the regular income tax rate.

As of June 25, Senate Democrats tried to pass the bill three times, each time with a more trimmed-down cost, and each time Democrats failed to reach 60 votes to end debate on the bill. The last version of the Senate bill cost $109 billion, adding $33 billion to the deficit through extended unemployment insurance.

The House passed its version of the extenders bill in May, and it included a 19-month fix to the Medicare reimbursement formula, the so-called "doc fix." Without it, doctors would see steep cuts to their Medicare reimbursements, as much as twenty-one percent. But Senate leaders were forced to scale the 19-month solution down to six, despite the fact that the House version was already pared down from a more expensive five-year fix. Ultimately, the Senate passed the short, six-month fix as a separate measure so that wrangling over the larger package would not prolong the pay cut for doctors serving Medicare patients.

While the House reluctantly passed the Senate's compromise, it only serves to delay the inevitable. Congress will have to pass a long-term extension of the Medicare reimbursement formula at some point, and it will be no easier, and no cheaper, during December's lame-duck session.

The problems facing Congress are not all the Senate's fault, however. The House has been having problems of its own. In particular, the House has not been able to pass a supplemental spending bill that would fund the wars in Iraq and Afghanistan. Surprisingly, the Senate passed its version of the war supplemental bill before the Memorial Day break, but anti-war Democrats in the House are holding up the House bill, demanding a timetable for withdrawal from Afghanistan before they will vote on any new funding for the war. At the same time, Defense Secretary Robert Gates has warned House Speaker Nancy Pelosi (D-CA) that delaying passage of the bill beyond July 4 would have dire consequences for military operations.

The situation is further complicated by the fact that House leadership planned on attaching a deeming resolution to the war supplemental that provides a budget blueprint for the fiscal year that starts Oct. 1. Since the House will not be passing a budget resolution in 2010 (the first time this has happened since Congress passed the Budget Act in 1974; see our previous *Watcher* article on this matter), the deeming resolution would put in place FY 2011 spending caps for

appropriations committees that are usually set by the budget resolution. The deeming resolution also allows Democrats to avoid providing estimates for the deficit.

Because the war supplemental is considered "must-pass" legislation, thanks to Gates' insistence, House leadership believed it would be easier to attach the deeming resolution to the war supplemental than to pass a stand-alone bill. Like other must-pass legislation, the war supplemental will likely serve as a vehicle to move other provisions, such as a $23 billion proposal offered by House Appropriations Chair David Obey (D-WI) to prevent the layoff of thousands of teachers due to state budget shortfalls.

With the current problems the supplemental is facing, however, congressional appropriators may have to wait even longer for FY 2011 budget levels before they start their work, greatly increasing the chances that the 12 spending bills required to fund the federal government's operations will not be passed by the Oct. 1 deadline.

Finally, there is the thorny issue of the Bush tax cuts, which expire at the end of 2010. President Obama has pledged, with Democratic congressional leadership concurring, to not let these tax cuts expire for families earning less than $250,000. However, with the prospect of a tax increase for high-income taxpayers on the horizon, members of Congress are getting an earful from lobbyists representing individuals in the highest tax bracket. Nervous about the prospects of being tarred with such labels as "job-killing tax-hiker" during an election-year, many members of Congress may hesitate at passing a limited extension.

Income tax rates are not the only Bush tax cuts that are set to end on Dec. 31. Since Jan. 1, the nation has been without an estate tax, thanks to another Bush tax cut, which steadily phased the tax out over nine years and completely eliminated it for 2010. The tax will return in 2011 and will revert to rates found in the law prior to the Bush tax cuts, which approximate 2002 levels. 2010 marks the first time the nation has been without an estate tax since its inception in 1916 and the first year that a billionaire has been able to pass on his entire estate to his heirs tax free.

At the end of 2009, the House passed what would have been a permanent extension of the exemption levels and tax rates in place that year, but the Senate has been unable to follow through with a similar bill. With only 41 votes needed to block passage of an estate tax fix, the fate of such a bill remains unclear.

Lack of Transparency in Oil and Gas Oversight Still a Major Problem

The Department of the Interior's management of oil and natural gas resources suffers from a lack of public access to information, according to government investigators and numerous public interest groups. This lack of openness takes a significant toll on the public's ability to challenge Interior's decisions and impedes accountability. Reforms to the Interior Department's oil and gas management policies announced in recent months have not made transparency a key element, casting doubt on their potential to bring about stronger oversight.

In recent testimony before a House subcommittee, an official from the Government Accountability Office (GAO) criticized the Department of the Interior's (DOI) oversight of oil and gas production for weaknesses in the disclosure of information. GAO investigators "found that stakeholders, including industry groups and nongovernmental organizations representing environmental, recreational, and hunting interests, expressed frustration with the transparency and timeliness" of certain types of information on oil and gas management. In addition to the transparency problems, GAO identified weaknesses in four other key areas: technical expertise; ability to conduct inspections; enforcement authority; and independence.

Over the course of several investigations into the management and oversight of oil and natural gas resources, combined with its work to strengthen oversight of nuclear safety, the GAO has identified several key elements it considers valuable to sound independent oversight. One such element, public access, states that the agency "should provide public access to its reports so that those most affected by operations can get information."

DOI's oil and gas oversight is conducted primarily by the Bureau of Land Management (BLM) and the former Minerals Management Service (MMS). On June 18, the MMS was renamed the Bureau of Ocean Energy Management, Regulation, and Enforcement (BOEMRE) as part of a set of reforms announced in the aftermath of the BP Deepwater Horizon catastrophe. The Interior secretary's decision to change the name of the troubled MMS may evoke the name changes of other disgraced organizations such as AIG and Blackwater, but it does little to improve transparency.

BOEMRE (Née MMS)

Reforms of offshore oil and gas oversight announced by Interior Department Secretary Ken Salazar in May fail to highlight the role of the public or the need to increase transparency at MMS. In a report recommending new safety measures for offshore drilling, the Interior secretary does, however, scatter a few mentions of transparency. For example, the document committed the agency to develop "new means of improving transparency and providing public access to the results of inspections and routine reporting" regarding oil rig safety equipment, including the misleadingly named blowout preventers. Additionally, MMS recently conducted inspections of all deepwater drilling rigs in federal waters of the Gulf of Mexico. The inspection results were made available to the public.

Still, public interest watchdogs have called for much greater transparency at MMS/BOEMRE, including narrower application of trade secrets protections and greater disclosure of key data, such as detailed production figures, royalty and tax payments, and environmental and safety inspection reports. According to one industry watchdog, "The way to clean up the mess in Interior and in our waters is to shine enough light to make dealings between industry and government transparent to all of us." Yet, DOI's reforms of the former MMS do not prioritize improving the transparency of the agency or greater public access to information. This neglect could threaten the efficacy of the reforms. Danielle Brian of the Project on Government Oversight (POGO) recently testified before the House Subcommittee on Energy and Mineral

Resources, stating, "No matter what reforms are put in place, they can only be effective with increased transparency about MMS's operations.

BLM: The Other Troubled Bureau

The BLM oversees federal onshore oil and natural gas projects and is supposed to ensure projects adhere to all applicable environmental laws and regulations, including the National Environmental Policy Act (NEPA). NEPA requires certain projects to undergo environmental reviews that also consider alternative actions. Such reviews are waived if the project qualifies for what is known as a categorical exclusion. The GAO has found that "Interior has been providing inconsistent and limited information with respect to its use of categorical exclusions in approving onshore oil and gas activities."

Under the Energy Policy Act of 2005, section 390 authorized DOI to grant categorical exclusion status and skip environmental reviews for certain oil and gas drilling projects. Many projects excluded from the environmental review process under section 390 are frequently not publicly disclosed. The GAO found that "BLM field offices had different degrees and methods of disclosing information related to decisions on section 390 categorical exclusions." The ease of access to information depends on which regional office the public seeks information from.

In September 2009, the GAO found that "BLM's use of section 390 categorical exclusions has frequently been out of compliance with both the law and BLM's guidance." The agency's abysmal implementation of the Energy Policy Act and of NEPA "may have thwarted NEPA's twin aims of ensuring that BLM and the public are fully informed of the environmental consequences of BLM's actions."

In addition to BLM, MMS also was criticized for poor implementation of NEPA. In a report released in March, the GAO found that MMS's failure to share information "has hindered [regional staff's] ability to complete sound environmental analyses under NEPA," and that the agency has failed to provide a required guidance handbook for implementing NEPA. NEPA's environmental reviews allow the public to review and comment on proposed oil and gas activities. Without sound, transparent reviews, the public is effectively shut out of a key part of government decision making.

Little Transparency in Lease Sales

According to GAO's recent testimony before the House subcommittee, the preliminary results of an ongoing GAO investigation show that "BLM state offices provide limited and varying amounts of information to the public on their leasing decisions." Despite the criticisms by the GAO regarding DOI's transparency and involvement of the public, the BLM has not made improving the transparency of the oil and gas leasing process a priority. Proposed reforms of BLM's lease sales make few references to transparency. There is only sporadic mention of public access, such as one assertion that "field offices will ensure greater public involvement." Such sparse and vague mentions of "greater public involvement" provide little substantive direction to staff and little hope for progress.

Websites Missing Key Documents

According to the GAO, another recent reform requires state BLM offices to post online their responses to protests against decisions to offer specific parcels for oil and gas drilling. At least one state office, Wyoming, posted the protest letters for leases sold in February and May 2010, but no response letters were posted. The websites for the Colorado office and the New Mexico office had neither protest letters nor agency responses posted online for sales going back to 2005. The Montana office does provide a webpage with the protest letters and responses for leases sold in 2009 and 2010 only.

Notably, the BLM's website provides substantial information on how to lease federal land for oil and gas drilling. A review of the website failed to identify any instructions for protesting leasing decisions.

DOI's Open Government Plan

Unfortunately for open government advocates, DOI's Open Government Plan, released in April, does little to address the problems of transparency and public engagement in oil and gas management.

As part of an evaluation of all agency Open Government Plans by a coalition of public interest groups, a reviewer noted that DOI's plan "suffers from a lack of specific details for implementation of those [transparency] projects and dearth of 'game-changing' ideas that would put the President's open government ideals into meaningful action."

In her House testimony, POGO's Brian criticized DOI's implementation of the Obama administration's transparency initiatives. "It is important to note that Interior has not released information about oil and gas leases, despite being given several opportunities to do so by measures outlined in the Open Government Directive. Interior's willingness to increase its openness in the wake of the Gulf disaster should be considered a real acid test as to how committed the Administration is to the kind of transparency measures that will help citizens hold the federal government and industry accountable."

Kagan's Impact on Transparency Difficult to Predict

Elena Kagan, President Obama's nominee for the U.S. Supreme Court, is currently undergoing her confirmation hearing before the Senate Judiciary Committee. During the hearing, she will be questioned about a wide range of legal and political issues, which may include government transparency. Kagan's arguments in several transparency-related cases as Obama's Solicitor General may offer some insight into her approach to open government. However, because she has argued those cases from the administration's perspective, her personal legal views on transparency are difficult to assess. It is, therefore, hard to predict how she may rule in transparency-related cases if confirmed as a justice.

Kagan was nominated by President Obama on May 10 to replace retiring Justice John Paul Stevens. Kagan attended both Princeton and Oxford University before obtaining her law degree from Harvard Law School. She first worked in a political capacity in 1993 when she was special counsel to then-Sen. Joe Biden, but she spent most of her early career in academia. In 1995, she joined the Clinton administration and held a variety of positions until 1999, when she returned to teaching. In 2009, she was nominated by President Obama to be Solicitor General, the position she currently holds.

Although she has never been a judge, Kagan, as Solicitor General, has been the primary federal government attorney arguing cases at the Supreme Court. It is her role to decide which cases the government takes to the Court and how they are argued. Kagan had reportedly been considered for the seat vacated by Justice David Souter, but Sonia Sotomayor was ultimately named.

Kagan Has Sided with Secrecy

During her time as Solicitor General, Kagan has pursued five cases before the Supreme Court concerning application of the Freedom of Information Act (FOIA), the country's most fundamental open government law. In four of the five cases, she has argued in favor of government secrecy. Each time, the Court sided in favor of the government. The Court has not yet taken up the fifth FOIA case.

The most notable of the cases was *Department of Defense v. American Civil Liberties Union*, in which Kagan fought the release of photographs depicting the abuse of detainees while in U.S. custody. In her argument to the Supreme Court, Kagan stated, "In the judgment of the president and the nation's highest-ranking military officers, disclosure of the photographs at issue here would pose a substantial risk to the lives and physical safety of United States and allied military and civilian personnel in Iraq and Afghanistan." Kagan made this assertion despite the fact that the administration had already released Justice Department memoranda that detailed the policy and actions of U.S. personnel in torturing detainees because "the existence of that approach to interrogation was already widely known." In that case, the Supreme Court overturned a lower court decision to release the photographs.

In a different case, Kagan argued that it would violate physicians' privacy to release Medicare data on claims paid. Kagan's argument in *Consumers' Checkbook v. Dept. of Health and Human Services* was that the information could be combined with other publicly available Medicare fee information to figure out how much a physician earned each year. Consumers' Checkbook had argued that physicians' privacy did not outweigh the public interest in using the data to measure physician experience, quality, and efficiency. The Supreme Court refused to overturn a ruling from the Court of Appeals for the DC Circuit, which sided with the government and allowed the records to be withheld. The Court of Appeals decision had reversed the original ruling of the U.S. District Court for the District of Columbia, which found in favor of Consumers' Checkbook and ordered the agency to release the records.

In two other FOIA cases, Kagan argued against disclosure of records sought by the public. *Loving v. Department of Defense* concerned a request for documents relating to the president's

review of a military death sentence, and *Berger v. Internal Revenue Service* involved a request for an IRS officer's time sheets. In both of these cases, the Supreme Court chose not to review the cases, essentially siding with Kagan by default and letting the lower courts' rulings to withhold the information stand.

Kagan Has Limited the Use of Privacy Claims to Hide Corporate Information

In another case, Kagan has argued against the idea that corporate information held by the government qualified for privacy protections. Government agencies are prohibited from disclosing records, even under FOIA, if the information would constitute an invasion of personal privacy. Corporations have attempted to extend this exemption for individual privacy to their corporate records.

In a fifth FOIA case, *Federal Communications Commission v. AT&T Inc.*, which the Supreme Court has not yet taken up, Kagan argued that corporate data in the possession of the U.S. government was not subject to the privacy exemption of FOIA requests. She put forth that the public has a right to information concerning corporate malfeasance in government programs. The lower court, the Third Circuit Court of Appeals, rejected this argument and sided with AT&T. The government appealed the Third Circuit ruling to the Supreme Court. If confirmed and the Court takes up the case, Kagan will have to recuse herself because of her past involvement.

Much of Kagan's existing arguments in favor of secrecy may be more the opinion of the administration than her own. On the issue of the torture photographs, for example, Attorney General Eric Holder testified before Congress in June 2009 that the administration would appeal to the Supreme Court any lower court decision to release the photographs. This may indicate a larger administration policy of withholding such records rather than the position of any one person, including Kagan. Thus, while her arguments in important transparency-related cases may offer us some insight, how Kagan would ultimately rule in future transparency cases as a Supreme Court justice is difficult to predict.

MSHA Limited Number of Mines on Violations List

Officials at the Mine Safety and Health Administration (MSHA) purposefully prevented a number of mines with serious safety violations from being placed on the list of mines with patterns of violations. Budget constraints, not safety concerns, led to some dangerous mines not being listed, according to the Department of Labor's Office of Inspector General (OIG).

On June 23, the OIG sent an alert memorandum to MSHA administrator Joseph Main in the midst of an ongoing OIG investigation of MSHA's enforcement procedures. The memo states that in March 2009, when the administrator of MSHA's Coal Mine Safety and Health division discussed the list of mining companies that had been identified as candidates for the agency's pattern of violation (POV) program, he directed the district managers to **"select no more**

than one mine on the initial screening list per field office and a maximum of 3 mines per district." (Emphasis in the original)

According to the memo, investigators were told that the limitations were a result of budgetary constraints. This guidance "set a limit that was inappropriate for this enforcement program." As a result of the guidance, program administrators were permitted to remove some mines from the POV list.

The POV program identifies the mining companies with the worst safety and health violations and invokes enhanced MSHA enforcement efforts for those mines. Several problems with the program allow mines to avoid penalties and the enhanced enforcement regime. For example, companies can escape this status by contesting citations to the independent Federal Mine Safety and Health Review Commission (FMSHRC), which has a backlog of approximately 16,000 cases.

The POV program drew public attention in April after 29 miners were killed in an explosion at the Upper Big Branch mine in West Virginia. The owner of the mine, Massey Energy, has a history of safety violations that placed it on the program's screening list. Massey avoided being placed in the POV program by contesting violations as a regular practice.

Another Massey-owned mine, the Tiller No.1 mine in Virginia, avoided being placed in the POV program on June 8 when a FMSHRC judge dismissed 10 of the 29 citations the company contested. The judge ruled that only 19 of the violations were "significant and substantial." Mines can be placed on the list if 25 violations are proved.

The OIG memo cited MSHA's review of the POV program between 2007 and 2009, which identified 89 mines for potential listing in the program. Although some mines were removed for appropriate reasons, the memo states that at least 10 mines were removed from the list in February and September 2009.

According to the memo, "MSHA is not subjecting these mines to the enhanced oversight that accompanies potential POV status, yet it does not have evidence that they had reduced their rate of significant and substantial violations. As a result, miners may be subjected to increased safety risks."

The OIG recommended that MSHA reevaluate the 10 mines while it undergoes its review of the existing POV program, an effort MSHA began following the West Virginia explosion. The memo further recommended that MSHA ensure that future decisions about the removal and inclusion of mines be based only on the health and safety conditions at the mines.

Problems with the agency's enforcement program led members of the House Committee on Education and Labor to request the OIG investigation after the Upper Big Branch mine disaster. In a June 23 press release, committee chair George Miller (D-CA) said, “The Inspector General’s alert raises very serious concerns that go to the heart of health and safety of mine workers. Prior

to Assistant Secretary Main's confirmation, MSHA obstructed a key safety enforcement tool that could have endangered the lives of mine workers."

In response to the OIG memo, the Labor Department issued a press release promising to reform the POV program. Secretary Hilda Solis and Main acknowledged that the program was "badly broken" and that the screening of mines will be different in 2010 than in the past. The agency is making administrative and rulemaking fixes, as well as working with Congress on legislation, according to the press release.

The OIG asked Main to formally respond to the action memo in 10 days.

Simplify Choices, Disclose More to Alter Public Behavior, White House Says

The White House's Office of Management and Budget (OMB) will push government to look at regulation in a new light and reassess how the choices regulators make affect the choices the public makes, according to a new memorandum sent to federal agencies.

The June 18 memo from Cass Sunstein, administrator of the White House Office of Information and Regulatory Affairs (OIRA), discusses the concepts of disclosure and simplification in a regulatory context and instructs agencies to consider whether those concepts can improve regulatory outcomes. OIRA is an office within OMB.

The memo is Sunstein's first major, formal directive to agencies describing his vision for federal regulatory policy. Since taking office in September 2009 after a protracted confirmation process, Sunstein's comments on rulemaking have mainly come in speeches and through more narrowly focused memos.

The first portion of the memo details principles for rules requiring the disclosure of information. Disclosure can help the public make choices that serve people better, the memo says.

The memo distinguishes between summary disclosure and full disclosure. "With summary disclosure, often required at the point of purchase, agencies highlight the most relevant information in order to increase the likelihood that people will see it, understand it, and act in accordance with what they have learned," the memo says, such as nutrition labeling or tobacco warnings. Full disclosure involves data or other detailed information, the memo says.

Principles for summary disclosure include simplicity, accuracy, timeliness, and proper placement. For full disclosure, the memo emphasizes the use of the Internet to make information available and usable. "The central goals of full disclosure are to allow individuals and organizations to view the data and to analyze, use, and repackage it in multiple ways," the memo says.

The second part of the memo describes Sunstein's desire to advance the concept of simplification as a means to achieve regulatory goals. Agencies should consider using "default rules" to simplify public choices, the memo says.

"In the domain of savings for retirement, for example, private and public employers might create an 'opt in' system, in which employees do not reserve any of their salary for savings unless they affirmatively elect to do so," the memo says. "Alternatively, employers might create an 'opt out' system, in which a certain amount of salary is placed in a retirement plan unless employees affirmatively elect not to participate in the plan." The latter would lead to greater enrollment and therefore greater savings, the memo implies.

When default rules are inappropriate, the memo advocates for the use of "active choosing" where the government does not set a default but does require consumers or other end users to make an explicit choice or state a preference among options.

The memo is consistent with Sunstein's past writings, including his book *Nudge: Improving Decisions About Health, Wealth, and Happiness*, which he co-authored with economist Richard Thaler before Sunstein entered government. Drawing on theories in behavioral sciences and behavioral economics, *Nudge* undercuts the traditional rational actor theory of economics, arguing instead that human foibles sometimes cause people to make poor economic or social decisions. To solve the dilemma, the authors say, people can be incentivized, or nudged, into making better choices if they are provided with better and more relevant information and circumstances. That nudge can often come from government – a philosophy Sunstein has brought with him to his White House post.

Sunstein's memo may signal the death of more official efforts to overhaul the regulatory process. Many expected the principles outlined in the memo to be included in an overdue executive order on regulatory review.

Advocates for improved regulation, including OMB Watch, as well as industry representatives, had been anticipating a broader and more formal declaration of policy from President Obama. In a Jan. 30, 2009, memo, Obama asked OMB to recommend within 100 days changes to the regulatory process. Obama said he would use the recommendations to develop a new executive order. The current process is governed by E.O. 12866, signed by President Clinton in 1993.

OMB then solicited public comment on changes to the process in February 2009, a highly unusual but welcomed approach. Since closing the comment period in April 2009, the White House has not given the public any indication as to the status of the order or its plans to reform the process.

Obama's 2009 memo specifically mentioned "the role of the behavioral sciences in formulating regulatory policy," a nod to Sunstein's theories. It is unclear why the administration may have chosen to address these issues through the Sunstein memo, rather than through executive order.

Sunstein's memo lacks specificity in certain areas, raising questions about its intent and scope. For example, the memo's instructions would seem to be most appropriate for consumer regulation. The examples used throughout the memo refer to consumer issues, such as nutrition labels and retirement accounts. However, the memo is written broadly enough that agencies could potentially apply it to any type of regulation.

It is also unclear how, or whether, the memo will be strictly enforced. Throughout the memo, Sunstein tells agencies what they "should" do but refrains from using words like "must" or "shall."

OIRA's review of agency regulations will likely serve as the mechanism for enforcement. Under E.O. 12866, agencies must submit to OIRA drafts of significant proposed and final rules before releasing those rules to the public. OIRA then reviews the drafts and circulates them to other federal agencies. Agencies often alter rules in response to the comments from OIRA and other agencies. The changes – and more importantly, the origin of the comments that prompted the changes – are not typically disclosed to the public.

When planning to impose disclosure or simplification requirements, the memo instructs agencies to analyze the impacts of several alternatives. "To the extent feasible, and when existing knowledge is inadequate, agencies should consider several alternative methods of disclosure and test them before imposing a disclosure requirement" and "should adopt disclosure requirements only after considering both qualitative and quantitative benefits and costs." The memo includes companion language for default rules. E.O. 12866 imposes similar requirements for regulations generally.

OMB Watch will continue to analyze the memo and monitor its effects. Readers are encouraged to leave their own impressions of the memo in the comment section below this article.

Supreme Court Says States May Disclose Petition Signatories

On June 24, the U.S. Supreme Court ruled 8-1 that states may publicly disclose referendum petition signatures. The case, *Doe v. Reed*, centers on the public's right to know who signed petitions related to Referendum 71, a 2009 attempt to overturn Washington State's expanded domestic partner law, which gives gay and lesbian couples the same rights as married couples.

Summary of *Doe v. Reed*

The State of Washington argued that the names of petition signatories should be disclosed upon request, as required by the state's Public Records Act. It further argued that such disclosure helps to sort out whether fraudulent signatures were included on petitions to reach the required number of signatories to qualify an initiative or referendum for the ballot.

The plaintiffs, who included several individual citizens and an anti-gay political action committee, argued that a constitutional right to anonymity for petition signatories always exists.

They also argued that even if the Court does not recognize a broad constitutional right, it should recognize that a right exists in this particular case due to the harassment and abuse to which the petition signatories could possibly be exposed. Consequently, they argued, if anonymity is not recognized, the public will be discouraged from signing petitions in support of placing referenda and initiatives on the ballot, and this will have an adverse effect on citizens' free speech.

The Court did not find that a constitutional right to anonymity for petition signatories always exists. Rather, it held that the law permits disclosure of petition signatories. "Such disclosure does not, as a general matter, violate the First Amendment," wrote Chief Justice John Roberts in the Court's majority opinion.

While the *Doe v. Reed* decision permits states to publicly disclose referendum petition signatures, the Court also held that courts may require anonymity in certain instances. In the particular matter concerning Referendum 71, the Court remanded the case to a lower court to decide if the referendum petition signatures should be publicly disclosed or if anonymity should be granted in this specific case. Plaintiffs' "chances of prevailing appear very slim, as five members of the Court either expressed significant doubts about their claim or expressly rejected it," according to *SCOTUSblog*.

The Court reasoned that signing a petition is an "expression of a political view – that implicates the First Amendment," noted *SCOTUSblog*. The Court relied on its precedents to illustrate that most campaign finance disclosure laws are constitutional, but it did allow for requiring anonymity in certain instances.

"The Court held that disclosure of referendum petitions generally survives constitutional scrutiny because it helps to combat fraud and eliminate mistakes (because the public is able to review the signatures) and because it promotes governmental transparency and accountability," noted *SCOTUSblog*.

Implications of the Decision

The Court noted the important role that disclosure plays in combating fraud and promoting government transparency. "Voters care about such issues, some quite deeply," said the Chief Justice. He also noted that the petitioners did not rebut arguments that most referendum petitions present "only modest burdens."

Sam Reed, Washington's Secretary of State, told NPR that the Court's decision "really is a victory for the people in terms of open government, transparency in government and the people's right to know."

Even though the Court decided the case by an 8-1 majority, the justices were split on important aspects of the case. "While the court was almost unanimous in the decision to favor transparency over privacy, the justices disagreed widely about who should get a privacy exception," according to NPR. This is evidenced by the seven separate opinions issued in the

case. Justices Ruth Bader Ginsberg and Anthony Kennedy were the only justices who did not write a separate opinion. Still, advocates for public disclosure view this case as a major victory.

J. Gerald Hebert, Executive Director of the Campaign Legal Center, released a statement praising the decision and using it to encourage Congress to move forward on the DISLOSE Act, the bill developed by Democrats to respond to the Court's decision in *Citizens United v. Federal Election Commission*. "Members of Congress considering the DISCLOSE Act should be encouraged by today's ruling from the Court, which highlights once again the public's right to know," Hebert said.

Tom Goldstein echoed similar sentiments on *SCOTUSblog*. "The decision is perhaps most significant for what it means for disclosure provisions under consideration in the pending campaign finance legislation that would respond to the Court's Citizens United decision," Goldstein said. The DISCLOSE Act passed the House on June 24 by a vote of 219-206 and now heads to the Senate, where it awaits further action.

Daniel Schuman of the Sunlight Foundation also noted that some passages in *Doe v. Reed* could indicate wider implications for campaign finance-related disclosure. In a blog piece posted on June 25, he speculates that there may be a "ticking time bomb" to be found within the multiple concurring opinions and Justice Clarence Thomas' dissenting opinion that could force the Court to eventually determine just what level of disclosure is permissible under the First Amendment.

In the short-term, *Doe v. Reed* impacts referendum and initiative petition campaigns nationwide, affecting the 23 states that allow citizens and special interest groups to petition to place measures on the ballot.

House Passes DISCLOSE Act, Senate Struggle Begins

On June 24, the House passed the DISCLOSE Act by a close, largely party-line vote of 219-206. Supporters praise the bill as a success for transparency, while critics argue that it is an attack on the First Amendment and creates unfair exemptions for groups such as the National Rifle Association. The companion bill in the Senate, S. 3295, must now overcome many obstacles.

The DISCLOSE Act (the Democracy Is Strengthened by Casting Light On Spending in Elections Act) was introduced in April by Rep. Chris Van Hollen (D-MD) and Sen. Chuck Schumer (D-NY) to mitigate the effects of the January U.S. Supreme Court decision in *Citizens United v. Federal Election Commission*. In that case, the Court ruled that all corporations, including 501(c)(4), 501(c)(5) (unions), 501(c)(6) (trade associations), and 527 organizations, can spend an unlimited amount of money from their general treasuries to expressly advocate for the election or defeat of candidates for federal office as long as those actions are "independent" of campaigns. Overall, the DISCLOSE Act is meant to increase disclosure requirements for election-related spending and restrict such activity by government contractors and foreign-controlled companies.

On June 14, several publications, including *CQ Politics*, reported that changes were made to the House bill to address opposition to the legislation's disclosure rules. The change came to be known as the NRA (National Rifle Association) carve-out, because the NRA would have been the primary beneficiary of the exemption. The agreement would have exempted 501(c)(4) organizations that have been in existence for more than 10 years, have members in all 50 states, raise 15 percent or less of their funds from corporations, and have more than 1 million members. Many advocacy groups denounced the change for setting up an unfair system that favors large, well established membership groups.

After outspoken criticism of the change, the membership threshold was lowered to 500,000. The manager's amendment, which contained the NRA carve-out, also included a provision raising the threshold for restrictions on campaign spending by government contractors. Under the amendment, companies with more than $10 million in annual contracts would be prohibited from spending general treasury funds to independently influence elections. Originally, the threshold was $500,000, then $7 million, in earlier versions of the bill.

Another change concerned those who have argued that the bill favors unions. According to the final language, the bill now stipulates that organizations are not required to report payments when the "funds attributable to dues, fees or assessments which are paid by individuals on a regular, periodic basis in accordance with a per-individual calculation which is made on a regular basis." Unions would clearly be affected by this language.

A lot of doubt regarding the bill's chances for passage stemmed from the announced exemption for large 501(c)(4) organizations – the NRA carve-out – and some House Democrats expressed uneasiness about making a politically difficult vote if the Senate was unlikely to act. In an attempt to allay these concerns, Senate Majority Leader Harry Reid (D-NV) and Schumer promised that the Senate will take up the measure. In a letter to House leaders, Reid and Schumer said, "We commit to working tirelessly for Senate consideration of the House-passed bill so it can be signed by the president in time to take effect for the 2010 elections."

The White House released a Statement of Administration Policy a few days before action on the floor, which stated, "This bill is not perfect. The Administration would have preferred no exemptions. But by providing for unprecedented transparency, this bill takes great strides to hold corporations who participate in the Nation's elections accountable to the American people."

After weeks of negotiations, floor debate began on June 24. Five amendments were considered, and all but one passed. The failed amendment, offered by Rep. Steve King (R-IA) sought to eliminate all campaign contribution limits in federal elections. Rep. Dan Lungren (R-CA) also offered a "motion to recommit" that would have sent the bill back to committee. That motion failed by a vote of 208-217.

The agreed-upon amendments include:

- Covered organizations must report their campaign spending to shareholders, members or donors in a "clear and conspicuous manner"

- Corporations with leases on the Outer Continental Shelf are banned from making campaign-related expenditures
- Disclaimers must include the city and state of the ad funder's residence or main office
- Political expenditures by corporations with significant foreign government ownership and corporations that have a majority of shares owned by foreign nationals are prohibited

Most of the provisions of the DISCLOSE Act remained intact upon final House passage. For example, under the bill, the CEO or highest-ranking official of any corporation that makes independent election expenditures is required to appear on camera to say that he or she "approves this message." The top funder of the ad also has to record a "stand-by-your-ad" disclaimer, and the top five donors to the group that purchases campaign-related broadcasts would be listed on the screen at the end of the message (this would not apply to groups exempt under the NRA carve-out). Corporations will also have to report certain information to the Federal Election Commission (FEC), including information about donors.

For more information on other provisions in the House bill, see a summary from the Congressional Research Service.

The bill faces an uncertain future in the Senate. Sens. Dianne Feinstein (D-CA) and Frank Lautenberg (D-NJ) have both expressed disapproval of the NRA carve-out. According to *Roll Call* (subscription required), Lautenberg said, "It is the height of irony that Congress is considering special treatment for the NRA in a bill designed to limit the role of special interests in Washington."

The Senate bill currently has 49 co-sponsors, none of whom are Republicans. Even if the bill is brought up in the Senate as promised, it may still have to overcome a possible Republican filibuster, meaning it will need 60 votes to move forward.

Timing is also an issue. The likelihood of the bill impacting the November elections remains in question, considering that the legislation's requirements won't take effect until 30 days after the president signs the bill. Congress' fast-approaching Independence Day and August recesses are additional roadblocks.