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IRS Allows Charitable Contribution Receipts by E-Mail

In a revision of Publication 1771, "Charitable Contributions -- Substantiation and Disclosure Requirements," the IRS has confirmed that a charity can provide acknowledgement of a contribution electronically. For contributions of $250 or more, a written receipt must also be sent.

The full text of Publication 1771 is available online, in Adobe Acrobat format on the IRS website.

NPTalk 2002 Reader Survey

On NPTalk's third anniversary, we invite you to participate in the following online survey. It'll help us to make NPTalk more useful to you over the course of the next 3 years and beyond.

NPTalk was launched in March 1999 as a simple list to disseminate occasional information around the role of technology in nonprofit policy and advocacy work. It quickly grew into a daily forum on nonprofit technology and advocacy-related items, covering a broad range of topics, highlighting a growing number of nonprofit resources, and sharing strategies to help improve nonprofit thinking and use around technology in public policy participation, with an average daily readership of 1,000 organizations in the U.S. and abroad.

Our third anniversary provides a great opportunity to assess both our track record and our future direction, as we work to improve the range of services we can offer. To that end, we are conducting our first ever NPTalk reader survey throughout the month of April. Your input is crucial, so please take a moment to participate.

NPTalk Reader Survey

Resolutions Not Worth Keeping

The FY 2003 Congressional budget plan is probably not going to be a resolution worth keeping.

In the last OMB Watcher, we reported that the House Budget Committee had approved a budget resolution on March 13. The full House passed the resolution on March 20. The House plan was billed as a "balanced" budget -- by using the more generous OMB budget assumptions (instead of the more conservative Congressional Budget Office numbers) and by not counting the cost of the so-called economic stimulus package. To balance the budget, in spite of the huge increases in defense and "homeland defense" and even more tax cuts, will require cutting domestic spending (almost everything the government does, except for defense and entitlement programs like Social Security). Excluding the increases in "homeland security," cuts to other domestic discretionary programs will be in the $17 billion range for next year and more than $82 billion over five years, according to the Center on Budget and Policy Priorities (CBPP).

The Senate Budget Committee budget resolution is only a little improved in terms of allowing for adequate domestic investment. Under the Senate plan, there would be slightly more money for education and other social programs during the next few years, but in the long term there would still be substantial cuts in domestic discretionary spending over the next decade. The Senate plan also requires a review of defense needs after 2004, rather than the House plan's blanket approval of a $10 billion "defense reserve fund."

There is one big difference.

The House resolution would make permanent the huge tax cut passed in the spring, which is due to end in 2011. The Senate resolution does not. It requires next year's Congress to come up with a plan to cut spending (even more) or raise taxes to insure that the Social Security surplus is only used for debt reduction. Unfortunately, the Senate failed to use the opportunity presented by the budget resolution process to go on the affirmative, and call for postponing the phasing in of the tax cut. Stopping the tax cut right now, when middle income Americans have already gotten almost all of their benefits from it, would save $600 billion in the next decade, according to the Center on Budget and Policy Priorities.

Stopping the tax cut, or at least postponing it, would allow us to meet the new challenges brought on by September 11, **without** cutting resources for the domestic investment that is fundamental to our domestic security and economic vitality. Providing kids with a good education, giving adults the job training and supports necessary to succeed on their own, undertaking important research and development, protecting the environment, improving transportation and water and sewer systems, strengthening the social safety net -- there are a myriad of important "investments" that will give us a return in the future, prevent the more expensive problems that will certainly result if we fail to take care of needs now, and allow us to meet the challenges of an aging population.

A resolution worth keeping would be to stop, or at least postpone the tax cut. No fingers need to be pointed. The budget picture changed after September 11 and the economic downturn. We can't afford the tax cut right now, without huge and harmful reductions in domestic spending. As E.J. Dionne, Jr., writes in his Washington Post op-ed of March 26, 2002, it is time to "challenge the conventional wisdom on taxes" so we can accomplish the things that we all agree are worth doing. The Senate is still stuck on "saving" the Social Security surplus for debt reduction. What they don't say is that "saving" the Social Security surplus is a purely rhetorical device that has little to do with saving Social Security and will be at the cost of the investments that benefit all Americans see this OMB Watch analysis for more details. Resolving to postpone the tax cut is the right thing to do.

Using Social Security's Surplus for Current Needs

Policy adjustments to Social Security – and not locking these surplus funds away – are the key to "saving" Social Security.

Senate Budget Committee Chairman Kent Conrad (D-ND), in commenting on the current federal budget debate, observed that, "the real test for this Congress is whether or not we're going to face up to our long-term challenges." The Chairman is absolutely right in directing the country to examine the long-term impact of its policy makers' budget decisions. Before we can be prepared to deal with our long-term domestic challenges, however, we must correctly identify just what these challenges are.

Though our domestic policy makers are caught up in a struggle to lob at one another accusations of "destroying" Social Security, while working quickly to illustrate why their own plan will "save" it, neither side is doing nearly as much as it says it is to "save" Social Security … and neither is doing quite so much to ruin it. Saving, or, for that matter, bankrupting, Social Security has little to do with how we spend its massive surpluses over the next 15 years. The reason, put most simply, is that those surpluses are so large that the government cannot let them idle, while it waits for more of the country to retire and begin drawing on this social insurance policy. Policy adjustments to Social Security – and not locking these surplus funds away – are the key to "saving" Social Security.

Thus, given the current situations on our domestic, international, social and economic fronts, we must rethink our current strategies and realize that the Social Security surplus is not – and should not be considered to be – untouchable. Social Security funds must be spent on something – debt reduction, tax cuts, or programs for the current and future well-being of the country. Paying down our national debt reduces the amount of money we have to pay each year in interest costs, which frees up money from general revenues to pay for increased Social Security withdrawals and future domestic needs. In the meantime, it does nothing to begin addressing those current domestic needs. Tax cuts do nothing to directly lower our interest payments or to reduce our total national debt. They lower revenue, and thus limit our ability to address urgent domestic problems, all while providing very little – if any – help to the nation's productivity or to increase the ability and number of workers to enter higher paying jobs. Only the third choice – investing now (to avoid paying even more later) to repair crumbling schools and roads, build a comprehensive public health system, provide job training to open up better paying and more gratifying job opportunities to low-wage workers, and provide health care to the millions of uninsured and underinsured Americans – offers a real return on this Social Security surplus money.

As Conrad noted, we must focus clearly on our country's "long-term challenges." Unquestionably, these include ensuring Social Security remains the effective, protective safety net that it has been for the last 65 years. But, with so many additional pressing problems, the country cannot afford to hold to an arbitrary assignment of excess Social Security revenues to the sole purpose of debt reduction. In the current political environment, in which there is no common voice pushing for a freezing of the President's $1.35 trillion tax cut to free up needed funds, it is time to reopen the debate about using Social Security's excess funds to address current needs – doing so will not harm Social Security and it will likely put the country in a stronger position 35 years from now to address the problems we will face then.

For a more complete comparison of the three options currently available for the Social Security surplus, please see the full version of this analysis.

Trustees Issue 2002 Annual Report on the State of Social Security

Last week, the Social Security Board of Trustees issued its 2002 Annual Report on the status of Social Security's finances, in which it extended its estimates of the number of years before Social Security's surpluses will reach certain key milemarkers.

Specifically, it extended:

- By one year (from 2016 to 2017), the year by which revenue from payroll taxes of current workers will no longer be sufficient to pay for retirees' benefits. At this point, Social Security will begin using the interest it earns each year from the government bonds it owns to make up the difference.
- By two years (from 2025 to 2027), the year by which payments to beneficiaries will exceed incoming payroll tax revenue and interest payments. At this point, Social Security will begin drawing on its massive surpluses it's been building for this very reason to continue to provide full benefits to all retirees.
- By 3 years (from 2038 to 2041), the year by which Social Security's surpluses will have been used entirely. At this point, without any changes to the current system, incoming payroll taxes will be sufficient on their own to pay for 73% of currently scheduled benefits for all retirees. (For a look at how 73% of scheduled Social Security benefits stacks up against current benefits, see the table below.)

Social Security Benefits Payable to Average Wage Earner – With No Changes to Tax or Benefits Structure (In Current 2002 Dollars)

Year of Retirement	Scheduled Benefit	Payable Benefit	Percent of 2002 Benefit
2002	14,357	14,357	100.0
2005	14,357	14,357	106.1
2010	15,618	15,618	115.5
2015	16,406	16,406	121.3
2020	17,278	17,278	127.7
2025	18,180	18,180	134.4
2030	19,159	19,159	141.6
2035	20,218	20,218	148.8
2040	21,361	21,361	157.9
2045	22,571	16,477	121.8
2050	23,834	17,399	128.6
2055	25,135	18,348	135.6
2060	26,494	19,341	143.0
2065	27,927	20,387	150.7
2070	29,444	21,494	158.9
2075	31,049	22,666	167.6
2080	32,739	23,899	176.7

(Assumes Retirement at Normal Age)
Source: Social Security Trustees Report 2002, Table VI.E11 and author's calculations, based on chart and calculations from Social Security Trustees Report 2000 in "Social Security Myth #2184 – There Won't Be Anything Left for Me,", Dean Baker, CEPR, February 20, 2001.

This is not the first time these so-called exhaustion dates have been extended, and analysts such as the Economic Policy Institute's Christian Weller and the Center for Economic and Policy Research's Dean Baker and Mark Weisbrot point out that even these postponed exhaustion dates are based on extremely conservative, even pessimistic economic growth projections. For additional perspective on just how sound Social Security really is, see this related article, and a recent Center on Budget and Policy Priorities' comparison of the size of the projected Social Security shortfall and last year's tax cut.

$50 Billion Per Year is Not Pocket Change

As reported in the *Washington Post* on March 25, advocates of estate tax repeal have redirected their efforts to state legislatures, pressuring them to "update" their estate tax laws to reflect the changes implemented in last June's $1.35 trillion tax cut.

With a 10-year cost to the federal government of $138 billion, the phase out and one-year full repeal of the federal estate tax makes up the third largest component of last year's massive tax cut. At the time the tax cut was passed, many people pointed out that the true costs of the repeal provisions were disguised by the limited 1-year duration of full repeal, and that the Federal government would actually lose at least $50 billion for each year full repeal remained. Another less well-known cost-cutting gimmick used to cram the costly estate tax repeal into an overloaded tax cut package was the early phase-out of the credit for state estate taxes.

In 37 states and the District of Columbia a portion of the federal estate tax paid by estates located in those states goes to the state's general revenue fund. According to a Center on Budget and Policy Priorities (CBPP) January 2002 analysis, in 2001, this "pick-up" tax brought in nearly $5 billion in revenue, an average of 1.3% of the states' general revenue funds. In another 12 states, which levy their own estate (or inheritance) taxes, $662 million was generated. The same CBPP report shows that, as a result of the rapid phase-out of the states' "pick-up" tax measures, as well as the phase-out and full repeal of the federal estate tax, 49 states and the District of Columbia stand to lose an estimated $6.5 billion in FY 2003. This loss represents a substantial chunk of state revenue shortfalls, which are projected to total almost $50 billion for all states in FY 2002 and are expected to continue through FY 2003. The recently enacted economic stimulus legislation will further exacerbate budget shortfalls by reducing corporate income tax revenue (most states also collect their corporate taxes based on those the federal government collects) and by not providing federal assistance to state budgets.

A February 2002 report from the National Council of State Legislatures (NCSL) indicates that at least 30 states have implemented budget cuts to help balance their budgets -- a state requirement in 49 states. The NCSL report emphasizes that the "magnitude of budget gaps has been significant enough that even programs that often are spared from cuts, such as K-12 education, have been reduced in some states." Other examples of the impact of these revenue declines include cuts to job training and child care programs, the cancellation of capital projects including badly needed improvements and modernizations for overcrowded schools, state hiring freezes, and increases in state employee health care plans. Though some analysts are saying that the national economy appears to be out of the thick of the recession, many are predicting that state budgets will continue to suffer as their local economies are slower to recover.

State revenue shortfalls and the resulting enacted and anticipated spending cuts make recent campaigns by estate tax repeal advocates all the more troubling. In Washington State, for example, Seattle Times publisher Frank Blethen led others in advocating that the state legislature drop its pickup tax. In a February 11 editorial piece in the paper that was simultaneously covering the deficit-ridden state budget woes, the Seattle Times argued that Washington State should shrink its estate tax "unless this state wants to be known for hoisting a flag hostile to family-owned business." Washington's legislature and those of at least 8 other states and DC rightly decided that they could not afford to grant the estimated 2% of their wealthiest residents with taxable estates this costly tax break. Instead, they will make the changes in their state laws to enable them to levy an estate tax, just as they have for more than 75 years, even as the federal estate tax repeal provisions diminish their revenue. But, as the Washington Post reported, "supporters of the [estate] tax cut have vowed to begin a state-by-state battle to repeal the estate tax in as many places as possible."

Congress should not have passed a tax cut it could only fit into last year's budget resolution at the expense of state budgets and services. With so many pressing health care, homeland security, infrastructure and education needs at the federal, state and local levels, Congress and the President should reconsider this costly and unfair tax cut and relieve some of the pressure on state governments. Until that happens, however, state legislatures and governors must hold strong against the self-described "powerful [estate tax repeal] lobby," for $50 billion each year in lost federal revenue -- and $7 billion in state revenue -- is certainly not pocket change.

Recent Activity on Faith-Based Charity Legislation

A review of recent activity on faith-based charity and charitable giving legislation.

Effectiveness Report Released

A report released by the University of Pennsylvania's Center for Research on Religion and Urban Civil Society has found no proof that religious social service programs are more effective than secular ones. The report, which was based on 25 other studies on the subject, did not find fault with faith-based programs, but found no evidence of their much-touted increased effectiveness, and called for more research on the subject.

Meanwhile, the Rockefeller Institute's Roundtable on Religion and Social Service Policy has begun a national study of faith-based social services. The study will focus on the efficacy of faith-based organizations, as well as the future of faith-based social service.

Charitable Contribution Bill Markup

Senate Finance Committee Chairman Max Baucus (D-MT) has said that his committee could mark up a bill expanding tax incentives for charitable giving after the Senate returns from the spring recess. It is not known if the bill marked up will be the Santorum-Lieberman compromise faith-based charity bill (The CARE Act (S. 1924)), or if different legislation preferred by Baucus will be used, or if a compromise between the two will be offered. It is unlikely, however, that any Senate legislation will contain the most controversial "charitable choice" elements of H.R. 7, the faith-based charity bill that passed the House last year.

Non-Itemizer Deduction Still In Doubt

The fate of the tax proposal that allows those who do not itemize on taxes to take a deduction for charitable contributions is still uncertain. It is known that key staff members to Baucus and Sen. Charles Grassley (R-IA), the ranking member of the Finance Committee, do not support the non-itemizer in the CARE Act because of its cost in lost federal revenue and/or its uncertainty in generating much new charitable giving.

On March 13, 2002, the research arm of Congress, the Congressional Research Service (CRS), released an analysis of legislative proposals to deduct charitable contributions for those who do not itemize their taxes. Based on the economic effect of the deduction, they conclude that, "the impact of the proposed deduction on charitable giving is likely to be relatively small." In fact, CRS claims that for every dollar in lost federal revenue, there will be only 12 cents in new charitable giving and only 6 cents of that will be for activities outside of religious sacramental services. For details, see this OMB Watch report.

This was followed by a March 18 Joint Committee on Taxation (JCT) report, "Description of Revenue Provisions Contained in the President's Fiscal Year 2003 Budget Proposal," which provided a review of the President's plan for the non-itemizer deduction. JCT described arguments for and against the proposal and concludes on page 11, "The proposal adds complexity to the tax law." JCT points out there would be additional record keeping to substantiate a contribution was made to a qualified charity.

JCT adds: "In addition, the proposal, like any other 'non-itemizer' deduction, would undermine the purpose of the standard deduction, which exists in part to relieve taxpayers with small deductions from the burdens of itemization and substantiation. One motivation behind the substantial increase in the standard deduction in the Tax Reform Act of 1986 was that '[t]axpayers who will use the standard deduction rather than itemize their deductions will be freed from much of the record keeping, paperwork, and computations that were required under prior law.'" (Quoting from JCS-10-87, May 4, 1987, page 11)

On March 21, the Center on Budget and Policy Priorities published a report on the non-itemizer deduction that echoed the concerns raised by CRS and JCT. Regarding the proposal in the CARE Act, they conclude that the tax break is "a cost that is difficult to justify given the deterioration in the long-term budget outlook."

Rep. Scott Sends Letter, Rep. Watts Campaigns

Rep. J.C. Watts (R-OK), a strong proponent of H.R. 7, went on the offensive in Connecticut, the home state of Sen. Joseph Lieberman (D-CT), who is one of the lead supporters of the Senate's faith-based charity bill. The Senate's CARE Act contains many of the same provisions of H.R. 7, but does not contain the highly controversial "charitable choice" provision that allows religious congregations to compete for government grants for social service work. Watts said that the "armies of compassion are waiting for the Senate to follow the House's lead and pass a solid faith-based bill" and also called for the Senate to bring its legislation to a conference with the House after passage. A conference on the legislation would "reopen old wounds" according to a Lieberman spokesman, and might prevent either piece of legislation from becoming law.

Meanwhile, Reps. Barney Frank (D-MA), Bobby Scott (D-VA) and Chet Edwards (D-TX) sent a letter to all 100 Senators, suggesting ways to pattern non-discrimination language for the CARE Act along the lines of AmeriCorps and Senior Corps. The bill currently allows faith-based groups working with federal funds to discriminate in hiring by allowing them to only hire members of their own faith.

House Committee Revises Stealth PAC Law

State and Local PACs May Get Exemption From Reporting.

The "Stealth PAC" Act passed by Congress in 2000 was intended to provide disclosure of soft money contributions and spending that is not regulated by the Federal Election Campaign Act because the activities funded do not expressly support or oppose candidates. But since the act became law, state and local PACs have lobbied for an exemption, claiming the requirements duplicate reports they must file with state election commissions. On March 28 they made progress toward that goal, getting an exemption included in H.R. 3991, the "Protection and IRS Accountability Act of 2002." Most of the act is aimed at Internal Revenue Service (IRS) reforms, but it also eliminates requirements for political action committees, exempt under IRC Section 527, to file notification reports for state and local candidates that file with state or local election commissions. The bill will now be considered in the Senate.

Many state and local PACs were unaware of the requirements, assuming the rules only applied to federal elections. If the law is enforced as written, some campaigns could face steep fines. See this OMB Watch analysis for details. It is not clear what action the IRS will take if the reporting requirement is eliminated.

Bush Administration Weakens Medical Privacy Rules

In a move hailed by the health care industry, the Bush administration announced on March 27 that it would roll back medical privacy standards put in place at the end of the Clinton administration.

Specifically, the administration plans to revoke a requirement that patients give written permission before their medical records can be disclosed to doctors, hospitals, pharmacies, and insurance companies -- safeguards seen by many, including the Health Privacy Project, as the core of the Clinton privacy rules. Under the new plan, medical providers may use patients' records as long as they inform patients of their privacy rights and request written acknowledgement from them, even after the records have been used. As the Washington Post points out, the key change in this policy is that control of the records is shifted from the patient to the provider.

Tommy Thompson, secretary of the Department of Health and Human Services (HHS), announced the proposal in a press release on March 21, 2002, arguing that the changes would ensure privacy while improving access to care.

The new proposal would also allow parents to have access to medical records of their children, such as information about mental health, abortion, and treatment for drug and alcohol abuse -- which privacy advocates argue will prohibit some teens from seeking medical treatment in those sensitive areas. According to the New York Times, the Bush administration proposal makes it clear that state law governs disclosures to parents.

Some parts of the original Clinton standards -- which were initially suspended by the administration -- are retained in the Bush proposal. In particular, patients will have the right to inspect their own medical records and possibly offer corrections.

GAO Report Examines Effect of White House Memo Halting Regulations

Fifteen rules that were scheduled to go into effect at the beginning of the Bush administration but were delayed by a White House memo have still not gone into effect, according to a recent report by the General Accounting Office (GAO) -- the investigative arm of Congress.

On President Bush's first day in office, January 20, 2001, White House Chief of Staff Andrew Card issued a memo directing all federal agencies to halt publication of new rules, completed at the very end of the Clinton administration, in the Federal Register. GAO determined that potentially 371 rules were subject to the memo, but only 90 were blocked on this basis.

Of these 90 rules, more than half were from the Department of Health and Human Services, the Department of Transportation, the Department of Agriculture, and the Environmental Protection Agency, and 65 of the 90 were determined by those agencies to be "significant or substantive" in nature. Yet according to GAO, "The agencies generally did not provide the public with a prior opportunity to comment on the delays in effective dates or rule changes, frequently indicating that notice and comment procedures were either not applicable, impracticable, or were contrary to the public interest."

By January 20, 2002 (one year after the memo), GAO determined that 75 of the 90 delayed rules had gone into effect. Of these, GAO identified three rules that had been withdrawn and replaced with new rules -- including an HHS rule on "protection of human research subjects" -- and nine rules that had been altered in some way but not withdrawn. The remaining 15 rules that have not taken effect include some potentially significant actions, such as:

- A Forest Service rule protecting national forests from new road building;
- A Department of Energy rule setting higher energy conservation standards for air conditioners and heat pumps;
- A rule from the Federal Aviation Administration restricting flights over Grand Canyon National Park; and
- A rule from the Mine Safety and Health Administration to protect miners from diesel particulate matter exposure.

A number of these rules were also identified as a "high priority" for review in a report from the Office of Management and Budget. Read more about that report.

In a number of cases, GAO points out that agencies have indicated they intend to change or withdraw a rule that has been allowed to take effect. This includes, for instance, a rule from the Department of the Interior placing restrictions on snowmobiling in Yellowstone and Grand Teton National Parks, as well as a rule from the Bureau of Land Management on "onshore oil and gas operations."

Clean Air Standards Upheld, Again

The Environmental Protection Agency (EPA) can finally move forward with its 1997 clean air standards for smog (ozone) and soot (particulate matter) following a ruling in its favor from the U.S. Court of Appeals for the D.C. Circuit on March 26 -- marking "a victory for breathers," according to Frank O'Donnell of the Clean Air Trust.

The ruling clears up the remaining legal issues over EPA's action that were left unresolved by the Supreme Court -- which earlier this year unanimously reversed a decision by a lower court to strike down the standards. Specifically, the D.C. Circuit found that EPA had not overstepped its legal authority, and that the standards were not arbitrary or capricious.

The decision comes amid mounting evidence of the dangers of fine particulates in the air (which frequently originate from vehicle engines, power plants, or wood fires) and ozone pollution. A study released earlier this month from the Journal of the American Medical Association found that long-term exposure to fine particulates significantly increases the risk of lung cancer. Other studies have shown that ozone exposure not only aggravates childhood asthma, but can also cause it. Now it is up to EPA to enforce the standards so that we will be protected from this damaging pollution in reality and not just legally in the courtroom.

As the Washington Post editorializes, President Bush could help by stopping efforts within his administration to weaken enforcement actions against heavy-polluting, older coal-fired power plants.

FERC Update

On March 25, the Federal Energy Regulatory Commission (FERC) stopped accepting comments on its ideas for limiting public access to "critical energy infrastructure information" (CEII). FERC first released an initial policy statement addressing this issue in October 2000, and followed it up with a January 16 Notice of Inquiry (NOI) in the *Federal Register*. The Notice of Inquiry sought public input on possible regulatory changes that would allow the agency to restrict unfettered general public access to CEII, but still permit those with a "need-to-know access to such information. The FERC Notice also indicated that until the agency takes final action on this issue, companies could self-identify CEII information that the agency will keep confidential.

The Notice also referenced a non-public index, entitled Overview of Previously Public Documents and Candidates for Critical Energy Infrastructure Information, that described the documents likely to be covered by this rule change. To view the appendix the public had to sign a non-disclosure agreement and any comments submitted with reference to the appendix would be considered confidential. According to FERC's docket records, 40 people signed agreements of non-disclosure in order to read the non-public appendix, the majority of which were power company and industry representatives.

According to FERC's docket, 49 comments were submitted on the Notice of Inquiry on behalf of 59 entities (some comments were on behalf of multiple organizations). Power companies and their associations dominated the process, submitting 29 comments, of which 5 were non-public because of signing the non-disclosure agreement. (Edison Electric Institute and Mid American Energy Company each submitted a non-public and a public comment; the other three were mixed with portions of their comments being public). The docket also revealed that government offices and agencies, primarily utility commissions, also had a fair level of participation with 7 comments. Only 6 public interest organizations, including OMB Watch, made comments. Additionally, a handful of non-power companies and private citizens submitted comments in this process.

While a majority of the comments, due primarily to the predominance of industry comments, were supportive of FERC's efforts, there were numerous commenters that either completely objected to FERC's actions or at least raised serious concerns. American Superconductor Corporation, for example, advocates possibly increasing information dissemination, noting, "efforts to suppress this information will not make the system stronger, or less vulnerable." The company states, "the grid must have much greater flexibility, capacity and "intelligence,'" and that "one useful approach is to publish more information about the state of the grid."

In its comments, the Utilities Commission for New Smyrna Beach, Florida raises its "significant reservations concerning the practicality, efficacy and legality" of FERC's proposals. New Smyrna concludes that CEII information is "already so broadly disseminated that restrictions of the type proposed in the NOI would be unlikely to provide significant additional security to U.S. energy infrastructure."

Indeed even PJM Interconnection, a company responsible for the operation and control of the bulk electric power system throughout major portions of five Mid-Atlantic states and the District of Columbia, urges FERC to only restrict disclosure "when it would increase the threat materially."

View the Docket of comments online.

Whitehouse Memo Orders Review of Information Procedures

On March 19, a little over six months after the terrorist attacks of September 11, the White House took action to "safeguard information" in the name of homeland security. The White House released two memos providing steps agencies should take to protect government information from being used by terrorists.

The memos are striking in two ways. First, it is surprising how little guidance the memos provide to agencies. For example, there is no information to help agencies in determining what information should be restored to web sites or what steps agencies should take in developing criteria to use in determining what information should be restored or restricted. There is no discussion of involving the public to help sort through the balancing between public access and security that might be needed.

Second, the memos are very troubling in their reach. The White House talks of "sensitive documents" without defining what the term "sensitive" means. One of the memos encourages agencies to review "sensitive but unclassified" information for the "need to protect such sensitive information from inappropriate disclosure…" While the memo calls for a balancing with the benefits "that result from the open and efficient exchange of scientific, technical, and like information," it places a heavy emphasis on nondisclosure. In fact, it provides rudimentary arguments for using the Freedom of Information Act (FOIA) as a means for exempting such information from public disclosure.

The first memo, from White House Chief of Staff, Andrew Card, was sent to the heads of all federal departments and agencies ordering them to undergo "an immediate reexamination" of current measures for identifying and protecting information on weapons of mass destruction. The Card memo goes on to broaden the focus beyond just information on weapons of mass destruction to also include "other information that could be misused to harm the security of our nation and the safety of our people." However, this categorization of "information that could be misused to harm" is so broad and general that an enormous amount of information that is significantly beneficial to the public would be included. Agencies and departments have 90 days to conduct this review and report to the Office of Homeland Security.

The second memo was from Laura Kimberly, Richard Huff, and Dan Metcalf, the Acting Director of the Information Security Oversight Office at the National Archives and Records Administration and the Co-Directors of the Justice Department's Office of Information and Privacy, respectively. The second memo provides guidance, prepared at Card's request, for this effort.

The vague guidance urges each agency to look at its classified, reclassified and declassified information, but also creates a new category, called "sensitive but unclassified." The guidance states that the decision to withhold information from the public "should be carefully considered, on a case-by-case basis," and that agencies should refer to the new October 12, 2001 policies established by Attorney General John Ashcroft regarding implementation of the Freedom of Information Act. The guidance also indicates that the government may consider information filed voluntarily by companies to be protected from the Freedom of Information Act under the existing trade secrets and confidential business information exemption.

These memos, by themselves, do not demonstrate an erosion of public access. But they are part a larger mosaic that represents a huge shift from policies premised on the belief that the public has a right-to-know to one based on need-to-know. Increasingly agencies are requiring the public to justify how they would use the information in order to determine whether public access should be granted. From our perspective, this trend is very disturbing.

The full text of the memos is available online.

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