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In This Issue

Plastics Chemical Poses Health Risk, Businesses Respond

The findings of a U.S. government science panel and actions by the Canadian government are prompting major retailers and manufacturers to reconsider selling products containing bisphenol-A, a chemical commonly found in hard plastics and food containers.

On April 15, the U.S. National Institutes of Health's National Toxicology Program (NTP) released a report claiming ingestion of bisphenol-A poses a possible risk to human health. The report says high levels of exposure to the chemical can cause reproductive or developmental abnormalities, such as low birth weight, and may lead to a wide variety of cancers including breast and prostate cancer.

Three days later, the Canadian government announced a proposed ban on bisphenol-A in baby bottles, citing its own study on the chemical. Both the U.S. and Canadian studies found that fetuses and infants are at a higher risk for the adverse health effects associated with exposure

to bisphenol-A.

In response, Wal-Mart Canada has already begun to pull from its shelves baby bottles containing the chemical. The retailer also announced it would begin phasing out bottles containing bisphenol-A in its U.S. stores and stop selling them by early 2009, according to *The Washington Post.*

Nalgene, makers of the ubiquitous translucent water bottles, announced it would stop using bisphenol-A in its products. Baby bottle manufacturer Playtex also said it would phase out the chemical.

Bisphenol-A is an ingredient in hard, polycarbonate plastics. No. 7 plastics, like those used for reusable water bottles, are usually polycarbonate. Bisphenol-A is also an ingredient in certain resins used to line food cans.

The NTP report finds most humans are exposed to bisphenol-A and retain it in their bodies. The report states, "Bisphenol A can migrate into food from food and beverage containers with internal epoxy resin coatings and from consumer products made of polycarbonate plastic such as baby bottles, tableware, food containers, and water bottles." The report cites another U.S. study that found bisphenol-A in 93 percent of humans tested.

The panel then looked at studies of laboratory rodents exposed to bisphenol-A and found a wide variety of adverse health effects at high doses and other possible health effects at low doses.

NTP concluded bisphenol-A is of "some concern" — a qualitative designation. Other options available to the panel included "serious concern" and "concern" for riskier substances, and "minimal concern" and "negligible concern" for less risky substances.

Although the NTP report finds bisphenol-A may pose risks to human health, NTP cannot act on its findings because it is not a regulatory agency. Regulation of the chemical would fall to the U.S. Food and Drug Administration (FDA) which, like NTP, is a division of the Department of Health and Human Services.

FDA has consistently refused to regulate bisphenol-A in the face of public and congressional pressure. The agency has said bisphenol-A does not pose a "safety concern at the current exposure level."

But a congressional investigation uncovered that FDA had relied on two industry-funded studies in making its determination not to regulate. The House Energy and Commerce Committee wrote to FDA in January asking the agency to identify the basis on which it has made its decision. FDA identified two studies, both of which were funded by the American Chemistry Council. One study had never been published or subjected to peer review.

Most other bisphenol-A studies have shown varying degrees of human health risks. In August

2007, an NIH-sponsored panel of 38 independent experts found that the level of bisphenol-A present in the average human's bloodstream is higher than levels that have been found to cause adverse health effects in laboratory tests.

The move by Wal-Mart, Nalgene, and others mirrors that of other industries that have decided to take voluntary steps in response to mounting evidence and public pressure, but in advance of federal mandates. For example, after widespread reporting of the dangerous effects of diacetyl, a chemical used to give popcorn its buttery flavor, major popcorn makers like Orville Redenbacher announced they would discontinue use of the chemical. Countless individual businesses and industries are also taking steps to mitigate their carbon footprints in order to combat climate change.

The trend is a natural response to the Bush administration's refusal to regulate in any area, even when regulation would aid both consumers and businesses. In the cases of both diacetyl and climate change, the Bush administration has rebuffed public petitions, court mandates, and congressional pressures to act.

Most recently, the White House halted a U.S. Environmental Protection Agency (EPA) rulemaking which would have set carbon emissions limits. Instead, EPA is asking for "comment on the best available science." Similarly, FDA and other Bush officials continue to emphasize the need for further study of bisphenol-A's effects before action can be taken.

Fuel Economy Proposal: Higher Mileage, State Preemption

The U.S. Secretary of Transportation, Mary E. Peters, announced April 22 a proposed new rule to raise fuel efficiency standards for cars and light trucks. In December 2007, Congress passed the Energy Independence and Security Act, which required revisions to the Corporate Average Fuel Economy (CAFE) standards. The new rule, if implemented, would be the first significant improvement in fuel efficiency standards since the CAFE program's inception in 1975.

The CAFE program sets a mandatory fuel efficiency rate (measured in miles per gallon) and fines manufacturers who are not in compliance. Manufacturers are evaluated based upon the fuel economy of their entire fleet as opposed to individual vehicles. CAFE standards were widely credited with improving automotive fuel economy in the years immediately following enactment, but progress has since leveled off.

The Energy Independence and Security Act of 2007 required the Transportation Secretary to issue regulations to achieve a 40 percent improvement in the fuel standard by 2020. According to Peters' speech, the proposal achieves a 25 percent improvement by 2015, or a 4.5 percent annual improvement, which exceeds the pace established in the law. The proposed standard, written by the National Highway Traffic Safety Administration (NHTSA), sets an industry average of 35.7 miles per gallon (mpg) for passenger cars and 28.6 mpg for light trucks by 2015. Peters said the proposal also "would reduce carbon dioxide emissions by an estimated 521 million metric tons, and is an important part of this Administration's commitment to

reduce greenhouse gas emissions."

The Alliance of Automobile Manufacturers (the Alliance), an important trade association for carmakers, praised the proposal, saying it "represents an important mile marker" on the way to meeting the law's requirements. "While these increases will present a challenge, it is critical that automakers and consumers have the certainty that this nationwide, 50-state fuel economy rule provides." This is a reference to the Alliance's and the Bush administration's desire to have one national standard instead of letting states like California determine fuel efficiency through vehicle emissions standards as part of their programs to reduce greenhouse gases.

While the new proposal would result in a significant improvement in fuel efficiency, the proposal needs to be seen in light of the administration's recent denial of California's clean air waiver. In December 2007, the administrator of the U.S. Environmental Protection Agency (EPA), Stephen L. Johnson, denied California a waiver under the Clean Air Act (CAA) to establish a state vehicle emissions standard. The CAA specifically allows California to receive EPA waivers to set standards more stringent than the national standard. Other states are then free to adopt the California standard. Part of Johnson's rationale was that a patchwork of state standards would be confusing to automakers.

Avoiding a patchwork of regulations at the state level was indeed the rationale for establishing federal environmental protection laws in the 1960s and 1970s. Creating one national standard to avoid the patchwork that Johnson referred to in the California waiver decision, and that the Alliance noted in its response to the new CAFE standards, is misleading. Granting California a waiver would mean that there would only be two standards, a national standard and California's standard, even if it was adopted widely by other states.

More likely, what the Bush administration and the Alliance are trying to achieve is one national standard because California's vehicle emissions program might result in a stricter fuel efficiency standard. Evidence of this is contained in the CAFE standards proposal. Near the end of the 400-plus-page proposed rule, NHTSA writes, "Given that a State regulation for tailpipe emissions of CO2 is the functional equivalent of a CAFE standard, there is no way that NHTSA can tailor a fuel economy standard so as to avoid preemption." (California's approach focused on tailpipe emissions.) NHTSA writes, "We respectfully disagree" with two district court rulings in Vermont and California that greenhouse gas vehicle emission standards adopted by those states are not preempted by the law that created the CAFE program. The agency also proposes to preempt state standards in the new rule.

The responses to the new proposed rule from public interest groups acknowledge the improvement in fuel efficiency that should be achieved. However, Public Citizen's Joan Claybrook, who was NHTSA administrator from 1977 to 1981, issued a press release in which she takes both NHTSA and Congress to task for their failure to establish stricter standards. "Other countries already have set targets that exceed the U.S. 2020 goal — Japan requires more than 35 mpg by 2010; the European Union is ramping up to as much as 52 mpg by 2012; and even China will require 38 mpg for 2008."

The Environmental Defense Fund (EDF) said the proposal represents "only one step toward a national policy to protect the climate and ensure lasting energy security." According to John DeCicco, an EDF senior fellow, "What's missing is a comprehensive solution that will unleash innovation and require other parties — such as the petroleum industry — to contribute a fair share of emissions reductions, both in the transportation sector and across the economy."

Farm Bill Proposes Food Safety Improvements

The huge farm bill reauthorization under discussion among House and Senate conferees contains two food safety-related items that could help regulatory agencies better protect the U.S. food supply and provide consumers with more information when making purchasing decisions. First, the bill contains country-of-origin labeling, primarily for marketing livestock by-products. Second, it proposes a bipartisan food safety commission to review the existing food system and make recommendations for improvements.

The Food and Energy Security Act of 2007, H.R. 2419, passed the House and the Senate in 2007 and is now undergoing final negotiations among the conference members. The conference is led by Senate Finance Committee Chairman Max Baucus (D-MT) and House Agriculture Committee Chairman Collin Peterson (D-MN). According to an April 28 BNA story (subscription), the leaders expect negotiations on remaining issues to be completed in their next conference meeting, expected to occur April 29, allowing them to write the final version and send it to President Bush by May 6.

One section of the bill amends the Agricultural Marketing Act of 1946 to require country-of-origin labeling for beef, pork, lamb, chicken, and goat meat. The provision defines the conditions that allow retailers to label food products with a U.S. origin label and those that require labeling products from another country. A similar provision requires labeling for seafood products and an indication of whether the fish is farm-raised or wild-caught. Additional country-of-origin labeling applies to macadamia nuts, peanuts, honey, and ginseng.

Pressure to provide country-of-origin labeling is the result of the many imported food recalls over the last few years that have consumers worried about food safety. The number of meat and poultry products has increased dramatically — due both to increased imports and domestic production — but the ability of regulatory agencies to keep up with the increase has lagged well behind.

Another provision of the bill creates a bipartisan food safety commission consisting of 19 members from federal agencies, Congress, consumer groups, public health experts, and agricultural and livestock producers and processors. The primary function of the commission is to produce a report that 1) summarizes information about the U.S. food safety system, and 2) makes recommendations on a variety of ways to improve the system.

The bill is quite specific about the range of statutes, reports, and studies the commission is to review. More importantly, the bill requires the commission to recommend ways 1) to

modernize the food safety system, 2) to update and coordinate the various food safety statutes, 3) to emphasize a preventive approach instead of a reactive approach, 4) "to ensure that regulations, directives, guidance, and other standards and requirements are based on best-available science and technology," and 5) to ensure that agencies receive the funding necessary to carry out their regulatory responsibilities.

The Bush administration is opposed to the new reauthorization bill, claiming it is too expensive and maintains too many subsidies to wealthy farmers, according to an April 24 *Washington Post* story. The White House favors extending the existing farm legislation for one year.

Report Documents Political Meddling with Science at EPA

U.S. Environmental Protection Agency (EPA) scientists are faced with widespread political interference that has significantly increased under the Bush administration, a new report from the Union of Concerned Scientists (UCS) shows. Hundreds of the scientists surveyed (60 percent) reported some degree of political meddling, ranging from unnecessary delays to forced resignations.

The EPA's budget has declined in real terms by almost 25 percent since Bush took office, lower than it was in the 1990s. The UCS investigation reveals an agency additionally weakened by a political agenda with little basis in, or respect for, science. From the blatant manipulation of climate change reports to the intimidation of scientists whose professional opinions clash with a political agenda and the closing of agency libraries, the current administration has undermined the scientific autonomy of the EPA more than any other recent administration. A majority of the survey respondents with at least 10 years tenure reported that political interference has increased over the last five years alone. Russell Train, EPA administrator under Presidents Nixon and Ford, was quoted in the UCS report saying that neither of those presidents ever attempted to bully him into a decision.

Disgruntled EPA Scientists

UCS surveyed over 5,000 EPA scientists during the summer of 2007, receiving completed responses from 1,586 individuals. Most of those responses were from veteran employees who had worked at EPA for more than 10 years. Surveys came from every region and from many of the agency's research laboratories.

Survey results indicated that while EPA staff is involved in quality scientific research, political interference affected how the research is handled; often, it is ignored, misinterpreted, or misstated. Almost half of respondents (47 percent) felt that EPA does not "make use of the best judgment of its scientific staff" to some degree, and the Office of Air Quality Planning and Standards was particularly egregious in this regard. Similarly, program offices with regulatory duties and EPA headquarters had the highest incidence of political manipulation.

The report also showed:

- 24 percent of respondents experienced frequent or occasional "disappearance or unusual delay" of websites, reports, or other documents
- 31 percent personally experienced frequent or occasional "statements by EPA officials that misrepresent scientists' findings"
- 43 percent knew of "many or some" cases where EPA political appointees had inappropriately involved themselves in scientific decisions, and 42 percent knew of situations where commercial interests did the same
- 62 percent do not have enough resources to adequately do their jobs
- 36 percent consider that the changes and closures within the EPA library system have impaired their ability to do their jobs; in regions where libraries had closed, this figure leapt to 48 percent

The Role of the Office of Management and Budget (OMB)

The survey found that OMB has played an increasingly significant role in controlling EPA's rules and policies. The Office of Information and Regulatory Affairs (OIRA) has taken an unusually active approach to regulatory reviews. It has tried to set scientific assessment guidelines and risk analysis parameters and has taken to reviewing the science upon which EPA bases decisions with its own "experts."

In just one example of OMB overstepping its role, the office refused to allow EPA to increase air quality standards for fine particulate matter based on OMB's scientific evaluation, in spite of the consensus of EPA specialists and advisory committees to do so.

Survey respondents were particularly vocal about OMB interference with their work:

- "Get the OMB and their inexperienced staff out of the review and decision-making process."
- "Restrain [the] Office of Management and Budget. This administration has not only watered down important rules protecting public health ... they have also altered internal procedures so that scientific findings are accorded less weight."
- "In this administration, self-censorship is almost as powerful as political censorship. Options that OMB or the White House wouldn't like aren't even put forward."

The concerns of EPA scientists about the role of OMB and the White House were recently bolstered by a Government Accountability Office (GAO) report about White House interference with EPA's work on screening chemicals for cancer or other health risks. According to the Associated Press, this involves assessments of chemicals used in "everything from household products to rocket fuel." Because of bureaucratic delays put in place by the White House, reviews of nearly a dozen major chemicals are now years overdue.

Recommendations from the Report

EPA scientists were evenly split on whether or not EPA was moving in the right direction. UCS has no such hesitation in declaring EPA's mission to protect the environment and public health

as compromised.

UCS recommends:

- Congress should step up to the plate to protect scientists and increase EPA's budget so there are adequate resources for programs, particularly monitoring and enforcement
- EPA should institute a transparency policy for all meetings, allow scientists to communicate freely with the media, and ensure the timely release of reports
- Congress should reform the regulatory process to better balance the White House's role in it
- EPA should ensure that its decision making is grounded in science by reviewing when scientific input is required and tightening its conflict-of-interest restrictions.

The House Committee on Oversight and Government Reform is investigating possible incidents of manipulation of EPA decision making. There will be a hearing in May.

The scientific community will likely be discussing these and other issues affecting the integrity of the science used by agencies at the Integrity in Science Conference on July 11. The conference, sponsored by Center for Science in the Public Interest, will address issues such as the need for increased science funding, more independent regulatory science, and the need to protect public sector scientists from political meddling and corporate influence. Planned sessions include tackling the climate crisis, protecting and empowering scientists at federal agencies, insulating clean energy research from special interests, protecting endangered species, and reducing conflicts of interest on federal advisory committees.

Bill Requires Disclosure of Product Defects

In an effort to improve transparency following litigation on defective products, the House last week introduced the Sunshine in Litigation Act (H.R. 5884).

Settlements of product safety lawsuits sometimes include secrecy agreements in which the parties agree not to disclose information relating to a product defect that may implicate public health and safety. Introduced by Reps. Robert Wexler (D-FL) and Jerrold Nadler (D-NY), H.R. 5884 restricts the authority of federal judges to approve settlements that include such restrictive measures.

"Too often, American consumers are left in the dark about a defective toy that has resulted in the injury of a child, or an automobile part that has led to deadly car accidents," stated Wexler.

The Senate Judiciary Subcommittee on Antitrust, Competition Policy, and Consumer Rights held a hearing in December 2007 on the Sunshine in Litigation Act (S. 2449), introduced by Sens. Herb Kohl (D-WI) and Lindsey Graham (R-SC). At the hearing, Judge Joseph F. Anderson of the United States District Court for the District of South Carolina said, "Many

judges all too often acquiesce in the demands of court-ordered secrecy."

Some predict that if judges are unable to approve settlements that include secrecy agreements, it will result in more cases going to trial and flooding the already overburdened court system. However, Judge Anderson, who presides in the only district to adopt a rule restricting court-ordered secrecy, reported that contrary to expectations, there have actually been fewer such cases going to trial in the five years following the rule's enactment than in the five years before.

The other concern raised against the Sunshine in Litigation Act is that it could violate private agreements reached between parties. The litigating parties should be at liberty to reach an agreement that settles their private matter. Moreover, the disclosure of information may also violate the parties' privacy.

Public interest advocates reply that, though the dispute may be a private matter, many have large public consequences affecting public health and safety. Many of these product defect and liability cases involve goods that are consumed by millions of Americans, and if the agreements would deny the public information about faulty products, as it was with Firestone tires, silicon breast implants, or toys from China, the public's right to know about potential harm outweighs the rights of private litigants to reach an agreement. Moreover, provisions to protect personal privacy and confidentiality are included in the bills.

The House and Senate bills revise the Federal Rules of Civil Procedure to require a showing that the public interest in the disclosure of information is either met or outweighed by specific concerns of privacy and confidentiality in order to allow the inclusion of nondisclosure agreements about product defect information in any settlements.

Contract Reform Takes Center Stage in House

A group of reform bills that would bring accountability and transparency to the federal contracting process has been approved by the House in the last few months, potentially setting the stage for federal contracting reform to be a major area of legislative action in the remaining months of the 110th Congress.

In the last two weeks, the House has approved five separate bills related to contractor accountability or oversight of the federal procurement process. These bills represent an excellent first step in bringing much-needed reform to the way the federal government oversees and implements federal contracts, a process that is rife with secrecy, corruption, waste, and abuse.

On April 14, the House passed H.R. 4881, the Contracting and Tax Accountability Act of 2007, which would require all firms bidding on federal contracts to submit a declaration that they are not delinquent in their taxes. The bill would also bar firms on which the IRS has placed a tax lien from being awarded a federal contract. This legislation seeks to recoup over $7 billion owed to the Treasury by firms receiving payments from the federal government. The legislation

was first introduced by Rep. Brad Ellsworth☼ (D-IN) on Dec. 19, 2007.

The next day, the House Oversight Subcommittee on Government Management, Organization, and Procurement held a hearing on H.R. 5712, the Close the Contractor Fraud Loophole Act, which would require all contractors, including those working outside of the United States, to report criminal violations and fraud by their employees. Existing law exempts certain contractors, including those working overseas, from informing the government if an employee breaks the law in obtaining or implementing a federal contract, or if an employee is significantly overcompensated. The subcommittee approved the legislation, sponsored by Rep. Peter Welch☼ (D-VT), and the full House passed the bill by voice vote on April 23.

Also on April 23, the House debated and approved two other pieces of legislation by voice vote. H.R. 3928, the Government Contractor Accountability Act, would amend the 2006 Transparency Act to require certain large government contractors that receive more than $25 million and 80 percent of their annual gross revenue from federal contracts to disclose the names and salaries of their five most highly compensated officers unless such information is already publicly available. The bill was introduced by Rep. Chris Murphy☼ (D-CT) in the fall of 2007.

H.R. 3928 would help increase transparency in the contracting process. Although publicly traded firms are required by the Securities and Exchange Commission to disclose the names and salaries of top-level managers, many firms that contract with the federal government, like private security company Blackwater USA and AEY, Inc., are private entities for which this information is not publicly available.

The third bill approved on April 23 was H.R. 3033, the Contractors and Federal Spending Accountability Act, introduced by Rep. Carolyn Maloney☼ (D-NY). This bill would require the General Services Administration to create an online database of information on federal contractors who have broken federal law or regulations, as well as include information on contractor performance. This bill would mandate a federal database that would be similar, but more expansive, to one created by the Project on Government Oversight, called the Federal Contractor Misconduct Database.

Such a database would be effective in improving pre-award contracting decisions and help procurement officers in identifying (and hopefully avoiding) abusive, risky, or dishonest contractors, particularly those who repeatedly violate standards of conduct. The Maloney bill was modified before it passed, stripping a controversial provision that would have forced federal officials to start suspension or debarment proceedings against firms with two judgments or convictions for the same offense during any three-year period. The final version of the bill merely requires contract officers to justify why they awarded a contract to a company with two or more debarment-worth offenses on its record.

H.R. 3033, like the other bills, likely faces an uphill battle to final passage in the Senate. Two reform-minded freshman senators, Claire McCaskill (D-MO) and Barack Obama (D-IL), are leading the charge for two of these bills in the Senate. McCaskill introduced a companion

measure to H.R. 3033 on April 23 and hopes to add it as an amendment to the Defense Authorization bill being considered the week of April 28. Obama has introduced a mirror bill (S. 2519) for the Ellsworth tax delinquency bill (H.R. 4881), but the Senate has not taken any action on that legislation.

Whether any of these bills are passed into law depends in large part on the Senate — where a razor-thin majority and more strident Republican opposition to these common-sense proposals might stall the progress made to date.

Lack of Action in Congress on Pivotal Fiscal Policy Issues

Congress continues to wrestle with a number of high-profile budget and financial bills that will have broad impact on citizens throughout the United States and around the world, including legislation on war funding, economic stimulus, housing, and the last budget of the Bush presidency. Despite significant congressional rhetoric and media coverage of these efforts, Congress has made little real progress on reaching compromise or instituting policies.

As contrasting election-year pressures will intensify heading into the summer — pushing Congress to enact more proposals but also making it harder to do — it's likely there will be additional rhetoric emerging from Washington, but little real progress. Below is a summary of the latest action (or lack thereof) on these efforts.

War Supplemental Package Remains Unfinished

Congress has been deliberating on a war supplemental package for most of 2008 and may finally put forward a bill late in the week of April 28. While specific elements of the bill are still the subject of rumor, the consistent message emanating from House Democratic leadership has been that the bill will likely be composed of the remainder of President Bush's FY 2008 request, which is now $108 billion; his full $70 billion request for an FY 2009 "bridge" fund that would partially cover FY 2009 war expenses; and some additional domestic spending measures.

By giving Bush enough war spending authority to obviate additional requests for the remainder of his term, Congress hopes to secure adequate leverage to attach several domestic spending initiatives that would likely by vetoed should they pass in a standalone bill. Such domestic spending may include funding for an unemployment insurance extension, a Food Stamp benefit increase, a child nutrition program enhancement, infrastructure repairs, and wildfire fighting efforts. However, Democratic lawmakers have stopped short of designating such items as "economic stimulus."

Second Stimulus Waiting on War Supplemental

Although House Majority Leader Steny Hoyer (D-MD) notes that "there may very well be matters in the [war supplemental] that have a stimulative effect," House Democratic leadership is "thinking more in terms of you have a supplemental, but you also have a separate stimulus." Following the release of March's sour jobs data, House Speaker Nancy Pelosi (D-

CA) reiterated the need for an additional round of economic stimulus legislation, with the White House quickly responding that the effects of the first economic stimulus package have yet to kick in (the Treasury Department began sending tax rebates to direct deposit accounts on April 28 and will soon begin mailing rebate checks to those without direct deposit).

Although items that many outside organizations and experts consider stimulative may appear in the war supplemental bill as items of additional discretionary spending, Democrats appear to still believe an additional proposal will be necessary outside of that legislation. The contents of a second stimulus bill would likely include whatever items do not make it into the final version of the war supplemental. In particular, extended unemployment insurance benefits, Food Stamp spending increases, and infrastructure repair projects are sure to be included in at least one of the bills, if not both.

Housing: House and Senate Moving in Opposite Directions

On April 23 and 24, the House Financial Services Committee began marking up the Housing Stabilization and Homeownership Retention Act (H.R. 5830), a plan by Committee Chair Barney Frank (D-MA) to provide $300 billion in federal loan guarantees in an effort to stem the growing national tide of foreclosures. Frank says he plans to conclude the mark-up by May 1, with the hope of moving the bill to the House floor by Memorial Day. The House Ways and Means Committee adopted a companion piece to the Frank bill on April 9 that consists of $11 billion in tax cuts, all targeted at the housing sector and fully offset.

Meanwhile, the House Judiciary Committee is slated to consider changes to the 2005 bankruptcy law on April 30. The bankruptcy law made it more difficult for consumers and homeowners to file for Chapter 7 bankruptcy and is viewed by many groups — including the Center for Responsible Lending, the Consumer Federation of America, and the National Consumer Law Center — as contributing to the steep increases in foreclosures, now occurring at a rate of 20,000 a week, according to *The New York Times*.

The House action is the next step after the Senate adopted the Foreclosure Prevention Act earlier in April, a package mainly made up of tax cuts, as well as modest counseling and financial assistance for homeowners. The bill is aimed more at easing the housing credit crunch by restoring liquidity to the sector than at addressing foreclosures like the House proposal does. This bill provides $11 billion in tax cuts and credits, though they are less targeted to the housing sector and homeowners at risk of foreclosure than in the House proposal. In addition, the Senate did not include offsets in its bill, choosing to deficit-finance the tax cuts. While the Senate version is sharply different from Frank's efforts, Sen. Christopher Dodd☼ (D-CT), chair of the Banking, Housing and Urban Affairs Committee, says he will resurrect an earlier proposal that is similar to Frank's and re-introduce it shortly in the Senate. This vastly increases the chances for a conference on housing crisis legislation.

Related resources: "Senate Housing Legislation Highly Disappointing: Three-Fifths Of Cost Of Senate Bill Goes For Tax Cuts That Will Do Little Or Nothing To Address The Foreclosure Crisis"

Budget Resolution: Despite Glimmer of Hope, Final Resolution Still a Long Shot
It has been six weeks since the House and Senate adopted $3 trillion budget resolutions for Fiscal Year 2009 by close votes of 212-207 and 51-44, respectively. In the time since then, House and Senate conferees have been unable to bridge the gaps between the chambers' versions. If a resolution is not jointly adopted by the two houses, or "deemed" adopted by the houses separately, appropriators will not have any discretionary spending caps or allocations to guide them in crafting annual spending bills.

The conferees' main impediments to compromise on a resolution are the $3.5 billion difference in discretionary spending and whether to offset the cost of a one-year patch to the Alternative Minimum Tax (AMT). The House version mandates offsets while the Senate version does not.

A glimmer of hope appeared during the week of April 21, when the Blue Dog caucus of Democratic fiscal hawks announced they might be willing to relent on their insistence that the $70 billion AMT patch be paid for. On April 24, a leading Blue Dog, Rep. Allen Boyd☼ (D-FL), indicated (subscription) the coalition was willing to look at other strategies to pay for the patch than forcing it to be spelled out in the budget resolution. If this concession is formally agreed to by the caucus over the next couple of weeks, there may be reason to expect passage of an FY 09 budget resolution. If not, the appropriations process will likely proceed as soon as Congress wraps up the war supplemental bill. If this happens, it will be the second time in the last three years Congress has operated without a budget blueprint.

Related Resources: FY 09 Budget Resource Documents

IRS to Continue Flawed Enforcement Program on Partisan Activities

In an April 17 letter, the Internal Revenue Service (IRS) announced that its enforcement program on partisan activities by charities and religious organizations will remain in effect for the 2008 election season. The IRS announcement provided some helpful information on how the agency will consider cases involving charities' websites, but it muddied the waters for organizations that publish voter guides. The announcement does little to mitigate the vagueness of the standard, a problem Rep. Adam Schiff☼ (D-CA) addressed in a hearing where he called for a bright-line rule defining what is and is not allowed.

The tax code prohibits 501(c)(3) organizations, including charities and churches, from intervening in any political campaign on behalf of, or in opposition to, any candidate for public office. In 2004, the IRS created new procedures, now referred to as the Political Activities Compliance Initiative (PACI), to review and fast-track enforcement action on allegations of improper intervention in elections. The new IRS letter said the goals of the program are to "educate the public and relevant community, and provide guidance, on the prohibition..." and to "maintain a meaningful enforcement presence in this area."

To meet its goal of increased awareness of the ban, the IRS said it will target education efforts

to segments of the charitable community that may not be fully aware of it. The IRS did not provide examples of what organizations the agency believes "may not have been reached with past efforts." The IRS also plans to employ newer outreach methods, such as web-based technology, to circulate its educational messages. In a press release accompanying the letter, the IRS said it is sending correspondence to the national political party committees explaining the prohibition of political intervention by charities and churches. The IRS stated that it will "concentrate on allegations of more egregious violations and the cases that result from them." Because the IRS relies heavily on complaints from the public as a means for discovering potential violations, this policy could encourage retaliatory or harassing complaints.

Issue advocacy

The IRS letter commented on cases involving issue advocacy and potential campaign intervention but only added to the confusion surrounding this difficult issue. Although charities can legally take positions on public policy issues, including issues that divide candidates in an election for public office, issue advocacy cannot be used as a guise for intervention in an election. IRS guidance on this topic has been extremely vague, and the commentary in question did little to mitigate confusion. Lois Lerner, Director of the IRS Exempt Organizations Division, said the agency "must be prepared to face taxpayer challenges, which may lead to court, regarding IRS published position on issue advocacy..." She acknowledged that the IRS has encountered "a number of cases with varied fact patterns" that differ from its guidance in Rev. Rul. 2007-41.

Using the example of voter guides, the IRS letter said these may or may not be considered campaign intervention, depending on the context. The IRS states, "Distribution of a communication that on its face appears to satisfy the requirements of a permitted issue advocacy communication may become impermissible campaign intervention if it is accompanied by a statement, or an action, that ties a position articulated in the communication to a particular candidate or election." Unfortunately for charities concerned with matters of public policy that legally advocate on issues, the IRS provides no further details or examples as to what type of "statement" or "action" would create the connections that the IRS deems to be in violation of the ban.

Websites of 501(c)(3) organizations with links to other websites

In its letter, the IRS also provided details on how it views links on the websites of 501(c)(3) organizations, drawing a distinction between links on an organization's website to related organizations (i.e., an affiliated 501(c)(4)) versus links to unrelated sites. In the case of links to unrelated organizations, the IRS said it "will pursue the case if the facts and circumstances indicate that the 501(c)(3) organization is promoting, encouraging, recommending, or otherwise urging viewers to use the link to get information about specific candidates and their positions on specific issues."

In the case of links to related organizations, the IRS said the agency will "not pursue, at this time, cases involving a link between the Web site of a section 501(c)(3) organization and the home page of a Web site operated by a related section 501(c)(4) organization." In its discussion of these situations, the IRS referred to the 1983 U.S. Supreme Court decision in *Regan v.*

Taxation with Representation of Washington, where Justice Harry Blackmun's concurring opinion stressed the importance of formal separation between 501(c)(3) and 501(c)(4) affiliates.

Rep. Schiff calls for bright-line rule

The widespread confusion in the charitable community caused by the IRS' vague facts and circumstances test and uneven enforcement (see OMB Watch's report *Overcaution and Confusion: The Impact of Ambiguous IRS Regulation of Political Activities by Charities and the Potential for Change*) has led to calls for the IRS to implement a bright-line rule on political intervention. Rep. Adam Schiff (D-CA) endorsed this idea during an April 15 hearing of the House Appropriations Financial Services Subcommittee that centered on testimony by new IRS Commissioner Douglas Shulman. According to BNA, Schiff told Shulman that a bright-line test is needed. He also asked the IRS to respond within 30 days to a Sept. 21, 2007, letter from All Saints Episcopal Church to the IRS, in which the church requests information about the two-year IRS investigation into the church's activities.

Court Upholds Stealth Lobbying Disclosure

The National Association of Manufacturers' (NAM) legal challenge to the stealth lobbying disclosure provisions in the 2007 lobbying and ethics reform law was rejected by the U.S. District Court for the District of Columbia on April 11. After the U.S. Court of Appeals and the U.S. Supreme Court refused to grant a stay pending appeal, NAM announced it would comply with the law while its appeal proceeds by disclosing members who contributed more than $5,000 toward lobbying in a quarter and have supervision, control, or active participation in NAM's federal lobbying efforts.

NAM filed suit in February 2008, challenging Section 207 of the Honest Leadership and Open Government Act of 2007 (HLOGA) and charging that the disclosure rules violate the group's First Amendment rights, are "vague, overbroad and burdensome," and could result in boycotts, shareholder suits, and other negative public reaction. In an April 11 opinion, the U.S. District Court for the District of Columbia rejected these arguments, holding that Congress had drafted the law to address a compelling need to stop corruption and that the law is narrowly tailored to meet that goal.

On April 18, Judge Colleen Kollar-Kotelly denied NAM's request for a stay of her decision. Her opinion noted Congress's intent to bring transparency to stealth coalitions with misleading names, such as "The Coalition: Americans Working for Real Change," which represents pharmaceutical companies. Her ruling was upheld by the U.S. Court of Appeals for the District of Columbia, which denied a stay and said NAM did not meet the narrow criteria for such relief. On April 21, Chief Justice John Roberts of the U.S. Supreme Court also denied a stay.

Section 207 of HLOGA limits coalition disclosure to non-individuals that contribute $5,000 or more to the lobbying efforts of an organization that meets registration and reporting thresholds under the Lobbying Disclosure Act (LDA) if the entity "actively participates in the

planning, supervision or control of such lobbying activities." Disclosure can be made by providing a web address to a site that lists these members. It is not necessary for the coalition to be a legal entity for the disclosure requirement to apply, so ad hoc coalitions are also covered.

NAM had claimed that all 11,000 of its members may be subject to disclosure, since many companies volunteer support for NAM's legislative agenda. However, this was an overly broad reading of the law, as it is unlikely that all 11,000 members actively supervise or control NAM's efforts. On April 23, after the Supreme Court rejected its application of a stay, NAM's blog post admitted as much in announcing it would file the required reports on April 21. The post said that the threshold requirements mean that "our larger member companies will comprise the list, that is, the sample is not representative of the membership." Although NAM will pursue its appeal, it said, "On balance, it makes sense not to complicate things at this point by inviting an enforcement action."

When HLOGA was being considered in Congress, many trade associations and conservatives voiced strong opposition to proposed provisions that would have required disclosure of grassroots lobbying activities. The fight over that provision obscured debate over the stealth lobbying disclosure requirements, although at the last second, a number of organizations voiced opposition to those provisions, too.

Many good government groups have noted the role coalitions play in various lobbying campaigns. Prior to HLOGA, the LDA only required disclosure of the coalition name but not its members — or how much each is paying in to the coalition. Another approach often used is when a company provides the funding for a campaign but gives the money to one lobby firm, which then hires another firm. The second firm may choose to create a coalition with such funds. Prior to HLOGA, only the two lobby firms would need to disclose their activities, but the actual client would remain hidden.

These stealth coalitions have proved very powerful. For example, in 2006, Public Citizen and United for a Fair Economy released a report that showed how 18 families worth a total of $185.5 billion financed and coordinated a 10-year effort to repeal the estate tax, a move that would have collectively netted them a windfall of $71.6 billion. These wealthy families, such as those associated with Wal-Mart, Gallo, Campbell's, and Mars, kept their activities anonymous by using associations to represent them and by forming a massive coalition of business and trade associations dedicated to pushing for estate tax repeal.

As a member of the House Ways and Means Committee, Rep. Lloyd Doggett☼ (D-TX) saw the role of these stealth coalitions in various tax bills. As early as 2002, Doggett spoke out for the need for more disclosure, noting that powerful companies joined with Republicans to keep such disclosure from occurring when the Lobbying Disclosure Act initially passed in 1995. Accordingly, he introduced legislation requiring the disclosure of stealth lobbying. Ultimately, a version of his bill made its way into HLOGA and became law. As soon as HLOGA was enacted, the American Society of Association Executives and others said they would challenge

this provision in the courts.

Current enforcement of the stealth lobbying provisions, which are in effect, appears to be questionable. According to an April 29 article in *Politico*, many stealth coalitions aren't reporting who is funding their lobbying efforts; the article notes that some may be taking advantage of the fact that grassroots lobbying disclosure was dropped from HLOGA. Those coalitions that are reporting are doing so in a circumspect way, burying links to lists of coalition members deep within long disclosure reports. In fact, *Politico* noted that more information appears in many coalitions' SourceWatch profiles than in lobbying disclosure reports. SourceWatch is a project of the nonprofit Center for Media and Democracy.

HHS Proposes Restrictive Rules for HIV/AIDS Grantees

On April 17, the Department of Health and Human Services (HHS) published a notice of proposed rulemaking that seeks public comments on special requirements for organizations that receive HIV/AIDS funding from HHS. The rule would require "legal, financial, and organizational" separation between a grantee and any affiliate organization that does not adopt mandatory language opposing prostitution and sex trafficking. This "pledge requirement" is being challenged in court by groups that say the policy might stigmatize and alienate the people in need of HIV/AIDS prevention services and violates First Amendment rights because it applies to other programs that are not federally funded. Comments on the proposed regulation are due May 19.

In 2003, Congress passed the United States Leadership Against HIV/AIDS, Tuberculosis and Malaria Act (the "Leadership Act"), which authorized the President's Emergency Plan for AIDS Relief or PEPFAR. The act mandates that "no funds made available to carry out the Act ... be used to provide assistance to any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking." Therefore, all organizations receiving PEPFAR funds are required to adopt an organization-wide policy opposing prostitution. The law is now up for congressional reauthorization (H.R. 5501) with the "prostitution pledge" left intact.

In July 2007, the United States Agency for International Development (USAID) and HHS issued guidelines that allow recipient organizations to establish affiliates that may operate free of the pledge requirement. The proposed rule requires the grantee to have an extraordinary degree of separation between itself and the privately funded affiliate(s).

The proposed rule states, "Mere bookkeeping separation of Leadership Act funds from other funds is not sufficient. HHS will determine, on a case-by-case basis and based on the totality of the facts, whether sufficient physical and financial separation exists. The presence or absence of any one or more factors will not be determinative." Factors considered will "include but will not be limited to":

- Separate personnel, management, and governance;
- Separate accounts, accounting records, and timekeeping records;

- Degree of separation from facilities, equipment, and supplies used by the affiliated organization to conduct activities inconsistent with an anti-prostitution policy, and the extent of such activities by the affiliate;
- Extent to which there are materials that could be associated with the affiliated organization; and
- The extent to which HHS, the U.S. government, and the project name are protected from publicly being associated with the affiliated organization.

The anti-prostitution pledge requirement is being challenged in court by grantees who argue that the requirement violates their rights under the First Amendment. In *Alliance for Open Society, Inc. v. USAID*, the plaintiffs challenge the "pledge policy." In February 2008, Global Health Council and InterAction, which are membership organizations of international development and public health groups, were added as plaintiffs. The case is currently pending in the District Court for the Southern District of New York, which will wait to assess the policy's constitutionality until after the rulemaking process has ended.

Critics claim there are problems with vague language throughout the proposed rule. For example, as InterAction and Global Health Council point out in their motion, "The vagueness of the Policy Requirement and Guidelines is exacerbated by the particular vagueness of the factors the Defendants will consider in deciding whether recipients are 'physically and financially separate, many of which use vague terms 'the extent to which' and 'the degree of.' USAID Guidelines at 4. Recipients have no way of knowing how much of any of these factors is too much." There is also no definition of "affiliate."

The proposed HHS rule is modeled on a Legal Services Corporation (LSC) regulation, which requires legal aid programs that receive LSC funds to remain separate from other organizations that do work that cannot be paid for with federal funds. The HHS notice says the proposed criteria were "upheld as facially constitutional by the U.S. Court of Appeals for the Second Circuit in *Velazquez v. Legal Services Corp.*, 164 F.3d 757, 767 (2d Cir. 1999), and *Brooklyn Legal Services Corp. v. Legal Services Corp.*, 462 F.3d 219, 229-33 (2d Cir. 2006)," but does not note that the courts are still considering the constitutionality of how the LSC rule is applied.

Since 1996, LSC has placed severe restrictions how its funds can be used and extended these restrictions to private funds raised by legal services programs. In December 2001, a legal challenge against the restrictions was filed in the United States District Court for the Eastern District of New York. In 2004 the court struck down the physical separation requirement but denied the plaintiffs' challenge to the restrictions on direct LSC funding. Both parties appealed, and the U.S. Court of Appeals for the Second Circuit sent the case back to the lower court for reconsideration using a different legal standard to determine the constitutionality of the physical separation requirement.

Unlike the LSC rules, HIV/AIDS grantees operate internationally, which entails additional burdens that are not taken into account. For example, establishing a completely separate affiliate organization would require a new registration in a foreign country. Many countries

may be suspicious of such activity and refuse to issue visas or work permits for more American workers. As InterAction and Global Health Council's motion stated, "The establishment of new and separate affiliates would also almost certainly cause havoc and long delays in the receipt of funds from abroad."

Written comments on the proposed rulemaking are due by May 19. They may be submitted online at regulations.gov or by e-mail to OGHA_Regulation_Comments@hhs.gov.

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