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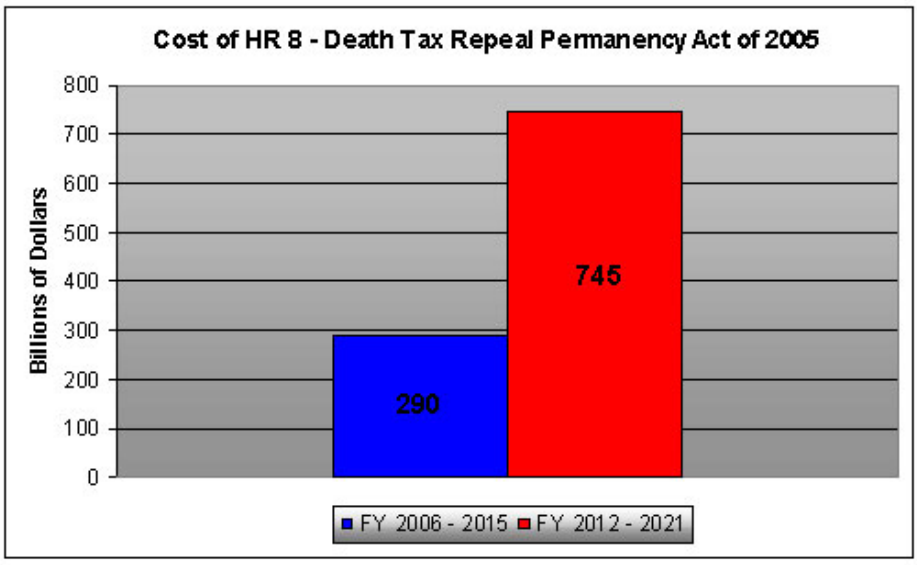
House Again Passes Irresponsible Estate Tax Repeal

For the third time in four years the House of Representatives passed a bill last week to permanently repeal the estate tax. The irresponsible and dangerous bill (H.R. 8) will cost $ 290 billion over the next 10 years but hidden within it are astronomically higher costs after the first decade.

The House passed H.R. 8, sponsored by Rep. Kenny Hulshof (R-MO), by a vote of 272-162, with 42 Democrats and all but one Republican supporting the bill. The tally showed little change from the last House vote on estate tax repeal. In 2003, a bill passed 264-163, with 41 Democrats supporting it.

The Joint Committee on Taxation has estimated H.R. 8 will cost $ 290 billion over the next 10 years. But this estimate really only measures four additional years of full repeal because the bill does not change estate tax law until after 2010. For the first 10 years of full repeal, from fiscal years 2012-2021, the cost of H.R. 8 will be $ 745 billion without including the increased debt burden.



The House also voted on an alternative proposal sponsored by Rep. Earl Pomeroy (D-ND), which failed 194-238. Instead of fully repealing the estate tax, Pomeroy's bill would have raised the exemption level to $ 3 million ($ 6 million for couples) in January 2006 and set it permanently at $ 3.5 million ($ 7 million for couples) after 2009. This means the first $ 7 million of a family's estate would not be taxed under the estate tax. Pomeroy's alternative would also hold the tax rate at its current level of 47 percent and exempt 99.7 percent of Americans from paying the tax.

At just a fourth of the cost of H.R. 8 over the next decade, the Pomeroy substitute was the fiscally responsible choice to further exempt small businesses and family farms from the estate tax and simplify the estate planning process by adding consistency to the tax code. Based on data from the Brookings Institution/Urban Institute Tax Policy Center, only 30 family farms or small business in the entire country would be subject to estate taxes under the Pomeroy alternative -- and, since these estates would be valued at over $ 7 million, they would not be such small operations.

Pomeroy's proposal had two additional benefits. His substitute would have had a consistent long-term cost rather than hiding massive costs in the second decade and beyond, and it would have fixed a known problem with capital gains issues associated with H.R. 8. Under current law, when an individual inherits property, the tax basis of the property is "stepped up" to its value at death. H.R. 8 would repeal that provision beginning in 2010 and substitute carryover basis rules that preserve the tax on increases in value before death.

The carryover basis rule is well known to be incredibly complicated and next to impossible to administer. It would require people to maintain records of assets for very long periods of times -- perhaps through multiple generations -- to determine the original price paid for the asset when wealth is inherited. A similar carryover basis provision was enacted in tax law in the 1970s, but proved to be so unworkable that it was repealed before it ever took effect.

Ironically, the House debate over estate tax repeal coincides with debate in Congress over cuts in programs assisting low-income families with children, the elderly, and people with disabilities. The House-passed budget resolution calls for an estimated $ 30 billion to $ 35 billion in cuts over the next five years in the low-income health care program Medicaid, food stamps, and other programs for low-income families. It is possible these cuts could come from programs such as the Supplemental Security Income program for poor and disabled Americans, foster care and adoption assistance programs, the Temporary Assistance for Needy Families program, and child care assistance supports. The budget resolution may also call for cuts to the Earned Income Tax Credit (EITC) for low- and moderate-income working families.

Many members of Congress have already expressed reservations about trimming back the EITC program while at the same time making permanent reductions to capital gains and dividend taxes that mostly benefit upper-income Americans. Add to that the repeal of the estate tax and a pattern emerges in House proceedings of paying for tax giveaways to the rich with cuts in programs for everyone else that may make many Republicans more than a little uncomfortable.

The estate tax debate will once again be determined in the Senate, where a House passed repeal bill died in 2003. It is still unlikely repeal supporters would have the 60 votes necessary to break a Democratic filibuster, but recent reports have indicated Senate Democrats may be moving towards a compromise.

The Hill newspaper reported on April 6 that Minority Leader Harry Reid (D-NV) has appointed Sen. Charles Schumer (D-NY) to be the lead negotiator with Senate Republicans in seeking a compromise on the estate tax. There are also indications informal conversations have taken place between other Democratic senators, such as Sen. Ron Wyden (D-OR), and Sen. John Kyl (R-AZ), a leading proponent of repeal among Republicans.

It is uncertain which direction those conversations and any more formal negotiations will go, but it is certainly possible that a bad reform proposal could emerge and gain broad bipartisan support.

No Compromise Seen in Budget Negotiations

It has been over a month since the House and Senate passed their fiscal year 2006 budget resolutions, yet GOP negotiators have not made significant strides toward reaching compromise between the two chambers. While only the Senate has named conferees to the conference committee, informal talks between House and Senate leaders have begun to point to difficulties ahead.

Last Friday, April 15, was the statutory deadline by which time Congress is supposed to pass the budget resolution. This deadline is non-binding and the budget resolution is rarely passed before the date. Yet this year it marks a change in the rapid pace maintained by both chambers in their budget work. Both the House and the Senate quickly pushed through their resolutions before recessing for the Easter holiday in mid-March. There have been few developments since then on the budget negotiations as the pace has slowed to a crawl.

The Senate appointed seven senators to the conference committee on April 4, including Budget Committee Chairman Judd Gregg (R-NH) and Ranking Minority Member Kent Conrad (D-ND). The House has yet to name any conferees and there have been no formal meetings of the committee. Some Capitol Hill sources speculate the House will wait to name conferees until a budget deal is accepted in order to avoid a variety of opportunities and platforms for Democrats to criticize the budget.

The major issue separating the two chambers is the level of mandatory spending reductions. The House has included $ 69 billion in cuts to mandatory programs while the Senate has budgeted only $ 17 billion. Both reductions would occur over five years. In addition, the Senate specifically removed in an amendment on the floor $ 20 billion in cuts to the Medicaid program -- a main target of House conservatives for spending cuts.

In continuing talks between the two budget committee chairmen last week, Gregg announced he would consider cuts to mandatory spending programs totaling $ 43 billion over the next five years. These cuts would come from many different programs including but not limited to Food Stamps, Medicaid, the Earned Income Tax Credit, and student loan subsidies. It is believed cuts to the Medicaid program would fall somewhere between $ 8 billion and $ 12 billion.

Further complicating the negotiations over mandatory spending was a letter sent to Nussle from Rep. Heather Wilson (R-NM) asking for Medicaid funding to be protected in budget negotiations with the Senate. The letter was signed by 43 other House Republicans. The support of those 44 Republicans for Medicaid funding may make it impossible to find significant savings this year as a majority of both chambers are now on record as opposing any cuts to the low-income health care program.

As Gregg and Nussle work to settle on a total amount of mandatory savings, they will need to also have a picture of what committees will be asked to cut funding. Both Nussle and Gregg worry any move toward the middle between the two chambers' mandatory savings figures will alienate enough GOP members to prevent floor adoption of a final measure. Gregg needs to keep the total amount of cuts lower to satisfy GOP moderates in the Senate while Nussle cannot accept too low a number without the risk of losing a significant number of House conservatives, many of whom felt the $ 69 billion in cuts in the House version was too small to begin with.

In addition to the quagmire over the mandatory funding debate, there are also differences in the two versions in the total amount for additional tax cuts, the total discretionary spending level in the budget, and a few somewhat less significant issues. Gregg has said he hopes to have a final budget resolution agreement before the May congressional recess. However, because the two versions of the budget resolution passed by such narrow margins, any compromise will once again be difficult to maneuver through both chambers. This will most likely lead to delays and drag out the process.

Billions Lost Annually Due to Tax Evasion

As tax day approached last Friday, there were a number of events in Washington, DC, dedicated to the issue of tax evasion and compliance. There is great concern in Congress and also among tax experts around the country about the detrimental effect the lack of tax compliance has on individual Americans and the broader U.S. economy.

The most significant meeting held last week was a Senate Finance Committee hearing on the U.S. tax gap. The tax gap is the difference between the amount of money the government is supposed to receive in taxes and the amount it actually does. Currently, the U.S. has a tax gap of approximately $ 353 billion per year. The hearing explored reasons why the tax gap exists and what steps the government and the IRS can take to work to close the gap.

Members of the committee expressed serious anxiety over the growth of the gap over the past few years. Expert testimony cited underfiling, underpaying, the vast exploitation of tax loopholes, and outright fraud among the many causes of the gap. There was also consensus at the hearing among witnesses and senators that the continuing complexity of the tax code has exacerbated the tax gap because it has become increasingly difficult for the average individual to accurately calculate their taxes.

Witnesses at the hearing included David Walker, Comptroller General of the Government Accountability Office (GAO), Mark Everson, Commissioner of the IRS, Eileen O'Connor, Assistant Attorney General of the Department of Justice, Nina Olson, the National Taxpayer Advocate for the IRS, and other tax compliance experts.

The presence of a large tax gap is detrimental to the U.S. because it represents revenues the government should be receiving from taxpayers to help pay for national priorities. As ranking Minority Chairman Max Baucus (D-MT) stated at the hearing, the tax gap can also be thought of as roughly $ 1 billion per day the government should be accruing that it is not.

Baucus went on to state concerns that the gap is contributing to economic instability and a devalued dollar. He said, "The value of a dollar in your pocket is actually less, because our nation has been piling up debts and owes more money to foreign governments." Baucus concluded if the tax gap were brought down to zero, the revenues could pay for roughly three-fourths of the current federal deficit, a large portion of our Social Security liabilities each year, or even all of the annual Medicare outlays.

Members of the committee as well as witnesses seemed to struggle with whether the more viable solution for dealing with the tax gap would be to increase services to taxpayers to help them better understand the filing process or to increase enforcement to ensure more compliance with the tax laws. IRS Commissioner Everson stressed that over the past four years the IRS has increased total individual audits (and more than doubled its high-income audits), increased the number of criminal prosecutions it recommends to the Justice Department, and increased its enforcement revenues from $ 33.8 billion in fiscal year 2001 to $ 43.1 billion in FY 2004.

Everson's testimony should not be taken at face value as many independent investigations have shown the information provided to the public by the Internal Revenue Service about the agency's criminal enforcement activities to be substantially inaccurate. According to the Transactional Records Access Clearinghouse (TRAC) run by Syracuse University, "IRS criminal enforcement data cannot be relied upon and if anything they appear to have grown worse over time." *(More information from TRAC about accuracy of IRS data)*

The money the IRS does not collect due to "tax cheats," non-compliance, loophole exploitation, or underpayments has a negative effect on the federal budget as well as the government's abilities to fund programs and services. As Comptroller General Walker mentioned in his testimony, paying taxes is a moral obligation people have as members of a society to provide funding for government services. He pointed out to members of the committee that people who do not pay taxes today are setting up their children and grandchildren for higher taxes in the future, because everybody ends up paying a small share for those who do not comply.

Besides increased efforts on tax compliance at IRS, there was a general consensus among those testifying at the hearing that the tax code is in desperate need of simplification and responsible reforms would help with compliance. While there continues to be a sense of urgency among many to simplify the code, it is unclear at this time whether the President's Advisory Panel on Tax Reform will be able to recommend substantial changes to the tax code that will survive politically.

The tax panel released a statement last week on Wednesday summarizing some of their initial work and findings. The panel has also requested the submission of specific proposals for reforming the tax code for the panel's consideration as its work moves forward.

The panel held their most recent public meeting in Washington, DC, on April 18. The meeting focused on how state tax systems interact with the federal system and how the tax system affects businesses looking to invest in technological innovations. More information on the meeting can be found here.

Homeland Security Won't Remove Hazmat Signs

The Department of Homeland Security (DHS) announced April 7 that it will drop a proposal to remove warning placards from railcars carrying hazardous materials that pose a toxic inhalation risk. The decision came after firefighters and other first responders warned that removing the signs could endanger those transportation workers and emergency personnel who respond to accidents involving hazardous materials, and communities through which the shipments travel. DHS was considering the removal of placards due to terrorism concerns.

DHS Secretary Michael Chertoff announced the decision at the National Fire and Emergency Services Dinner in Washington, DC. Chertoff explained, "I understand that there is a legitimate serious concern about whether by identifying hazardous material, we are giving people a target or a bull's-eye. And that is a real risk we have to weigh. I also understand that we have to consider the need of people who respond, people who respond not only to terrorist threats, but to derailments or accidents that happen at any point in time anywhere in the country, and the need they have to understand the hazards that they are going to face."

Last year, the Transportation Security Administration within DHS ordered an independent review of alternatives to the placard system. Among other things, it found that first responders use the placards to react to an emergency quickly and appropriately. The study also concluded that no alternate technologies are currently available that could effectively replace the system.

DHS and the Department of Transportation (DOT) published a notice and request for comments Aug. 16, 2004 in the *Federal Register* asking for feedback on several security proposals to increase security of toxic inhalation hazard (TIH) materials on railways. About 10 million tons of TIH materials are shipped by rail in the United States every year. The agencies specifically solicited comments on whether the placards should be removed, if alternative systems could replace the placards, and what the perceived impacts would be on first-responders and transportation workers.

An International Association of Fire Chiefs survey, published in early March 2005, found that 98 percent of fire chiefs who responded believed the placards were essential and should not be removed. The association opposed the DHS proposal. Almost all of the nearly 100 comments submitted in response to the *Federal Register* notice raised concerns about removing the placards.

Public Interest Group Sues IRS Over Access

Transactional Records Access Clearinghouse (TRAC), a nonpartisan research center at Syracuse University that disseminates federal government statistical information, filed a lawsuit April 14 against the Internal Revenue Service (IRS) for withholding information about enforcement actions that has been publicly available for the past 30 years. The center filed the lawsuit under the Freedom of Information Act (FOIA) after the IRS rejected a request for the statistical data, claiming releasing it could compromise homeland security.

TRAC submitted three separate FOIA requests for the IRS statistical databases in November 2004. Despite a consent decree from prior litigation requiring the agency to make statistical data available to TRAC on an ongoing basis, the IRS rejected each request. The agency claimed that the requested records did not exist, explaining that basic statistics about audits, appeals and collection activities were no longer compiled. The IRS also cited "new federal security requirements" to justify its refusal to release an IRS manual for statistical information systems.

TRAC claims in the lawsuit that the IRS does not have a valid exemption under FOIA to justify withholding the documents. The requested information is unclassified, and IRS officials do not possess the authority to designate documents for "Internal Use" only. The lawsuit also seeks a ruling that would allow the pursuit of disciplinary action against responsible agency officials for arbitrarily and capriciously withholding these documents from the public.

Scholars, public interest groups, researchers and journalists use the requested information to evaluate the agency's implementation of tax laws. Previously, the data has been used to prove that rich taxpayers involved in enforcement actions are more successful in reducing the taxes and penalties owed than poorer taxpayers.

David Burnham, co-director of TRAC, evaluated the IRS position stating, "From my research, it appears the IRS is reverting to its habits in the 1950s and 1960s, when secrecy was the norm and the problems of corruption and political abuse were later uncovered by the Congress."

Public Citizen Litigation Group, a public interest group with extensive experience litigating FOIA cases, is representing TRAC in this matter.

Senate Whistleblower Bill Leaves Committee, FBI Whistleblower Hearing Set

The Senate Committee on Homeland Security and Governmental Affairs favorably reported out a bill April 13 that would strengthen whistleblower protections. The measure, the Federal Employee Protection of Disclosures Act (S. 494), would amend the Whistleblower Protection Act to provide additional protections for federal employees.

Sen. Daniel Akaka (D-HI) introduced the bill, which is identical to legislation introduced in the 108th Congress as S. 2628. That bill, S. 2628, was the first stand-alone whistleblower protection bill to be approved by the Senate Committee on Government Affairs in 10 years. The Federal Employee Protection of Disclosures Act would clarify the original congressional intent for the WPA, and strengthens the language by:

- Adding a provision that allows for the protection of **any** disclosure that provides evidence of waste, abuse or violation of any law, rule or regulation;
- Allowing the Office of Special Counsel to file amicus briefs with federal courts;
- Requiring employee training on whistleblower rights;
- Permitting the review of whistleblower cases by any court of appeals, not just the Federal Circuit, as is currently the case;
- Protecting whistleblowers from having security clearances revoked as retaliatory actions;
- Amending the Homeland Security Act of 2002 to permit the disclosure of independently obtained critical infrastructure information if it provides evidence of waste, fraud or abuse.

Congress unanimously strengthened the WPA in 1994, but the courts have defied its statutory language and congressional intent by ruling to severely limit the cases in which whistleblowers receive protection. The protections have been whittled down so that whistleblowers will not be protected if they blow the whistle about wrongdoing to co-workers, if the whistleblowing connects with their job duties, or if another whistleblower has already exposed the issue.

Recent whistleblowers have demonstrated the importance of these individuals in exposing serious and unaddressed problems in government. FBI translator Sibel Edmonds was fired after publicly revealing that the agency was purposely delaying document translations to get more funding, and employing a person connected with individuals under FBI investigation, among other accusations. She later sued the FBI for wrongful termination, but her suit was dismissed after the government argued that the case would divulge state secrets if it proceeded. Edmonds has filed an appeal, and oral arguments for her new case will begin April 21.

S. 494 is cosponsored by Sens. Susan Collins (R-ME), Charles Grassley (R-IA), Carl Levin (D-MI), Patrick Leahy (D-VT), George Voinovich (R-OH), Joseph Lieberman (D-CT), Norm Coleman (R-MN), Richard Durbin (D-IL), Mark Dayton (D-MN) , Mark. Pryor (D-AR), Tim Johnson (D-SD), Frank Lautenberg (D-NJ) and Thomas Carper (D-DE) and Lincoln Chafee (R-RI).

Judge Upholds D.C. Hazmat Ban

On April 18, U.S. District Judge Emmet G. Sullivan upheld a new Washington, DC, law prohibiting hazardous cargo rail shipments near the U.S. Capitol. Sullivan said that the District has a right to protect itself from an accident involving hazardous chemicals, because the federal government has failed to do so.

CSX, the rail company challenging the District's new law, stated that it will immediately appeal the ban, which is scheduled to take effect April 20. The fate of the ban now rests with the federal appeals court. CSX said that it will reroute railcars containing hazardous materials to comply with the ban, despite its ongoing appeal.

Sullivan's decision comes after CSX and the federal government refused to engage in settlement talks with the city that could have avoided a costly legal battle. The refusal was unfortunate but not unexpected. Given the company's position that the law is an unconstitutional infringement of interstate commerce, it makes legal sense that the company would avoid appearing to give credence to the policy by negotiating on the matter. Unfortunately, this prevented any real progress or even constructive discussion on a genuine safety concern and forces the courts to resolve the issue.

Faster Freedom of Information Bill Introduced in House

On April 13, Reps. Brad Sherman (D-CA) and Lamar Smith (R-TX) introduced the House version of the Faster FOIA bill, H. R. 1620, which would establish a commission to report on delays in responding to Freedom of Information Act (FOIA) requests, and recommend solutions. The Senate version, S. 589, also a bipartisan bill, passed favorably out of the Judiciary Committee on March 17.

Both H.R. 1620 and S. 589 would create a 16-member Commission on Freedom of Information Act Processing Delays, which would study how to lessen delays in the FOIA process. Currently, federal agencies have 20 days to respond to a FOIA request, but backlogs contain requests that are decades old.

Smith noted the importance of the bill, stating that "American citizens should have the opportunity to quickly and easily obtain information from the federal government." The bill was referred to the Committee on Government Reform.

Smith and Sherman also introduced the OPEN Government Act in February, which contains several measures to strengthen FOIA. Sens. John Cornyn (R-TX) and Patrick Leahy (D-VT) introduced the Senate versions of both the Open Government Act (S. 394) and Faster FOIA bill.

President Bush recently raised FOIA during a speech before the American Society of Newspaper Editors (ASNE) on April 14. Bush discussed the need to balance public disclosure of information with security issues. "I know there is a tension now between making the decision of that which is -- that which can be exposed without jeopardizing the war on terror .... Right after September the 11th, I was fully aware that the farther we got away from September the 11th, the more likely it would be that people would forget the stakes. I wish I could report that all is well. It's not. It's just not. It's going to take a while."

When asked specifically about the presumption of disclosure, and the time it takes agencies to respond to requests, Bush referenced the Cornyn legislation stating, "John Cornyn is a good friend, and we look forward to analyzing and working with legislation that will make -- it would hope -- put a free press's mind at ease that you're not being denied information you shouldn't [sic] see... I think that FOIA requests ought to be dealt with as expeditiously as possible."

EPA Late Again with Toxic Release Data

The Environmental Protection Agency (EPA) has significantly missed its publicly stated goal of March for the release of the 2003 Toxic Release Inventory (TRI). The agency made several changes to its data management in an effort to streamline the process, apparently to no avail. In recent years, the agency has been releasing the annual TRI database in May or June.

The TRI data remains one of EPA's mostly widely-used databases, however the agency seems incapable of speeding up the process to release the database. Public interest groups have regularly complained that the delay make the data less timely and therefore less useful.

The Office of Management and Budget (OMB) has also chastised EPA for the regular delays with a prompt letter in March 2002 from its Office of Information and Regulatory Affairs urging the agency to find ways to speed up the annual release of TRI data. However, the following year EPA had one of the longest delays, releasing the 2001 TRI on June 30, 2003 -- one day before companies were required to submit their TRI forms for 2002.

As part of the agency's recent efforts to speed up the process of confirming and finalizing the data, EPA discussed procedural changes and timelines with interested stakeholders months ahead of time. The agency also reduced its analysis report of the data and publicly posted a Nov. 2004 database of the individual TRI forms. Unfortunately, it appears these efforts have resulted in little actual change. Even with minimal analysis done by EPA, this year is no faster and may be among the latest.

EPA is also in the process of evaluating several significant changes to TRI reporting, in an attempt to reduce the reporting burden on companies. Given the agency's continued problems managing the current TRI system, it seems that major changes would be inadvisable and likely lead to additional delays.

Disclosure Helps Chemical Security

The Wisconsin county of Waukesha has addressed chemical safety and security concerns with reporting and disclosure requirements stronger then those established by the federal government. The county has long used public disclosure of risks and hazards as a means to reduce and manage risks from toxic chemicals. A recent congressional report supports the county's approach concluding that reporting and disclosing chemical inventories and associated hazards promotes risk reduction.

In 1986, Congress passed the Emergency Planning and Community Right-to-Know Act (EPCRA), which requires disclosure of toxic pollution and chemical storage and allows for citizens to participate in local chemical emergency planning. Wisconsin quickly adopted EPCRA as a state law and passed additional stronger right-to-know policies.

For example, the federal Clean Air Act requires facilities that use large quantities of hazardous chemicals to inform the public about possible health consequences from a "worst-case" chemical accident. Waukesha County has established a program to calculate and disclose similar information for facilities that fall below the federal reporting thresholds. These policies provide Waukesha emergency management officials and the public with a better understanding of the threats to public safety that hazardous chemical-using facilities pose.

The county has made good use of the information. Emergency management officials identify 'special needs' facilities, like schools, daycare centers, and nursing homes, which require specialized evacuation plans to protect against a chemical accident. The increased collection of chemical information and the greater attention to chemical safety has compelled many facilities in Waukesha to eliminate toxic chemicals.

According to James Malueg, director of the Waukesha emergency management department, "The benefits of public reporting are that many facilities are maintaining a lower inventory of very toxic chemicals. Some have reduced the amount on-site while others have turned to substituting toxic chemicals with safer ones. This has been a direct result of the [right-to-know] legislation."

Malueg and Waukesha county policymakers are backed-up by a Feb. 14 Congressional Research Service report titled "Chemical Plant Security." The report explores the issue of making facilities that use hazardous chemicals safer from possible terrorist attacks. Within a balanced presentation of differing viewpoints on the best methods to improve security, the report concludes that public disclosure of chemical risks can make communities safer. Specifically the report states, "reporting and disclosure requirements are meant to facilitate planning, but sometimes they also promote risk reduction. For example, facility managers concerned about community relations sometimes reduce use of particularly toxic or otherwise hazardous materials .... In other cases, the public disclosure requirement may encourage them to change chemical processes and handling in order to reduce the risk of reportable spills."

Unfortunately, Waukesha County took down their online database of facilities' chemical inventories and worst case scenarios shortly following the 9/11 terrorist attacks. Citizens can still find out about chemical hazards by contacting the Waukesha County Department of Emergency or the state environment department, but online access has fallen victim to secrecy in the name of security.

Free E-Filing for IRS Form 990 Available

The National Center for Charitable Statistics (NCCS) is offering free electronic filing for nonprofits that file the annual Form 990 to the Internal Revenue Service (IRS) online. The process offers features that make filling out the form easier and helps make it more accurate.

Charitable organizations with budgets over $ 25,000 a year are required to file an annual information return (Form 990) with the IRS. The IRS uses the information to ensure groups continue to be eligible for tax-exempt status. The completed forms are made available to the public, and used for donor decisions, research and other purposes.

The IRS will begin requiring electronic filing of Form 990 for organizations with assets over $ 100 million next year. The following year electronic filing will be mandatory for groups with assets over $ 10 million and all private foundations and charitable trusts. However, smaller organizations can take advantage of NCCS's free service now. *990 Online* includes:

- A calculator that automatically totals and checks for errors
- Links to instructions and tips, eliminating the need to wade through the 49-page IRS instruction booklet
- Ability to create an Adobe Acrobat PDF file for printing or distribution
- Ability to import files from Excel.

NCCS, a national clearinghouse of research data on nonprofits sponsored by the Urban Institute, is working with state charity officials to offer electronic state registration at the same time Form 990 is filed electronically with the IRS. Pennsylvania and Colorado will be the first states to offer this service. NCCS is encouraging nonprofits to contact their state charity officials and ask them to participate.

Administration Stifles Dialog on Social Security

The Bush administration has denied use of public facilities to a group critical of its version of Social Security reform, while using federal resources to pay for propaganda and promotion of its agenda. It refused to allow a women's group to hold a conference on Social Security at the National Archives because they did not have a speaker supporting private accounts. The same week three people were ejected from a federal government supported town hall meeting on Social Security in Colorado because their car had an anti-war bumper sticker.

On March 31, the National Archives and Records Administration told a coalition of women's organizations that it could not hold a forum on Social Security at the Franklin Delano Roosevelt Library in Hyde Park, NY, because the coalition opposes Bush's proposal for private accounts and did not have a speaker supporting the administration's view. The library's director claimed the forum would violate the Hatch Act because it would not present both sides of the debate and "may be perceived as being partisan."

However, the Hatch Act only prohibits use of federal funds for partisan electioneering and does not address issue advocacy or debate on legislative proposals. The government agency responsible for enforcement of the Hatch Act, the Office of Special Counsel, told the *Washington Post* that the Hatch Act does not apply to the meeting because it "does not seem to involve a partisan campaign or activity." The National Archives moved to correct the error after the issue became public by telling the press it would re-invite the groups, but the groups were unaware of any re-invitation and had already made alternative plans.

The forum sponsors were the Older Women's League, the American Association of University Women and the League of Women Voters. They had invited two Republican members of Congress from New York, Reps. Sue Kelly and John Sweeney, to attend the forum, but both declined. Rep. Maurice Hinchey (D-NY) accepted.

The National Council of Women's Organizations objected to the National Archives' action, issuing a statement that said, "In keeping with the Bush administration's determination to quash anyone who disagrees with them, federal agencies now consider it 'partisan' to hold any opinion that is not identical to the president's." The statement noted that Bush was touting his plan for Social Security at the Bureau of Public Debt, a federal facility in West Virginia, without providing for any speakers opposed to the personal account proposal.

Although the National Archives backed off its assertion that the planned forum would violate the Hatch Act, groups wishing to use federal facilities may face pressure to alter the content of their meetings in the future. Archives spokeswoman Susan Cooper said groups would be "urged" to include dissenting voices in meetings, although not required to do so.

Ejections from Town Hall Meetings

On March 28, three people ejected from a Social Security town hall meeting in Colorado met with Secret Service officials to find out why. In an e-mail circulated by the National Coalition Against Censorship, three Denver residents described their experience, saying they had obtained tickets to the event from Rep. Bob Beauprey's (R-CO) office. When they entered, "we were told that we had been 'ID'ed' and were warned that any disruption would get us arrested. After being seated in the audience we were forcibly removed before the President [Bush] arrived, even though we had not been disruptive." The Secret Service told the three it was a private event.

In a subsequent meeting the Secret Service told them and their attorney that they were identified by a Republican staffer who saw a bumper sticker on their car that said, "No Blood for Oil." The Secret Service also said that the Republican Party was in charge of ticket distribution and staffing for the event. However, the White House communications office set up the event. The group also reported that a person wearing a Democratic T-shirt was ejected from a similar event in Arizona on the same day.

Federal Resources Used for Social Security War Room

The *Associated Press* reports that a 'war room' to sell Bush's Social Security plan has been established at the Treasury Department's public affairs office. Called the Social Security Information Center, the project has hired three full-time former Bush-Cheney and Republican National Committee campaign workers to use television ads, grassroots organizing, and other means to push the president's plan. The project is also coordinating travel for town hall meetings for Bush, Vice President Cheney, Treasury Secretary Snowe, and other cabinet members. The project also has a program for rapid response to negative editorials and news coverage.

While it is not uncommon for a president to use the resources of the office to promote a policy agenda, the use of government funds for this project has been questioned. Joan Claybrook, president of Public Citizen, said, "They have the right to say their piece and to respond, but to create a whole team of PR experts to try and influence the media, I think, is an excessive use of taxpayer money."

IRS Checking Form 990 Against Watch Lists

The Internal Revenue Service (IRS) is screening applications for tax-exempt status for terrorist names, IRS Commissioner Mark W. Everson testified at an April 5 Senate Finance Committee hearing on nonprofit accountability and tax compliance. The IRS's counter-terrorism project, focusing on the abuse of charities, is developing an electronic capability to review filed Forms 990 and 990-PF for terrorist names.

The explosive growth of the U.S. economy's nonprofit sector over the last decade has fueled tax fraud, terrorist financing schemes and illegal political activities, Everson said at the congressional hearing.

The IRS has already instituted procedures and is currently developing the electronic capability to review filed Forms 990 and 990-PF for terrorist names. Name matches are "coordinated with the appropriate office for verification and further action." In his testimony, Everson did not elaborate on which terrorism watch lists the IRS checks names against or where the name matches are sent. He also did not extrapolate on the consequences for an organization that had a name match.

The Senate Finance Committee did not question Everson about the controversy surrounding watch lists. The lists are notoriously fraught with inaccuracies and ambiguities, so there is no way to verify whether a name on the list is actually the individual encountered. For example, one of the lists is 143 pages of individuals -- about 20,000 names and aliases -- and organizations. Some of the names are partial, such as "Ahmed the Tall."

The IRS is also planning a redesign of the Form 990. In November 2004, the IRS revised Form 1023, the application form to qualify as a tax-exempt organization, to ask for specific information on foreign activities, and the revision of Form 990 will most likely be similar.

The IRS is seeking more information about the practices of organizations that make grants to foreign entities, and the level of oversight the organizations exercise over the use of funds abroad. IRS agents are currently examining more than 100 charities that make grants overseas to determine whether they are supporting terrorism. According to Everson, investigations so far have contributed to the sentencing of 44 individuals in terrorism related cases, 32 of them for money laundering.

Since 2001, federal authorities have raided and shut down 25 charities, freezing the assets of the organization and arresting or deporting its staff. Yet, not one staff member has been convicted on a terrorism-related charge.

Senate Finance Committee Discusses Nonprofit Accountability

On April 5, the Senate Finance Committee continued its examination of accountability, governance and oversight of the nonprofit sector in a hearing titled "Charities and Charitable Giving: Proposals for Reform." The hearing focused mostly on the valuation of non-cash contributions, excessive compensation, transparency and the sharing of information.

Witnesses included Mark W. Everson, commissioner, Internal Revenue Service; George Yin, chief of staff, Joint Committee on Taxation (JCT); Leon Panetta, director, Panetta Institute for Public Policy; Mike Hatch, attorney general of Minnesota; Dr. Jane Gravelle, Congressional Research Service; Richard Johnson, attorney; David Kuo, White House Office of Faith-Based and Community Initiatives; Brian Gallagher, president, United Way; and Diana Aviv, Independent Sector.

In addition to Chairman Charles Grassley (R-IA), senators in attendance for portions of the hearing included Sens. John Rockefeller (D-WV), Orrin Hatch (R-UT), James Jeffords (I-VT), Olympia Snowe (R-ME), Rick Santorum (R-PA), Blanche Lincoln (D-AR), Jim Bunning (R-KY), Ron Wyden (D-OR) and Charles Schumer (D-NY).

The hearing centered mainly on the tax-exempt proposals included in the JCT report, "Options to Improve Tax Compliance and Reform Tax Expenditures"and the Senate Finance Committee staff discussion draft. The Independent Sector Panel on the Nonprofit Sector's interim reportwas also discussed in the last panel. Common themes included:

- The lack of effective enforcement vehicles available to the IRS to police tax-exempt organizations
- Perceived lax oversight exercised by governing boards of nonprofit organizations
- Concerns with respect to excessive compensation paid to executives of tax-exempt organizations
- Deficiencies in Form 990 reporting by tax-exempt organizations
- Perceived excess in travel, entertainment and other related expenses of tax-exempt organizations.

The nonprofit health care industry received specific criticism at the hearings.

In opening remarks, Grassley expressed his intention to "move legislative reforms" in this area promptly to strengthen charitable governance and improve the tax gap. Rockefeller noted that the vast majority of foundations and charities do good work and encouraged the committee to find a way to fix the misuses without discouraging the formation and good work of charities. Santorum noted his serious concerns that a number of proposals in the JCT report and the staff discussion draft would impose too onerous a burden on small nonprofits. He encouraged the committee to push for enforcement of current laws before enacting new legislation.

IRS Commissioner Mark Everson testified that tax compliance and enforcement by nonprofit organizations is one of his top four priorities at the IRS and encouraged the committee to continue its review of the sector. Everson called the abuses "increasingly present" and said that if Congress does not act to end the abuses soon, public support for charities will "wither." Everson attributed much of the growth of problems to "weak governance practices" and "a culture that has become more casual about compliance and less resistant to noncompliance."

Everson, who said the IRS lacks adequate resources to effectively enforce current regulations, noted that while the nonprofit sector has evolved and grown over the years, tax law and regulation have changed much less. "Since 1969 there has been only limited review of the rules relating to tax-exempt status," he said, referring to the 1969 tax law changes affecting philanthropy. Among the most serious problems Everson highlighted is the growth of donor-advised funds and supporting organizations that allow taxpayers to make a deductible donation but delay shifting the money or other assets to the final charitable beneficiary.

The testimony of George Yin focused on the JCT's proposal to limit the deduction for charitable gifts of property to basis value. Yin argued that the cost to the taxpayer of getting an appraisal or determining fair market value for a piece of property, coupled with the cost to the IRS of ensuring that the value is justified, outweighs the charitable benefit of gifts of property. He advocated that the proposed limitation would encourage charitable gifts of cash and publicly-traded securities, which have a tangible value. Under questioning, he stated that he does not believe that a change in valuation would result in a decrease in the overall level of charitable giving. Yin also briefly touched on the JCT proposals to require a five-year review of tax-exempt status and the creation of a termination tax, but was not questioned by the committee on those issues.

Many senators voiced concerns that any changes regarding gifts of property could discourage legitimate charitable giving.

"I do not accept the concerns about non-cash donations," Jeffords said. He said farmers, for example, should be permitted to donate land and take a full tax deduction for the value of the land. "The government has no problem taxing that land at its fair market value. It can't have it both ways."

Schumer echoed Santorum's earlier concerns, noting that the $ 300 billion in tax revenue that goes uncollected each year due to tax avoidance and evasion could be collected with better enforcement of existing laws, not new legislation. He also noted that it will be unduly burdensome for many tax-exempt organizations under new, one-size-fits all-legislation, which will harm many smaller organizations that support or directly provide important social services.

In response to these concerns, many charities are arguing for increased self-regulation. Leon Panetta, a member of the Panel on the Nonprofit Sectors' Citizen Advisory Committee, encouraged the committee to find the right balance between the need for new laws versus increased self-regulation and pushed for the creation of a National Council on Nonprofit Accreditation. Brian Gallagher of United Way echoed these concerns, discussing United Way's internal efforts to ensure good governance. He also suggested that tax-exempt organizations be asked to report annually concrete results that are tied directly to their missions.

Minnesota Attorney General Hatch testified that self-regulation alone will not curb the abuses and lent his support to both the JCT and Senate Finance Committee staff draft proposals. He also encouraged the committee to eliminate the rebuttable presumption and instead shift the burden to prove reasonable compensation from the IRS to the charity.

Independent Sector's Diana Aviv discussed the Panel's interim report and recommendations. The 72 page report provides suggested actions for the IRS, legislators and tax-exempt organizations. If enacted, the proposals would affect all charities, regardless of size. Among the suggested changes: charities with at least $ 2 million in total revenue and filing a Form 990 would be required to conduct a yearly financial audit; organizations with $ 500,000 to $ 2 million in total revenue would be required to have an independent public accountant review financial statements and suspension of tax-exempt status for charities with less than $ 25,000 if they fail to file an annual notice with the IRS for three consecutive years. Aviv implored the committee to allow the panel to complete its work before introducing legislation. She noted that panel was preparing a second phase to provide greater detail on recommendations and to seek input from nonprofits throughout the country.

The Panel's recommendations were not questioned extensively by the committee even though the proposals have been questioned by some nonprofit leaders. A commentary in the *Chronicle of Philanthropy* by Pablo Eisenberg argued the recommendations were too weak and did not address the core accountability issues facing the sector, such as financial self-dealing activities. There has also been criticism leveled by the National Committee for Responsive Philanthropy, the Philanthropy Roundtable, and some conservatives that the panel's recommendations and process miss the mark. Some complained that the panel's proposals come at a time when many nonprofits are facing reduced funding and more costs for compliance and regulation. Additionally, the internal process of the panel has been shrouded in mystery. Organizations not directly involved with the panel's deliberations scrambled to get comments to the panel on its preliminary recommendations only to learn that the panel was already meeting to discuss the next phase.

Charities not involved in the Panel's discussions have also pushed for increased self-regulation. The National Council on Responsive Philanthropy has put forth a number of proposals that have not been considered by the Finance Committee or the Nonprofit Panel:

- Sharply limiting or eliminating compensation for foundation trustees
- Eliminating any and all self-dealing and conflict of interest by foundations
- Raising private foundations' payout from 5 to 6 percent
- Increasing disclosure of corporate philanthropic grant making
- Disclosing grant making by public charities and donor-advised funds
- Reducing the private foundation excise tax -- but devoting the bulk of the remaining excise tax to public oversight and enforcement activities by IRS and state attorneys general.

The panel's seeming unwillingness to discuss any recommendations not specifically mentioned in the Finance Committee staff draft proposals has some nonprofits concerned. Rick Cohen of NCRP noted, "[F]oundations get off pretty much scot-free in the first phase, which seems completely inappropriate given the press coverage around foundation scandals of self-dealing, inappropriate expenses, foundation trustee fees, and insufficient levels of grant making." Additionally, Independent Sector has raised $ 3 million "taking on issues that have minimal bearing on the scandals that have undermined and continue to undermine the trust of Americans in the nonprofit sector." In a statement critiquing the Nonprofit Panel's performance and proposals, NCRP has issued an additional set of recommendations to the Senate Finance Committee to strengthen self-regulation.

Overall, the witnesses' statements and the tone set by the committee suggest that proposed legislation will go farther than the panel's proposals. It also appears that the Senate Finance Committee's proposal may extend far beyond the proposals set forth in its discussion draft issued last summer and resemble the comprehensive proposals suggested by the JCT in January.

In related news, the House Ways and Means Committee announced it will hold a hearing on the sector April 20. A full list of witnesses has yet to be released, but George Yin of the Joint Committee on Taxation, David Walker of the Government Accountability Office and Douglas Holtz-Eakin of the Congressional Budget Office will testify during the hearing. According to Ways and Means Committee Chairman Bill Thomas (R-CA), the hearing will, "examine the legal history of the tax-exempt sector; its size, scope and impact on the economy; the need for congressional oversight; IRS oversight of the sector; and what the IRS is doing to improve compliance with the law."

527 Reform Bill Sponsors Circulate Amended Version

A draft substitute amendment to S. 271, the 527 Reform Act of 2005, is being circulated by sponsors Sens. John McCain (R-AZ) and Russell Feingold (D-WI). It removes some problems with the original bill, but still would subject independent political organizations to the same regulations as parties and federal candidates.

The substitute bill removes the possibility of the Federal Election Commission (FEC) determining that a group is "described in Section 527" by removing that phrase and limiting regulation to groups registered with the Internal Revenue Service (IRS) as political organizations under Section 527. It also extends an exemption for state and local 527 groups if they do not refer to federal candidates in their activities and public communications, only operate in one state, and do not refer to political parties unless it is to identify a non-federal candidate.

While these and other changes limit the damage S. 271 would cause, the fundamental problems remain. It would drive partisan activity to 501(c) groups in order to avoid FEC regulation, losing the public disclosure required of all 527s. It would also limit the ability of state and local groups to refer to anyone who is a federal candidate, even if she or he is a state or local official and the reference is in relation to state or local issues.

The bill would also tilt the political playing field in favor of business corporations because they can spend for political purposes without tax consequences, while 501(c) organization expenditures on political activities are taxed at the highest corporate rate.

Corporate-Conservative Alliance Plots Attack on Safeguards

From many small and supposedly disconnected proposals, a larger pattern is emerging: corporate special interests and conservative lawmakers are conspiring to mount a comprehensive assault on regulatory protections, on a scale equivalent to the broad-based attacks of the Contract With America.

The corporate-conservative alliance behind the major attacks of the mid-1990s decided almost immediately thereafter that any comprehensive "regulatory reform" is doomed from the start and that the wiser course of action would be to pursue the same objectives through smaller piecemeal proposals. Many of the same players are active today, and they appear to have learned that lesson well.

The November elections reinforced GOP political hegemony, and an emboldened corporate-conservative coalition is seizing the opportunity to pick up where the Contract With America left off. The combination of proposals recently announced and initiatives already underway reveals a plan to dismantle public safeguards in a corporate takeover agenda every bit as ambitious as the discredited efforts of the Contract With America.

Detailing the Corporate Takeover Agenda

The new attack on public safeguards adapts some of the ideas from the Contract With America and also offers some newly-minted ideas just as devastating as any from the 1990s. The single intention of all these efforts is to realign power dynamics in order to increase corporate profits by reducing the level of protection government is supposed to provide for the people. The details of the new corporate takeover agenda fall into the following clusters.

Distorting the Process for Creating Protections

The corporate-conservative coalition has had plenty of success in weakening or eliminating specific protections one by one, but the possibility that the public will realize the stakes -- as happened with a few high-profile missteps, such as the threatened weakening of the Clinton administration's standards for arsenic in drinking water -- makes that approach risky. The corporate-conservative alliance has thus always worked with a second approach less fraught with these risks and more capable of wide-ranging consequences: weakening the underlying process for creating all regulatory protections. Here are some of the proposals to distort the regulatory process:

> **Net Benefits:** The vision of net benefits is that agencies will be required to prove, through rigged cost-benefit analytical formulae, that any proposed regulation results in quantified, monetized benefits that exceed quantified, monetized costs. Industry may be seeking a bill to codify E.O. 12,866, the cost-benefit

analysis executive order. Additionally, as a possible further step in the direction of a net benefits policy, the White House's Office of Information and Regulatory Affairs (OIRA) has used its 2005 annual draft regulatory accounting report to invite comments on the utility of net benefits measures.

Centralized White House Review: The White House obviously has not ceased serving as one-stop shopping for corporate special interests seeking to roll back existing and pending regulatory safeguards. OIRA has extraordinary powers under the Paperwork Reduction Act (reauthorization of which is a priority item in the 109th Congress) to modify information collections, even those necessary for proposed regulations. The latest major OIRA initiative is the hit list of regulations to be weakened or eliminated, presumably in order to benefit the manufacturing sector, which puts at risk protections ranging from safe drinking water to Listeria to family and medical leave rights.

Regulatory Budgets: The vision of regulatory budgeting is that agencies are given fictional "budgets" of total costs that can be imposed on industry through regulations. When an agency reaches its fictional budgetary cap, it must cease regulating. The first step in this direction is H.R. 725, which would authorize a pilot study of regulatory budgeting.

Regulatory Sunsets: Corporate special interests are clamoring for regulatory sunsets, or automatic expiration dates for regulatory protections, on the argument that older regulations are somehow necessarily outdated. This argument easily falls apart: consider important protections such as the ban on lead in gasoline, which was a good idea 30 years ago and is still a good idea today. The first step in the direction of regulatory sunsets is H.R. 682, which would use periodic reviews under the Regulatory Flexibility Act as an occasion for agencies to consider whether a regulation is still needed.

Regulation by Litigation: Using the pejorative label of "regulation by litigation," some industry-funded think tanks have been raising objections to the consent decrees that resolve deadline cases and other litigation against the agencies to compel them to do their jobs. Reportedly, Rep. Candice Miller (R-MI), who chairs the regulatory affairs subcommittee of the House Government Reform Committee, is interested in legislation to force OIRA review or the equivalent of notice-and-comment rulemaking as a condition precedent of any consent decrees.

If current cost-benefit analysis policies had been in place 30 years ago, we would not have banned lead in gasoline! Read more.

Hiding Information the Public Needs

Whether the goal is holding corporate special interests accountable for the harms they cause or holding the government itself accountable to the public from which it derives its authority, information is critically important. The corporate-conservative conspiracy therefore is planning to constrict the free flow of information in order to continue implementing its agenda in the shadows.

Industry Information Disclosures: Many regulatory protections depend on the public's ability to force corporate special interests to disclose vital pieces of information that become the basis of sensible safeguards. A proposed amendment to the Senate's bankruptcy bill would have reduced corporate disclosure by resurrecting a small business paperwork measure that would give a get-out-of-jail-free card to small businesses for first-time violations of information collection requirements. Fortunately, that amendment was defeated, but it could return. There may be other efforts to reduce industry's information disclosure requirements.

The Paperwork Reduction Act: Reauthorization of the PRA is likely to start in earnest this year. Not only could it be the vehicle for other anti-regulatory riders, but it is also a powerful tool that enables OIRA to change information collection requirements ranging from surveys to reporting and labeling requirements.

Open Government: The corporate takeover of government policy thrives in the secrecy that this administration is willing to create. The administration's penchant for secrecy and distinct unwillingness to err on the side of disclosure when faced with Freedom of Information Act requests will continue to present a formidable challenge to protections of the public interest.

Supplanting Science With Politics

This administration has an atrocious record of sullying science with political considerations. The corporate takeover agenda has as one of its aims the continuation of this trend, in order to cast doubt on the scientific conclusions that underscore the need for public protections. OIRA has indicated that implementation of peer review will be a major priority this year, and one of the suggestions bandied about in OIRA's pre-109th Congress meetings with industry has been legislation to add judicial reviewability to the Data Quality Act. The Integrity of Science coalition, a network of scientists and advocates, is continuing to monitor these developments and organize broad-based opposition to further attempts at politicizing science.

Neutering Federal-State Partnerships

Another common theme addresses the relationship between federal and state governments in regulatory policy. State and local governments are important partners in implementing federal standards, in issue areas ranging from special education to the environment. Additionally, state and local governments are actors just like corporations whose behaviors need to be modified -- they are employers, polluters, managers of waste dumps, and so on. Finally, they are also important as regulators themselves; especially in a time of GOP hegemony in federal government, we rely on state/local governments to create protections more stringent than the federal floor. Distorting this complex relationship can, therefore, wreak

havoc in regulatory policy.

Unfunded Mandates Reform Act: State and local government groups are clamoring for increasing the enforcement and coverage of UMRA, and they are being aided by GOPers anxious to reestablish the party's states' rights credentials--especially in a time of budget cuts and preemption policies that have been harmful to the states. This effort could pull back on any number of public protections insofar as state and local governments would incur costs above $ 62 million. Among the protections at risk would be the minimum wage, because any increase would affect states as employers, and environmental protections, many of which depend on state agencies for enforcement. Expanded coverage could also put at risk mandates that establish standards for special education, disability access, foster care and more.

Preemption: The issue of the federal government's power to preempt state policies leads to anti-regulatory initiatives that occupy one extreme position or the other. On the one hand, the federal government is aggressively preempting the states' efforts to develop regulatory protections of the public interest in the face of weak or nonexistent federal protections. On the other, Sen. Lamar Alexander (R-TN) has expressed interest in offering a bill to prevent any federal preemption of state regulations unless the law specifies the exact conflict between state and federal law. (This kind of bill has been offered before.)

Consent Decree Rollbacks: Alexander is also promoting a bizarre plan to replicate the Prison Litigation Reform Act for all consent decrees that resolve federal court cases against state or local governments. (The sole exception would be for school desegregation decrees.) His bill would establish automatic sunsets for consent decrees: every four years or with every change in administration.

Establishing an Imperial Presidency

What we have called the Imperial Presidency is a drive to consolidate as much power as possible, with as little accountability as possible, in the executive branch and ultimately the White House itself.

Threats to Whistleblowers & Agency Experts: The administration has already won management "flexibility" and the erasure of civil service protections for workers in the Department of Homeland Security, and it is seeking the same flexibility for the rest of the government workforce. One proposal would link worker salary increases to an agency's score in White House program performance reviews. The workers who would be imperiled without civil service protections include the agency scientists and experts who must conduct research and reach conclusions that threaten industry's bottom line. As menacing as the administration has already been to such familiar figures as David Graham, Jack Spadaro and Sibel Edmonds, the elimination of civil service protections could make things even worse.

Reorganization Authority: The White House is also seeking -- with strong support from Rep. Tom Davis (R-VA), chair of the House Government Reform Committee -- the power to reorganize the very structure of government. The danger is obvious: any resulting restructuring would decrease the role and power of many agencies charged with serving the public interest. Restructuring guided carefully by Congress can serve the public interest (for example, some groups are calling for a single food safety agency), but wholesale, unchecked authority is a recipe for disaster.

DHS Above the Law: The REAL ID Act has a provision that would give the Department of Homeland Security the power to waive all law in the course of securing the borders. The measure, which passed the House and is now moving as a rider to the Iraq supplemental, also has a clause stripping the courts of authority to hear cases arising from any waiver decisions.

Sunset & Results Commissions: A Sunset Commission bill would force government programs -- not individual regulations, but programs in their entirety -- to plead for their lives every 10 years or else expire. A Results Commission bill would allow a presidential commission to recommend restructuring of programs and departments, based in part on performance data, and to have its proposals fast-tracked through Congress. Both would expose the structure of government and the very existence of a government agency to the destructive whims of the corporate-conservative coalition.

Wrapping Attacks in a Rhetoric of Results

Performance is developing into a technical threat equivalent to cost-benefit analysis. Just as CBA is justified on the grounds that regulatory costs should not exceed benefits, the drive to performance assessment is justified with a good government rationale (in this case, that government programs should produce results or else be held accountable). Also like CBA, the devil is in the details: both CBA formulae and performance assessments are typically rigged to side against stringent protection of the public interest. The link between CBA and performance also crosses from the metaphorical to the actual: the White House is using its performance measurement system, the Program Assessment Rating Tool (PART), to penalize agencies for failing to use cost-effectiveness in regulatory choices or conduct cost-benefit analyses (even when forbidden by law).

PAR Act: The Program Assessment and Results Act would codify the PART, which is currently not authorized by any law. The PAR Act offers a pretense of congressional oversight over PART even as it gives the White House a green light for continuing with PART and any other assessments it sees fit to conduct.

Beyond PART: PART is expressly intended to link management and budget decisions with notionally neutral information about "performance" or "results." Performance rhetoric is already starting to creep beyond PART: proposals for civil service reform, reorganization and results commissions, and more would adopt the language of performance (or even PART scores themselves) in projects that could have

widespread consequences for the public interest.

Take Action

OMB Watch and Citizens for Sensible Safeguards, a coalition of leading public interest organizations created to defeat the Contract With America, will continue to monitor developments and oppose the corporate-conservative agenda. You can do your part as well, by signing up for action alerts and updates and adding your voice to the calls for protections of the public interest instead of a corporate takeover of our government.

Sign Up for Action Alerts

Email address:

Your name:

Preferred mail format: auto-detect text HTML

subscribe

Be sure to check our Take Action page periodically, at www.ombwatch.org/regs/action.

Local Governments Demand UMRA Changes to Avoid Accountability

State and local governments addressed a Senate subcommittee and called for an expansion of provisions in the Unfunded Mandates Reform Act (UMRA) that would further relieve them from their obligations to provide important public protections.

The Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia held a hearing April 14 on the Unfunded Mandates Reform Act. After accounts from the Government Accountability Office, the Office of Information and Regulatory Affairs and the Congressional Budget Office on the first 10 years of UMRA, a second panel featured testimony from representatives of state and local governments demanding relief from their obligations under government mandates. Representatives from the National Association of Counties (NACo), the National Conference of State Legislatures, and the National League of Cities all decried their obligation to comply with federal requirements in federally funded programs.

In testimony before the subcommittee, NACo Vice President Colleen Landkamer presented a NaCo study that looked at obligations of counties associated with 10 common mandates from which NaCo is presumably seeking relief. The study criticized the following public protections:

- Clean Air Act, which requires compliance with federal air pollution standards.
- Clean Water Act, which requires compliance with regulations regarding wastewater treatment and discharge.
- Resource Conservation and Recovery Act, which regulates solid and hazardous waste.
- Americans with Disabilities Act, which protects the rights of disabled citizens.
- Help America Vote Act, which establishes minimum standards for voting equipment used in federal elections.
- Endangered Species Act, which protects jeopardized species against harm, including destruction of their habitats.

Rather than calling for increased funding of these important public safeguards, state and local governments asked for relief from compliance. Landkamer outlined the approximate costs of some of the federal obligations. For instance, according to the study, the compliances costs borne by a family of four for the Americans with Disabilities Act is $ 8.38 while the cost for the Clean Water Act and the Safe Drinking Water Act is $ 26.11.

NACo's figures, however, failed to take into consideration the cost to the states in the absence of the mandates. CBO Deputy Director Elizabeth Robinson testified that any study of costs to states must take into consideration the counterfactual -- what the states would have done in the absence of the federal requirement. In most cases, such as public education requirements, the states would have more than likely chosen to spend money even in the absence of a federal mandate. Taking those expenditures into consideration, the cost of the federal mandate is actually much lower than the figures presented by NACo.

Landkamer also decried the one-size-fits-all approach of federal mandates. Federal mandates are applied equally across the board to all state and local governments in order to ensure that all citizens are guaranteed the same basic level of public health, safety and environmental protections. Landkamer's arguments ignore that to apply obligations on the state on a case-by-case basis is to deny citizens the same degree of protection.

State and local governments also called on the committee to consider changes that would strengthen UMRA by closing loopholes and exemptions. Currently, for instance, UMRA does not apply to costs associated with enforcing constitutional rights or providing for national security. UMRA also excludes grant conditions. State and local groups called for expanding UMRA to cover these exemptions. If UMRA is expanded in this way, state and local governments may no longer have to comply with such important public protections as the Help America Vote Act or the Americans with Disabilities Act, which safeguard many important rights.

Though representatives of state and local governments were united in calling for an expansion of UMRA's provisions, the

suggestions for reform varied considerably. Committee Chairman George Voinovich (R-OH) asked for the groups present to coordinate their efforts and bring to the committee a singular legislative package of recommendations. Voinovich told the panel that with a coordinated effort from state and local governments, they would be able to "move mountains."

The Senate hearing is part of a coordinated effort to expand the provisions of UMRA. Provisions already in the Senate budget resolution would increase the number of votes needed to overturn an UMRA point of order. The House of Representatives has also held a hearing that sought suggestions on how to expand UMRA's provisions, and that hearing featured many of the same organizations represented in the Senate hearing.

House Considers Anti-Regulatory Hit List

The White House's anti-regulatory hit list took center stage in a House committee hearing, during which GOP members and White House regulatory czar John Graham praised the hit list as a gift to the manufacturing sector while Democratic members criticized the entire project as yet another example of a corporate special interest takeover of government.

The hearing, held April 12 by the House Government Reform Committee's Subcommittee on Regulatory Affairs, featured Graham, Department of Commerce Assistant Secretary for Manufacturing and Services Albert Frink, and several representatives from the manufacturing sector all celebrating the hit list project. Only one witness -- Sidney Shapiro, law professor at Wake Forest University and board member of the Center for Progressive Regulation -- was allowed to offer an opposing view.

The hearing began with a statement from subcommittee chairperson Rep. Candice Miller (R-MI). According to the *Washington Post*, Miller has been meeting regularly with representatives from the manufacturing sector and other corporate special interests to develop anti-regulatory plans. Miller's opening remarks parroted the usual corporate special interest arguments that onerous regulation harms the competitiveness of U.S. manufacturing and directly contributes to job loss in that sector.

What is the Hit List?

The White House's Office of Information and Regulatory Affairs invited corporate special interests in March 2004 to send in their wish list of regulatory protections to be weakened or eliminated, and the administration followed up a year later with a list selecting 76 items from the industry wish list that the administration was endorsing as its "regulatory reform" priorities. OIRA did not, however, seek comments on protections to address unmet needs. (Read more about the hit list.)

OMB's Regulatory Hit List

The hearing focused on the latest development in the White House's anti-regulatory hit list: the release last month of a report in which the White House selected 76 of the public's 189 suggestions for regulatory protections to be weakened or eliminated and endorsed them as the administration's regulatory "reform" priorities. The hit list items with the White House's seal of approval include such important protections as rules governing how long truck drivers can work without breaks and an interim rule protecting the food supply from the deadly food-borne pathogen Listeria. Graham promised that the 76 priority rollbacks "will be done," but he acknowledged that it would be a long road.

The hit list focuses primarily on regulatory protections developed by the Environmental Protection Agency and the Department of Labor. Frink urged that the hit list should go even further, citing the Sarbanes-Oxley Act as the most onerous requirement for the manufacturing sector. The act seeks to avoid Enron and WorldCom-type scandals by establishing audit reporting standards and other rules to hold public companies accountable. Despite what Frink characterized as a "plea for assistance" from the manufacturing sector to reduce the burdens of rules associated with Sarbanes-Oxley, rules implementing that act do not appear on the final hit list.

The Myth of Reduced Competitiveness

The primary basis of the argument for regulatory rollbacks is a Small Business Administration study purportedly demonstrating that regulation is overly burdensome for the manufacturing sector, but Professor Shapiro debunked those arguments in his testimony. Scholarly research does not support the claim that regulation harms competitiveness. According to leading research, regulation does not affect plant location decisions or trade flow. In fact, in some cases regulation has actually increased competitiveness. The cost of compliance with regulation is less that half of one percent of the value of manufactured goods and can hardly be seen as the cause of manufacturing moving overseas, especially given labor and trade issues which have a much more marked impact on competitiveness.

Other "Reforms" for Manufacturers

The White House is targeting the manufacturing companies for even more favors beyond the anti-regulatory hit list. In January 2004, the Department of Commerce released a report entitled *Manufacturing in America*, which outlined recommendations to increase the competitiveness of the manufacturing sector. Already the Department of Commerce has implemented 18 recommendations from the plan and intends to work towards the rest. Reducing

Shapiro also discredited much of the underlying data on the cost of regulation to business. Much of the existing data comes from the manufacturing sector itself, which has clear incentives to overstate the costs of regulation. Further, their arguments fail to consider the benefits of these regulations. The cost may be high, but the benefits of these regulations are even greater. Even Graham concedes that the benefits of regulation far outweigh the cost.

Shapiro also rejected the argument that the manufacturing sector deserves to be enabled to dodge its responsibilities because it bears larger regulatory burdens than other sectors. As Shapiro pointed out, manufacturing is also one of the most dangerous industries, along with logging and construction. Given that the manufacturing sector is responsible for some of the greatest risks to the public, it is only natural that the sector would have one of the largest regulatory burdens.

the burden of regulation and legislation is seen as a major priority under the recommendations. Among the recommendations already implemented was the creation of the position of an assistant secretary for manufacturing and services, a position now filled by Albert Frink, who spoke at the hearing. Other recommendations already implemented included the creation of a manufacturing council and an office of industry analysis, which will work with OIRA "to develop analytical tools and expertise to assess manufacturing competitiveness."

Reduce Cost, Not Protections

Rep. Stephen Lynch (D-MA), the ranking minority member on the subcommittee, made the case for strong public health and safety protections. Lynch relied on his own experience as a steelworker to assert the need for strong public health and safety protections. Visiting the wakes and funerals of friends who died on the job helped Lynch to realize the importance of government intervention in workplace health and safety. Though in some cases the cost of regulation can and should be reduced, it should not be done so at the expense of needed protections, Lynch asserted. Many items on the hit list seek not only to reduce cost burden but also to limit a needed public protection. For instance, one reform priority seeks to reduce reporting requirements to the Toxic Release Inventory. This supposed reform will limit the public's access to information about the release of harmful toxins by chemical plants and will ultimately impede EPA's enforcement of the Clean Air Act.

Lynch also questioned several inconsistencies on the hit list, such as the appearance of the Listeria rule as an accomplishment in 2004 and then as an item for reform in the 2005 hit list. Graham claimed that the rule has turned out to be overly costly and that the reform is intended not to repeal the rule but rather to "refine and retune" it. Comments printed in the final hit list report suggest otherwise: the comments appended to the listing of the rule claim that not only were the costs of compliance too great, but that the benefits were also overstated.

True regulatory reform should not just seek to remedy excessive regulation but must also seek to identify unmet needs and gaps in public protections. Rather, the current ad hoc hit list method seeks to remove regulation without simultaneously looking at gaps in regulation. Shapiro suggested that regulatory reform should take place in the context of agencies' regulatory plans. Shapiro suggested that the development of the semiannual agendas could be an occasion to identify regulations in need of updating as well as unmet needs crying out for new regulatory protections.

Call for an Open and Transparent Process

Lynch also called for the process of regulatory reform to be an open and transparent process in which all sides are given a voice. Lori Luchak, speaking on behalf of the American Composites Manufacturers Association, echoed this sentiment. She argued that stakeholders, who may have a better idea of the most effective way to implement a regulation, should have a seat at the table during the creation of a regulation.

Not all stakeholders have had the kind of opportunity that Luchak enjoyed. The public interest community had little to no say in the rollback nominations; 97 percent of rollback on OMB's hit list were suggested by industry representatives. Public industry groups were left out of much of the OMB regulatory reform process due, in part, to the comments OMB solicited. Whereas in previous years OMB asked for comments on any proposals for regulatory reform, in 2004 OMB solicited nomination for regulatory reform measures that would reduce the burden on the manufacturing sector. This phrasing implied an interest only in rollbacks of existing protections, to the exclusion of calls for new safeguards to address unmet needs.

Lynch insisted that complete and accurate information is essential for Congress to make well-informed regulatory decisions. Regulatory reform measures should reflect the interests of all stakeholders and not just those of big business. A balanced regulatory reform plan should address not only excessive costs but also the need for increased public protections.

Lynch and Rep. Henry Waxman (D-CA) sent a letter to John Graham in March requesting information on the hit list process, in particular Graham's external communications on regulatory reform, including discussion participants and topics of discussion. Graham had yet to respond to their inquiry.

Increased Congressional Oversight

Both the committee members and the manufacturing sector seemed to view Congress's main role in the hit list and other regulatory "reforms" as one of oversight. When Miller pointedly asked Graham what the committee could do to help, Graham suggested that committee staff should be monitoring the progress of the agencies on completing the regulatory reform priorities and holding agencies responsible for missed deadlines.

Corporate special interests, meanwhile, may be clamoring for an even more aggressively anti-regulatory role. According to the *Washington Post*, "the U.S. Chamber of Commerce wants the panel to require federal agencies to do a formal review of their past rules with an eye to eliminating some of them." Miller may take up this reform option or others when the committee considers the reauthorization of the Paperwork Reduction Act or other bills this session.

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