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Coalition for an Accountable Recovery Submits Comments on Recovery.gov Guidance Memo

On April 17, the Coalition for an Accountable Recovery (CAR) submitted its comments on the Office of Management and Budget's (OMB) April 3 memo, "Updated Implementing Guidance for the American Recovery and Reinvestment Act of 2009." The memo is a supplement to a previous set of guidelines issued Feb. 18 to federal agencies on the implementation of the Recovery Act. CAR notes that OMB's efforts are laudable and that the guidance is helpful in advancing transparency and accountability with regard to Recovery Act spending. However, the coalition also argues that the guidance still needs modification for meaningful transparency and accountability to be realized.

To enable the level of transparency in Recovery Act spending as described by President Barack Obama when he signed the bill into law, the federal government should collect spending

information, including data about who is receiving Recovery Act money, how much they are getting, and what they are doing with it; this information should be collected directly from Recovery Act funds recipients. The Recovery Act and OMB guidance, however, take a different approach to recipient reporting. Instead of a system in which all recipients (other than individuals but including states) of Recovery Act funds submit expenditure and performance reports, the model described in the act and in OMB guidance would have only those entities that receive Recovery Act funds directly from the federal government report on the use of those funds. Additionally, data from these prime recipients would be reported directly to the federal agency that disbursed the funds, with the disbursing agency making that information available on Recovery.gov. Not only would the public not be able to directly view these recipient reports, recipients of Recovery Act funds that are sub-awardees (e.g., subcontractors and sub-grantees) would not be required to report on the use of their funds. The use of tens of billions of Recovery Act dollars by thousands (perhaps tens of thousands) of Recovery Act funds recipients would be hidden from public scrutiny.

The April 3 OMB guidance would implement such a model of limited transparency, obscuring a substantial portion of Recovery Act expenditures. However, the guidance states that OMB intends to eventually improve this reporting system by requiring that expenditure reports be collected directly from all recipients, including those that receive funds from prime and sub-recipients.

> [T]he current reporting model will not track funds to subsequent recipients beyond these local governments or other organizations. OMB plans to expand the reporting model in the future to also obtain this information, once the system capabilities and processes have been established.

CAR, co-chaired by OMB Watch and Good Jobs First, applauds this move to a system of multi-tier reporting but recommends that OMB not only elaborate on the details of such requirements, but also specify a date by which this will be implemented. Another improvement in the recipient reporting system is also on the horizon. In the revised guidance, OMB states that it "intends to oversee the development a central collection system" that would require recipients to report directly on the use of Recovery Act funds to the federal government. By collecting these reports directly from recipients, OMB would mitigate delays and distortions of data in the reports. And like the eventual requirement of multi-tier recipient reporting, OMB has not specified the details of such a system. CAR has recommended that OMB require all recipients of Recovery Act funds over $25,000, regardless of how many layers removed from the initial federal disbursal that receipt is, to report on their use of Recovery Act funds to the central collection system. OMB has, however, specified a date by which this system will be functional. In its April 3 guidance, OMB states that it is "moving aggressively to develop the capability to centrally collect the recipient reports due on October 10th, 2009."

Although OMB intends to make improvements in requirements of who reports and how, the April guidance neglects to move closer to CAR's vision of a spending tracking system that accounts for the use of Recovery Act funds. The guidance elaborates somewhat on how the number of jobs saved or created is to be reported, but it remains silent on requiring that other

jobs data (e.g., wages paid, types of benefits, and other job quality indicators) be reported. There is also no requirement to track information about the demographics of people who are getting jobs. OMB gives significant leeway to federal agencies in establishing quantitative outputs and outcomes to measure the impact of Recovery Act projects. While CAR recognizes that the programmatic agencies are better suited than OMB to establish theses benchmarks, CAR recommends that OMB work with agencies to ensure that sufficient and relevant performance data are collected and that OMB set a short timeframe to establish which performance criteria will be collected. CAR also makes a number of other recommendations, including suggestions about contract details, weekly agency report details, and data feed specification in its comments to OMB.

In addition to noting critical gaps in recipient reporting requirements, CAR recognizes that OMB appears to moving toward a model of reporting articulated in CAR's Interim Recovery.gov Data Reporting Architecture. The Obama administration has set aggressive and laudable goals for Recovery Act spending reporting and has made improvements since Recovery.gov was launched. By seeking comments from the public, OMB is engaging in an iterative design process that will result in an increasingly improved Recovery Act expenditure tracking system. While CAR recommends that OMB make a number of changes to its guidance, it also notes that OMB appears to be on the right track with this latest revision.

EPA Moves to Require Greenhouse Gas Reporting

The U.S. Environmental Protection Agency (EPA) has taken the first crucial step toward creating a transparent and accountable climate change program by proposing a greenhouse gas registry. The registry would require thousands of facilities from a broad range of industries to record and report their annual emissions of greenhouse gases. A comprehensive registry is a prerequisite for any future efforts to reduce greenhouse gas emissions.

According to EPA, the proposed registry would cover approximately 13,000 facilities, accounting for roughly 85 to 90 percent of greenhouse gases emitted in the United States. The proposed threshold for reporting greenhouse gases is 25,000 tons per year of carbon dioxide equivalent (CO2e). Carbon dioxide is only one of at least six gases covered by the draft rule, but since each gas has a different impact on global warming, the impacts are converted into the carbon dioxide equivalent for consistency. The EPA published the proposed registry rule on April 10 and is accepting public comments on the plan until June 9.

The proposal would cover many energy-intensive industry sectors such as cement production, iron and steel production, and electricity generation, among others. Emissions from cars and trucks would not be covered directly, but motor vehicle and engine manufacturers and transportation fuel suppliers would be covered. Petrochemical production facilities and refineries would also be covered. Emissions from manure management systems at the largest factory farms would be included.

EPA estimates that first-year reporting costs for the private sector would total $160 million, with annual reporting thereafter costing $127 million. EPA's proposal also provides for administrative, civil, or criminal penalties for facilities that fail to monitor or report greenhouse gas emissions under the new rule.

Benefits of Registry

As Congress moves climate change legislation forward and the EPA proceeds with greenhouse gas regulations, a registry becomes more essential. Detailed and transparent data on emissions are crucial for efficiently implementing a cap-and-trade system, which would place a monetary value on each ton of emitted gases and is now being pushed by President Obama and leaders in Congress. A mandatory registry covering all major emitters could provide the transparency to efficiently set prices on emissions and the accountability to ensure their reduction.

Even without mandatory emissions regulations, public disclosure of emissions could serve as an incentive to reduce such pollution. The EPA's Toxics Release Inventory (TRI), which requires reporting of releases of toxic chemicals from specific facilities, has used public disclosure to drive significant reductions in toxic emissions over the years.

Data collected under this proposal might give EPA a better understanding of the relative emissions of specific industries and the distribution of emissions from individual facilities within those industries. These data could be used to evaluate what forces are driving emissions increases and what technologies are succeeding at emissions reductions.

Additionally, a greenhouse gas registry provides a baseline whereby facilities can earn credit for early emissions reductions reached before a mandatory system is implemented. A comprehensive registry of emissions also would enable EPA to use voluntary reduction programs for industries not covered by future legislation.

Missing Pieces

Even though the proposed registry rule represents a major step forward for EPA’s efforts on climate change, there are several facets noticeably absent from the current proposal. It is likely that the agency will receive comments pushing for several of these missing pieces to be addressed before moving forward.

First, the proposed registry does not include a mechanism to track greenhouse gas offsets, which are measures that reduce the amount of global warming gases in the atmosphere. Offsets are likely to play a major role in future climate change legislation. Tracking the creation and verification of offsets would be crucial to an efficient emissions trading scheme.

The proposed rule also does not require third-party certification of a facility's emissions report. Without independent verification, the market for greenhouse gases would be functioning with less certainty and accountability. The draft rule does, however, require electronic reporting, and

EPA intends to use existing reporting programs where practicable – both provisions could improve the accuracy of reported data.

Manufacturers of cars and trucks would need to report emissions rates for greenhouse gases, similar to current reporting for other pollutants. However, the proposed registry would not collect data on emissions from in-use travel. Almost 30 percent of U.S. greenhouse gas emissions come from the transportation sector.

It is also notable that the proposed rule does not address how the new registry will mesh with the assortment of local, state, and regional greenhouse gas registries, some voluntary and some mandatory. The programs are widely varied in both the breadth of reporting sources and methods for tracking emissions. It is unclear if the national program will preempt these programs or if states will be encouraged to alter their existing programs to fit more readily within the new federal program.

EPA's current timetable calls for 2010 to be the first year of emissions reporting, and while efforts to reduce greenhouse gases would benefit from having several years of baseline emissions data, time is of the essence when it comes to enacting climate change mitigation policies. Leaders in Congress hope to pass climate change legislation by the end of 2009, and the final major international meeting to produce a treaty to succeed the Kyoto Protocol will be held in December. It is hoped that the data from the proposed greenhouse gas registry will enhance expected U.S. mitigation policies once they are enacted; such implementation would occur over the course of several years.

Sixth Annual Ridenhour Awards Honor Truth-Telling, Courage

The Sixth Annual Ridenhour Awards were presented April 16 by the Nation Institute and the Fertel Foundation. The awards are presented each year to journalists and whistleblowers in honor of Ron Ridenhour, a former Vietnam veteran who exposed the 1968 massacre at My Lai. The awards are given to those who act to protect the public interest and promote social justice. The 2009 awardees were Thomas Tamm, Bob Herbert, Jane Mayer, and Nick Turse.

Ridenhour, a recipient of the 1987 George Polk Award, led a long and distinguished career as a journalist before passing away in 1998. The awards presented in his name are generally given to top winners in the categories of truth-telling, courage, and authorship. In 2009, an additional prize for reportorial distinction was awarded. A number of past recipients, including Joseph Wilson and Daniel Ellsberg, were in attendance.

Truth-Telling

The award for truth-telling went to former Department of Justice attorney Thomas Tamm. Tamm blew the whistle on the National Security Agency's (NSA) domestic wiretapping program. He had initially brought the issue of questionable legality of the program to his superiors in 2004. After being warned to drop the subject, Tamm proceeded to call *The New York Times*

from a subway pay phone, informing the paper of the NSA program. The *Times* published the story, and the authors of the article wrote books on the subject.

Tamm suffered revenge from the government as a result of his work to expose the program. He was harassed and investigated by the Federal Bureau of Investigation (FBI), his house was raided, and his children were subjected to FBI interrogation. Despite the hardships he has faced after revealing the NSA's illegal activities, Tamm has stood strong on the principles that guided his actions. At the awards ceremony, he said, "We are safer, stronger, and more secure when we support the rule of law." From Tamm's experiences, it is evident that whistleblowers still need greater protections under the law.

Courage Prize

New York Times columnist Bob Herbert won the courage award for the overall fearless truth-telling of his reporting. On the eve of the American invasion of Iraq, Herbert stood out from other journalists in one clear way – he opposed the war. In addition to his unpopular but accurate stance on that issue, Herbert has also taken on the problems of poverty and racism in his work.

In his acceptance speech, Herbert dispelled the belief that working men and women had no responsibility for current events. Herbert stressed that despite the commonly held belief to the contrary, ordinary people do have power and great ability to shape policy.

Book Prize

Jane Mayer of *The New Yorker* won the book prize for her 2008 work, *The Dark Side*. This extensively researched book connects the extraordinary rendition and torture of detainees captured by U.S. forces to top officials in the Bush administration. Mayer shows how these arguably unconstitutional policies implemented during the "war on terror" actually impeded the fight against Al Qaeda. Despite the protests of top intelligence officials, the Bush administration pushed forward with such policies, which ultimately undermined national security.

Reportorial Distinction

This prize, unique to the 2009 awards, was awarded to Nick Turse for his November 2008 article, "A My Lai a Month." Turse built upon Ridenhour's work to demonstrate that My Lai was not a unique event. Ridenhour had expressed that My Lai was "an operation, not an aberration." Turse, simultaneously filling the roles of historian, journalist, and whistleblower, used records at the National Archives, as well as unpublished interviews with Vietnamese survivors and U.S. military officials, to prove Ridenhour's claim. Turse demonstrated that high-level generals authorized the systematic use of "brute force" in Vietnam instead of the use of discriminate and selective firepower.

Vietnam is still seen by many Americans as a war in which U.S. forces were defending the freedom of the South Vietnamese people, rather than an aggressive assault on North Vietnam.

Turse's work teaches us that when records are sealed for generations and abuses of power are effectively hidden for decades, our national memory is altered.

Each of these people is an example of individuals willing to stand up for their country in the face of retribution. They are whistleblowers and journalists seeking to expose abuses of power so that such misconduct is an aberration, not the operative norm.

EPA Moving on Climate Change

In the first major move by the federal government to address climate change, the U.S. Environmental Protection Agency (EPA) has declared heat-trapping greenhouse gas emissions a threat to public health and welfare, setting the stage for potentially major regulations.

According to a notice released April 17, EPA Administrator Lisa Jackson believes "the total body of scientific evidence compellingly supports" the finding that greenhouse gases endanger public health and welfare. Jackson also says cars and trucks contribute to greenhouse gas pollution.

While the so-called endangerment finding does not represent regulatory action in and of itself, it will obligate EPA to limit greenhouse gases in the future. The finding lumps greenhouse gases in with other air pollutants that require regulation under the Clean Air Act.

EPA is already working on regulations and expects to propose them for public comment "several months from now," according to the notice. The initial regulations will target vehicle emissions, but the endangerment finding will eventually require EPA to regulate stationary sources such as power plants or other industry facilities.

Congressional Democrats pushing legislation to address climate change welcomed EPA's announcement and hope to gain added leverage during the debate over a pending cap-and-trade proposal. Rep. Edward Markey (D-MA), one of the principal authors of the cap-and-trade bill, called EPA's notice a "game-changer."

Markey and other Democrats are betting that industry lobbyists and some Republicans will throw their support behind the cap-and-trade bill, viewing it as less onerous than EPA regulations.

The National Association of Manufacturers (NAM), an industry trade group, urged the Obama administration to "defer to Congress," signaling that the Democratic strategy may have some merit.

House Minority Leader John Boehner (R-OH), calling EPA's decision an "energy tax," said, "The Administration is abusing the regulatory process to establish this tax because it knows there are not enough votes in Congress to force Americans to pay it."

The cap-and-trade bill, sponsored by Markey and Rep. Henry Waxman (D-CA), attempts to prevent duplication or contradiction between EPA regulations and the proposed legislative solution by forbidding the agency from moving forward with any efforts to regulate greenhouse gas emissions under the Clean Air Act.

Instead, an economy-wide cap-and-trade program in which polluters haggle for emissions allowances would prevail. The program would set maximum emission levels for the entire U.S. and ratchet the cap down over time. By 2050, the program would reduce emissions 83 percent below 2005 levels, according to the bill.

However, until and unless the bill becomes law, EPA must continue plodding down a regulatory path. The U.S. Supreme Court ruled in April 2007 that EPA must determine whether greenhouse gases warrant regulation, though it did not set a deadline for the agency.

The Bush administration began that process shortly after the Court's ruling but later backed away from any aggressive action. In July 2008, EPA issued an advanced notice of proposed rulemaking, which only solicited comments on the issue of climate change and greenhouse gas regulation. The notice was criticized as a masquerade for real action.

Before publishing the advanced notice, Bush's EPA had prepared an endangerment finding, but White House officials blocked the agency from moving forward. Officials at the Office of Management and Budget (OMB) refused to open an e-mail sent by EPA with the finding attached, leaving the notice in bureaucratic limbo.

The finding prepared under Bush's EPA likely served as the basis for Jackson's finding, allowing the Obama administration to move quickly on the issue.

EPA backed up its finding by saying that the higher temperatures that greenhouse gases cause lead to a higher risk of heat-related deaths and increase the spread of food and water-borne illnesses. EPA says that the U.S. is already experiencing climate change's effects and that those effects "are expected to mount over time."

EPA also noted the negative effects on public welfare, including increases in wildfires, heavy rain, and flooding, as well as risks to crops and wildlife.

Jackson made the endangerment finding under a section of the Clean Air Act that deals expressly with vehicle emissions; the notice does not address stationary sources. However, the Clean Air Act requires EPA to regulate pollutants from stationary sources if the emissions endanger public health and welfare.

"EPA also will soon have to address whether power plants' CO2 emissions 'contribute' in the same way to dangerous global warming pollution," according to David Doniger, a climate change policy expert at the Natural Resources Defense Council.

Limits on stationary sources could have a major impact on the electricity industry. Electricity generation is responsible for 34 percent of U.S. greenhouse gas emissions, according to EPA. Transportation-related emissions account for 28 percent. The remainder is produced mostly by industrial sources, commercial sources, and residential sources, all of which could also be encompassed by stationary source regulations.

The endangerment finding is currently available on EPA's website. Once published in the *Federal Register*, EPA will accept public comment for 60 days. Jackson will likely formally announce her determination shortly thereafter.

Comments on New Regulatory Order Pour into OMB

Approximately 170 groups and individuals submitted comments for the Obama administration to consider as it begins reshaping or retaining the current regulatory structure. Although they varied significantly in many details, the comments reflect a familiar split between business interests and public interests that has characterized the regulatory debate for years.

On Jan. 30, President Barack Obama signaled his intention to issue a new regulatory executive order. He sent to the heads of executive departments and agencies a memorandum charging the head of the Office of Management and Budget (OMB) to work with federal agencies to produce recommendations for a new order and to develop the recommendations in 100 days; this 100-day period ends in early May. The memo outlined several factors that agencies should consider when making their recommendations.

On Feb. 26, the Office of Information and Regulatory Affairs (OIRA) published in the *Federal Register* a request for public comments on revisions to a new regulatory executive order. OIRA is the office within OMB responsible for reviewing significant regulations developed by agencies. OIRA's review function has been in place since President Reagan assigned the duty to the office in 1981. President Clinton, in 1993, issued the current executive order (E.O. 12866) that prescribes how this review takes place.

This was the first time that an administration sought public comment on the development of a regulatory order. In addition, OIRA officials met with several groups to discuss important issues related to designing a new order. Public comments were accepted from the issuance of the *Federal Register* notice through March 31. The notice contained the same list of factors for public consideration as outlined in the presidential memo to the agencies: 1) the relationship between OIRA and the agencies; 2) disclosure and transparency; 3) public participation in the rulemaking process; 4) the use of cost-benefit analysis; 5) concern for distributional considerations, fairness, and future generations; 6) ways to reduce delay in the review process; 7) the role of behavioral sciences; and 8) the best tools to use in the regulatory process.

Not surprisingly, there was significant disagreement between business interests and public health, labor, environmental, and consumer rights groups on two major issues. First, the majority of industry trade groups supported the existing relationship between OIRA and

agencies, citing the need for a central location responsible for coordinating agency activities, identifying duplications or contradictions, and ensuring consistency. The majority urged the administration to preserve OIRA's rule-by-rule review power. In addition, many groups urged OIRA to expand its review to agency guidance documents and rules promulgated by independent agencies (which are currently exempt from E.O. 12866 review).

Most public interest organizations argued that OIRA's role should change to one of planning and coordinating regulatory activity among federal agencies. They urged OIRA to stop reviewing individual rules because the office does not have the necessary expertise, the review adds to the delay in finishing rules, and the responsibility to produce rules is delegated by Congress to the agencies, not to OIRA.

Several groups wrote that public health or environmental considerations, not compliance costs, should be most important in regulatory decision making. The groups said Congress explicitly elevated safety, health, and environmental considerations above cost considerations in many statutes.

Second, the majority of industry groups expressed support for cost-benefit analysis as it is currently performed. Several expressly supported certain aspects of the existing framework such as the use of discounting future benefits, something strongly opposed by many public interest groups. Several groups called for evaluating the costs of regulations once the regulations have been in place. (Under the current approach, cost-benefit analyses include only estimates of compliance costs before rules are in place.) While strongly supporting the importance of cost-benefit analysis, many industry groups called for modifying the ways in which cost-benefit analysis is conducted by the agencies and used in decision making.

All of the public interest groups called for at least modifying, if not replacing, cost-benefit analysis. Some called for cost-benefit analysis to be used only when statutes require its use. Other groups wanted to supplement the analyses with additional quantitative and qualitative analyses such as cost-effectiveness analysis and distributional impact analyses. Others want to replace cost-benefit analysis with either other economic analyses or considerations of "safety first." Although the two sides disagree over the use of cost-benefit analysis, there was broad support for reassessing the way the tool is currently used if it is retained in a new regulatory order.

Several academic scholars and groups submitted comments, and those, too, were split over these two primary issues. Most of the academic comments, however, also called for modifications or supplements to cost-benefit analysis.

There were also areas of agreement among the various commenters. Broad support exists for increasing transparency in the regulatory process. Many industry and public interest groups, individuals, and academics called for more openness within OIRA and the agencies. Of primary concern to most was the need for greater transparency of communications among OIRA, agencies, and outside interests. There was also strong support for having agencies initiate their

online regulatory dockets earlier in the process and for including in those dockets all relevant information, such as scientific and technical studies, communications, and data.

Many commenters also substantially supported increasing public consultation in the process. For example, there was widespread support for expanding and revamping electronic portals to increase public participation and disclosure of information. Agencies and OIRA need to improve their electronic capabilities. There was considerable support for enhancing electronic rulemaking capabilities generally; specific comments focused on improving Regulations.gov, the current government-wide system used for rulemaking activity.

Many comments acknowledged that it takes too much time for rules to be completed, but there was little agreement on solutions to make the process timelier. Some argued that increased coordination and planning by OIRA could speed up the process. Many public interest groups argued that OIRA's review of regulations takes too long and does not appropriately defer to agency expertise. There was substantial support for analyzing the various sources of delay that infect the current process and developing solutions to make the process more responsive.

Many comments addressed distributional considerations generally, but there was little agreement on how this should be done. Few comments specifically addressed the role of behavioral sciences and the best tools to use in the process, the last two topics OMB listed in the request for comments.

The Obama administration has not projected when a new executive order might be completed. On April 20, the administration nominated Cass Sunstein to be OIRA administrator. Sunstein, a colleague of Obama's on the University of Chicago law faculty, is a prolific academic, most recently serving as a faculty member at Harvard University. He is a controversial figure when it comes to administrative law issues and will likely want to have his hand in crafting any executive order. Assuming Sunstein is rapidly confirmed by the Senate, a new order probably will be completed in late summer or early fall.

Lobbying for Recovery Act Funding Restricted

On April 7, the Office of Management and Budget (OMB) issued interim guidance on how to comply with President Barack Obama's March 20 memorandum that restricts contact between registered lobbyists and executive branch officials regarding the American Recovery and Reinvestment Act of 2009.

The OMB guidance clarifies that federally registered lobbyists may only communicate in writing with executive branch officials when it comes to issues about how Recovery Act money is to be spent. However, those not registered under the Lobbying Disclosure Act, including state lobbyists, are permitted to meet or call executive branch officials about Recovery Act spending.

The OMB guidance memo states that government officials should not avoid meeting with lobbyists, and the policy is not meant to ban lobbying communications. Agencies "should

proceed with all communications with Federally registered lobbyists in accordance with the prescribed protocol." The "prescribed protocol" has lobbyists up in arms.

According to the interim guidance, oral communications with federally registered lobbyists are restricted to general and logistical questions related to Recovery Act funding or implementation. Examples of permissible conversations include: how to apply for funding, how to conform to deadlines, to which agency or officials applications should be directed, and requests for information about program requirements. There are also no restrictions on oral communications with federal registered lobbyists at widely attended gatherings, as defined in ethics rules.

However, the interim guidance makes clear that federally registered lobbyists associated with for-profit companies, nonprofit organizations, and state and local government entities are prohibited from conducting oral communications with executive branch officials regarding "particular projects, applications, or applicants for funding." A particular project is considered to be "(i) a discrete and identifiable transaction, or set of transactions (ii) in which specific parties have expressed an interest." OMB's guidance only applies to communications before Recovery Act funding is awarded, which may allow a lobbyist to speak with a government official about changes to a grant or contract.

If a discussion between an executive branch official and a federally registered lobbyist extends beyond generalities and begins to cover restricted topics about the Recovery Act, the official must end the conversation and ask the lobbyist to submit the comments in writing. The written comments must be posted online within three days. The date of contact, the name of the lobbyist's client(s), and a one-sentence description of the substance of the conversation must be disclosed. In addition, all written documents registered lobbyists send to agencies have to be disclosed and posted on the agency's Recovery Act website.

The restrictions on lobbyists were faulted as too broad and raise questions about infringing on First Amendment free speech rights. According to *The Hill*, the American League of Lobbyists (ALL), the American Civil Liberties Union (ACLU), and Citizens for Responsibility and Ethics in Washington (CREW) are considering suing the federal government to block the new policy. The groups argue that the requirements are too burdensome and as a result, officials will not want to meet with lobbyists, creating adverse effects.

Because the rules only apply to *federally registered* lobbyists, state registered lobbyists are free to discuss specific Recovery Act projects with the administration. The policy also does not apply to individuals who used to be but are no longer federal lobbyists. The same concern arises as with Obama's hiring restrictions: the focus on *registered* lobbyists. Some advocates note that registered lobbyists are unfairly singled out in these policies, and anyone else who does not meet the federal definition of a lobbyist can meet with federal officials to discuss projects without having these meetings disclosed. In turn, more nonregistered lobbyists will be meeting with agencies about Recovery Act funding.

Communications between lobbyists and agencies are beginning to appear online, but currently, there are only a handful listed. To get this information, one must go to each agency's separate Recovery Act web page and then locate any lobbying communication. There are multiple inconsistencies between the agencies, and some do not reference lobbying contacts at all. For example, the Department of Energy refers to lobbying contacts as "interested parties," while others list "lobbyist correspondence." Preferably, the lobbying information would reside at one site for all agencies.

Legal Services Corporation Changes Introduced

Momentum is growing for Congress to eliminate severe restrictions on legal aid programs that receive Legal Services Corporation (LSC) funds. LSC programs are currently prohibited from engaging in certain activities such as lobbying, participating in agency rulemaking, and bringing class-action lawsuits. The new congressional efforts come as reports show how the restrictions have harmed home foreclosure prevention efforts.

The LSC is a nonprofit corporation that provides grants to legal aid groups and is funded by Congress through direct appropriations. An appropriations rider containing special conditions has been attached to LSC funding and has been renewed annually since 1996.

On March 26, Sen. Tom Harkin (D-IA) introduced the Civil Access to Justice Act of 2009 (S. 718) that ends the LSC restrictions on the use of non-federal funds, except those related to abortion litigation. "Lifting these restrictions allows individual states, cities and donors the ability to determine themselves how best to spend non-federal funds to ensure access to the courts," said Harkin. The bill also seeks to increase the LSC budget from $390 million to $750 million.

According to a Harkin press release, the Civil Access to Justice Act would remove "many of the restrictions currently placed on legal tools that LSC-funded attorneys can use to represent their clients. [. . .] In the spirit of compromise, the bill does maintain the prohibition on abortion related litigation as well as many of the limits on whom LSC-funded programs can represent, including undocumented immigrants (with limited exceptions such as victims of domestic violence), prisoners challenging prison conditions and people charged with illegal drug possession in public housing eviction proceedings." The measure would also create a program to expand law school clinics.

On April 7, the Brennan Center for Justice released a fact sheet that shows how the LSC restrictions harm foreclosure prevention efforts. Homeowners who are losing their homes to foreclosure are in need of legal help, yet the legal services available to them are limited and underfunded. The fact sheet details accounts of ordinary Americans and how the LSC restrictions have impacted homeowners in their struggle to keep their homes.

During this time of economic recession, there appears to be strong public support for legal services. Reportedly, two-thirds of those polled on behalf of the American Bar Association said they favor federal funding for people who need legal assistance.

A *Washington Post* editorial on March 14 went even further. It asked lawmakers to "unshackle Legal Services from congressionally-imposed restrictions that have kept it from working more efficiently and broadly." For example, unlike most others who represent plaintiffs, Legal Services lawyers who prevail in a civil case are prohibited from seeking legal fees from an opponent. The editorial also called for support of the Harkin bill.

A number of organizations also signed a joint letter that draws upon the current economic crisis to highlight the need to remove the restrictive appropriations rider. According to the letter, "Families and communities across the country are suffering because of the restrictions: victims of consumer fraud and illegal housing practices are placed at a disadvantage because LSC-funded attorneys cannot seek attorneys' fees; efforts to help prisoners reenter society are needlessly postponed; communities are hamstrung in their ability to combat predatory lending practices because legal aid clients cannot participate in class actions; and those most knowledgeable about issues critical to low-income clients cannot engage themselves in legislative and administrative reform efforts."

Supreme Court to Decide on Key Provision of 1965 Voting Rights Act

Northwest Austin Municipal Utility District No. 1 (NAMUDNO) v. Holder, a U.S. Supreme Court case in which a small utility district in Texas is challenging Section 5 of the Voting Rights Act of 1965, is scheduled for oral argument on April 29. Section 5, reauthorized in 2006, applies to all or part of 16 states, and it applies to nine states in their entirety. It requires those states to get federal approval before changing election rules or procedures, due to past laws and practices that discriminated against and disenfranchised racial minorities. This provision is referred to as the "preclearance" provision.

The implications of the NAMUDNO case have raised the level of interest in voting districts nationwide. In California, four counties are covered by the "preclearance" provision, the benefits of which the state has already touted. California Attorney General Jerry Brown "described the Voting Rights Act as 'a safeguard against discrimination' that has worked well ever since it was enacted," according to the *Daily Journal*. The blog reported that, in California, "supporters of Section 5 point out that, as recently as 2002, the U.S. Justice Department questioned proposed changes to the way Chualar Union Elementary School District in Monterey County elects its school trustees." The district wanted to change from electing trustees based on geographical area to electing trustees using an at-large system.

The "Justice Department said the move could have a discriminatory impact on Hispanics because they would be less enabled to vote for their preferred candidate," according to the *Daily*

Journal. Thus, the change did not go into effect due to the Justice Department's belief that it "was motivated, at least in part, by a discriminatory animus."

Six states covered in whole or in part by Section 5 submitted a brief supporting the continuation of the Section 5 "preclearance" provision. The brief, written by North Carolina Attorney General Roy Coope, and joined by the attorneys general from Arizona, California, Louisiana, Mississippi, and New York, says that the "preclearance requirements of Section 5 do not impose undue costs on covered jurisdictions." The brief also argues that the preclearance provision offers benefits to the covered jurisdictions by encouraging districts to "consider the views of minority voters" early in the process to change laws, helping to identify changes that have a "discriminatory effect," and preventing "costly litigation."

Other covered states, notably Alabama and Georgia, disagree with the views espoused by the aforementioned attorneys general. Alabama Gov. Bob Riley (R) says that voting rights discrimination in Alabama is an issue of the past. Thus, he directed state lawyers file a brief to that effect. Attorneys for the governor argue in the brief that Alabama only received two rejections from 1996-2005, out of more than 3,000 instances in which they sought clearance from the Justice Department. This, however, does not indicate that Alabama officials would not disenfranchise voters if they knew that there was no federal government oversight.

According to the *Birmingham News*, Riley said in the brief that "Congress wrongly equated Alabama's modern government, and its people, with their Jim Crow ancestors." Riley also says in the brief that "while several states moved the dates of their 2008 presidential primaries without needing permission from the federal government, it took Alabama four months to do so because of the Voting Rights Act."

The *NAMUDNO* case also impacts nonprofit organizations. The case affects constituents often served by these groups. Nonprofits have been instrumental in helping to ensure that voters are not disenfranchised. The OMB Watch report, *How Nonprofits Helped America Vote: 2008*, illustrates the efforts that nonprofits have taken to protect the electoral process and demonstrates the importance of continued nonprofit voter engagement.

To safeguard the rights of the constituents it serves, the nonprofit NAACP filed a merits brief. Other nonprofits, including the Constitutional Accountability Center, the Asian American Legal Defense and Education Fund, the Leadership Conference on Civil Rights, and the Brennan Center for Justice, filed amicus briefs in the case.