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Despite Colorado's Disaster, More States Consider Restrictive Budget Rules

In 1992, the Colorado legislature passed a constitutional amendment locking in restrictive budget and tax provisions. This amendment, known as the Taxpayer Bill of Rights (TABOR), has resulted in a structural cycle of drastic disinvestment in public services across the state. This result is not unique to Colorado and if TABOR amendments are adopted in other states -- as could happen in 18 states across the country -- the effect would no doubt be similar.

TABOR is a complex law, but is based on two very simple concepts: cut taxes when there is a surplus, and cut the budget when there are deficits. It was adopted in Colorado to codify strict tax and spending limitations in the state constitution, thus making it harder for the legislature to respond to the constantly changing economic and budgetary health of the state. The Colorado amendment:

- Requires voters to approve all increases in either taxes or state debt
- Limits growth in state revenue to a formula based on population growth plus inflation rate
- Places separate revenue limits on school districts and local government
- Mandates that all taxes above those limits be refunded to taxpayers.

There is widespread agreement among economists and budget and tax experts that the amendment has a) made the economic cycle of state revenues and spending extremely volatile and b) made social investment by the state government very difficult in Colorado by constitutionally enforcing both tax cuts and stringent spending levels.

This structure prevents the state from adopting a rainy-day mentality as it does not permit coffers to expand during "boom" years to give the legislature flexibility to cope with increased need and unexpected crises during "bust" years. By instituting tax cuts during times of surplus, and then requiring reduction in services as the only solution to reducing deficits, TABOR fundamentally hinders the ability of the legislature to respond to evolving state priorities and unforeseen needs. TABOR essentially institutes a habitual cycle of reductions in public investments.

TABORs are also bad policy because they treat problems within complex economic systems with simple, "one size fits all" solutions. By forcing tax cuts during surpluses and spending cuts during deficits, TABORs ignore the complexities of communities and economic environments and ties the hands of legislators in their ability to innovate. In continually promoting balancing the budget as the sole priority in constructing the state's economic policy, it ignores and undermines one of the fundamental roles of government: serving the greater good.

The tangible effects of the TABOR law in Colorado have been felt across the state. After the law was instituted, a booming Colorado economy triggered the tax limit and sent $ 3.25 billion in refunds to Colorado households over five years (about $ 3,200 per family). However, in 2002 when the state was hit with a terrible recession and the state budget went into deficits, TABOR prevented the legislature from responding to increased need caused by the economic downturn. The deficits caused stringent budget cuts, especially on social services. (This is made even more complicated by limits on growth within programs; in essence, locking services into levels that do not fit current needs.) This only aggravated the difficulties citizens in Colorado faced due to a struggling economy.

The results of this cycle are devastating for Colorado. It ended $ 55.6 million in annual property tax credits for elderly homeowners, drained $ 128 million of aid from public universities and community colleges, and cut $ 550 million in extra aid for highways. Feeling the financial pressure, the state also placed limits on the number of poor children covered by state-subsidized health care. Many social service and community investment programs, particularly education programs, have never recovered from these cuts.

Budget policies mandated by TABOR have had the net effect of leaving behind the state's most vulnerable citizens. It ranks 47th in K-12 education funding as a share of state income. It ranks 48th for state funds invested in higher education and 44th in the nation in terms of the share of low-income individuals enrolled in Medicaid. In 1991-1992, 15 percent of low-income Colorado children lacked health insurance. In 2002-2003 that figure rose to 27 percent. And since 2001, Colorado has eliminated all state support to local and regional health agencies.

This is just a glimpse of how public services have eroded in Colorado over the past decade under TABOR. For more detailed information on the impact of program cuts in Colorado, see the following reports: "Public Services and TABOR in Colorado" and "Is Colorado's TABOR Creating Jobs?"

The problems caused by the decreased role of state government have not gone unnoticed. Colorado state legislators agree overwhelmingly that TABOR has been devastating to state services and in turn, the citizens of Colorado. In fact, they spent much of their time in 2004 discussing possible reforms. State Sen. Ken Gordon (D) is one critic of the amendment. "TABOR has been a disaster for this state," he said. "If we don't change it, we will be the first state to de-fund higher education."

Although they spent significant time discussing TABOR reforms, state politicians were not able to come up with any solutions, and thus TABOR still exists in full force, quietly continuing the cycle of de-funding government. The experiment with TABOR in Colorado illustrates the dangers of putting untested fiscal constraints directly into state constitutions since changing these binding amendments later is much more difficult.

Despite the myriad problems experienced in Colorado, other states are considering adopting state tax and expenditure limiting amendments (TELS) similar to Colorado's TABOR into their constitutions. In the first two months of 2005 alone, 13 state legislatures introduced 17 different TELS bills. Other states, such as California, have coalitions of organizations and state politicians sponsoring initiatives either to limit spending or to restrict appropriations through changes to the state constitution.

These states are blindly moving forward despite the fact Colorado legislators are still struggling 13 years later to find a fix for the problems caused by their TABOR constitutional amendment. Some public figures, including Colorado Gov. Bill Owens (R), are perpetuating this trend, touting TABOR as a low-tax, limited-government success story. Yet it is the people of Colorado who have absorbed the negative consequences of the TABOR amendment.

Efforts across the country to install TABORs at the state level come when states are already suffering through fiscal crises. Twenty-six states are struggling to reduce budget deficits while continuing services in a less than robust job market (news coverage | analysis). As Bert Waisanen of the National Conference of State Legislatures said in March 2006, "Governors have to run programs like Medicaid, No Child Left Behind, homeland security. But there is less and less money coming from Washington to pay the bills."

The fiscal strain on states will continue to grow as President Bush and congressional leaders are pushing policies to reduce the huge federal deficit by severely cutting domestic discretionary funding, including funding going directly to states -- all while passing trillions of dollars worth of unpaid-for tax cuts. As Washington is cutting spending, entitlement liabilities are increasing every year and are predicted to explode as baby boomers begin to retire in 2011. These factors will further squeeze state budgets and make it far more difficult to continue current service levels.

The unfortunate trend is one of states shouldering an increasing percentage of the fiscal burden, and often finding they are unable to meet the demands of these programs. The result is millions of people who rely on Medicaid, Medicare, and other government programs are being left behind, cut off from services.

Some states, such as Indiana and Washington, are exploring policies to deal with their budget crises while still providing essential services. Even though this is a welcome change to the current accepted thinking about tax and budget policy, the fact so many other states are contemplating adding TELS to their state constitutions is alarming, especially in light of Colorado's negative experience with TABOR.

This trend does have a silver lining. Various state and national groups are forming coalitions to fight TABOR-like bills and initiatives. In Oklahoma, for example, the coalition was able to mobilize strong public opposition to TABOR through promoting awareness of problems in Colorado under TABOR. This helped to diminish enthusiasm for instituting TABOR

amendments in Oklahoma. Based on Oklahoma, educating the public and state legislators about the effects of these provisions is key in stopping the expansion of harmful state tax and expenditure limiting laws.

For more information on TABOR, check the following websites:

- Center on Budget and Policy Priorities
- *Milwaukee Journal Sentinel* (JSOnline)
- The Bell Policy Center
- coloradobudget.com

President's Tax Panel Hits the Road

President Bush's Advisory Panel on Tax Reform has hit the road over the past month and a half holding six public meetings in their efforts to reform the country's tax code. The panel, which will submit suggestions to Treasury Secretary John Snow by July 31, has heard testimony from a variety of experts. The panel is charged with reforming the federal tax code to make it simpler, fairer, and more conducive to economic growth and job creation.

The panel began its public hearings with two meetings in Washington, DC, and has since held forums in Tampa, FL, Chicago, New Orleans, and San Francisco. (See a full list of witnesses and all public testimonials and statements.) The panel has heard from a wide variety of sources including noted academics Leonard Burman and Bill Gale of the Urban Institute-Brookings Institution Tax Policy Center, Federal Reserve Board Chairman Alan Greenspan, representatives of the small business community, various other tax experts, and citizens.

The first two meetings in Washington, DC, focused on the history of the federal income tax system, consumption taxes, the complexity of our current tax system, and the alternative minimum tax (AMT). The AMT was designed to ensure wealthy Americans could not take advantage of tax incentives to avoid paying taxes. Because the tax was not indexed for inflation, it is increasingly forcing middle-income Americans to pay extra taxes -- an unintended consequence.

Both Snow and Greenspan made statements at the meetings in Washington. Snow briefly discussed the complexity of the code and the resulting loopholes in the system, while Greenspan spoke of lessons that can be learned from past reform efforts and the importance of having certainty in the tax code.

After the initial meeting in Washington, the tax panel began a series of meetings around the country designed to give credence to the panel through publicity in the states as well as to solicit testimony from sources around the country. The four meetings that have taken place to date have rotated through a variety of topics including how the tax system affects businesses and entrepreneurs, decisions by taxpayers and investment alternatives, public perception of fairness in the code and its impact on families, and how the tax code spurs economic growth and international competitiveness.

The president established the panel by executive order on Jan. 7 to help accomplish an overhaul of the tax code, one of his top second-term priorities. The panel is co-chaired by former Sens. Connie Mack (R-FL) and John Breaux (D-LA). Other members include former Rep. Bill Frenzel (R-MN); Charles Rossotti, former Internal Revenue Service commissioner; Liz Ann Sonders, chief investment strategist for Charles Schwab & Co.; Elizabeth Garrett, Sydney M. Irmas Professor of Public Interest Law, Legal Ethics and Political Science at the University of Southern California; Edward Lazear, a senior fellow at the Hoover Institution; Timothy Muris, former Federal Trade Commission chairman; and James Poterba, economics professor at Massachusetts Institute of Technology.

To date the panel has not extended the opportunity to the general public to testify (although all the meetings are open to the public), but anyone may submit written comments. The Center for American Progress, a progressive think-tank in Washington, DC, submitted their comprehensive tax reform plan to the panel.

The Center's tax plan would tax all income sources evenly, reduce dependence on payroll taxes, and enhance the take-home pay of lower-income taxpayers. To simplify the tax code, the plan reduces the number of income tax brackets from six to three, taxing the three at 15, 25, and 39.6 percent. To increase economic opportunity, the plan restores fiscal discipline by reducing the large budget deficit by addressing the fiscal gap and offers Americans new opportunities to save and create wealth for their retirement years. Notably the revenue-neutral plan reduces taxes for 70 percent of Americans and provides an average tax cut of approximately $ 600 to those making less than $ 200,000 annually (read the Center's comments).

OMB Puts Children's Health at Risk with Data Quality Act

The Environmental Protection Agency (EPA) released new guidelines for assessing cancer risk March 29 after years of deliberation. These guidelines officially recognize for the first time that children are particularly vulnerable to certain cancer-causing chemicals. However, the Office of Management and Budget (OMB), while reviewing the guidelines, inserted two requirements, including that any EPA cancer evaluation meet the standards of the Data Quality Act (DQA), which will have the effect of putting more children at risk.

These guidelines determine how EPA regulates cancer-causing chemicals. The agency released the draft policy for these guidelines two years ago, March 2003. Supplemental guidelines for assessing cancer risks to children were included in the draft. The EPA's Scientific Advisory Board reviewed the draft and recommended finalizing the guidelines as written. Then the guidelines were sent to OMB for review.

EPA's guidelines estimate that children under two years of age are 10 times more likely to get cancer from certain chemicals than adults who are similarly exposed. Many would consider this vulnerability a cause to use the precautionary principle and strictly regulate any substances for which even partial evidence shows children at risk. However, OMB elected to require that the data meet rigorous standards established under the DQA before the agency can act to protect children.

The DQA has been accused of being a wolf in sheep's clothing, an industry tool for delaying and derailing regulatory protections posing as a good-government policy. Most agencies, including EPA, were cautious with the DQA and wrote a degree of flexibility into their guidelines for implementing DQA. Apparently this flexibility displeases OMB as it attempts to reduce EPA's discretion by writing the requirement directly into agency guidelines such as these. The DQA requirement coupled with another provision added by OMB, which permits "expert elicitation," could easily be used by industry to challenge and delay agency actions.

This delay means that children at risk of exposure to dangerous chemicals will need to wait for protection while EPA does further study and analysis. Such regulatory delays often benefit industry because the cost of implementing controls and restrictions can be put off.

This isn't the first time that OMB has used data quality to delay public protections. In the 1980s evidence arose that aspirin given to children with flu symptoms could cause a potentially fatal condition called Reye's Syndrome. The Department of Health and Human Services recommended requiring warnings on aspirin containers, but OMB sent the proposal back to the agency dissatisfied with the evidence and demanded further study. Eventually court decisions forced the labeling to be put in place, but in the intervening four years nearly 200 children died from Reye's Syndrome.

Transportation Agency Hides Vital Data as 'Sensitive Security Information'

The Transportation Security Administration (TSA) is invoking its little-known secrecy powers to hide a variety of information from the public, labeling the information as Sensitive Security Information (SSI). The agency's excessive and unreasonable use of the power is troubling, with recent examples defying common sense, and revealing that TSA withholds information from those who use it for safety reasons or even for their jobs.

TSA has demanded that airplane pilots avoid flying near nuclear power plants, in what seems like a reasonable request. If pilots pass near the facilities, fighter jets will intercept them and force a landing. However, the agency then refused to provide locational data for the nuclear plants so the pilots could comply. In an effort to help pilots abide by the order, the Aircraft Owners and Pilots Association spent several days compiling a list of facility locations from public information and posted it on the Internet. TSA demanded that the group take the information down because the agency believed it could assist terrorists. This publicly available information, when compiled into one place, was now SSI.

The U.S. Naval Research Laboratory estimates that if a railcar carrying chlorine through the District of Columbia exploded, up to 100,000 people could be killed. The D.C. Council wanted to know if trains containing hazardous chemicals were being re-routed to protect against attacks. TSA refused the council access to the information, again claiming it was SSI. Unsatisfied with the safety of its citizens being an unknown, the council passed legislation forcing the re-routing of trains carrying hazardous materials. A court battle has ensued, and TSA continues to assert it cannot release such information to local and state governments or civil litigants.

Finally, the Occupational Safety & Health Administration investigated work-related hazards faced by employees at the Portland International Airport in 2004, after the agency received safety complaints. However, in the end the agency refused to release its report publicly because TSA considered the document SSI.

The above examples illustrate how the TSA is overusing the SSI designation to hide information from concerned citizens. The Homeland Security Act of 2002 expanded SSI significantly. TSA altered it again in May, 2004, to include information exempt from open government laws, including the Freedom of Information Act. Those granted access to SSI by TSA must sign non-disclosure agreements.

Many complain that TSA uses its ability to categorize information as SSI excessively and inconsistently. Last September, two House members asked the Government Accountability Office to investigate the agency's use of SSI, citing numerous examples of its misuse. The members acknowledged the need to protect certain types of information, but emphasized that

it must be done in concert with ensuring the public's right to know.

The former chief security officer at the Department of Homeland Security, Jack Johnson Jr., has expressed a conflicting opinion stating, "When it comes to choosing between the public's right to know and the safety of the country, I will err on safety every time."

While everyone can agree that the safety of U.S. citizens is a high priority, government agencies such as TSA underestimate how much public disclosure can contribute to ensuring safety. The aforementioned cases show that reasonable access to information could improve safety conditions for communities and workers. Disclosure means that instead of a handful of government employees working to solve security and safety problems, knowledgeable and empowered citizens can participate in insuring a safe country.

Take Action: Chemical Security Long Overdue

A recent accident at a Texas oil refinery reminds us of the need for Congress to pass chemical security legislation that identifies hazardous chemical-using facilities and requires company plans both for reducing chemical hazards and improving site security through safer materials or processes wherever feasible.

Thousands of facilities around the country place millions of Americans at risk from the potential release of deadly chemicals. For several years, Congress has considered and reconsidered chemical security legislation that would encourage companies to reduce chemical hazards at these facilities. Sen. Jon Corzine (D-NJ) has repeatedly introduced bills that would require facilities that use large quantities of hazardous chemicals to evaluate safer chemicals and technologies to reduce safety and security risks. Companies that pursue these opportunities would have less severe accidents when problems occur and pose less tempting targets for possible terrorist attacks. Unfortunately, Congress has repeatedly failed to act on this issue.

A March 23 accident at BP Amoco's Texas City refinery, which killed 15 employees and injured over 100 people, illustrates the high cost of inaction. According to reports BP filed with the Environmental Protection Agency, the accident could have been even worse. The Texas City refinery stores 800,000 pounds of deadly hydrofluoric acid onsite, threatening the lives and health of more than half a million people in its 25-mile "vulnerability zone." However, oil refineries can replace hydrofluoric acid with sulfuric acid, a much safer chemical that many other refineries are already using.

While Corzine has not yet reintroduced his legislation to Congress this session, the Texas City accident demands that Congress finally take action. More than three years since the 9/11 attacks, there is still no national policy to assess and reduce chemical vulnerabilities wherever practical.

Urge your representatives to support chemical security legislation.

NY Town Scraps Restrictive FOIA Policy

On March 28, open government advocates in Spring Valley, NY, a village just north of New York City, won the day when town officials agreed to scrap a five-year old policy that restricted access to Freedom of Information (FOI) requests. While state law requires public access to FOI requests during regular business hours, Spring Valley's policy only permitted access from 10 a.m. to noon on Tuesdays and from 1 to 3 p.m. on Thursdays.

Joseph Jacaruso, who implemented the policy five years ago, asserts the policy was designed to help manage processing FOI requests, not to restrict access to government information. However, according to Robert Freeman, executive director of New York's Committee on Open Government, "the Spring Valley policy was a failure to comply with the Freedom of Information Law." The Committee on Open Government, an organization in New York's Department of State, was created under the state's FOI law to oversee and advise state agencies with regard to the Freedom of Information, Open Meetings and Personal Privacy Protection Laws.

New York's state FOI law, passed in 1974, received a positive review from a recent audit by more than 50 New York reporters. For an event connected to Sunshine Week, the reporters submitted FOI requests to local government agencies throughout the state, and received requested information from 90 percent of the agencies. The New York state legislature is also considering legislation to strengthen its FOI law. The proposed bill would require state and local government agencies to reply to FOI requests within 25 days. Delayed responses and massive backlogs are common. Freeman believes the bill will pass because it has Republican support in the Senate and Democratic support in the Assembly.

CFC Shifts Position on Terrorist List Checking

In a proposed regulation published in the *Federal Register* on March 29, the Combined Federal Campaign (CFC) shifted its position away from last year's requirement that participating charities check their employee's names against government terrorist watch lists. Instead, the proposed rule uses a certification that charities are in compliance with the law. The proposed rule appears to be a major step in the right direction. Public comments are due in late May.

The CFC is the federal government's workplace charitable giving program. In 2004 CFC added language to its funding agreement that required participating organizations to certify that they do not "knowingly employ individuals or contribute funds to organizations" listed as terrorists on various U.S. government watch lists. CFC interpreted this to impose an affirmative obligation for charities to check their employees' names against the lists. On Nov. 10, 2004, OMB Watch and 12 other nonprofits filed suit challenging this policy.

The proposed rule seeks public comment on a new approach for the fiscal year 2006 program. It has three elements that apply to federations and unaffiliated organizations:

- A certification by the charity that it is in compliance with all laws, Executive orders and regulations that bar transactions with groups or individuals subject to sanctions by the Treasury Department
- Acknowledgement of awareness of lists of blocked entities and individuals on Treasury's website, and
- A promise to notify CFC if the group "becomes noncompliant" after the certification.

The Supplementary Information in the *Federal Register* announcement says, "A pattern of abuse of U.S. and foreign charities has become evident in recent years." It goes on to cite instances where charities have been shut down, investigated and leaders prosecuted, and notes that these cases "underscore the importance of due diligence within the charitable sector." The proposed certification would be a condition of participation for charities wishing to get contributions through CFC.

In seeking public comment CFC specifically asks how its proposal would work for organizations that also get federal funds from the U.S. Agency for International Development (USAID), which uses a different certification. The USAID certification is much more restrictive, requiring list checking, use of public information and monitoring and oversight procedures.

The proposed rule says that, in the event a participating charity notifies CFC that it is not in compliance with the certification requirements, CFC can "take such steps as it deems appropriate under the circumstances," including suspension from the program and recouping funds already disbursed.

The proposed rule is being analyzed by attorneys for nonprofits, including OMB Watch's, who sued the CFC challenging the constitutionality of the employee list checking requirement.

FEC Seeks Comment on Internet Regulation

Under orders from a federal court to reconsider its exemption of Internet communications from campaign finance regulations, the Federal Election Commission (FEC) proposed new rules on March 24, seeking public comment on a variety of issues. The proposed rules, which provide more questions than answers, were preceded by an outcry from bloggers, members of Congress and others concerned about possible over-regulation of Internet political activity. Comments are due in late May and a public hearing will be held in later June.

The proposed rules take a generally limited approach to FEC regulation of Internet communications. The primary provisions include:

- Treatment of campaign ads on the Internet under the same rules as off line ads, which would require they be paid for with funds subject to contribution limits.
- Possible simplified disclosure rules for regulated Internet political communications.
- No disclosure by bloggers paid by candidates or campaigns (although the FEC asks for further comment on whether such payments should be disclosed).
- Links to candidate sites and re-publication of campaign materials through websites or e-mail would only be a regulated contribution if paid for.
- Extension of the media exemption to online journals, but the FEC asks whether it this should only apply to publications that also appear offline.
- Exemption for individual volunteers if using a personal computer, or one available at a public site, such as a library or Internet café. Isolated, incidental or occasional use of computers by individuals at their place of work would be permissible if it did not exceed one hour per week.
- Disclaimers stating the funding source for unsolicited e-mail to more than 500 recipients that solicit contributions or expressly advocate election or defeat of a federal candidate if the e-mail addresses are purchased.

The proposed rule was preceded by widespread alarm among bloggers and others after a March 3 C/Net News.Com interview quoted FEC Commissioner Bradley Smith as saying, "I think grassroots Internet activity is in danger." Concern increased after FEC Chairman Scott Thomas gave a speech at the Politics Online conference on March 11 that warned of possible "massive evasions of the prohibitions on party soft money and corporate and union resources in federal elections"

if the new regulations are "done sloppily." Since corporate contributions to campaigns are already prohibited by campaign finance law, the point of further Internet regulation was not clear. Thomas also raised the possibility of bloggers becoming regulated political committees if their major purpose is to influence federal elections, and noted that many Internet-based services could be exempt as media communications.

That same day the Online Coalition sent a letter to Thomas expressing concern about the potential impact the rulemaking could have on Internet based political speech. The bipartisan coalition, whose tagline reads *"from left to right, preserve our rights"*, said, "The Internet is a fundamental tool in the American political process. Just this week, we learned that 75 million Americans used the Internet to gather news, read commentary, discuss issues, register to vote, and generally join in the democratic process during the last election cycle. We believe the Internet is the primary driving force behind the increased participation among traditionally under-represented groups of voters ...." The letter also expressed concern that the FEC's media exemption may not provide sufficient protection to bloggers and asked that the definition of prohibited coordination with campaigns be clarified. It has nearly 3,000 signatories.

Members of Congress also joined the public discussion prior to publication of the draft rule. On March 17, Senate Minority Leader Harry Reid (D-NV) introduced S. 678, a bill that would exempt Internet communications from FEC regulation. Reid also sent a letter to Thomas saying, "Congress did not intend to regulate this new and growing medium in the Bipartisan Campaign Reform Act (BCRA) .... Regulation of the Internet at this time, with its blogs and other novel features, would blunt its tremendous potential, discourage broad political involvement in our nation and diminish our representative democracy."

On March 11, Rep. John Conyers (D-MI), ranking minority member of the House Judiciary Committee, and 13 other representatives sent a letter to the FEC urging caution, saying the FEC should "make explicit in this rule that a blog would not be subject to disclosure requirements, campaign finance limitations or other regulations simply because it contains political commentary or includes links to a candidate or political party website, provided that the candidate or political party did not compensate the blog for such linking."

Public statements by the FEC commissioners, as well as the many questions posed in the proposed rule, makes it clear no decisions about the final approach to Internet regulation have been made. Among the many difficult issues to be debated is whether bloggers that are paid to post statements that support or attack candidates should disclose the payment. On March 4, the *New York Times* reported that in the 2004 South Dakota Senate campaign two bloggers were paid $ 27,000 and $ 8,000 by the ultimate winner, Sen. John Thune (R-SD), to post information attacking then Sen. Tom Daschle. There were also reports that the Howard Dean campaign paid $ 12,000 to bloggers during the Democratic primaries.

Santorum Amendment Encourages Relief for Charitable Giving

On March 1, Sen. Rick Santorum (R-PA) introduced an amendment to the 2006 Senate Budget Resolution. The amendment, a "Sense of the Senate" about charitable giving, notes the bipartisan popularity of the 2003 Charity Aid, Relief and Empowerment Act (CARE Act). The amendment passed by unanimous consent.

The resolution notes that the CARE Act passed the Senate on April 9, 2003 with a vote of 95-5. The House passed similar legislation 408-13 on Sept. 17, 2003. The bill enjoyed huge bipartisan support and was supported by 1,600 charities. However, due to party differences, a House-Senate conference never met to consider the legislation. Consequently, the CARE Act did not become public law.

The Sense of the Senate, which is legislative language that offers the opinion of the Senate, but does not make law, stated that a relevant portion of tax relief in the resolution should be used for charitable aid. The legislation observes the need for the non-itemizer deduction, gifts from Individual Retirement Accounts to charity, increased deduction for food donations, and greater charitable deductions for corporate donors.

The resolution is notable because President Bush dropped his support for the non-itemizer deduction in his budget request to Congress this year. In the past, the president has called for those who do not itemize their taxes to have the option of taking a tax deduction for charitable contributions. But the cost of the tax break compared with other favored tax breaks may be why the president dropped the support.

Florida Church Is Subject of IRS Inquiry for Political Activities

On Feb. 15, the Internal Revenue Service (IRS) notified a Liberty City, FL, church that it is under investigation for engaging in partisan political activity. The investigation stems from an October 2004 appearance at a service by Democratic presidential candidate Sen. John Kerry (D-MA). If the church is found to have engaged in prohibited political activity, it could lose its tax-exempt status.

In a 10-page letter to the Friendship Missionary Baptist Church, the IRS wrote, "a reasonable belief exists that [the church] engaged in political activities that could jeopardize its tax-exempt status as a church." Included with the letter is a 21-question inquiry regarding the pastor's alleged endorsement of Kerry, coordination with the Kerry campaign, and solicitation of contributions.

The inquiry was prompted by an Oct. 13, 2004, request to the IRS by watchdog group Americans United for Separation of Church and State (Americans United). The IRS, in their letter to Friendship Missionary, also noted the publication of an Americans United press release in *Tax Analyst*.

Federal tax law prohibits all 501(c)(3)s, including churches, from intervening in political campaigns. They may not "participate in, or intervene in (including the publishing or distributing of statements) any political campaign on behalf of or opposition to any candidate for public office". The prohibition has been interpreted very broadly in order to avoid use of tax deductible contributions for electioneering, which would result in a taxpayer subsidy for campaigns.

The Rev. Gaston Smith informed his congregation about the inquiry. He stated that "visits by political candidates are nothing new and the 75-year-old church did not violate the tax code." He noted that during the previous week, Miami-Dade mayoral candidates Jimmy Morales, a Democrat, and Carlos Alvarez, a Republican who was later elected, made campaign stops there.

According to Friendship Ministry, the service was nothing out of the ordinary. The service schedule consisted of praise and worship, followed by Smith's sermon and altar call. Kerry then spoke for approximately five minutes and was followed by the Revs. Jesse Jackson and Al Sharpton.

However, a conflicting report by Americans United stated, "During the service, the church's pastor ... introduced Kerry as 'the next president of the United States' and told the crowd that 'to bring our country out of despair, despondency and disgust, God has John Kerry.'"

In determining whether a 501(c)(3) activity constitutes impermissible campaign intervention, the IRS will examine an activity based on all the surrounding "facts and circumstances," examining the content and timing of the message, the intended audience for the message, and the organization's history of engaging in similar activities.

While Friendship Ministry declined to ponder the motivation of the IRS inquiry, Rep. Kendrick Meek (D-FL) charged that the complaint came from outsider groups that may be specifically targeting black churches. In a *Miami Herald* article, he stated that two other Miami-area churches received inquiry notices last year, but declined to name them or discuss the probes.

Last year, the IRS was criticized for investigating whether a speech by Julian Bond, Chairman of the National Association for the Advancement of Colored People, criticizing Bush administration policies, violated the prohibition on 501(c)(3) electioneering. The NAACP has said that the probe was politically motivated and meant to discourage the organization's efforts to register black voters.

Doggett Introduces Lobby Disclosure Bills

On March 13, Rep. Lloyd Doggett (D-TX) introduced two versions of his "Stealth Lobbyist Disclosure Act of 2005" (H.R. 1302), a proposed amendment of the Lobbying Disclosure Act of 1995 (LDA), and H.R. 1304, which modifies the Internal Revenue Code to treat lobbying coalitions as political organizations under Section 527 of the tax code and require more disclosure of their lobbying activities.

H.R. 1302 provides that, in the case of a coalition or association that employs or retains other persons to conduct lobbying activities, each individual member of the coalition or association is the client for whom a registration must be filed. Current law only requires the coalition or association to register and file reports.

The legislation creates a total exception for 501(c)(3) organizations. Other 501(c) organizations, such as social welfare organizations, unions and trade associations, are also exempt if they have "substantial exempt activities other than lobbying with respect to the specific issue for which it engaged the person filing the registration statement." The term "substantial" is not defined. This exemption creates a potential hazard for these 501(c) organizations if their focus is on a specific issue.

Members of a coalition or association are also exempted if the amount they reasonably expect to contribute toward specific legislation-influencing activities of the coalition or association is less than $ 1,000 per any semiannual period.

H.R. 1304 amends the tax code to treat any coalition or association that is identified as a client on any registration filed under the LDA as a political organization under Section 527 for purposes of disclosure, whether it is a political organization or not.

The proposal would require any coalition or association to notify the Secretary of the Treasury of: (1) its existence within 72 hours after one of its lobbyists makes an initial legislative contact; and (2) any change in membership within 72 hours. It also requires the notice to include a general description of the business or activities of each member of the coalition or association and the amount reasonably expected to be contributed by each member toward coalition or association activities for influencing legislation. Additionally, a penalty tax for failure to give required notices would be imposed.

H.R. 1304 has the same exemption for 501(c) groups as H.R. 1302, but exempts members of a coalition or association who contribute less than $ 2,000 per year for lobbying activities, rather than using the $ 1,000 per semiannual period standard.

Doggett has introduced identical bills in the last two congresses. A member of the tax-writing Ways and Means Committee, Doggett became interested in the issue because of the number of groups he calls "stealth coalitions," which he has seen lobbying on provisions of tax law.

Sunset, Results Commission Proposals Likely

Both the White House and congressional Republicans have vowed to introduce legislative packages that would force programs to fight for their lives every 10 years and would link controversial performance ratings to decisions about the very structure of government.

As we reported before, the White House's fiscal year 2006 budget submission announced two proposals for creating unelected commissions with far-reaching powers to weaken protections of the public health, safety, civil rights, and the environment. One, for a "sunset commission," would force all government programs to plead for their lives on a periodic basis, such as every 10 years. The other would allow for ad hoc "results commissions" charged with reviewing administration proposals for restructuring or eliminating programs in order to "improve performance and increase efficiency." Clay Johnson, deputy director for management at the Office of Management and Budget, recently told the *Federal Times* that OMB will soon submit legislative proposals to create these sunset and review commissions.

Bills in previous congresses put forward similar proposals, and a recent article by the industry-funded think tank Mercatus Center reports that Republican lawmakers are planning to reintroduce those bills in the 109th Congress. Rep. Kevin Brady (R-TX) introduced the Abolishment of Obsolete Agencies and Federal Sunset Act in every session of Congress since 1997, and Sen. Sam Brownback (R-KS) introduced in the 108th Congress the Commission on Accountability and Review of Federal Agencies Act (CARFA) that would terminate or realign government programs viewed as "ineffective." Both Brady and Brownback are expected to introduce their legislation again this term, according to the Mercatus Center article.

CARFA

CARFA was first introduced by Rep. Todd Tiahrt (R-KS) in 2002. Tiahrt's original proposal called for the creation of a 12-person commission, appointed by the president. The commission would have two years to review federal programs and agencies and propose legislation to realign or eliminate programs based on their assessment. In making its recommendations, the commission would look at all programs but those in the Department of Defense. CARFA would create a fast-track for the resulting bill, requiring Congress to take up the bill immediately and requiring a straight up-or-down vote with no possibility of amendments. Debate would be limited to only 10 hours. The bill made no provisions to protect programs that safeguard public health, safety the environment, or civil rights.

CARFA was modeled on the Defense and Base Closure and Realignment Act (BRAC), which was first used during the Kennedy administration in the 1960s and then resurfaced in the late 1980s to close unneeded military bases while avoiding political skirmishes among representatives. CARFA, however, had important differences from BRAC. First, while BRAC required a bipartisan commission, comprised equally of Republicans and Democrats, the CARFA bill would have allowed the president to choose all the members of the commission. Further, while a straight up-or-down vote saved the closing of military bases from political infighting, voting up or down on CARFA proposals would play only into special interests; by selecting programs to be eliminated but never addressing unmet needs, CARFA would act as a one-way ratchet, slashing needed government programs without addressing gaps in protection. Whereas a commission more closely comparable to BRAC would recommend closures of specific program sites, such as one Head Start center, a CARFA commission would recommend the elimination of entire programs, such as Head Start itself.

In the last Congress, Brownback put forth the same legislation, but with several important changes. First, Brownback's legislation, which was also introduced in the House by Tiahrt, excluded entitlement programs as well as those operated by the Department of Defense from review by the commission. Second, the bill would have required the president to develop a review methodology, present it to the commission for approval, and conduct reviews of at least half of all government programs. The Brownback version would have required program assessments to be "based primarily on the achievement of performance goals."

Already the White House's Office of Management and Budget uses the Performance Assessment and Rating Tool (PART) to assess government programs. The clear intention of this proposal, as evinced by both the language of CARFA and Senate

testimony on the bill, is to use tools like the PART assessments to justify eliminating government programs and agencies. Though PART appears to be a neutral tool to assess government productivity, we have shown elsewhere that PART is highly political and fails to capture the real successes and failures of government programs. PART is so flawed that some programs actually receive point reductions for following the law. Using this tool to remake government could have dangerous consequences for the health, safety and security of Americans.

Sunset Commission

Brady's Abolishment of Obsolete Agencies and Federal Sunset Act (originally titled simply the Federal Sunset Act) sought to require agencies and programs to justify their continued existence or face elimination. The bill would establish a 12-person bipartisan commission comprised of four members of the House, four members of the Senate, and four individuals who are not members of Congress but have expertise in government affairs and operations. The commission would review federal agencies on a set 12-year cycle. Each agency reviewed by the commission would be abolished within a year of the review unless Congress voted to reauthorize the agency.

Each agency up for review would be evaluated on a laundry list of criteria, including cost-effectiveness, number and type of beneficiaries, continued need for the program, extent of public participation, and coordination with state and local governments. The commission would be required to hold public hearings and request public comment on each agency under review and to work with the Government Accountability Office, OMB, and chairmen and ranking members of any relevant congressional committees. The commission would then report to Congress on its findings and make recommendations in the form of legislation. The commission would also be required to monitor and report to Congress on any legislation creating new agencies or programs. The model for this commission is based on the Texas Sunset Advisory Commission.

Critics of the Brady proposal have argued that the prospect of reviewing every federal program to this level of detail would be timely and costly. This massive undertaking would also be duplicative of systems of accountability and oversight already in place, such as congressional oversight committees. In a 1998 hearing on Brady's bill, Ed DeSeve, then OMB's deputy director of management, argued that "the proposed structure and process in H.R. 2939 would substitute the conclusions of a 12-member commission for the judgment of congressional committees, the full House and Senate, and the president. It would effectively put eight members of Congress in a preeminent role over all other duly elected members and provide no role for the president."

Any Chance of Success?

Fortunately, neither of these bills gained much traction in previous Congresses. In fact, neither one ever made it out of committee. The White House apparently had not consulted with members of Congress when it first announced its plans for sunset and results commissions, and it is unknown if the White House is now working with Brady and Brownback or if its proposals will be unrelated initiatives. Whether or not these bills garner support on the Hill, they will likely surface in the months to come.

Agencies Continue to Abandon Protective Plans

Key agencies charged with protecting public health, safety and the environment continued to abandon work on long-identified priorities for new or improved regulatory safeguards, according to the fall 2004 Unified Agenda released last December.

According to the fall 2004 edition of the Unified Agenda, a special feature of the *Federal Register* that projects agency regulatory priorities every six months, the Environmental Protection Administration (EPA), Food and Drug Administration (FDA), and National Highway Traffic Safety Administration (NHTSA) continued to abandon work on proposals for improved regulatory safeguards -- some of which had been on agency agendas since Bush I, while others were proposed to improve security in the aftermath of 9/11.

EPA withdrew 12 items from its agenda, four of which predated this administration. Among the withdrawn items were the following:

- A 1997 proposal to increase fees for pesticide tolerance actions, to counter the problem of "costs substantially exceeding the fees currently charged" (RIN 2070-AD23);
- A 2003 proposal to unbundle contracts in order to create more opportunities for small businesses (RIN 2030-AA86); and
- A 2003 proposal to require background checks of contract and subcontract workers at federal facilities and sensitive locations such as Superfund removal sites (RIN 2030-AA85).

NHTSA withdrew six items from its agenda, of which all predate this administration and one in particular dates back to Bush I. That proposal would have required improved radiator caps to prevent the accidental scalding of motorists and service station attendants who hastily remove caps from still-hot radiators (RIN 2127-AE59).

FDA withdrew only one item from its agenda, although it was originally proposed in the aftermath of 9/11. Congress passed a law to improve the security of the food supply, repeatedly using a key term -- "serious adverse health consequences" -- to describe the scope of FDA's duties to protect the food supply against potential bioterrorist attack. FDA

added the task of defining that term to its fall 2003 agenda, but it removed it from the fall 2004 agenda with no explanation.

Neither the Occupational Safety and Health Administration nor the Mine Safety and Health Administration withdrew more items from its agenda.

Examples of Proposals Withdrawn from Agendas

	Why We Needed the Agency to Act	**Excuse for Not Acting**
EPA On-Site and Off-Site Background Checks Performed by EPA and Contractors	*from the December 2003 Unified Agenda:* The events of September 11, 2001, have heightened both Government and private industry awareness relative to protecting facilities and the personnel who work therein. EPA has a large number of contracts that require contractor (and subcontractor) employees to access federally-owned or leased facilities and space, federally-occupied facilities, and Superfund, Oil Pollution Act, and Stafford Act sites. Although such access is often necessary for contract performance, it nevertheless creates significant potential risks for EPA. While background checks provide no guarantee as to a person's loyalty, trustworthiness, or suitability for contract performance, they provide valuable information that may prove useful in determining an individual's suitability to perform on-site services for the EPA.	*from the Federal Register:* The public comments EPA received objected not only to the proposed clause's broad application, but also to its key substantive provisions. EPA has decided to withdraw this proposed EPAAR clause, and plans instead to incorporate a narrowly tailored background check requirement in the Agency's emergency response contracts' statements of work. Currently, this category of contracts consists of Superfund Technical Assistance and Removal Team (START), Emergency and Rapid Response Services (ERRS), and Response Engineering and Analytical Contract (REAC). In the future this requirement may be included in other types of contracts.
FDA Definition of "Serious Adverse Health Consequences" from Bioterrorism	*from the December 2003 Unified Agenda:* The events of September 11, 2001, highlighted the need to enhance the security of the U.S. food supply. Congress responded by passing the [Bioterrorism Act, which uses] the term "serious adverse health consequences" to describe the standard [for] many of the new authorities provided therein. Together with the final rules implementing [other sections] of the Bioterrorism Act . . . , a definition of the term will further enable FDA to act quickly and consistently in responding to a threatened or actual terrorist attack on the U.S. food supply or to other food-related, public health emergencies. A definition of the "serious adverse health consequences" term will promote uniformity and consistency across FDA in understanding of the term and determining an appropriate response. In addition, a definition of the term will inform the public and stakeholders about what FDA considers to be a serious adverse health consequence under the Bioterrorism Act.	No explanation provided

	from the November 1992 Unified Agenda:	*from the December 2004 Unified Agenda:*
NHTSA Fixing Radiator Caps to Prevent Scalding	The purpose of the thermal locking radiator cap would be to prevent the accidental scalding of motorists and gas station attendants who hastily open the cap on a hot radiator of a motor vehicle.	However, based on current cost estimates and reduced incidence of injuries, the agency decided to withdraw the rulemaking.

White House Adds Rule to Hit List After Calling it 'Accomplishment'

Just three months after touting an interim rule controlling Listeria in ready-to-eat meats as a "regulatory reform accomplishment," the White House added that same rule to a list of regulations that should be weakened or eliminated.

Corporate special interests nominated the Listeria rule for rollbacks in response to a call from the White House's Office of Information and Regulatory Affairs, which used its annual draft report on the costs and benefits of regulations last February to request industry's nominations for regulatory protections to be weakened or eliminated.

When OIRA released the final version of that report in December, it summarized the public's nominations and submitted them to the agencies for their review. In addition to a separate list of the White House's own suggestions for rollbacks and a list of anti-regulatory initiatives that it wanted moved to higher priority status, OIRA included a list of what it called "regulatory reform accomplishments." The Listeria rule was on that list.

OIRA released a new report on March 9, announcing 76 of the industry-nominated rollbacks that the administration was endorsing as its regulatory reform priorities. Incredibly, the same Listeria rule touted in December as an accomplishment appeared on that list of regulatory protections to be weakened or eliminated.

Listeria monocytogenes is a deadly pathogen that has the highest hospitalization rate and the second-highest fatality rate of all foodborne pathogens. Pregnant women who contract Listeria poisoning will almost always miscarry or bear a child with severe developmental disabilities. Because Listeria outbreaks have been traced to ready-to-eat meat products such as hotdogs and lunch meats, the Clinton administration began work on a performance standard with related requirements to test the final products as well as food-contact surfaces.

When the Bush administration took office, however, the Department of Agriculture made an about-face and abandoned the idea of a strong performance standard, issuing instead an interim final rule that favored the food industry and weakened the USDA's power to enforce any protections against Listeria in ready-to-eat meats. As the Consumer Federation of America has documented in a recent report, the Bush administration has campaign finance ties to the big food companies, in particular ready-to-eat meat producer Pilgrim's Pride. After holding a meeting with food industry representatives, OIRA ordered the USDA to make changes in the rule.

The case of the Listeria rule is not the first in which OIRA has sent inconsistent signals in its anti-regulatory hit lists. OIRA called for a similar hit list in its draft annual report in 2001, with similarly confused results. One of the hit list nominations that OIRA designated that year as a "high priority" for weakening or elimination was a rule requiring labeling of trans-fatty acids in food products -- the same rule that OIRA had urged the Food and Drug Administration to develop. That same high-priority list included the rescission of the Clinton administration's standards for arsenic in drinking water, although in a matter of months OIRA administrator John Graham delivered a speech to the National Economists Club in which he characterized the Clinton arsenic standard as having been well-founded in science and thus deserving of OIRA's deference.

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