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

Subscribe | Blog | Donate

The Watcher

July 14, 2009 Vol. 10, No. 14

## In This Issue



---

## Focus on Implementation Lacking in Hearing on Recovery Act

On July 8, the House Committee on Oversight and Government Reform held a hearing on the implementation of the Recovery Act to date. The hearing included testimony from a number of government officials and raised concerns that some members of Congress may lack a clear understanding of the challenges of implementing and tracking a large-scale economic recovery effort. As implementation progresses and new decisions are made, better oversight of these developments will become even more important.

The hearing, "Tracking the Money: Preventing Waste, Fraud and Abuse of Recovery Act Funding," featured testimony from Office of Management and Budget (OMB) Deputy Director Rob Nabors and Acting Comptroller General Gene Dodaro, as well as three governors – Martin O'Malley (D) of Maryland, Ed Rendell (D) of Pennsylvania, and Deval Patrick (D) of Massachusetts.

Despite the opportunity to probe the panelists on many questions that remain about Recovery Act implementation and some of the finer details of the reporting system outlined in recent OMB guidance, members of the committee generally focused their attention elsewhere.

With the possibility of a second stimulus package framing the hearing, many representatives focused their questions on the merits of the Recovery Act itself, rather than its implementation. Several of the Republican committee members, for instance, pounced on the job creation numbers announced at the hearing. Nabors, at different points in the hearing, mentioned that the recovery effort has created or saved 150,000 jobs (according to the most recent Council of Economic Advisors estimate), and that, according to OMB, federal agencies have spent $57 billion of the Recovery Act funding thus far. Using these numbers, several members of the committee asked Nabors why each job created or saved cost the government roughly $400,000. Nabors attempted to rebut this argument by pointing out that those figures were measured at different times and that the act is having more of an effect on the economy than simply creating jobs. Nabors also noted that simply dividing the total disbursements by the number of jobs created is far too rudimentary a calculation to judge the full impact of the Recovery Act.

Many of the Democrats' questions revolved around defending the content of the Recovery Act, culminating in an exchange between Rep. Gerry Connolly (D-VA) and Rendell, in which Connolly asked a rapid string of seemingly leading questions designed to get the governor to say how great the Recovery Act has been for Pennsylvania. Rendell spent most of his testimony on that very subject, as well as on the perceived need for a second stimulus bill focused on infrastructure projects. The experiences Rendell has amassed as a governor charged with allocating and tracking Recovery Act spending went largely unaddressed.

Despite the focus on the Recovery Act itself, some committee members did ask questions related to implementation. In particular, Rep. Edolphus Towns (D-NY), the chair of the committee, highlighted the lack of a definition for a full-time equivalent (FTE – the number of hours that constitute a full-time job) when tracking Recovery Act job creation. This is an issue the Coalition for an Accountable Recovery (CAR) has raised before. Currently, OMB leaves this definition up to the recipients receiving Recovery Act funds, which means each state or other recipient could potentially have a different measurement for full-time jobs. Unfortunately, Nabors essentially said that OMB would not be creating any standards to define an FTE.

O'Malley also touched on issues of implementation. He showcased his state's recovery website, which is one of the most advanced state Recovery Act sites. O'Malley, building off of his experiences with CitiStat in Baltimore and StateStat in Maryland, created a website where citizens can view information on the state's stimulus activities mapped out and searchable by location.

The day after the hearing (July 9), the Recovery Accountability and Transparency Board (Recovery Board) announced it had awarded a $9.5 million contract to redesign the federal website www.recovery.gov to Smartronix, a Maryland-based information technology company. The $9.5 million covers work between now and January 2010, but the contract could be worth up to $18 million over the next five years if all options are exercised. Details of this contract

award, including a copy of the contract, have yet to be disclosed, leading many advocates to question the large cost of the contract and what value the government will receive. In response to a CAR request to the government to post the contract online, the Recovery Board noted that the General Services Administration prohibits such disclosure until after the expiration of a bid protest period. Apparently, the Recovery Board will make the contract available after that period.

On July 13, more details about Recovery.gov were released when Earl Devaney, chairman of the Recovery Board, stated that the public will have access to recipient reporting data in its raw form on Oct. 11, one day after the first recipient reports are due. This access is a positive development, as many advocates worried the Recovery Board would prohibit releasing data to the public until after the 20-day correction and revision window had closed. Although this development will ensure public access to the raw data reported by Recovery Act recipients, it may also lead to confusion in the media and the public during the correction period as Recovery Act information is changed. Methods for handling error correction updates have yet to be worked out.

These recent developments, including the lack of information on the Smartronix contract award, make future hearings on the implementation of the Recovery Act even more important. Advocates and observers, including CAR, expressed hope that future Recovery Act oversight hearings will focus on delineating the systems and requirements for reporting information about the Recovery Act and where those systems and requirements are falling short of expectations about the transparency of Recovery Act spending.

## IRS Set to Receive Substantial Funding Boost

Congress is preparing to substantially increase the enforcement resources of the Internal Revenue Service (IRS) in the FY 2010 Financial Services appropriations bill, representing a reversal in the lethargic funding approved during the Bush administration. This much-needed increase in resources is only a first step in improving the enforcement of the tax code, however, as observers say the IRS also needs to improve how it uses its limited resources.

On July 9, the Senate Appropriations Committee near-unanimously approved its version of the FY 2010 Financial Services bill, which sets funding for the IRS, among other agencies, at $12.2 billon. That is an increase of $549.8 million over FY 2009 levels and $26.4 million more than requested by the Obama administration.

The majority of the funding increase was directed to the enforcement budget of the IRS, which grew to $5.5 billion, an increase of $386.7 million over FY 2009 levels and equal to the president's request. With the House and Senate set to begin conference negotiations over the differences between its Financial Services bills, these funding levels could change somewhat before the final bill is passed. The House allocated $22.4 million less to the total IRS budget than the Senate did, but regardless of the final compromise, enforcement activities are sure to

receive a significant increase in funding over FY 2009 levels since both the House and Senate included the president's requested increase.

The enforcement division of the IRS oversees activities including the examination of both domestic and international tax returns; the settlement of taxpayer appeals of examination findings; the detection and investigation of criminal violations of tax laws; and the collection of unpaid accounts. According to the Senate Committee on Appropriations' report on the bill, the IRS will work to strengthen these activities while also "launch[ing] a robust package of six enforcement initiatives."

Five of these six initiatives represent priorities of President Obama in his attempt to reduce the tax gap, the perennial $300 billion-plus disparity between what all taxpayers owe in taxes and what they actually pay into the system. These initiatives, which focus on international tax issues and primarily seek to address abuse of the tax system by multinational corporations and wealthy individuals, include:

- Improving identification and coverage of complex international financial transactions
- Increasing coverage of smaller international businesses and individuals
- Increasing reporting compliance of domestic taxpayers with offshore activity by doubling the number of criminal investigation attachés in foreign ports of duty
- Expanding IRS's international presence in the tax-exempt and government sectors, including investigation of offshore tax shelters used by pension plans

Of course, money is not the sole solution to the problems contributing to the tax gap. As OMB Watch noted in *Bridging the Tax Gap: The Case for Increasing the IRS Budget*, it is both the quantity and *quality* of enforcement activities performed by the IRS that matter. For example, face-to-face audits – the most effective type conducted by the IRS – produce the highest return-on-investment, yet they have dwindled in number and in duration, particularly for corporations. The IRS has managed to gradually increase the overall audit rate, shifting toward the less effective correspondence audit, yet these levels are still at historic lows and do not adequately enforce existing tax laws.

While high-income individuals receive too little attention, the IRS also wastes significant resources over-auditing low-income filers claiming the Earned Income Tax Credit (EITC). Audits of EITC filers 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.

The key will be for IRS Commissioner Douglas Shulman to use the increased resources provided by Congress to start to correct some of the problems with IRS enforcement practices.

## Phase Three of Open Government Directive Process Generates Recommendations

The third phase of public participation in generating recommendations for the federal Open Government Directive wrapped up on July 6. The final phase sought draft recommendations within three broad topics – transparency, collaboration, and participation – which President Barack Obama identified in his January memo as the three principles of open government.

The transparency topic generated many thoughtful and useful recommendations. The administration proposed five categories within the overall topic: Transparency Principles, Transparency Governance, Open Government Operations, Data Transparency, and Information Access. This was the result of two earlier phases, one called a "brainstorming" phase to generate ideas and the other a "discussion" phase to share thoughts about the top ideas from the first phase.

### Transparency Principles

The first category asked participants to define transparency. What does government transparency mean? What are its goals? What should be the priorities for improving transparency? The leading vote getter – the definition from the 21st Century Right-to-Know Recommendations (an effort spearheaded by OMB Watch) – stated:

> An informed public is essential to democracy and can help create a more effective, accountable government. Transparency is a powerful tool to demonstrate to the public that the government is spending our money wisely, that politicians are not in the pocket of lobbyists and special interest groups, that government is operating in an accountable manner, and that decisions are made to ensure the safety and protection of all Americans.

Participants submitted 24 other responses in this category.

Another highly rated submission, also from the 21st Century Right-to-Know Recommendations, was a set of basic principles for government transparency, including proactive dissemination, timely disclosure, and clarity and usefulness of information, as well as making that information indexed and findable. Another top-scoring recommendation combined ideas from several submissions to discuss the importance of transparency in a functioning democracy and stressed what the transparency should accomplish – it should inform citizens about government actions, inform decision making, and provide context for evaluating data. Another submission offered principles derived from a survey of 500 government financial principles in the U.S. and Canada. Among the eight financial transparency principles were understanding what information people want and delivering it, being as open as possible without creating risk, and investing transparency money wisely.

### Transparency Governance

The administration also requested input in the category of transparency governance. It asked for recommendations concerning ways in which institutional changes could bring about a culture of transparency. The government appeared to be interested in structures and policies that would ensure thoughtful and considered progress toward transparency. Among the ideas submitted in previous phases that intrigued the administration were creating a transparency officer within each agency and the use of online dashboards to more easily convey information to the public.

The highest-rated recommendation in this category stressed the need for better protecting the rights of whistleblowers who disclose information about waste, fraud, and abuse when other governmental checks and balances fail. The second-ranked recommendation advocated for improving those checks and balances with the establishment of incentives and enforcement mechanisms for transparency. The third-ranked recommendation proposed modernization of agency information technology (IT) systems to better address the needs related to information access in the Internet age. The fourth-place recommendation called for establishment of design principles for data, including access to machine-readable data, open standards and formats, and reduced complexity of data, to allow it to be more easily distributed over the Internet. The top three recommendations were made by the 21st Century Right-to-Know Recommendations.

### Open Government Operations

The third category of transparency recommendations sought strategies for a more open government. The administration requested ideas that would help change the way business is done in Washington, such as rethinking the relationship between the government employee and the public. The administration also wanted help identifying what information would be most useful in holding government accountable. Input on balancing transparency with the need for confidential, trusted spaces and cost of implementation was also requested.

The most popular, by far, of the 23 ideas submitted was a recommendation to strengthen whistleblower protection legislation so that government employees could expose waste, fraud, and abuse without fear of retaliation. Comments on the whistleblower recommendation noted that it was a legislative proposal, which fell outside the president's control. Despite that issue, the recommendation received top votes, with several commenters recommending reworking it into an executive policy proposal. The recommendation was made by a representative of the Make It Safe Coalition, an alliance of good government groups working to secure better whistleblower protections.

Other high-scoring recommendations in this category suggested that the records of meetings between government officials and outside entities should be made public; that campaign finance reform was necessary; and that there should be databases with information on public revenues, allegations of contractor misconduct, and the backgrounds of the government officials who run each agency. One suggested a commission to work out the gray area between the right to privacy and the need for transparency. There was also widespread sentiment that the government should continue to solicit public input.

**Data Transparency**

Another category the administration wanted to address was data transparency. The quick launch of Data.gov, to provide greater access to raw data and online tools for tracking and analyzing the data, indicated the administration's level of interest in this area. The government requested suggestions on how agencies should be directed to supply more data for Data.gov, and which data they should provide. The materials also asked for input on government-wide approaches to data and metadata that would ensure data transparency.

Data transparency received the least amount of input, with only seven recommendations submitted. The top-rated recommendation advocated for machine-readable data and metadata for three major types of public data – public reference data, public records, and public statistics. It came from the 21st Century Right-to-Know Recommendations. The second-ranked recommendation focused on tasks chief technology officers should pursue, including providing access to well defined bulk files, use of interactive and transparent Web 2.0 technologies, assessments of agencies' capabilities, and surveying the high-priority information needs of users.

Other ideas submitted under this category included a recommendation that science.gov be re-envisioned as one-stop location for government scientific information that would help citizens identify government experts and would organize scientific activities by topic and geographic area. Another suggestion took inspiration from the popularity of Google Earth and recommended the creation of a Government Universe map with 6 galaxies – the Executive, Congressional, Judicial, States, Business Sectors, and Public Sector galaxies. Each galaxy would have its major components circling around it as stars, and users could drill down to access to government information in that area.

**Information Access**

The final transparency category for which the administration wanted specific recommendations was improving the government's ability to disclose information proactively. Processing requests made under the Freedom of Information Act (FOIA) can be a costly endeavor for many agencies, so the government has increasingly accepted proactive dissemination as a way to both serve the public interest and save costs. The administration requested input on translating the need for better policy and compliance into actionable recommendations.

This category received 15 proposals, of which the top-rated recommendation suggested modernizing the FOIA system by creating a centralized digital system to streamline the process and better comply with requirements under E-FOIA to post repeatedly requested materials online. The second-ranked recommendation focused on improving electronic records management in the government and establishing requirements that electronic records be maintained in a searchable form. The third-ranked proposal recommended launching an interagency effort to track online the interactions between government and lobbyists and others who wield monetary influence. All three recommendations came from the 21st Century Right-to-Know Recommendations.

Other suggestions in this category included increasing public access to the results of publicly funded research and establishing a standard format for FOIA archives. Another proposal advanced the idea of creating a global navigation (taxonomic) index to organize all governmental offices and information into a framework that would allow users to easily search and locate federal information.

**Other Recommendations**

A sixth category asked for any transparency recommendations that did not fit into the previous categories. These 16 responses were principally related to national security. Recommendations called for reform of controlled unclassified information (CUI) to ensure adequate public disclosure and the preservation of checks and balances; classification reform to avoid over-classification and the preemption of state and local sunshine laws; the use of the state secrets privilege only when there is a reasonable risk of significant harm resulting from disclosure and never using the privilege to cover up illegal or unconstitutional conduct; and conducting regular oversight of security secrecy. All of the top-rated items came from the 21st Century Right-to-Know Recommendations.

## EPA Calls for Transparency as "First Step" to Improving Water Quality

In a July 2 memo to top staff, the administrator of the U.S. Environmental Protection Agency (EPA), Lisa Jackson, called for greater transparency of water quality enforcement and compliance information. Jackson acknowledged that U.S. waters do not meet public health and environmental goals, and she listed enhancing transparency as the first of several steps toward improving compliance and water quality.

Stating that "Americans have a right to know how their government is doing in enforcing laws to protect the nation's water," Jackson directed staff to improve, expand, and enhance the amount of information on water quality available to the public. She added, "[G]overnment has an obligation to clearly inform the public about water quality and our actions to protect it."

Jackson's memo lays out several actions to expand public access to government data, improve the analysis and presentation of compliance data, and use new technologies to link such regulatory data to real-time environmental conditions.

The administrator called for enhanced information on compliance and enforcement of water quality laws to be posted on the agency's website, including Clean Water Act compliance data for each state. Jackson stated, "An informed public is our best ally in pressing for better compliance." Where possible, the website will show connections between local water quality and the state's enforcement record.

Jackson set broad standards for the data to be available online. The information must be easy to access, simple to understand, and provide the user with ways to analyze the performance of

individual businesses, as well as states and the nation's performance overall. Online tools to analyze state performance reports should also be made available.

Jackson ordered state performance reports that have been released under the Freedom of Information Act (FOIA) to be posted online. Government transparency advocates have recommended posting all materials disclosed under FOIA on agencies' websites. Providing public access to already-disclosed information would reduce the burden of future FOIA requests for the same information. It is unclear whether Jackson intends to expand this approach into a policy that would place all FOIA-released materials online.

Complementing the administrator's call for greater transparency is her plan to "move EPA's information technology into the 21st century." Recognizing how much more powerful information is when presented clearly to the public, Jackson is demanding that EPA be an "analytical resource" that provides – over the Web – easily understandable, useable, real-time data, including facility-level compliance data, water quality data, and other environmental data.

Jackson's memo also calls for raising the bar on performance of Clean Water Act enforcement. She pushed for putting resources into the highest-priority problems that will yield the largest impact on water quality, such as "wet weather pollution," which would include storm water runoff.

The memo continues an emerging trend at EPA of greater transparency – at least rhetorically. Shortly after her confirmation as head of EPA, Jackson released a memo to all employees calling for greater transparency, followed by a memo emphasizing a restoration of scientific integrity.

In a September 2008 report, the Government Accountability Office (GAO) listed several problems inhibiting the accuracy and transparency of EPA's reporting of enforcement for all environmental regulations. GAO recommended several actions for EPA to improve transparency. Among them, GAO recommended disclosure of additional enforcement data and the methods for calculating them. It is not clear from the administrator's memo how these recommendations would be incorporated into Clean Water Act enforcement reporting.

A July 2005 GAO report identified gaps and discrepancies in data that impeded EPA's ability to efficiently allocate resources to protect environmental health. Jackson's memo does not address data gaps or data quality.

The new memo from Jackson only addresses enforcement of and compliance with one statute, the Clean Water Act. No such memo or other instructions have been released regarding transparency in the enforcement of the numerous other environmental statutes under EPA's jurisdiction.

Jackson's memo was addressed to Cynthia Giles, the new head of the EPA's Office of Enforcement and Compliance Assurance (OECA). Working with the agency's Office of Water, OECA will develop an "action plan" to increase transparency, improve compliance, and transform the information systems dealing with water quality programs. The offices are to

gather ideas from states, the EPA regional offices, and outside stakeholders; develop recommendations; and report to the administrator within 90 days.

## OMB Watch Submits Recommendations on Handling Sensitive, Unclassified Information

On July 8, OMB Watch released a report that explores the impact of secrecy labeling practices within the federal government. The report, *Controlled Unclassified Information: Recommendations for Information Control Reform*, was submitted to the newly formed presidential task force established to review current policies and to reform the overuse of Sensitive but Unclassified (SBU) control markings.

The George W. Bush administration first established the term Controlled Unclassified Information (CUI) in a May 2008 memorandum intended to simplify the proliferation of terms used by federal agencies to label non-classifiable, but sensitive, information. The memo created the single CUI designation to refer to terrorism-related information, with an emphasis on increasing interagency information sharing. The need for improved information sharing increased considerably after the 9/11 Commission's report identified the failure to share information as a critical governmental problem in the months before the attacks.

The OMB Watch report addresses certain key concerns with the CUI system and recommends the creation of a new CUI policy that ensures better public access to CUI-designated records. Although the current CUI reform effort simplifies the label framework and establishes consistent definitions and practices, the report argues that it falls short in important areas. These include the overuse of CUI markings, time limits and the implications for public access to the information, congressional and judicial use of CUI information, and the lack of oversight involved with CUI.

The report offers 15 specific policy recommendations for revising the CUI instructions that the Bush administration issued. Included in these recommendations are:

- Affirm that a goal of the program is to reduce the amount of information being labeled CUI and include provisions to help limit use of the label
- Make it a goal of the program, once the policies have been proven to work, to address the overuse of SBU labels in non-terrorism-related information
- Establish clearer criteria of what information qualifies to be designated as CUI
- Reliance on control labels in making FOIA determinations should be clearly prohibited
- To maximize disclosure, require the use of portion marking of records so partial disclosures can be more readily implemented
- Establish a time limit of no more than five years, after which CUI markings will automatically expire unless renewed by the agency that produced the record
- Make clear that whistleblowers disclosing CUI records to uncover waste, fraud, and abuse will be protected from reprisal

- Mandate training for agency officials and mechanisms, such as annual audits, for monitoring the system and ensuring compliance

On May 27, the Obama administration ordered the creation of a task force of agency representatives to address existing problems in the CUI reform effort. The presidential memo stated that issues the task force must consider in making recommendations include "protecting legitimate security, law enforcement, and privacy interests as well as civil liberties, providing clear rules to those who handle SBU information, and ensuring that the handling and dissemination of information is not restricted unless there is a compelling need." The interagency task force is to review existing practices on SBU and CUI, create metrics for measuring agency progress in implementing the CUI framework, and report back to the president on how to proceed further.

The task force has 90 days from its establishment to generate recommendations and submit them to the president. The task force has been receiving input from those outside of government through meetings with groups and through written comments and recommendations. The National Security Archive, for example, submitted comments expressing concerns that SBU labeling increases the likelihood that records will be withheld under the Freedom of Information Act. OMB Watch also provided its report to the CUI task force.

## New Food Safety Agenda Emphasizes Prevention and Protection

The Obama administration unveiled a broad food safety agenda July 7, pledging to recraft a national food safety system that focuses on preventing, rather than reacting to, foodborne illness outbreaks. The agenda includes a raft of new policies and longer-term proposals that aim to empower officials and strengthen food safety regulation.

The new food safety agenda is the product of President Obama's Food Safety Working Group, which was formed in March. The working group's policy priorities were accompanied by a set of key findings that emphasize prevention. "Preventing harm to consumers is our first priority," the working group wrote. "Key to this approach is setting rigorous standards for food safety and providing regulatory agencies the tools necessary to ensure that the food industry meets these standards."

The emphasis on prevention marks a dramatic shift in the way food safety, and government regulation at large, has been pursued in recent years. The Bush administration preferred a more conservative, market-based approach to regulation, leaving industry to sort out controls and methods of prevention.

Health and Human Services Secretary Kathleen Sebelius and Secretary of Agriculture Tom Vilsack chair the working group. Other agencies, including the Centers for Disease Control and Prevention, the U.S. Environmental Protection Agency, and the Department of Homeland Security, participate in the working group.

The administration announced several new standards that aim to prevent food contamination and outbreaks of foodborne illnesses. The Food and Drug Administration (FDA) finalized a regulation that will reduce the risk of salmonella contamination posed by shell eggs. The agency estimates the new regulation will prevent 79,000 illnesses and 30 deaths every year. The regulation was published July 9 and will go into effect Sept. 8.

According to the Center for Science in the Public Interest, the new rule "will require on-farm controls and expanded microbial testing to eliminate" salmonella contamination in eggs. The rule also requires producers to keep better records and to develop and implement a salmonella prevention plan. FDA estimates the regulation will cost producers $81 million per year, which amounts to "less than 1 cent per dozen eggs produced in the United States."

The salmonella standard has been under development for more than a decade. The Clinton administration published a public notice on the issue in 1998, and the Bush administration formally proposed the rule in 2004 but then allowed the rulemaking to founder.

The Obama administration will also address salmonella contamination in poultry and turkey. The Food Safety and Inspection Service (FSIS) – the food safety arm of the U.S. Department of Agriculture (USDA) and regulator of meat products – will by year's end issue new standards to reduce the risk of salmonella.

Other standards were placed on a longer-term agenda and appear less concrete. The FDA will soon issue "commodity-specific draft guidance on preventive controls that industry can implement to reduce the risk of microbial contamination in the production and distribution of tomatoes, melons, and leafy greens," which could prevent outbreaks of *E. coli*.

However, guidance does not have the force of law the way regulation does. The administration says mandatory standards will come later: "Over the next two years, FDA will seek public comment and work to require adoption of these approaches through regulation."

In addition to new regulations, Obama's food safety plan also aims to expand regulators' capacity to investigate foodborne illness outbreaks and trace those outbreaks back to the offending product or food facility. The administration pledged to give investigators new tools to better monitor the food supply, including a new "incident command system," which "will link all relevant agencies, as well as state and local governments, more effectively to facilitate communication and decision-making in an emergency."

In addition, FDA will ask the food industry to implement measures to improve product tracing. Currently, officials often cannot quickly determine the origin of a contaminated product because of supply-chain complexities or poor recordkeeping.

However, leaving the responsibility for tracing in the hands of the food industry may not yield significant improvements. Two recent foodborne illness outbreaks illuminate the complexity of tracking food through multiple handlers and facilities and detecting the point of contamination. In the summer of 2008, an outbreak of a rare strain of salmonella was initially blamed on

tomatoes, prompting retailers and restaurants to pull the product; however, months later, officials identified Mexican-grown jalapeño peppers as the culprit.

Investigators are currently struggling to solve a mystery surrounding *E. coli*-contaminated cookie dough. The outbreak was traced to a Nestlé plant in Danville, VA, but investigators have been unable to pinpoint the source of the contamination or the exact strain of *E. coli* responsible. The incident also sparked a controversy when the FDA revealed that Nestlé had for several years refused to provide the agency with information about the company's food safety practices.

The administration also pledged to improve on-the-ground enforcement. FSIS is instructing its inspectors to more aggressively ensure "that establishments handling beef are acting to reduce the presence of *E. coli*."

The Food Safety Working Group is also addressing organizational issues. The working group will continue to operate in order to coordinate food safety issues across the federal government, and it will aim to clarify responsibilities among agencies. Although FDA and FSIS carry most of the responsibility for food safety issues, "at least a dozen Federal agencies, implementing at least 30 different laws, have roles in overseeing the safety of the nation's food supply," the working group said.

If implemented as written, the administration's plan would mend several of the major holes in the nation's food safety net while Congress works on a more comprehensive overhaul. Both the House and the Senate are considering bills that would help federal regulators better prevent and control foodborne illness outbreaks. For example, lawmakers are considering giving FDA the authority to order companies to recall contaminated food, a power the agency currently lacks. A House bill would also improve traceback mechanisms.

However, reform efforts are moving slowly while competing with other priorities on Capitol Hill. The House bill, the Food Safety Enhancement Act (H.R. 2749), cleared a major hurdle June 17 when it was approved by the House Energy and Commerce Committee, clearing the way for a debate before the full chamber. Several bills addressing food safety improvements were introduced in the Senate early in the 111th Congress but have languished in the Agriculture, Nutrition, and Forestry Committee and the Health, Education, Labor, and Pensions Committee.

Congress is poised to fulfill Obama's request to increase funding for both FDA and FSIS. The House approved a spending bill for FY 2010 that would boost FDA's funding 14 percent to about $3 billion. The bill would also give FSIS a 4.5 percent increase. However, Obama's budget request indicates the funding increase at FSIS will only provide for an additional 25 employees – a less-than-one-percent increase in staff. The Senate Appropriations Committee approved identical levels for both agencies.

## Advocacy Groups File Suit over Violations of Voter Registration Law

A coalition of voting rights groups has filed lawsuits against two states, Indiana and New Mexico, for failing to adequately implement a section of the National Voter Registration Act (NVRA), commonly known as the Motor Voter law. The groups charge that the states' public assistance agencies and motor vehicle offices have not met their responsibilities to offer residents the opportunity to register to vote.

According to Project Vote, "full implementation of this law could improve lagging voter registration rates among low-income citizens by two to three million new voters per year nationwide."

Section 7 of the NVRA requires that all state offices that provide public assistance programs, including Food Stamps, Temporary Assistance for Needy Families (TANF), and Medicaid, and offices providing services to persons with disabilities distribute voter registration application forms. The offices are also required to assist applicants in completing the forms and sending the applications to the appropriate state election officials.

In New Mexico, the lawsuit was filed on behalf of the Association of Community Organizations for Reform Now (ACORN) and four New Mexico residents who were not offered the opportunity to register to vote when they went to a state agency.

In Indiana, the complaint was filed on behalf of ACORN, the Indiana State Conference of the NAACP, and Paris Alexander, an Indiana resident and Food Stamp program client who was not provided the opportunity to register to vote.

The Indiana suit details that registration applications from the Family and Social Services Administration offices have declined, despite an increase in participation in the Food Stamp program. And according to the New Mexico complaint, Project Vote conducted a study of 74 New Mexico Motor Vehicle Division offices in March 2009 and found that 80 percent are not in compliance with the law.

According to the coalition of advocacy groups, New Mexico and Indiana are not exceptional cases; they allege that states across the country are violating the Motor Voter law. A Demos fact sheet reports, "Registrations from public assistance agencies nationwide has declined almost 80 percent in the 10 years after initial implementation of the NVRA, from over 2.6 million registrations in 1995-1996 to only 540,000 in the most recent reporting period of 2005-2006."

Because state agencies are not doing their jobs, nonprofit organizations have to increase already stretched resources and help low-income residents with voter registration. According to Project Vote, "Compliance with the NVRA since its inception in 1993 has been spotty at best, non-existent at worst, leaving third-party groups with the hefty responsibility of picking up the slack by conducting expensive registration drives in disenfranchised communities."

To increase the number of registered voters, Demos, ACORN, and the Lawyers' Committee for Civil Rights Under Law have joined forces and are working to improve states' compliance with the public assistance provisions of the NVRA through their National Voter Registration Act Implementation Project.

In the midst of this activity, the Election Assistance Commission (EAC) released a report on the impact of the NVRA on the administration of elections during 2007 and 2008. The EAC report verifies the extent of the implementation of public agency registration and problems that have been reported. One of the recommendations of the EAC report was that departments of motor vehicles, public assistance offices, and disability agencies should be encouraged to remind voters to check and update their registrations.



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

Subscribe | Blog | Donate

The Watcher

July 29, 2009 Vol. 10, No. 15

## In This Issue



---

## TARP IG Reports Underscore Need for Better Transparency in Financial Bailout

Two recent reports by the Special Inspector General for the Troubled Asset Relief Program (SIGTARP), Neil Barofsky, provide useful information and stand in sharp contrast to the Treasury Department's attempt to provide comparable transparency for the program, also known as TARP. One report clearly presents existing TARP information, while the other supplies new data that Treasury should be providing. In both cases, the reports highlight changes Treasury should make to how it conducts and presents TARP data.

To date, TARP, the most prominent element of the larger initiative colloquially known as "the bailout," has been a relatively secretive program. The Treasury Department, which is

responsible for administrating the program, has kept many details secret, such as how banks are using the funds given to them. During the week of July 20, however, Barofsky released two reports on TARP as part of his efforts to bring more transparency and accountability to the program.

One report, released July 21, is the Quarterly Report to Congress, a massive, 252-page overview of all the programs within TARP, as well as the related programs outside of TARP that are considered part of the bailout effort. The second report, released July 20, titled *SIGTARP Survey Demonstrates that Banks Can Provide Meaningful Information on Their Use of TARP Funds*, contains the results of a survey Barofsky conducted of the 364 recipients of TARP funding. In the survey, he asked these institutions to report on their use of TARP funds.

These two reports work well in tandem. The quarterly report provides the public with the "big picture" view of TARP and shows the relative importance of each of the programs, while the survey shows why the government needs to do a better job of disclosure, especially for information related to the largest of the TARP programs, the Capital Purchase Program (CPP). Prior to these reports, the public knew little about the current status of TARP, and together, the reports help make the argument for comprehensive reporting requirements for TARP recipients.

The Quarterly Report is a useful primer on TARP; everything about TARP is located in one easily accessible place. It provides a general background on TARP and then describes each of the twelve programs under TARP. These descriptions are useful for those who are looking to learn about the various aspects of the program. TARP is complicated, with many different, highly technical parts, and Barofsky's report breaks down these complicated terms and issues.

Much of this information is also available online but in a less cohesive format through FinancialStability.gov, the Treasury's website for TARP. FinancialStability.gov lists and describes the various TARP programs but under a tab labeled "Road to Stability." The descriptions are often cursory as well, without a great deal of context for each program. Indeed, the description for the Systemically Significant Failing Institution (SSFI) Program, a $75 billion program which has only been used by AIG, is only a sentence long on FinancialStability.gov, and it does not mention AIG.

**TOTAL POTENTIAL FUNDS SUBJECT TO SIGTARP OVERSIGHT, AS OF 6/30/2009** ($ BILLIONS)

| Program | Brief Description or Participant | Total Projected Funding at Risk ($) | Projected TARP Funding ($) |
|---|---|---|---|
| Capital Purchase Program ("CPP") | Investments in 649 banks to date; 8 institutions total $134 billion; received $70.1 billion in capital repayments | $218.0<br>($70.1) | $218.0<br>($70.1) |
| Automotive Industry Financing Program ("AIFP") | GM, Chrysler, GMAC, Chrysler Financial; received $130.8 million in loan repayments (Chrysler Financial) | 79.3 | 79.3 |
| Auto Suppliers Support Program ("ASSP") | Government-backed protection for auto parts suppliers | 5.0 | 5.0 |
| Auto Warranty Commitment Program ("AWCP") | Government-backed protection for warranties of cars sold during the GM and Chrysler bankruptcy restructuring periods | 0.6 | 0.6 |
| Unlocking Credit for Small Businesses ("UCSB") | Purchase of securities backed by SBA loans | 15.0[a] | 15.0 |
| Systemically Significant Failing Institutions ("SSFI") | AIG investment | 69.8[b] | 69.8[b] |
| Targeted Investment Program ("TIP") | Citigroup, Bank of America investments | 40.0 | 40.0 |
| Asset Guarantee Program ("AGP") | Citigroup, ring-fence asset guarantee | 301.0 | 5.0 |
| Term Asset-Backed Securities Loan Facility ("TALF") | FRBNY non-recourse loans for purchase of asset-backed securities | 1,000.0 | 80.0 |
| Making Home Affordable ("MHA") Program | Modification of mortgage loans | 75.0[c] | 50.0 |
| Public-Private Investment Program ("PPIP") | Disposition of legacy assets; Legacy Loans Program, Legacy Securities Program (expansion of TALF) | 500.0 – 1,000.0 | 75.0 |
| Capital Assistance Program ("CAP") | Capital to qualified financial institutions; includes stress test | TBD | TBD |
| New Programs, or Funds Remaining for Existing Programs | Potential additional funding related to CAP; other programs | 131.4 | 131.4 |
| **Total** | | **$2,365.0 – $2,865.0** | **$699.0** |

Notes: Numbers affected by rounding.
[a] Treasury announced that it would purchase up to $15 billion in securities under the Unlocking Credit for Small Businesses program.
[b] Actual TARP expenditures as of 6/30/2009.
[c] $75 billion is for mortgage modification.

Sources: Treasury, Office of Financial Stability, Chief of Compliance and CFO, SIGTARP interview, 3/30/2009; Treasury, Transactions Report, 7/2/2009, http://www.financialstability.gov/docs/transaction-reports/transactions-report_070209.pdf, accessed 7/6/2009; Treasury, "Auto Supplier Support Program: Stabilizing the Auto Industry in a Time of Crisis," 3/19/2009, http://www.treas.gov/press/releases/docs/supplier_support_program_3_18.pdf, accessed 3/19/2009; Treasury, "Unlocking Credit for Small Businesses Fact Sheet," 3/17/2009, http://www.financialstability.gov/roadtostability/unlockingCreditforSmallBusinesses.html, accessed 6/10/2009; Treasury, "Treasury, Federal Reserve, and FDIC Provide Assistance to Bank of America," 1/16/2009, http://www.treas.gov/press/releases/hp1356.htm, accessed 1/16/2009; Treasury Press Release, "U.S. Government Finalizes Terms of Citi Guarantee Announced in November," 1/16/2009, http://www.financialstability.gov/latest/hp1358.html, accessed 6/8/2009; Treasury, "Financial Stability Plan Fact Sheet," 2/10/2009, http://www.financialstability.gov/docs/fact-sheet.pdf, accessed 6/8/2009; Treasury, "Making Home Affordable: Updated Detailed Program Description," 3/4/2009, http://www.treas.gov/press/releases/reports/housing_fact_sheet.pdf, accessed 6/10/2009; Treasury, "Public-Private Investment Program," 4/6/2009, http://www.financialstability.gov/roadtostability/publicprivatefund.html, accessed 6/9/2009.

*Source: SIGTARP Quarterly Report to Congress, July 21, 2009*

Additionally, FinancialStability.gov does not provide dollar totals for each program. Instead, in the description of each program, the site gives only the maximum amount each program could use. Barofsky's report, however, shows the amount each program has actually expended to date. For instance, the report states that thus far, only $441 billion of the $700 billion has been spent, not including the $70 billion that certain banks have paid back to the government. The Capital Purchase Program, which seeks to encourage lending by increasing the capital base of participating banks, accounts for 46 percent of spent funds. Such information is not readily available on FinancialStability.gov.

While the Quarterly Report shows how Treasury should be presenting information, Barofsky's other report, the bank survey, demonstrates how Treasury should be collecting more data. Since starting as SIGTARP in December, Barofsky has been pushing the Treasury for increased TARP transparency and accountability, and Treasury has been resistant to enacting some of his proposed changes. In particular, Barofsky recommended that institutions should be required to report regularly on their use of TARP funds. Treasury, however, has said that such a requirement would be impossible to comply with, since all funds are fungible, and even if such accounting were possible, it would not be useful. Instead, Treasury only requires banks to report on their lending activities, which does not provide as full of a picture of the effect of TARP.

Faced with Treasury's inaction to obtain useful information, Barofsky sent out a letter asking banks to detail their usage of TARP funds. The survey was voluntary and applied only to CPP funds. It asked for responses in an open-ended format, which means that while Barofsky

received a 100-percent response rate, numerical analysis of the information is impossible. However, the survey results do provide insight on how banking institutions are using CPP funds, which, according to the Quarterly Report, account for almost half of all TARP funds.

Barofsky found that 83 percent of institutions used their TARP funds to support lending activities, which is the primary intended use of CPP. Additionally, 43 percent of banks used their funds for capital reserves, 31 percent for investments (such as purchasing mortgage-backed securities), 14 percent for debt repayments, and four percent used their TARP funds to acquire other institutions. The banks also reported significant influence from regulators, such as the FDIC and the Federal Reserve, with some institutions saying that regulators have encouraged them to use their funds for capital reserves or acquisitions.

Contrary to Treasury's protests, it is clear that the survey yielded useful information, which could be used in future oversight hearings in Congress. With this information, Congress might decide that it did not intend for TARP funds be used for acquisitions and make changes to the program. Regardless, without this survey, Congress would have even less understanding of how TARP funds are being used by banks.

Barofsky has promised to publish the survey responses online within 30 days of the report's publication. The institutions surveyed have requested anonymity, so the responses may be published in a redacted format. Despite this, it would be immensely useful to read the full results of the surveys for more detailed information on how each institution is using its TARP funding.

Barofsky's survey demonstrates that not only is such reporting possible, but it is also valuable. It provides a strong argument for mandatory reporting requirements, which Barofsky again recommends the government institute. Treasury should heed this recommendation and begin instituting a monthly reporting requirement based on Barofsky's survey. Additionally, Treasury should restructure the entire FinancialStability.gov site, such that TARP information is more readily accessible and clearly presents relevant financial data. Without such reforms, Congress, the news media, government watchdogs, and the general public will lack basic tools for understanding how the Treasury Department is using the $700 billion Congress mandated it to deploy to "restore liquidity and stability to the financial system of the United States; protects home values, college funds, retirement accounts, and life savings; and preserves homeownership and promotes jobs and economic growth."

## OMB Watch Submits Contracting Reform Comments

OMB Watch recently submitted comments and recommendations on needed reforms to the federal contracting process in response to a presidential memorandum issued earlier in 2009. The Presidential Memorandum on Government Contracting directs the Office of Management and Budget (OMB) to both collaborate with federal agencies to review existing contracts and to develop new guidance to help reform future government contracting.

The first part of the president's March 4 memo calls on OMB and agencies to review existing contracts to look for savings. On July 29, OMB Director Peter Orszag released a memo to agencies that provides "guidance on reviewing existing contracting and acquisition practices." Originally required by July 1, the memo requires agencies to review their current contracting and acquisition processes with the goal of developing a plan to save seven percent of baseline contract spending by the end of FY 2011. The memo also requires agencies to "reduce by 10 percent the share of dollars in FY 2010 that are awarded with high-risk contracting vehicles. High-risk contracting vehicles include non-competitive contracts or contract competitions that receive only one bid, cost-reimbursement contracts, and time-and-materials contracts. Agencies are required to develop these plans and submit them to OMB by Nov. 2.

OMB is still working on the second part of the president's memo, which requires new guidance to reform the contracting process going forward. The president identified four areas of reform the new guidance should address, including maximizing the use of competition; improving practices for selecting contract types; strengthening the acquisition workforce; and clarifying those functions that federal employees – as opposed to contractors – must perform. The March 4 memo also directed OMB to hold a public meeting to begin soliciting public testimony and to foster further discussion of the matter. The meeting, which took place on June 18, was well attended by contractors and contracting trade groups, along with a small cadre of public interest groups, including OMB Watch.

OMB also solicited public written comments through July 17. The comments submitted by OMB Watch focus on the need for transparency and openness in the government contracting process:

> OMB Watch strongly supports the Obama administration's drive to strengthen the federal acquisition system and recommends several courses of action to further that objective. Overall, these recommendations are guided by OMB Watch's belief in the power of transparency and access to government information to transform government processes and produce better outcomes for the public. Without greater transparency, issues of waste, fraud, and abuse; conflicts of interest; and poor performance will continue to plague the federal procurement process.

It remains to be seen what effect these comments and similar submissions from other public interest groups will have on OMB's reform guidance. The president's contracting reform memo states that Orszag must develop guidance by Sept. 30.

## House Passes Statutory PAYGO Bill

The House passed legislation (H.R. 2920) on July 22 that would reinstate statutory "pay-as-you-go" (PAYGO) budgeting rules, which were allowed to expire in 2002.

The bill was championed by Majority Leader Steny Hoyer (D-MD) and was largely based on language developed by President Obama. Despite criticism from key Republican leaders, the bill

attracted 24 Republican votes and passed by a large margin (265-166). The bill now moves to the Senate, where it may face obstacles, particularly the lack of support from Senate Budget Committee Chairman Kent Conrad (D-ND).

Since Congress allowed statutory PAYGO rules to lapse, a number of expensive fiscal policies, such as the 2001 and 2003 Bush tax cuts and the Medicare prescription benefit, were approved in Congress, substantially adding to the national debt. These policies, combined with the economic instability of the past two years and massive spending initiated to help jumpstart the economy, have pushed the federal government deeply into the red. The result has been an increase in public demand to restore fiscal responsibility in government budget and tax policies.

PAYGO rules were first created as part of the Budget Enforcement Act of 1990 to help control deficit spending by requiring any proposed new mandatory spending or tax cuts to be "paid for" with reduced spending or tax increases elsewhere in the federal budget.

Under the House-passed bill, the Office of Management and Budget (OMB) would tally at the end of the calendar year the sum total of legislation enacted into law and whether it equaled a surplus or a deficit over five- and ten-year budget windows. This is called the PAYGO scorecard. If the PAYGO scorecard was out of balance at the end of the year in either the five- or ten-year budget window, OMB would institute automatic across-the-board reductions to program spending, known as sequestration.

Imposing sequestration is a key difference between a statutory PAYGO requirement and chamber-specific PAYGO rules put in place when Democrats took back control of the House and Senate in 2006. This difference is crucial to forcing Congress to actually follow the rules. For example, the entire time statutory PAYGO was in effect from 1990 through 2002, sequestration was never triggered because Congress passed legislation that complied with the rules. The current chamber-specific rules, on the other hand, lack an automatic enforcement mechanism. This allows Congress to ignore PAYGO whenever it becomes too difficult to pass deficit-neutral legislation, something that has happened quite frequently since 2006.

While the passage of H.R. 2920 is a step toward forcing Congress to develop more responsible and sustainable fiscal policies, the bill has significant exceptions and loopholes that will weaken its overall effectiveness. Under the bill's current language, discretionary programs, such as Head Start, WIC (the Women, Infants, and Children nutrition program), and other economic recovery programs are not subject to spending caps. In addition, the bill includes a long list of mandatory spending programs primarily benefitting low-income populations that are also exempt, including Social Security. A fix to payment rates for doctors under the Medicare program – an expensive legislative agenda item for Congress – is also exempt.

On the tax side, three major tax policies – the annual fix to the Alternative Minimum Tax (AMT), extension of 2009 rates for the estate tax, and a substantial portion of the 2001 and 2003 Bush tax cuts that primarily benefit middle-class families – also received a special exemption. Finally, there is also a loophole that allows Congress to designate spending as "emergency" in order to bypass PAYGO requirements. This last exemption is a carryover from

previous versions of statutory PAYGO, but overuse of the "emergency" designation during the George W. Bush administration has shown this provision can be abused.

The sum total of these exemptions is massive and is at the heart of Conrad's opposition to the bill. He has stated multiple times that he is concerned about the exemptions in the bill, particularly the three major tax exemptions and the Medicare doctor payment fix. At a recent House Budget Committee hearing on PAYGO in June, OMB Director Peter Orszag explained that the exemption of those four policies was done, in fact, to prevent waivers.

Conrad is also hesitant to abdicate control of the budget to the executive branch by giving OMB the sole power to determine sequestrations.

Conrad is not alone in his criticism of the House legislation. Rep. Paul Ryan (R-WI), the ranking member of the House Budget Committee, has criticized the bill because it does not subject discretionary spending to PAYGO. Ryan is also disappointed that the bill does not place caps on discretionary spending. Also, some critics felt the five- and ten-year budget windows used to create the PAYGO scorecard would not do enough to curb spending from year-to-year because legislators would try to work around the system by instituting awkward sunset dates for different policies.

Conrad's opposition to this bill in the Senate and a general willingness among senators to waive PAYGO at any time, particularly for tax cuts, makes it unlikely that this legislation will progress further during this legislative session. Despite the attempt by the House to institute more responsible controls on the federal budget process, the president and congressional leaders will need to return to this issue repeatedly and with a sincere desire to pass sustainable fiscal policies in order to avoid making annual deficits even worse than already projected.

## White House Refuses to Release Visitor Logs

On July 22, Citizens for Responsibility and Ethics in Washington (CREW) filed a lawsuit against the Department of Homeland Security (DHS) for withholding White House visitor logs. The logs pertain to individuals who visited the White House to discuss health care policy. Some see the administration's refusal to disclose the logs as a continuation of Bush administration secrecy.

CREW filed the lawsuit after being denied the records in response to a Freedom of Information Act (FOIA) request. In response to the lawsuit, White House legal counsel Gregory Craig sent a letter to CREW with a list of White House visitors "reflected in the relevant visitor records," but he makes no claim that the list is complete. Further, the letter maintained the administration's position that the logs are only subject to "discretionary release." CREW rejected the letter and said it did not satisfy the FOIA request.

The Obama administration had refused to make such logs public previously. In June, CREW sued for the release of logs related to meetings with coal executives after the records were denied

as part of an earlier FOIA request. In both the coal and the healthcare cases, the administration argues that the visitor logs are presidential records not subject to FOIA.

During his presidential campaign, then-Senator Obama made White House communications a central component of his transparency platform, regardless to whether the records held presidential or agency provenance. As part of his "plan to change Washington," Obama criticized the Bush administration for crafting policy based on secret meetings. The campaign website remarked that "Vice President Dick Cheney's Energy Task Force of oil and gas lobbyists met secretly to develop national energy policy." Further, the site stated that the Obama administration "will nullify the Bush attempts to make the timely release of presidential records more difficult."

The Bush administration repeatedly withheld White House visitor logs and fought in court against disclosure, claiming that they were presidential records, not records of an agency subject to FOIA. That administration attempted to withhold visitor logs concerning lobbyists such as Jack Abramoff, Stephen Payne, and religious conservative leaders. White House visitor logs are maintained by the Secret Service, a component of DHS, which is subject to FOIA. U.S. District Court Chief Judge Royce Lamberth twice ruled against the Bush administration on the issue, once in December 2007 and again on appeal in January 2009. Lamberth stated, "Shielding such general information as the identities of visitors would considerably undermine the purposes of FOIA to foster openness and accountability in government."

The Obama administration appealed the January decision again, rather than changing course. In the Bush-era case, the Obama administration argues that the logs would disclose information properly protected as presidential communications, an argument originally advanced by the Bush administration.

Although the Bush administration lost twice in court, official White House policy was changed to try and protect visitor logs. The Bush White House issued a Memorandum of Understanding with the Secret Service in 2007 that establishes mutual agreement that visitor logs are not agency records because "once the visit ends, the information ... has no continuing usefulness to the Secret Service." The Obama administration has stated that it is reviewing its current policies, but it is unknown whether it will alter this agreement.

## Court Rules that CIA Committed Fraud in State Secrets Case

On July 20, a federal district court judge ruled that the Central Intelligence Agency (CIA) committed fraud while attempting to get a fifteen-year-old case dismissed on state secrets grounds.

In 1994, Richard Horn, a former agent of the Drug Enforcement Agency, sued Arthur Brown, then CIA station chief, and Franklin Huddle, Jr., the chief of mission at the U.S. embassy in Burma. Horn claimed the CIA unlawfully wiretapped him while he was stationed in Burma because they allegedly opposed his work to restrict that nation's drug trade.

Three administrations have pushed to get the case dismissed. In 2000, then-Director of Central Intelligence George Tenet requested the case against Brown be dismissed since Brown was a covert agent and his identity constituted a state secret. In response to this line of argument, the district court eventually dismissed the case in its entirety in 2004.

In 2007, the Court of Appeals for the DC Circuit overruled the dismissal of the case against Huddle. The court ruled that since Huddle was not a covert agent, a case could go forward against him, using unclassified information. However, the court upheld the removal of Brown from the suit because of his apparent continued status as a covert agent.

In 2008, however, the district court learned from the Department of Justice that Brown's cover had been lifted in 2002. Despite this change in status, the CIA continued to claim that Brown was still covert. The discovery of this lie led to the district court's most recent decision. Judge Royce Lamberth wrote that it soon became "clear ... that many of the issues [of the case] are unclassified."

The ruling referred one of the CIA attorneys for disciplinary action for perpetrating fraud against the court. Five others involved in the case – three CIA attorneys, as well as Brown and Tenet – were given one month to defend themselves prior to charges of contempt or other sanctions being levied upon them. Over two hundred documents related to the case were also unsealed.

This ruling comes at an inopportune time for the CIA. The extent of the agency's disclosure to Congress about torture and other activities during the "war on terror" has come under a great deal of scrutiny in recent months. Some, such as Rep. Rush Holt (D-NJ), have begun to suggest that Congress undertake a comprehensive investigation of intelligence operations, comparable to that undertaken by the Church Committee in the 1970s. "Sure, there are some people who are happy to let intelligence agencies go about their business unexamined," explained Holt. "But I think most people when they think about it will say that you will get better intelligence if the intelligence agencies don't operate in an unexamined fashion."

The state secrets privilege, an evidentiary privilege formalized in 1953 in *United States v. Reynolds*, permits the executive branch to withhold specific evidence at civil trial if there is a reasonable risk that disclosure would harm national security. This privilege has received a great deal of attention of late, especially given the contention of many that it was overused during the George W. Bush administration. President Obama promised a review of the use of state secrets, but in the meantime, his administration has maintained claims of privilege in all of the cases it inherited from the Bush administration. Two bills (H.R. 984, S. 417) currently before Congress would provide for greater scrutiny of state secrets claims in order to balance security concerns with proper oversight.

## Reproductive Health Declines as Chemical Exposure Increases

Troubling national trends show increases in reproductive health problems as the widespread use of certain chemicals has increased dramatically. A new analysis of available data makes several recommendations for U.S. chemicals policy to address the growing health concerns and potential links to toxic chemicals. Among the recommendations is a call for greater public disclosure of chemical safety information, increased federal research on safer chemical substitutes, and removing political influence from assessments of chemical safety.

The analysis, *Reproductive Roulette*, produced by the Center for American Progress (CAP), draws on numerous scientific studies that show a clear degradation over the last several decades in both male and female adult reproductive health nationwide, as well as more developmental problems among young children.

At the same time that the nation's reproductive health has deteriorated, the number and amount of potentially harmful chemicals has exploded, as has Americans' exposure to such chemicals. The report cites scientific studies identifying linkages between exposure to chemicals and the reproductive disorders that are on the rise. Despite these studies, more information is needed about the amounts of chemicals people are exposed to and how combinations of chemicals impact a person's health, especially developing fetuses and children, according to the report.

Fertility problems are growing, including decreasing sperm counts, decreased fertility among women of all childbearing ages, and significantly higher reports of miscarriages and stillbirths since the 1970s and 1980s. Since the mid-1990s, premature births and infants born with low birth weight have increased significantly. Several factors, including discrepancies in health care and changes in reporting methodology, may contribute to these health trends, but the report cites studies that link certain chemicals to these ailments even after considering these other factors.

In addition to fertility problems among adults, the report describes data that show increasing rates of birth defects and disabilities over the last few decades. Reported cases of autism have increased 10-fold since the early 1990s. Exposure to chemicals has been linked to many birth defects and developmental problems. The ubiquity of chemicals such as phthalates and bisphenol A (BPA) in household products makes avoiding exposure almost impossible.

Chemical production in the U.S. has greatly increased since World War II, with 80,000 chemicals now in commercial use, a 30 percent increase since 1979. Studies from the Centers for Disease Control and Prevention (CDC) have documented the widespread presence of toxic chemicals in a random sample of Americans. A study by the Environmental Working Group, a nonprofit public interest organization, found 287 industrial chemicals in newborns' umbilical cords. According to the U.S. Environmental Protection Agency's (EPA) Toxics Release Inventory (TRI), in 2007, more than 4.1 billion pounds of toxics were reported disposed of or released into the environment.

The CAP report notes that exposure to these chemicals frequently occurs through the use of everyday products, from cosmetics to baby bottles and even medical equipment like blood bags and IV tubes. Data on human exposure to chemicals through products is harder to acquire because there are few rules requiring manufacturers to report the amount or type of toxics included in products. Public disclosure advocates are pushing to expand TRI to include reporting the amount of toxics in products. Such data would help government agencies track harmful chemicals as they move through the environment and identify sources of human exposure.

The CDC's biomonitoring program is the most extensive exposure monitoring program in the nation, yet it still only tracks 148 chemicals. Biomonitoring measures the amount of chemicals in a person's blood or urine. Blood and urine levels reflect the amounts of chemicals that actually get into the body from the environment and thus are crucial to evaluating the public health risks of toxic chemicals.

In the report, CAP recommends several measures to help fill the information gaps that hinder policy responses and protection of public health. Specifically, CAP calls for requiring chemical companies to test the safety of their products and disclose the results prior to commercial release, including consumer goods and cosmetics. Also, the EPA must speed up its assessments of new chemicals using its Integrated Risk Information System (IRIS). Additionally, public disclosure of chemical safety data should be expanded, to build on previous successes like those of the TRI program, which has driven a 60 percent reduction in releases of its "core" chemicals. Finally, greater research and resources are needed for agencies to study health impacts of chemicals and develop safer chemical substitutes.

The report relies heavily on publicly available information that tracks chemicals and public health trends, such as the CDC's biomonitoring data and TRI. Without this information, linkages between the rapidly expanding use of potentially dangerous chemicals and related public health problems would be even more difficult to document. As the CAP report shows, the data currently available already strongly suggest that greater protections are needed. However, there remains a dearth of relevant information and limited public disclosure. The recommendations to expand the scope, quality, and quantity of such information would improve the ability of policymakers to effectively defend against emerging public health threats and enable the general public to hold officials accountable for doing so.

## While Sunstein Nomination Is Delayed, Regulatory Reform Waits

Sen. John Cornyn (R-TX) has placed a hold on the nomination of Cass Sunstein, President Obama's pick to head the Office of Information and Regulatory Affairs (OIRA). News of Cornyn's hold emerged July 22 – one week after Sen. Saxby Chambliss (R-GA) lifted his hold on the nomination.

Cornyn's hold all but eliminates the likelihood that Sunstein's nomination will come up for a vote before the Senate breaks on Aug. 7 for summer recess. The Senate plans to return Sept. 8.

A spokesman for Cornyn told Fox News that the senator is concerned about Sunstein's views on animal rights. Sunstein has written that animals should enjoy meaningful legal rights, including the right to sue.

OIRA is a small but powerful White House office responsible for overseeing federal agencies' regulatory activity. The office reviews and sometimes edits the text of regulations, and it approves government forms and surveys that require the public to divulge information.

Obama nominated Sunstein April 20. Sunstein is a distinguished academic who served on the University of Chicago Law School faculty with Obama and then moved to Harvard Law School. He is currently serving as a special adviser to Peter Orszag, director of the White House Office of Management and Budget (OMB).

During his career as a legal scholar, Sunstein authored several provocative articles and books on a variety of subjects, including animal rights. In his most recent book, *On Rumors: How Falsehoods Spread, Why We Believe Them, What Can Be Done*, scheduled for release in September, Sunstein examines the impact of salacious rumors in the Internet age and suggests that current libel standards may not be strict enough, according to advance copies. The book has stirred controversy among free speech advocates. This is but one example of the controversial subjects Sunstein has addressed in his academic career.

Republican senators beyond Cornyn and Chambliss, including Sens. Susan Collins (R-ME) and Pat Roberts (R-KS), expressed concern about Sunstein's views on animal rights. Both Roberts and Collins said their concerns were allayed after hearing directly from Sunstein. Chambliss lifted his hold after an in-person meeting with Sunstein to discuss the nominee's views on animal rights and the Second Amendment. At Chambliss' request, Sunstein has also met with various stakeholders concerned about his views on animal rights.

The animal rights flap has delayed not only Sunstein's nomination, but also progress on meaningful efforts to reform the federal regulatory process. If confirmed, Sunstein will likely shape the way the Obama administration writes and enforces new rules.

President Obama pledged to issue a new executive order to govern the process. On Jan. 30, Obama issued a memo asking federal agency personnel to recommend improvements. Orszag was charged with leading the effort, and Obama set a deadline of 100 days.

On Feb. 26, Orszag commenced a public comment period, a highly unusual but welcomed approach to the development of an executive order. In response, 183 individuals and organizations commented on the current state of the regulatory process and suggested reforms. (Click here for coverage of the comments.)

Since then, the administration has not provided many updates on the nature of the recommendations or the development of the new executive order. The 100-day deadline passed in May. "The director has submitted a set of recommendations to the president, in compliance with the president's memorandum and within the 100-day timeframe," an OMB official told *The Hill*. "As decisions based on those recommendations are approved, they will be made public."

Two major aspects of the regulatory process likely to be covered by the executive order are regulatory review as managed by OIRA and cost-benefit analysis. Currently, agencies must submit to OIRA any rule that is deemed significant. OIRA then comments or edits the rule and circulates it among other federal agencies. Critics, including OMB Watch, say this process increases the potential for political interference in regulatory decisions and delays the completion of new standards needed to protect the public.

Cost-benefit analysis is an equally controversial issue. Proponents say it is a logical way for regulators to determine whether a new policy is worth pursuing. However, critics point out that the benefits of regulation, such as lives saved or injuries avoided, are difficult to estimate and impossible to put a price on, thus making cost-benefit analysis biased against regulation.

Sunstein has written both on OIRA's role in the regulatory process and on cost-benefit analysis. He believes that OIRA can play a positive role and supports the use of cost-benefit analysis.

Those views have not endeared him to some public interest groups, including the Center for Progressive Reform, a think tank of law professors advocating for a regulatory process that better protects the public. Meanwhile, *The Wall Street Journal* editorial board and some conservative groups are satisfied with Sunstein.

It remains unclear whether Sunstein would attempt to further advance his academic writings as OIRA administrator. He pledged during his confirmation hearing before the Senate Homeland Security and Governmental Affairs Committee to make statutory intent the preeminent criterion for regulatory decision making at OIRA. He also said that cost-benefit analysis should not be used as an "arithmetic straitjacket" to constrain regulation.

Sunstein avoided opportunities to provide more specificity on his plans during the hearing. For example, when asked, "Do you believe that OIRA should be an activist office, steering regulation in particular directions?" Sunstein sidestepped the question, writing, "I believe that OIRA has a role to play in promoting compliance with the law and with the President's commitments and priorities – and that it can do so in a manner fully consistent with its mission." Sunstein was approved by the panel with only one dissenting vote.

## EPA to Emphasize Environmental Justice Issues

The U.S. Environmental Protection Agency (EPA) publicly committed to emphasizing environmental justice issues at a recent meeting of the agency's National Environmental Justice Advisory Council (NEJAC). EPA officials, including Administrator Lisa Jackson, described to

the council ways in which the agency intends to reflect environmental justice concerns in the future as EPA formulates rules and emphasizes enforcement.

NEJAC consists of community, academic, industry, environmental, state, local, and indigenous peoples groups and advises the agency on environmental justice concerns across policy areas. The council was created by EPA in 1993 in response to evidence showing that minority and poor communities bore a disproportionate burden of exposure to pollution from industrial and municipal operations compared to the general public. NEJAC held its most recent public meeting July 21-23 in Arlington, VA.

According to its website, EPA defines environmental justice as "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, culture, education, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. Fair Treatment [*sic*] means that no group of people, including racial, ethnic, or socioeconomic groups, should bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal, and commercial operations or the execution of federal, state, local, and tribal environmental programs and policies."

On July 21, in her speech before NEJAC, Jackson promised that environmental justice issues would be a focus for the agency in all its activities. She said:

> In the years ahead, I want to see a full-scale revitalization of what we do and how we think about environmental justice. This is not an issue we can afford to relegate to the margins. It has to be part of our thinking in every decision we make. And not just at EPA. We need the nonprofit sector. We need the academic sector. And we need the private sector. It's absolutely essential that we have a wide range of voices raising these issues.

In a July 22 BNA article (subscription), other EPA officials explained to NEJAC how the agency would shift the focus toward greater consideration of environmental justice issues. For example, Charles Lee, the head of EPA's Office of Environmental Justice, said that his office would spend the next five years developing agency-wide outcomes and means of achieving them as part of defining what success means at EPA.

In a July 23 article, BNA reported that other officials explained how the agency is already moving to incorporate environmental justice considerations into its programs. Acting deputy director of the Environmental Assistance Division within the Office of Prevention, Pesticides, and Toxic Substances, Mike Burns, noted that the agency is reviewing its internal rulemaking process to bring environmental justice considerations into the process at every stage, not just at the end or ignoring them. Burns noted the review should be complete by the summer of 2010.

Cynthia Giles, the assistant administrator for enforcement, told NEJAC that her office was taking steps to increase the transparency of its actions and more actively disseminate

information to local communities so that the public has important information for its advocacy efforts, according to BNA.

Most federal agencies responsible for public health, safety, and environmental issues are expected to comply with Executive Order 12898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*. This Clinton-era order requires agencies to develop environmental justice strategies and to collect and disseminate information on the health effects on various subpopulations.

As the EPA officials indicated, environmental justice issues have not been an important part of agency actions in recent years. Nor have environmental justice concerns been prominently considered in other agencies, according to an April 20 Government Accountability Office (GAO) report on federal rulemaking. GAO concluded that among the 139 major rules it evaluated between January 2006 and May 2008 for the report, fewer than five percent of the rules triggered environmental justice reviews. (Not all of the rules GAO addressed were public health or environmental rules.)

Perhaps the clearest indication that EPA will emphasize environmental justice is the decision by the agency to reconsider a rule redefining hazardous wastes so that the wastes would be exempt from regulation under federal law. According to BNA, Mathy Stanislaus, EPA's assistant administrator for solid waste, told NEJAC that the agency would accept comments on revisions to the rule finalized in October 2008. EPA had not properly considered the risks to poor and minority populations when it issued the final rule. The rule is open for public comment until Aug. 13.

EPA agreed to reconsider the rule after Earthjustice petitioned the agency to amend the rule that "stripped federal oversight of recyclers who handle 1.5 million tons of hazardous waste generated by steel, chemical and pharmaceutical companies each year," according to an Earthjustice press statement. Part of the petition for reconsideration was based on EPA's inadequate consideration of environmental justice issues. Earthjustice has mapped hazardous waste recycling facilities identified by EPA to be sources of contamination; many are located in poor and minority communities.

The decision to reconsider the rule has exposed some divisions among industry, while environmental groups have supported the decision and are pushing for revisions, according to a July 1 BNA article. Many manufacturers supported the 2008 rule and argued that the uncertainty EPA's reconsideration causes can hurt the chances of states adopting the rule. The states have implementation responsibility under the Resource Conservation and Recovery Act. The association representing the hazardous waste industry, however, cited flaws in the 2008 rule that could lead to unequal implementation and supported EPA's decision at a June 30 public hearing, according to BNA.

## Senate Set to Lift Legal Services Corporation Restrictions

On June 25, the Senate Appropriations Committee approved a bill that increases funding for the Legal Services Corporation (LSC) in FY 2010 and drops some speech restrictions on legal aid grant recipients that have been in place since 1996. The Senate version of the bill increases legal aid services by $10 million over FY 2009 levels, but it contains $35 million less than the Obama administration's request. The House version of the bill has $40 million more than the Senate version, but it continues a number of speech restrictions dropped by the Senate bill.

Since 1996, Congress has imposed a series of restrictions on LSC grantees that not only cover the federal funds they receive, but also any non-federal funds they raise. Except in a few circumstances, LSC grantees are restricted from engaging in lobbying, participating in agency rulemakings, bringing or participating in class-action lawsuits, representing those who are not U.S. citizens, soliciting clients in person, most activities involving welfare reform, influencing the census, and litigating on cases involving abortions, redistricting, prisoners, or people being evicted from public housing if they face criminal charges for illegal drugs. Most striking, these restrictions apply regardless of whether the activities are paid for with privately raised money. Additionally, LSC programs cannot claim, collect, and retain attorneys' fees, regardless of the funding source or other statutory provisions.

A number of groups supportive of legal services programs have tried for a number of years to get some or all of these restrictions removed. Many of these groups have also argued for additional funding for LSC. In 2009, largely due to the economic downturn and the increased need for legal services, Congress appears more amenable to increased funding and possibly addressing the restrictions.

The Senate version of the Commerce, Justice and Science FY 2010 appropriations bill provides $400 million for LSC. Of that amount, $374.6 million is for legal services, $3.4 million for technology innovation grants, $1 million for student loan repayment assistance to attract attorneys, $4 million for the LSC Inspector General, and $17 million for management and grants oversight. The bill also lifts all the restrictions on non-federal funds except for litigation on abortions and cases involving prisoners. The bill keeps in place all the restrictions with regard to federal funds.

As the Brennan Center for Justice, a leader in trying to get the LSC restrictions removed, details in *A Call to End Federal Restrictions on Legal Aid for the Poor*, "A set of federal funding restrictions is severely undercutting this important work, and doing so in the midst of an unprecedented national financial crisis. The time has come to eliminate the most severe of the LSC funding restrictions."

Sen. Barbara Mikulski (D-MD), who drafted the LSC provision, has been praised for removing the restrictions on non-federal funds. A *Baltimore Sun* editorial noted, "For the first time since 1996, it looks as if the LSC finally may be able to get back to providing the kind of essential legal services its founders envisioned and that poor people desperately need in order to secure their rights under the law."

The House approved its version of the appropriations bill on June 19 on a 259-157 vote. The bill provides $440 million for LSC. Most of the funding – $414.4 million – is for legal aid assistance, and the bill also provides funds for technology innovation grants and for loan repayment assistance to help programs recruit and retain talented attorneys. The House version of the bill continues existing limitations on the use of LSC funds but would lift the restriction on the ability of LSC-funded programs to collect attorneys' fees.

As the House bill was moving to floor action, the Obama administration released a Statement of Policy on June 16 indicating disappointment that the restrictions on use of non-LSC funds remained in the bill. According to the document, the administration "urges the Congress to also remove the riders which restrict the use of non-LSC funds by LSC grant recipients and which prevent LSC lawyers from participating in class action law suits that typically seek injunctive relief for the benefit of all members of a class by stopping illegal activity."

In May, President Obama released details of his FY 2010 budget request, which included a total of $435 million for the LSC and requested the elimination of the current restrictions on non-LSC funds, including the restrictions on attorney's fees and participation in class-action suits.

Nonetheless, the House did not change the bill to respond to the administration's concerns.

*The Washington Post* has repeatedly called for reforming the LSC restrictions, and on July 13 applauded Mikulski for leading an effort to pass the appropriations bill without the LSC restrictions in the Senate. "The Senate effort is preferable to the House version because it goes further in freeing up legal aid lawyers, but it is not perfect," said the *Post* editorial. "Legal aid lawyers may not seek fees in cases funded with federal dollars – a nonsensical restriction that prevents legal aid clinics from generating more of their own revenue."

On July 8, the Center for American Progress released a report that calls on Congress to increase appropriations for the LSC and lift current restrictions "because the restrictions waste resources and hinder the pursuit of justice."

The Senate version of the bill next faces a vote of the full Senate, which is expected to occur before the August recess. After floor action, it will proceed to a conference with the House to be reconciled.

## Advocates Say New Recovery Act Lobbying Guidance Doesn't Go Far Enough

On July 24, Peter Orszag, the director of the Office of Management and Budget (OMB), released further guidance that amends restrictions on lobbying for Recovery Act funds. The document states that it is meant "to supersede all prior written OMB and other agency guidance on the subject." Despite the adjustments within the guidance, which advocates note is a significant step in the right direction, many say the changes do not go far enough to prompt disclosure of all lobbying and other contacts associated with Recovery Act spending.

In a blog post on May 29, Norm Eisen, Counsel to the President for Ethics and Government Reform, announced changes to President Obama's March 20 memorandum that placed restrictions on communications between federally registered lobbyists and executive branch employees regarding the use of Recovery Act funds. The announced changes modified the oral communications ban to include everyone who contacts government officials, but it only applied to competitive grant applications submitted for review. Since then, formal guidance was expected but was not issued until late on July 24.

The guidance confirms that after competitive grant applications have been submitted, and before a decision has been made, communications about the grant applications are prohibited for everyone, not just federally registered lobbyists. The new guidance states the restriction on oral communications "applies in the context and at the stage where concerns about merit-based decision-making are greatest – the period beginning after the submission of formal applications for, and up through awards of, competitive grants or other competitive forms of Federal financial assistance under the Recovery Act. The restriction also has been expanded to cover, generally, all persons outside the Federal Government (not just federally registered lobbyists) who initiate oral communications concerning pending competitive applications under the Recovery Act."

There are exceptions to the rule, but mostly they are in the context of when the federal agency has follow-up questions to discuss. The restrictions only apply to competitively awarded grants, not to other types of grants such as formula or discretionary grants.

As with the initial OMB guidance on Recovery Act lobbying, this version still draws a distinction between federally registered lobbyists and others. Disclosure is required for oral and written communications with "federally registered lobbyists, including lobbyists for governmental or non-profit entities, and who are communicating on behalf of a client for whom they are registered." However, this does not include those who are no longer federally registered, state lobbyists, or "federally registered lobbyists who are not communicating on behalf of a client (or, in the case of an in-house registered lobbyist, on behalf of an employer) for whom they are registered." Moreover, disclosure is only required for federal financial assistance – grants, loans, and insurance – but not for contracts.

Thus, the same effort on behalf of an entity to obtain Recovery Act *financial assistance* might or might not be disclosed depending on who is conducting the communication. If a federally registered lobbyist is communicating, the public will know about the attempt to influence how the Recovery Act funds are used. However, if the communication is initiated by a person within the organization or a representative of the entity who is not a federally registered lobbyist, then the effort will not be disclosed. No communications regarding influence on awards of Recovery Act *contracts* will be disclosed, even if initiated by federally registered lobbyists.

As in the previous OMB guidance, no disclosure is required regarding discussions about logistical Recovery Act issues. Federal agency officials can also listen to lobbyists at "widely attended gatherings," and disclosure of such communications is not required. However, if the

lobbyist tries to have a private conversation with an official at a public event, the communication must be disclosed.

Citizens for Responsibility and Ethics in Washington (CREW) issued a press release July 24 stating that the changes are "a more common sense approach. It is just good policy that once an application for a competitive loan or grant has been filed, no one – registered lobbyist or not – can lobby the government official responsible for handing out the taxpayer funds."

However, concerns still remain because of the specificity of competitive grants, which are a small share of Recovery Act funds. Influence can occur prior to the submission of a competitive grant application, and the largest share of Recovery Act funds are distributed through formula grants, contracts, loans, and tax expenditures, which are excluded. Moreover, some groups, such as OMB Watch, argue that all communications attempting to influence the awarding of money under the Recovery Act – regardless of who is involved – should be disclosed.

The OMB guidance also announces that a new template for the Registered Lobbyist Contact Disclosure Form will be available shortly, but it doesn't address what advocates flag as an underlying problem: agencies are currently doing an inadequate job of disclosing lobbyist contacts, and reporting is inconsistent across agencies. For example, the Department of Energy only has nine listings of meetings with lobbyists, and the Department of Labor has five; the Federal Communications Commission has 22 meetings listed. Compounding the problem, Recovery.gov has no information on lobbyists.

Ideally, a new "web tool," if adopted and consistently used, will make the disclosure of lobbyist contacts easier. Details on the tool are currently unavailable, as it is still in its early development stages.



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

Subscribe | Blog | Donate

The Watcher

August 18, 2009 Vol. 10, No. 16

## In This Issue



---

## Obama Administration Seeks to Curtail Award Fee Contracts

During a recent Senate hearing, a top official from President Obama's budget office detailed the administration's plan for curtailing the use of award fee contracts, controversial vehicles that, according to good government groups, are filled with waste, fraud, and abuse. This plan stems from the Office of Management and Budget's (OMB) latest release of guidance to federal agencies on reforming the federal procurement process – part of a larger reform effort the administration is undertaking. During the same hearing, however, chief procurement officials from several federal agencies raised concerns over the possible consequences of further regulation.

On Aug. 3, the Senate Homeland Security and Governmental Affairs Subcommittee on Federal Financial Management convened a hearing on award fee contracts, titled "Eliminating Wasteful Contractor Bonuses." Headed up by Sen. Thomas Carper (D-DE), the subcommittee first heard testimony from a panel consisting of representatives from OMB and the Government Accountability Office (GAO). Both Jeffrey Zients, the newly confirmed Deputy Director for

Management at OMB, and John Hutton, Director of Acquisition and Sourcing Management at GAO, agreed with members of the subcommittee that too often, there is a misalignment of goals and rewards within award fee contracting, and the government must continue to rein in their use.

Used to outsource for products or services where the government cannot objectively measure contractor performance, award fee contracts are supposed to motivate a contractor to increase quality and control costs. If the contractor does not deliver, the government pays only the base fee and withholds any award fees that the two parties agreed upon during the negotiation of the contract. According to a series of GAO investigations, however, federal agencies have long supplied contractors with award fees for subpar work. This is the result, according to Hutton, of the gradual establishment of a culture of complacency within the federal procurement ranks to use inadequately scrutinized award fee contracts too often and without cause.

According to some GAO estimates, the practice of awarding unwarranted fees wastes hundreds of millions of taxpayer dollars every year. Despite this, Zients said implementation of OMB's recently released guidance on stricter use of award fee contracts, along with a renewed effort at increasing and developing procurement personnel, will go a long way toward cleaning up the current mess. During his testimony, Hutton noted the improvement that agencies identified in the May GAO report have already made toward enacting reforms advocated by his agency.

During the second panel, the procurement officials and a representative from an industry trade group demurred on the possible methods to control award fee contracts. Most of the testimony from the top procurement officials lapsed into a treatise on why their agency is different from others and therefore deserves not to lose flexibility to new regulations. Officials from the National Aeronautics and Space Administration (NASA), the Department of Homeland Security (DHS), and the Department of Energy (DOE), all supported GAO's and OMB's vision for increased scrutiny of award fee contracts but maintained that their agency missions require the broad use of the contract vehicles.

It is unclear whether some of the reforms proposed by OMB will have unintended consequences. While regulations can help procurement personnel within federal agencies make the proper decisions on contracting details, overregulation could reinforce the very attitude of complacency and noncompliance that Hutton and Zients intend to root out. Additionally, the Obama administration's new guideline for all federal agencies to cut 10 percent of contracting dollars in the coming fiscal year could exacerbate the "shell game" of lowering base fees to zero to make agencies' bottom lines provide the illusion of reducing contracting obligations. This sledgehammer solution may also reinforce government officials' predilection to "go through the motions" rather than proactively work to bring about fundamental change.

Since taking office, Obama has made contract reform a priority of his administration. With the release of a March 4 memorandum, the president set in motion a reform effort that has seen the release of the above-mentioned OMB contracting guidance; a solicitation of public comments on further contracting reform, which may influence the release of further guidance in the fall; and a request for substantially more government procurement personnel. While it will take time

before the reforms bear out, the hearing showed the work that lies ahead by illustrating the often-unseen rift that can exist between an administration attempting to institute reform and the federal agencies that must navigate the practical consequences of those efforts.

## CDC Attempts to Track Health and Pollution Connections

The Centers for Disease Control and Prevention (CDC) recently launched a website to allow the public to track environmental and public health information. The new National Environmental Public Health Tracking Network is intended to be a dynamic Web-based tool for tracking and reporting environmental hazards and the health problems that may be related to them. The tracking network offers information on several environmental hazards and health conditions, such as asthma, cancer, and certain air and water contaminants.

The CDC laid the foundation for the tracking network through grants to health departments in 16 states and New York City. The local tracking networks report their data to the national network, allowing researchers and the public to monitor and identify trends in environmental public health data.

CDC is working with the U.S. Environmental Protection Agency, the U.S. Geological Survey, the National Cancer Institute, and the National Aeronautics and Space Administration to share data and develop the tracking network. The CDC also consults with academic and nonprofit stakeholders such as researchers at Tulane University and the University of California, the American Lung Association, and the American Public Health Association.

Although a comprehensive online tool allowing the public to simultaneously track environmental pollution and trends in public health is sorely needed, the CDC's new effort represents only an initial step toward such a tracking system. CDC officials acknowledge some of the limitations to the new tracking network and say that many will be addressed over time.

According to the CDC and the Pew Environmental Health Coalition, a national public health tracking network will serve several vital functions that currently are not available. CDC and its federal and state partners intend for the network to improve scientists' ability to assess the connection between environmental pollution and its effect on health, as well as assess unusual trends and events to determine which communities may be at risk. County-level data are intended to aid residents seeking information about conditions such as asthma or the presence of air contaminants in their communities. The public and government officials could also evaluate the effectiveness of pollution abatement policies, improving the accountability and efficiency of the programs.

Through the state tracking programs, the CDC collects information on non-infectious health conditions and diseases, such as asthma and leukemia; chemicals or other substances in the environment, such as air pollution and water contaminants; and the amount of a chemical in a person's body, such as blood lead levels.

The health data tracked are asthma, cancer, carbon monoxide poisoning, childhood lead poisoning, and heart attacks. CDC eventually plans to provide data on reproductive and birth outcomes and birth defects. Environmental data being tracked include carbon monoxide, ozone, and particulate matter levels in air, as well as contaminants in well water and municipal water.

The tracking network currently draws on data collected by CDC-funded programs in California, Connecticut, Florida, Maine, Maryland, Massachusetts, Missouri, New Hampshire, New Jersey, New Mexico, New York State, New York City, Oregon, Pennsylvania, Utah, Washington, and Wisconsin.

Numerous missing data sets currently weaken the usefulness of the site. For example, a search for childhood leukemia cases finds data from only eight states, and only years 2001 through 2005 are available. Such incomplete geographic and chronologic ranges severely limit the ability to identify trends and connect health impacts to environmental damages. Few data sets on the website contain information from all states or even a large majority of states. For instance, not all states provide data on cancer, or the same types of cancer, making state comparisons impossible. Pennsylvania is missing data on asthma tracking, and only three states are reporting on carbon monoxide emergency room visits. Similar data gaps occur among the environmental data sets.

The tracking network website demonstrates the difficulties of combining numerous different data sets into a useable, easy-to-understand format. Several federal agencies collect and process data before contributing it to the network. As well, the 16 states and New York City track data independently. Coordinating all these types of data into one accessible, searchable database is a large undertaking, and the CDC is only beginning the process.

Among the website's strengths, it provides substantial definitions and documentation for the data, including how they were collected, what the limitations are, and to a lesser extent, how the data may be used. For example, the website describes the significance of tracking hospital admissions for asthma using a standardized method, claiming it allows for the monitoring of trends over time, identification of high-risk groups, and aids in asthma prevention, evaluation, and program planning efforts.

Searches are conducted by selecting options from several drop-down lists and check boxes. Search results are depicted in tables, graphs, and color-coded map formats, with the maps showing state- and county-level information.

The new site does not offer the user the ability to overlay one data set with another geographically. For example, a user cannot map asthma data overtop data on air pollution over time. Another significant weakness is the fact that raw data cannot be downloaded from the website, nor can the graphs, tables, and maps be downloaded in any format. The printing capabilities are also limited, and it is not possible to print the search results using certain Internet browsers. Officials at CDC recognize that users will need to download the data into formats that allow greater flexibility, such as into spreadsheets, and stated that they are developing such capabilities.

### Legislation

The CDC plans to expand the tracking network to all 50 states and to track additional environmental hazards and health conditions to build a more complete picture of environmental health. The agency may get some help if pending legislation in Congress is successful.

Congress is involved in the effort to track the health consequences of environmental contaminants. House Speaker Nancy Pelosi (D-CA) cosponsored with New York's Rep. Louise Slaughter (D) a bill that would establish a national environmental health tracking program and provide greater funding for CDC's biomonitoring efforts.

According to the Speaker's office, "The network will coordinate national, state and local efforts to inform communities, public health officials, researchers and policymakers of potential environmental health risks, and to integrate this information with other parts of the public health system."

## The Rise of Gov 2.0

At the close of President Obama's first 200 days in office, the administration has demonstrated a willingness to experiment with new technologies and their potential role in making government more participatory and accountable. New e-government tools have been deployed to keep track of government spending, gather public input on policymaking, and convey the status of government projects. These tools may hold the potential to give Main Street the same voice in government traditionally reserved for K Street.

### Participation

The largest e-government project launched thus far has been the effort to collect input on the pending Open Government Directive. On May 21, the administration began a three-phase process to generate ideas, discuss issues, and draft policy proposals related to the directive. The effort combined an online smorgasbord of wikis, electronic voting, and blogs with a traditional input process. Over 1,000 ideas were submitted to the first phase of the project. This effort wrapped up on July 6, just over one month after it was initially launched.

Two other web-based public discussions followed the path laid out by the Open Government Directive process. The new efforts addressed declassification and the executive branch's use of Internet cookies on its websites.

The Public Interest Declassification Board (PIDB) began operation in 2006 to create more transparency and greater access to declassified documents. In July 2009, PIDB utilized a blog to solicit public input on potential revisions to Executive Order 12958 and received over 150 comments. This was followed quickly in early August by the Office of Management and Budget's use of a blog to discuss its cookie policy for federal websites; the goal of the discussion was to

determine how to protect privacy of site visitors while utilizing "user- friendly, dynamic, and citizen-centric websites."

These efforts have been met with some criticism and doubt. The administration struggled to keep many of the discussions on track as some participants attempted to hijack the Open Government Directive dialogue, demanding the release of U.F.O. records, the president's birth certificate, and the legalization of marijuana. As online experiments for engaging the public have progressed, the administration has employed different moderating tools to keep discussions focused on the policy debates at hand.

Some interested groups have begun a dialogue to assess the administration's handling of these discussions and to identify ways in which the tools used can be improved. The League of Women Voters, AmericaSpeaks, OMB Watch, and several other groups put together a survey for those who participated in the Open Government Directive process. These groups hope to present recommendations for improvement to the administration.

Additionally, while the government has attempted to engage the public online, none of the initiatives involved have been completed; thus, the weight and influence of the public's voice in the policymaking process remains to be seen.

**Accountability**

The administration has also recognized the potential of e-government tools to improve accountability.

To this end, the administration has developed several new interactive websites, including an "IT Dashboard." The dashboard, launched in late June, is part of the redesigned USAspending.gov and tracks complicated and costly procurements of government IT services. The system allows users to examine every federal IT project by agency and shows whether each project is on schedule and on budget, along with a link to a detailed list of performance metrics for the project.

Furthermore, the dashboard demonstrated its usefulness in improving accountability within a month of being launched. In late July, officials with the Veterans Affairs Department (VA) were able to pinpoint more than 45 failing IT projects in the process of compiling data for the dashboard system. These programs were either significantly behind schedule or over budget. As a result, the VA promptly suspended the programs to assess them for possible cancellation, thereby saving taxpayers money.

Other new federal websites include Recovery.gov, which will soon be redesigned. Since the site's launch in April, the government has continued to add new features to Recovery.gov. Included in these updates is a recipient mapping feature that incorporates data from USAspending.gov to create visualizations of Recovery Act projects throughout the country. The mapping system addressed early criticism that data from the two sites were not linked.

These initiatives hold promise for a new era of e-government that enables a more participatory and accountable federal system. However, they also demonstrate the relative inexperience the government has in deploying new technologies for these purposes. While tools exist to accomplish these goals, the administration is still in the beginning phases of shaping them in such a way that maximizes their utility.

## Obama Administration Joins Roadless Rule Battle

In an Aug. 13 filing, the U.S. Department of Justice (DOJ) reserved its right to appeal a district court ruling and support the 2001 roadless rule that protects millions of acres of forest land. If the district court ruling striking down the rule is allowed to stand, it would conflict with a recent appeals court decision upholding the roadless rule. The administration's support for the roadless rule could bring years of conflict over the rule's status to an end.

The 2001 Roadless Area Conservation Rule protected approximately 58 million acres of pristine forest land from new roads, logging, and development. The rule was developed through an extensive public process and a series of environmental reviews required by the National Environmental Protection Act (NEPA). It went into effect in 2001 and was an early target of the Bush administration's efforts to open vast expanses of forest lands to development and to change the way the U.S. Forest Service managed these lands.

The roadless rule has been the subject of constant court battles since it went into effect. In addition, the Bush administration tried to replace the rule with a program allowing states to determine which portions of federal lands would be open to development and resource extraction. This policy change has also been litigated extensively in an effort to reinstate the Clinton rule. (An April 2007 *Watcher* article summarizes some of those court actions.)

On Aug. 5, the U.S. Court of Appeals for the Ninth Circuit issued an opinion upholding the roadless rule. The court wrote, "The Forest Service's use of a categorical exemption to repeal the nationwide protections of the Roadless Rule and to invite States to pursue varying rules for roadless area management was unreasonable. It was likewise unreasonable for the Forest Service to assert that the environment, listed species, and their critical habitats would be unaffected by this regulatory change." The court further said that the Forest Service had violated NEPA and the Endangered Species Act in issuing the rule change.

According to a Wilderness Society press release summarizing the appeals court decision, reinstating the rule will protect more than 40 million acres of land but not the entire 58 million acres originally covered by the roadless rule. The Wilderness Society's senior policy analyst, Mike Anderson, said, "[T]he Obama administration must now take the next steps necessary to make protection permanent and nationwide." The Tongass National Forest in Alaska and lands in Idaho are not covered by the reinstatement. In addition, Colorado is in the process of implementing its own rule.

In a separate case, the state of Wyoming challenged the roadless rule. In that case, Judge Clarence Brimmer of the U.S. District Court of Wyoming issued a decision Aug. 12 vacating the roadless rule, according to an Aug. 17 BNA article (subscription). Brimmer's decision is in direct conflict with the Ninth Circuit ruling and is being appealed by environmental groups.

More importantly, BNA reports that DOJ filed a notice Aug. 13 with the Tenth Circuit Court of Appeals preserving the administration's right to appeal Brimmer's decision. A DOJ spokesman told BNA that the administration had not yet decided whether to appeal.

Obama campaigned in support of the roadless rule. The notice filed with Tenth Circuit has given environmentalists hope that DOJ will join the appeal and lend weight to arguments supporting the need for a national standard to protect national forests, according to BNA.

Other indications of the administration's support for the roadless rule come from Agriculture Secretary Tom Vilsack. According to an Aug. 15 major statement on national forest policy, Vilsack said the Forest Service would not appeal the decision of the Ninth Circuit reinstating the Clinton-era policy and overturning the Bush change. The article also hinted at the possibility that the administration would appeal the Wyoming district court ruling.

If the Tenth Circuit comes to a conclusion substantially the same as what the Ninth Circuit decided, it is likely that the roadless rule will be fully reinstated. Since these two federal circuits cover all the western states primarily affected by the rule, another challenge from a circuit with less interest is this issue is unlikely.

If the two circuits agree, it is also less likely that the U.S. Supreme Court would agree to accept the case on appeal. If the two appeals courts are in conflict, however, the case will probably be appealed to the high court, and the outcome will remain in doubt pending Supreme Court action. The administration could also pursue a separate rulemaking to address the issue if the two appeals courts come to conflicting conclusions.

## Lead Limits, Tracking Requirements for Toys Take Effect

The Consumer Product Safety Commission (CPSC) will begin enforcing new regulations on the amount of lead allowed in toys and other children's products, as well as enforcing other measures intended to prevent children's exposure to dangerous goods.

As of Aug. 14, CPSC will enforce stricter limits on lead in children's products. The limit on lead paint and other coatings is now 90 parts per million (ppm).

In 2007, retailers, distributors, and manufacturers announced more than 100 children's product recalls after dangerously high levels of lead paint were discovered. The recalls encompassed millions of individual toys. They also drew the attention of Congress, which gave CPSC the authority to tighten limits on lead when it passed a sweeping reform bill that bolsters the agency's powers and resources.

CPSC will also enforce new limits on the level of lead in the content of children's products, including jewelry intended for children. The agency says, "After August 14, it will be unlawful to manufacture, import, sell, or offer for sale, a children's product that has more than 300 ppm of lead in any part (except electronics) that is accessible to children."

According to CPSC, the previous standard for both paint and content was 600 ppm.

As of Aug. 14, CPSC will also require manufacturers to mark children's products with information that will allow consumers to identify the products' origins. Tracking labels must now include manufacturer name, date, "and more detailed information on the manufacturing process such as a batch or run number."

The hope is that, in the event of a product recall, the more detailed tracking labels will allow consumers to quickly identify whether a product in their possession has been recalled. The labels may also help regulators and investigators identify products that pose a risk to children.

CPSC can also impose tougher penalties on violators of new and existing regulations. "Civil penalties increase substantially to a maximum of $100,000 per violation and up to a maximum of $15 million for a related series of violations," according to the agency. "Previously, civil penalties were a maximum of $8,000 per violation and up to a maximum of $1.825 million for a related series of violations."

Congress passed the Consumer Product Safety Improvement Act (CPSIA) in late July 2008, and President Bush signed the bill into law on Aug. 14 of that year. The law gave CPSC one year to prepare to enforce the lead and tracking label requirements.

It remains unclear whether CPSC has adequate resources to enforce the new requirements. According to a report released Aug. 14, CPSC continues to struggle to monitor the rising tide of consumer products imported into the U.S.

The report by the Government Accountability Office (GAO) found that although CPSC holds the authority to police imports, its ability to do so is limited by staffing shortfalls. CPSC's Import Surveillance Division, created in 2008, has only 11 employees, including nine investigators stationed at seven ports, according to the report. The staff is supported by field laboratories that test products and by analytical staff in agency headquarters. GAO notes that the U.S. has more than 300 ports of entry.

Consumer products are increasingly manufactured abroad. Most of the children's products recalled in 2007 were made in China. The rash of recalls highlighted the importance of import monitoring and enforcement.

The report also faults the U.S. Customs and Border Patrol, which does not share enough information with CPSC, GAO said.

CPSC's chronic underfunding and staff shortfalls are well documented. In 2008, an OMB Watch report found that CPSC's budget was cut almost 40 percent from 1974 (the agency's first year of full operation) to 2008. Staffing levels were nearly halved over the same period.

In the CPSIA, Congress attempted to increase funding for CPSC. The law authorizes $118.2 million for FY 2010, which begins Oct. 1, 2009. However, in his May budget request, President Obama suggested only $107 million for the agency. Both the House and the Senate have included the full authorized amount in their respective FY 2010 spending bills currently under consideration.

### Commission Expanded to Five Members

Also as of Aug. 14, CPSC is a five-member commission. The CPSIA added two new commissionerships to the agency, effective one year after the bill was signed into law. The expansion will prevent the commission from falling dormant in the event of a vacancy, as it did in 2007 when former chairman Hal Stratton resigned and President Bush failed to nominate a replacement in time.

The Senate has confirmed both of President Obama's nominees to fill the two new spots. Robert Adler was formerly a professor at the University of North Carolina's business school. Before his career in academia, Adler served as legal counsel at both the CPSC and the House Energy and Commerce Committee. Anne Northup was a U.S. congresswoman representing Kentucky's 3rd District from 1997 to 2007.

## Forged Letter Scandal Highlights Need for Greater Disclosure

In June, Rep. Tom Perriello (D-VA) received a letter that was supposedly authored by Creciendo Juntos, a nonprofit group in his district. The letter urged him to oppose the American Clean Energy and Security Act, a bill designed to combat climate change. Perriello's office also received similar letters on letterhead from the local NAACP chapter. These letters turned out to be fake; they were sent by a lobbying firm hired by a trade group representing coal producers and power companies. Government ethics and transparency watchdog organizations responded, saying that using forged letters as part of a lobbying campaign is outrageous misconduct that harms the legislative process and highlights the need for increased disclosure.

The letter on Creciendo Juntos stationery stated, "We support making the environment cleaner, but the reason we are writing is that we are concerned about our electric bills. Many of our members are on tight budgets, and the sizes of their monthly utility bills are important expense items."

A total of 12 forged letters were sent out, and in addition to Perriello, they were mailed to Reps. Kathy Dahlkemper (D-PA) and Chris Carney (D-PA). Other nonprofits' identities were used in the letters, including the American Association of University Women and the Jefferson Area Board for the Aging. Bonner & Associates, a Washington, DC-based lobbying firm, admitted to

sending the letters and said it fired the staff person responsible. The American Coalition for Clean Coal Electricity (ACCCE) said it had hired the Hawthorn Group to lobby against the climate change legislation, and Hawthorn then hired Bonner to manage a grassroots campaign in opposition to the bill.

ACCCE issued a statement Aug. 3 noting that it was considering legal action against Bonner & Associates. The coalition said it was outraged to learn of the forged letters after they were distributed.

Several other parties are focusing on Bonner's conduct. Rep. Edward Markey (D-MA), a sponsor of the climate bill and chairman of the Energy Independence and Global Warming Committee, has initiated an investigation on whether the forged letters amount to fraud on Congress. In addition, the Sierra Club has asked the Justice Department to bring criminal charges against Bonner for wire fraud.

Beyond the immediate scandal, this incident brought attention to "Astroturf" campaigns – lobbying efforts that give the impression of actual grassroots mobilization on a particular issue. The public currently has little or no information about who is funding such lobbying blitzes. Under the current disclosure law, there are no disclosure requirements for grassroots lobbying campaigns, including the fake, Astroturf kind, even if specific pending legislation is mentioned and members of the public are encouraged to contact Congress.

Advocates say that this lack of disclosure has consequences beyond salacious headlines of the day: public interest organizations and constituents who try to operate legitimate grassroots campaigns cannot compete against well funded corporate Astroturf campaigns, and in the end, the playing field is rendered unequal and the democratic process is hurt.

Opponents of increased disclosure (who often include groups engaged in Astroturf lobbying) argue that requiring the public's access to such information is an unconstitutional regulation of speech and is intended to silence diverse viewpoints. Ethics watchdogs, however, say disclosure of grassroots lobbying is not intended to restrict free speech, but it is intended to bring increased transparency to both government and those who seek to influence government.

In addition, advocates note that nonprofit organizations and labor unions are already required to report on their grassroots lobbying activities via their annual IRS Form 990 reports.

When Congress was considering the Honest Leadership and Open Government Act (HLOGA) in 2007, a provision was included that would have required groups to report grassroots lobbying if they were already registered under the Lobbying Disclosure Act (LDA) and if expenditures on grassroots lobbying campaigns exceeded $25,000 per quarter. In the end, the Senate agreed to an amendment from Sen. Bob Bennett (R-UT) to strike the language from the bill.

The forged letter scandal, coupled with allegations that many of the health care town hall protests are being organized and bankrolled by Astroturf lobbying groups, highlight the very reason ethics and government watchdogs fought to have increased disclosure requirements

included in HLOGA. For example, in 2007, OMB Watch Executive Director Gary Bass wrote an op-ed in *The Hill* calling on "actors who meet defined thresholds to disclose their grassroots lobbying activity. This can be done without burdening small groups. [. . .] Additionally, for decades, charities have been disclosing their grassroots lobbying activities to the IRS, without infringing on freedom of speech, without chilling debate and without burying groups under mountains of paperwork."



OMB WATCH
Promoting open government, accountability, and citizen participation since 1983
Subscribe | Blog | Donate
The Watcher
September 15, 2009 Vol. 10, No. 17

## In This Issue



---

## October Surprise: Looming Recovery Act Data Quality Issues

At the end of October, the first round of recipient reporting for the Recovery Act will be released on Recovery.gov. This reporting is a crucial step in Recovery Act oversight and transparency, but there is no guarantee that the reporting process will proceed smoothly. Come October, the diffusion of responsibility for Recovery Act data quality could result in a great deal of confusion, as a flood of bad data could stymie the administration's efforts at Recovery Act transparency.

The data provided by the reporting process is supposed to let both the government and the public track where Recovery Act funds are going, and, importantly, how many jobs have been created or saved due to Recovery Act programs. Despite this vision, Earl Devaney, chair of the Recovery Accountability and Transparency Board, has been saying publicly that the first round of reporting is likely to be very rough, complete with a great deal of bad data. Unfortunately, no

agency has taken sole responsibility for data quality, creating a last-minute scramble as the reporting deadline approaches.

The Recovery Act reporting requirements are not exceptionally complex, and a majority of recipients should be able to report on time without incident. However, when one is dealing with tens of thousands, potentially hundreds of thousands, of recipients, even a 10 percent error rate would result in an enormous amount of erroneous information, creating an equally large PR headache for the administration.

The problems with reporting will likely attract media attention. Already, critical articles on the poor quality of Recovery Act data have been written, including a recent *New York Times* article highlighting the "fuzzy math" behind some construction projects in New York City. Also, some articles will focus on minor errors that appear as wasteful spending, like the recent "$1 million sliced ham" stories, which reported on a poorly described Recovery Act procurement that made it seem like the government spent $1.19 million on two pounds of sliced ham. (The description of the procurement failed to mention that the order was for 760,000 sliced hams, not just one ham.)

The reaction to Recovery Act spending will be the result of several issues that will arise in October. First, there is the possibility that some recipients might not report, limiting the information available about Recovery Act spending. Theoretically, agencies will know the prime recipients they have given stimulus funding to, but they will not know any subrecipients those primes divide their funding among until data is reported. Therefore, it will be very difficult for agencies to know whether all the subrecipients that are required to report have done so. This is because the prime recipients are not required to disclose if and when they will divide their funding among subrecipients until the information is reported at the end of each quarter. Agencies will then be left with a short 10-day period to ensure all recipients have reported data.

Another cause for concern will be the quality of the data from those recipients who do complete their reports. It will be the first time Recovery Act recipients are using the reporting system, and there are bound to be problems when they report. The data dictionary the Office of Management and Budget (OMB) released is a technical document, which could be confusing for organizations that are not used to federal reporting guidelines.

There are also several data points which require subjective, often narrative entries, which will result in a wide, uneven range of answers. Several of these entries involve job creation and retention estimates, which will be the most scrutinized entries in the entire data set and yet are the most likely to have errors. For example, one report field requires recipients to estimate the number of jobs created, despite the administration giving relatively little guidance on how to differentiate between jobs created versus jobs saved, as well as the lack of a definition of what constitutes a job. The administration has left it up to the individual agencies to disseminate statistical techniques for their recipients to use, and less than half of the federal agencies have done so thus far. The lack of central guidance in job creation estimates that will come from this reporting cycle will provide critics with more ammunition to criticize the Recovery Act.

How have these problems arisen? If the data, which are the foundation of oversight, are of poor quality, then one would be tempted to blame the Recovery Board, since it is specifically charged with Recovery Act oversight. However, Devaney has repeatedly stated the board's mission is data integrity or protection, not data quality. Devaney has said it would be inappropriate for the board, as a collection of Inspectors General, to become involved in the actual collection of data. Instead, Devaney points to OMB and the agencies, arguing that they change and execute the reporting guidelines.

OMB, however, points to the agencies and Recovery Act fund recipients. According to OMB's guidance documents, the agencies must take responsibility and work with their recipients to ensure comprehensive and accurate data reporting.

Recently, however, OMB has begun to take greater responsibility for data quality. At a Senate hearing on Sept. 10, OMB Deputy Director Rob Nabors said OMB is working to make sure the reporting process goes as smoothly as possible. Nabors detailed steps the agency is taking – such as sending OMB personnel to state and local municipalities to facilitate communication between recipients, agencies, and OMB – and holding webinars for Recovery Act recipients.

More importantly, on Sept. 11, OMB released a new memorandum to the federal agencies titled "Improving Recovery Act Recipient Reporting." The memo "identifies essential actions that Federal agencies must take immediately to effectively assist recipients in meeting reporting requirements" and may signal that OMB is concerned the first round of recipient reporting will be difficult. OMB's memo says "current recipient registration is below expected levels, which may lead to underreporting" as the reporting deadline approaches, and that the agencies must start identifying their recipients now. By identifying the recipients well ahead of time, OMB is trying to avoid the missing-recipients problem.

However, it remains to be seen how effective these steps will be and if they are simply too late in the process to be effective. With less than a month remaining until the reporting deadline, agencies still might not have enough time to perform the outreach OMB is recommending.

It appears that both OMB and the Recovery Board understand the October reporting period will be rough. The board had originally planned on releasing the data on Oct. 11, the day after the reporting deadline, but it recently decided to hold onto the information a little longer, consistent with the intent of the Recovery Act, which builds in a 20-day error correction period. According to the Recovery Board, the recipient reports collected by Oct. 10 will be released on Oct. 30. Additionally, information about contracts provided directly from federal agencies will be posted to Recovery.gov on Oct. 15. The agencies will be able to use these additional days to correct simple errors in the data before it is released, ensuring a more accurate representation of Recovery Act spending in a timely manner.

## Wartime Contracting Commission Continues Work through Summer

While Congress was away for its August recess, the Commission on Wartime Contracting in Iraq and Afghanistan continued its work, holding a hearing on Aug. 11 to investigate deficiencies in contractors' business systems. The timing of the hearing prevented some significant problems from receiving much public attention.

The hearing explored the challenges that government oversight officials face when contractors' systems for billing, purchasing, labor, compensation, estimates, and other activities are inadequate for providing complete, accurate, and timely information. The commission also looked at the bureaucratic infighting that can occur among government oversight agencies. Altogether, the hearing displayed troubling glimpses of a broken contracting process that wastes billions of taxpayer dollars every year.

Prior to the hearing, the commission examined contractor business systems involved with tracking company information related to some $43 billion in contracts and learned federal auditors found half of the systems for billing and compensation "inadequate." According to the commission's June interim report:

> Significant deficiencies in contractor systems increase the likelihood that contractors will provide proposal estimates that include unallowable costs or that they will request reimbursement of contract costs to which they are not entitled or which they cannot support.

These deficiencies cost taxpayers billions of dollars each year, and, according to former Rep. Christopher Shays (R-CT), co-chair of the commission, some of these "contractors have had inadequate systems in place for years" and have not suffered any serious consequences because of it.

The lack of repercussions for contractors raised two questions for the commission: how could contractors operate with inadequate systems for an extended period, and how could those tasked with oversight allow it to happen?

Brought before the commission to answer the first question were executives of DynCorp International, Fluor Corporation, and KBR, the latter of which was the sole-source contractor for the third iteration of the Army's Logistics Civil Augmentation Program (LOGCAP), and which now competes with the first two contractors for awards in LOGCAP IV. KBR's widely criticized handling of LOGCAP III dogged Senior Vice President William Walter throughout most of the hearing, as the commission focused on KBR and used the company as a symbol for the broken contracting system at large.

Commission members argued during the hearing that because the company is so large and extensively integrated into Department of Defense (DOD) operations, KBR feels it can get away with almost any transgression, including the continuation of inadequate billing and

compensation systems. Walter rejected this characterization and argued that, while the company disagrees with government auditors over the exact quality of its systems about half the time, KBR has always been found to have adequate business systems by the one auditing agency that matters: the Defense Contract Management Agency (DCMA).

This gets to the second question about how contractors continue to operate with seemingly deficient systems, yet repeatedly win and keep contracts with the government without consequences from those tasked with oversight. The answer lies in a tale of bureaucratic turf war between the DCMA – the contracting representative of DOD – and the Defense Contract Audit Agency (DCAA), which as the agency's title suggests, audits and advises on defense contracts for DOD. DCAA's recommendations, however, are not legally binding on DCMA, and the management agency routinely ignores the audit agency's suggestions. This arrangement further undermines sufficient contracting oversight at DOD, as the commission feels DCAA audits are more thorough and trustworthy compared to DCMA's analyses.

This conflict is at the heart of many of the challenges facing sufficient defense contract oversight within the federal government. In fact, as the commission revealed during the hearing, contractors can hide from the harsh eye of DCAA behind DCMA's admittedly soft investigations. This working relationship between the two agencies has affected defense contracting since at least 2002, according to the director of DCAA, April Stephenson.

With wartime activities declining in Iraq and contractors preparing to ramp up services in Afghanistan, the lack of regard shown DCAA by DCMA, which once had a staff of over 100 but now numbers in the teens, portends significant difficulties for oversight of contingency operations. Combine that with the warm reception given those problems by contractors, and taxpayers face the potential for sizeable dollar losses due to hamstrung oversight and contractor negligence.

## EPA Pushing Data Out to the Public

The Obama administration has made government transparency a high priority in its early months, and of all the federal agencies, the U.S. Environmental Protection Agency (EPA) appears to be making the quickest progress in turning rhetoric into action. Across a range of issues, the EPA is taking proactive steps to improve transparency, collecting and releasing to the public important environmental data needed to protect the environment and public health.

Much of this information is actively being pushed out to the public, whereas other releases are only made following lawsuits and Freedom of Information Act (FOIA) requests. These actions, combined with instructions from the EPA administrator, Lisa Jackson, to operate more openly, are a distinct change from agency policies during the last several years. However, it is still too early to determine whether these information disclosures comprise an agency-wide commitment to openness and engagement with the public.

**TRI Early Release**

Among the developments was the early release of Toxics Release Inventory (TRI) data for 2008. Historically, the TRI data, which track the release or transfer of more than 650 toxic chemicals from facilities nationwide, were not available to the public until up to 14 months after the end of a reporting year. The data for 2008 were released Aug. 18 in a "raw" downloadable format and are expected to be finalized or "frozen" before the end of 2009. With the early release, EPA is encouraging data users to study and analyze the data on their own. EPA also is seeking public comments on its early data sharing policy.

This early data release follows action by Congress to restore TRI reporting levels that were scaled back in a controversial rulemaking during the Bush administration. The rulemaking had restricted the amount of toxic release information citizens and communities would receive from TRI and prompted a firestorm of criticism and more than 122,000 comments in opposition to the change in reporting levels.

**Pesticides in Drinking Water**

Atrazine, one of the most widely used herbicides in the United States, is toxic to humans and animals even at very low levels. It is also one of the most ubiquitous pesticides in streams and groundwater. A recent report by the Natural Resources Defense Council (NRDC) was critical of EPA's monitoring and notification system for atrazine contamination. NRDC acquired sampling data from EPA's atrazine monitoring program, but only after two FOIA requests and a lawsuit.

Shortly after the report was published, EPA announced the public release of the data that NRDC had sued to acquire. According to EPA, "As part of this [EPA's] commitment to transparency and to enhance accessibility, EPA has posted complete atrazine monitoring program drinking water data gathered from 150 community water systems over the six-year period 2003 through 2008."

The agency has released two sets of atrazine data, one for ecological monitoring and one for drinking water monitoring. The accessibility and usability of the data sets online vary. To access the ecological data, one must navigate through the cumbersome *Federal Register* (The data are available in the public docket.). The drinking water raw data are available as Excel spreadsheets, and data are also presented in a summary form. The website also provides a basic explanation of the data and EPA's understanding of the health risks.

Missing are data visualization tools many open government advocates have been calling for from the Obama administration. Both *The New York Times* and NRDC provided maps, charts, and graphs interpreting the raw data for their readers. EPA has only provided links to spreadsheets.

**School Air Pollution Monitoring**

Earlier in 2009, EPA began a program to monitor the air quality around selected schools to identify areas where air pollutants are at dangerous levels. The program was developed in

response to a *USA Today* report published late in 2008 that used publicly available pollution information to identify schools that might be at risk of dangerously high air pollution levels. Pressure from the public and Congress encouraged Jackson to take action. The results of the air monitoring are made available online as they are collected from monitoring sites.

**Coal Ash Dump Sites**

In December 2008, the failure of a retaining wall at a Tennessee dump site for wet coal ash – the toxic waste product from combustion of coal at power plants – caused more than one billion gallons of coal ash sludge to wash over hundreds of acres and flow into local waterways. The spill caused alarm over the possibility of additional catastrophic failures of similar dump sites.

In response, Jackson vowed to gather the information needed to issue a rule to bring these dump sites under federal regulation. A survey sent to hundreds of power plants around the country collected information on the location and inspection history of coal ash dump sites. Despite protests from the Department of Homeland Security, which viewed disclosing such information as a security threat, EPA published online a list of the highest-risk dumpsites identified through a survey to electric utilities nationwide.

On Aug. 28, in response to a FOIA request by several environmental groups, the agency released more detailed information about the impoundments. Of 584 impoundment units in 35 states, 194 have been given hazard ratings by the National Inventory of Dams. Several reporting utilities labeled portions of their responses as confidential trade secrets. Data on the inspection histories and size and capacity of impoundments were not disclosed by EPA. The agency stated that it will evaluate the claims of confidential business information and disclose the data that are not deemed to be legitimate trade secrets.

The agency plans to assess by year's end all 109 coal ash dump sites that have been assigned a high or significant hazard rating. With the data now available, public interest groups and individuals are able to evaluate dump sites in their communities and hold their state and federal officials accountable for ensuring the safety of the sites.

**Recovery Act and Data.gov**

As part of the Recovery Act, EPA distributed more than $7 billion, mostly for assistance with water quality and infrastructure programs. The agency's transparency efforts also extend to these spending data. Expenditures are now presented in an interactive map depicting total Recovery Act obligations and gross outlays by EPA at the national and state levels. EPA claims that in the future, the map will link to project-by-project information.

**"Fishbowl" Still Cloudy**

In an April 24 memo to agency staff, Jackson pledged that EPA would operate with transparency, as if it were "in a fishbowl." Jackson outlined broad principles for agency

transparency, including instructions to staff to "make information public on the Agency's Web site without waiting for a request from the public to do so."

Whereas the release of data on school air quality and the early release of TRI data are agency initiatives, other data releases have come only following FOIA requests and legal action. The EPA has not explained what steps it will take to conform to the administrator's instruction to push out information without waiting for FOIA requests. Additionally, the agency still lacks a permanent assistant administrator for the Office of Environmental Information (OEI), a key department with many responsibilities covering the agency's public release of data.

Overall, the recent actions are a welcome change in openness from EPA. The information being released includes vital data needed by the public to hold the agency accountable, protect public and environmental health, and prepare for emergencies. However, it is not clear that these disparate actions comprise a coherent, uniform policy for public disclosure of environmental information.

## Secrecy Report Card Gives Modest Grades to Bush and Obama

On Sept. 8, OpenTheGovernment.org, a coalition of 70 open government advocates, released its sixth annual *Secrecy Report Card*. Focusing on 2008, the report card serves primarily as a final assessment of the Bush administration but also addresses early actions of the Obama administration. Overall, the report notes a decrease in secrecy at the end of the Bush years but concludes that greater efforts are needed to increase federal transparency.

According to the report, original classification decisions under the Bush administration decreased by 13 percent to the lowest level since 1999. Once information has been designated as classified by an original classifier, many other documents can be derivatively classified. Despite the drop in original classifications, derivative classification decisions increased. Further, the number of pages being reviewed for automatic declassification declined by 14 percent, and the number of pages declassified declined by 16 percent in 2008.

The report also indicated that the federal government spent a little less during the last year of the Bush administration on both classification and declassification. However, the proportion of declassification spending to that of classification remained grossly disproportionate. According to the report, "for every one dollar the government spent declassifying documents in 2008, the government spent almost $200 maintaining the secrets already on the books, a 2 percent increase from last year."

The report included a special section on openness and secrecy trends in the Obama administration, for which the coalition gives a mixed review. The new administration has taken several steps toward its promise of "an unprecedented level of transparency." One of these was the collaborative and participatory online policymaking process for the Open Government Directive. Using social media tools, the government solicited public input on potential open government recommendations. This was the first effort to use the Internet to widely and actively

engage the public in policymaking. However, the report indicates that there is an "undefined connection between the recommendations developed during the process and what will be presented to the President." This raises concerns about the effectiveness of the process, but the Open Government Directive has not yet been released, so it is impossible to know how public input factored into policymaking at this time.

The Obama administration also issued a new Freedom of Information Act (FOIA) memorandum that directs FOIA to be applied with a presumption of openness and agencies to release records in anticipation of public interest. Moreover, the new memo included important language about enforcement and accountability. The memo orders that the chief FOIA officers of each agency recommend adjustments to agency transparency practices, personnel, and funding as necessary. The report cited two lawsuits, *CREW v. EPA* and *CREW v. Council on Environmental Quality*, in which the government released material previously withheld under Exemption 5 of FOIA after reviewing it under the new guidelines.

The *Secrecy Report Card* also noted some actions that cloud the Obama administration's early transparency initiative. The Obama administration has issued seven signing statements, most of which challenge specific provisions of law. However, the report admits Obama's signing statements have "not been as expansive or specific as his predecessors." In addition, the administration has also maintained the Bush administration's claims of state secrets in three court cases and has argued for its constitutionality in an amicus brief to the U.S. Supreme Court in a fourth case. Rooting the privilege in the Constitution, according to the report, "could hinder Congress's legal ability to regulate it."

Additionally, the 2009 report card includes a section highlighting fiscal transparency efforts. In particular, the report is critical of the differing commitments to transparency in the financial bailout and stimulus legislation. According to the report, FinancialStability.gov, the public face of the bailout, lacks reports from Treasury, the Federal Reserve, the Federal Deposit Insurance Corporation, and other executive branch agencies. The public face of the stimulus, Recovery.gov, however, is far more comprehensive, providing "information for accountability from a variety of sources."

Overall, the report presents a mixed record for both the last year of the Bush administration and the first few months of the Obama administration. Patrice McDermott, Director of OpenTheGovernment.org, stated, "Promising trends began to develop in the last year of the Bush Administration, but we have a long way to go to return to the level of government openness and accountability that existed before the September 11 attacks."

## Majority of Americans Support Food Safety Reform, Poll Finds

Eighty-nine percent of Americans support more aggressive food safety regulation, according to a poll commissioned by The Pew Charitable Trusts. The findings could place added pressure on Congress as it considers whether to make food safety reform a top legislative priority in 2009.

According to an outline of the poll's key findings, 89 percent of voters support broad reform of the food safety net, "including 61% who strongly support this."

The poll also probed respondents for their views on specific policy ideas. At least 90 percent voiced support for better systems for tracking food through the supply chain, more frequent government inspections of food facilities, and stronger regulation of imported food.

Americans would continue to support increased regulation and inspections even if it meant higher grocery bills, according to the Pew poll. "72% say it would be worth it to pay between 3% and 5% more in grocery costs to have these new safety measures—this is true among lower-income (77% worth it), middle-income (74%), and higher-income voters (69%)."

Hart Research Associates and Public Opinion Strategies conducted the poll. The pollsters surveyed 1,005 registered voters between June 29 and July 3. The results carry a 3.1 percent margin of error.

The poll results lend weight to arguments in favor of increased regulation of the food industry. Advocates have been increasingly calling for more protective food safety standards and more diligent enforcement, citing high-profile recalls and contamination scares that have made headlines over the past few years.

In June, for example, the Food and Drug Administration (FDA) warned consumers about a batch of Nestlé refrigerated cookie dough which had become contaminated with *E. coli* bacteria. Nestlé recalled all packages of the cookie dough, but not before dozens had been sickened.

The cookie dough was manufactured in a Danville, VA, plant. However, FDA investigators found no traces of *E. coli* at the plant, leaving investigators bewildered.

The uncertainty surrounding the cookie dough investigation is not uncommon. In the summer of 2008, the FDA spent months trying to figure out the cause of a salmonella outbreak that sickened more than 1,000 people. Initially, FDA focused on tomatoes but later identified Mexican-grown jalapeño peppers as the culprits.

To help public officials during future investigations, FDA has launched a Reportable Food Registry where industry and local officials can report food safety problems "when there is reasonable probability that an article of food will cause serious adverse health consequences."

Federal, state, and local officials hope the registry will allow investigators to more quickly identify the scope of foodborne illness outbreaks. By linking reports from a variety of sources, the registry could reveal geographic or illness patterns caused by the same or similar foods. "Working with the food industry, we can swiftly remove contaminated products from commerce and keep them out of consumers' hands," said Michael R. Taylor, a senior advisor at the FDA.

Congress mandated the creation of the registry in the Food and Drug Administration Amendments Act of 2007. Congress gave FDA one year to create the registry. FDA missed the deadline, which passed in September 2008.

Congress is considering further legislative reforms to the food safety system. On July 20, the House passed the Food Safety Enhancement Act of 2009 (H.R. 2749) by a vote of 283-142.

The bill would give FDA the authority to pull risky products from store shelves. Currently, FDA cannot mandate a recall. Instead, the agency works with industry to orchestrate voluntary recalls. The bill would also require more frequent inspections of food facilities. To pay for the inspections, the bill would allow FDA to charge food facilities an annual $500 registration fee.

In the Pew poll, 66 percent of respondents said they supported the registration fee program.

In the Senate, reform efforts have lagged. Sen. Richard Durbin (D-IL) introduced a bill in March with bipartisan support, but no hearings have been held. Durbin's bill is similar to the House version, but it does not include the registration fee provision.

Debate over other congressional priorities further clouds the forecast for successful passage of any reform package in 2009. Comprehensive food safety reform is likely to take a back seat to health care and finalizing FY 2010 appropriations.

## Sunstein Confirmed as Obama's Regulatory Chief

On Sept. 10, the Senate confirmed Cass Sunstein as the administrator of the White House Office of Information and Regulatory Affairs (OIRA). Sunstein's nomination had been stalled by several senators who were concerned about the nominee's views on such issues as animal rights and citizens' right to bear arms. The Senate confirmed Sunstein by a 57-40 vote.

Sunstein is a distinguished academic and author who served on the University of Chicago Law School faculty with President Barack Obama, where they became friends. Sunstein subsequently moved to Harvard Law School. He worked briefly in the Department of Justice's Office of Legal Counsel before embarking on an academic career. He served as a special adviser to Peter Orszag, director of the White House Office of Management and Budget (OMB), while awaiting confirmation.

Obama nominated Sunstein April 20 to lead OIRA, the small office within OMB that reviews proposed and final regulations and paperwork requirements. The office also has responsibilities over federal statistics, dissemination of information, and general information resources management.

Sunstein's nomination was controversial. Obama's choice to lead this powerful but little-known office drew criticism from the left because of Sunstein's ardent support of the use of cost-benefit analysis, an economic tool that has been used to weaken the stringency of federal regulations

since the Reagan era. He has also argued for greater control by OIRA over aspects of the regulatory process at the expense of agency authority.

In his May 12 confirmation hearing before the Senate Homeland Security and Governmental Affairs Committee, Sunstein portrayed himself as a pragmatist, one who would not use economic analysis as a straitjacket for regulations. In pledging to look to the law first for regulatory guidance, Sunstein tried to distance himself from past regulatory czars who strongly supported economic analysis to judge the adequacy of health, safety, and environmental rules. The committee approved Sunstein's nomination on May 20 with only one dissenting vote.

His confirmation by the full Senate, however, was stalled by a series of objections from conservatives to his views on animal rights and the Second Amendment. Sens. Saxby Chambliss (R-GA) and John Cornyn (R-TX) placed holds in sequential order to delay action on the nomination because of Sunstein's controversial views that animals should enjoy meaningful legal rights, including the right to sue. Although Sunstein worked to assuage the concerns of those who raised objections to his views, these and subsequent holds kept the Senate from debating the nomination before the chamber's August recess.

Facing what looked like a series of rotating holds by Republican senators, Senate Majority Leader Harry Reid (D-NV) scheduled a cloture vote – a Senate procedural motion to end the delaying tactics – upon the Senate's return in September. On Sept. 9, senators invoked cloture in a 63-35 vote, formally ending debate on the nomination. They voted to confirm Sunstein as administrator the following day.

The agenda for the new OIRA administrator is daunting. Obama pledged during the presidential campaign to address both financial and social regulatory issues and to overhaul the way government regulates these sectors. OMB Watch and many others have argued for years that the current regulatory process is badly broken. It is characterized by political interference, substantial delay, biased procedures, too little agency discretion, science superseded by politics, and far too few resources for agencies to meet their legal mandates. (Summaries of OMB Watch's recommendations for reforming the regulatory process are on our website.)

The administration has already begun to address some problems. OIRA conducted a process by which agencies and the public (for the first time) could submit comments about how to reform the executive order that defines much of the current process by which regulations are developed and reviewed. (Read the comments submitted here.)

It has also encouraged the public to participate in improving regulatory decision making by publicly vetting changes to the government's e-rulemaking platform, Regulations.gov.

In addition to regulatory reform, the administration has pledged to make science a centerpiece of its decision making, to make the administration more transparent than any other, and to change the government's approach to preempting state regulatory authority.

In OMB Watch's statement on Sunstein's confirmation, Executive Director Gary D. Bass said, "We expect Cass Sunstein to oversee a regulatory system that puts the public first by allowing federal agencies to write and enforce the regulations that protect us in our everyday lives," and that OMB Watch looks forward to working with the staff at OIRA "to promote a regulatory agenda that actively works to protect the public."

## Supreme Court Rehears Citizens United Case; Decision Could Impact Nonprofits

Citizens United, a 501(c)(4) nonprofit organization, developed and sought to run a film about candidate Hillary Clinton during the 2008 presidential primary. The group also wanted to promote the film with several ads. The highly critical movie was partially funded by corporate contributions, which the Federal Election Commission (FEC) said was a violation of the Bipartisan Campaign Reform Act of 2002 (BCRA). In a federal lawsuit recently reheard by the U.S. Supreme Court, Citizens United charges that ads for the film should not be subject to donor disclosure and disclaimer requirements and that the BCRA provisions enforced by the FEC are unconstitutional.

BCRA, sponsored by Sens. John McCain (R-AZ) and Russ Feingold (D-WI), prevents corporations (including nonprofit organizations) and labor unions from using general treasury funds to pay for any "electioneering communications" – broadcast messages that refer to a federal candidate 30 days before a primary election and 60 days before a general election.

The case was first heard by the Supreme Court in March, but in a surprising move a few months later, the Court asked Citizens United and the government to reargue the case in order to give the Court the opportunity to consider a broader set of questions regarding campaign finance law. In June, the Court requested an examination of whether two previous decisions that upheld the government's right to limit corporate expenditures in political campaigns should be overturned, specifically the 1990 decision in *Austin v. Michigan State Chamber of Commerce* and the 2003 decision in *McConnell v. Federal Election Commission* that dealt with BCRA.

The Court met in special session on Sept. 9 for a second hearing of *Citizens United v. Federal Election Commission*, and one outcome may be that the Court allows businesses and unions to spend without restraint in a way that could help their candidates of choice. At issue in the case is whether corporate money can be used to directly advocate for the election or defeat of federal candidates.

Shortly after arguments concluded, the Court released audio to the public. *The New York Times* reported, "The makers of a slashing political documentary about Hillary Rodham Clinton were poised to win. The only open question was how broad that victory would be." The film was called *Hillary: The Movie*.

Elena Kagan, the Solicitor General of the United States, all but said "that a loss for the government would be acceptable, so long as it was on narrow grounds." Suggesting that the

campaign finance restrictions were perhaps not meant to be applied to a corporation like Citizens United, Kagan argued that if the Court overturned *Austin*, companies could use the funds to promote political positions at odds with the interests of some of their shareholders, and therefore, the Court should not go that far, even if it finds in favor of Citizens United.

While Chief Justice John Roberts and Justice Samuel Alito appear to remain skeptical of that argument, corporations are not stripped from political speech entirely during campaigns. Rather, corporations and unions pay for federal election spending through political action committees.

Further, the Court has supported the ban on independent spending by corporations in the past. In *McConnell*, the Court upheld the electioneering communications provision, and *Austin* upheld a state's right to restrict direct corporate spending in political campaigns.

Theodore Olson, representing Citizens United, remained committed in calling for a broad ruling by reversing the two precedents. This prompted Justice Sonia Sotomayor's first question as a justice. "Are you giving up on your earlier arguments that there are statutory interpretations that would avoid the constitutional question?" she asked.

The Court could ultimately avoid constitutional questions by ruling that BCRA does not apply to video-on-demand services, which is where Citizens United's film would have aired in 2008, though Court watchers say such an opinion would have been more likely in March. Another possible outcome is expanding an exemption to the general ban on corporate campaign spending for some nonprofit corporations. This approach would be based on a previous Supreme Court case, *FEC v. Massachusetts Citizens for Life*, which created what is known as the "MCFL exemption." "MCFL groups" are "organization[s] formed for the express purpose of promoting political ideas, have no shareholders, are not established by a business corporation or labor union, and do not accept contributions from those entities," according to the Court. Expanding the scope of *MCFL* to include groups like Citizens United could allow MCFL groups to take some corporate funding.

Observers have speculated on what the outcome of the Citizens United case could mean for nonprofit corporations. Past examples show that many business corporations are reluctant to spend directly on political ads, presumably for fear of alienating customers, shareholders, and employees. Instead, they channel such spending through groups like Citizens United, the U.S. Chamber of Commerce, and trade associations, almost all of which are tax-exempt, nonprofit corporations. If the Court's decision allows a significant increase in such spending, as supporters of the current prohibition strongly believe will occur, it will create pressure in two areas when it comes to tax-exempt (but not charitable) entities.

First, these entities can only maintain a 501(c)(4) tax-exempt status or a 501(c)(6) status if political activity is not their "primary" activity, which is not clearly defined.

Second, it is not clear what constitutes "political activity." The Internal Revenue Service (IRS), for example, applies "a facts and circumstances" test to determine political activity, and that test

is both subjective and ambiguous at best; the IRS is the agency charged with oversight of nonprofit organizations' tax-exempt status. The FEC, responsible for enforcing campaign finance laws, applies equally vague tests.

The Court will now work toward a decision, and a final ruling may not be complete until after the new Court term begins Oct. 5.

## Assessing the Impact of the Social Innovation Fund

The Social Innovation Fund (SIF) is the Obama administration's major philanthropic effort, with the White House requesting $50 million for the program earlier in 2009. While it is clear that the administration is interested in innovation within the nonprofit sector, organizations are uncertain about how the program will impact their work.

America Forward, the coalition of nonprofit organizations that made the policy recommendations that led to the Edward M. Kennedy Serve America Act, which authorized the program, says the SIF is "intended to increase the impact of social entrepreneurs and innovative nonprofit organizations by scaling proven programs and investing in promising new ideas. In essence, it enables a new role for government to partner with social entrepreneurs and philanthropy to fundamentally improve our nation's problem-solving capacities." It will achieve this by providing "grants to existing grantmaking institutions that will in turn invest in growing innovative, results-driven nonprofits. Both grantmaking institutions and the nonprofit grantees will match the Fund's investment, generally resulting in a 2:1 match."

The impact that the SIF will have on the nonprofit sector remains to be seen. However, it may not impact the sector in ways initially imagined. For instance, it is widely believed that a $35 million expenditure (the appropriation proposed in the House, a $15 million decrease from the White House's request) toward the nonprofit profit sector will really benefit community organizations. Details of the SIF, however, put that premise into question. "Of the total amount, 5% comes off the top for evaluation and R&D, and only 10% will go as grants awarded directly to 'community organizations,'" according to an article by Rick Cohen, a columnist for *Blue Avocado* and the author of the "The Cohen Report" for *Nonprofit Quarterly*.

Community organizations can receive funds that are regranted from foundations, but they will have to match the dollar amount of the funds received. This will make it difficult for local, community-based groups to receive these funds, because many of these organizations "are neither funded by nor visible to private foundations," according to Cohen. Then, even if they manage to get on the radar of the private foundations, providing matching funds can prove to be a major obstacle.

"Unless they're already in the embrace of well-connected foundations and their initiatives, community nonprofits – at the heart of social innovation – are unlikely to find themselves winners in the foundation-dominated Social Innovation Fund," says Cohen. Furthermore, the statutory requirements for measured effectiveness, evidence-based decision making and so forth

may sound good on paper, but in practice, "this provides an institutional mandate for centralized regulation and extensive paperwork," according to a blog post by Jeff Trexler, a professor at Pace University. This level of regulation and paperwork could be another barrier for small community nonprofits.

"Many entrepreneurial leaders of the nonprofit sector toil for small organizations in out-of-the-mainstream locales. They may not be in line to get much from the Social Innovation Fund unless they are willing to sign up as local affiliates of the designated national innovators," commented Cohen in a May article for *Nonprofit Quarterly*. "It would be important for the administrators of the fund to ensure that they make special effort to find innovation wherever it occurs in the nonprofit sector – and to build the networks and 'infrastructure' that support and sustain nonprofit innovation," he continued.

Foundations, on the other hand, stand to benefit tremendously from the SIF. Of the total amount of the SIF, "85% will go in grants sized between $1 million and $5 million to 'grantmaking institutions'," according to Cohen. The foundations will have to match the grant funds before they regrant anything, but this will likely not be an issue for large foundations. Foundations are interested in the program to gain access to the administration and to receive the administration's endorsement, not to receive the funds, said Cohen.

Vince Stehle, a program director at the Surdna Foundation, wrote in an article for the *Chronicle of Philanthropy* that the SIF can become a distraction if the sector focuses all of its energy on this small fund. "For foundations, the more important point is to challenge the conventional wisdom that philanthropy uncovers great new programs and the federal government will always bring the big money to carry out the great ideas on a larger scale. That's not always the case," wrote Stehle.

Stehle cites several examples where the federal government and not philanthropy led the way in new, innovative ideas. He cites the Internet as an example of a federally supported program that "sparked the most sweeping generation of innovations in the history of information technology. In that case, the government was the sole sponsor of development work for 20 years before most people in philanthropy had even heard of the Internet," wrote Stehle. Thus, with a public-private partnership, innovative ideas can come from either direction. Sometimes it is useful for philanthropy not to lead, but to follow federal money, wrote Stehle.

In remarks given at the White House in June, President Obama spoke about the importance of the nonprofit sector in addressing societal ills and in creating and implementing innovative programs. "Solutions to America's challenges are being developed every day at the grass roots – and government shouldn't be supplanting those efforts, it should be supporting those efforts," Obama said. These remarks appear to show that the administration understands the importance of the innovations that solve our communities' problems and that those solutions originate from grassroots or community-based organizations. It remains to be seen, however, if those same organizations will have the opportunity to secure some of the SIF funding to bring such innovative ideas to a larger audience.

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

Subscribe | Blog | Donate

The Watcher

September 29, 2009 Vol. 10, No. 18

## In This Issue



---

## Commentary: Obama Reform Proposal would Improve Transparency in Financial Markets

Transparency is integral to a responsive, accountable, and ultimately functioning government, but it is also a vital component of a functioning economy. Indeed, a number of federal institutions exist to ensure that depositors, lenders, and borrowers have access to relevant financial data that allows them to engage in mutually beneficial transactions. The Obama administration's financial regulatory reform proposal acknowledges the important role that transparency plays in the economy's financial sector and contains a number of measures to increase transparency in the notoriously opaque financial system.

The financial industry is the sector that allocates capital to the rest of the economy; that is, it pools, pipes, and pumps money from investors to businesses that make the goods consumers

buy. If investors cannot trust those to whom they would lend funds, then businesses could not function. It is here that regulation becomes necessary, as federal institutions serve as enforcers of the rules that inculcate trust in the system. And at the heart of financial regulation are those rules designed to enhance transparency in the financial market. Indeed, the Securities and Exchange Commission (SEC) functions by providing "a common pool of knowledge for all investors" because "[o]nly through the steady flow of timely, comprehensive, and accurate information can people make sound investment decisions."

While there were many events over the past few years leading to the near-collapse of the financial system, the opacity of several sectors places them on a likely list of suspects. The financial crisis has its roots in investors from all around the globe, searching for low-risk, high-yield vehicles in which to invest. Discovering what they believed at the time to be such low-risk investments, they began purchasing massive quantities of securities based on the value of residential mortgages (e.g., collateralized debt obligations [CDO], residential mortgage backed securities [RMBS], etc.). It turned out, however, that many of the underlying mortgages in those securities were issued fraudulently, incompetently, and willfully ignorantly.

As a consequence of reckless lending decisions, mortgage-backed securities lost significant value and decimated the balance sheets of the firms that owned them. Critically, potential lenders refused to extend credit to them, because creditors had no idea if those firms would be able to stay in business to be able to repay the loans. In every step of the process, inaccessible information contributed to poor decisions by investors and stymied inter-business lending.

When firms were purchasing CDOs, they believed (or could plausibly claim they believed) they were making risk-free investments, because credit rating agencies (CRAs) – the private entities that grade the riskiness of debt instruments – judged the CDOs to be so. The CRAs failed spectacularly in their assessments. Understanding the methodologies behind the CRAs' ratings and disclosing details of the financial ties between CDO issuers and CRAs might have exposed failures in the securities rating systems, giving pause to potential purchasers.

The financial regulation proposal put forth by the Obama administration would increase transparency in and strengthen oversight of CRAs. Crucially, the proposal also recognizes the role that lack of transparency played in the financial crisis and the need for increased transparency in broader financial regulatory reform.

According to the proposal:

> Securitization, by breaking down the traditional relationship between borrowers and lenders, created conflicts of interest that market discipline failed to correct. Loan originators failed to require sufficient documentation of income and ability to pay. Securitizers failed to set high standards for the loans they were willing to buy, encouraging underwriting standards to decline. Investors were overly reliant on credit rating agencies. Credit ratings often failed to accurately describe the risk of rated products. In each case, lack of transparency prevented market participants from understanding the full nature of the risks they were taking.

In a recent speech on Wall Street, Obama laid out his plan to fill in these information gaps (a detailed description of the proposal is available here). The speech came as the House Financial Services Committee, chaired by Rep. Barney Frank (D-MA), began holding hearings on financial regulatory reform. The committee will likely spend a good part of October holding hearings and conducting markup sessions as the members try to reconcile the administration's plan with many other financial reform plans. However, since Frank currently supports Obama's reform proposal, it appears likely that this plan will receive the most attention.

Obama's plan is divided into five parts:

- Supervision and regulation of financial firms
- Comprehensive regulation of financial markets
- Consumer and investor protections
- Government financial crisis management tools
- Coordination of international standards

Each plank of the plan seeks to address a perceived failing of the financial system that contributed to the current economic crisis, and improving transparency plays a role in the first three major areas.

The first part, the regulation of financial firms, would have the greatest impact on the financial system. The administration would create several new agencies, including the Financial Services Oversight Council (FSOC) and the National Bank Supervisor (NBS). The NBS would combine national banks' federal savings association supervisors, in an effort to prevent regulatory shopping. At the same time, the Federal Reserve would step up its regulation of bank holding companies. The FSOC would serve to coordinate all financial regulation in an effort to prevent regulators from ignoring sectors of the market. Additionally, the FSOC would "facilitate information sharing and coordination among the principal federal financial regulatory agencies regarding policy development, rulemakings, examinations, reporting requirements, and enforcement actions."

As the second plank in its plan, the administration would strengthen the SEC. Noting that "over the counter derivatives" such as credit default swaps, which ultimately caused the $70 billion bailout of insurance giant AIG, were "a major source of contagion through the financial sector during the crisis," the proposal seeks impose new record keeping and reporting requirements on these financial instruments. Additionally, the plan states that "[i]nvestors and credit rating agencies should have access to the information necessary to assess the credit quality of the assets underlying [opaque financial instruments]." And while this section of the plan encourages the SEC to impose more transparency requirements on CRAs, it would not result in new legislation to mandate such rules. Rather, it would leave to the SEC discretion as to which transparency regulations to implement.

The third part of the plan would protect financial consumers by creating the Consumer Financial Protection Agency (CFPA), a sort of financial services version of the Consumer Product Safety Commission. The CFPA, which would "make sure that consumer protection regulations are

written fairly and enforced vigorously," would protect consumers from hazards such as sub-prime mortgages. The CFPA would also have a key transparency role, in that it would have the power to require clear and reasonable public disclosures of financial services companies.

The fourth and fifth sections of the reform proposal are somewhat less developed than the other three. The fourth plank pledges that, next time around, the government will have a tool to address "too big to fail" institutions, but it remains unclear what kind of tool that will be. The fifth plank is a vague promise for "international cooperation," which is intended to help prevent another global financial collapse.

The Obama proposal highlights the "lack of transparency [that] prevented market participants from understanding the full nature of the risks they were taking." Indeed, elements of the proposal will take big steps toward filling the information gaps that helped precipitate the financial crisis by mandating the financial services sector to disclose more information. The government will provide much needed transparency while also regulating the most risky financial products. This new level of transparency is warranted, as it will protect not just investors and other players in the financial services industry, but also the millions of Americans who depend on a functioning financial system that allows the economy to grow.

## Congress Attempts to Wrap up Appropriations

With the end of the fiscal year quickly approaching on Sept. 30, congressional leaders plan to pass a continuing resolution (CR) to keep government agencies funded through the end of October and allow additional time for appropriations work to continue. Although not a guarantee, the additional time should allow Congress to finish its appropriations work, preventing the need for an omnibus spending bill before the end of the year.

The FY 2010 appropriations process will consume Congress over the coming weeks, as both chambers work to complete the government's twelve annual spending bills and pass them on to the president for his signature. The House moved quickly in 2009 and passed all of its appropriations measures before the August recess. Alternatively, the Senate passed only four spending bills before leaving Washington for the summer. Having completed two more appropriations bills since the break, the upper chamber still has six spending bills to pass and then must reach agreement with the House on a compromise version for each of those bills.

The only appropriations legislation that has successfully passed both chambers and been reconciled is the bill funding the legislative branch. The House agreed to the conference report, which includes the text of the (CR), on Sept. 25, and the Senate is likely to pass the conference report the week of Sept. 28, before the end of the fiscal year.

**FY 2010 Appropriations***

| As of Sept. 28, 2009 | FY 2009 | President's Request | House | | | Senate | | | Conference |
|---|---|---|---|---|---|---|---|---|---|
| | | | Sub-Cmte | Cmte | Floor | Sub-Cmte | Cmte | Floor | |
| Agriculture | 20.5 | 23 | 22.9 | 22.9 | 22.9 | 23.1 | 23.7 | 23.7 | |
| Commerce-Justice-Science | 57.7 | 64.6 | 64.4 | 64.4 | 64.3 | 64.9 | 64.9 | | |
| Defense | 631.9 | 640.1 | 636.3 | 636.3 | 636.3 | 636.3 | 636.3 | | |
| Energy & Water | 33.3 | 34.4 | 33.3 | 33.3 | 33.3 | 34.3 | 34.3 | 34.3 | |
| Financial Services | 22.7 | 22.6 | 24.1 | 24.2 | 24.2 | 24.4 | 24.4 | | |
| Homeland Security | 40.0 | 42.8 | 42.6 | 42.6 | 42.6 | 42.9 | 42.9 | 44.3 | |
| Interior & Environment | 27.6 | 32.3 | 32.3 | 32.3 | 32.3 | 32.1 | 32.1 | 32.1 | |
| Labor-HHS-Education | 151.8 | 160.7 | 160.7 | 160.7 | 160.7 | 163.1 | 163.1 | | |
| Legislative Branch | 4.4 | 5.2 | 4.7 | 4.7 | 4.7 | 4.7 | 4.7 | 4.7 | 4.7 |
| Military Construction-VA | 72.9 | 77.7 | 77.9 | 77.9 | 77.9 | 76.7 | 76.7 | | |
| State-Foreign Operations | 50.0** | 52 | 48.8 | 48.8 | 48.8 | 48.7 | 48.7 | | |
| Transportation-HUD | 55.0 | 68.9*** | 68.8 | 68.8 | 68.8 | 67.7 | 67.7 | 67.7 | |

*Numbers are amounts of discretionary spending in billions of dollars. Green boxes indicate approval; grey boxes indicate bill not yet approved by appropriate body.

**Includes supplemental funding

***Does not include $39.5M presidential request for general fund appropriations

(*click to enlarge*)

Two of the six bills remaining for the Senate include what are possibly the most contentious spending measures – the Defense Department and Labor-HHS-Education spending bills. With rancorous debate and an abundance of amendments typifying Senate appropriations proceedings, such as debate on the recently completed Interior-Environment funding bill, legislative wrangling over Defense and Labor-HHS-Education appropriations bills could push lawmakers to the end of their one-month extension under the CR.

Exacerbating defense-spending matters are current foreign policy debates over troop levels in Afghanistan and missile defense in Eastern Europe. The Obama administration also has several demands for the Senate's defense bill, including increased funding for Afghan security forces and the removal of funding for the C-17 transport plane. To date, Congress has largely acquiesced to the administration's defense-spending demands, including cancellation of the F-22 fighter jet, the VH-71 presidential helicopter, and the F-35 alternate engine; the matters over funding for security forces and the C-17 represent some of the remaining defense-spending battles the administration has left to fight. On the other hand, Obama's record on gaining congressional approval for domestic spending demands is less impressive.

Of the five appropriations measures passed by both houses, but that have yet to be reconciled, sizeable differences exist between House and Senate versions of the Agriculture, Energy & Water, Homeland Security, and Transportation-HUD bills. This includes an $800 billion difference between Agriculture bills, a $1 billion difference between Energy & Water bills, a $1.7 billion difference between Homeland Security bills, and a $1.1 billion difference between Transportation-HUD bills.

Despite these sizable obstacles, congressional leaders believe that one month is enough time to sort through all the differences over spending measures. If they are not able to finish before the CR runs out, Congress could either pass another CR or lump all the remaining bills together and pass them at once – what's known as an omnibus appropriations bill. Omnibus spending bills are less transparent and deny the media and watchdogs groups the proper scrutiny of specific spending measures. It is also more likely that legislators can insert controversial provisions at the last second because of the expedited timeframe these bills are usually considered under.

## New Policy Marks First Step in Narrowing State Secrets Privilege

On Sept. 23, the Justice Department released a new policy on use of the state secrets privilege. The policy, which parallels several related recommendations from the *Moving Toward a 21st Century Right-to-Know Agenda*, will be implemented on Oct. 1. The long-expected announcement drew mixed reactions from public interest groups, ranging from support to criticism that the policy offers little more than a rehash of the heavily criticized policies of the Bush administration.

Since the Obama administration took power, public access advocates have been vocally disappointed with the lack of change in the use of state secrets claims in court. Over the course of several months, the Obama administration has repeatedly reaffirmed the Bush administration's claims of state secrets in several cases. This has happened despite repeated promises to reform the use of the privilege, as well as June comments by Attorney General Eric Holder that a new policy was imminent.

However, some advocates say the administration took a sizable step toward delivering on its campaign promises with the new policy that establishes several new internal checks and balances over the use of state secrets. At the same time, even supporters of the administration's actions acknowledge that the new provisions should only serve as a first step.

Among the improvements, the new policy establishes:

- A new review process within the Justice Department that concludes with the Attorney General (AG) making a personal recommendation on use of the privilege. Before a state secrets claim reaches the AG, it is first reviewed by the Assistant Attorney General (AAG), which was where the process often concluded in the past. After the AAG's recommendation is reviewed by a review panel, it then passed to the Deputy Attorney General, who sends it to the AG for final review.
- A requirement that agencies must produce detailed evidentiary submissions to the Justice Department when making a state secrets claim.
- Limits on the administration's ability to seek dismissal of an entire case based on the application of the privilege, narrowing nondisclosure to evidence of strict national security concern.
- A commitment to only use the privilege for legitimate national security reasons and not to conceal illegal activities, embarrassment, or to delay the release of information that would not reasonably be expected to cause significant harm to security. "Significant harm" is a new standard, though it remains undefined in the policy.
- Periodic reports on the use of the privilege from the Justice Department to Congress.
- Inspector general oversight of credible allegations of government wrongdoing, regardless of whether the privilege is invoked.

A number of these provisions appear to be exactly what public interest advocates asked the administration for in the *Moving Toward a 21st Century Right-to-Know Agenda* report, which was endorsed by more than 350 organizations and individuals from across the political

spectrum, including OMB Watch. For instance, the report called for a declaration that state secrets would not be invoked to hide misconduct. The new policy includes such a statement, along with a requirement that all misconduct claims be referred to the appropriate Inspector General's office.

The recommendations also called for reporting to Congress, which the policy also contains. The recommendations sought a provision indicating that the privilege only be used as a last resort, which the new "significant harm" standard appears intended to do. Other items from the recommendations also made it into the new policy.

However, the new policy fails to meet one key test from the recommendations: judicial oversight. The report included several recommendations on allowing *in camera* review by judges, discovery of non-privileged material, and creation of substitute materials. Though the narrow tailoring of the new policy implies the discovery of non-privileged information, none of the other points appears in the policy.

The Justice Department press release that accompanied the new policy states, "In order to facilitate meaningful judicial scrutiny of the privilege assertions, the Department will submit evidence to the court for review." However, the new policy contains no such prescription, leaving it open to abuse, critics claim. There are rumors that a forthcoming report from a state secrets task force will provide additional details about judicial oversight issues. If so, it is unclear why specific policies or procedures were not included in the policy memo on Sept. 23.

Some critics were upset that the new policy will only apply to new cases, not existing ones. Some noted that the policy was released at the same time that oral argument on a motion for summary judgment in the state secrets case of *al-Haramain v. Obama* was scheduled.

Other critics worry that the policy release is an effort by the administration to forestall larger legislative reforms on state secrets. However, the administration, thus far, has not taken a position on any of the pending legislation, and the policy does not appear to have diminished interest in state secrets legislation from key leaders in Congress. Currently, there is legislation in the House, (H.R. 984, introduced by Rep. Jerrold Nadler (D-NY)) and the Senate (S. 417, introduced by Sen. Patrick Leahy (D-VT)) to curtail the application of the state secrets privilege. Primarily, the bills direct the White House to submit information it deems to be protected by the privilege for *in camera* review. It also prohibits the outright dismissal of a lawsuit without independent review of the evidence. Nadler has specifically indicated that the administration policy is helpful but that legislation is still needed.

Leahy described the new policy as "moving in the right direction to better control assertions of the state secrets privilege." However, Leahy also noted, "I remain especially concerned with ensuring that the government make a substantial evidentiary showing to a federal judge in asserting the privilege, and I hope the administration and the Department of Justice will continue to work with Congress to establish this requirement."

Public interest advocates moved quickly to encourage congressional action to lock in the procedural changes contained in the administration's policies and to do more to ensure proper oversight of the privilege's use. A letter co-signed by seven groups, including OMB Watch, was sent to the chair and ranking member of the House and Senate Judiciary Committees. The letter noted, "Legislative reform is still vitally needed to address a variety of problems not addressed in the new executive policy."

## Congress Braces for Patriot Act Battle

On Sept. 22, Congress began hearings on USA Patriot Act provisions that are set to expire on Dec. 31. Some legislators and the president are seeking to retain controversial portions of the act, albeit in modified form.

The Patriot Act was initially passed in 2001 in an environment of heightened fear after the September 11 terrorist attacks. The legislation broadened the authority of the Federal Bureau of Investigation (FBI) to issue national security letters (NSLs), expanded access for law enforcement to personal and business records, and enabled searches of personal and business property without the knowledge of the occupant. Despite courts deeming some portions of the law unconstitutional and Congress amending other sections, several of the original problems identified by civil liberties and government openness advocates remain.

Three key provisions in the act, among the most controversial, are expiring at the end of 2009. However, the Obama administration wants to preserve them. These are the provisions for roving wiretaps to monitor suspects who may try to avoid detection by switching mobile numbers, the ability to obtain business records of national security targets from third parties, and the ability to track lone-wolf suspects who may be planning attacks without belonging to a terrorist group.

Assistant Attorney General Ronald Weich wrote to Congress on Sept. 14 identifying these provisions as "important authorities." Weich indicated that the administration would consider modifications so long as they do not undermine the effectiveness of the powers. Some who questioned these powers have criticized President Obama for his support of the Patriot Act provisions despite his campaign platform, which opposed much of the legislation. However, others who also raise concerns about these powers, such as the American Civil Liberties Union (ACLU), interpret this letter as an announcement that the administration is open to reform.

Congress has already started the debate over reforming the law. Sens. Russell Feingold (D-WI) and Richard Durbin (D-IL) introduced the Justice Act on Sept. 17, which some groups, such as the Electronic Frontier Foundation, were quick to support. The bill would preserve the three controversial provisions but add new checks and balances, which would also cover NSLs. Further, the Justice Act would repeal a provision intended to provide legal immunity to telecom companies that may have illegally assisted the National Security Agency's warrantless wiretapping program. Even if Weich's letter is a signal that the administration is open to reform, Obama was a supporter of telecom immunity when he was a senator. Thus, it is uncertain whether he would veto the Justice Act if it is passed with the immunity repeal.

Sen. Patrick Leahy (D-VT) has introduced a separate bill, called USA Patriot Act Sunset Extension Act of 2009 (S. 1692). This legislation includes some oversight and limitations on the expiring provisions but does not include the privacy safeguards and restrictions on non-disclosure provisions that the Justice Act does. The Leahy bill is set to be marked up on Sept. 30, at which time provisions from the Justice Act could be adopted.

The national security letter provision is not set to expire at the end of 2009; however, both pieces of legislation include new restrictions on NSLs. Included in these reforms are increased standards for issuance, limitations on the types of information that can be obtained by NSLs, limitations on non-disclosure orders for NSLs, and limits on emergency use of NSLs.

In the House, Reps. Jerrold Nadler (D-NY) and Jeff Flake (R-AZ) had introduced the National Security Letters Reform Act of 2009 (H.R. 1800) on March 30. That legislation would increase judicial oversight of NSLs by limiting the gag order covering the letters to 30 days and requiring that FBI requests for extensions of gag orders be made to a district court within any district that the investigation is taking place. The legislation also requires that the FBI specifically demonstrate how lifting the gag order would endanger evidence, the safety of an individual, or the national security of the United States. Moreover, anyone receiving an NSL would have the right to petition a court to modify or set aside the letter or to suppress the evidence gathered as a result of the letter. That bill has yet to move out of committee.

Other areas that public interest groups have complained about are not addressed by the reauthorization bills. In March, the ACLU issued a report calling for reform of the Material Support Statute that criminalizes various activities, regardless of whether they are intentionally meant to further terrorist goals. Opponents of the material support statue complain that the provisions have reduced humanitarian aid to the Middle East as charities worry about possible prosecution if some individuals helped are in some way connected to terrorism. Also, the ACLU has sought to remove the ideological exclusion section of the law, which denies admission to foreign nationals who support political or social groups that endorse acts of terrorism.

## Companies Required to Report Greenhouse Gas Pollution

Beginning in 2010, thousands of businesses around the country will have to track their greenhouse gas emissions and report them to the U.S. Environmental Protection Agency (EPA), according to new agency rules. The information collected by EPA will be publicly available and used to inform policies to reduce these emissions and protect against the worst impacts of climate change.

On Sept. 22, the EPA released its final rule, required by Congress, creating a greenhouse gas (GHG) registry that will compile the emissions data from the largest emitters across the economy. EPA expects the new registry will track 85 percent of GHG emissions and cover 10,000 facilities. With a threshold of 25,000 tons, only the largest emitters will be required to monitor and report. Covered facilities must begin tracking their emissions on Jan. 1, 2010, and report them every year, beginning in 2011. The final rule also notes that under Clean Air Act

authority, companies that fail to monitor or report their emissions could be subject to enforcement action, including fines up to $37,500 per day per violation.

Soon after the European Union initiated its emissions trading plan in 2005, the price of carbon crashed. The E.U. did not have accurate emissions data, which reduced the effectiveness of its cap-and-trade program. Congress is considering a similar program, and policymakers hope that accurate and consistent monitoring will help prevent a similar price crash.

**Potential Benefits of the Registry**

Transparent, public data on emissions allows the public to hold polluters accountable for the cost of the pollution. Citizens, community groups, and labor unions have previously made use of such information to obtain pollution reductions from companies, even without government regulation. Such negotiations with polluters will be informed by the data collected in the GHG registry. The information in the GHG registry could also drive new technologies that reduce emissions. The data could also allow businesses to track their own emissions and compare them to similar facilities and help in identifying ways to reduce emissions.

The Toxics Release Inventory (TRI), another program that requires reporting of pollution by individual facilities, has seen much success in prompting voluntary reductions of toxic pollution since the program's inception in the late 1980s. Facility operators frequently first learned of their toxic releases through disclosure under TRI. The database allows governments and technology vendors to identify potential sources for reductions.

The damage to a company's reputation resulting from public awareness of its pollution is another motivator for voluntary pollution reductions. Such a dynamic is expected to be present under the GHG reporting program as well.

In its analysis of the impact of the mandatory reporting rule, EPA cited these mechanisms for promoting voluntary reductions, as well as the expanding use of eco-labels that could inform consumers by rating a product based on emissions data from the GHG registry.

**Reaching the Registry's Potential**

The GHG reporting rule creates a registry that will also be capable of significantly aiding the nation's climate change policies. However, many questions remain over the implementation of the rule, which will largely determine to what extent the registry reaches its potential to assist the climate change battle.

EPA will require electronic reporting of emissions, which should reduce the reporting burden on companies while increasing the accuracy of reports. However, many of the covered facilities have little or no experience with such reporting, and agency training and outreach will need to be sufficient to head off preventable reporting errors.

The agency will likely gather public comments later in 2009 on the design of the electronic reporting system. Although such plans can get very technical, they are important to the overall usefulness of the database. This basic architecture will determine what kinds of analyses can be done once the data start coming in and how hard it will be to expand the database in future years.

What EPA does with the data is another looming issue. The agency's first release of data will not occur until 2011, and there will only be one year's worth of emissions data at that time. However, there are many other data sets – such as voluntary registries like the Carbon Disclosure Project, which already possess years of emissions data – that can be compared to and compliment EPA data. If EPA provides the data in useful formats, then outside groups should be able to combine them with other data sets, map the data, or otherwise manipulate the information. To maximize the effectiveness of the program, open government advocates have asked that the public have access to information beyond the raw emissions numbers, extending to information on the way facilities track their emissions and what quality control plans are in place.

Another concern raised by transparency advocates is the potential to deny disclosure of important data under trade secrets protections. The final reporting rule does not elaborate on how the agency will handle claims that information being reported is confidential business information and therefore must not be disclosed to the public. Rather, the agency intends to seek additional comment from the public before it decides how to address trade secrets allegations.

This registry could become one of the most anticipated and broadly used environmental data sets ever collected by the government. The potential climate policies impacted by the data include research and development initiatives, economic incentives, new or expanded voluntary programs, adaptation strategies, emission standards, a carbon tax, and a cap-and-trade program. The degree of usefulness of the reporting system will be determined by decisions made during the months ahead.

## Sugar Company Ignored Explosion Hazards, Investigation Concludes

The U.S. Chemical Safety Board's (CSB) investigation into the cause of a fatal 2008 explosion at a Georgia sugar refinery concludes that the Imperial Sugar Company and its managers did not take corrective actions to prevent dust explosions, even though they knew of potential hazards. The initial blast and subsequent dust explosions throughout the plant killed 14 workers and injured 36.

On the evening of Feb. 7, 2008, an enclosed, unventilated conveyor belt under two storage silos exploded in the Port Wentworth, GA, plant owned by Imperial Sugar. According to the Investigation Report produced by the CSB:

> "The explosion lofted sugar dust that had accumulated on the floors and elevated horizontal surfaces, propagating more dust explosions through the buildings. Secondary dust explosions occurred throughout the packing buildings, parts of the refinery, and the bulk sugar loading buildings. The pressure waves from the explosions heaved thick concrete floors and collapsed brick walls, blocking stairwell and other exit routes."

The report lists a variety of causes of the explosion, including poor design and maintenance of equipment, poor "housekeeping practices," and inadequate emergency evacuation plans and communications. Although dust collection systems and ducts to transport the collected dust existed throughout the plant, a review of the dust-handling system conducted just prior to the explosion showed "the dust collection equipment was in disrepair, and some equipment was significantly undersized or incorrectly installed. Some dust duct pipes were found to be partially, and in some locations, completely filled with sugar dust."

The CSB is an independent federal agency that investigates industrial chemical accidents, reviews safety codes and regulations, and makes recommendations based on its investigations. It does not have the power to issue citations or fines.

The agency began investigating the incident the day after the accident and worked with various state and local agencies and Imperial Sugar personnel. The 19-month-long investigation was headed by CSB's John Vorderbrueggen. In the press release announcing the final report, Vorderbrueggen said, "Imperial's management as well as the managers at the Port Wentworth refinery did not take effective actions over many years to control dust explosion hazards – even as smaller fires and explosions continued to occur at their plants and other sugar facilities around the country."

The report notes that dust explosions have occurred in sugar plants since about 1925 and that Port Wentworth personnel were worried about the possibility of sequential explosions as far back as 1967, according to internal correspondence. (Imperial bought the Georgia facility in December 1997.) Despite a series of fires over nearly 40 years in Imperial Sugar plants, the CSB wrote, "that the small events and near-misses caused company management, and the managers and workers at both the Port Wentworth, Georgia, and Gramercy, Louisiana, facilities to lose sight of the ongoing and significant hazards posed by accumulated sugar dust in the packing buildings. Imperial Sugar management and staff accepted a riskier condition and failed to correct the ongoing hazardous conditions, despite the well-known and broadly published hazards associated with combustible sugar dust accumulation in the workplace."

In 2006, the CSB recommended to the Occupational Safety and Health Administration (OSHA) that OSHA issue a combustible dust standard generally for industries that face dust-related workplace hazards. OSHA did not begin a rulemaking but issued a National Emphasis Program (NEP) in 2007 that directed federal inspectors to increase inspections at plants that could be subject to dust explosions and that were already subject to certain OSHA requirements. The NEP does not impose a new combustible dust standard, however, or impose additional requirements on industry.

In 2008, OSHA issued 211 citations for violations at the company's Georgia and Louisiana plants, resulting in $8.7 million in initial fines, according to a Sept. 24 Associated Press article. The company is appealing the fines, and OSHA has set a hearing to resolve the issue for May 2010, according to a *Savannah Morning News* article on April 4. The article also notes a 2008 study by the Senate Health, Education, Labor and Pensions Committee criticizing OSHA's tendency to collect a significantly lower level of fines than the amounts initially levied against violators.

OSHA announced on April 29 that it would begin a combustible dust standard rulemaking as the CSB urged the agency to do in 2006. In the press release announcing the intent to issue an advanced notice of proposed rulemaking (ANPRM), Secretary of Labor Hilda Solis said, "OSHA is reinvigorating the regulatory process to ensure workers receive the protection they need while also ensuring that employers have the tools needed to make their workplaces safer." The release specifically cites the CSB's consistent message that a broad combustible dust standard is necessary.

On Sept. 25, OSHA submitted the ANPRM to the Office of Information and Regulatory Affairs for review. The ANPRM is expected to cover issues such as data collection, dust hazard assessment, and a discussion of different regulatory approaches. The rule would seek to broadly establish a combustible dust standard potentially across metal, wood, plastic, rubber, coal, flour, sugar, and paper industries. The submission summary notes OSHA's intent to have a stakeholders' meeting in December. OSHA is notoriously slow to produce rulemakings, and the breadth of the industries covered could mean it will be years before a standard is completed. The CSB report says that OSHA's NEP for combustible dust will remain in place until a new standard is complete.

In the meantime, the CSB made a series of recommendations to Imperial Sugar, its insurance company, and others, encouraging them to use similar regulations in place for other industries with comparable hazards to reduce the risk of major accidents. The recommendations to Imperial Sugar include implementing a corporate-wide "housekeeping program" to control dangerous dust accumulation, developing training materials that focus on dust hazards, and improving emergency evacuation policies and procedures.

The Georgia plant was rebuilt and began operating again in June.

## Agencies and Courts Beat Congress to the Punch in Climate Change Fight

Unprecedented regulatory proposals and a paradigm-shifting federal court ruling are converging to put big polluters on the hook for their contributions to global warming. The developments raise the stakes for Congress as it considers whether to curb greenhouse gas emissions and how to do so.

On Sept. 21, the U.S. Second Circuit Court of Appeals ruled that state and local governments and other groups can sue individual power companies over heat-trapping greenhouse gas emissions. Eight states, the city of New York, and three conservation groups brought a public nuisance suit against six major coal utilities.

The decision overturned that of a lower court, which had said the issue was too complex and inherently political to be decided judicially. The Second Circuit sent the case back to the lower U.S. District Court for the Southern District of New York. The district court must now decide on the merits of the case and issue remedies, if appropriate.

Environmentalists are calling the decision a game changer. The ruling will open the door for other state and local governments or environmental groups to sue major emitters of greenhouse gases.

Polluters could increasingly feel themselves pinned between litigation and oncoming federal regulations being developed by the Obama administration. The threat of tort lawsuits and prescriptive requirements imposed by government agencies may compel polluters to reduce their carbon dioxide emissions.

During the week of Sept. 28, the U.S. Environmental Protection Agency (EPA) is expected to announce the first-ever proposed limits on carbon dioxide emissions from stationary sources such as power plants, oil refineries, and other large industrial facilities, according to BNA news service (subscription required).

Insiders say EPA will require any facility meeting an annual 25,000-ton emission threshold to install best available technologies for limiting emissions of carbon dioxide, the most abundantly emitted greenhouse gas.

EPA usually caps pollution at 250 tons, but carbon dioxide is emitted in much greater quantities than most other pollutants. The tailored limit should quiet concerns voiced by opponents of carbon dioxide regulation who claim EPA would impose requirements on minor emitters like small retailers, schools, or churches.

The Obama administration has already released a proposal attempting to tackle the other major source of carbon dioxide emissions – vehicles. On Sept. 15, EPA and the National Highway Traffic Safety Administration (NHTSA) jointly issued a proposed regulation covering carbon dioxide emissions from passenger cars and light-duty trucks.

EPA's part of the rule would – for the first time ever – set a limit on carbon dioxide emissions from vehicles. The average car in a manufacturer's line of vehicles would be allowed to emit no more than 295 grams of CO2 per mile in 2012. The rule would ratchet the limit down to 250 grams per mile by 2016.

To stay within the limits, manufacturers would be forced to improve vehicle fuel efficiency under the existing Corporate Average Fuel Economy (CAFE) program administered by NHTSA. CAFE

standards set miles-per-gallon requirements on cars and trucks. NHTSA's portion of the rule revises CAFE standards to match EPA's proposed emissions limits. The new standards will require the average car to travel 30.1 miles on a gallon of gas in 2012 and 35.5 miles by 2016.

The agencies published the rule in the *Federal Register* on Sept. 28 and will accept public comments through Nov. 27. The agencies will also hold three public hearings on the proposal in Detroit, Los Angeles, and New York City.

EPA is pursuing both the vehicle and stationary source regulations using its authority under the Clean Air Act. In 2007, the U.S. Supreme Court ruled that the EPA must determine whether greenhouse gases should be considered a pollutant under the act. The act has previously been used to curb more traditional forms of pollution like smog and soot. In April, EPA proposed a formal finding declaring greenhouse gas emissions a danger to public health and welfare. If EPA finalizes the endangerment finding, which it is expected to do soon, it will obligate the agency to finalize regulations on greenhouse gas emissions, such as those under development now.

The proposed limits on both vehicles and stationary sources come on the heels of EPA's establishment of a greenhouse gas registry. Beginning Jan. 1, 2010, major greenhouse gas emitters will be required to keep track of their emissions, the agency announced Sept. 22. After receiving reports from facilities, EPA will make the data publicly available on its website. (Read more about the greenhouse gas registry.)

Advances on the regulatory and judicial fronts stand in stark contrast to the lack of progress in Congress, where climate change legislation has taken a back seat to health care reform and other priorities.

In June, the House passed its version of a cap-and-trade bill, which would set a national limit on carbon dioxide emissions and create an economy-wide system in which polluters buy, sell, and trade emissions credits. However, action has stalled in the Senate. Sens. Barbara Boxer (D-CA) and John Kerry (D-MA) are expected to introduce a companion cap-and-trade bill during the week of Sept. 28, according to ClimateWire, but Democratic leaders have said a vote on the bill will likely be delayed until 2010.

The legislation holds the potential to dramatically alter the emerging system in which greenhouse gas emissions would be regulated by lawsuits and sector-specific rules. The House bill would prohibit EPA from finalizing any greenhouse gas regulations using its Clean Air Act authority. If passed, the bill would scuttle both the stationary source and vehicle emissions regulations. Instead, the agency would help to administer the cap-and-trade program.

It is less clear how passage of cap-and-trade legislation would affect tort lawsuits filed in the wake of the Second Circuit decision. Passage of the bill could provide polluters with the legal cover to avoid liability.

The cap-and-trade system would be partially dependent upon EPA's greenhouse gas registry, which is unaffected by any pending legislation.

Unlike regulatory approaches, cap-and-trade legislation would fit emissions reductions into a broader framework. Congress faces a choice: It could act itself by mandating a comprehensive, market-based, and tightly controlled emissions-reduction regime, or it could let EPA continue with more familiar command-and-control regulations and preserve a role for the courts, both of which would yield less predictable results.

## White House Moves to Limit Lobbyists on Federal Advisory Committees

The White House announced Sept. 23 that it informed executive branch agencies and departments that federally registered lobbyists are not to be appointed to federal agency advisory boards and commissions. This is the latest attempt at removing the influence of federally registered lobbyists within the executive branch.

The blog post announcing the policy was written by Norm Eisen, Special Counsel to the President for Ethics and Government Reform, and did not clearly ban federally registered lobbyists from advisory committees. Instead, Eisen used rather ambiguous language, saying it is "our aspiration that federally-registered lobbyists not be appointed to agency advisory boards and commissions." Many nonprofit advocates say this narrow focus on federally registered lobbyists remains misguided, and some are concerned that qualified experts will be excluded from participating in advisory panels.

Executive branch agencies use Federal Advisory Committees (FACs) as a means of furnishing expert advice, ideas, and diverse opinions to the government on a variety of public policy matters. The Federal Advisory Committee Act (FACA) was enacted to ensure that the advice to government is open, time-limited, and objective. FACA requires that committees be fairly balanced in their views, that the public is given notice of meetings, and that advice given to government is properly disclosed. Information about people serving on FACs must also be disclosed. According to the General Services Administration, in Fiscal Year 2007, 52 government agencies used 915 advisory committees with a total of 65,000 members.

Eisen promoted the policy statement as "the next step in the President's efforts to reduce the influence of special interests in Washington." President Obama's Jan. 21 executive order on ethics banned federally registered lobbyists – for two years – from working in an agency they previously lobbied, but the order did not apply to advisory boards. Eisen's post states, "Keeping these advisory boards free of individuals who currently are registered federal lobbyists represents a dramatic change in the way business is done in Washington."

Craig Holman of Public Citizen told *The Hill* that it "would be a natural extension of the existing revolving-door prohibitions that prevent administration officials from working on issues on which they recently lobbied. It makes sense that the same conflict of interest concerns would apply to the panels, which administrations often rely upon to develop policy."

This decision will likely affect the make-up of some agency committees, and some experts suggest that it may negatively impact discussions about important policy matters. Others note that the policy could backfire and not reduce the influence of special interests but reduce useful information that is publicly logged.

A way around the administration's "suggestion" is to have someone who is not a federally registered lobbyist, but who is from the same industry that such a lobbyist would represent, sit on an advisory panel. This would meet the White House's newest objective but certainly would not reduce the influence of special interests in the executive branch.

The "suggestion" also provides no distinction between lobbyists working for nonprofit public interest organizations and those working for for-profit concerns. Additionally, the "suggestion" would mean the expertise that the federally registered lobbyist might have would be lost to the committee. Finally, the "suggestion" does not address the fact that many agencies already provide online disclosure of FAC members or that some have strict guidelines about conflict of interest.

As occurred after the order was issued on executive branch hiring, many observers questioned whether or not there would be an increase in the number of lobbyists deregistering. Recently, Reuters reported that restrictions on lobbyists have resulted in "unexpected consequences with some lobbyists giving up their formal registrations and finding other ways to influence policy as they try to maintain access to key agencies or hope for future government jobs."

Additionally, lobbyists on the committees are not the only ones who exert influence within government. For example, those who make large contributions to lawmakers have not been included in attempts to reduce influence on government agency decisions. Influence exists, whether it comes from a federally registered lobbyist or those who do not quite meet the definition of "lobbyist."

Currently, there is no other specificity or guidance related to the new policy besides Eisen's blog post. Therefore, whether or not the announcement about lobbyists on advisory committees should be taken as policy is questionable at this time.

Government watchdogs note that FAC panels may need to be reformed in a way that can allow lobbyists with subject-matter expertise to serve while addressing existing deficiencies. For example, during the 110th Congress, the House passed a bill that would have resulted in stricter conflict of interest disclosure requirements on advisory committee members and prohibited the practice of outsourcing advisory duties. Open government advocates supported those disclosure requirements and noted that making public the identities of advisory committee members would go a long way toward neutralizing the special interest effect on advisory committees. The bill died in the Senate.

In November 2008, a diverse group of regulatory experts and advocates coordinated by OMB Watch made the following recommendations to the incoming Obama administration that would strengthen FACA and the advisory committee system in several ways:

- Require agencies to appoint to scientific advisory committees individuals from the disciplines relevant to the charge of the advisory committees. Such appointments should be made without consideration of political affiliation or activity.
- End the practice of hiring private contractors to develop advisory committees to avoid FACA requirements. This practice has been used by some agencies to claim under a legal loophole that they do not have strict management over the committees.
- Extend FACA requirements to all subgroups of covered advisory committees.
- Make the processes by which committees operate and by which their members are selected fully transparent.

## Nonprofits Active in Efforts to Prevent Use of Courts to Discourage Public Participation

Nonprofit organizations have recently been active in efforts to prevent the use of lawsuits designed to discourage public participation. Nonprofits across the country have played a role in the campaign to eliminate Strategic Lawsuits Against Public Participation (SLAPPs). These efforts coincide with a pending legislative proposal to combat SLAPP suits on the federal level.

SLAPPs are "meritless lawsuits brought on the basis of speech or petition activity" and "silence and punish those who engage in public participation, chilling speech that is essential to the functioning of our democracy and to the public interest," according to the Federal Anti-SLAPP project.

SLAPPs are increasingly getting more attention due to the chilling effect that they have on the speech rights of individuals and organizations. Both national and local nonprofits are active in the anti-SLAPP movement.

Many organizations have taken the lead in bringing this issue to a larger audience. The Citizen Media Law Project has blogged about a case involving an ex-congressman who sued an individual for defamation after a court ruling revealed the individual's identity. That individual had commented anonymously on the ex-congressman's online news article. The case was dismissed as a result of New York State's anti-SLAPP law.

Nonprofits are also involved in helping to defend against SLAPPs. The Electronic Frontier Foundation (EFF), the American Civil Liberties Union (ACLU), the First Amendment Project, Public Citizen, and the California First Amendment Coalition are some of the organizations that are assisting individuals and organizations when SLAPPs are filed. For example, EFF has represented individuals and obtained dismissals by citing state anti-SLAPP statutes in cases involving anonymous posting on blogs and websites. Similarly, the ACLU represented the sponsor of a successful California ballot initiative that made marijuana use Santa Barbara's lowest law enforcement priority after the city sued the initiative sponsor.

The City of Santa Barbara filed suit in the marijuana case challenging the constitutionality of the initiative, which was passed by two-thirds of Santa Barbara voters. The ACLU argued that,

"While the City is free to challenge the duly enacted initiative – however baseless its claims – it cannot name [the initiative sponsor] as the defendant solely because she exercised her right to sponsor a petition that the voters enacted. California law protects defendants like [the initiative sponsor], sued in their capacity as participants in the political process, from strategic lawsuits against public participation ("SLAPP")."

The nonprofit organizations involved in the anti-SLAPP movement have highlighted various methods to defend against SLAPPs. Often, the first step is to determine if others have been hit with the same SLAPP and, if so, to strategize together. If the SLAPP was filed due to an individual's vocal opposition, it is common for the filer to sue all opponents, according to the California Anti-SLAPP Project. Informing the media and getting positive coverage is another technique used to defend against SLAPPs. SLAPPs are also a way to retaliate against public interest lawsuits, so organizations that are regularly involved in such suits should be prepared for such actions. Additionally, having other organizations join a lawsuit can be helpful in preventing a SLAPP counterclaim. "Often, the mere existence of several groups opposing a single project or opponent can add a note of importance to your lawsuit," according to the California Anti-SLAPP Project.

Individuals and organizations can prevent becoming a SLAPP target by being knowledgeable about anti-SLAPP statutes, checking homeowner and business insurance policies and being aware of what is covered, making sure that all statements are factually accurate, and seeking legal advice if there is uncertainty concerning whether planned written or oral statements may subject the individual or organization to a lawsuit.

On the federal level, Rep. Steve Cohen (D-TN) plans to sponsor anti-SLAPP legislation during the 111th Congress. The Citizen Participation in Government and Society Act of 2009 will prevent individuals or groups from using the federal court system to intimidate or discourage citizens from public participation. Many nonprofit groups have signed on as supporters of the proposed legislation, including OMB Watch, the Natural Resources Defense Council, the Alliance for Justice, Public Citizen, and the Center for Science in the Public Interest. Cohen also sponsored anti-SLAPP legislation in Tennessee when he was a state senator.



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

Subscribe | Blog | Donate

The Watcher

October 14, 2009 Vol. 10, No. 19

## In This Issue



---

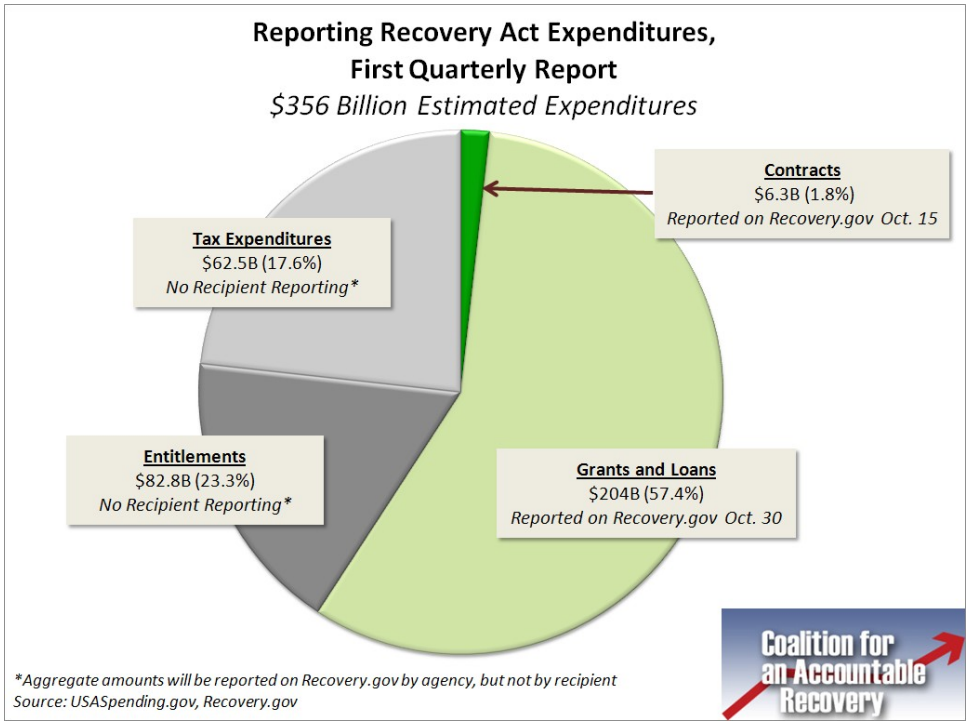
## First Round of Recovery Act Data Expected Oct. 15

On Oct. 15, the Recovery Accountability and Transparency Board (Recovery Board) will begin releasing on Recovery.gov the first round of Recovery Act recipient reporting to the public.

The reporting of this information, including spending data and jobs numbers, is the culmination of a complex process that started in February. Never before have recipients of federal spending reported on their use of the funds in such a timely or transparent manner, so the release of the data alone will mark a historic moment in bringing greater accountability to federal spending. At the same time, the data published on Recovery.gov will likely leave many transparency advocates pushing for more information accompanied by higher data quality.

The recipient reports, filed between Oct. 1 and Oct. 10 (with a ten-day grace period announced Oct. 10), will be released by the Recovery Board in two tranches: The first will cover recipient reports about federal contracts that have been received and will be released through Recovery.gov on Oct. 15; the second will cover recipient reports on federal grants and loans that have been received and will be released through Recovery.gov on Oct. 30. Between $6 billion and $12 billion, or about one to two percent of the $787 billion Recovery Act, will be reported by recipients on Oct. 15. On Oct. 30, some $204 billion in grants and loans will be reported.

The Coalition for an Accountable Recovery, which OMB Watch co-chairs with Good Jobs First, has compiled a set of charts and tables that describe the dimensions of the expected data. These figures are estimates drawn from federal spending data sources USAspending.gov and FPDS-NG, but data on how many recipients will report and the dollar amounts of awards they report will remain a mystery to the public until the data are released in the latter half of October.




*(click to enlarge)*

According to the reporting provisions in the law, a great deal of Recovery Act information does not have to be reported by recipients to the federal government. Most prominently, the $288 billion in personal and corporate tax cuts, such as the Making Work Pay tax cut, does not have to be reported. Similarly, recipients of the $224 billion in entitlement spending, such as the increase in Social Security spending and the unemployment insurance expansion, also do not have to report on their Recovery Act funds. Ultimately, some $512 billion of the stimulus, representing almost two-thirds of all Recovery Act spending, will not be reported by recipients at any point.

Of the remaining $275 billion, which will be distributed though contracts, grants, and loans, details will be reported by recipients. However, of that amount, only a small fraction has been

distributed thus far. While agencies have allocated funding and awarded grants, contracts, and loans, states and other recipients have yet to draw down federal funding. In fact, contract spending, which is what will be reported Oct. 15, represents less than four percent of estimated Recovery Act spending to date, constituting but a sliver of all released Recovery Act funds.

Additionally, the data that will be reported Oct. 15 is not representative of the Recovery Act as a whole. Most of the contracts that are on Recovery.gov and USAspending.gov now are Energy Department (DOE) contracts, accounting for almost half of current Recovery Act contract spending to date. Most of the DOE contracts will go to facilities, such as the Hanford nuclear facility in Washington. Hanford, which received the largest set of contracts, has estimated these contracts have generated approximately 3,000 jobs related to Recovery Act cleanup along the Columbia River, accelerating demolition of the plutonium finishing plant, retrieving solid radioactive waste, and other tasks.

Because the total dollar amounts of contracts is a small fraction of the entire Recovery Act, it is expected that job counts in the reports will also represent a small fraction of the ultimate number of jobs that will be created by the stimulus.

However, there are also two other reasons why recipient report job numbers will be small in comparison to the millions of new and sustained jobs touted by the framers of the Recovery Act. First, these data will not have direct information from the ultimate recipient of Recovery Act funds. That is, only direct, or "prime," recipients will report job counts, estimating the number of jobs created by the multiple tiers of subrecipients below them. Second, these data will only cover direct jobs and omit employment created by the newly enhanced buying power of recipient employees, the so-called "multiplier effect." A parallel effort of job count estimation is being conducted by the Council of Economic Advisers, which reported in September that "slightly more than 1 million jobs" had been created directly and indirectly at the time it released its first quarterly report on the Recovery Act.

In September, OMB Watch highlighted potential data quality issues in Recovery Act reporting and how bad data could affect the usefulness of the information. With tens of thousands of recipients reporting through a new, unfamiliar system, even a small amount of user error could result in thousands of flawed reports. Indeed, recent evidence seems to indicate that some recipients are having trouble with the first reporting deadline, as on Oct. 10, the last day for filing reports, the Recovery Board pushed the reporting deadline back by ten days to give recipients more time to collect and report their data.

Data quality will also be affected by the small window of opportunity for prime recipients and federal agencies to review and correct omissions and errors. With potentially tens of thousands of reports, it remains unlikely that federal agencies will have time to thoroughly inspect every recipient report within the 20 days allotted to them for data review. Additionally, there will be no reconciliation between recipient reports, federal agency reports, and Treasury account records, leaving what will likely be large discrepancies in different sources of spending information.

Despite these data quality issues, there remains the significant problem of the data trail disappearing after money changes hands twice. The Office of Management and Budget (OMB) requires only prime recipients and their first tier of subrecipients to report on the use of Recovery Act funds. For example, the federal Department of Transportation might grant funds to the Texas Department of Transportation. The Texas DOT could then give money to Dallas for a bridge repair project. Dallas would likely hire contractors to execute the work, but because the contractor hired by Dallas is a second-tier subrecipient, citizens and the federal government will have no information on who the contractor is or the value of the contract.

Because so little Recovery Act funding is available for reporting, the Oct. 15 publication date will likely shed little light on the how well Recovery Act funds are being spent. The public will, however, be given a window on how the recipient reports can be analyzed and obtained through the new Recovery.gov website. Even if the reporting system itself works perfectly, the dearth of data and potential quality issues may limit the significance of this first round of recipient report publishing. However, as successive reporting cycles add more and more information, and as the Recovery Board and OMB iron out difficulties with the reporting system, Recovery.gov has the potential to be a powerful instrument of federal spending transparency and accountability.

## Latest TARP Program Poses Significant Conflict of Interest Issues

The Obama administration rolled out a revamped Public-Private Investment Program (PPIP) the week of Oct. 5. The program is designed to accomplish the original goals of the Troubled Asset Relief Program (TARP). According to observers, the program still contains too little disclosure of conflicts of interest among those charged with implementing it.

Despite being created over a year ago, TARP still has not been used to actually alleviate the strain of troubled assets at the heart of the near-collapse of the financial sector. When former Treasury Secretary Henry Paulson came to congressional leaders in 2008 with dire warnings of the collapse of the nation's economy, he argued that resources were needed to purchase toxic assets from many of the nation's leading financial institutions.

After Congress passed a program Paulson advocated, however, the Bush administration shifted course. Instead of purchasing toxic assets, the Treasury Department has used almost half of the committed TARP funding to infuse banks with additional capital, which could be seen as providing relief from the troubled asset symptoms but not providing a cure. The rest of the funding is split between auto industry bailouts, AIG support, small business loans, mortgage modification programs, and Citigroup and Bank of America investments. The fact that jars the most with Paulson's earlier dire warnings is that, to this day, Treasury has yet to even commit about a third of the $700 billion it requested from Congress.

Starting the week of Oct. 5, however, Treasury began to focus more of its attention on TARP and toxic assets by announcing that by the end of the month, PPIP should be operating at full strength. Created in March, the Obama administration designed PPIP as a way to purchase

some of the toxic assets still on the balance sheets of many banks. The PPIP was originally planned as a massive $1 trillion program, with the Federal Deposit Insurance Corporation (FDIC) and the Federal Reserve joining Treasury in helping to finance the effort, though it has since been scaled back. The program would use federal dollars, matched dollar-for-dollar with private money through Public-Private Investment Funds (PPIFs), to purchase the toxic assets. With the toxic assets off their books, financial institutions should be better positioned to loosen up financing in capital markets.

Although the financing system is fairly straightforward, there are still complicated problems within the program related to how to value the assets in question. Previously, financial institutions had to value the assets using the "mark-to-market" rule, by which assets are valued at current market price. In the current economic situation, current market price for these toxic assets is startlingly low, forcing banks to declare losses on the assets. This is the very reason why there is a need for PPIP.

In April, however, thanks to a change in regulations, these institutions were allowed to be a little more creative in how to value toxic assets. Instead of going by current market rates, institutions can value assets at "fair value," which theoretically will be higher than the current, recession-era value. While the rule change has taken some pressure off of financial institutions in the short term, it has an unfortunate effect on PPIP. Now, the administration is left with what many see as a bad choice to make: either purchase the toxic assets at an artificially inflated price (giving the financial sector a nice subsidy in the process) or offer a mark-to-market price and have the financial institutions refuse to let go of their toxic assets, since they do not want to be forced to take a loss.

Considering the administration's desire to deal with toxic assets, it will probably choose the first option. According to experts, such a choice would not only be bad for the PPIF investors (i.e., taxpayers), it would also create a conflict of interest situation. The PPIFs are run by prominent private fund managers, such as Invesco Ltd, BlackRock, and the Wellington Management Company, which are charged with determining the fair value for the toxic assets the PPIFs will be purchasing. However, these companies could also be managing toxic assets for their private clients. If so, there is a clear incentive for the fund managers to overvalue toxic assets in order to receive a larger subsidy from the government. By arranging potentially bad deals for the government, fund managers would be relieving themselves of toxic assets while at the same time reaping a profit for their private clients and themselves.

The conflict of interest problem is not new, and the Special Inspector General for the Troubled Asset Relief Program (SIGTARP) has been questioning Treasury's safeguards since its April report. More recently, SIGTARP went as far as writing in its July report that there exist "numerous potential opportunities for fraud, waste, and abuse in PPIP." While Treasury has adopted many of SIGTARP's recommendations for PPIP, it has resisted several of the core conflict of interest recommendations, including the imposition of information "walls" between the PPIFs and their parent fund managers and increased disclosure requirements for PPIF fund managers.

By not adopting the SIGTARP recommendations, the PPIP program remains riddled with potential conflicts. While the program may succeed in taking toxic assets off the books of prominent financial institutions, it could do so at the risk of hurting the bottom line for taxpayers.

## OMB Releases Plan to Elevate Performance Evaluation

The Office of Management and Budget (OMB) released a memo to federal agencies on Oct. 7 that outlines a new initiative to bring a renewed emphasis and additional resources for program evaluation within agencies. Although this initiative is not a comprehensive plan to reinvigorate performance measurement in the federal government, it will help correct many problems that kept previous performance systems from creating real improvement in government performance.

The memo is entitled "Increased Emphasis on Program Evaluations" and details a three-part plan to help agencies develop better systems to conduct "rigorous, independent program evaluations." The plan includes giving better access to agency program evaluations on the Internet that are both in progress and planned for the future, re-launching an interagency working group on evaluations, and a voluntary pilot program to provide additional resources to fund rigorous program evaluations or strengthen evaluation capacity within agencies. Each of these three policy changes will help to improve performance evaluations within agencies and encourage better use of performance information.

**Posting more information about federal evaluations online**: OMB will begin working this fall with federal agencies to expand access to information about program evaluations. The goal will be to "make researchers, policymakers, and the general public aware of studies planned or underway" that examine if a program is making the grade or evaluate the effectiveness of other approaches and strategies that achieve the desired outcomes.

This plan mirrors the Obama administration's general commitment to a more transparent government but also helps to decrease a tendency to protect agency prerogatives in performance evaluations. During the Bush administration's use of the Program Assessment Rating Tool (PART), there was reluctance among some agency staff to share all of their internal performance evaluation materials and results with OMB. In addition, OMB often dismissed evidence and evaluations that were shared as unsatisfactory. The requirement in this memo to simply make program evaluations public should help to create a more positive dialogue about performance evaluations and results.

What's more, this requirement has the potential to become as useful a repository as one that allows the public to search all government-funded clinical trials provided by the National Institutes of Health (see ClinicalTrials.gov). While the memo does not explicitly state that OMB will develop a central repository for all government program evaluations, allowing for the capacity to search evaluations across agencies and departments that focus on a central goal or

issue (alleviating homelessness, for instance) would allow for better coordination and communication between agencies that run programs with similar objections.

**Interagency Evaluations Working Group**: The second part of the memo states that OMB is going to re-constitute an interagency working group of program evaluation experts from the Domestic Policy Council, the National Economic Council, and the Council of Economic Advisers. This working group will help build agency evaluation capacity by developing a network of experts inside and out of the federal government, share best evaluation practices from across the federal government, develop techniques for using evaluation and performance data to continually drive improvement, and potentially develop government-wide guidance for program evaluation practices.

There are three key points made within the language of this section of the memo that are improvements over previous performance efforts. First, it is clear the Obama administration understands a one-size-fits-all approach will not succeed. The memo references that different evaluation methods and structures are necessary for different types of programs and objectives the government is trying to achieve and that agencies need flexibility within government-wide evaluation guidance to "adopt practices suited to their specific needs."

Second, there is an acknowledgment, albeit subtle, that many agencies do not have the resources or in-house expertise to develop "strong, independent evaluation offices." This acknowledgment is bolstered by the fact that OMB intends to make additional resources available to a limited number of programs to develop their own evaluation systems.

Finally, in both the first section of the memo and the second, OMB opens the door to potential collaboration between government and outside experts to design and implement robust program evaluation studies. This could potentially allow those outside the government who are responsible for implementing government programs, as well as experts from academia or other sectors, to work more closely in designing evaluations that are targeted and useful for those implementing federal programs.

**Voluntary FY 2011 Evaluation Initiative**: The third and final aspect of the memo is a voluntary program that invites interested agencies to submit additional information along with their FY 2011 budget materials to win more funding for high-priority evaluation activities. OMB plans to award funding to 20 "rigorous program evaluations across the Federal government or [to agencies] to strengthen agency evaluation capacity."

Agencies must submit additional information to OMB that includes an assessment of evidentiary support for budget priorities, new proposals for rigorous evaluations, an assessment of agency capacity to conduct rigorous independent evaluations, and the identification of statutory requirements that may have the unintended effect of keeping agencies from conducting rigorous evaluations and assembling evidence about what is working within agencies.

This third part could almost be called a pilot program since it is initially being implemented in a limited way. Only 20 awards will be made to agencies, and the scope of performance measurement activities this will support is restricted to "social, educational, economic, and similar programs" that support life outcomes of Americans. The memo specifically mentions that four very large areas – procurement, construction, taxation, and national defense – will not be considered except on a case-by-case basis. OMB Director Peter Orszag further describes this section as a pilot in a blog post released on Oct. 7, stating:

> The agencies participating in this initial effort will serve as demonstration projects through which we can test approaches to improve program effectiveness and efficiency, share best practices, and further improve performance. After assessing this initiative in FY2011, the Administration will be better positioned to implement government-wide evaluation metrics.

The limited scope and voluntary nature of this part of the initiative may help alleviate some problems encountered in the past by getting the Obama administration's performance measurement effort off on the right foot. Overall, this memo gives agencies more of a central role in developing their own evaluation systems and has a more collaborative tone than previous performance improvement efforts. Yet this is not a comprehensive plan to replace the PART, as both Orszag and Chief Performance Officer Jeffrey Zients have hinted that more is coming at some point in the future. There are currently no details regarding when additional aspects of the Obama administration's overhaul of performance systems will be released.

## Controversial Patriot Act Reauthorization Ready for Senate Floor

On Oct. 7, the Senate Judiciary Committee approved a bill, the USA Patriot Act Sunset Extension Act of 2009 (S. 1692), to reauthorize the Patriot Act. The bill, introduced by Sen. Patrick Leahy (D-VT), chair of the committee, passed with bipartisan support but has been denounced by civil liberties groups and privacy advocates. A week earlier, the committee voted down another reauthorization bill, the JUSTICE Act (S. 1686), introduced by Sens. Russ Feingold (D-WI) and Richard Durbin (D-IL), that would have greatly reduced surveillance powers and strengthened civil liberties protections.

Critics of the Leahy bill assert that the legislation does little to address the well known civil liberties concerns and extends sweeping law enforcement surveillance powers with little to no safeguards. For instance, as passed out of committee, the bill renews the roving "John Doe" wiretap authority that allows the federal government to obtain a wiretap order without the requirement to name the target or specify the phone lines and e-mail accounts to be monitored. Further, it offers little or no reform of other controversial Patriot Act provisions

Reform of National Security Letters (NSLs) was also limited in the legislation. NSLs are used by the Justice Department like subpoenas to seek information from companies, such as Internet service providers and phone companies, about their subscribers. The Feingold-Durbin bill had

included increased standards for NSL issuance, limitations on the types of information that can be obtained by NSLs, limitations on non-disclosure orders for NSLs, and limits on emergency use of NSLs. The Leahy bill only requires that the government draft an internal statement showing that the information sought is somehow relevant to an investigation. Conversely, the Feingold-Durbin standard would require discussion of specific facts, a much more rigorous standard. However, the committee noted that the Obama administration supports a relevance standard like that found in the Leahy bill.

The Obama administration has been criticized as being an agent against reforming the broad powers granted to the executive branch by the act. According to reports, five of the seven amendments introduced to limit privacy and civil liberties protections were recommended by the Justice Department. Feingold accused the administration of taking positions behind closed doors that it is not taking publicly. In the committee's public hearing, the Justice Department had stated that it took no position on any of the civil liberties and privacy issues. However, it was reported that they announced their disapproval of some of the bill provisions to the committee during classified meetings.

Some of the provisions to protect civil liberties that the administration opposed, such as the restrictions on NSLs, were proposals that Obama had supported as a senator. In particular, Obama had supported the SAFE Act (S. 737) in 2005 that attempted to reform Section 215 orders that require anyone to produce tangible records relevant to an investigation to protect against international terrorism, including business records. The SAFE Act had been unanimously reported by a Republican-controlled committee and included the requirement of a link between records sought and a terrorist or other agent of a foreign power. Durbin proposed an amendment to the Leahy bill that would have added this standard, but it was voted down due to the administration's opposition.

Some committee members reacted negatively to the committee vote to accept the Leahy bill for Senate debate. Feingold expressed his disappointment in the final version of the bill. Feingold likened the Senate Judiciary Committee to a "Prosecutor's Committee" and stated that the bill "falls well short of what the Congress must do to correct the problems with the Patriot Act." This position was echoed by some advocates, including Leslie Harris, president of the Center for Democracy and Technology, who proclaimed that "the opportunity for real reform will not come again anytime soon. Congress needs to do the right thing, even if Obama will not."

Some minor reforms were included the final Leahy bill. The bill included reforms for "sneak and peek" searches and requires the executive branch to issue procedures to minimize the use of NSLs. However, these changes were not enough to garner the support of Feingold or many of the civil liberties groups following the legislation.

## Metal Mining Proposal Marks Online Forum Trend at EPA

The U.S. Environmental Protection Agency (EPA) launched an online forum on the agency's blog to collect comments on a potential change to the way metal mining companies report their

pollution. Controversial court decisions in recent years have reduced the amount of information on the industry's pollution. This online forum marks at least the third time the Obama administration's EPA has used a "Web 2.0" tool to engage the public on matters of proposed agency policies.

According to the Toxics Release Inventory (TRI), the metal mining sector consistently places among the most polluting industries. In 1997, the metal mining industry and several others were added to TRI, which is an EPA program requiring thousands of facilities to report how much toxic pollution they release. From 1998 to 2007, more than 19 billion pounds of toxic releases were reported by the industry. Yet even with such large quantities being reported, many environmental groups are concerned that a significant amount of releases is not being disclosed, largely due to the agency's response to the court decisions.

In 2003, the mining industry won a partial victory in a lawsuit against the EPA over how to report its pollution to TRI. The court's decision led the agency to exempt small concentrations of toxics in waste rock from being reported. The EPA established a *de minimis* provision exempting concentrations of most toxics under one percent from having to report. Although concentrations of naturally occurring toxics such as selenium are typically low in metal mines' waste rock, the prodigious amounts of waste rock mean that the total amount of toxics quickly adds up.

The EPA is now considering a possible metal mining rulemaking. The online forum is a preliminary step in the agency's preparation for a formal rulemaking process. The agency has not specified what issues it expects to address in the rulemaking, nor why such a process is even needed. Rather, the agency is requesting comments on several issues previously raised by stakeholders during telephone interviews conducted by EPA in November 2008.

The public is encouraged to submit comments on five broad issue areas raised by the industry and environmental groups:

- Ways that TRI can drive environmental improvements
- Accurate measurement of releases
- Expanding what releases must be reported
- Clarifying definitions of terms
- Any additional TRI metal mining issues

This online process for metal mining and TRI mimics the process used by two other EPA offices to gather comments in a more informal manner than through the use of the *Federal Register*. The Office of Enforcement and Compliance Assurance (OECA), working with the Office of Water, solicited opinions from the public to help design its upcoming Clean Water Enforcement Action Plan. The action plan – ordered by the EPA administrator – is intended to improve information transparency, strengthen enforcement of water pollution laws, and expand the use of technology to increase efficiency and provide information to the public. OECA also designed an online forum to collect ideas on areas to focus its enforcement and compliance activities in the future. In this case, the online forum aids an ongoing process at EPA – the revision of its

enforcement priorities every three years. A future fourth online forum is planned by the head of EPA's solid waste office, but it has not been announced yet.

What impact on agency policy these forums will have remains to be seen. In each instance, the agency has not exploited fully the capabilities of the forums. For example, the enforcement forum, as its name suggests, allows for multilateral conversations, with commenters responding to one another. The agency has not responded to any comments, creating a one-way flow of information and failing to engage the public in dialogue.

The clean water forum was intended to inform the creation of a document for the EPA administrator. The action plan was due at the end of September. It has not yet been disclosed whether the plan is completed or available to the public. There is no way to judge the extent the public's forum comments were incorporated into policy recommendations until the report is released.

The metal mining discussion forum will be open until Oct. 30. According to EPA, comments received before that time will be included in a public docket, and a link to the docket will be posted. A proposed rule may be published by early 2011.

## Read the Bill Act Stalled in Congress

Recently introduced House and Senate resolutions seek to illuminate the legislative process, giving Congress, as well as the American people, the opportunity to read legislation and formulate an informed opinion prior to any debate or votes.

In the House, Rep. Brian Baird (D-WA) introduced H.Res. 554 on June 17, along with 180 cosponsors from both parties. The resolutions would amend House rules to require that non-emergency bills and conference reports be posted online for at least 72 hours prior to consideration by the full chamber.

In the Senate, Sen. Jim Bunning (R-KY) introduced S.Res. 307 on Oct. 7, which has gained the support of 28 Republican cosponsors. The proposal would amend the Senate rules but would establish an even more exacting standard, requiring that legislation, accompanied by an evaluation from the Congressional Budget Office, be posted online 72 hours before subcommittee and committee consideration, as well a similar time standard for floor debate and votes.

ReadtheBill.org, a project of the Sunlight Foundation, has been supporting the legislation. According to its website, there are several important benefits to such a legislative approach: “When Congress rushes to pass complex legislation, the bills are not properly vetted. With more time to examine the legislation, the public can help ferret out wasteful spending, sneaky provisions that were inserted by well-connected special interests and other problematic provisions.”

The House Rules Committee has had that chamber's resolution since late June with no action. On Sept. 23, Rep. Greg Walden (R-OR) filed a motion to discharge the resolution from the committee. A discharge motion recalls a bill from committee for consideration by the full House and is a procedural move used to circumvent a committee that has no intention on acting upon legislation. Such a petition may be circulated if a bill has sat in committee for 30 days without being reported out and requires a simple majority (218 representatives) to be successful. The discharge petition for H.Res. 554 currently has 182 signatures. The resolution appears stuck in the Rules Committee until additional support is found for the discharge petition.

The Senate resolution has garnered attention mostly from Republicans, as noted by the cosponsor list. Moreover, the effort appears sidelined by health care and energy legislation, two wars, spending bills, and countless other matters perceived as higher legislative priorities.

Those promoting congressional transparency consider passage of the “Read the Bill” legislation a key element in bringing sunshine to Congress. It remains to be seen if legislators have the same interest.

## Fractured Nomination Process Leaves Regulatory Posts Vacant

Senate Republicans are blocking several of President Obama's nominees – often for reasons unrelated to the position – resulting in vacancies at the Department of Labor, U.S. Environmental Protection Agency, Department of Justice, and elsewhere. In addition, the Democratic leadership has not often combated Republican tactics, as nominations have slipped down the list of Senate priorities.

At the Labor Department, several vacancies have hampered the administration's ability to advance its agenda, especially in the areas of occupational safety and health and worker rights.

On Aug. 5, President Obama nominated David Michaels to lead the Occupational Safety and Health Administration (OSHA). Michaels is an epidemiologist and professor at George Washington University, where he also runs the Project on Scientific Knowledge and Public Policy. A Republican-controlled Senate confirmed him in 1998 to serve as the Assistant Secretary for Environment, Safety and Health at the Department of Energy under President Clinton.

Michaels' nomination to OSHA is attracting scrutiny. Industry lobbyists fear Michaels would move aggressively to finalize new workplace health and safety standards. The Occupational Safety and Health Act, which OSHA enforces, directs the agency to write regulations "reasonably necessary or appropriate to provide safe or healthful employment and places of employment." The agency is a major focus for opponents of strong regulatory action on worker safety.

Industry lobbyists and conservative bloggers have also criticized Michaels' 2008 book, *Doubt Is Their Product: How Industry's Assault on Science Threatens Your Health*. In the book, Michaels details numerous examples – including tobacco, asbestos, and lead – where industry

groups have commissioned scientific studies and reports intended to undermine evidence that would prove their products harmful or strengthen the case for regulation.

Several industry groups including the National Association of Manufacturers and the U.S. Chamber of Commerce have written to members of the Senate Health, Education, Labor, and Pensions (HELP) Committee highlighting their objections to Michaels' nomination and asking for a confirmation hearing in the committee. If the groups' concerns remain after the hearing, it is likely that senators will place holds on the nomination, a procedure by which one senator can single-handedly delay a bill or nomination.

A delay in Michaels' nomination will translate into additional delays in new OSHA standards and in revitalizing an agency that has been largely nonresponsive to worker safety issues. Critics of the Bush administration faulted OSHA for finalizing too few worker protection standards. As a result, there is a backlog of hazards in need of attention. OSHA Deputy Assistant Secretary and acting OSHA chief Jordan Barab has been making progress in trying to reduce the backlog: OSHA is developing a proposed rule to limit workers' exposure to diacetyl, a chemical used to give foods a buttery flavor, and the agency recently finalized a rule that would standardize the way employers communicate occupational hazards. However, OSHA is unlikely to shift into high gear without a full-time, Senate-confirmed head.

Republicans have also objected to M. Patricia Smith, President Obama's pick to be the Labor Department's solicitor general, the top enforcement official at the agency. After the Senate HELP committee approved Smith and reported her nomination to the full Senate, Sen. Mike Enzi (R-WY) announced a hold on the nomination.

Smith drew the ire of committee Republicans after she made an inaccurate statement during her confirmation hearing. Smith said she had not discussed expanding Wage Watch – a state-level program intended to crack down on wage and hour violations, which she ran while serving as the New York State labor commissioner – but later acknowledged that she had discussed expanding Wage Watch to the federal level.

The committee's Democratic staff called the error inadvertent. Committee chair Sen. Tom Harkin (D-IA) said Enzi's hold was "clearly an effort to try to delay the confirmation of the government's top advocate for our nation's workers," according to *The New York Times*.

Meanwhile, Lorelei Boylan has withdrawn her nomination to lead the Labor Department's Wage and Hour division amid conservative objections, according to *The Washington Post*. Boylan is also involved in New York's Wage Watch program. The Wage and Hour Division enforces minimum wage standards, child labor laws, and other worker rights issues. The *Post* reported that Boylan withdrew her nomination because of family issues, not because of Republican opposition.

Another Labor Department agency critical to worker protection, the Mine Safety and Health Administration, is also without a permanent leader. Joe Main, a safety official at the United

Mine Workers of America, was nominated July 6. He has been approved by the Senate HELP committee and awaits a full Senate vote.

Key posts at the U.S. Environmental Protection Agency (EPA) also remain unfilled. In May, Obama nominated Paul Anastas, a green chemistry and green engineering expert, to lead EPA's main research office. The nomination has been delayed by Sen. David Vitter (R-LA), who is seeking a review of EPA's risk assessment for formaldehyde. EPA currently considers formaldehyde a "probable carcinogen" and is expected to update its scientific studies soon. The International Agency for Research on Cancer calls formaldehyde a "known carcinogen."

Sen. George Voinovich (R-OH) has placed a hold on the nomination of Robert Perciasepe to serve as EPA Deputy Administrator because Voinovich believes EPA has underestimated the potential costs of cap-and-trade legislation currently under consideration in Congress. The senator is requesting that EPA redo its economic analysis. He is using Perciasepe as a bargaining chip while acknowledging that, "This hold does not to serve [*sic*] as a reflection on Mr. Perciasepe's ability to perform in the role of the Deputy Administrator."

Voinovich's and Vitter's holds are part of a broader trend in which senators are holding nominees hostage not because of their qualifications but because of the lawmakers' objections to the views or policies of the administration. The holds are a simpler but more damaging alternative to traditional oversight mechanisms, such as hearings or letters of inquiry, as qualified candidates are kept out of their positions.

While Republicans have lodged complaints against nominees, Democrats have been slow to counter Republican arguments and unwilling to push back by scheduling votes. Instead, the nomination process appears to have fallen down the Senate agenda, behind other priorities like health care and FY 2010 spending legislation.

The pace at which the Senate is confirming nominees for the Obama administration is slowing. Between the spring and summer recess, the Senate confirmed an average of 18 nominees per week while in session. Since returning from the August recess, the average has dropped to less than nine per week, according to Senate and White House records.

Although Democrats hold a filibuster-proof majority, leadership has appeared unwilling to move to confirm nominees. Majority Leader Harry Reid (D-NV) has forced only two confirmation votes. One was on Cass Sunstein, the head of the White House Office of Information and Regulatory Affairs. The other was Thomas Perez, the Department of Justice's (DOJ) top civil rights lawyer. Republicans held up Perez's nomination after the Justice Department dismissed voter intimidation claims filed against the Black Panthers. The Senate confirmed Perez Oct. 6.

Perez was the first DOJ nominee to be considered by the Senate since April. Meanwhile, other Justice Department nominees accumulated: four critical assistant attorney general nominees await confirmation, including Ignacia Moreno, nominee for the environment and natural resources division; Mary Smith, nominee for the tax division; Dawn Johnsen, nominee for the

Office of Legal Counsel (OLC); and Chris Schroeder, nominee for the Office of Legal Policy (OLP).

Johnsen's nomination has drawn criticism largely because of her past work with an abortion rights organization. Obama nominated Johnsen to head the OLC, a powerful office that provides the Attorney General and other administration officials with legal advice on almost any issue, on Feb. 11, making hers one of the longest outstanding nominations.

Obama nominated Schroeder on June 4. OLP provides high-level policy recommendations to the Attorney General and handles special projects and judicial nominations for the department. Schroeder is a law professor at Duke University and has written extensively on administrative and environmental law. He formerly served as a scholar at the Center for Progressive Reform, a collection of academics advocating for a regulatory system that better protects the public.

Parochial interests have slowed the nomination of Martha Johnson to serve as administrator of the General Services Administration (GSA) – the government agency responsible for procuring and managing real estate, equipment, and other assets. Currently, Missouri Sen. Kit Bond (R) has a hold on Johnson's nomination. Bond blames GSA for delays in the construction of a federal building in Kansas City, MO. Previously, Reid had slowed Johnson's nomination in an attempt to move a GSA-sponsored conference to Las Vegas in his home state of Nevada. Johnson was nominated May 4.

## NCRP Report Confirms Return on Investment in Advocacy

New research from the National Committee for Responsive Philanthropy (NCRP), a national foundation watchdog organization, concludes that public policy work is an effective strategy to address societal issues. A majority of grantmakers have traditionally steered away from funding public policy, grassroots advocacy, and other civic engagement activities. However, studies continue to show that advocacy work is vital to advancing a nonprofit organization's mission. The NCRP finding that there is such a great return on investment in advocacy could resonate with funders.

NCRP's Grantmaking for Community Impact Project seeks to increase philanthropic resources for advocacy, organizing, and civic engagement to particularly benefit communities most in need. An objective of the project is to appease funders' concerns by featuring the positive impact communities have experienced because of support for nonprofit advocacy. The project's reports use both quantitative and qualitative methods to gauge the positive returns from civic engagement.

NCRP began the *Strengthening Democracy, Increasing Opportunities* series with a report on New Mexico nonprofits in December 2008. This latest report, the third in the series, looks to nonprofits in Minnesota. NCRP details the impact of 15 state nonprofit organizations' advocacy from 2004 to 2008; during this time, the groups received $16.5 million from foundations.

According to the report, "Minnesota foundations that made grants to nonprofit organizations in the state had a $2.28 billion impact from 2004 to 2008."

NCRP studied local nonprofits that worked with underrepresented communities on a range of issues and recorded the groups' activities and achievements. The organizations used a variety of advocacy strategies, including working in coalitions, mobilizing communities, working with policymakers, conducting research, and utilizing the media.

Most notably, and probably the most useful for those trying to gain foundation support for advocacy activities, is the cost-benefit breakdown presented in the report, as grantmakers want to know their money is being put to good use. According to NCRP, the economic and social benefit impacts of advocacy outweighed the cost of organizing campaigns.

NCRP tracked advocacy and organizing impacts, funding, civic engagement indicators, and the groups' progress. A return-on-investment calculation was made by dividing the aggregate dollar amount of successes, or desired outcomes, by the aggregate dollars invested in advocacy and organizing. The report found that every grant dollar spent on advocacy produced a $138 return on investment. This data led to the report's conclusion that it is highly beneficial for nonprofits and foundations to work together, and it is especially effective for these groups to become involved in public policy advocacy.

The report lays forth recommendations for foundations, particularly those facing tough economic situations. Foremost among the recommendations is that funding for advocacy, community organizing, and civic engagement should be increased. Board members and donors should also be conscious of how advocacy can help an organization achieve its goals, according to the report.

## EMILY's List Decision May Impact Contribution Limits, Other Campaign Finance Cases

A three-judge panel of the U.S. Court of Appeals for the D.C. Circuit issued an opinion in *EMILY's List v. Federal Election Commission* in September, striking down regulations that limited donations to nonprofit political action committees that are used for campaign activity. The regulations were intended to limit how certain nonprofit organizations raise and spend money for political campaigns.

EMILY's List, a non-connected political action committee (PAC) that seeks to elect pro-choice, Democratic women to office, challenged Federal Election Commission (FEC) regulations, which went into effect in 2005, as an unconstitutional violation of the group's First Amendment free speech rights. EMILY's List, which maintains both federal and nonfederal accounts, filed a complaint on Jan. 12, 2005, challenging the regulations regarding the treatment of funds received in response to certain solicitations and amended rules regarding federal/nonfederal fund allocation ratios for PACs.

The regulations required tax-exempt organizations to use "hard money" for election and campaign activities. "Hard money" is limited to a $5,000 annual cap per contributor. The regulations enacted by the FEC were intended to limit "soft money," which is "unlimited donations by individuals, corporations, political action committees and unions, to nonprofit groups," according to *The Washington Post*.

The decision in the *EMILY's List* case could greatly impact contribution limits for tax-exempt groups in the future. It may enable individuals to circumvent campaign finance regulations limiting the amount of money that they can give to a federal candidate by allowing them to give unlimited money to a nonprofit organization. The organization would then be able to spend the money to directly support or oppose a candidate's campaign.

Rick Hasen, a law professor at Loyola Law School—Los Angeles and the moderator of the Election Law Blog, said that this decision "essentially will allow individuals (and, I predict, eventually corporations and unions) to make unlimited contributions to political committees to fund independent expenditure campaigns." Hasen further stated, "Even if the court restrains itself in Citizens United [a campaign finance case currently before the U.S. Supreme Court], the writing is on the wall: if the court's members remain the same, the corporate limits eventually will fall. After that, the court could strike down contribution limits to PACs and the ban on party soft money."

Judge Janice Rogers Brown also seemed to worry about going down this path in her concurring opinion in the *EMILY's List* case. She said that the majority ruling would allow political action committees to say, "Just like you, we want [*federal candidate*] to win. You have already donated all the law allows to [*federal candidate*], but there is no limit on how much you can give to us to support [*federal candidate*]." She also noted that the majority opinion means that multicandidate political committees can "spend unlimited amounts of soft money to run ads attacking or supporting federal candidates and political parties" or "on get-out-the-vote activities that support federal candidates and political parties," and Congress cannot do anything to stop it.

Brown said the majority opinion overreached by deciding the constitutional question, instead of only deciding the statutory issue. Quoting language from a previous D.C. Circuit case, Brown said, "Federal courts should not decide constitutional questions unless it is necessary to do so. Before reaching a constitutional question, a federal court should therefore consider whether there is a non-constitutional ground for deciding the case, and if there is, dispose of the case on that ground."

The *EMILY's List* case has also answered the constitutional question posed in the *SpeechNow.org v. FEC* case that the D.C. Circuit is scheduled to hear soon. In that case, "The plaintiff is challenging the contribution limits that apply to a group which makes only independent expenditures," according to Democracy 21. "The majority opinion in *EMILY's List* attempts to resolve that question, even though it wasn't presented in the case. The opinion says contribution limits cannot apply to such a group, thus serving to preempt the full Court of

Appeals' decision in the *SpeechNow* case before it even has reached the Court of Appeals, much less before it has been briefed and argued," said Democracy 21.

The FEC is still deciding if it will appeal the decision. If it moves forward, the commission can appeal to an *en banc* panel of the D.C. Circuit Court of Appeals, or it can appeal directly to the U.S. Supreme Court. According to *Roll Call*, "The Justice Department could choose to pursue the case on its own should the FEC take a pass or simply let the deadlines lapse."

The *EMILY's List* case has already affected FEC enforcement proceedings. The FEC did not take a position on whether Black Rock Group, a political consulting group, could coordinate independent expenditure campaigns. The *EMILY's List* decision "has left the FEC uncertain over how to proceed with some questions of campaign finance law," according to *The Hill*.

"We are moving toward a deregulated federal campaign finance system, where money flows freely and perhaps only disclosure laws remain. It is a world in which those with more money use their considerable funds to elect candidates of their choice and to have disproportionate influence over public policy. The unlevel playing field awaits," according to Hasen.



OMB WATCH
Promoting open government, accountability, and citizen participation since 1983
Subscribe | Blog | Donate
The Watcher
October 28, 2009 Vol. 10, No. 20

## In This Issue



---

## Poor Data Quality and Lack of Website Functionality Hobble Recovery Act Recipient Reports

The release of the first round of Recovery Act contracts spending data marks the first time that recipients of federal funding have been required to report to the federal government on their use of the funds in a timely and transparent manner. This represents an important milestone in government transparency and accountability. However, the poor data quality and Recovery.gov's limited functionality hinder the promise of a new era of fiscal transparency – at least for this round of recipient reporting.

Since the Recovery Accountability and Transparency Board (Recovery Board) released the first round of Recovery Act recipient reporting on Oct. 15, everyone from federal officials, members of Congress, transparency advocates, and ordinary citizens have gone to the site to see the new

data. These recipient report data provide a new level of detail on federal projects. Provisions in the Recovery Act require that recipients of Recovery Act funds report back to the federal government on the amount of funds received and expended on Recovery Act projects, including project status updates. The Recovery Act also requires that recipients indicate the number of jobs created or saved by the project, along with a narrative explaining why and what kind of jobs were created. Additional information is also being collected.

This level of information has never been reported before. However, this new dataset will deliver full transparency only when two dimensions of data publication are adequately implemented. First, the public should be able to access recipient reports on Recovery.gov in myriad ways that allow for an array of searches and analyses. Second, the data that are made available should accurately reflect how recipients used Recovery Act funds.

Recovery Act transparency requires that sufficient tools be available to access spending data. In this respect, the website built to disclose the recipient reports to the public, Recovery.gov, falls significantly short. Users have very limited options to search, sort, or sift through the recipient reports, limiting the connections that can be drawn between various data points or the ability to find out if a particular company has received Recovery Act funds. While the site does allow rudimentary searches by ZIP code, allowing users to find out how many Recovery Act contracts XYZ Corporation received in any given neighborhood, users cannot find out the total number of contracts and total dollar amount XYZ Corporation received in the state or throughout the nation. In other words, the user cannot search by recipient. This information is vital to developing a balanced understanding of how Recovery Act funds are being deployed. Without this type of searching and sorting that enables users to slice and dice Recovery Act spending data, Recovery.gov severely limits the usefulness of the data set produced by the transparency provisions in the Recovery Act.

In addition to online analytical resources provided by the federal government, Recovery Act data must be made available in machine-readable formats to allow outside stakeholders to create their own tools. When the Recovery Board first released the data, it also made recipient reports available in one machine-readable format, but the implementation of this feature was cumbersome. Initially, the data were only available in 180 separate files (organized by state), but after some loud complaints, the Recovery Board corrected this issue by re-releasing the recipient reports as one, nationwide file. When the Recovery Board received additional feedback that the file contained formatting errors, it released a corrected version in a very short timeframe. Although these issues have been fixed, it is still necessary to make additional data formats available on Recovery.gov, such as an ATOM feed, which makes it easier for machines to process and display the data without human intervention.

Beyond issues with information access, Recovery Act transparency is also hobbled along a second dimension: data quality. Specifically, the jobs information, a much-touted feature of the recipient data, is rife with errors. One recurring problem is that job creation narratives do not match up with job creation numbers. For example, the narrative description of the jobs created and saved might indicate that no jobs were created or saved, but the number field that contains a count of jobs shows that 10 jobs were created or saved. Another common problem is that

similar projects have different job creation numbers (for instance, both Chrysler and General Motors were given projects to build cars for the government for similar amounts of money, but according to their respective recipient reports, Chrysler created no jobs at all, but General Motors created or saved more than 105 jobs).

Furthermore, it is not always clear where jobs were created. A particular outlier in this regard is a report in which a recipient noted it created 4,685 jobs in Colorado, the most of any state in the nation. Yet a close reading of the report reveals that 3,852 of those jobs were actually created in other states.

From the large number of errors, it is clear many recipients have differing interpretations of the jobs reporting requirements. The upshot of these data quality problems is that the total number of jobs created or saved by Recovery Act contract recipients is simply an unreliable gauge of the impact the act is having on the economy.

Transparency in the Recovery Act will continue to be constrained unless Recovery.gov is substantially improved and unless recipient report data quality improves significantly. There have been improvements already to the website, and it is likely that subsequent rounds of recipient reports will contain improved data quality. The Recovery Board, which built and maintains Recovery.gov, has been responsive to outside feedback and criticism, giving good reason to be optimistic this groundbreaking transparency model will continue to improve.

## Senate Continues to Struggle with Appropriations

Congress is preparing to pass a second continuing resolution (CR), as the first stopgap appropriations measure is set to expire on Oct. 31 and little progress has been made toward completing the remaining appropriations bills in the Senate. As the window of opportunity to pass all the appropriations bills individually continues to close, even the once-optimistic head of the Senate appropriations process has stated that Congress will likely have to use an omnibus spending bill to finish the work before the end of 2009.

The Senate has consistently lagged behind the House in completing appropriations bills in 2009. The House passed all twelve of its appropriations bills very quickly, wrapping up the process on July 30, just before Congress left for its summer recess. In contrast, the Senate – even when incorporating the need for more time due to debate rules in the upper chamber – has not prioritized passage of its spending measures. The Senate managed to pass just half of its twelve appropriations bills before the start of the new fiscal year on Oct. 1.

With the end of the calendar year looming, which is the stated deadline of Senate Appropriations Chair Daniel Inouye (D-HI) for appropriations work, it is unlikely Congress will pass all twelve appropriations bills individually, especially with major legislation addressing health care reform and climate change taking up a majority of Congress's time. The slow pace of appropriations work has finally taken a toll on the once-optimistic members of the Senate appropriations process.

During the week of Oct. 19, stories began to emerge from Capitol Hill that the once-rosy outlook of senators had turned sour, and legislators were proportionately scaling back expectations. When asked by *Congressional Quarterly* (subscription required) on Oct. 20, Sen. Inouye acknowledged that Congress would "likely have to pass a multi-bill appropriations package to wrap up this year's spending work."

Since gaining an extra month under the first CR, the Senate has passed one appropriations bill, the Defense spending measure, and the House and Senate have conferred on three more bills (Agriculture, Energy & Water, and Homeland Security) that were then sent on to the president for his signature.

The Senate still has four appropriations bills left to pass, including the Commerce-Justice-Science, Financial Services, Veterans, and State-Foreign Operations spending measures. Once passed, the Senate must conference those bills with the House. The two chambers are currently conferencing two bills (Defense and Transportation/HUD), and on Oct. 27, the House-Senate conference committee for the Interior and Environment appropriations bill approved the conference report that includes a new CR that will fund the federal government through Dec. 18.

**FY 2010 Appropriations***

| *As of Oct. 28, 2009* | *FY 2009* | *President's Request* | *House* | | | *Senate* | | | *Conference* |
|---|---|---|---|---|---|---|---|---|---|
| | | | Sub-Cmte | Cmte | Floor | Sub-Cmte | Cmte | Floor | |
| Agriculture | 20.6 | 23 | 22.9 | 22.9 | 22.9 | 23.1 | 23.6 | 23.6 | 23.3 |
| Commerce-Justice-Science | 57.7 | 64.6 | 64.4 | 64.4 | 64.3 | 64.9 | 64.9 | | |
| Defense | 631.9 | 640.1 | 636.3 | 636.3 | 636.3 | 636.3 | 636.3 | 636.3 | |
| Energy & Water | 33.3 | 34.4 | 33.3 | 33.3 | 33.3 | 34.3 | 34.3 | 33.8 | 33.5 |
| Financial Services | 22.6 | 24.2 | 24.1 | 24.2 | 24.2 | 24.4 | 24.4 | | |
| Homeland Security | 40.1 | 43.1 | 42.6 | 42.6 | 42.6 | 42.9 | 42.9 | 42.9 | 42.8 |
| Interior & Environment | 27.6 | 32.3 | 32.3 | 32.3 | 32.3 | 32.1 | 32.1 | 32.1 | 32.2 |
| Labor-HHS-Education | 151.8 | 160.7 | 160.7 | 160.7 | 160.7 | 163.1 | 163.1 | | |
| Legislative Branch | 4.4 | 5.2 | 4.7 | 4.7 | 4.7 | 4.7 | 4.7 | 4.7 | 4.7 |
| Military Construction-VA | 72.9 | 77.7 | 77.9 | 77.9 | 77.9 | 76.7 | 76.7 | | |
| State-Foreign Operations | 50.0** | 52 | 48.8 | 48.8 | 48.8 | 48.7 | 48.7 | | |
| Transportation-HUD | 55.0 | 68.9*** | 68.8 | 68.8 | 68.8 | 67.7 | 67.7 | 67.7 | |

**Numbers are amounts of discretionary spending in billions of dollars. Green boxes indicate approval; grey boxes indicate bill not yet approved by appropriate body.*
***Includes supplemental funding*
****Does not include $39.5M presidential request for general fund appropriations*

(*click to enlarge*)

If an omnibus bill is required, it is not clear which appropriations bills will be included in it. The most likely scenario is that it would include only those bills that have not passed the full Senate chamber. Since the new CR will last until Dec. 18, it is possible the Senate will make more progress on the four remaining bills it has left to pass, leading to a smaller omnibus bill in December.

## U.S. Waters Still Toxic Dump Sites

A new report from Environment America uncovers a dirty truth in publicly available government databases about the country's waterways – widespread toxic pollution dumped by industrial facilities. More than 230 million pounds of toxics were discharged into 1,900

waterways across all 50 states in 2007, including chemicals known to cause cancer and birth defects.

The report, *Wasting our Waterways: Toxic Industrial Pollution and the Unfulfilled Promise of the Clean Water Act*, draws on publicly available data collected by the U.S. Environmental Protection Agency (EPA) and other agencies, underscoring the importance of public right-to-know laws, which enable citizens to use information to hold government and polluters accountable. Key among the government databases used was the 2007 Toxics Release Inventory (TRI), a public database maintained by EPA that tracks the releases and transfers by a wide range of facilities nationwide of more than 600 toxic substances.

Environment America used the data to not only determine the overall pollution levels from industrial facilities, but also to identify specific facilities with the highest amount of toxic water waste. For instance, the report identifies AK Steel Corporation's Rockport, IN, plant as the facility with single highest waterway discharges of toxics in the whole country. In 2007, the facility dumped more than 24 million pounds of toxic nitrate compounds into the Ohio River. In addition to their toxicity, nitrate compounds are largely responsible for the colossal "dead zones" that perennially afflict water bodies such as the Gulf of Mexico, where the Ohio River's waters eventually end up.

The federal government also appears among the report's list of the top twenty polluters. The U.S. Army's Radford Ammunition Plant in Virginia dumped 13.6 million pounds of nitrate compounds into the New River, making it the second biggest water polluter in 2007 and another contributor to dead zones. Scientists consider pollution from agricultural storm water runoff to be a much larger contributor to dead zones, but TRI does not track agricultural runoff, and measuring such pollution has been problematic.

The study also draws on scientific data developed by the state of California to characterize the types of harm that specific chemicals might cause. California's Proposition 65 database includes approximately 800 chemicals known to cause cancer, birth defects, or other reproductive harm.

The report explains that "among the potential health effects of [developmental and reproductive toxicants] are fetal death, structural defects such as cleft lip/palette and heart abnormalities, as well as neurological, hormonal, and immune system problems."

Weyerhaeuser's Pine Hill, AL, paper mill released the most developmental toxicants into a waterway in 2007. In addition to 35,000 pounds of the pesticide nabam and 35,000 pounds of the biocide sodium dimethyldithiocarbamate, the mill discharged lead, mercury, and zinc into the Alabama River.

Several shortcomings with the TRI database are exposed by the report. Misspelled or inconsistent names of waterways made regional tracking of pollution difficult. To ensure the right bodies of water were identified, the authors were forced to review and repair manually thousands of records. The TRI program also has several important gaps in the information collected. The program currently does not cover several industries especially relevant to

waterway pollution, such as wastewater treatment plants and agricultural facilities. The list of chemicals reported to TRI omits numerous important water pollutants, and small facilities are excluded from the program entirely.

For the most part, toxic releases reported to TRI fall within a facility's permitted levels. In response to the report, several large polluters emphasized their compliance with their water pollution permits. However, the report's authors present the data in an effort to defend their calls for stricter permits. Such disclosures of a company's pollution often also result in public pressure on companies to voluntarily reduce their emissions.

Enforcement of and compliance with the nation's primary water protection statute, the Clean Water Act (CWA), have been weak in recent years. *The New York Times* is currently running a series describing the worsening pollution problems with American waterways and the feeble enforcement of clean water laws. According to the *Times*, "In the past five years, companies and workplaces have violated pollution laws more than 500,000 times. But the vast majority of polluters have escaped punishment."

The Environment America report also makes clear that even if widespread compliance with CWA permits were achieved, the nation's waterways would still be severely harmed unless permitted pollution levels are reduced.

The report includes recommendations for policymakers to improve the health of the nation's waters. The policy emphasis should be placed on reducing the use of toxic chemicals in industry by promoting safer substitutes. First, the country's chemical policy must be reworked to regulate chemicals based on their intrinsic hazards, with the goal of eliminating public exposure to hazardous substances. Additionally, chemical manufacturers should be required to test the safety of their products and disclose all results prior to putting the chemicals on the market.

The authors also call on federal policymakers to strengthen implementation of the Clean Water Act. Their first recommendation is to ensure pollution permits are renewed on schedule and permitted levels of pollution are ratcheted down, with the goal of eliminating pollution entirely –as the CWA calls for. Moreover, the penalties for violating the CWA should be strengthened by establishing mandatory minimum penalties. Congress is called upon to ensure EPA has adequate resources and staff to meet its CWA requirements.

## Federal FOIA Mediator Begins to Use Technology to Reach Public

On Oct. 22, the National Archives and Records Administration (NARA) launched the website for the Office of Government Information Services (OGIS), which will mediate disputes between the government and those who seek its information. The office, once in danger of being all but muted by the Bush administration, is showing signs of emerging as an independent arbiter seeking out creative solutions to old problems.

The primary purpose of OGIS, created by the 2007 OPEN Government Act, is to improve agency implementation of the Freedom of Information Act (FOIA). OGIS will review the FOIA policies and procedures of agencies, agency compliance with FOIA, and recommend policy changes to Congress and the president to improve FOIA administration.

The OPEN Government Act specified NARA as the location for OGIS in an effort to establish the office at an objective agency with a good reputation for records management. Since the Department of Justice (DOJ) defends agencies accused of inappropriately withholding documents, it is viewed as having a bias toward federal agencies. Hence, Congress created OGIS to be an independent voice on FOIA compliance and complaints.

The OGIS website demonstrates the office's interest in positioning itself as a liaison between the public and the federal government on FOIA matters. The website provides the public with several ways to contact the office, along with news on FOIA administration developments and congressional testimony. Further, it provides centralized access to FOIA resources outside of the federal government that assist the public in gaining access to federal information. Included in these resources is the Federal Open Government Guide, published by the Reporters Committee for Freedom of the Press, that is oriented toward the non-lawyer general public.

The office appears likely to expand its online capabilities in the near future. Miriam Nisbet, the first director of OGIS, has set a goal of utilizing online tools to fulfill its mission. In testimony before the Senate Judiciary Committee in September, Nisbet stated that she saw potential in using current technologies to better assess agency compliance and performance under FOIA "similar to what is being done to assess federal agencies' information technology initiatives through the IT Dashboard [an assessment of federal spending on information technologies offered through USAspending.gov] and Data.gov [a new service providing access to government databases in a one-stop website]." Further, she described plans to establish an online dispute resolution (ODR) system to efficiently process and evaluate a large volume of cases in the office's role as mediator. The utilization of tools to make this process more efficient and more likely to avoid litigation would, according to Nisbet, "save time and money for agencies and public alike, as well as bolster confidence in the openness of government."

The use of new technology to help monitor government compliance with FOIA and to resolve disputes is an advance that could help resolve disputes more quickly and save agencies and the taxpayers from having to pay the cost of litigation. In recent years, the cost of FOIA litigation has ranged in the hundreds of thousands of dollars. During several of these years, fees collected from FOIA requests amounted to less than half of litigation expenses.

Nisbet, appointed in June, entered the position from UNESCO's Information for All Program. She also served as the legislative counsel for the American Library Association from 1999-2007. Prior to that, she was the Deputy Director of the DOJ's Office of Information Privacy.

## House Moves to Reduce Risks from Chemical Plants

On Oct. 21, the House Energy and Commerce Committee approved two pieces of chemical security legislation that encourage plants to switch to safer and more secure technologies. Although the bills still lack crucial accountability measures, they represent a major improvement over the flawed and inadequate temporary security measures currently in place.

According to Department of Homeland Security (DHS) testimony, U.S. chemical plants and water facilities remain vulnerable to terrorist attacks. The department has identified more than 7,000 high-risk chemical facilities. The current program does not cover drinking water and wastewater facilities.

A terrorist attack against a chemical facility – or against the railcars that deliver chemicals – could release a cloud of poison gas resulting in thousands of casualties. The new legislation aims to address this threat in several ways, including by promoting the conversion to chemicals that pose less or no risk to surrounding communities.

The bills – the Chemical Facility Anti-Terrorism Act of 2009 (H.R. 2868) and the Drinking Water System Security Act of 2009 (H.R. 3258) – require plant workers to participate in the security process and preserve states' authority to establish stronger security standards. Both bills also require covered facilities to assess whether there are alternative chemicals or processes that they could use that would reduce the consequences of a terrorist attack.

For example, numerous water facilities across the country have independently switched from using chlorine gas as a disinfectant to liquid bleach or ultraviolet light. These alternate technologies work as well or better than chlorine gas and do not potentially threaten thousands should a terrorist attack cause a release.

One glaring weakness in the legislation is the absence of transparency. The bills allow the government to keep secret even the identities of facilities that are covered by the security programs. The types of information considered "protected" and thus not available to the public are overly broad and allow DHS to deny the public access to basic regulatory data needed to ensure the government and facilities are obeying the law. Such excessive secrecy could threaten the security of the millions of citizens living near, or even just passing by, what then-Senator Barack Obama referred to as "stationary weapons of mass destruction."

Notably, the bills give DHS or the U.S. Environmental Protection Agency the authority to require the most high-risk facilities to convert to whichever safer technology the facility identifies for itself – under limited circumstances. A chemical plant can only be forced to convert if it is economically and technologically feasible to do so and if the conversion would actually reduce the risks. The legislation specifically prohibits requiring a facility to convert if doing so would force the facility to move to another location to avoid the requirement.

The bills' supporters agreed to numerous other compromises to ensure broader support and dampen what had been strong industry opposition. One change reduced the number of high-risk

chemical facilities that may be required to eliminate catastrophic risks with safer technologies. Another change prevents citizens from suing individual companies for noncompliance. Instead, citizens may petition the government to investigate alleged violations at specific facilities.

The House Energy and Commerce Committee, chaired by Rep. Henry Waxman (D-CA), a sponsor of the bills, approved both bills on near party-line votes. Only one Democrat, Rep. Zach Space of Ohio, voted to oppose the chemical facility bill even after he sponsored a successful amendment to add further protections for agricultural interests. All the Republicans on the committee voted against the bill. The water facility bill was approved by voice vote.

The House Homeland Security Committee passed a weaker version of the chemical facilities bill in June. The existing security regulations expired in October, but interim appropriations measures have extended the program.

A long legislative road remains ahead of the legislation. Before the full House can vote on the measures, several issues must be worked out. The two House committees passed different versions of the bills, with different weakening and strengthening amendments. The House Rules Committee must negotiate the form the legislation will take on the House floor. Additionally, technical questions remain, such as how government responsibility for covered wastewater and drinking water facilities will be decided. The legislation is still expected to be on the House floor before the end of 2009. Then the focus shifts to the Senate, which to date has taken no action on the issue.

## OMB Role in EPA Chemical Program Questioned

The White House Office of Management and Budget (OMB) has repeatedly inserted itself in the development of a U.S. Environmental Protection Agency (EPA) program designed to study the effects of chemicals on human and animal endocrine systems.

On April 15, EPA asked OMB to approve scientific test orders it plans to send to chemical manufacturers. Under its Endocrine Disruptor Screening Program (EDSP), EPA is attempting to require manufacturers to screen certain chemicals to determine whether they are endocrine disruptors – a term used to categorize any compound capable of causing certain reproductive and developmental abnormalities. Before issuing the orders, EPA was required under the Paperwork Reduction Act to seek OMB approval. (All agencies must receive OMB clearance before collecting information from 10 or more people.)

OMB approved EPA's request Oct. 2, and EPA has said it will begin sending test orders for seven chemicals later in October. EPA will send out orders for 60 other chemicals from November through February 2010. Recipients of the test orders have the option of subjecting their chemicals to new tests or submitting existing studies.

While EPA will continue to manage the process, OMB cleared the information collection request with caveats. The primary focus of the EDSP is to require manufacturers to subject chemicals to

fresh testing designed to detect endocrine effects. Manufacturers could also submit existing studies if appropriate. When OMB approved the request, it instructed the agency to consider existing studies "to the greatest extent possible."

OMB's role has caused concern among scientists and public health advocates. They say most currently available studies were not conducted with the goal of determining a chemical's effect on the endocrine system and did not study low-dose, long-term exposures.

Scientists have long suspected some chemicals, including those found in certain pesticides and plastics, of mimicking or interfering with natural hormones and disrupting development in the process. The term "endocrine disruptor" was coined in the early 1990s because these substances wreak havoc with the endocrine system – the web of glands and receptors that interact with hormones in both humans and animals. Exposure to endocrine disruptors may begin to cause adverse health effects even at very low doses.

A paucity of reliable data and rising public concern prompted Congress to pass the Food Quality Protection Act (FQPA) in 1996. The law instructed EPA to develop a screening program to determine if pesticides and other chemicals could affect endocrine systems and to pinpoint the doses at which harm occurs.

**The role of OMB**

At the crux of the OMB controversy is the issue of "other scientifically relevant information," a term found in the FQPA. An EPA document describing the procedures and timeline for the EDSP says manufacturers may submit other scientifically relevant information and that EPA will accept such information if it satisfies the test order. But like the information collection request approved Oct. 2, the EDSP procedures document was reviewed by OMB. Again, OMB emphasized the use of existing studies.

An EPA draft of the procedures document submitted to OMB in August 2008 includes an option whereby test order recipients could submit existing data. EPA's initial language presented the issue in stark contrast: in order for a submission of existing data to be deemed sufficient, the data would have to "satisfy the request in the test order."

OMB edited the option to add a significant amount of language about existing data and other scientifically relevant information. OMB suggested language allowing for submission of "relevant" information, regardless of whether it satisfies the order. EPA accepted OMB's edits and published the document April 15.

According to the final document, the ultimate decision rests with EPA, and EPA must provide a written determination to the recipient who submitted existing data as to whether its response is acceptable. Under the FQPA, if manufacturers do not comply with EPA test orders for a certain chemical, EPA may bar them from selling that chemical.

OMB has defended its role in the EDSP. Speaking at an American Bar Association meeting Oct. 23, Michael Fitzpatrick, associate administrator of the White House Office of Information and Regulatory Affairs (OIRA), the arm of OMB that reviews information collection requests and regulatory documents, said that OMB had not manipulated EPA's scientific work or decisions. He emphasized that EPA will maintain complete control over the EDSP and said that EPA welcomed the increased emphasis on the inclusion of other scientifically relevant information.

Still, OIRA's role raises questions. OIRA is not a scientific agency. It employs mostly economists and policy analysts and only a few scientists.

Critics have long urged OIRA to defer to agencies' scientific judgments. In November 2008, a diverse group of regulatory experts and advocates coordinated by OMB Watch recommended that agencies, including White House offices, "abstain from inappropriate interference in the work of other agencies and end secretive interagency reviews of scientific and technical information."

On Oct. 22, the Center for Progressive Reform wrote to newly confirmed OIRA administrator Cass Sunstein, criticizing OMB's role in the EDSP and saying, "As a result, there is a real danger that the EDSP's testing efforts, already behind schedule because of the Bush EPA's delays, will be postponed for many more years" because of the potential for delay from EPA's review of studies that are not ultimately relevant.

A letter from Rep. Edward Markey (D-MA), chair of the House Energy and Commerce Committee's Subcommittee on Energy and the Environment, further raised the profile of the controversy. Markey reiterated concerns voiced by the scientific community, writing, "OMB has suggested that EPA use existing data from toxicological tests, many of which have not been designed to assay whether these chemicals interfere with the endocrine system." Markey added, "These actions could put public health at risk."

Markey asked OMB Director Peter Orszag to respond to six questions, including whether OMB had assessed whether other scientifically relevant information would be legally and scientifically sufficient to fulfill the requirements of the EDSP and whether OMB had been influenced by outside parties.

The latter question alludes to the role of industry in OMB's review of the information collection request. Several industry groups filed public comments asking OMB to reject EPA's request.

**Importance of reliable data**

The impact, critics fear, is that EPA will not be able to receive the proper data on exposure to harmful chemicals. "Getting a clear picture of those risks requires up-to-date, evidence-based science," said Kathryn Gilje, Executive Director of Pesticide Action Network North America.

The 11 tests, or assays, EPA has developed to screen for endocrine disrupting effects would evaluate chemicals' effects on a variety of human and animal functions, including reproduction,

sexual differentiation and development, and thyroid function. Under Tier 1 of the EDSP, if satisfactory existing studies do not exist, manufacturers will subject their chemicals to EPA's test battery (which has also been criticized). If a chemical is identified as an endocrine disruptor, it advances to Tier 2, where scientists will attempt to pinpoint a dose-response relationship.

An EPA scientific advisory committee formed to aid in the design of the EDSP first addressed the issue of existing studies in 1998: "There are numerous reasons for using only validated assays. These include: having confidence that the assay is detecting the effect it purports to be detecting, that the results of the assay are reproducible and comparable from laboratory to laboratory, and that the results permit a comparison of the toxicity of various chemicals."

The full impact of OMB's comments cannot be gauged until manufacturers begin responding to EPA's orders for information. If manufacturers attempt to submit other scientifically relevant information that is not sufficient to determine endocrine disrupting effects, EPA will face a choice over whether to accept it. The back and forth between EPA and industry, which could occur for multiple chemicals, will in part shape the EDSP.

EPA may also experience political consequences if it seeks to add chemicals to the EDSP beyond the 67 currently included. In addition to encouraging EPA to use other scientifically relevant information, OMB asked EPA to revise its estimates for the time the agency expects manufacturers to spend complying with EDSP test orders. EPA must present its revisions if it decides to seek approval to send test orders for additional chemicals, OMB said, at which time OMB may approve or disapprove the request.

If for any reason EPA is unable to obtain information on the endocrine disrupting properties of chemicals, public health could suffer. Endocrine disruptors have been blamed for health effects in both humans and animals, including birth defects and thyroid problems. Endocrine disruptors were also implicated after researchers discovered that 80 percent of male smallmouth bass in the Potomac River watershed are producing immature female eggs. Similar intersex fish have been discovered in other water bodies across the country.

Without reliable science on low-dose exposure to endocrine disruptors, government officials will be unable to determine the best steps to manage the risk to public health and the environment.

## EPA Inspector General Targets Water and Air Enforcement

The U.S. Environmental Protection Agency's (EPA) Office of Inspector General (OIG) recently provided two assessments of EPA's weaknesses in enforcing water and air programs. The OIG cited management problems at the federal and regional levels that largely indict the Bush administration's lax approach to environmental enforcement.

On Oct. 14, the OIG released an evaluation report entitled *EPA Oversight and Policy for High Priority Violations of Clean Air Act Need Improvement*. High priority violations (HPVs) are significant violations of the Clean Air Act (CAA) by stationary sources like power plants and

factories. These significant violations led the EPA to institute a high priority violation policy during the 1990s. The policy contains thresholds defining HPVs and steps the agency should take to address the violations. The steps may ultimately lead to EPA regional offices displacing states in pursuing violators if a state is unable or unwilling to act.

OIG's investigation of the HPV program focused on violations classified as HPVs between October 2005 and Dec. 31, 2007, from five regions with the highest number of unaddressed high priority violations. EPA's policy requires that these significant violations be addressed (either resolved or have formal enforcement actions taken) within 270 days after EPA or the states receive notice of the violations.

The report summarized the results of the reviews of more than 3,700 violations, concluding:

> HPVs were not being addressed in a timely manner because regions and States did not follow the HPV policy, EPA Headquarters did not oversee regional and State HPV performance, and regions did not oversee State HPV performance. According to EPA data, about 30 percent of State-led HPVs and about 46 percent of EPA-led HPVs were unaddressed after 270 days.

The report cited several management problems throughout EPA. For example:

- Polluters did not receive notices of violations within the time required
- None of the states and regional offices met to review case strategies within the time required
- States often employed voluntary approaches with the violators rather than imposing formal enforcement actions as required by agency policy
- Regional offices did not take over enforcement of delinquent cases when states failed to act

The OIG report was directed to Cynthia Giles, Assistant Administrator of the Office of Enforcement and Compliance Assurance (OECA), and contains several recommendations for agency action. In her response to the OIG (contained in the report), Giles outlined several actions the agency has already taken or intends to take to remedy its poor performance. She noted, however, that EPA intends to review the HPV policy "to determine what revisions might be necessary to ensure the most effective implementation of an HPV policy" and whether the policy is the appropriate tool to address significant violations of the CAA. Until that review is complete, some of the OIG recommendations will not be implemented.

On Oct. 15, the House Committee on Transportation and Infrastructure held an oversight hearing entitled "The Clean Water Act after 37 Years: Recommitting to the Protection of the Nation's Waters." The focus of the hearing was to explore state and federal enforcement issues. Among the ten witnesses were Lisa Jackson, EPA Administrator, and Wade T. Najjum, Assistant Inspector General for Program Evaluation, of EPA's inspector general's office.

At the hearing, Jackson announced the creation of the Clean Water Action Enforcement Program, the "first step in revamping the compliance and enforcement program," according to the agency's press release. The plan had been under development by OECA since July. It outlines EPA's strategy to target its enforcement to the most significant water pollution problems, to provide better access by the public to water quality data in local communities, and to strengthen performance at both the federal and state levels.

The plan describes the challenges forcing EPA to focus on the most significant sources of pollution, noting, "Over the last 30 years, water enforcement focused mostly on pollution from the biggest individual sources, such as factories and sewage treatment plants. Now we face different challenges. The regulated universe has expanded from the roughly 100,000 traditional point sources to nearly one million far more dispersed sources such as animal feeding operations and storm water runoff. Many of the nation's waters are not meeting water quality standards, and the threat to drinking water sources is growing."

Najjum's testimony focused on the challenges EPA faces in its management and enforcement. Each year, the OIG lists the major management issues that should be addressed agency-wide. For FY 2009, three issues on that list affected management and enforcement at the agency: EPA's organization and infrastructure, its oversight of states' responsibilities, and performance measurement.

In each of these areas, Najjum presented a range of problems similar to those described in the OIG report on air program enforcement. Reporting and data problems, for example, make it extremely difficult for the agency to oversee state activity to determine if the law is being adequately enforced. States and regional offices are inconsistent in their approaches to managing enforcement of violations and often interpret EPA guidance differently.

In addition, Najjum discussed problems resulting from the organizational structure of EPA, which has both functional offices (monitoring, research, enforcement, and standard-setting) and pollution media offices (air, water, radiation, pesticides, etc.) As a result, there is inadequate coordination between offices at the federal level and between headquarters and regional offices; the missions, goals, and performance measures across programs are not linked together; and inadequate resources force difficult allocation decisions.

Both OIG assessments of EPA's enforcement capabilities and challenges reinforce the arguments critics have leveled at EPA and presidential administrations for at least the last decade. Although the agency has been significantly underfunded to meet its responsibilities, it has not energetically enforced the law, its oversight of states has been lax, and it faces a continuous stream of new challenges.

## FEC Decides Not to Appeal EMILY's List Decision

The Federal Election Commission (FEC) has decided not to appeal a September ruling by a three-judge panel of the U.S. Court of Appeals for the D.C. Circuit in *EMILY's List v. FEC*. That

opinion struck down FEC regulations that limited donations to some nonprofit groups that engage in campaign activity. The FEC's decision not to appeal may have major implications for campaign finance issues, as well as certain nonprofits' activity during upcoming elections in 2010 and 2012.

The appeals court ruled that the FEC regulations violated EMILY's List's speech rights in violation of the U.S. Constitution. EMILY's List is a non-connected nonprofit political action committee (PAC) that seeks to elect pro-choice, Democratic women to office. In 2005, the group challenged the FEC's regulations as they relate to the treatment of funds received in response to certain solicitations and amended rules regarding federal/nonfederal fund allocation ratios for PACs.

There has been much speculation since the *EMILY's List* ruling as to whether the FEC would appeal. There are many reasons why the FEC's decision not to appeal is unsurprising. Currently, there is a deep partisan divide on the FEC, and that divide was evident in the FEC's decision not to appeal. All three Democratic commissioners voted to appeal the decision while the three Republican commissioners voted not to appeal it. With the commission split 3-3, there was not the clear majority needed to proceed with an appeal. This split is consistent with other partisan schisms at the FEC over the past year.

The FEC had the option to appeal to an *en banc* court comprised of the appeals court's nine judges, rather than accept the decision from the original three-judge panel that decided the case. However, the likelihood that an *en banc* court would have affirmed the panel's decision may have played a role in the FEC's decision not to appeal the case. Since the September decision striking down the FEC regulations was unanimous, five of the remaining six judges would have had to vote to uphold the regulations. This "seems highly unlikely based on the record of those judges," according to the Center for Competitive Politics. Thus, the Center concludes that, "an *en banc* appeal would most likely be a waste of time."

Campaign finance reform groups see this as an issue that tends to break down partisan lines. Democracy 21 President Fred Wertheimer said in a statement that "[n]ormally government agencies take actions to defend the constitutionality of the regulations they have issued, but [the Oct. 22] vote by the Republican FEC Commissioners to block an FEC appeal continues their pattern of doing everything they can to emasculate the nation's campaign finance enforcement agency and thereby to emasculate the nation's campaign finance laws."

Paul Ryan, an election law expert at the Campaign Legal Center, told *Politico* that the "EMILY's List decision, if allowed to stand, loosens the campaign finance law restrictions on committees like EMILY's List and allows them to use more soft money to engage in activities that arguably influence federal elections." This could result in an unprecedented amount of "soft money," which is unlimited donations to certain nonprofit groups by individuals, corporations, political action committees and unions for use during elections.

Charlie Spies, an election lawyer who has represented the Republican National Committee, believes that "an appeal would further upend the already shifting election law landscape heading

into the 2010 midterm elections," according to *Politico*. "It is important for groups planning to participate in the political process to have certainty going into 2010, and the commission is helping provide that by not appealing the court's decision," Spies told *Politico*.

There is some speculation about whether Solicitor General Elena Kagan can still appeal the case to an *en banc* court. "There is no doubt that Kagan could take the case to the Supreme Court now; legal analysts are not sure she has the option of seeking *en banc* review, or whether that was a choice left to the FEC," according to the *Supreme Court of the United States Blog*.

The Center for Competitive Politics notes that the "Solicitor General represents the FEC in the Supreme Court, and can appeal statutory and constitutional questions even if the FEC does not ask her to do so. However, such action by the SG is extremely rare. Moreover, it is not entirely clear that she can appeal a regulation without the agency's acceptance – her authority is to defend "statutes" of the United States. No statute is at issue in *Emily's List*. It would be strange indeed for the Solicitor General to seek *certiorari* in the Supreme Court in order to defend the validity of a regulation that the agency itself does not believe is constitutional, and it would seem a waste of the Supreme Court's time to hear such an odd appeal."

Most legal experts, however, believe that the Solicitor General can appeal the case even if the FEC does not support the decision, according to *Politico*. Kagan is studying the decision, according to *The Hill* and *Roll Call*.

What remains clear is that if the outcome of this case stands, it has created a new standard for election-oriented nonprofits to raise and spend unlimited funds to directly support or oppose a candidate's campaign. The results suggest major implications on the upcoming elections in 2010 and 2012.

## Census Amendment Stalls Appropriations Bill, LSC Funding

Civil rights groups are urging the Senate to reject a controversial amendment to the FY 2010 Commerce, Justice, and Science (CJS) Appropriations bill (H.R. 2847) currently working its way through Congress. Sens. David Vitter (R-LA) and Robert Bennett (R-UT) have proposed the amendment, which is designed to cut off funding to the Census Bureau unless the 2010 Census survey includes a question regarding citizenship and immigration status. The amendment flap has delayed passage of the CJS legislation, which would, in part, increase funding and restore speech rights to Legal Services Corporation (LSC) grantees.

According to Sen. Vitter, "If the current census plan goes ahead, the inclusion of non-citizens toward apportionment will artificially increase the population count in certain states, and that will likely result in the loss of congressional seats for nine other states, including Louisiana."

Many civil rights groups argue that this additional question about citizenship will discourage census participation and in turn, undermine accuracy. According to the Leadership Conference on Civil Rights (LCCR), "The question would inflame concerns within both native-born and

immigrant communities about the confidentiality and privacy of information provided to the government and deter many people from filling out their census form."

On Oct. 20, a broad coalition of civil rights and advocacy organizations held a press conference on Capitol Hill to urge the Senate to vote against the amendment. Some of the groups involved include LCCR, the National Association of Latino Elected and Appointed Officials (NALEO), and the Asian American Justice Center (AAJC). Many of the groups released statements denouncing Vitter and Bennett's effort. Wade Henderson, president and CEO of LCCR, stated, "The 14th Amendment clearly requires a count of every resident for apportionment of U.S. House seats, yet the Vitter amendment echoes a shameful period when the census counted most African Americans as three-fifths of a person. The ideals that our country was founded on, and the sacrifice and struggle of generations of Americans to realize them, deserve better than this."

In addition, many House leaders and members of the Congressional Hispanic Caucus, Congressional Black Caucus, and Congressional Asian Pacific American Caucus condemned the amendment. They, too, held a press conference, during which House Majority Leader Steny Hoyer (D-MD) said the census changes are "something that neither the Census Bureau or the country can afford."

The 2010 census is scheduled to begin on April 1, 2010, and most of the materials have already been printed and finalized. Reportedly, the amendment's addition of a new question would require the Census Bureau to reprint materials, at a cost to American taxpayers of more than $7 billion.

In response, Rep. Joe Baca (D-CA) introduced the "Every Person Counts Act" (H.R. 3855), which would restrict the Commerce Secretary from including any questions regarding citizenship or immigration status on the census.

In mid-October, *The New York Times* ran an editorial commenting that the changes proposed by Vitter and Bennett would be wasteful and counterproductive. "Adding a new question about citizenship would further ratchet up suspicions that the census is being used to target undocumented immigrants," said the editorial. "That would discourage participation not only among people who are here illegally but also their families and friends who may be citizens and legal residents. That leads to an inaccurate count. And since census numbers are also used to allocate federal aid, undercounting minorities shortchanges the cities and states where they live."

When the full Senate began consideration of the CJS bill in early October, Majority Leader Harry Reid (D-NV) scheduled a cloture vote, but Senate Republicans blocked the effort to cut off debate. Reid plans to hold another cloture vote soon.

The NALEO Educational Fund issued a press statement stating, "We urge the Senate to vote in favor of cloture, which would lay the foundation for halting the Vitter-Bennett amendment. If the cloture vote is not successful, we urge every Senator to oppose this unconstitutional and costly measure if it comes to the Senate floor."

In addition to its civil rights and logistical implications, the Vitter-Bennett amendment is stalling an appropriations bill that would overturn onerous restrictions on legal aid nonprofits. The CJS legislation includes a provision that removes advocacy-related restrictions placed on the private and local funds of LSC-funded nonprofits. Currently, these legal aid groups are barred from using their non-federal funds to engage in lobbying, initiate class-action litigation, or participate in agency rulemakings. These restrictions even apply to funds that come from private donors.

For more information on the LSC provision, see the July 29 issue of *The Watcher*.



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

Subscribe | Blog | Donate

The Watcher

November 10, 2009 Vol. 10, No. 21

## In This Issue



---

## About Those Recovery Act Job Numbers

Prominently displayed in a large, green font on the front page of Recovery.gov is the number 640,329. That is the number of jobs created or saved as reported by the recipients of some $150 billion in Recovery Act funds. The placement, font size, and accompanying press release from the White House have drawn immense attention and copious media reports. However, questions about the number's accuracy degrade the count's usefulness as a gauge of the economic impact of the Recovery Act. The figure itself remains only a fragment of the information that describes how the act is improving the economy and helping unemployed workers.

Although media reports are quick to glom on to a few egregious overreporting errors, such as a 4,000-job overcount by one recipient in Colorado, a systematic analysis of the more than 150,000 recipient reports reveals not only hundreds of instances of potential overcounts, but also hundreds of instances of potential undercounts:

- 421 reports of zero job creation/retention for awards of more than $100,000 where the project was marked as "completed"
- 36 reports of less than two jobs created or retained for awards of more than $1 million where the project was marked as "completed"
- 2,691 reports of jobs created or retained where the project was marked as "not started"

Within the data, there are substantial inconsistencies in what recipients report as a job created or saved. A close reading of recipient reports makes it apparent that many recipients have not received clear instructions on how to count jobs created or saved, as several recipients wrote in narrative descriptions of Recovery Act project employment that differed from the reported number of jobs created or saved. For example, one recipient wrote that "[a]lthough no new jobs were created, employees were kept from being placed on lay off." Yet, the recipient reported zero jobs created or saved.

In another instance, the *Denver Post* noted that one recipient, the town of Frisco, CO, said its grant to purchase two laptop computers for the police "did not create any jobs. But it did make it easier for the existing officers to do their jobs properly." However, the town listed two jobs created or saved.

These inconsistencies and suspect reports indicate that there is great confusion among recipients about what they should be counting as a job created or saved by the Recovery Act. However, confusion about the definition of a "job created or saved" is not limited to those tasked with calculating and reporting the data.

Within hours of the latest release of Recovery Act recipient reporting data on Oct. 30, CNN's Wolf Blitzer was puzzled by a description of some of the jobs saved by the act.

> TOM FOREMAN, CNN CORRESPONDENT: It was a place called Wood Product Signs. They had a contract to create jobs -- to create signs for the Forest Service.... They said, they would have normally had to lay people off this summer because it's seasonal work. As it was, they were able to keep three of their regular employees and add two more, for a total of five employees for six weeks.
>
> [...]
>
> BLITZER: Yes. I assume, when they talk about jobs, they mean permanent jobs that people are going to have for a while, not just a temporary job.

Blitzer's assumption, while not uncommon, betrays unfamiliarity with the methodology by which job counts are to be calculated by recipients. According to Office of Management and

Budget (OMB) guidance on calculating the number of jobs created or saved, recipients must report the information as "full-time equivalents," or FTEs. FTEs are calculated by dividing the total number of hours worked on a Recovery Act project by the number of hours a full-time employee would work in a single quarter. For example, there are 520 hours in a forty-hour-per-week job in a single quarter. If a recipient paid two employees to work a total of 1,040 hours from July 1 to Sept. 30, the recipient would report two FTEs. If a recipient paid two part-time employees to work a total of 520 hours in that same time period, the recipient would report one FTE. Not included in reported data are the number of hours worked or the number of hours considered by the recipient to be full time, leaving the news media and the public to erroneously conclude that an FTE reported by one recipient is comparable to an FTE reported by another. Differing conceptions of what a "job" is, among recipients and the public, is only one factor obscuring the act's impact on the economy.

The information that OMB and the act require recipients to report does not describe the quality of the jobs created or saved or who is being employed by Recovery Act funds. As noted above, job counts are reported as full-time *equivalents*; that is, two half-time jobs would appear as one full-time job. Neither information on benefits nor wage data accompanies job counts, clouding the degree to which the act is creating employment sufficient to fully sustain families.

Additionally, skill levels of employed workers remain unknown. Nuclear waste cleanup jobs require more training and experience than custodial work, yet in the eyes of Recovery Act reporting, jobs created in both fields are equal. Also absent from reported employment is information on the race, income, geographic location, and previous employment status of employed workers.

Equally striking is that OMB advises recipients of Recovery Act funds to only count jobs saved if those employees were to be laid off. In other words, if an entity used Recovery Act money to continue employing existing workers, then no jobs would be created or saved, according to OMB. These myriad dimensions of the employment data are critical to understanding the Recovery Act's ultimate impact on the employment picture.

Facile dollars-per-job calculations ignore these elements of employment, and, crucially, neglect to account for jobs created or saved beyond the first-level subrecipient. Existing reporting guidelines require that only entities that receive funds directly from the federal government (prime recipients) and the entities who receive Recovery Act funds directly from those prime recipients (first-tier subrecipients) report job counts. Yet, it is probable that in many projects, those first-tier subrecipients will subcontract work and obtain goods and services to execute their projects.

For example, the Texas Department of Transportation (TxDOT) may receive road repair funds from the federal Department of Transportation (DOT) and subsequently re-grant those funds to the City of Dallas. Dallas will likely employ contractors to conduct road repairs. In this scenario, TxDOT (the prime recipient) will report the number of jobs it created or saved and the number of jobs created by the City of Dallas (first-tier subrecipient). Jobs created or saved by the contractors hired by Dallas will not be counted.

In addition to the jobs created or saved by Recovery Act fund recipients (direct jobs), the enhanced buying power of the directly employed will spur job growth in other sectors of the economy (indirect jobs). For example, a construction worker who was not laid off because his company received an award will have money to repair his car, buy a new pair of work boots, and maybe take his family out to dinner. The auto mechanic, shoe salesman, and waiters in the restaurant will be less likely to lose their jobs, yet those jobs are not included on the Recovery.gov homepage.[1]

The bottom-line jobs count is an unreliable indicator of the Recovery Act's success, not only because its calculation is less than scientific, but also because it is just one component of the act's impact on employment and lives of people in need. Excluded by the number are the hundreds of thousands of workers who are receiving unemployment insurance and can continue to provide for their families; the tens of thousands of individuals who can see a doctor because states have increased Medicaid funds; and the countless children who will have enough food to eat because of increased nutrition assistance funding. Also embedded in the economic effects of the act beyond employment and short-term ameliorations are the investments in infrastructure, green energy, and health care information technology that will enable decades of increased economic growth capacity.

The eye-catching number on Recovery.gov has clouded these important features of the Recovery Act, but it is just one indicator (and a rough one at that) of the ultimate impact of the act on the economy, and ultimately the families it was created to help.

---

[1] They are, however, counted by the president's Council of Economic Advisors (CEA) and are reported on a quarterly basis. According to the Oct. 30 White House press release, the CEA estimates that one million jobs have been created to date by the Recovery Act. This total includes direct and indirect jobs created by Recovery Act contracts, grants, loans, and jobs created by tax cuts and direct aid to individuals such as unemployment insurance, Medicaid, and Food Stamps.

## OMB Watch Submits Comments on Contractor Database

On Nov. 5, OMB Watch submitted comments and recommendations to the General Services Administration (GSA) on the new Federal Awardee Performance and Integrity Information System (FAPIIS). Required by the FY 2009 National Defense Authorization Act (NDAA), the database is supposed to help contracting officials make better award determinations by providing timely information on the honesty and reliability of contractors.

While OMB Watch has long supported the creation of a responsibility database, the group found several problems with the proposed rule. Problem areas included the planned structure of the database and its relationship to other contracting databases; the quality and display of the information; the lack of specified training for contracting officials on how to use the database; and the inability of the public to access the database.

According to the proposed rule in the *Federal Register*, Section 872 of the FY 09 NDAA calls for the GSA "to establish and maintain a data system containing specific information on the integrity and performance of covered Federal agency contractors and grantees." The provision also "requires awarding officials to review the data system and consider other past performance information when making any past performance evaluation or responsibility determination." Ideally, the performance database would provide contracting officers (CO) a one-stop shop with easily measurable findings that they could consult when attempting to choose between various contractors. The proposed rule falls short in several of these areas, according to OMB Watch's comments.

The proposal creates yet another separate performance database that combines some new performance information and some information already available in other databases. In fact, the proposed rule calls for contracting officials to consult both FAPIIS and the Past Performance Information Retrieval System (PPIRS), an already existing database, when making a bid determination. The comments to GSA noted that rather than having to search multiple databases, COs should be able to get all the pertinent data they require to make a sensible decision from a single interface that is fed by a system of distributed databases that are linked together, web-accessible, and fully searchable.

However, simply collecting all the contractor information stored in the government's many contracting databases and funneling it into one interface would not solve the problem of the lack of data coherence among the information collected. The contractor data collected by the government needs extensive revision and standardization before it can be useful to contracting officials, OMB Watch noted. In its comments, the group said the government should develop a quantified scoring system to help COs sift through the millions of compliance records that currently present different information in different ways, complicating an already difficult task and overburdening an overworked and understaffed government contracting corps. Making it even more important to standardize the information is the need for the government to broaden the scope of the information presented in the database.

The current proposal limits the amount of information a CO could view on any one contractor in several ways. While the language establishing FAPIIS requires the database to provide many types of performance data, it establishes a high threshold for the inclusion of information and an arbitrary time limit on that information populating the database. The rule requires contractors to report information on civil, criminal, and administrative actions only if the contractor settles the issue with an admission of fault, which rarely happens, as dispute settlements usually purposefully lack an admission of guilt. OMB Watch's comments make clear that the rule should require the database to include all civil, criminal, and administrative proceedings, regardless if the outcome includes an admission of guilt. The arbitrary time limit of five years for information to stay in the database should also change, the group said. While contracting officials should not necessarily hold past transgressions against a contractor, it is essential for a CO to gain perspective on a judgment by seeing a company's entire history.

Furthermore, there is no requirement for COs to go through any training or receive any detailed guidance on the appropriate use of the new database. Without knowledge of how to evaluate the

various findings provided through FAPIIS, contracting officials are likely to ignore the information in the new performance database or only pay it a cursory consultation. This is contrary to the purpose of the database, as the information provided should form the basis of a rigorous responsibility review. OMB Watch recommended that the proposal stipulate training for contracting officials on how to use the new database properly.

Lastly, the proposed rule allows only government contracting officials to access the new performance database. Public access to accurate and timely data about the federal contracting process is essential to efficient and effective implementation and oversight of federal contracting. Indeed, there is no reason to withhold from the public all information about how federal contractors are performing. OMB Watch's comments said the proposal should require public disclosure – with pertinent safeguards to protect sensitive business information and within the scope of applicable laws – of contractor performance information. This would foster better decisions from contracting officers and more competition between contractors, as both would become more responsive to increased public scrutiny of contracting decisions and processes.

Other watchdog groups are echoing OMB Watch's recommendations and are calling for sweeping improvements of the proposed rule to create FAPIIS, including the Project on Government Oversight and the Center for American Progress Action Fund. Without some implementation of these recommendations, the government may simply create another layer of bureaucracy that will at best become an annoyance to contracting officials or at worst stifle their important work.

## House Passes Chemical Security Bill

More than eight years after the 9/11 terrorist attacks, the House approved legislation that seeks to greatly reduce the risks of terrorist attacks on chemical plants and water treatment facilities. The Chemical and Water Security Act of 2009, passed in a 230-193 vote, includes measures long sought by labor, environmental, and public interest groups, including greater worker participation and the authority for states to implement stronger security standards. However, the House bill lacks measures to ensure an accountable security program that is not hobbled by excessive secrecy.

The House-passed bill, H.R. 2868 (sponsored by Rep. Bennie Thompson (D-MS)), will require covered facilities to assess potentially safer chemicals or processes that could reduce the consequences of a terrorist attack. By removing a toxic substance that might poison thousands if released, a facility becomes less of a target to potential terrorists. Under certain circumstances, the bill gives the Department of Homeland Security (DHS) or the U.S. Environmental Protection Agency (EPA) the authority to require a facility to convert to a safer technology identified in the plant's assessment. If the facility would be forced to relocate or be hurt economically, it would avoid the requirement to convert.

Following months of work by several House committees, the bill passed on Nov. 6 without a single Republican vote. Members of the House Homeland Security Committee and the Energy and Commerce Committee worked out the bulk of the comprehensive security bill, with major contributions from both the Transportation and Infrastructure and Judiciary Committees.

During the House floor vote, Republicans continued attempts to remove key portions of the legislation and replace the measure with an extension of the current security program. The current program, known as the Chemical Facility Anti-Terrorism Standards, is regarded by many public interest advocates as fatally flawed and does not cover thousands of water treatment facilities.

Several compromises were negotiated in the weeks leading up to the floor vote, including the elimination of a citizen suit provision that had allowed citizens to sue individual companies for noncompliance. Instead, a petition process will be created, through which citizens may request the government to investigate a specific facility. Citizens may still sue the government for failing to implement the law.

Most concerning to open government advocates is the expansive definition of what types of information may be considered "protected," and thus not disclosed to the public. The bill grants the secretary of DHS and the EPA administrator discretion to conceal facility compliance information should they deem that the information places the facility in danger. This would prevent the public from even knowing what facilities are covered by the law, let alone whether a facility is in compliance or not. Government inspection histories and information on violations and penalties at specific facilities could also be concealed. Should DHS and EPA withhold these records, the lack of compliance information would create an immense barrier to public accountability. Some degree of transparency is necessary to ensure the effectiveness of the government program and to assure communities that nearby plants are safe.

Allowing the public to hold the government and the facilities accountable does not require the release of information that could threaten public safety. Public interest advocates have long acknowledged that information that poses a real threat should remain secret. However, open government advocates believe the disclosure of basic regulatory data would not reveal any specific vulnerabilities at chemical plants, nor would it increase the risk to those living around facilities.

Certifications, notices of violation, and other procedural materials are of no use to terrorists. On the other hand, such information can be used by the public to sustain continual improvements to security. The information would allow the public to stay several steps ahead of those planning an attack by using compliance data to push facilities and the government to improve their implementation of the law. An informed public is an engaged and vigilant public. Without public pressure, vulnerabilities may persist and worsen, increasing daily the threat to workers and communities. This basic accountability is crucial to ensuring that the program is accomplishing what it is designed to accomplish – the security of our plants, workers, and citizens.

Despite the lack of clear transparency or disclosure requirements, the bill greatly strengthens current security measures. The bill adds thousands of drinking water and waste water treatment plants to its scope. The EPA will work with DHS to develop similar security standards for these plants as those put in place for chemical plants. Additionally, the bill takes advantage of the technical expertise and creativity of thousands of plant workers by including them in the assessment of a site's security risks and the development of a site's security plan. Labor advocates also won protections for workers from excessive and exploitative background checks.

The focus now turns to the Senate, where no chemical security legislation has been introduced. Sen. Frank Lautenberg (D-NJ) and Sen. Susan Collins (R-ME) have both signaled their intentions to separately introduce such legislation this session.

## House Committee Marks Up State Secrets Bill, Sends It to the Floor

On Nov. 5, the House Judiciary Committee began markups on a bill that would codify standards for when and how the executive branch may apply the state secrets privilege in civil litigation. Although the Obama administration has promised certain limitations on its own use of the privilege, civil liberties and open government groups continue to call for legislation to address the privilege. Ultimately, the committee approved the bill on an 18-12 vote and referred the legislation to the full House.

The State Secrets Protection Act of 2009 (H.R. 984) was introduced by Rep. Jerrold Nadler (D-NY). The purpose of the bill is to allow executive branch secrecy claims to be examined in a secure manner. The markup was the first time the committee had addressed the issue since the bill was referred to it in June.

The state secrets privilege was created by the U.S. Supreme Court's decision in *United States v. Reynolds* (1953). Historically, the privilege has typically been invoked to withhold specific pieces of evidence from being reviewed by a judge for possible introduction at trial. Officials in the Bush administration interpreted the privilege more broadly and repeatedly used it to pressure courts to dismiss entire cases, arguing that any and all records related to the government's defense would be state secrets. Despite the privilege's court origins, few judges have been willing to question or limit its use. Critics contend that the privilege has been misused to cover up violations of U.S. and international law, such as wiretapping programs, torture, and rendition. In addition, the public learned that the classified material in the original *Reynolds* case, once declassified in 2000, actually contained no secret information.

### Judicial Review

Nadler stated that the bill was an effort to restore "appropriate balance between our three branches of government." The effort to ensure this balance through judicial review is a key part of Nadler's legislation.

The bill would prevent the outright dismissal of an entire lawsuit without an independent review of the evidence deemed privileged. The legislation would require the White House to submit the information it deems a state secret to a federal judge, who would conduct an independent review of the material. Further, if the court believes the executive branch claim is legitimate, then the court can require a non-privileged substitute of the evidence to be created, if possible. Refusal to submit evidence would result in a finding against the government.

Several witnesses, including federal judges and a former Central Intelligence Agency director, submitted testimony in June to the Subcommittee on Constitution, Civil Rights, and Civil Liberties that the courts have proven themselves competent to safeguard sensitive information while administering justice. Congress has provided guidance to the judiciary in the past for handling sensitive information in the Freedom of Information Act and the Classified Information Procedures Act.

During the markup process, judicial review turned out to be a point of contention. Rep. Adam Schiff (D-CA) put forward an amendment that would have required courts to give "due deference" to the government's assertion that disclosure would harm national security. This amendment would essentially codify the existing standard most commonly applied by the judicial branch, which usually accepts the state secrets claim without review of evidence. The amendment failed, however, on a vote of 12-17.

The Obama administration issued new policies and procedures for invoking the privilege in late September. While the administration's policy marked the first time a president has publicly clarified the Supreme Court decision in *Reynolds* and set certain boundaries, several groups have indicated concern that the administration left itself broad room to apply the privilege without sufficient oversight. Although Attorney General Eric Holder's press release on the policy discussed judicial review, the policy itself failed to address a court's ability to review evidence in a state secrets assertion. Particularly troubled by the administration's continued application of the privilege, the American Civil Liberties Union stated, "On paper, this is a step forward. In court however, the Obama administration continues to defend a broader view of state secrets put forward by the Bush administration."

Legislation on the state secrets privilege is currently pending in the Senate, as well. The Senate bill (S. 417) directs courts to weigh executive branch state secrets claims over the claims of the plaintiff. The House bill, however, takes an approach aimed at retroactively narrowing the application of the privilege. The House legislation seeks to reopen cases, as far back as 2002, in which the privilege was claimed.

Regardless of what promises or policies the Obama administration creates, legislation is key to preserving changes that apply to future administrations and enforcing them with proper oversight.

## House Judiciary Committee Approves Strong PATRIOT Act Reform

In a 16-10 party-line vote on Nov. 5, the House Committee on the Judiciary approved H.R. 3845, the USA PATRIOT Amendments Act of 2009. The legislation contains several important reforms of controversial surveillance powers granted in the wake of the 9/11 terrorist attacks. Republicans on the committee claimed that "the legislation would hinder law enforcement and intelligence agencies in fighting terrorism."

The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (PATRIOT Act) was first passed by a landslide after the 9/11 terrorist attacks to provide law enforcement and intelligence agencies additional powers to thwart terrorist activities; it was reauthorized in 2005. The legislation has been criticized by many from across the ideological spectrum as "one of the most significant threats to civil liberties, privacy and democratic traditions in U.S. history" and as unconstitutional, with certain provisions violating the rights of innocent persons, especially under the First, Fourth, and Fifth Amendments.

Judiciary Chair John Conyers (D-MI), along with Reps. Jerrold Nadler (D-NY), and Robert Scott (D-VA), introduced H.R. 3845 to reevaluate the PATRIOT Act, as several of the law's provisions are due to expire at year's end. The bill contains several significant reforms of the powers granted under the original PATRIOT Act. Conyers described the goal of the legislation as "craft[ing] a law that preserves both our national security and our national values." The Obama Justice Department has encouraged the reauthorization of all provisions.

Among the most touted of the reforms provided by the bill, H.R. 3845 would permit the so-called "lone wolf" provision to sunset. This authority removed the requirement that an individual needed to be an agent of a foreign power to be placed under surveillance by intelligence officials and permitted surveillance of individuals with a much lower evidentiary threshold than allowed under criminal surveillance procedures. It was intended to allow the surveillance of individuals believed to be doing the bidding of foreign governments or terrorist organizations, even when the evidence of that connection was lacking. The Justice Department maintains the "lone wolf" authority is necessary, even though there is no evidence that it has been used. Others have likened it to "aim[ing] a Howitzer at a gnat," when pre-existing powers are more than adequate to monitor suspected terrorists. "[Law-enforcement and intelligence agencies] didn't need new 'lone wolf' powers; they needed to understand the powers they already had," said Julian Sanchez in a recent *Reason Magazine* commentary.

Opponents of the lone wolf provision also believe that existing Title III criminal surveillance and FISA authorities are more than sufficient to attain the goals of the lone wolf provision while more effectively protecting the rights of innocent Americans.

H.R. 3845 also restricts the use of national security letters. According to a Congressional Research Service report from Oct. 28, available through the Federation of American Scientists, "National security letters (NSL) are roughly comparable to administrative subpoenas.

Intelligence agencies issue them for intelligence gathering purposes to telephone companies, Internet service providers, consumer credit reporting agencies, banks, and other financial institutions, directing the recipients to turn over certain customer records and similar information."

Under current law, intelligence agencies have few restrictions on the use of NSLs, and in numerous cases, they overuse the authority. An FBI inspector general report in 2007 "found that the FBI used NSLs in violation of applicable NSL statutes, Attorney General Guidelines, and internal FBI policies." The reform provisions seek to create greater judicial scrutiny of NSL use, as the relevant agency would need to demonstrate to a judge the connection to foreign actors, as well as the need for a gag order, prior to issuing the NSL.

In other reform provisions, the legislation would require the government demonstrate to a judge that the target of a roving wiretap is a single person in order to obtain a warrant. An even stricter evidentiary standard is mandated to obtain library and bookstore records. The roving wiretap and records seizure authorities are set to expire at the end of 2013 rather than in 2009.

The House bill also establishes new reporting and audit provisions to facilitate congressional oversight of surveillance.

With the committee stage completed, passage of strong reform legislation is likely in the House. However, the bill approved by the Senate Judiciary Committee in October contains much more modest reforms, would retain the lone wolf provision, and is, in general, much more in line with the wishes of the administration. Should both bills pass and go into conference to be reconciled, it is unclear which approach would prevail.

Conyers urged Congress to seize the opportunity that reauthorization presents to reform the law. He said, "With several provisions of the Patriot Act expiring at the end of this year, we have the opportunity to fix the most extreme provisions of that law and provide a better balance. Our legislation passed today preserves government legal powers where they are needed most, but reins in some of the most problematic aspects of existing law."

## EPA to Overhaul Air Pollution Standards

The U.S. Environmental Protection Agency (EPA) will revise existing standards for six major air pollutants, according to top agency officials. The changes could yield major public health benefits.

Speaking at a conference Oct. 26, EPA Assistant Administrator for Air and Radiation Gina McCarthy pledged that the agency would review between 2008 and 2011 six major air pollution standards, including one updated late in 2008.

McCarthy emphasized the importance of a multi-pollutant strategy. She said a wholesale review is needed "to actually tell a whole picture, and not individual pollutant-by-pollutant stories," according to BNA news service (subscription required).

McCarthy's comments portend a flurry of rulemaking at EPA. Revising major air pollution standards is a significant undertaking: EPA must collect and distill clinical and epidemiological studies, seek out the advice of air pollution and public health experts, prepare a litany of legal and policy supporting documents, receive intra-administration clearance, and solicit comment from the public and regulated communities.

The complexity of the process is often well worth the effort, according to public health advocates. Clean air standards are among the most beneficial set by government agencies. Even modest improvements in air quality can dramatically reduce adverse health effects such as asthma attacks and heart attacks. Currently, however, the air standards are either out of date or too weak to generate significant new public health gains.

The Clean Air Act names six air pollutants under the National Ambient Air Quality Standards (NAAQS) program: ozone, particulate matter, lead, sulfur dioxide, nitrogen dioxide, and carbon monoxide. For each of the six pollutants, EPA must set standards sufficiently protective of both public health (called the primary standard) and public welfare (called the secondary standard). The Clean Air Act requires EPA to review and, if necessary, revise the standards every five years.

In the past, EPA repeatedly failed to abide by the five-year schedule, sometimes letting a decade or more pass before reviewing a specific pollutant. For example, EPA has not completed a review of the standards for sulfur dioxide since 1996 or for carbon monoxide since 1994. In both of those reviews, EPA chose not to change standards first set in the 1970s. Current reviews for both pollutants are in their early stages.

Early signs indicate the Obama administration will make the NAAQS program a higher priority. Although EPA has not completed a review for nitrogen dioxide since 1996, it proposed revisions to the standards on July 15. The agency is under a court order to set final standards by January 2010.

The new standards would target short-term emission spikes such as those near major highways. "People who live or go to school near these thoroughfares are particularly at risk," according to the American Lung Association (ALA). The ALA is asking EPA to set an even stricter standard for short-term nitrogen dioxide emissions than EPA proposed in July.

Although each of the standards for ozone, particulate matter, and lead has been revised since 2006, the Obama administration will continue to review them, EPA officials say. EPA may find additional revisions necessary because of interference by President Bush's White House.

EPA revised the ozone standards in March 2008. Although EPA tightened both the primary and secondary standards to 0.075 parts per million (ppm) from 0.084 ppm, EPA's scientific advisors

had recommended an even lower level. The 2008 revision to the ozone standard was the first since 1997.

EPA had originally sought to set a separate secondary standard tailored to higher ozone exposure levels seen during summer months but was undercut by the White House. During the customary White House review of the rule, conducted by the Office of Information and Regulatory Affairs (OIRA), then-OIRA administrator Susan Dudley asked President George W. Bush to overrule EPA on the secondary standard. Bush agreed with Dudley and forced EPA to abandon its original decision and make the secondary standard the same as the primary standard.

Although ozone is not scheduled for another review until 2013, reviewing the standards ahead of the five-year schedule has been an early priority for current EPA Administrator Lisa Jackson. The agency plans to propose revisions in December. If EPA chooses to lower the standard to the high end of the range proposed by its scientific advisors, 0.070 ppm, it could prevent at least an additional 300 premature deaths and 610 heart attacks annually, according to agency estimates. The proposal is currently under review at OIRA.

OIRA also interfered in EPA's 2006 revision to the air quality standards for fine particulate matter. As in the ozone case, EPA chose to lower the standards, but it ignored the advice of its scientific advisors who had called for an even lower exposure level. OIRA was accused of channeling industry objections into the final rule. The rulemaking docket also shows that OIRA edited the text of the final rule, removing a sentence that said reducing fine particulate matter exposure "may have a substantial impact on the life expectancy of the U.S. population."

Particulate matter is perhaps the most dangerous air pollutant to which humans are regularly exposed. According to BNA news service (subscription required), a recent EPA study found that "1.7 percent to 6.7 percent of all deaths in 2007 in 15 cities were attributable to long-term exposure to fine particulate matter." Lowering the standard "could reduce the risk of mortality from long-term exposure to the pollutant by as much as 89 percent in some urban areas, according to the assessment."

A federal court struck down the 2006 fine particulate matter standards, finding that EPA had not sufficiently justified its decision. EPA expects to propose new standards in July 2010 and finalize them by April 2011.

Lead is the only air quality standard EPA will not formally review during the Obama administration. The current standard for lead was finalized in November 2008. EPA tightened the exposure level to 0.15 $\mu g/m^3$ (micrograms per cubic meter), from 1.5 $\mu g/m^3$. The adjustment marked the first time EPA had revised the standard since it was first set in 1978.

However, EPA is in the process of reconsidering the national network of lead pollution monitors. In addition to setting a new lead standard in 2008, EPA announced it would add new pollution monitors to help regulators identify polluted areas. OIRA pressured the agency to double the emissions threshold for determining where monitors should be placed. The change

means state and local officials will not be required to place new lead pollution monitors near at least 124 facilities that emit lead. EPA announced July 22 that it would reconsider the threshold.

## OSHA Levies a Record Fine against Oil Giant BP

On Oct. 30, the U.S. Occupational Safety and Health Administration (OSHA) announced it was issuing a proposed $87.4 million fine against BP Products North America Inc. (BP) for failure to remedy workplace hazards. The proposed fine is the largest ever issued by the agency and results from a 2005 explosion at an oil refinery that killed 15 workers.

In March 2005, safety violations at BP's Texas City, TX, refinery caused a massive explosion that killed 15 and injured 170 people, according to an OSHA press release announcing the fine. BP and OSHA agreed to a settlement in September 2005 that required the company to correct potential hazards to employees like those that had led to the explosion.

According to an Oct. 30 *New York Times* article, investigations of the cause of the explosion concluded BP drastically cut costs on safety, had antiquated equipment, and did not rest fatigued employees who had worked 29 days straight to meet production schedules. BP has settled more than 4,000 civil claims since the explosion and agreed to pay more than $21 million in penalties as part of the settlement with OSHA, according to the *Times*.

The announcement of the fine comes after a six-month investigation. OSHA issued the refinery 270 "notifications of failure to abate" the hazards that were part of the settlement, resulting in $56.7 million in proposed penalties. According to the press release, the agency found another 439 new "willful violations" of industry standards for safety management processes and systems. OSHA assessed another $30.7 million in proposed penalties for these additional violations.

Acting Assistant Secretary of Labor for OSHA Jordan Barab said, "BP was given four years to correct the safety issues identified pursuant to the settlement agreement, yet OSHA has found hundreds of violations of the agreement and hundreds of new violations. BP still has a great deal of work to do to assure the safety and health of the employees who work at this refinery."

BP has appealed the fine to the Occupational Safety and Health Review Commission, an independent administrative court that hears appeals of OSHA citations and penalties, according to a BP press release issued Oct. 30. The refinery manager said, “We continue to believe we are in full compliance with the Settlement Agreement, and we look forward to demonstrating that before the Review Commission. While we strongly disagree with OSHA’s conclusions, we will continue to work with the agency to resolve our differences.”

According to a *Dallas Morning News* article, criminal charges were sought against BP by blast victims in a separate action. As part of a plea agreement between BP and the Department of Justice (DOJ), the criminal charges against BP were settled if the company met the terms of the agreement with OSHA. In addition, BP pleaded guilty to one violation of the Clean Air Act, was

sentenced to three years probation, and was fined $50 million. The criminal plea agreement was approved in March by a federal court.

Brent Coon, an attorney for those injured, said that a finding by the review commission that BP did not comply with the OSHA agreement would mean that BP is not in compliance with the criminal settlement. According to the *Morning News* article, the attorney plans to ask DOJ to revoke BP's probation and allow the criminal cases to proceed.

The criminal plea agreement was reached over the objections of many of the blast victims. In July 2008, a safety investigation report filed as part of the criminal action against BP concluded that the safety violations at the plant "remain so serious that they could result in another major accident," according to a July 30, 2008, BNA article (subscription required). BNA quotes the report as arguing, "[t]here is not a valid engineering or practical excuse for such continued violations." The violations "include the same violations which caused the March 2005 explosion, 15 deaths and hundreds of injuries." The victims of the explosion were pressing for a $1 billion fine instead of the $50 million the DOJ agreed to in the plea agreement.

The 2005 explosion has already resulted in about $71 million in penalties against BP and even more in claims settlements. The most recent proposed penalties may be reduced by the review commission, and it is possible that BP will contest the resulting fines in court after the review. BP also incurs the costs of rebuilding the Texas City plant. These substantial costs make one wonder if BP made good business choices by not taking the time and effort to put in place programs to protect its workers and to comply with OSHA's health and safety requirements.

## Nonprofits Play Role in Legislative Push to Remove Barriers to Voting

Nonprofits are playing a key role in a recent legislative push to remove barriers from the voting process. Various organizations have kept voting issues at the forefront by continuously informing the public about policies and tactics that disenfranchise voters. These organizations' efforts focus on military voting concerns, online voter registration, and election reform as a means to ensure that all citizens are able to vote as easily as possible.

On Oct. 28, President Barack Obama signed the Military and Overseas Voter Empowerment Act, which is designed to address barriers affecting military and overseas voters in federal elections by allowing them to access voter information online. It passed Congress with bipartisan support from legislators who "decried an antiquated voting system that left as many as one out of four overseas ballots uncounted," according to *Roll Call*.

This is a major victory for nonprofits that have been trumpeting this issue. Count US In, a nonprofit organization that addresses issues with absentee voting for military personnel, has been active in spreading awareness of problems that disenfranchise our men and women in uniform. The group provides website links to help service members find information on

candidates, voting organizations that can help address individual issues, and obtaining absentee ballots.

The Overseas Vote Foundation, another nonprofit organization, has also been active in ensuring that Americans overseas are able to exercise their right to vote. The organization provides nonpartisan voter registration, state-specific voter information guides, help desk services, an election official directory, and assistance with ballot requests for U.S. overseas citizens and military members and families. The group's goal is to help overseas citizens and military members vote easier, faster, and more accurately. Overseas Vote Foundation also keeps readers abreast of the latest news concerning absentee voting.

There has also been a major push to implement online voter registration. A bill currently before Congress would "require all states to offer online voter registration by 2012," according to *Roll Call*. This would be a major challenge for the vast majority of the country and would require most states to significantly upgrade their procedures. Currently, "only six states offer some form of online voter registration, while half allow voters to verify their registration online. For most states, the voting system is a hodgepodge of snail mail, voter registration drives and polling places," notes *Roll Call*.

The online voter registration bill would bring the voter registration process in line with the convenience of other aspects of daily living. "Many voters expect to be able to register to vote online as part of their normal routine," Rep. Zoe Lofgren (D-CA), the sponsor of the bill, told *Roll Call*. "They are used to the convenience of online tools in their daily life and registering to vote should be just as easy and accessible as banking and bill paying," Lofgren said.

Katie Blinn, the assistant director of elections in the state of Washington, told BNA (subscription required) that "[v]oters are eager to be able to register online." She said that "a link on the website of Washington's Secretary of State drew new voter registrations at the rate of 1,500 a day after the option for online registration was announced. In all, 158,000 new voters registered online in Washington last year, the first year that option was available."

There are also election reform efforts in localities around the nation. On Nov. 3, the City Council of the District of Columbia gave final approval on legislation that will implement no-excuse early voting and allow individuals to register to vote at the polls on Election Day. It will also encourage young people to vote by allowing 16-year-olds to pre-register and 17-year-olds who will be 18 by the general election to vote in the primary, according to Common Dreams, a nonprofit citizens' organization and media outlet.

FairVote, a nonprofit that seeks to provide universal access to electoral participation, was active in urging the D.C. Council to pass the legislation. The organization testified before the Council in support of the Omnibus Election Reform Act of 2009. FairVote told the Council that "this bill will ... lay the groundwork for a 21st Century voter registration system that anticipates participation as opposed to the current 19th Century system that places hurdles along the way to the ballot box."

## Study Reveals the Focus on Lobbyists Could be Flawed

According to a study conducted by OMB Watch and the Center for Responsive Politics (CRP), 1,418 federally registered lobbyists "deregistered" with Congress in the second quarter of 2009 (between April and June). This is a considerably higher rate than that seen in the average reporting period, when a few hundred lobbyists terminate their active status. The groups cautioned that this finding does not necessarily mean that the Obama administration's policies on lobbyists are leading to fewer outside influences on government policy, or that those policies are creating more transparency.

The groups' joint press release states, "This drop occurred shortly after President Barack Obama issued Executive Order 13490, which created new restrictions on former lobbyists appointed to the executive branch." Lobbyists terminate their registrations for a variety of reasons, meaning that the data does not provide enough context to provide a direct correlation to the executive order, which Obama issued in January.

The president promised during his campaign to crack down on the influence of lobbyists in his administration. He followed through with his promise on his first day in office with the executive order, which, among other things, limits hiring federal lobbyists who have lobbied on a particular matter or specific agency during the previous two years. Some, however, have criticized the order as artificially reducing influence peddling. Instead, they argue that the order has had a perverse effect by forcing lobbyists to deregister and do their work under a different name.

To test the hypothesis that lobbyists were deregistering, OMB Watch and CRP conducted their analysis. Lee Mason, OMB Watch Director of Nonprofit Speech Rights, reiterated that the data are difficult to interpret but also emphasized that the timing of the increase in terminations needs to be more carefully considered. "While we can't draw a direct link between the president's executive order and the increased pace of terminations during the second quarter of 2009," he said, "we can say that they came at a most controversial time."

The study found that the number of terminations is higher than the number of new registrations. "All told, there have been 18,315 lobbyist termination reports filed since January 2008. Meanwhile, only 15,310 lobbyists reactivated their registrations after previously filing termination reports. This leaves a total of 3,005 lobbyists who have effectively 'de-registered,' of which more than half (1,691) have come since April 2009," according to the group's press release.

As part of their study, the groups also flagged a problem with terminology that often leads to confusion and decreases lobbying transparency. The term "deregistration" is often used in the media and by those in the lobbying community; however, on the disclosure forms of the Senate and the House, there is no such term.

OMB Watch and CRP determined that the most accurate way to gauge the number of active lobbyists terminating their registrations requires tracking lobbyists' names listed on line 23 of

the Lobbying Disclosure Act's (LDA) form (LD2, which tracks lobbying activity on behalf of a client) and standardizing the data for each individual lobbyist. "With no unique identifier per individual lobbyist and with no 'deregistration' field, verifying and enforcing compliance with the rules is made much more difficult," the groups noted.

The organizations also reinforced the view that the requirements for reporting lobbyist information are in desperate need of improvement. As asserted in the groups' press release, the shortcomings of the current disclosure system are leading to real-world problems. According to OMB Watch and CRP, "[T]housands of lobbyists who appear to have left their line of work may not have actually done so. At the federal level, many people working in the lobbying industry are not registered lobbyists, instead adopting titles such as 'senior advisor' or other executive monikers, thereby avoiding federal disclosure requirements under the Lobbying Disclosure Act."

Additional information disclosure that would allow the public to clearly identify registrations would include details such as: who is registering, who a lobbyist's client is, and when a lobbyist has truly ended his or her lobbying activities. In hopes of achieving greater lobbying disclosure and transparency, the study made three recommendations:

- Assign a unique identification number to each federally registered lobbyist
- Add a field for "deregistering" as a lobbyist
- Amend the LDA to codify these changes

The administration's January policy – as well subsequent limits on Recovery Act and Troubled Asset Relief Program (TARP) lobbying and limits on lobbyists on federal advisory committees – raises an important question for some: do the administration’s limits on lobbyists truly address potential corruption and influence in our government?

According to transparency and nonprofit speech rights advocates, limiting communications with government officials and limiting executive branch hiring has not had the desired affect of full transparency. In the meantime, lobbyists can easily maneuver around the current restrictions. Their work can be managed in a way to avoid meeting the threshold required to register under the LDA, but as noted earlier, they can continue to do similar work. As a consequence, what may be occurring is that the same level of money and influence, from the same big-moneyed special interests, is reaching decision makers through different, shadier channels while an illusion of transparency overlays reality.

Indeed, according to observers, despite efforts to limit lobbyists' abuses and put the public interest first, the role of special interests remains. For example, those who won Recovery Act contracts also spent millions lobbying the government. The Recovery Accountability and Transparency Board recently completed the release of the first round of quarterly disclosure reports by Recovery Act recipients. These reports appear to indicate that those who engaged in heavy lobbying also received the largest Recovery Act contracts. Phil Mattera of Good Jobs First details some specifics at the Dirt Diggers Digest.

In addition, advocates and observers say that the role of money in the entire public policy process must be considered as part of the special interest influence picture. As a recent *Wall Street Journal* opinion piece by Joel Jankowsky remarks, "This administration's treatment of lobbyists has only decreased openness in the policy-making system. [. . .] If the administration truly wants to address its stated concerns about the influence of special interests, it should focus on what the public actually cares about: the influence of money on the policy-making process."



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

Subscribe | Blog | Donate

The Watcher

November 24, 2009 Vol. 10, No. 22

## In This Issue



---

## GAO Report Shines Spotlight on Recovery Act Jobs Data

On Nov. 19, the Government Accountability Office (GAO) released a report that details the first round of Recovery Act recipient reports. The GAO report focuses on data quality issues, which have garnered attention following widespread news stories about bad data in the Recovery Act reports. While the GAO report itself is informative, its recommendations, which call for improved guidance from the Office of Management and Budget (OMB), are particularly important. The recommendations echo earlier comments from transparency groups, which have long warned of potential data quality problems, especially concerning the job estimation data.

The GAO report is narrowly focused and seeks to examine "the jobs created or retained as reported by recipients" within the 17 jurisdictions (16 states and the District of Columbia) the GAO has been studying. The report did not undertake an in-depth audit of the recipient reports, in that it did not contact most of the recipients who reported in the first cycle; instead, the GAO looked for obvious errors or inconsistencies in the data. Using this method, the GAO found there were errors in a significant number of reports.

The GAO uncovered a wide variety of problems, many involving the job creation estimates. It found 3,978 reports (out of 56,986 studied) that "showed no dollar amount received or

expended but included more than 50,000 jobs created or retained," and "9,247 reports that showed no jobs but included expended amounts approaching $1 billion." At the same time, the GAO found 261 reports where the "job creation narrative" field contained words such as "zero," "none," or "N/A," but showed jobs created or saved in the "number of jobs saved" field. These reports accounted for about a tenth of the jobs reported created or saved nationwide as listed on Recovery.gov.

However, the GAO found these major mistakes were relatively rare, since the erroneous reports only constituted a small fraction of the number of overall reports. The GAO hypothesized that most of the errors had one of two root causes: many were simple keystroke errors, and the rest were likely due to confusion among the agencies and recipients. The GAO is primarily concerned with the second point, as it indicates confusion over the guidance from OMB and a lack of clear communication between OMB, federal agencies, and Recovery Act recipients.

Expanding on this point, the GAO report specifically criticizes OMB's handling of job creation estimates. GAO's communications with recipients revealed that many were confused by OMB's guidance on how to calculate these estimates. The problem, it seems, is that OMB did not use a standard job creation definition. The current OMB guidance leaves it up to recipients to decide what constitutes a full-time job (the so-called "full-time equivalent," or FTE). To correctly estimate their FTEs, recipients had to take the number of hours worked on Recovery Act projects and divide it by the number of hours in a typical full-time schedule. The resulting figure is the number of jobs created or saved by the project (the FTE). Some recipients, however, were unsure how to use this formula or what it meant. For instance, some recipients simply entered in the number of actual people hired or retained, regardless of how many hours they worked. Such mistakes account for the errors described above, where recipients claimed that they created or saved jobs, despite having received no Recovery Act funding yet. Another common problem consisted of recipients simply entering the number of hours worked, leading to a drastic overestimate of jobs.

The lack of a standard FTE definition leads to other problems as well, according to the GAO report. It also makes it impossible to compare jobs across projects or awards, and especially across the country. For instance, if one highway contractor considered an FTE to be three months of a 40-hour work week, then a three-month job would result in one FTE. However, if another contractor considered an FTE to be a year's worth of 40-hour work weeks, then the same three-month job would only equal 0.25 FTEs. In other words, similar jobs, for similar amounts of money, can yield apparently vastly different job creation numbers. And since recipients only report the final FTE determination, and not the standard by which they arrived at the number, it is impossible to tell how individual recipients arrived at their job creation estimates, or what the estimates actually mean.

The lack of a standard FTE is not a minor problem, as the GAO found many recipients used different FTE standards. For instance, four Pennsylvania transit agencies all used different FTE measures, as did two California institutions of higher education. This fact has profound implications for the 640,329 jobs figure posted on Recovery.gov. As the GAO notes, "the current OMB guidance ... creates a situation where, because there is no standard starting or ending

point, an FTE provides an estimate for the life of the project. Without normalizing the FTE, aggregate numbers should not be considered."

It is unsurprising, then, that the GAO's main recommendation concerns the standardization of the FTE. First and foremost, the GAO recommends OMB should "clarify the definition and standardize the period of measurement for FTEs and work with federal agencies to align this guidance with OMB's guidance and across agencies." A clear standard for estimating FTEs would help prevent many of the problems the GAO found in the recipient reports, while also allowing comparison across states and projects.

Second, GAO recommends that OMB clarify how recipients should report information for jobs saved. Under current guidance, it is not clear how recipients should report funding used to continue to pay existing staff. GAO recommends that the guidance be changed to clearly show that recipients should simply report “hours worked and paid for with Recovery Act funds,” essentially removing the distinction between “created” and “saved.” Such a change would stop recipients from engaging in strange hypothetical situations to decide if employees would have been fired without the funding, further reducing recipient confusion, as well as helping to convey the actual impact of the Recovery Act.

Such ideas are by no means new. OMB Watch has written extensively on the issues and has repeatedly made recommendations similar to the GAO's. However, this is the first time a federal agency has made the recommendations, giving them additional weight.

OMB Watch has also noted other problems with the jobs data. For example, Recovery Act grantees are to report on jobs created or saved by their subrecipients or themselves. However, contractors are not yet required to report information about their subrecipients. Also, job information is limited to the prime recipient and one tier below that entity; it does not always reach the ultimate recipient of the funds. GAO did not address these other types of problems in its report.

In response to the GAO report, OMB said it "generally accepts the report's recommendations." While this statement does not necessarily portend significant change from the agency, it might show OMB understands that the first reporting cycle could have been better if the agency had improved its own guidance. It remains to be seen if the report will affect the next reporting period, which ends in December.

## The IRS Gets Serious about Tax Enforcement

On Nov. 17, the Internal Revenue Service (IRS) announced that some 14,700 taxpayers had taken part in its recently concluded tax amnesty program by coming forward to report previously undisclosed income hiding in foreign bank accounts. The figure represents a near doubling of the original estimate of 7,500 taxpayers the IRS provided at the end of the voluntary disclosure program. Credited in part for the success of the tax amnesty program is the Obama administration's larger emphasis on tax enforcement. With a beefed up IRS enforcement

budget, new tax treaties with countries that once acted as tax havens, and stricter tax haven legislation in the works on Capitol Hill, the U.S. is starting to get serious about international tax enforcement.

When President Obama released his FY 2010 budget in May, watchdog groups noted the IRS stood to receive an overall increase in funding of $764 million, including a $400 million increase in tax enforcement funds. This represented a 13 percent increase for IRS enforcement activities, a much-overlooked area within the federal government during the Bush administration. Though the House has passed its Financial Services appropriations measure, which includes IRS funding, the Senate has not passed its version yet. Despite this, the IRS stands to receive a substantial funding boost, as both versions of the Financial Services appropriations bill are very similar to the president's request, and there is little reason to believe there will be significant changes in a conference committee.

Increased attention to stopping tax avoidance and evasion carries beyond the federal budget. In August, the Swiss government came to terms with U.S. demands that the Swiss bank UBS turn over information on U.S. clients suspected of tax avoidance. Along with revealing information about the identities of some 4,450 American UBS clients, the arrangement between the two governments included a new information exchange agreement. The agreement will allow the IRS and the Department of Justice (DOJ) to work with the Swiss government in prodding other Swiss financial institutions to disclose the identities of Americans suspected of hiding money in Swiss accounts.

In a similar development, the Mediterranean island of Malta, another former tax haven, recently agreed to a new tax information-sharing treaty with the United States. New information-sharing agreements fashioned after the Swiss settlement and the Malta treaty may provide a model for lawmakers in Washington looking to assist the IRS in cracking down on tax havens.

Even though the Obama administration's tax enforcement push spurred the IRS to begin a tax amnesty program in March, it was not until the agreement with the Swiss government was in place that the program began to see significant usage. The program, which offered a streamlined, uniform penalty for citizens hiding assets overseas, became exceedingly popular after the UBS agreement in August. In fact, the IRS pushed back the original deadline of the program, which was Sept. 23, to Oct. 15 to accommodate the surge in interest from taxpayers. The more than 14,000 taxpayers who came forward to take advantage of the program disclosed secret accounts in overseas tax havens containing anywhere from $10,000 to $100 million, though it will be some time before the Treasury Department can determine the total amount of back taxes and fines brought into the government.

At the end of the tax amnesty program, some lawmakers called for stricter legislation to help the IRS root out taxpayers hiding money in overseas tax havens. In late October, a group of legislators introduced the Foreign Account Tax Compliance Act in both the House and the Senate. The chairmen of the Senate Finance and House Ways and Means committees, Sen. Max Baucus (D-MT) and Rep. Charles Rangel (D-NY), respectively, who wrote the bill, sought to force foreign financial institutions, including trusts and corporations, to provide information

about their U.S. account holders. If a foreign bank were to refuse to comply with the new regulations, the government would levy a 30 percent withholding tax on income from U.S. financial assets held by that foreign institution. Neither of the bills has moved out of its respective committee.

The increased emphasis by the Obama administration on tax enforcement has pushed the legislative branch and the global community to reassess tax policy in general and tax evasion in particular. With an increased budget and additional resources going toward enforcement – including new international criminal investigation offices and a program focused on unraveling the complex business entities used by some taxpayers to avoid paying taxes – the IRS is cracking down on tax evasion. If Congress passes additional tax haven legislation, the IRS will be able to do even more to ensure the tax system is as equitable as possible.

## Lessons of Bhopal: 25 Years Later, U.S. Chemical Laws Need Strengthening

Dec. 3 marks the 25th anniversary of the most catastrophic industrial accident in history: the leak of poisonous gas from a chemical plant in the Indian city of Bhopal. A similar accident some months later in West Virginia drove Congress to pass legislation intended to protect citizens from such disasters by requiring emergency planning and public disclosure of chemical releases. Twenty-five years after the Bhopal tragedy, much progress has been made, but much remains to be done to provide a minimum level of protection against chemical releases.

In the early morning of Dec. 3, 1984, in the central Indian city of Bhopal, 40 tons of highly toxic methyl isocyanate (MIC) leaked from a pesticide manufacturing plant owned by an American company, Union Carbide. In addition to the thousands killed in the immediate aftermath, an Amnesty International report published in 2004 calculated that an additional 15,000 people died in the years following the accident due to long-term gas-related effects, and 100,000 people continue to suffer from "chronic and debilitating illnesses for which treatment is largely ineffective."

In August 1985, another Union Carbide plant experienced a toxic gas leak, this time in Institute, WV. More than 100 residents living near the facility were injured.

In response to the accidents, in 1986, Congress passed the Emergency Planning and Community Right to Know Act (EPCRA), a major advance in the right-to-know movement. As its name suggests, the law focuses on two main areas: emergency planning for chemical releases and public disclosure of threats from toxic chemicals.

### Emergency Planning

The emergency planning sections of EPCRA required local governments to develop plans for sudden chemical releases resulting from spills, fires, or explosions. The law is intended to ensure

that facilities quickly notify emergency response officials when releases occur and that they know what hazardous chemicals might be involved.

State governments are required to oversee and coordinate local planning efforts. The law outlines the formation of State Emergency Response Commissions (SERCs) and Local Emergency Planning Committees (LEPCs) for designated emergency planning districts. The LEPCs work with facilities to create emergency plans, such as evacuation routes and first responder training programs. Facilities must report releases of certain hazardous substances to the appropriate local, state, and federal authorities. Information about accidental chemical releases must be available to the public.

**Right to Know**

EPCRA also established several reporting requirements to ensure that citizens, especially those living near plants using hazardous chemicals, have the information they need to protect themselves and hold businesses accountable. The law requires material safety data sheets (MSDS) be provided to the local emergency planners and the public upon request. An MSDS provides important information on the health risks and proper handling of hazardous chemicals. Additional information on the types and quantities of hazardous chemicals stored at facilities must also be made available to emergency planners and the public.

The law also established the required reporting of releases of toxic chemicals. The U.S. Environmental Protection Agency (EPA) created the Toxics Release Inventory (TRI) to catalog the reports and provide easy public access to the information. (TRI data are available through OMB Watch's Right to Know Network and on EPA's website.)

The planning and reporting aspects of EPCRA do not regulate hazardous substances. The law demands no changes to the way a facility operates and sets no limits on how much of a substance can be released. Yet EPCRA is credited with driving significant improvements in the chemicals industry by making companies more aware of the dangers and inefficiencies at their plants and generating public pressure to reduce pollution and other health threats.

Attempts to weaken EPCRA over the years have repeatedly threatened the public protections and right-to-know measures provided by the law and its regulations. A "midnight regulation" put forth in the last months of the George W. Bush administration exempted factory farms from the EPCRA requirement to report emissions of toxic gases from the vast quantities of animal waste produced at these facilities. Such emissions can pose a serious threat to public and environmental health. The rule is still the subject of legal actions from both environmental organizations and operators of concentrated animal feeding operations.

The Bush administration also pushed through a controversial rule that dramatically raised the reporting threshold of the TRI program. Despite overwhelming public opposition to the proposal, the Bush rule survived two years before Congress and the Obama administration reversed the rule in March 2009, restoring the reporting rules that had been in place before the weakening changes.

Despite that restoration, TRI grows weaker every year as new chemicals are introduced and new industries begin releasing chemicals, none of which are covered by TRI. The list of covered chemicals and industries has not been significantly expanded since the late 1990s, allowing thousands of new chemical creations to enter commerce without letting the public know about their releases.

### Chemical Security

In August 2008, an explosion and fire killed two people at the same Institute, WV, plant where the 1985 accident helped push Congress to pass EPCRA. The explosion occurred very close to a storage tank holding 40,000 pounds of MIC, the same chemical that was released in Bhopal. Subsequent investigations have shown the ongoing weaknesses in community right to know and the safety of chemical facilities.

A congressional investigation determined that the operator of the plant, Bayer CropScience, "engaged in a campaign of secrecy by withholding critical information from local, county, and state emergency responders; by restricting the use of information provided to federal investigators; by attempting to marginalize news outlets and citizen groups concerned about the dangers posed by Bayer's activities; and by providing inaccurate and misleading information to the public." Bayer sought to exploit a national security law to hide information by inappropriately labeling it as sensitive security information.

Despite the historic milestone established by EPCRA, a static unrevised law can only accomplish so much. The incident at the Bayer plant in West Virginia exposes the risk to the public's right to know posed by excessive secrecy in the name of "national security" and the need for safer technologies to replace unnecessarily dangerous processes at chemical plants across the country. Legislation that recently passed the House aims to reduce the risks and consequences of a terrorist attack on a chemical plant. The bill would drive adoption of safer technologies that would eliminate the risks of poisonous releases from chemical plants in the event of a terrorist attack. Such safer alternatives, which are already in use at plants across the country, are the best option for protecting the public and plant workers from the next Bhopal.

## Technology Sector Increases Its Presence in Open Government Dialogue

In addition to nonprofit organizations, educational groups, and individual advocates, corporations have recently begun to stake out positions in the ongoing open government dialogue. Among these private sector actors are Adobe, Google, and Microsoft. These new voices are putting both money and technological resources behind an effort to advance the Obama administration’s commitment to transparency.

Most recently, Adobe made its entry onto the open government scene by hosting a Nov. 4 conference in Washington, DC, with the theme of “moving open government from promise to practice.” The event was heavily advertised with posters, billboards, and television spots. The

event featured other big-name corporate technology sponsors, including Oracle and Dell. Although the conference did not specifically focus on Adobe products, some advocates found it ironic that the company would be hosting an open government conference, due to the fact that Adobe utilizes a large number of proprietary technologies.

Some open government organizations have strongly questioned both the ability and the appropriateness of using proprietary technologies, such as Adobe products, to increase access to government information. For instance, the Sunlight Foundation pointed out that agencies often use the PDF format to publish data such as budget tables. However, this method of presenting the information prevents it from being easily parsed and therefore difficult to mash up with other data. Instead, open government groups generally prefer data to be published initially in machine-readable formats such as XML. XML formats can be converted to PDF, but PDF formats cannot convert to XML.

Google is another private sector technology company that has already established its position in the open government dialogue. Google maintains a public policy office in Washington, DC, that interacts with Congress and the executive branch. In June, the company submitted comments to the Office of Science and Technology Policy concerning recommendations for the Open Government Directive. Among the suggestions Google made were that the federal government should utilize an XML Sitemap that informs search engines of pages that can be crawled, that government should make more selective use of robots.txt files on websites, and that government should encourage agencies to publish popularly requested data on agency websites and Data.gov.

A company known for its efforts in open-source and cloud computing technology, it seems that Google has largely been accepted by access advocates as an important voice in the dialogue. On Nov. 17, the company made full-text legal opinions from all U.S. court systems fully searchable and available to the public using Google Scholar. Typically, many of these opinions are held in subscription-only databases such as Westlaw or Lexis-Nexis.

Microsoft has also worked to establish itself as a resource on implementing open government. The company's biggest project is the Open Government Data Initiative launched in May. The initiative is an attempt to develop a system by which government agencies can publish their data using Microsoft Azure, the company's cloud computing platform. This method of dissemination would allow developers to interact with the data and make tools to display that data in a usable format. In this way, the government will be able to automatically refresh and update the data, and the public will have instant access to the most recent data without having to download new copies. (Full disclosure: A Microsoft employee serves on the Board of Directors of OMB Watch.)

On one hand, private corporations give the open government community a powerful ally with deep pockets and a booming voice. On the other hand, the open government community is somewhat suspicious of corporations, which often place profit and private interests ahead of the public good. The question of whether or not the involvement of private corporations is something the community should embrace remains to be answered.

## OSHA Misses Injuries and Illnesses, GAO Says

The Occupational Safety and Health Administration (OSHA) cannot adequately verify lost-time injury and illness cases reported by employers, according to the Government Accountability Office (GAO). Although injury and illness rates for workers have been declining in recent years, critics say the improvement has more to do with OSHA data collection procedures than occupational safety and health policy.

OSHA audits the injury and illness records of about 250 out of approximately 130,000 worksites subject to detailed reporting requirements, according to GAO. The audits aim to determine whether internal company records match the reports submitted to OSHA.

However, whether the data is recorded accurately in the first place is a different story, and OSHA cannot often verify the details of injury reports. "OSHA's efforts to verify the accuracy of the data are not adequate because OSHA overlooks some information it could obtain from workers about injuries and illnesses" during the audits, GAO said.

The Oct. 15 GAO report, which was not released until Nov. 16, is titled, *Enhancing OSHA's Records Audit Process Could Improve the Accuracy of Worker Injury and Illness Data*. The report is available on GAO's website at http://gao.gov/products/GAO-10-10.

Data verification is not required by law or by OSHA regulation, but OSHA does attempt to verify reports during records audits. However, "OSHA does not require inspectors to interview workers during records audits about injuries and illnesses that they or their co-workers may have experienced." GAO said interviewing could provide OSHA with valuable information.

OSHA should attempt to verify injury and illness reports more promptly, GAO noted. Currently, OSHA waits about two calendar years to audit employer records. As a result, affected employees may have moved to different jobs or forgotten details of a specific incident.

GAO also faulted OSHA for failing to regularly update its list of high-hazard industries. Only designated high-hazard industries are subject to records audits and, subsequently, attempts at verifying injuries and illnesses. Eight additional industries should be included, the report says, including rental centers, amusement parks, and industrial launderers.

A relatively small number of U.S. worksites are subject to OSHA injury and illness recordkeeping requirements. Employers with 10 or fewer employees and those in "specific low hazard retail, service, finance, insurance or real estate" industries are not required to record or report an incident unless it "results in a fatality or the hospitalization of three or more employees," according to OSHA regulations. The exemptions cover about 83 percent of all employers, according to GAO.

OSHA relies on accurate injury and illness data to make regulatory decisions intended to improve worker protections. Industries found to have above-average injury or illness rates may

be subject to more frequent or more thorough inspection, and OSHA may target emerging hazards through new regulation.

A 2006 study conducted by two University of Illinois-Chicago researchers, Lee Friedman and Linda Forst, blamed changes OSHA made in 1995 and 2002 that redefined injuries and illnesses. The changes allowed employers to interpret incidences more narrowly. The researchers found that 83 percent of the decline in injury and illness rates can be attributed to the definitional changes.

According to the Bureau of Labor Statistics, another Department of Labor agency, there were 3.7 million injury or illness cases in 2008, a rate of 3.9 cases per 100 workers. That number is down significantly from 1998, when the rate was 6.7 cases per 100 workers. However, BLS uses OSHA definitions and relies on OSHA's recordkeeping requirements to obtain its data. In 2008, 5,071 workers died as a result of injuries and illnesses suffered in the workplace – more than 13 fatalities per day.

GAO is not the first to criticize OSHA for mishandling injury and illness statistics. In June 2008, the House Education and Labor Committee held a hearing to investigate problems with OSHA's statistical policies and practices.

In his opening statement, committee Chair George Miller (D-CA) noted "mounting evidence that a number of employers are engaging in intimidation in order to keep workers from reporting their own injuries and illnesses." Miller faulted OSHA for relying on a system of employer self-reporting.

Both employees and employers face disincentives to fully report injuries. Since some worksites provide employee bonuses based on safety records, workers may prefer to underreport injuries, or not report them at all, according to the GAO report. Employees also face pressure from employers hoping to avoid worker compensation liability. Pressure can take the form of threatened job loss, job transfer, or reprimand.

Occupational health specialists and other health practitioners frequently witness these pressures. GAO noted that "67 percent reported observing worker fear of disciplinary action for reporting an injury or illness, and 46 percent said that this fear of disciplinary action has at least a minor impact on the accuracy of employers' injury and illness records."

GAO made four recommendations to improve injury and illness verification: OSHA should require employee interviews, minimize the time lag between incident and audit, update its list of high-hazard industries, and increase outreach efforts to help employers more accurately record data.

In response to the report, Acting Assistant Secretary for Occupational Safety and Health Jordan Barab acknowledged "GAO's analysis makes clear that there is a need to improve the accuracy of employer-provided injury and illness data" and pledged to take action on all four of GAO's

recommendations.


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



OMB Watch
Promoting open government, accountability, and citizen participation since 1983
Subscribe | Blog | Donate
The Watcher
December 8, 2009 Vol. 10, No. 23

## In This Issue



---

## OMB Watch Unveils Recovery Act Recipient Reports Database

On Dec. 3, OMB Watch released a beta version of a new database on FedSpending.org that gives the public improved access to and searchability of Recovery Act recipient report data. The database allows users to search more than 160,000 reports from recipients of almost $159 billion in Recovery Act contracts, grants, and loans awarded between Feb. 17 and Sept. 30.

FedSpending.org's Recovery Act data tab gives users flexibility to search, either individually or in aggregate, for prime recipients, sub-recipients, ZIP codes, congressional districts, federal awarding agencies, award amounts, and much more through a variety of means, including an Advanced Search function. Additionally, any search results can be downloaded from the site.

The Recovery Act created a new model for reporting on how federal funds are spent. Each quarter, recipients, including sub-recipients and vendors, are to report on FederalReporting.gov on how much money they received, how many jobs they created or saved, and other information. This is the first time there has been timely and transparent reporting by recipients of federal funds. It is also the first time that sub-recipients have reported on money passed through states, contractors, and grantees. This new model expands the opportunities for presenting information to the public about government spending.

For example, for the first time, the public can better understand how much of a grant or contract is retained by the prime recipient or given out through sub-awards. To properly illustrate this, OMB Watch created a new data field to indicate how much of a given award a prime recipient or sub-recipient does not pass on to another entity (such as a sub-recipient or vendor). This field, "Net Amount Retained," shows the extent to which Recovery Act funds are passed from the prime recipient to a sub-recipient or a vendor without double-counting funds in the totals for searches. FedSpending.org's Recovery tab includes the "retained" calculation because it can be useful for understanding the actual amount of Recovery Act funding that stays with a certain entity or at a certain location.

Using data published on Recovery.gov, the website required by the Recovery Act and maintained by the Recovery Accountability and Transparency Board (the Board), OMB Watch augmented FedSpending.org with the ability to search and sort Recovery Act recipient reports. While the Recovery.gov website contains a modicum of search functionality, the Board's site emphasizes searches by location, with results displayed on a map. FedSpending.org, however, allows users multiple search options (e.g., by recipient name, recipient DUNS number, federal award number, funding agency, and more) and presents the results as a streamlined summary.

By giving users more search options, FedSpending.org can return search results more relevant to a user's request. For example, by entering "University of Texas at Austin" in the "Recipient Name" search field, FedSpending.org returns a simple table of recipients that have names matching the search criteria. In this example, the user would see three "University of Texas at Austin" matches.

List of recipients for FY 2009

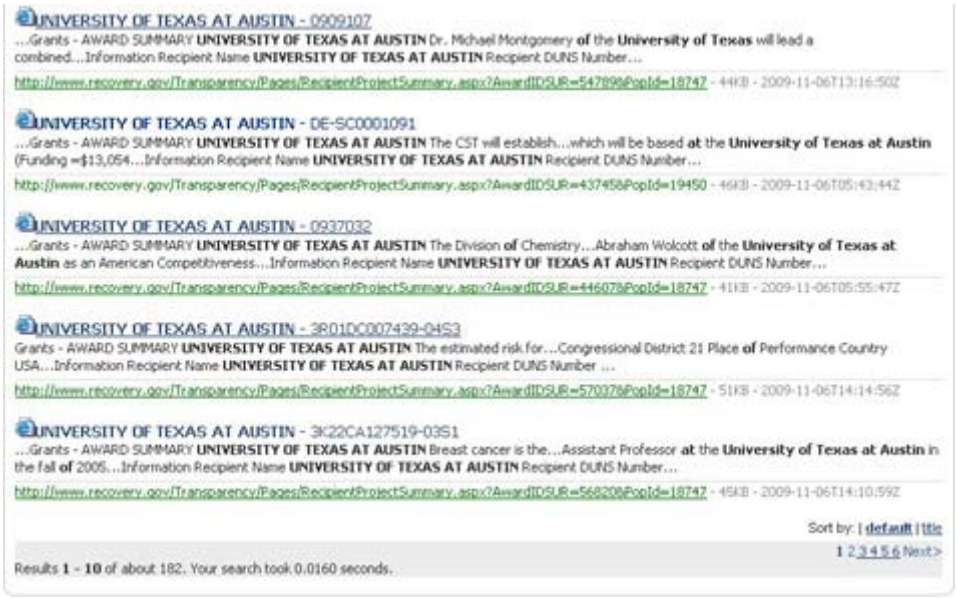
Each line below is for one recipient. Totals are for quantities within the search: there may be other awards for each recipient that were not retrieved by the search. You can click on the column headers below to re-sort the search.

| Recipient Name | State | Received as Prime Award | Received as Sub-Award | Number of FTEs | Number of Awards |
|---|---|---|---|---|---|
| University of Texas At Austin | TX | $53,026,828 | $1,002,001 | 47.33 | 109 |
| UNIVERSITY OF TEXAS AT AUSTIN | TX | $416,392 | $0 | 20.00 | 1 |
| University of Texas At Austin | TX | $0 | $1,039,826 | 0.00 | 2 |

*A FedSpending.org Recovery database search result*

The user can either view information for each match or an aggregation of all three results. Recovery.gov, however, does not easily allow users to search recipient reports by name only, so a search for "University of Texas at Austin" will return all recipient reports if the phrase "University of Texas at Austin" appears anywhere in the report. In this case, 182 matches are

found, including a grant to Florida State University, because the search term appears in the award's description.




*A Recovery.gov recipient report search result*

OMB Watch created the Recovery Act recipient reports tab on FedSpending.org not only to give the media, watchdogs, and the general public a tool to understand Recovery Act spending, but also as a example of the kind of functionality Recovery.gov should have. Because the Recovery Act recipient data tab was created in about a month and on a small budget, it has been released as a beta version, and small errors and glitches may be present on the site.

## Estate Tax Reform Bill Passes House, Moves to Senate

On Dec. 3, the House passed the Permanent Estate Tax Relief for Families, Farmers, and Small Businesses Act of 2009 (H.R. 4154). With time running short, the bill now moves to the Senate, where straight passage of it is uncertain, and passage of any estate tax legislation is anything but assured.

Introduced by Rep. Earl Pomeroy (D-ND), the legislation permanently extends current estate tax law, which taxes the heirs of a deceased individual whose estate is valued above $3.5 million ($7 million for couples) at a 45 percent tax rate. The Pomeroy bill passed the House by a narrow margin – just 225 to 200 – and mainly along partisan lines, though 26 Democrats did join a united Republican caucus in opposition to the measure. The bill essentially mirrors what the president asked for in his FY 2010 budget request. Most importantly, the Pomeroy bill would extend current law and prevent the estate tax from expiring in 2010 and then coming back in 2011 under its pre-Bush tax cut levels.

According to an estimate released by the Congressional Joint Committee on Taxation, the Pomeroy bill would bring in $468 million in 2010, when the government would otherwise collect no estate taxes, but then cost the government $533 billion over the next nine years because of higher exemptions and lower tax rates than would have been in place if current law was left unchanged.

Passage of the Pomeroy bill in the Senate is unlikely because several important senators have misgivings about certain provisions. Sens. Max Baucus (D-MT) and Kent Conrad (D-ND), chairs of the Senate Finance and Budget Committees, respectively, argue that Congress should index the tax for inflation, something the Pomeroy bill does not do. Moreover, the Pomeroy bill includes the Statutory Pay-As-You-Go Act of 2009 (H.R. 2920) that would give PAYGO budget rules the force of law in Congress. The House passed the PAYGO bill in July, but the Senate has yet to take action on it because, according to a recent *CongressDaily* article (subscription required), top Democratic senators are opposed to enacting the provisions.

Estate tax legislation is therefore likely to go down one of two paths in the Senate. One alternative is for the Senate to bring up legislation similar to the Pomeroy bill, debate it, and pass it. The other option is for the Democratic leadership to tack a one-year estate tax extension onto a likely omnibus appropriations bill that insiders say Congress will pass before the end of 2009. Depending on how congressional events play out, either option is possible.

Some members of Congress have suggested that passing an estate tax bill in 2010 could be a possibility. However, passing legislation then means the government would retroactively apply the estate tax, an extremely rare occurrence, according to the aforementioned *CongressDaily* article. There are also questions about the legality of such a measure, something Congress would like to avoid.

Beyond the policy differences, there are several procedural obstacles to the Senate bringing up legislation similar to the Pomeroy bill and passing it before the estate tax expires at the end of 2009.

First, the health care debate is currently consuming the Senate. If the Senate were to move off the current debate to take up the estate tax, senators would need to vote again to take health care back up, an unlikely course of events given the difficulty Senate Democrats went through the first time to enter the health care debate. Yet with the Senate not guaranteed to finish health care before the end of 2009, the chance of squeezing in the estate tax is doubtful at best.

Making matters worse, if the Senate passes stand-alone estate tax legislation, it will have to conference with the House over any differences between the two bills. Once the conference reaches a compromise, each chamber would have to vote to pass the consensus estate tax legislation before Congress could send it to the president for his signature. Again, with time running out to intervene in the expiration of the estate tax, this seems an incredible feat.

Any estate tax legislation brought to the Senate floor would also be vulnerable to amendments. Democratic leaders in the House prevented a competing estate tax proposal (H.R. 3905),

introduced by Rep. Shelly Berkley (D-NV), that sought to reduce the estate tax beyond 2009 levels from coming to the floor. In the Senate, though, language that Berkley based her proposal on passed earlier in 2009.

In March, when the Senate passed its budget resolution to begin the FY 2010 appropriations process, opponents of the estate tax won a small battle by adopting an amendment by Sens. Blanche Lincoln (D-AR) and Jon Kyl (R-AZ) that cut the estate tax to a $10 million exemption per couple at a 35 percent rate. Later, conferees meeting to reconcile House and Senate versions of the budget resolution stripped the provision out. It is not clear at this point that the Lincoln/Kyl amendment could muster the necessary 60 votes in the Senate.

The other option is for Democratic leaders to attach a one-year extension of the estate tax onto a likely omnibus appropriations bill that will come before the end of 2009. If Congress passes a one-year extension, legislators would have to revisit the issue next year, when most expect Congress to take up a comprehensive tax reform package.

## House Moves to Give More Access for GAO, SIGTARP, and the Public

While the attention of many transparency advocates has been focused on the first round of recipient reporting under the American Recovery and Reinvestment Act (the Recovery Act), the House has been working on two financial transparency measures dealing with the Federal Reserve and use of the Wall Street bailout funds.

Within the past month, the Financial Services Committee folded Rep. Ron Paul's (R-TX) popular "Audit the Fed" bill into the committee's larger financial reform package, and the House passed Rep. Carol Maloney's (D-NY) bill creating a database collecting Troubled Asset Relief Program (TARP) data. Both bills give oversight agencies more information and access, and, along with the Recovery Act, are part of a pattern of greater fiscal transparency in the federal government. However, both bills have only passed the House and could face significant hurdles in the Senate.

While the financial crisis happened only recently, the effort to audit the Federal Reserve stretches back decades. Every session for the past several decades, Paul has been introducing a bill to abolish the Federal Reserve entirely, along with a more moderate bill calling for an audit of the Fed. While the bill to abolish the Fed usually gains little traction, the other proposal has become very popular in 2009. The audit bill orders the Government Accountability Office (GAO) to audit the Fed and provide Congress, but not the public, with the findings of this audit. The GAO already audits parts of the Fed but is not allowed to investigate the Fed's monetary policy, so how this audit is accomplished is a sticking point. Paul's bill would allow the GAO to audit the entire Federal Reserve, a goal which the Fed, along with some members of Congress, are uncomfortable with.

Critics believe that subjecting the Fed's monetary deliberations to outside scrutiny would lead to political oversight by Congress, or at the very least, hinder the Fed's ability to affect financial markets. These concerns led Rep. Barney Frank (D-MA), chair of the House Financial Services Committee, which has jurisdiction over the bill, to attempt to scale it back.

In late November, however, the committee voted 43-26 to add Paul's bill to the larger financial reform package with a few changes, which ironically Paul has said he will oppose because it is part of the broader financial reform package. The new bill allows uninhibited audits of the Fed's balance sheet, giving the GAO access to the Fed's direct loans to financial institutions (the so-called "discount window"), and lending to foreign banks, both of which were controversial parts of the recent bailout effort. But there are still exemptions for transcripts and minutes of meetings of the Federal Open Market Committee, which deals with monetary policy, and there is also a delay before the Fed's market actions are released by the GAO. Despite these exceptions, the audit would help shed light on underreported aspects of the bailout, while assuaging critics who fear congressional oversight of the Fed.

Recently, supporters of the "Audit the Fed" proposal in the Senate took steps to highlight their concerns about the lack of transparency at the Fed. Demanding a vote on the Senate version of the "Audit the Fed" bill, Sen. Jim DeMint (R-SC) has placed a hold on the confirmation of Federal Reserve Board Chairman Ben Bernanke until the Senate votes on the bill. Sen. David Vitter (R-LA) also placed a hold on the Fed chief's confirmation until the bill sees a floor debate. While a vote to proceed on the Bernanke confirmation will likely receive the 60 votes necessary to overcome the holds, the Fed audit bill has itself drawn a hold from Senate transparency opponents.

The other bill currently moving through Congress involves creating a database to track, in real time, TARP expenditures. Maloney introduced the bill in March, but it lay dormant until November, when it began gathering steam that led to its unanimous passage in the House on Dec. 2. Unlike the Recovery Act, which created an entirely new system for collecting data, the database would only collect already existing data, centralizing a great deal of information from across the federal government, including regulatory data, filing data, news clippings, press releases, public records, and information already reported to the federal government by TARP recipients. It would also collect on at least a daily basis "all data that is relevant to determining the effectiveness of the Troubled Asset Relief Program in stimulating prudent lending and strengthening bank capital." This information would help authorities such as the Special Inspector General for TARP (SIGTARP) follow TARP funds and evaluate the program.

The bill also allows for public access to the database, which would give citizens the ability to track the money themselves. While this clause was not a part of the original bill, it is an important transparency measure. While it is difficult for regulators and government entities to compile such information, it is almost impossible for anyone outside of government to find and aggregate this kind of data. Maloney's bill would allow citizens to easily see which institutions have received TARP funding and what kind of an effect the program is having on the institutions and the economy.

The next hurdle for both bills is the Senate, which could slow progress. While Paul's bill had over three hundred sponsors in the House, only thirty have signed onto the Senate version, most of them Republicans, and the Senate Banking Committee has yet to hold a hearing on the bill. In fact, Sen. Chris Dodd (D-CT), chair of the Banking Committee, specifically did not include an audit of the Fed in his financial reform package. This lack of support is important, since Bernanke and Treasury Secretary Tim Geithner have expressed their opposition to the audit proposal. Similarly, as Maloney's bill moves to the Senate, its prospects are unclear, although Sen. Mark Warner (D-VA), who is chair of the Budget Committee's new Government Performance Task Force, introduced a similar bill, and should be a strong advocate for the proposal as it moves forward in that chamber.

While both bills are significant fiscal transparency measures, due to the Senate's current legislative backlog (health care reform and the appropriations bills will both take precedence), it is unlikely that Congress will pass either bill by the end of 2009.

## Open Government Directive Hits the Streets

The Office of Management and Budget (OMB) released the long-anticipated Open Government Directive on Dec. 8. The directive, a memo from OMB Director Peter Orszag to all agency and department heads, requires that all agencies develop and implement an Open Government Plan specific to each agency.

The directive has been in development since the first day of the Obama administration, when the president issued a memo tasking OMB and other key officials to develop the directive. The Office of Science and Technology Policy (OSTP) oversaw a three-phase online dialogue to publicly generate, discuss, and develop policy ideas for the directive. The three phases attracted a great deal of public participation.

The directive continues to emphasize the three principles outlined by President Obama in his original memo – transparency, participation, and collaboration. The directive is comprised of four main components centered on very simple but important themes – publishing information; creating a culture of openness; improving data quality; and updating policies to allow for greater openness. Each section tasks agencies and other key offices with specific goals, complete with deadlines and clear requirements that the public be informed and permitted to participate in almost every project.

### Publish Government Information Online

The section on publishing government data online reinforces and broadens the presumption of openness discussed in Attorney General Eric Holder's new guidance on implementing the Freedom of Information Act (FOIA). Agencies are instructed to "proactively" make information available instead of waiting for specific requests under FOIA. "With respect to information, the presumption shall be in favor of openness (to the extent permitted by law and subject to valid privacy, confidentiality, security, or other restrictions)," according to the directive. The section

also breaks new ground by instructing agencies, to the extent practicable, to publish information in open formats that can be "retrieved, downloaded, indexed, and searched by commonly used web search applications."

The section also sets clear deadlines for agencies, including publishing three previously unreleased, "high-value datasets" on Data.gov in 45 days and establishing an Open Government webpage on each agency website within 60 days. The Open Government webpages are to serve as the primary vehicle for each agency to communicate with and get input from the public on open government issues on an ongoing basis.

**Improve the Quality of Government Information**

This section stresses the need to identify and correct data quality problems, with an emphasis on immediate action on the quality of federal spending data. The section specifically requires agencies to designate within 45 days a "high-level senior official" to be accountable for the quality of federal spending data for the agency. Within 60 days, OMB is to issue guidance on quality of federal spending data that includes a requirement for agencies to submit plans describing internal controls for data quality. At some point, the need for additional data quality guidance for other types of information will be reviewed. Finally, within 120 days, OMB is to issue guidance related to fiscal transparency, including a "longer-term comprehensive strategy" that addresses reporting methods and data quality.

**Create and Institutionalize a Culture of Open Government**

This section establishes the key deliverables to encourage genuine and consistent progress on open government issues. First, the agencies must produce a detailed Open Government Plan within 120 days that will be used to measure progress. These plans are to be updated every two years. The directive provides details on what is to go into each agency's plan with regard to transparency, participation, and collaboration. Additionally, the agency plans are to identify at least one new "flagship initiative" that addresses transparency, participation, or collaboration. The agencies must also establish a process for soliciting public and employee feedback on the plan and respond to that feedback.

Second, the Federal Chief Information Officer and Chief Technology Officer will create an Open Government Dashboard on the White House website within 60 days that will provide access to the agency plans and track key metrics of openness for each agency. Although not specifically mentioned, it is possible that one example could be a FOIA Dashboard that monitors agency implementation of the law.

Third, an inter-agency working group on open government issues will be established within 45 days to provide a forum for sharing best practices and coordinating interagency efforts.

Fourth, within 90 days, OMB will issue guidance on the use of competitions, prizes, and other incentive strategies for encouraging progress on open government.

**Create an Enabling Policy Framework for Open Government**

This section acknowledges that current policies governing information management are largely antiquated and in need of updating. The section requires that the Office of Information and Regulatory Affairs (OIRA) review existing policies "such as Paperwork Reduction Act guidance and privacy guidance" to identify problems and issue revisions to allow openness to move forward. This policy review may prove critically important in addressing gaps on policies, such as those regarding disclosure of agency logs on meetings with people outside of government.

OMB Watch's executive director, Gary D. Bass, noted that the new directive marks a new direction for the executive branch. "The directive's presumption of openness – certainly a positive step – reflects a thoughtful understanding that achieving the goal of transparency requires a cultural shift in the way government operates," stated Bass. "The directive's scope and specificity blends both rigorous timelines and agency flexibility that will likely achieve significant improvements in government openness across agencies. The key will be how the public, the White House, and federal agencies work together in implementing the directive," Bass added.

The content of the directive reflects many of the transparency recommendations collaboratively developed by the right-to-know community during a two-year process coordinated by OMB Watch. Those 70 detailed recommendations were delivered to the Obama transition team in a report called *Moving Toward a 21st Century Right-to-Know Agenda*. Among those recommendations were requests for creating incentives for openness, interagency coordination, and publication of high-priority data that is currently unavailable – all of which are addressed in the new directive.

The directive essentially sets the bar for government openness quite high. The task before agencies and officials with responsibilities in the directive is to take the new policy provisions of the Open Government Directive and implement them. Open government advocates are sure to pay extremely close attention to the deliverables and deadlines established in the directive. If agencies or officials miss these deadlines or produce lackluster products, a strong backlash of criticism will likely follow.

## Secret Holds Continue in the Senate

Citizens for Responsibility and Ethics in Washington (CREW), a Washington, DC-based watchdog group, recently called upon the Senate Committee on Ethics to investigate the ongoing use of secret holds. The organization contends that senators have failed to abide by Section 512 of the Honest Leadership and Open Government Act of 2007 (HLOGA), which ended the use of secret holds. The group requested the committee discipline senators from both parties who have failed to abide by the procedures, as well as issue guidance to govern future conduct.

In the House, where strict majority rule prevails, the order of business is controlled by the Speaker, in consultation with the majority party leadership and the majority-dominated

Committee on Rules. The Senate lacks such a centralized structure, and much of the chamber's business proceeds by unanimous consent. Holds are among the numerous procedural tools available in the Senate to ensure, ostensibly, that the minority is represented. Officially, a hold is simply a "notice of intent to object to proceeding" without actually objecting, which is used to block votes, as a bargaining tactic to gain concessions, or to buy time to study legislation. Under a secret hold, a senator informs his or her party leader, who informs the Majority Leader that the senator objects to proceeding, but the rest of the Senate and the public are left in the dark as to the identity of the senator placing the hold and the reasons for the hold.

The relevant section of HLOGA was passed in 2007 to bring transparency and accountability to the use of holds by prohibiting their secret use. As CREW explains, the new procedure works as follows:

> (1) a colleague objects to a unanimous consent request on behalf of an unnamed senator; (2) that senator must then submit a "notice of intent to object" letter to leadership explaining his objection; (3) within six days the senator must place the notice, with his name, on the appropriate Senate calendar, under a newly created section.

No new rule or standing order, nor any enforcement mechanisms, were created by the legislation, and subsequently, it relies on self-compliance. CREW found that only twice has the new procedure been followed, whereas for numerous nominations and bills since HLOGA was signed into law, secret holds have continued.

In its request for investigation, CREW argued:

> The Senate Ethics Manual provides that "[c]ertain conduct has been deemed by the Senate in prior cases to be unethical and improper even though such conduct may not necessarily have violated any written law, or Senate rule or regulation." Such conduct has been characterized as "improper conduct which may reflect upon the Senate." This rule is intended to protect the integrity and reputation of the Senate as a whole.

HLOGA was passed to bring greater honesty and openness to government writ large, and Section 512 was designed to bring such transparency to the Senate itself. The requirements to publicly announce holds and the reason why they were placed can restore the hold as a legitimate tool to air concerns of the minority, rather than simply as a tool of willful obstructionism. With clarity on why the hold is being placed and by whom, the Senate may choose to address the concerns raised and then continue its business without undue delay.

The Committee on Ethics is responsible for ensuring that Senate procedures do not violate the laws that the Senate itself has passed. Neither the committee as a whole, nor Sens. Barbara Boxer (D-CA) or Johnny Isakson (R-GA), the chair and vice-chair, respectively, has issued any comment. It also seems unlikely the committee will take comprehensive action on this issue

without greater pressure, as each branch of government is notorious for poor self-policing.

## Study Shows Infants Exposed to Hundreds of Harmful Chemicals before Birth

A new study has found up to 232 industrial chemicals in the umbilical cord blood of infants born in 2007 and 2008. The identified chemicals include known carcinogens, neurotoxins, endocrine disruptors, and numerous other compounds toxic to various organs and systems. The study, commissioned by the Environmental Working Group (EWG) and Rachel's Network, reveals the extent of exposure to harmful substances faced by pregnant mothers and underscores the need to create public policies to prevent future exposures.

The report is the 11th biomonitoring investigation commissioned by EWG, which overall have identified up to 486 chemicals, pollutants, and pesticides in 186 people of all ages. Biomonitoring is the direct measurement of people's exposure to toxic substances in the environment by measuring the substances or their metabolites in human specimens, such as blood or urine. Biomonitoring measurements indicate the amount of the chemical that actually gets into people from all environmental sources combined.

The research analyzed the contents of the umbilical cord blood of ten infants from racial or ethnic minorities born in the United States in 2007 and 2008. Fetuses and infants are most vulnerable to negative health impacts from chemical exposure. Five independent research labs in three countries tested for chemicals that are commonly found in American households. Little is known about how the chemicals in this mix interact with one another or what their combined health impacts might be.

Among the harmful substances identified in the cord blood, researchers reported for the first time ever the presence of 21 contaminants in American infants, including bisphenol A (BPA), a synthetic hormone found in numerous plastic products such as baby bottles, metal food cans, and cell phone cases, and eight previously undetected polychlorinated biphenyls (PCBs), which were banned in the late 1970s but are still ubiquitous in the environment.

A relatively new scientific field of study, biomonitoring is a major tool in advancing the public's right to know. Individuals have a right to know what industrial chemicals are contaminating their bodies and what harm those chemicals pose to their health. Biomonitoring helps to fill some of the numerous gaps in the data regarding chemical exposures and the potential for adverse health effects.

Biomonitoring studies, such as the EWG report, can help improve public health policy by identifying trends in chemical exposures, identifying disproportionately affected and particularly vulnerable communities, assessing the effectiveness of current regulations, and setting priorities for legislative and regulatory action. These biomonitoring studies clearly indicate that more needs to be done to protect public health.

However, companies that manufacture or use harmful chemicals have opposed efforts to use biomonitoring. When California state legislators introduced a proposal to create a biomonitoring plan for their state, businesses fought the measure, labeling it a "job killer." The industry claims that expanding the public's knowledge would create unwarranted fear and excessive regulation. After winning several amendments to the measure, some industry groups dropped their opposition and, in 2006, California's biomonitoring program went into effect. The state's first reports are due in 2010.

The Centers for Disease Control and Prevention (CDC) acknowledges that the presence of a chemical in the body does not mean the chemical will cause a problem. However, without the basic exposure data provided by biomonitoring, there is no way to understand what health impacts may result. Exceptionally little is known about the impact of chemicals on developing fetuses and infants and the effects of interactions among numerous combinations of chemicals.

Rather than sowing fear, biomonitoring advocates hold that such information is empowering to citizens, as information about releases of toxic pollution under the Toxics Release Inventory (TRI) has empowered communities to press for reductions. By combining the pollution data from sources such as TRI with local biomonitoring data and information about health trends, a fuller picture of the impacts of chemical exposure emerges. Communities can use the information to hold polluters and public officials accountable and demand actions needed to reduce their exposure to toxics.

The CDC operates a national biomonitoring program that has produced three assessments of the U.S. population's exposure to chemicals. The program's third report was released in 2005 and identified 148 industrial chemicals in the population. A fourth report from CDC is due later in December.

Biomonitoring programs in other countries have had a big impact on public health. Data from a breast milk monitoring program in Sweden first alerted the world to widespread exposure to the toxic flame retardants known as PBDEs after researchers watched levels rise exponentially in nursing mothers in the 1990s. In the 1970s and 1980s, biomonitoring showed a drop in blood lead levels as lead in gasoline was phased out for reasons apart from public health concerns about the heavy metal. This information helped speed the phase-out of lead as an additive in gasoline and other products.

Despite the research undertaken by the CDC and private groups like EWG, there is still much that is unknown about the public's exposure to harmful industrial chemicals and what health effects the chemicals are causing. The ubiquitous presence of industrial carcinogens and endocrine disruptors among the most vulnerable populations – fetuses and infants – raises serious questions about the effectiveness of current chemical policies.

## State Governments Follow Federal Lead in Data Reporting Technology

President Barack Obama's Jan. 20 inaugural promise to lead the most transparent administration in history has had a major impact on federal information technology, which has led to new developments in data reporting at the state level. Spurred by federal requirements to report Recovery Act spending, states have created new reporting technologies and new transparency experiments.

Data reporting on stimulus spending has received a great deal of attention at the federal level. The American Recovery and Reinvestment Act (Recovery Act) was the largest emergency federal spending bill in American history, and the executive branch moved quickly to distribute the funds to states. The administration and states moved equally quickly to establish reporting tools to track the spending. In October, states and other recipients began to electronically file details of the spending. Those recipient reports are already available for public review at Recovery.gov or on the Recovery Act tab of OMB Watch's FedSpending.org.

Going beyond stimulus reporting, however, several states have started to experiment with using online tools to increase public access to a broader range of data. Most recently, the state of Massachusetts launched a wiki-based online data catalogue that includes education, health, population, environmental, energy, and transportation data in addition to economic and financial information. Although much of the data included is spotty, citizens can create accounts and receive updates on any datasets they designate of interest to them. Massachusetts also joins other states, such as California, Michigan, and Utah, in focusing on releasing more state-based databases to the public.

State efforts have been supported and encouraged by the National Association of State Chief Information Officers (NASCIO). In September, NASCIO published a report, *Guidance for Opening the Doors to State Data*, that sets out a standard of principles to be considered by states and localities for the democratization of data. These principles attempt to set standard guidelines of civic engagement, data quality, security, and regulation that should be considered in creating data portals.

Localities have also gotten involved in the effort to release data in XML, XLS, CSV, and RSS formats. The City of San Francisco has also launched DataSF, which has similar types of public works and demographic data that the state of Massachusetts is attempting to put online, but is focused on the San Francisco metropolitan area. The city allows the data to be downloaded and even has iPhone mobile applications. Using free and open-source technology, the public is able to provide feedback by voting and commenting on datasets. The City of New York has also begun to release these types of data but in a more formal system that does not enable user feedback other than through a contact form.

The new data and tools have invigorated grassroots use of data. The Sunlight Foundation is using the month of December to host a blog series that spotlights citizen efforts to advance state and local transparency. Called the "24 Days of Local Sunlight," the series has so far made mention of local watchdog efforts in Missouri, Tennessee, and Kansas.

While the release of full databases is certainly a leap forward, most of the general public remains unable to use the information without some sort of user interface that helps people understand what they are looking at and why the data is important. It is critical that all branches of government offer some sort of dashboard for the presentation of data so that it is accessible by all, even users with little to no technical knowledge.

To fill this gap, the federal Office of Science and Technology Policy plans to launch an Open Government Innovation Gallery in the near future. Developers offering new tools to the public will be able to showcase their work in the gallery. Another initiative by Intellitics, Inc., ParticipateDB, has already begun and does a similar thing. ParticipateDB, however, is only in a closed-alpha stage and is focused on a broader spectrum of open-data initiatives, including international efforts.

Individuals interested in federal data user interfaces should go to Apps.gov. To locate raw data available in your state, see Data.gov.

## New OIRA Staffer Calls Attention to Office's Role

The White House Office of Information and Regulatory Affairs (OIRA), the clearinghouse for federal regulations, has brought in a conservative economist, Randall Lutter, to review regulatory proposals from agencies. The move has upset OIRA critics and unnerved those who interpret Lutter's past writings as a sign of his views on public health and environmental regulation. Those working inside government and those who know him argue that the criticisms of Lutter, a civil servant on temporary assignment to OIRA, are unfair.

Lutter, an economist formerly with the conservative AEI-Brookings Joint Center on regulation, is on temporary assignment to OIRA from the Food and Drug Administration (FDA), where he most recently served as Deputy Commissioner for Policy, a non-political position. OIRA reviews drafts of proposed and final regulations as well as proposed paperwork requirements any time an agency wishes to survey ten or more people.

White House officials have not commented publicly on Lutter's responsibilities but say that he was detailed to OIRA temporarily because the office is in need of additional staff. According to White House Office of Management and Budget (OMB) spokesperson Kenneth Baer, OIRA was "looking for economists in the civil service who had experience" with OIRA and regulatory issues, and Lutter was a good fit. Lutter was a career employee with OIRA in the 1990s before working for FDA.

Documents show that he has been involved in a U.S. Environmental Protection Agency (EPA) rule that would limit sulfur dioxide emissions. An intra-administration e-mail exchange, made available in EPA's online rulemaking docket, shows that Lutter questioned EPA's estimates of the potential costs to industry of sulfur dioxide regulation. Lutter asked EPA economist Charles Fulcher why the agency had not attributed any costs to certain counties in a cost-benefit analysis. In response, Fulcher attempted to explain EPA's methodology. Lutter then requested

he and Fulcher further discuss the issue by phone. Unlike e-mail exchanges, the details of phone conversations are not subject to public disclosure in this case.

The e-mail exchange took place Nov. 19, three days after the draft proposed regulation was approved by OIRA and sent back to EPA. EPA published the proposed sulfur dioxide rule Dec. 8. The rule and the cost-benefit analysis are available on EPA's website.

Gina McCarthy, EPA's assistant administrator for air and radiation, told OMB Watch that the questions posed by Lutter were "perfectly appropriate." McCarthy said she had not heard complaints from her staff about the role of Lutter or OIRA in the sulfur dioxide rulemaking. She said the relationship between EPA and OIRA thus far in the Obama administration has been productive and that rules are emerging from OIRA review in a "stronger, crisper, more defensible fashion."

OIRA's decision to bring Lutter on staff first sparked controversy when Rena Steinzor, president of the Center for Progressive Reform, posted the news Dec. 2 on her organization's blog. "Few personnel developments could be more discouraging to those hopeful that the Obama Administration will fulfill its many commitments to revitalize the agencies responsible for protecting public health, worker safety, and natural resources," Steinzor wrote.

Steinzor based her concerns on rumors that Lutter would be hired as an OIRA policy advisor, which would be a political appointment. She noted that she raised the Lutter issue in a meeting with senior OIRA officials, and no one provided any clarity about Lutter's employment status.

A *Washington Post* article appeared in the Dec. 4 print edition and described Lutter's role in the sulfur dioxide rulemaking. The article included comments from OMB, of which OIRA is a part, confirming Lutter's employment at OIRA. OIRA Administrator Cass Sunstein has not commented publicly on Lutter.

Lutter is on temporary detail from FDA, OMB said. According to the Office of Personnel Management, "A detail is a temporary assignment to a different position for a specified period when the employee is expected to return to his or her regular duties at the end of the assignment." Detailees are still technically considered employees of the agencies from which they are detailed.

Lutter has "no decisionmaking authority," said Baer, the OMB spokesperson. Baer emphasized that Lutter, like the vast majority of government employees, is a civil servant. His job is to provide technical economic advice and to help implement the plans and priorities for the administration, Baer said.

Lutter's role in the sulfur dioxide rulemaking raises questions, not about his fitness for civil service, but about OIRA's overall role in the rulemaking process. Current and past OIRA officials have maintained that OIRA's responsibility is to vet draft regulations among other federal agencies and/or to ensure draft regulations are consistent with presidential priorities. OIRA desk officers, the civil service staff in the office, are the foot soldiers in this coordination effort.

But past controversies indicate that OIRA can have a larger impact, sometimes to the detriment of public interests. In 2007, OIRA refused to open an e-mail from EPA containing the agency's proposal to declare greenhouse gases a public health threat, according to a House committee investigation. That finding was finalized Dec. 7, almost two years later. OIRA has also been known to chafe at specific details of regulations. For example, in 2008, OIRA persuaded the EPA to reduce the number of air pollution sensors needed to detect concentrations of airborne lead.

OIRA is still operating under the regulatory framework detailed in Executive Order 12866 signed by President Clinton in 1993. President Obama announced Jan. 30 that he would revise and replace that order. Because Obama's executive order is pending, observers remain curious as to whether the role of OIRA, and the regulatory process overall, will change under his administration.

Lutter has wide-ranging experience with environmental and public health regulation. In 2003, he began working at FDA as the agency's head economist. While there, he was promoted to Associate Commissioner of Policy and Planning, then Acting Deputy Commissioner for Policy.

At FDA, Lutter defended the Bush administration's preemption doctrine for medical product regulation. Under President Bush, the FDA argued that product approval should bar state courts from hearing tort cases against manufacturers in the event consumers are harmed by normal use. Lutter testified before the House Oversight and Government Reform Committee in 2008 that, "FDA believes that the important decisions it makes about the safety, efficacy, and labeling of medical products should not be second guessed by state courts."

Critics of preemption say that state courts must be given the flexibility to examine whether manufacturers dutifully considered the effects of their products, especially as new, post-approval information emerges and consumers are allegedly harmed by products. Without the threat of tort suits, manufacturers have reduced incentives to prioritize product safety.

Lutter also contributed to the development of FDA policy that makes it easier for pharmaceutical companies to push doctors to prescribe drugs for unapproved uses. On Jan. 13, FDA finalized its *Good Reprint Practices* guidance document, which permits drug makers to use as a marketing tool journal articles showing a drug can be used to treat symptoms not specified in FDA's approval of the drug. Critics say the journal articles used by the industry do not necessarily meet typical scientific standards and may not have been reviewed by FDA.

The office Lutter headed at FDA, the Office of Policy, Planning and Preparedness, was reconfigured in August when Commissioner Margaret Hamburg reorganized the agency's senior staff structure. Lutter has not represented FDA at a "significant meeting" since May 1, according to calendars for senior officials posted on FDA's website. Lutter has not appeared on the list of senior officials since the reorganization.

Prior to serving at the FDA, Lutter worked for AEI-Brookings, a joint project of the American Enterprise Institute and the Brookings Institution that was often criticized by progressive advocates for taking a hostile view of regulation. (Brookings has since left the partnership; AEI

continues the project on its own as the Reg-Markets Center.) While there, he authored controversial research papers and commentaries on environmental issues, including a 2001 opinion piece titled, "Chill out on Warming," which defended President Bush's refusal to sign the Kyoto Protocol, a multi-nation agreement to cut greenhouse gas emissions.

Lutter previously served at OIRA during the George H.W. Bush and Clinton administrations. He also worked for the White House Council of Economic Advisors under President Clinton. Colleagues from his days in the Clinton White House have defended Lutter. "During my tenure at OIRA, I was unaware of the personal political or philosophical preferences of the staff because, like all good civil servants, they parked these preferences at the door. I was looking for and I got data and analysis, and the decisions were made not by the career civil servants but by the political appointees, as they should be," former OIRA administrator Sally Katzen told OMB Watch. "Randy worked for me for almost five years, and he stood out only because of his obvious intelligence and thoughtful analysis. I think it's a most unfortunate distraction to discuss the role of individuals rather than the merits of the policy decisions," Katzen said.

Several people who have worked inside government are surprised at the attack on Lutter since he is a career employee, not a political appointee. They argue that those who work inside government should not be subjected to political litmus tests. Instead, they argue, it is the responsibility of political appointees to instruct career staff on what policies to follow. Critics note that this approach is particularly difficult to follow at OIRA because the office has such enormous power to review administrative actions taken by agencies. The actions by any one reviewer – even when he or she appears to be non-political – can have enormous policy impact.

## MSHA Outlines Policy, Regulatory Agenda

The Mine Safety and Health Administration (MSHA) began outlining its agenda for protecting workers with the announcement of a comprehensive plan to end black lung disease and the publication of its regulatory plan. MSHA had been headed by acting administrators during the last years of the Bush administration and has been slow to address many safety issues after a series of mine accidents and increased incidence of debilitating disease.

On Dec. 3, MSHA announced in a news release a "comprehensive strategy to end new cases of black lung among the nation's coal miners." Black lung and related diseases have been on the rise, according to several reports and studies conducted earlier this decade. According to the release, "over 10,000 miners have died from black lung over the last decade. The federal government has paid out over $44 billion in compensation for miners totally disabled by black lung since 1970."

In announcing the black lung plan in Beckley, WV, MSHA head Joseph A. Main indicated there was widespread support for the initiative among mining associations and unions. The plan has several components. For example,

- MSHA will hold four informational meetings in December in mining communities (including Main's appearance in Beckley).
- An educational "End Black Lung" webpage provides information on dust-related topics and will be the repository for future information on the plan and MSHA's activities.
- MSHA and the National Institute for Occupational Safety and Health (NIOSH) will hold a series of one-day regional workshops to bring together experts on the best practices to control coal dust. The first workshop was in November, and the others are scheduled throughout 2010.
- During the week of Dec. 7, inspectors will focus on the quality of dust-suppression plans and training by industry personnel about the risks of black lung and silicosis, a disease caused by exposure to silica dust in mines.

In addition to the black lung prevention plan, the Department of Labor (DOL) issued its regulatory plan, part of the semiannual Unified Agenda, a collection of agencies' planned regulatory and deregulatory actions. MSHA has several proposed and final actions included in DOL's agenda.

Working with NIOSH, MSHA issued a proposed rule in January to address the requirements for personal dust monitors. The agencies plan to complete the rule by April 2010, allowing for the approval of continuous personal dust monitors. These monitors represent new technology to measure miners' exposure to respirable dust. This rule is part of the black lung prevention plan.

MSHA is working with the Occupational Safety and Health Administration (OSHA) to develop a proposed rule to regulate exposure to silica in order to combat silicosis, another irreversible but preventable disease. According to the plan, "[t]o assure consistency within the Department, MSHA intends to use OSHA's work on the health effects of occupational exposure to silica and OSHA's risk assessment, adapting it as necessary for the mining industry." The proposed rule will not be issued until April 2011, however.

Another action that is likely to cause some consternation among those concerned with miners' health protection is the call to reduce the exposure of miners to respirable dust without necessarily reducing the personal exposure limit, the legal limit for exposure to coal dust. According to a Dec. 7 *Charleston Gazette* article, MSHA's plans to reduce exposure could include verifying the effectiveness of a coal company's dust control plan and/or changing the unit of measurement for exposure to a shift average instead of an average based on specific samples, as is currently the method for determining exposure.

According to a summary of MSHA's regulatory agenda by *Mine Safety and Health News* (subscription required), recent audits conducted by the agency indicated that there were problems with some dust prevention plans and implementation. Correcting these problems could result in better enforcement of the current standards, Main argued at the Beckley appearance, implying that kind of corrective action could replace reducing the exposure limit.

According to the *Gazette*, the current exposure limit is 2.0 milligrams per cubic meter and has been the legal limit since 1972. Should MSHA ultimately choose to use other approaches to

limiting exposure without reducing the exposure limit, the agency will be ignoring years of scientific evidence that calls for reducing the limit, according to Dr. Celeste Monforton of George Washington University's school of public health.

On one hand, MSHA's agenda provides some hope that long-delayed worker protections will finally be addressed by an agency more focused in recent years on protecting mining companies. On the other hand, whether because of scant resources or political calculations, actions on a range of safety issues could still be years away.

## Group Asks FEC if Federal Election Law Preempts State Robocall Laws

Robocalls – automated phone messages – are one of the least expensive methods that political candidates use to reach voters. However, restrictions on unsolicited calls have complicated efforts by candidates who want to use political robocalls. While political robocalls are exempt from the national "do not call" registry, some states have implemented restrictions on them. A political organization is now asking whether these state laws run afoul of federal law.

In October, a political action committee, the American Future Fund Political Action (AFFPA), requested an advisory opinion from the Federal Election Commission (FEC) questioning whether federal election law preempts state laws. In AFFPA's request, it urged the FEC to find that statutes enacted in 41 states are preempted by the Federal Election Campaign Act (FECA).

Depending on how the FEC decides, such state laws could be overturned as applied to federal candidates and political committees. AFFPA indicates it wants to conduct nationwide robocall operations during the 2010 congressional campaigns, and these laws prevent it from doing so.

In AFFPA's request for an advisory opinion, it asked whether additional state restrictions on robocalls are preempted by FECA. One question it focused on is, "Are state laws purporting to prohibit all pre-recorded telephone calls by federal political committees preempted by FECA?" In its analysis following this question, AFFPA states that "the Act and Commission regulations establish that limitations and restrictions on Federal candidate expenditures is an area to be regulated solely by Federal law."

Jason Torchinsky, counsel for AFFPA, told *Politics Magazine* that "the FECA [Federal Election Campaign Act] is supposed to be the single national source for regulation of federal campaign expenditures, and the FEC's prior opinions confirm that." He further stated that AFFPA is "simply asking the FEC to confirm this same rationale applies to robocalls."

In response to AFFPA's request, Minnesota, Indiana, North Carolina, North Dakota, Arkansas, and Wyoming have filed comments with the FEC defending their state laws. The states argue that their laws do not place undue restrictions on robocalls. In North Carolina's comments, the state mentions that while robocalls are banned in many instances under its robocall statute, there are also several exemptions.

One exemption applies to a "tax exempt charitable or civic organization," which AFFPA would presumably fall under. The only other requirements that tax exempt organizations have to comply with to meet all of the elements for exemption are refraining from making a "telephone solicitation" and clearly identifying "the person's name and contact information and the nature of the call." North Carolina argues that these requirements are easy to comply with.

North Carolina further states in its response that "North Carolinians receive hundreds of thousands of automated calls each election cycle for local, state and federal elections and almost all such calls provide the disclosure set forth in our law without incident or burden."

Minnesota argues that the FECA does not preempt the typical state robocall statute. Some of the other states that submitted comments echoed the points raised in Minnesota's response. AFFPA argues that state laws requiring prior consent for robocalls "limit expenditures by political committees." Minnesota counter-argues that their statute and other similar statutes "do not prohibit any candidate or political committee from making expenditures on telephone solicitations. Rather, these types of laws merely impose reasonable time, place, and manner restrictions on how such telephone solicitations can be made."

AFFPA chairman Nick Ryan told *CQ Politics* that "these regulations limit the ability of candidates and those of us who seek to advocate. It impinges on our right to communicate."

According to *CQ Politics*, "the 'do not call' registry is broadly popular – a 2007 survey found 72 percent of Americans had registered numbers – and complaints about political solicitations are widespread."

*NPAction.org*, an OMB Watch website on nonprofit advocacy, published an article that delves into some of the controversy surrounding robocalls. According to the article, robocall supporters "argue these calls can help to increase voter participation and encourage interest in the government. They can be an effective rapid response tool for contacting supporters to take action. Also, they point out that not only is political speech protected by the First Amendment of the Constitution, but that robocalls are already regulated by state and federal laws."

According to *CQ Politics*, the FEC is likely to have a decision before the end of 2009.

## How Will Proposed Anti-Prostitution Rules Impact Nonprofits?

On Nov. 23, the Department of Health and Human Services (HHS) issued a proposed rulemaking to revise its implementation of an anti-prostitution policy requirement for organizations that receive HIV/AIDS funding from the agency. The requirement currently compels speech by government grantees.

Presently, HHS grantees cannot engage in HIV/AIDS assistance activities unless they adopt a statement explicitly opposing prostitution and sex trafficking for their entire organizations. Affiliated organizations that do not adopt the pledge must be completely separate entities. The

proposed rule slightly changes the current regulation, but it continues to be quite burdensome for nonprofits and leaves many terms undefined.

In 2003, Congress passed the United States Leadership Against HIV/AIDS, Tuberculosis and Malaria Act (the "Leadership Act"). The Leadership Act contains the "anti-prostitution pledge requirement," mandating that "no funds made available to carry out the Act ... may be used to provide assistance to any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking." Therefore, all organizations receiving such funding are required to adopt an organization-wide policy opposing prostitution. This is troubling for some nonprofits working in areas where prostitution is legal and groups providing aid must work with the culture they are in. Those organizations believe that the service they provide is health-related HIV/AIDS education and treatment, not social and cultural intervention. For that reason, they believe that the prohibition is unwarranted. For an example of such concerns, see an August 2008 policy brief from the Center for Health and Gender Equity.

The proposed rule will amend the regulation that took effect on Jan. 20. Under the current rule, all funding recipients, including sub-recipients, are required to certify compliance with the anti-prostitution rule. It also establishes the standards for determining whether a grantee has sufficient independence from an affiliated organization that "engages in activities inconsistent with a policy opposing prostitution and sex trafficking."

The proposal issued in November would no longer require recipients to submit documentation certifying that they have a policy explicitly opposing prostitution. Instead, grantees would have to agree that they are "opposed to the practices of prostitution and sex trafficking because of the psychological and physical risks they pose for women, men, and children." HHS would be required to include in public documents that funding recipients must agree with this statement.

Currently, organizations that receive HIV/AIDS funding are forced to have "legal, financial, and organizational separation [...] between entities that receive grants [...] and another organization that engages in activities inconsistent with a policy opposing prostitution and sex trafficking." Organizations can establish affiliates that may operate free of the pledge requirement. However, the rules for establishing affiliates are very restrictive. The grantee must have an extraordinary degree of separation between itself and the privately funded affiliate(s).

Currently, separation is required from any organization that engages in restricted activities; the proposed regulation would only require separation from "affiliated organizations" that engage in restricted activities. However, there is no definition of "affiliated," and the proposed rule does not define which activities the agency considers to be "inconsistent with a policy opposing prostitution." Critics claim there are problems with the vague language throughout the proposed rule.

The proposed rulemaking also changes the method for determining whether there is sufficient separation between grantees and the affiliated organizations that engage in prohibited activities. It would change the list of factors taken into account when considering whether there is proper separation. Establishing different standards are meant to ease the burden on recipients.

To determine whether sufficient separation exists, currently there must be "physical and financial separation," while the proposed regulation requires "legal, physical, and financial separation" only "to the extent practicable in the circumstances," without definition. Legal separation, for example, could be one of multiple factors considered in making a conclusion about adequate separation.

The proposed rule states, "Mere bookkeeping separation of Leadership Act HIV/AIDS funds from other funds is not sufficient." Other than this, to decide if proper separation exists, "HHS will determine, on a case-by-case basis and based on the totality of the facts," with no single factor being determinative. Advocates say the proposed regulation is an improvement, in that it removes several explicit factors involved in the overbroad separation requirements (such as the use of equipment and supplies). However, HHS may still take those into consideration. HHS states it will use the following five factors, although it may also consider others that are unnamed:

- Legal separation
- Separate personnel
- Separate recordkeeping
- The degree of separation between the affiliated organization's facilities where restricted activities occur
- The extent of signs and other forms of identification that distinguish the recipient from the affiliate

OMB Watch submitted comments in April 2008 before HHS issued the rule now in place. Some of the concerns expressed then still remain. For example, the proposed regulation continues to compel speech, in that organizations must still agree that they are opposed to prostitution and sex trafficking because of the psychological and physical risks they pose for women, men and children.

Groups would also still be required to establish a separate affiliated organization if they want to exercise free speech rights. Vagueness also remains a problem regarding factors considered in deciding whether recipients are "physically and financially separate." The draft regulation does not define prohibited activities, and therefore, organizations may not know when an affiliate is required. OMB Watch's 2008 comments stated, "The extreme vagueness of the rule, combined with broad proposed powers to enforce them on a case-by-case basis, leaves grantees open to inconsistent enforcement action at best, and political retribution at worst.

The anti-prostitution pledge requirement has been challenged in court by grantees who argue that the requirement violates their First Amendment rights. In *Alliance for Open Society, Inc. v. USAID*, a federal district judge in New York City issued a preliminary injunction in August 2008, prohibiting HHS and the United States Agency for International Development (USAID) from enforcing the policy requirement against U.S. organizations that are members of Global Health Council and InterAction. If that injunction is lifted, those organizations would be subject to the HHS regulation. Under a July 2009 agreement, the government suspended its appeal, but it may choose to restore it by Jan. 8, 2010.

The proposed regulation would apply only to organizations receiving Leadership Act HIV/AIDS funds from HHS. USAID will issue its own revised guidelines, which will probably be very similar to HHS' final regulation.

HHS is currently accepting comments on its proposed regulation, with a deadline of Dec. 23. Comments can be submitted electronically at www.regulations.gov.



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

Subscribe | Blog | Donate

The Watcher

December 21, 2009 Vol. 10, No. 24

## In This Issue



---

# Fiscal Policy in 2009 – A Review

Federal fiscal policy has been front and center throughout 2009 as the Obama administration and Congress have gone to extraordinary lengths to bring the country's economy back from the brink of disaster. It seems like every week, we saw a crucial vote or major policy proposal released. A massive Wall Street bailout, an economic stimulus effort with unprecedented transparency provisions, an attempted reform of the financial regulatory system, a new presidential effort to reform the contracting system, significant gains in proper enforcement of the tax code, and a Congress that continued to fail at passing appropriations and tax bills in a timely manner have made for a pretty exciting, if not chaotic, year. Below is a review of some of the major developments in federal fiscal policy in 2009 from an OMB Watch perspective.

### American Recovery and Reinvestment Act (Recovery Act)

*Congress Passes Stimulus Law*

When President Barack Obama signed into law a $787 billion economic stimulus package on Feb. 17, he also approved an unprecedented set of transparency and oversight provisions. The law called for the establishment of a Recovery Accountability and Transparency Board to

oversee the disbursement of more than $500 billion in federal cash outlays and a website (Recovery.gov) to publicly track the spending.

With states reeling from budget shortfalls, the Recovery Act funds were timed to stop many layoffs within states and help states address needs of people who were facing economic hardship. Funds for Medicaid, unemployment assistance, and other direct assistance went out the door quickly. Once states submitted plans, the federal government also began distributing funds for the Education Stabilization Fund to states. With remarkable speed, federal agencies and states worked collaboratively to handle these new funds.

- Stimulus Becomes Law; Implementation Begins

*OMB Guidance Put in Place Quickly*

Within one day of Obama signing the Recovery Act into law, the Office of Management and Budget (OMB) released 62 pages of initial guidance to agencies on how to implement the law. On April 3, OMB updated the guidance and finalized it on June 22. Thus, within four months, OMB was able to develop a government-wide plan for implementing the Recovery Act, impressive by any standard. While speed and completeness were applauded, there were numerous concerns about the content of the guidance. The February version of the guidance did not provide for centralized reporting, and only provided for two tiers – with only the prime recipient and their sub-recipients reporting on use of Recovery Act funds. Critics maintained that without centralized reporting, it would be difficult to aggregate data about spending. Additionally, without the ultimate recipient reporting on how the money was being used, the public would be missing vital information. While the final guidance still lacks true multi-tier reporting, it does provide a useful framework for reporting to a central data collection service, called FederalReporting.gov. The design of the system is also scalable to ultimately have all recipients of Recovery Act funds, including multi-tier sub-recipients, report directly to the federal government – something OMB Watch advocated for in early 2009.

- Analysis of Guidance Implementing Recovery Act
- Coalition for an Accountable Recovery Submits Comments on Recovery.gov Guidance Memo
- Stimulus Becomes Law; Implementation Begins

*Data Quality Issues*

The release of the first round of Recovery Act data on Oct. 30 marked the first time that recipients of federal funding have been required to report to the federal government on their use of the funds in a timely and transparent manner and the first time that sub-recipients reported such information. This represented an important milestone in government transparency and accountability. However, poor data quality, Recovery.gov's limited functionality for analysis, and an unclear definition of "full-time equivalent," which is the standard for reporting jobs saved or created under the Recovery Act, hindered the promise of this new era of fiscal transparency – at least for this first round of recipient reporting. The Recovery Board and OMB are rumored to making improvements to the reporting structure and to the guidance for future quarterly reports

from recipients. Recipients of Recovery Act funds are required to report on a quarterly basis on the use of their funds; the next round of recipient reports will be made available on Jan. 30.

- Recovery Act Reporting: Data Quality vs Data Integrity
- Fuzzy Math: Recovery Act Job Counting Edition
- GAO Recovery Act Report Confirms Impending Data Quality Issues
- Poor Data Quality and Lack of Website Functionality Hobble Recovery Act Recipient Reports
- AP's Limited Review of Recovery Act Job Numbers
- About Those Recovery Act Job Numbers

**Budget and Appropriations**

*Congress Finally Passes FY 2009 Appropriations Almost Six Months Late*
After a couple of days of voting down Republican-offered amendments, the Senate finally agreed to end debate on a $410 billion omnibus spending bill for FY 2009. After the 62-35 vote, the Senate ended the FY 2009 appropriations process by a voice vote in early March (President Obama quickly signed to bill into law the next day). The bill funded government for the next six months. Congress only acted on three appropriations bills in FY 2009 (Defense, Homeland Security, and Veterans Affairs), covering the rest under a continuing resolution (a temporary extension of current funding levels). Democrats in Congress felt they could not resolve their differences with former President Bush and opted in December 2008 to continue funding the government under the continuing resolution until he left office. Work on completing appropriations legislation resumed in earnest during the week of Feb. 23, and Obama signed the final bill on March 6.

- Congress Looks to Complete Fiscal Year 2009 Funding Bills
- Senate Votes to Quit Dithering, Sends '09 Omnibus to Obama

*FY 2010 Appropriations Still Unfinished*
Although the House passed all of its fiscal year 2010 appropriations bills on time, the Senate was not able to do so. With the beginning of the fiscal year rapidly approaching in September and eight out of twelve appropriations bills still unfinished, Congress was forced to pass not one, but two continuing resolutions, keeping the government running as legislators tried to finish all the appropriations bills. In early December 2009, as the second continuing resolution ran down, House and Senate appropriators agreed to a $446.8 billion omnibus bill, combining all the unfinished bills, save one – the bill funding the Department of Defense. Work on that appropriations bill is still ongoing but should be finished by the end of 2009.

- Post-July 4th Appropriations Update
- Busy, Busy, Busy: An Appropriations Update
- Congress Passes Continuing Resolution
- Congress Will Never Finish Appropriations
- Congress Passes Second Continuing Resolution
- Warp Speed: An Appropriations Update

## Troubled Asset Relief Program (TARP)

*COP and SIGTARP Push for More Transparency*
For most of the past year, the Congressional Oversight Program (COP) and the Special Inspector General for TARP (SIGTARP), two government offices which are charged with conducting TARP oversight, have been pushing the Treasury Department to be more transparent in its TARP operations. In particular, both COP and SIGTARP recommended that institutions should be required to report regularly on their use of TARP funds, and SIGTARP even went as far as surveying individual TARP recipients. COP and SIGTARP used the results of the survey to show that more TARP transparency is feasible.

- TARP IG Reports Underscore Need for Better Transparency in Financial Bailout
- SIGTARP Quarterly Report Highlights Lack of Treasury Action
- COP Evaluates TARP, Gives it a Passing Grade

*PPIP Conflict of Interest Problems*
Despite being created over a year ago, TARP still has not been used to actually alleviate the strain of troubled assets at the heart of the near-collapse of the financial sector. The Obama administration rolled out a revamped Public-Private Investment Program (PPIP) the week of Oct. 5 – the program is designed to accomplish the original goals of TARP. However, the program still contains too little disclosure of conflicts of interest among those charged with implementing it.

- Latest TARP Program Poses Significant Conflict of Interest Issues

## Contracting

*Defense Acquisition Reform*
In May, the president signed the Weapon Systems Acquisition Reform Act of 2009 into law. The legislation's intent is to overhaul the Department of Defense's (DOD) acquisition process for major weapons systems. One provision establishes a high-level position within DOD, the Director of Independent Cost Assessment (DICA), to review weapons programs. Another provision requires program cancellation for excessively costly weapon systems, and extra certification of programs that begin to exceed cost estimates. However, Congress did not provide the DICA with a sufficiently wide jurisdiction of review, and the Secretary of Defense can override the cancellation of a program deemed "essential to national security." Because of these loopholes and restrictions, this otherwise well intentioned law will likely fall short of its intended goals.

- Congress Meekly Moves toward DOD Acquisition Reform
- Commentary: Defense Acquisition Reform - Where Do We Stand?

*Presidential Memo on Contracting Reform*
In March, the White House released the Presidential Memorandum on Government Contracting that directed OMB to collaborate with federal agencies to review existing contracts in the short

term and then to develop new guidance to help reform future government contracting. In late July, OMB released the first set of memos to agencies requiring review of current acquisition processes with the goal of reducing contract spending over the next few years. Within this first set of memos, agency heads are tasked with two assignments. The first is to review existing contracts and acquisition practices and develop a plan to save seven percent of baseline contract spending by the end of FY 2011. The second is to reduce by 10 percent the share of dollars obligated in FY 2010 under high-risk contract vehicles, such as noncompetitive, cost-reimbursement, time-and-materials, and labor-hour contracts.

In late October, OMB released a second set of memos addressing longer-range goals for agencies to improve contracting, including requiring agencies to develop strategic five-year plans. It will be several years before the results of these efforts can be evaluated, and while there are still restrictions on contracting transparency, the indication is that these policies will have a net positive effect on federal contracting.

- OMB Watch Submits Contracting Reform Comments
- Obama Administration Seeks to Curtail Award Fee Contracts
- OMB Watch Submits Comments on Contractor Database

**Estate Tax**

The debate over the estate tax has been a rollercoaster ride in 2009, and with the tax set to expire in January 2010, the stakes could not be higher. In the spring, Sens. Blanche Lincoln (D-AR) and Jon Kyl (R-AZ) successfully offered an amendment to the Senate budget resolution that would increase the exemption of the tax to include only those individuals with an estate worth $5 million or more ($10 million for a couple) and drop the rate from 45 percent to 35 percent. The conference committee did not include the Lincoln/Kyl language in the conference report and thus killed the measure. The estate tax issue remained silent until late in the fall when rumors began to surface about congressional designs. In early December, the House passed a permanent extension of the current estate tax, which taxes individuals with estates larger than $3.5 million ($7 million for a couple) at a 45 percent rate on all assets above the exemption. Despite this action in the House, the Senate has yet to take action on the estate tax. With only a few days left before Congress adjourns for the holidays, it is unclear if anything will end up passing the upper chamber.

If there is no Senate action, the tax will expire in 2010. It is set to return to the pre-Bush tax cuts level in 2011. This would be at an exemption level of $1 million ($2 million for couples) and a higher tax rate.

- House, Senate Pass Budget Resolutions
- Estate Tax Reform Bill Passes House, Moves to Senate

## IRS Enforcement

*IRS Ends Private Tax Collection*
In March, the Internal Revenue Service (IRS) ended its use of private companies to collect the tax debts of citizens. This was a positive change in the collection policies of the IRS, as private collectors lacked the flexibility to work with individuals to create plans to pay taxes owed. Moreover, the program unnecessarily put taxpayers' sensitive personal information at risk and, according to government experts, was a waste of federal resources. OMB Watch had been a vocal critic of the IRS's private tax collection program and worked over the past three years to shift those resources to more efficient enforcement practices at the IRS.

- The Beginning of the End for Private Tax Collection
- Congress Looks to Complete Fiscal Year 2009 Funding Bills

*IRS Gets More Funding*
During the appropriations process this spring, Congress allocated increased funds to the IRS. Out of the $12.2 billion Congress allocated, $5.5 billion went to enforcement activities. This represented an increase of $386.7 million, or seven percent, over FY 2009 levels, and was equal to President Obama's request. This much-needed increase in IRS funding represents a reversal in the lethargic spending levels approved during the Bush administration. These additional funds, along with the aid of new tax treaties, will give a big boost to the IRS's efforts to track down tax cheats, both domestically and internationally.

- IRS Set to Receive Substantial Funding Boost

*The UBS Tax Settlement*
In August, the Swiss government came to terms with U.S. demands that the Swiss bank UBS turn over information on U.S. clients suspected of tax avoidance. Along with revealing information about the identities of some 4,450 American UBS clients, the arrangement between the two governments included a new information exchange agreement. The agreement will allow the IRS and the Department of Justice (DOJ) to work with the Swiss government in prodding other Swiss financial institutions to disclose the identities of Americans suspected of hiding money in Swiss accounts. The agreement showed unexpected early results in tax enforcement at the IRS, as over 14,000 U.S. citizens came forward to take part in an IRS amnesty program to reveal hidden assets overseas.

- The IRS Gets Serious about Tax Enforcement

## Performance

After the government's first-ever Chief Performance Officer – Jeffrey Zients – was confirmed by the Senate in June, the Obama administration began its process of overhauling government performance systems. It was made clear throughout the first half of 2009 that the new administration was not happy with current performance measurement systems, including the

Program Assessment Rating Tool (PART). OMB Director Peter Orszag and Zients both made public statements about changes to come with PART. However, as of this writing, OMB has not revised PART.

Further, in October, OMB released a memo to federal agencies that outlined a new initiative to bring a renewed emphasis and additional resources for program evaluation within agencies. The three-part plan included giving better access to agency program evaluations on the Internet that are both in progress and planned for the future; re-launching an interagency working group on evaluations; and a voluntary pilot program to provide additional resources to fund rigorous program evaluations or strengthen evaluation capacity within agencies. Although the initiative is not a comprehensive plan to reinvigorate performance measurement in the federal government, it is a positive first step toward creating real improvement in government performance.

- Senate Likely to Confirm First-Ever Chief Performance Officer
- OMB Releases Plan to Elevate Performance Evaluation

## Transparency: Change You can Trust

In 2008, we heard a lot about "change." In this 2009 year-end summary, we use another type of "change" to rate the Obama administration's transparency efforts thus far.

### Open Government Vision

2009 opened up with a roar when President Obama used his inaugural address to promise a new era of sunlight with regard to government actions. The president followed up the next day with a memo ordering certain top officials to develop an Open Government Directive in 120 days. The directive would establish actions to be taken by agencies in an effort to move toward a government that is transparent, participatory, and collaborative. Although the process for developing the directive was experimental and sometimes rough, and even though it took longer than anticipated, the administration delivered the goods in strong fashion. This and several additional actions by the new administration have begun to forge an expansive vision for open government that is unmatched by previous administrations.

The Open Government Directive earns an impressive one-dollar coin in change for its vision and breadth, setting a clear new direction for government transparency. Shortly after the directive was released, top cabinet agencies followed through with commitments to undertake specific open government initiatives. 2009 has been marked by much talk of "change," and this action represents no mere penny-ante change.

The president called for progress on three main principles – transparency, participation, and collaboration – and the directive delivers on all three with specific requirements and deadlines for all agencies. The directive comprises four main components centered on very simple but

important themes – publishing information; creating a culture of openness; improving data quality; and updating policies to allow for greater openness.

The proof will, of course, be in the pudding. The directive provides an ambitious timeline for implementation of its various requirements. The question remains how vigilant the White House will be in pushing agency compliance, how active agencies will be in pursuing the spirit of the directive, and how involved the public will be in holding agencies accountable for robust openness plans.

**Nominees Boost Transparency Vision**

The administration's vision of a more transparent government was further expressed among the nominees chosen to run key agencies. A number of shiny quarters among Obama's nominees add up to some real change favoring transparency. The Office of Legal Counsel (OLC), plagued by secrecy and controversy during the previous administration, saw the nomination of transparency advocate Dawn Johnsen to lead the embattled office. Johnsen has written articles advocating for restrained executive power and increased government transparency, in particular at OLC. Unfortunately, partisan politics continues to hold up her Senate confirmation.

The nomination and confirmation of David Michaels to head the Occupational Safety and Health Administration (OSHA) also bodes well for open government. Michaels, a former Clinton administration official, has advocated for protecting the transparency and integrity of scientific research used to inform public policy. The selection of Lisa Jackson to head the U.S. Environmental Protection Agency (EPA) was at first greeted with some trepidation by open government advocates concerned about her record heading New Jersey's environmental office. However, Jackson quickly set a startling new tone at EPA – which was one of the most troubled agencies during the Bush administration. Not long after her confirmation, Jackson released memos to all EPA staff calling for a return to operating as if the agency were "in a fishbowl" and to "uphold the values of scientific integrity."

White House appointees have been aggressively advocating for government openness. Just to highlight a few: Cass Sunstein, a controversial nominee to run the Office of Information and Regulatory Affairs (OIRA) at the Office of Management and Budget (OMB), has called for expanding the public's right to know as an academic. He is now in a position to influence policies on public access and dissemination. Vivek Kundra was confirmed as the federal Chief Information Officer and head of e-government operations at OMB. Like a ball afire, Kundra has pushed for a new vision on use of information technologies in the government. He quickly added an Information Technology Dashboard on USAspending.gov to bring greater clarity and accountability to how billions of dollars are spent. He also created Data.gov, a new website that

provides access to databases from different agencies in government. His vision of "cloud computing" is refreshing and exciting.

Outside of OMB is a host of energized White House staff, including Aneesh Chopra, the federal Chief Technology Officer, who works out of the Office of Science and Technology Policy (OSTP). Chopra shares the policy vision that Kundra has and has the technology chops to make it happen. Beth Noveck, also in OSTP, is an academic with vision on how to use new media to make government more interactive and participatory. Norm Eisen, a special counsel to the president, has already been working tirelessly behind the scenes to put in place the strongest of government-wide policies for openness.

**Opening the White House**

Candidate Obama pledged to run "the most open and transparent administration in history," and the White House transparency is a very public example of putting that promise into action. Not all of the change has gotten delivered at the same time, but improvements have continued to pay off like a busted slot machine. And increased openness came to the White House itself. The official White House website was rebuilt, utilizing an open-source Drupal platform, and with many new features, including a blog; the text of signed legislation, Executive Orders, and memoranda; webcasts of presidential speeches and some meetings; and a link to the White House photo stream hosted by Flickr. During the campaign, Obama promised to post all non-emergency legislation online five days prior to signing it for public comment; this fell by the wayside in the early weeks of the administration, but legislation awaiting the president's signature is now available at whitehouse.gov.

The White House also made progress on transparency policies. On his first full day in office, President Obama issued Executive Order 13489, which revoked a President Bush order (Executive Order 13233) that allowed former presidents and vice presidents (and their representatives, if they are deceased) to veto the release of any of their presidential materials. Obama's order makes clear that only the president or a former president (not a vice president) can make a claim of executive privilege, but that the government is not bound by such a claim if it is made. Obama's actions, in essence, return implementation of the Presidential Records Act to how things worked prior to the Bush administration. However, as long as no legislation is passed by Congress with regard to this issue, any future president is free to issue yet another order undoing Obama's order.

Transparency on White House visitor logs is an example of change that took a while to happen, but it ultimately did happen – and was widely perceived as monumental. Early in the Obama administration, the White House continued the Bush administration's policy of withholding visitor logs, and a lawsuit was initiated by Citizens for Responsibility and Ethics in Washington (CREW) following denial of a FOIA request for the logs. Then the administration agreed to release its visitor logs from the start of the administration for those specifically requested. In December, the administration will disclose all visitor logs, except those dealing with national security and other key matters, for Sept. 15 onwards.

**FOIA**

Also on his first full day in office, President Obama issued orders for the Attorney General to draft a new FOIA memorandum. When released, the memo was much like the earlier one used by the Clinton administration, including a similar foreseeable harm clause; however, it included more powerful language, backing it with enforcement and incentive mechanisms. Later, the Justice Department clarified the policy as it pertained to several exemptions and reinforced the idea that FOIA employees should make efforts to exercise greater discretionary disclosure. Taking an additional step toward implementation of this bold policy, the administration appointed Miriam Nisbett as director of a new office dedicated to resolving FOIA disputes.

This policy was a significant shift from the Bush administration's instructions that when they are in doubt or have a reasonable legal justification, agencies should withhold information from disclosure. Unfortunately, it is taking time for these new Obama policies to swim against the current of a long culture of entrenched secrecy. The new policies appear to have made little to no change in the agencies' litigation of FOIA lawsuits brought by public interest groups. Without follow-through, FOIA falls short of the full dollar mark. Still, it seems that the administration is usually willing to compromise on stickier subjects. For instance, it will not recognize White House visitor logs as being subject to FOIA, but it has made agreements to release the logs on a limited basis.

**State Secrets**

Early on, the Obama administration initiated a review into the use of the state secrets privilege and of pending cases in which the privilege had been invoked. Formally established by the 1953 Supreme Court decision in *United States v. Reynolds*, the state secrets privilege is an evidentiary privilege that permits the executive branch to withhold evidence at civil trial if the release of that information would prove detrimental to national security. Historically, its use has been limited; the privilege was invoked only a handful of times for the first several decades after *Reynolds*, and then only to exclude specific pieces of evidence. During the George W. Bush administration, the privilege was used with both unprecedented frequency and scope, as the administration used the privilege to argue that entire cases should be thrown out because the subject matter of the case – frequently extraordinary rendition, warrantless wiretapping, or other components of the "war on terror" – was itself a state secret. Unfortunately, all the while the Obama administration was reviewing the privilege, it was also repeatedly reiterating the broad state secrets claims of the Bush administration in every case still at trial.

In September, the Obama administration formally announced its public policy governing the assertion of the privilege, a first for any administration. In this memorandum, the Attorney General announced that the privilege would only be invoked "to the extent necessary to protect against the risk of significant harm to national security," and only after an extensive internal review. Prior to invocation, the department or agency requesting a claim needs to submit a detailed justification to the Department of Justice (DOJ), subject to the review and recommendation for further action of the relevant Assistant Attorney General. A review committee of senior DOJ officials is established to review his or her recommendation and to make a recommendation of their own to the Deputy Attorney General, who in turn makes his or her recommendation to the Attorney General for an ultimate decision. Many find this policy to be a strong first step in the right direction, but the policy failed to address several key issues, most especially judicial oversight. Public interest groups have asked for provisions that allow *in camera* review by judges, discovery of non-privileged material, and creation of substitute materials. Without clear judicial oversight commitments, the new policy will continue to shortchange the public and courts.

Legislation remains another major piece of change missing from this equation to ensure that the privilege is invoked uniformly and properly from administration to administration and is given proper scrutiny by the courts. A strong bill was recently passed out of the House Judiciary Committee, which would strengthen the hand of the courts by applying tools used in criminal cases under the Classified Information Protection Act and ensure that justice is done while

protecting legitimately classified information. However, neither this bill, nor the Senate counterpart still in committee, is likely to move any further in 2009.

**Chemical Security**

A good deal of "change" happened in 2009 regarding efforts to pass comprehensive chemical facility security legislation. The Chemical and Water Security Act of 2009 (H.R. 2868) passed the House in November. This action earns a respectable fifty cents of change – halfway to becoming law. More than eight years after the September 2001 terrorist attacks, the action sends to the Senate legislation that seeks to greatly reduce the risks of terrorist attacks on chemical plants and water treatment facilities. Such facilities remain vulnerable to terrorist attacks that could release plumes of deadly poison gas to drift over U.S. cities and towns. The legislation is a compromise with the chemical industry and its supporters in Congress. Covered plants would be required to assess what safer and more secure alternative technologies are available and how difficult it would be for a plant to convert. By eliminating the unnecessary presence of toxic chemicals or dangerous processes, facilities could remove themselves from a terrorist's list of potential targets. The bill also gives the government the authority to require the riskiest facilities to implement the safer technologies that the facilities identify – but only under certain circumstances. Among other conditions, if converting to safer processes is not economically feasible, then the plant would not be required to convert.

The chemical security legislation still grants the Department of Homeland Security (DHS) and the EPA the authority to conceal information about the program, such as what facilities are covered and whether they are in compliance, thus hurting the public's ability to hold the facilities and the government accountable for following the law. Advocates will continue pushing for stronger accountability measures in the Senate version of the legislation.

**E-gov**

Since taking office, the Obama administration has structured its electronic government changes along its three themes of open government: participation, collaboration, and transparency. The administration's focus on transparency was heavily demonstrated by its pursuits in expanding federal information technology systems. Going beyond the Web 2.0 infrastructure of social media tools, the administration focused on using the web as a tool to push out data to the public. Although this focused largely on Recovery Act spending, the federal government quickly launched an IT dashboard and Data.gov to release other kinds of data to the public in machine-

readable formats. Further, we have recently seen this have a trickle-down effect on states and local governments. States like Massachusetts and cities like New York and San Francisco have launched similar programs to make data on transportation, health, environment, and education freely available.

Participation efforts have included engaging the public in town hall events with Facebook and Twitter; indeed, some of the administration's most notable efforts were those that focused on using social media tools as a way to involve the public in policymaking processes. The largest of these was the solicitation process for recommendations on an Open Government Directive to set the transparency goals of all government agencies. The three-phased process was a first attempt and a learning process not without its problems. Becoming more participatory and collaborative meant having to deal with those who would otherwise attempt to derail the policy discussion with off-topic issues or accusations. The administration used a similar process to collect public input on declassification policy, and we eagerly await the results.

### Reforming Information Controls: CUI


In 2009, the Obama administration created an inter-agency task force to investigate if there was any change hiding under the Controlled Unclassified Information (CUI) policies established by the Bush administration. As highlighted by OMB Watch in our report, *Controlled Unclassified Information: Recommendations for Information Control Reform*, the new CUI regime, intended to replace over 100 disparate Sensitive But Unclassified (SBU) information control labels, was greatly in need of change. The Bush efforts focused solely on facilitating information sharing – particularly terrorism-related information – between government agencies, but there was almost no focus on information management or disclosure issues. We made a series of recommendations for reform of the existing CUI framework, including maximizing disclosure to the public by prohibiting reliance on control labels in making FOIA determinations, establishing time limits on labels, and embracing oversight to ensure reform efforts do not cause greater overuse of control labels.

The CUI task force sent its forty recommendations to the administration in August and publicly released them on Dec. 15. Among the recommendations included are the expansion of the CUI framework to apply to all SBU information across government, not just terrorism-related information; a series of improvements to the procedures for designation, identification, marking, safeguarding, dissemination, life cycle, training, accountability, standardization, and oversight provisions of the framework; a timeline and resource allocation strategy for implementation; and measures to track progress made toward implementation. The recommendations are half way to the policy change CUI needs. If these recommendations move beyond a policy proposal, and are actually implemented in full, it will be a significant improvement to the status quo.

**Environmental and Public Health Data**

Several smaller actions in 2009 concerning EPA and access to environmental data are gradually adding up to a pocketful of "change." The bedrock environmental right-to-know program, the Toxics Release Inventory (TRI), experienced a number of advances. In March, after two years of being subject to a Bush-era reporting rule that weakened the public's right to know, Congress restored the previous reporting rule, ensuring that detailed information on pollution continues to be provided to the public. EPA followed the restoration of TRI with the earliest public release of the data in the history of the program and announced the development of several new tools to analyze the data.

Beyond TRI, EPA also finalized its plan to collect and report greenhouse gas emissions data from facilities in most economic sectors. The data will be used to inform climate change policies at the state and federal level. Following 2008's disastrous spill of toxic coal ash – the residue from burning coal to produce electricity – from an impoundment in Kingston, TN, EPA surveyed coal-burning power plants nationwide to identify the coal ash impoundments that could pose a similar threat of failure. After overriding complaints from the DHS, EPA published the information online.

**Classification/Declassification**

The record on the administration's position on national security classification and declassification has been mixed at best, with the beginnings of work in a few places that haven't added up to any major change yet. Classification and declassification has been a major topic of discussion in the administration during its first year but remains a subject that it has not fully tackled. In May, the administration convened a panel to develop recommendations to the president for addressing this issue. To date, the administration has not released the recommendations, even though they were due in late summer.

While drafts of its executive order have been leaked, nothing is final. These leaked versions seem to call for a National Declassification Center that was also called for by the Public Interest Declassification Board. On the other hand, the administration has come under fire for giving

into intelligence agencies by overturning a previous executive order requirement that they declassify historical national security records that are at least 25 years old.

At the beginning of 2009, the administration appointed Adm. Dennis Blair as the Director of National Intelligence. Blair testified during his confirmation hearing that too much secrecy is an impediment to security and called for a smarter classification system that started by shifting the culture of secrecy in the intelligence community. Further, the administration released several memoranda written by the OLC under Bush that gave binding legal advice to agencies on the president's authority over detainees, the use of military force against terrorists, military detention of U.S. citizens, and the power to transfer captured suspects to foreign custody. On the other hand, it worked effectively with Congress to exempt photographs of detainees being tortured while in U.S. custody from FOIA. Also, a September report card on secrecy by OpenTheGovernment.org that primarily focused on 2008 noted that while original classification decisions decreased for the first time since 1999, the proportion of declassification spending to that of classification remained grossly disproportionate.

**Data Gaps**


Despite the change concerning access to some types of environmental data, even searching the sofa cushions turned up no change regarding the public availability of other key types of information. These gaps in the data available to the public are made all the more evident as other sets of data are disclosed and the public seeks to link various types of information. One of the obstacles to disclosing information – especially information about the environmental and public health risks of commercial chemicals – is the excessive use of trade secrets claims. Businesses that submit information to regulatory agencies like EPA can label much of the information as proprietary, and the government will conceal that information from the public. Many public interest groups have decried the unavailability of data needed to identify the risks posed by the more than 80,000 chemicals now in commerce in the United States. Information on toxic chemicals used in natural gas drilling, which are linked to the contamination of drinking water wells across the country, are also concealed from the public as trade secrets. Legislation introduced this year would require disclosing the identities of these drilling chemicals. Information about the health risks of nanomaterials – the microscopic engineered particles that are finding their way into hundreds of consumer products – is hard to come by. EPA has announced its intentions to step up its data collection regarding certain nanoscale materials in 2010, but for now, lack of research and the industry's use of the trade secrets barrier have kept the public in the dark about the potential risks from this growing technology.

The data gaps extend beyond environmental and public health data to fiscal items such as the Recovery Act. For the first time, there is timely and transparent reporting by recipients of federal Recovery Act funds and their sub-recipients on how the money is being used and how many jobs are being created or saved. This new model expands the opportunities for presenting information to the public about government spending. However, key elements of the contract to create the public website, www.recovery.gov, remain hidden, even after repeated FOIA requests.

Also, the new Federal Awardee Performance and Integrity Information System, required by the FY 2009 National Defense Authorization Act, is intended to help contracting officials make better award determinations by providing timely information on the honesty and reliability of contractors. However, among other problems, the public does not have the ability to access this database, and the contractor data collected by the government need extensive revision and standardization before they can be useful to contracting officials.

## Beginning Steps toward a Regulatory Reform Agenda: Regulatory News in 2009

In 2009, the Obama administration took steps toward rebuilding the federal government's ability to protect public health, workplace safety, and environmental quality. President Obama set out key principles to guide the administration's actions on transparency, regulatory reform, and scientific integrity. He appointed well qualified agency heads who reversed or halted many harmful regulations from the prior administration. In doing so, the president has created expectations for a renewal of government's positive role. The most vexing problems, however – changing a dysfunctional regulatory process and restoring badly needed resources to agencies – remain major hurdles.

When President Obama took office in January, the government's ability to protect the public through regulation had badly deteriorated. Agencies had lost scores of qualified workers, budgets had been slashed, and political considerations overruled regulatory science, laws mandating agency rulemaking, and enforcement programs. Moreover, the process by which these protections are developed had become burdened with obstacles that caused delays and de-emphasized science. The result was a wide range of food safety crises, consumer product recalls, and nearly dormant agencies responsible for worker safety and environmental concerns. In addition, the financial system was teetering on the brink of collapse.

### The White House Agenda

*Reforming the Process*. Obama promptly sought to reform the regulatory process, stating in a Jan. 30 memo that the principles set out in Executive Order 12866, the presidential order that defines much of the structure by which agencies produce regulations, "should be revisited."

On Feb. 4, Obama revoked President Bush's January 2007 order revising E.O. 12866. Bush's order further politicized the regulatory process and threatened to prevent regulatory agencies from setting new standards by expanding the authority of regulatory policy officers and the scope of OIRA's review powers. Obama's decision (E.O. 13497) sent a message that the administration recognizes that agencies need to address public problems more quickly.

In the call for a review of E.O. 12866, the president created a process in which both agency opinions and public comments would be considered for the first time. Obama's memo asked agencies to develop within 100 days recommendations for a new order. Subsequently, on Feb. 26, the Office of Management and Budget (OMB) published a request for public comment in the

*Federal Register*. The administration received by the March 31 closing date approximately 180 comments to consider in drafting a new order.

To date, the administration has not issued a revised order, and the Office of Information and Regulatory Affairs (OIRA) continues to review agencies' rulemakings under E.O. 12866, issued in 1993. The public does not know what regulatory changes agencies recommended to OMB; none of the agencies' submissions have been disclosed.

*Transparency*. In his first full day in office, the president issued two memos that set out transparency principles intended to drive his administration. The first memo, *Transparency and Open Government*, called for "an unprecedented level of openness in Government." The second memo outlined how the Freedom of Information Act (FOIA) was to be applied during the Obama administration: a presumption of disclosure should inform agencies' FOIA decisions. As a corollary to Obama's FOIA memo, on March 19, Attorney General Eric Holder issued new guidelines for FOIA implementation that require agencies to adopt a presumption of openness. (For more, see OMB Watch's 2009 information policy review.)

*Scientific Integrity*. On March 9, Obama issued a memo aimed at restoring scientific integrity in the federal government. Many agencies, especially those charged with protecting the environment, workers, and public health and safety, rely heavily on scientific studies and conclusions.

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." The memo argued for the importance of disclosure and transparency. It also assigned to the director of the Office of Science and Technology Policy (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.

*Nominations*. Obama's choices to lead his cabinet departments and other agencies represent a sea change from the Bush administration. His appointments are mostly former elected officials with government management expertise or public servants who have served at federal, state, and/or local levels. He has refrained from appointing people either unqualified or tied too closely to interests regulated by the agencies to which they are appointed.

Despite a flawed senatorial confirmation process, high-quality appointees are leading key agencies responsible for protecting public health, workplace safety, and environmental quality. Changes in regulatory activity and enforcement are occurring at important agencies like the U.S. Environmental Protection Agency (EPA), the Food and Drug Administration (FDA), and the Consumer Product Safety Commission (CPSC). The recent confirmations of David Michaels at

the Occupational Safety and Health Administration (OSHA) and Joseph Main at the Mine Safety and Health Administration (MSHA) raise hopes that long-neglected workplace safety issues will soon be addressed.

As the office that governs federal rulemaking, leadership at OIRA is also critically important to reforming the regulatory process. On April 20, Obama nominated Cass Sunstein, a colleague of Obama's on the University of Chicago law faculty, to be OIRA administrator. Sunstein is a controversial figure when it comes to administrative law issues; he is an ardent supporter of using cost-benefit analysis in regulatory decisions, and he has written about the need to further centralize power in OIRA. He is also a strong proponent of government transparency. How Sunstein makes the transition from legal scholar to government administrator will be critical to defining the Obama regulatory agenda.

Sunstein's nomination was fraught with controversy. Republican senators placed sequential holds on the nomination because of Sunstein's views that animals should enjoy meaningful legal rights, including the right to sue. Although Sunstein worked to assuage the concerns of those who raised objections to his views, the holds kept the Senate from debating the nomination before the chamber's August recess.

Meanwhile, the progressive community expressed different, albeit more salient concerns, fearing that Sunstein would support the status quo at OIRA. OMB Watch and many others have argued the role of the office should dramatically change from the rule-by-rule review of agencies' regulations, serve as facilitator for inter-agency reviews, and put greater emphasis on fulfilling its responsibilities under the Paperwork Reduction Act, the law that established OIRA. This changed role could avoid inevitable conflicts with agency heads over regulations and restore the primacy of science in agency decision making.

*Midnight Regulations.* Among the regulatory successes so far, the Obama administration has made progress in addressing numerous last-minute regulations, so-called midnight regulations, completed in the waning months of the Bush administration. Obama's appointees used a range of strategies to quash or limit the impact of many of those regulations. The White House issued a moratorium on regulations not yet in effect, and employed, on a case-by-case basis, other strategies to revise or stop many last-minute rules that went into effect on or before Jan. 20. Among other successes, agencies restored scientific integrity to the process for making decisions on endangered species, preserved crucial services for Medicaid beneficiaries, and cut back on fossil fuel development in western states. While the administration has largely proven effective in altering the regulatory path of those regulations it has targeted, some actions are still continuing – and some regulations remain unaddressed entirely.

*Financial Reform*. In January, the country was in the midst of the worst financial crisis since the Great Depression. The administration's immediate approach to the crisis was to spur economic recovery and rescue the financial system. In March, the Treasury Department released an outline of an ambitious comprehensive financial regulatory reform package that sought to restore responsibility and accountability to the financial system. Treasury released legislative language to, among other things: 1) create a watchdog agency, the Consumer Financial

Protection Agency (CFPA), which would set basic safety standards; 2) strengthen investor protections; 3) reform credit rating agencies; and 4) reform predatory mortgage and lending practices.

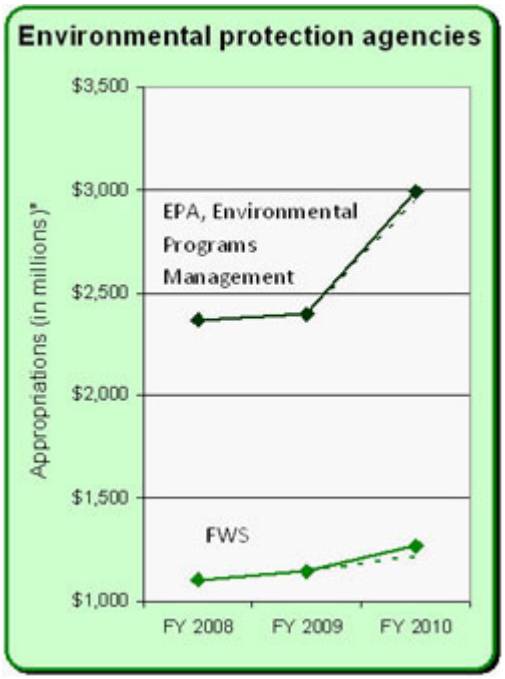
During the summer and fall, the Senate and House initiated their own proposals, basically modeled on the administration's legislative blueprint. Both chambers' packages address the taxpayer-financed rescue of Wall Street and efforts to protect retirement funds and savings, homes and businesses, and consumers from predatory lending abuses.

The House financial reform legislation, H.R. 4173, the Wall Street Reform and Consumer Protection Act of 2009, passed Dec. 11 by a vote of 223 to 202. The Senate Banking Committee held hearings and in November released a 1,100-page discussion draft – an omnibus package of all major financial sector legislative reforms under consideration by the 111th Congress – but has not begun a mark-up of the draft.

In the aftermath of the global financial meltdown, the new administration and Congress began the most ambitious rewriting of the nation's financial regulatory rules since the 1930s. As was the case then, this is proving to be a multi-year effort. Legislative progress has been slow – a reflection of industry resistance, the complexity of the issues, and other legislative priorities.

**Agency Reforms**

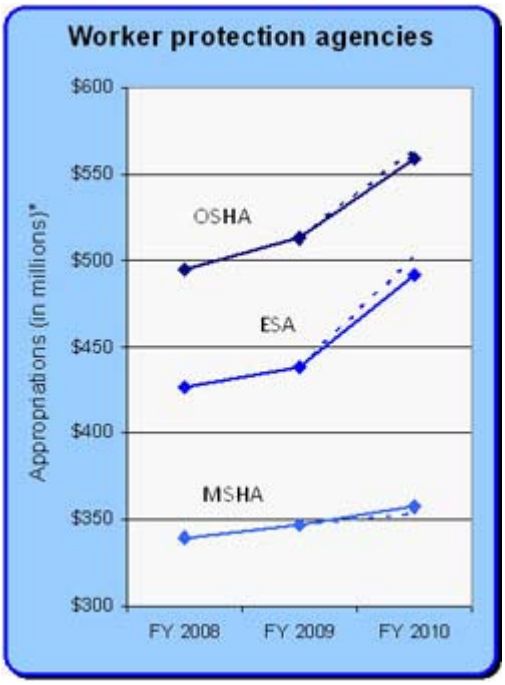
*Resources*. Under new leadership in 2009, several agencies began to reform their approaches to providing public protections. One of the most severe challenges they face is the lack of resources – both human and financial – to address the myriad problems threatening the public. Although there was some progress in restoring resources, Congress and the administration have not yet reversed years of funding cuts and the exodus of qualified personnel.



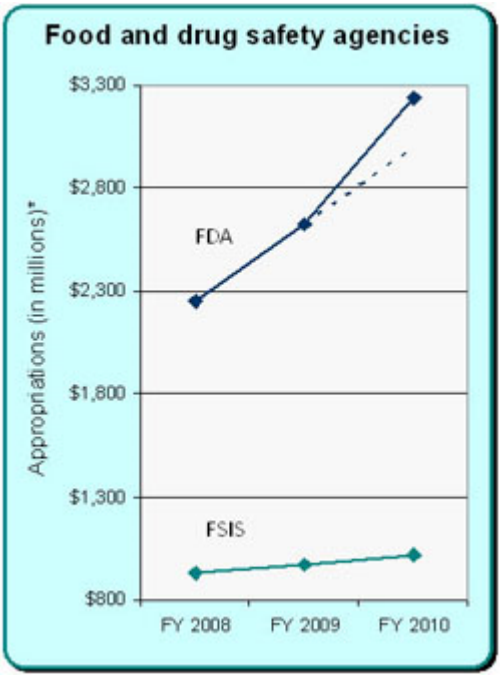

In FY 2009, Obama signed into law an omnibus spending bill that included significant budget increases for CPSC and FDA. However, the bill included only marginal increases for other agencies with budgetary challenges, including MSHA, the Food Safety and Inspection Service (FSIS), and EPA.

For FY 2010, the president initially sought significant funding increases for FDA, OSHA, and EPA. However, Obama proposed only modest increases for other regulatory agencies such as FSIS, MSHA, the National Highway Traffic Safety Administration (NHTSA), and the U.S. Fish and Wildlife Service. Congress showed greater commitment toward regulatory agency funding, boosting the budgets of several key agencies, often above Obama's requests. (See graphs at right, which refer to enacted appropriations for

regulatory agencies from FY 2008 to FY 2010. (Dashed lines represent President Obama's FY 2010 request.))




*Transparency and participation*. Throughout 2009, some agencies began to implement the president's call for a more open and participatory government. EPA Administrator Lisa Jackson reinstated principles many considered ignored by the previous administration when she issued on April 23 a memo to staff outlining broad principles of transparency to govern the agency's interactions with the public. By promising to operate EPA as if it were "in a fishbowl," she explained that to gain the public's trust, EPA "must conduct business with the public openly and fairly." Jackson pledged that all agency programs "will provide for the fullest possible public participation in decision-making," including groups that have been historically underrepresented, such as minorities and those affected disproportionately by pollution.



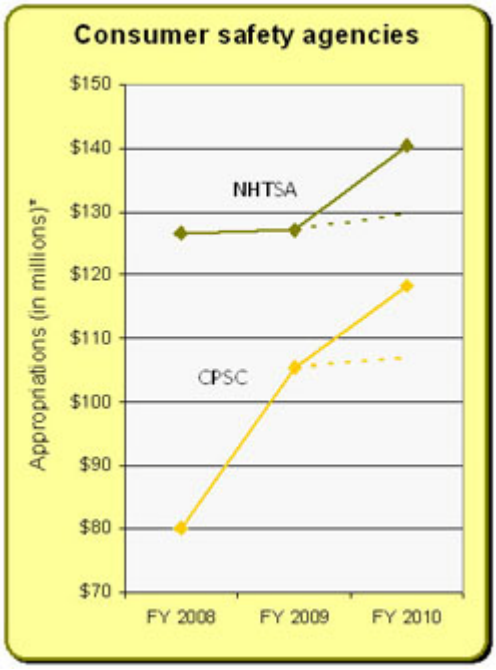

FDA has also taken steps to improve transparency and public participation at the agency. On June 24, FDA published a notice in the *Federal Register* asking the public to submit comments to its newly created transparency task force. The task force also held public meetings to gather additional comments. The task force is charged with finding ways the agency can better communicate its decisions and information about public health threats and is to develop recommendations approximately six months after its formation.

Some agencies have begun to change their FOIA policies as well as take other open government actions similar to FDA and EPA. At the same time, other agencies, such as MSHA, seem not to have received the messages the president has sent about a presumption of openness and continue to stonewall public requests for information generally in the public sphere.

*Scientific Information*. Without OSTP's recommendations to the president on scientific integrity or increased resources, the state of science in the agencies has not been greatly enhanced. For example, little has been done publicly to reverse the Bush-era policies chilling scientists' ability

to speak openly about their work, to change media access to agency scientists, or to require scientific information to be disclosed and published.

One notable action in 2009 was EPA's decision to change its process for assessing the public health risks of potentially toxic chemicals. EPA's Integrated Risk Information System (IRIS) staff studies industrial chemicals and posts final risk assessments on EPA's website. On May 21, EPA announced changes it says will decrease the time it takes to conduct the assessments and afford EPA more control over the pace of the process and content of the assessments. Under the Bush administration, EPA and OIRA had added unnecessary steps to the process and provided other agencies with opportunities to interfere with EPA's scientific determinations.




**Legend**

EPA = U.S. Environmental Protection Agency
FWS = U.S. Fish and Wildlife Service
OSHA = Occupational Safety and Health Administration
ESA = Employment Standards Administration
MSHA = Mine Safety and Health Administration
NHTSA = National Highway Traffic Safety Administration
CPSC = Consumer Product Safety Commission
FDA = Food and Drug Administration
FSIS = Food Safety Inspection Service

*All appropriations levels are taken from appropriations bills as passed by Congress and signed by the president. Levels may not represent an agency's entire available budget due to exclusion of user fees, carryover balances, and other funding sources. Figures are not adjusted for inflation.

A role for the White House in the revised IRIS process is preserved, giving OMB and possibly other White House offices two opportunities to review IRIS assessments before they are finalized. EPA has insisted that it will maintain control over the process, including the White House review, at all times. The revised process also sets a time limit of 45 days for each review phase and is more transparent. EPA also says that comments on draft assessments should focus solely on science.

*Rulemaking*. At several agencies, writing regulations in the public interest sat at or near the top of the agenda. On Dec. 7, after months of development, the EPA announced its endangerment finding for greenhouse gases, declaring emissions a threat to "the public health and welfare of current and future generations."

The finding allows agencies to formulate specific regulations. For example, on Sept. 15, EPA and NHTSA jointly issued a proposed regulation covering carbon dioxide emissions from passenger cars and light-duty trucks. EPA also proposed a rule limiting stationary sources emitting more than 25,000 tons of carbon dioxide annually to install best available control technology. The agency plans to finish the rule by April 2010.

OSHA has begun to address a series of workplace issues that have been stuck in the regulatory pipeline for years. Protections against exposure to diacetyl (a chemical compound used to give

foods like microwave popcorn a buttery flavor) and silica dust, safety rules for cranes and derricks, prevention of combustible dust explosions, and plans for other workplace hazards are on OSHA's agenda.

The CPSC has also taken on new regulatory tasks after wallowing for years with too few commissioners and inadequate legal authority to address consumer safety issues. CPSC's top priority in 2009 was implementing the Consumer Product Safety Improvement Act (CPSIA), passed by Congress in late July 2008. Consistent with CPSIA, in 2009, the agency began enforcing stricter standards for lead in children's products and began requiring manufacturers to mark children's products with information that will allow consumers to identify the products' origins.

OMB's regulatory office, OIRA, has noted that it has been quickly moving agency rules through the process. The office says that they have reviewed more rules than the past two administrations and at a faster pace. OMB Watch analyzed all notices (proposed and final rules and other regulatory documents published in the *Federal Register*) sent to and reviewed by OIRA during the first year of the Bush and Obama administrations, up to Dec. 15, 2001, and 2009, respectively. Our analysis shows that OIRA under Obama has approved rules at an average rate of 38.2 days, compared to 44.8 days under Bush. Economically significant rules, those expected to have economic costs or benefits exceeding $100 million per year, have been approved at only a slightly faster rate – 27.8 days for Obama's OIRA compared to 30.1 days under Bush.

*Enforcement*. Recent years have illustrated that strong enforcement needs to accompany protective standards. Without resources and the political will to enforce the law, rules are meaningless. It is still early in the administration to have real indicators of agency enforcement, even for those agencies that have received budget increases, but some agencies seem to have made enforcement a higher priority.

In October, EPA released a *Clean Water Act Enforcement Action Plan* that lays out a broad vision for clean water enforcement as well as specific steps the agency will take in the coming months and years to improve enforcement at the state and federal level.

In July, Jackson publicly committed to emphasizing environmental justice issues and described ways in which the agency intends to reflect environmental justice concerns in the future as EPA formulates rules and emphasizes enforcement.

The administration unveiled a broad food safety agenda July 7, the product of Obama's inter-agency Food Safety Working Group. The agenda pledges to recraft a national food safety system that focuses on preventing, rather than reacting to, foodborne illness outbreaks. To accomplish this, the plan aims to expand regulators' capacity to investigate outbreaks and trace them back to the offending product or food facility. The administration pledged to give investigators at FDA and FSIS, among other agencies, new tools to better monitor the food supply, including a new "incident command system," which "will link all relevant agencies, as well as state and local

governments, more effectively to facilitate communication and decision-making in an emergency."

**Conclusion**

President Obama and the 111th Congress took the stage at a point in U.S. history when our financial and social regulatory systems were failing and scarce federal resources were stretched to the limit. Health care and stabilizing the financial system became the overriding concerns of the administration. Nevertheless, through sound appointments and policy commitments to transparency and scientific evidence, 2009 may mark the beginning of a new era for government in protecting the public. Still, substantial hurdles remain. Without a reformed regulatory process that reduces delay and political interference, and without resources to restore agencies' capabilities, these small steps may lead nowhere.

## A Song about Nonprofit Speech Rights in 2009


Jingle Bells, Jingle Bells, Speech Rights are the thought of the day
Oh what fun it is to work
When nonprofits have a say, hey!

Dashing through the year
In a less hostile terrain
With amended lobbyist guidance
Lobbyist influence waned
The administration tried
Not to be influenced by corporate fears
But restrictions have barred some nonprofit leaders
From the administration for two years

Oh!
Jingle Bells, Jingle Bells, Speech Rights are the thought of the day
Oh what fun it is to work
When nonprofits have a say, hey!

Federally registered lobbyists
Terminated throughout 2009
But this does not necessarily mean
That outside influences have declined
Recovery Act and TARP lobbying guidance
Have provisions for restricted communications
We think all meetings should be disclosed
In a database searchable throughout the nation

Oh!
Jingle Bells, Jingle Bells, Speech Rights are the thought of the day
Oh what fun it is to work
When nonprofits have a say, hey!

New restrictions may cause
Qualified experts to be excluded
But the misguided focus on federal lobbyists
Won't cause influence to be diluted
The forged letter scandal highlights
The need for "paid grassroots lobbying" disclosure
Which would have resulted in highlighting this conduct
And giving it unwanted exposure

Oh!
Jingle Bells, Jingle Bells, Speech Rights are the thought of the day
Oh what fun it is to work
When nonprofits have a say, hey!

Due to *EMILY's List* being struck down
Nonprofits that receive PAC donations
Will no longer have those contributions
Limited by FEC regulations
*Citizens United* won't be decided
Until early in the next year
Allowing corporate political spending
Is something that we fear

Oh!
Jingle Bells, Jingle Bells, Speech Rights are the thought of the day
Oh what fun it is to work
When nonprofits have a say, hey!

The Supreme Court said states aren't required
Under Section 2 of the Voting Rights Act
To create a crossover district
When racial minorities are less than half
The Military/Overseas Voter Empowerment Act
Would usher in reform
It received bipartisan support from legislators
Decrying uncounted ballots as the norm

Oh!
Jingle Bells, Jingle Bells, Speech Rights are the thought of the day
Oh what fun it is to work
When nonprofits have a say, hey!

Appropriations are complete
Advocacy restrictions are still in place
LSC-funded groups can't advocate
Even when it's not funded by the state
The Serve America Act without Foxx
Was a major victory
The amendment sought to restrict recipients'
Lobbying and advocacy

Oh!
Jingle Bells, Jingle Bells, Speech Rights are the thought of the day
Oh what fun it is to work
When nonprofits have a say, hey!

Jingle Bells, Jingle Bells, Speech Rights 'til the end
We're continuing to follow these issues
And much more in 2010!

* * *

Nonprofit organizations play a vital role in our democracy. OMB Watch seeks to encourage and cultivate greater rights for nonprofit engagement, which in turn lead to more and richer citizen participation throughout the country.