August 22, 2005 Vol. 6, No. 17

## In This Issue

Federal Budget
Economy and Jobs Watch: Continuing Bad News for Americans
Congressional Budget Office Projections: No Change in Bleak Long-Term Fiscal Outlook

Information & Access
Industry Misuses Data Quality Act to Challenge EPA Choices
Open-Government Activist Seeks to Recover Legal Fees from FOIA battle
Minnesota Considers 'Biomonitoring' to Protect Public Health
Town Seeks to Keep Secret Maps, Images

Nonprofit Issues
Federal Election Commission Seeks Comments on Rule that Could Gag Charities around Elections
Action Expected on Charitable Giving Legislation in September

Regulatory Matters
Legislative Update: Federalism Bills
States Present Opportunities and Pitfalls for Progressive Regulation

---

### Economy and Jobs Watch: Continuing Bad News for Americans

Last month's economic news has been far from encouraging for most Americans, with a continuation of an uneven and unpredictable job market, rising consumer prices, and declining earnings. Yet, despite the grim realities faced by most working families in the U.S. the recovery period has been very good to business, with corporate profits up over 15 percent since it began. A survey of indicators shows the Bush administration's economic policies, specifically how they value profits for corporations over the bottom line for average Americans, have further eroded the country's economic health.

The reality that the economic recovery is not helping most American households to recover is beginning to be acknowledged by the Bush administration. Earlier in August, Secretary of the Treasury John Snow conceded the slowly progressing economic recovery has not benefited all Americans equally. Snow said, "[Now] the idea...is to explore the things that produce broad-based prosperity and one of the things we know is that less educated people have seen their incomes and wages grow more slowly."

But the unbalance in the recovery has been caused by more than just a poorly educated workforce. Snow's comments came amid the release of two reports that put this recovery period in historical context. In early August, the Center on Budget and Policy Priorities released a report that compares our current economic recovery with previous recovery periods dating back to World War II and finds that, not only is this one less robust, it is much more unevenly distributed, with corporate profits reaping nearly all the benefits at the exclusion of the labor market. In fact, corporate profits are the only major economic indicator that has outpaced the post-World War II average during this recovery, and they have grown twice as fast as during the recovery in the early 1990s.

The second report, a Congressional Budget Office (CBO) background paper, examines employment during and after the economic recession of 2001. CBO found similar trends in the labor market with wages and employment suffering during the recovery, while corporate profits soared. Among its many interesting findings, the CBO writes, "both the magnitude and persistence of the decline in the labor force [participation rate] during the past several years are unprecedented."

CBO has reported elsewhere on the unbalanced distribution of economic gains during the recovery period, speculating that one explanation for the unforeseen increases in federal revenues this year is increasing personal income concentrated

among high-income taxpayers. High-income taxpayers generally pay tax at higher rates, thus bringing in more revenue to the Treasury.

As Americans continue to be apprehensive about the economy, more negative indications have come with the release of economic data from the Labor Department's Bureau of Labor Statistics (BLS). The data indicate a significant rise of consumer prices in July (by 0.5 percent), driven largely by rising energy and food costs, in particular record high oil prices. In a separate release, BLS also reported workers' earnings, adjusted for inflation, declined by 0.2 percent in July.

This is a distressing combination as many Americans continue to struggle with mounting personal debt, living paycheck-to-paycheck with very little personal savings. These households will experience a more severe financial squeeze, as they are forced to pay more to put food on their tables, fill their gas tanks, and heat and cool their homes with less money.

Most troubling of the bad news is the economy continues to fall short in creating a sufficient number of jobs to keep pace with population growth. Although July saw a healthy rise in hiring from previous months, adding 207,000 jobs, the average number of jobs added each month for 2005 is only 191,000. This is well below the jobs necessary to keep up with new workers entering the labor market. Therefore Americans are currently facing higher prices for essential goods, while holding lower paying jobs and having an ever shrinking number of options with an increasingly flooded labor market. As evidence mounts of the failure of Bush administration economic policies to our economy growing strong for all Americans, the need for an about-face on these policies becomes increasingly clear.

## Congressional Budget Office Projections: No Change in Bleak Long-Term Fiscal Outlook

Just over a month after the White House released its misleading and overly optimistic budget projections, the Congressional Budget Office (CBO) released an update to their *Budget and Economic Outlook* last week. The CBO report is far more realistic in its long-term assumptions and therefore shows little change in our country's dismal long-term fiscal outlook.

Similar to the July Office of Management and Budget (OMB) projections, the CBO report foresees a $331 billion deficit for fiscal year 2005 (FY05), a $33 billion reduction since CBO released an initial estimate in March. CBO also has increased their estimate of the total deficits over the next ten years by more than $1.1 trillion to $2.1 trillion. These estimates are much more worrisome (and accurate) than OMB numbers, with CBO projecting ten-year deficits from 2006 - 2015 to be $600 billion more than OMB.

Unlike the OMB numbers, CBO finds very little reason to be optimistic about the future health of the federal government. They write, "Although the deficit for 2005 is lower than previously expected, the fiscal outlook for the coming decade remains about the same as what CBO described in March." In March, CBO described a very dark future if current policies are continued.

This CBO report casts further doubt on Bush administration claims that its economic policies are working to spur strong economic growth and will continue to shrink deficits. CBO has confirmed what many private analysts have reported: the recent jump in federal revenue is due to short-term, temporary factors that are unsustainable, and over the long-term the country still faces large and difficult fiscal challenges. CBO concludes, "Over the long-term, then, growing resource demands...will exert pressure on the budget that economic growth alone will not eliminate."

Yet even the CBO's long-term projections do not reveal just how troubling our budgetary outlook is. The CBO is required by law to assume the continuation of current policies, the most important for its current estimates being the expiration over the next five years of most of the tax cuts legislated in 2001 and 2003. Since it is unlikely the Republican-controlled Congress will not act to extend those tax cuts (with some of them already slated to be extended this fall in a congressional reconciliation bill), deficits will likely be much higher than CBO projections. In fact, extending all of President Bush's tax cuts will add an additional $1.6 trillion to the deficit over the next ten years, according to the CBO report.

The Senate Budget Committee's most senior Democrat, Kent Conrad (D-ND), believes the nation needs a "serious fiscal wake-up call" if Congress is to correct the long-term budget shortfalls that "threaten our economic security." The increased payments on the debt due to the long and sustained deficits alone will begin to put enormous pressure on the entire federal budget just as the baby-boomer generation begins to retire en mass. This pressure, along with the possible continuation of reckless budget and tax policies, could mean a recipe for disaster for our nation's financial health.

The current administration should be more straight-forward in addressing serious concerns regarding national economic security and begin an honest dialog with Congress about adopting alternative policies that will return the country to a

sound and sustainable fiscal path.

## Industry Misuses Data Quality Act to Challenge EPA Choices

Two industry groups recently filed challenges, under the Data Quality Act, against the U.S. Environmental Protection Agency's (EPA) methodological choices. Both challenges focus on evaluations of human health risks from specific chemicals. The petitions specifically question documents that address emissions of Metam Sodium, a pesticide, and Dioxin/Furan, used to produce cement. The petitions challenge EPA procedures, however, which are policy decisions made within the agency -- and not data -- and as such lie outside the scope of the Data Quality Act (DQA).

The stated purpose of the Data Quality Act is to "ensure and maximize the quality, objectivity, utility, and integrity of information disseminated." Yet, both of these challenges violate the spirit of that goal, and instead attempt to transform DQA into an avenue for industry to challenge methodology, agency judgment or choices.

### *Metam Sodium Challenge*

The industry group Metam Sodium Alliance (MSA), comprised of three chemical companies that produce Metam Sodium, the third most widely used pesticide in the country, challenged EPA preliminary human health and ecological risk findings for the chemical. The risk assessment process allows the agency to establish guidelines and restrictions to protect workers, the general public and the environment from exposure to dangerous levels of toxic chemicals. The draft risk assessment, which the industry group has challenged, projects the need for a buffer zone during the use of this pesticide to protect communities from airborne exposure.

On June 24, MSA challenged EPA's use of the Probabilistic Exposure and Risk Model for Fumigants (PERFUM) in the agency's official Risk Assessment of Metam Sodium. The MSA asserts that the EPA should have used Fumigan Exposure Modeling System (FEMS) in the assessment. Under the PERFUM model EPA projects that a buffer zone of more than one mile is necessary to protect against human health risks due to exposure.

MSA suggest the use of the PERFUM model compromises the utility, integrity and objectivity standards of the agency's data quality guidelines with the use of the PERFUM model. Moreover, the petitioner argues that the PERFUM methodology is inadequate and limited, yet, they offer no scientific data or expert testimony to support the claim that PERFUM is inferior to FEMS. In the draft risk assessment, EPA explains its selection stating "EPA selected the PERFUM model over the other distributional models because PERFUM provides the most resolution for the acute duration of exposure, which is the key concern for these soil fumigants."

The petitioner asserts, the PERFUM-driven analysis in the current draft Risk Assessment threatens to unjustifiably, undermine the commercial viability of Metam Sodium. In response EPA has noted "that a well established process for pesticide re-registration exist." This suggests that MSA claims the FEMS model's superiority is merely an attempt to use DQA in a veiled effort to protect their commercial interest from an EPA policy with which they disapprove.

Since the Risk Assessment is in draft form and currently open for public comment, EPA forwarded the challenge to the EPA Office of Pesticide Programs (OPP) for incorporation into the docket for the metam sodium re-registration process. OPP uses a six-phase process to conduct re-registrations. As part of the six-phase review, the EPA is currently evaluating the risk assessment under the Federal Insecticide, Fungicide and Rodenticide Act. This allows the pesticide registrants and the U.S.D.A. an opportunity to review and correct errors before the risk assessment is available.

### *Dioxin Challenge*

The second challenge, submitted by a coalition of cement kiln operators, seeks changes to an EPA report presenting a comprehensive inventory of sources and releases of dioxin-like compounds in the United States. It is generally accepted that dioxin-like compounds are among the most toxic substances released into the environment by human activities. Cement kilns, which are used to burn hazardous waste, are among the many sources of dioxin emissions.

On June, the Cement Kiln Recycling Coalition (CKRC) requested correction of information contained in the EPA's Inventory of sources and Environmental Releases of Dioxin-Like Compounds. Specifically, CKRC believes the External Review Draft incorrectly estimates the amount of dioxins that Hazardous Waste Combuster (HWC) cement kilns emit each year. The report estimates that HWCs emit 68.40 grams of dioxins per year and are responsible for 4.47% of annual dioxin emissions in the United States. In contrast, another EPA report finalized in 1999 calculates dioxin/furan emissions from HWC cement kilns at approximately 13.1 grams per year. CKRC challenges the External Review Draft's use of

estimated emissions factors instead of the actual emissions data collected in the 1999 report. The group had requested that EPA replace the "estimated" emissions data replaced by actual data collected by the EPA's Office of Solid Waste.

More importantly, CKRC is asking the EPA to circumvent its own policies and make corrections to the External Review Draft immediately. The agency is currently accepting feedback on the draft during a public comment period. However, the industry association claims the current data makes them vulnerable to special interest groups. CKRC states: "that correction of this fundamental error through the regular comment process will not be sufficiently timely to protect the interests of CKRC's members." Their petition goes on to say, "Interest groups, particularly those inclined to oppose energy recovery in cement kilns, often promote their goals by trumpeting negative allegations about cement kilns." To date, the EPA has not issued a response to CKRC's challenge.

Both challenges question the methodology and policy choices made by EPA rather than data. The CKRC does contain some data specific arguments but they are used to launch a broader attack on the policy decision by EPA to emphasize dioxin/furan emissions. Both challenges also demonstrate the duplicative nature of the data quality act as they both address documents that currently have comments processes open to receive any data complaints or feedback.

## Open-Government Activist Seeks to Recover Legal Fees from FOIA battle

After winning a four-year legal battle for access to county documents concerning the Seahawks Stadium, a Seattle resident has returned to court seeking greater financial compensation for his efforts. King County Superior Court Judge Michael Hayden heard arguments on August 19, during which Armen Yousoufian sought an award of more than $1 million in compensation for his legal fees and as a deterrent to prevent other agencies from stonewalling citizen requests of public information.

The battle began in 1997, when Yousoufian requested documents from the King County government on the then-proposed Seahawks Stadium. After King County officials denied the request, Yousoufian sued under Washington's Public Disclosure Act (PDA). In 2001, the King County Superior Court ruled in his favor and ordered the county to pay $100,000 in fines. Unfortunately, this amount did not come close to covering the $330,000 in legal fees Yousoufian had incurred.

Washington's PDA allows assessment of penalties ranging from $5 to $100 per day for every day documents are withheld. The original ruling had used the minimum of $5 per day. At last week's hearing, Yousoufian's attorneys argued the penalty should be raised to $90 per day, for a total of more than $742,000, in addition to lawyer fees. In its counterargument, the county acknowledged that the minimum penalty was too low but sought to raise it to only $10 a day and less than half the attorneys' fees. Judge Hayden is expected to issue a written ruling by the end of the month.

Fee recovery is a critical component of any effective public disclosure law. Without it citizens unfairly denied requested documents would often be unable or unwilling to take on the uncompensated financial burden of battling the government in court. Recognizing this, Sens. John Cornyn (R-TX) and Patrick Leahy (D-VT) included in their Openness Promotes Effectiveness in our National (OPEN) Government Act (S. 394), a provision that would allow the public to more easily recoup legal costs from the federal government for improperly withheld documents. The bill currently has five cosponsors, while the House version of the bill (HR 867) has 20 cosponsors.

## Minnesota Considers 'Biomonitoring' to Protect Public Health

Minnesota lawmakers are considering biomonitoring legislation that would test Minnesota citizens to determine their exposure levels to a variety of toxic chemicals. The proposed law seeks to better gauge health risks currently posed by such chemicals, as the first step toward controlling and reducing those risks.

The proposed legislation requires the state's commissioner of health to provide community-based biomonitoring for toxic chemicals in economically, racially and geographically diverse communities. Upon detection of dangerous levels of a toxic chemical, the bill calls for various state agencies to identify the source or sources of the chemical exposure, and develop recommendations to minimize the exposure.

Versions of the "Healthy Minnesotans Biomonitoring Program" bill have been introduced in both the Minnesota House (H.F. 1850) and Senate (S.F. 979), on February 14 and March 16, respectively.

Biomonitoring is a cutting-edge tool that yields clearer information about chemicals that are still being absorbing into peoples' bodies, and therefore continue to pose health risks, despite environmental progress made over the past three

decades. These studies help improve public health policy, by indicating trends in chemical exposures, identifying disproportionately affected and particularly vulnerable communities, assessing the effectiveness of current regulations, and setting priorities for legislative and regulatory action. In July, the Center for Disease Control and Prevention (CDC) released its Third National Report on Human Exposure to Environmental Chemicals, a nation-wide biomonitoring study released every two years. The study found troubling levels of toxics, including metals, carcinogens and organic toxics like insecticides, in individuals across the country.

Many scientists have pointed out that more focused state-level biomonitoring studies would yield more revealing data than the national CDC study. Such examinations could allow researchers to draw stronger connections between sources of toxics, at-risk populations, and pollution-prevention measures that should be taken by industry.

According to the federal Toxics Release Inventory in 2003 Minnesota industries released or disposed of over 31 million pounds of toxic chemicals. A Minnesota biomonitoring program could determine which of these chemicals are trespassing into resident's bodies.

California is the only other state currently considering a state-wide biomonitoring program. The bill (SB 600) was introduced in February and passed out of the California Assembly Health Committee June 28, despite strong opposition from industry. Supporters say that the bill will help scientists, medical professionals, decision-makers and community members better understand the effects of environmental contaminants on human health. They are hopeful the bill will clear its next hurdle in the Assembly Appropriations Committee.

## Town Seeks to Keep Secret Maps, Images

Officials in the town of Greenwich, Connecticut are compiling a list of vulnerable public buildings and utilities and plan to withhold aerial images and maps of these sites from the public, despite having been ordered by the Connecticut Supreme Court to disclose them. Mapping information has been a continual target for proponents of increased government secrecy, even though little evidence supports their claims that such information is too dangerous to remain public.

A Greenwich computer consultant, Stephen Whitaker, requested access to the town's recently compiled geographic information system (GIS), which contained digital maps and aerial photos of the community. The town denied the request claiming that the information could be misused by terrorists and criminals. Whitaker fought the town's decision all the way to the state's highest court. On June 15, the Connecticut Supreme Court ruled that the town had no evidence supporting its claim that disclosure of the images represented an immediate danger to the community. Greenwich officials were ordered to grant Whitaker full access to the computer files.

However, a month after the court decision town officials requested the state intervene and limit public access to the town's GIS files. A Connecticut law passed after the 9/11 terrorist attacks granted the Public Works Commissioner the power to restrict public access to information that risks harm to any person. The agency is currently investigating the situation; however, whether the new law is even applicable in the case is unclear, as Whitaker's request predates it.

Mapping and GIS data is among the first information held up by proponents of greater government secrecy as examples of the types of information that must be withheld from the public in order prevent terrorists from using it. For instance, a previous *OMB Watcher* article revealed that the Department of Homeland Security had accepted a New Jersey municipal utilities' GIS database of property parcels into a program designed to restrict information. However, municipal property parcels data collected for property tax assessments seem a far cry from the critical infrastructure information the program was established to protect. It appears that the utility simply did not want to supply the information without charging for the service.

While little research has been done in this area, at least one study supports the court ruling to allow access to the GIS files. According to a 2004 RAND Corporation report, efforts to remove information from government websites after the 9/11 attacks, especially maps and imagery information, were unnecessary and unproductive in protecting against terrorism. The report, "Mapping the Risks: Assessing the Homeland Security Implications of Publicly Available Geospatial Information," found that the data was simply not detailed or current enough to be significantly useful to terrorist purposes. The report also determined that terrorists could acquire better information from direct observation or other public sources including textbooks, trade journals, street maps and non-governmental websites. Therefore the removal of the information from government websites was pointless.

## Federal Election Commission Seeks Comments on Rule that Could Gag Charities around Elections

The Federal Elections Commission (FEC) is considering changes that could affect the advocacy voice of charities across the country. Currently charities are strictly prohibited from electioneering, and are thus not covered by campaign finance law. However, the FEC is reviewing current rules regarding communications made 30 days prior to primary elections and 60 days before general elections, and weighing whether charities should be limited in mentioning a candidate for federal office during those periods.

On August 12, the FEC General Counsel released a proposal on "electioneering communications" -- broadcast, cable or satellite communications that, because they refer to a federal candidate, cannot be aired within 30 days of a primary and 60 days of a general election. The proposal examines the unqualified exemption for 501(c)(3) tax-exempt organizations, seeking information on the level of deterrence current tax laws have to prevent an organization from "promoting, attacking, supporting or opposing" (PASO) a federal candidate. Other information sought in the proposal includes to what extent do grassroots communications result in charities PASO-ing a candidate, as well as input on a proposed rule that would allow the FEC to make its own determinations on whether an ad PASOs a candidate.

The proposal is significant, because it involves a wholesale review of the exemption that 501(c)(3)s receive under current rules. 501(c)(3)s are currently entirely exempt from the electioneering communications prohibition. The Bipartisan Campaign Reform Act of 2002 (BCRA) exempts certain communications from the definition of electioneering communications. It also authorizes the FEC to issue regulations exempting other communications as long as the communications do not "promote, support, attack or oppose" a federal candidate. In 2002, the FEC exempted 501(c)(3)s because it did not want to discourage organizations from issue advocacy based on a threat that had not manifested.

The FEC also assumed that the Internal Revenue Code (IRC), which prohibits charities from intervening in political campaigns, could be used to regulate 501(c)(3)s for the purposes of election law. *Shays v. FEC* challenged the exemption for 501(c)(3) organizations, with the plaintiff complaining that the rule was neither inadequately considered or explained and questioning whether the FEC should leave enforcement to the Internal Revenue Service (IRS). A U.S. District Court found the record unclear as to whether the regulation's reliance on the IRC prohibitions would result in exempt advertisements that "promotes, supports, attacks and opposes" a federal candidate. The Court held that the exemption for 501(c)(3) organizations violated the Administrative Procedure Act (APA) because the explanation and justification for the rule led the Court to believe that the FEC had failed to conduct a reasoned analysis. Specifically, the Court found that the explanation was deficient because it did not address the "compatibility" of the IRS' enforcement with Federal Election Campaign Act's (FECA) requirements, and identified three specific omissions:

- whether public communications that PASO a federal candidate would be viewed by IRS as political activity in which 501(c)(3) organizations may not engage;
- the risks, if any, that limited lobbying activity permitted for 501(c)(3) organizations could give rise to advertisements that PASO a federal candidate; and
- the implications of allowing the IRS to "take the lead in campaign finance law enforcement."

The District Court remanded the regulation to the FEC for further action consistent with the order. Rather than appealing this aspect of the Court's decision, the FEC is initiating rulemaking to address the three concerns. A well-developed administrative record will help inform their decision, as well as allay the Court's concerns.

If the FEC makes changes in the rules affecting charities, it could result in stifling nonprofit speech, as nonprofits would struggle to determine how to conduct issue advocacy without referencing an elected federal official in a manner that is neither too flattering or too disparaging to the satisfaction of the government. Comments on the proposal are due on or before Sept. 30 and should be sent to ECdef@fec.gov, or through the Federal eRegulations Portal at www.regulations.gov. The FEC will hold a hearing on Oct. 19.

The FEC is considering a range of options including:

- retaining the section 501(c)(3) exemption;
- narrowing the section 501(c)(3) exemption;
- repealing the two current exemptions for 501(c)(3) organizations; and
- replacing all of the current exemptions with a broad new exemption covering all communications that do not *promote, support, attack, or oppose* a federal candidate.

## Action Expected on Charitable Giving Legislation in September

The Senate Finance Committee intends to introduce a package of nonprofit accountability reforms and charitable giving tax incentives soon, according to sources on the Hill.

Sources say the committee hopes to mark up the Charity Aid and Recovery Act (CARE) in September. The CARE Act, contained in Title III of S. 6, the Marriage, Opportunity, Relief, and Empowerment Act of 2005 (MORE Act), includes several charitable-giving incentives, including a charitable deduction for itemizers, and tax-free distributions to charities from individual retirement accounts. The bill also contains provisions to improve the oversight of exempt organizations, including providing more money for IRS-oversight operations and making public more IRS determination letters.

The committee is also working on several charitable reform proposals and will likely introduce these proposals in September. Legislation may also address donor-advised fund reform, supporting organization reform and self-dealing, however, it is unclear to much of the sector the exact content of the legislation.

It is uncertain whether Santorum will support the nonprofit accountability legislation that Sen. Charles Grassley, chairman of the Senate Finance Committee, intends to introduce, even if it contains Santorum's CARE Act provisions. On May 31, Santorum and 20 senators, both Republican and Democrat, raised their concerns in a letter to Grassley and Ranking Member Max Baucus (D-MT). Santorum is concerned that the legislation will not focus on giving resources to the IRS to enforce the current laws, and that new laws might have an adverse effect on small nonprofits. If Santorum opposes the legislation, it will be more difficult for Grassley to move his bill through the Senate — and this will have a large impact on whether the CARE Act will pass.

In the House, Leadership is waiting to see what the fallout from the Senate will be. Rep. Roy Blount (R-MO) has indicated his intention to re-introduce the House version of the CARE Act and companion nonprofit accountability legislation after the Senate has acted.

## Legislative Update: Federalism Bills

Legislative developments brewing in the 109th Congress could alter the relationships between the federal and state governments, thus potentially distorting important regulatory protections.

### *Unfunded Mandates Reform Act Revisions*

There has been a flurry of activity marking the tenth anniversary of the Unfunded Mandates Reform Act: a series of hearings, a Government Accountability Office symposium, and hints from various congressional offices that UMRA could be reshaped in ways that might present serious obstacles to public protections. More information and analysis is available here. There appears to be a two-pronged strategy:

- **Creating a supermajority roadblock:** This part of the strategy was already realized in the Senate budget resolution. Before the budget resolution changed things, UMRA included a point-of-order mechanism that was relatively harmless: it allowed any member of Congress to raise a point of order against a bill imposing new requirements on state and local governments that, according to the Congressional Budget Office, would impose new costs of $50 million (indexed for inflation to $62 million) or more, but that point of order could be overcome by a simple majority vote. A undebated provision in the budget resolution, introduced by Sen. Lamar Alexander (R-TN), changes that simple majority vote into a 60-vote supermajority requirement, albeit only in the Senate.

  Bills subject to the point of order are not necessarily the paradigm case of an "unfunded mandate," or a requirement imposed specifically on the states without accompanying funding. Take, for example, a hypothetical bill to raise the minimum wage. State and local governments are employers, just like any private corporation that would be subject to minimum wage laws; even a small raise in the minimum wage would easily trigger the $62 million threshold for state and local governments. In such a case, senators wishing to block a minimum wage increase could raise an UMRA point of order, and the hypothetical minimum wage would then have to be supported by at least 60 votes. This heightened point of order becomes a backdoor filibuster that a senator can use to block legislation without ever having to criticize it.

- **Expanding UMRA's reach:** State and local government groups have been actively advocating for expanding the scope of laws subject to UMRA and amending UMRA to close what they call "loopholes." The changes they are calling for include the following:

- Eliminating UMRA's current exemptions, which include grant conditions (such as requirements attendant to foster care funding) and laws that impose requirements on the states in order to improve national security;
- Extending UMRA's coverage to laws that alter existing mandates when the total cost of the revised mandate exceeds $62 million, even if the *incremental* cost of the new requirements does not alone reach the UMRA cost threshold; and
- Imposing a form of regulatory budgeting by holding costs associated with implementing regulations within the bounds of the Congressional Budget Office cost estimates for the original legislation.

In an April 2005 hearing, it was apparent that no legislative proposal had been developed at that time. Given the major developments still to be tackled when the Senate returns from August recess, it now seems unlikely that there will be major developments on this prong of the UMRA strategy in that chamber until late fall at the earliest. Timing aside, this threat still seems significant.

### *Attack on Consent Decrees*

Two currently pending bills, H.R. 1229 and S. 489, would erode government accountability by limiting the public's ability to hold state and local governments accountable for their violations of federal law. Consent decrees are court-enforceable settlement agreements that resolve litigation against state and local governments; the requirements built into such agreements, which are negotiated by the governments themselves, become the terms of a court order to remedy the existing violations and, in many such cases, to fix the systemic problems that caused those violations. These bills would put an artificial expiration date on consent decrees to remedy violations of federal law.

The stakes are high with these bills. They pose an immediately obvious threat to civil rights, with the exception of school desegregation cases, which are exempted under the bills. Also at stake would be many cases in which state agencies are responsible for implementing federal protective policies, such as air quality standards and workplace safety requirements. Many states have a weak record of environmental enforcement and workplace health and safety enforcement. When states fail to follow the law, the litigation option empowers workers and communities suffering environmental harms to act as private attorneys general, compelling the states to do their jobs. These bills would take power away from the people to hold their own government accountable.

Public interest groups, led by the civil rights community, are monitoring these threats closely.

### *On the Fringe*

At least two other bills would have federalism implications, although with little likelihood of passage they do not appear to pose any real threat.

H.R. 3499, the "Local Control of Education Act," purports to "restore state sovereignty over public elementary and secondary education." It works by, first, declaring the obvious--that requirements built into federal education spending laws are not requirements on the states unless the states affirmatively act to take the money--and then, second, by requiring states every five years to re-affirm their decision to be subject to federal education requirements.

The final bill, H.R. 3621, is farthest out on the fringe. It would give governors and state legislators standing to litigate against any federal statute, regulation, or program that "invades or otherwise violates or intrudes upon the residual core sovereign authority" protected by the Tenth Amendment or that "damages or otherwise diminishes the republican form of government" in the state. Both ideas are nonstarters, and the second one is null and void from word one, given that the Supreme Court long ago ruled that the clause of the Constitution ensuring a "republican form of government" is nonjusticiable.

### *Political Context*

These last two bills appear to be largely rhetorical efforts that allow some in Congress to espouse states' rights while doing little or nothing for the states themselves. The consent decree bills and potential UMRA reforms, however, pose serious threats in part because they are fueled by states' rights rhetoric. Recent budgets have been devastating to the states (even in those states that are showing revenue upticks, because those upticks are likely to be temporary and those states may well be forced to replace the missing federal funding with state revenues), and the administration has also shown no compunctions against trampling over the states' power to protect their citizens with safeguards that are stronger than the federal government's anemic safeguards. This year's budget is shaping up to be just as harmful to the states. A high-profile effort to strengthen UMRA could be a ploy to rehabilitate the GOP's weakened states' rights credentials while continuing

to starve the states of needed resources, with the added benefit of weakening public protections and thus benefiting GOP sponsors in corporate America.

## States Present Opportunities and Pitfalls for Progressive Regulation

Although many progressives have begun to focus resources on winning battles in the states, the regulatory record at the state level is characterized by both opportunities and potential pitfalls.

### *Successes at the State Level*

Under the Bush administration, many important federal regulations have been stalled, weakened or even rolled back. In such cases, states have often been forced to take matters into their own hands, developing their own regulations that are more stringent than the national standards.

Most recently, Pennsylvania has decided to raise the bar on EPA's weakened mercury regulation. The Pennsylvania Environmental Quality Board voted 16 to three to go beyond the federal mercury regulation and require coal-fired power plants in the state to reduce mercury emissions by up to 90 percent. The federal standards promulgated by EPA earlier this year require only a 70 percent reduction by the mid-2020s.

Earlier this year, New Jersey also adopted more stringent standards for mercury emissions. Pennsylvania, however, has 39 coal-fired power plants in the state and has the second highest levels of toxic mercury pollution in the nation, making the task of lowering emissions across the state far more complicated than in New Jersey, which has only five such plants. Pennsylvania has also joined a host of other states to sue EPA over the standard, arguing that the Clean Air Mercury Rule does not offer adequate protection of health and the environment. Litigation serves as another mechanism for states to demand greater levels of protection from the federal government.

California offers another example of states enforcing stringent standards in the absence of federal protections. EPA promulgated regulations in January 2001 to mandate dramatic decreases in harmful emissions, most notably particulate matter and nitrogen oxide. These standards, known as the "Federal 2007 Rule," are scheduled to take effect in 2007. However, according to state and local pollution control officials, EPA has been pressured by the trucking industry to weaken the rule. In order to ensure truck drivers in California will be forced to comply with the original federal standard, California passed its own diesel fuel standards in October 2001 that are identical to the federal standard and scheduled to take effect at the same time.

Unwilling to rely on EPA to fully implement the rule, other state and local leaders worked with the State and Territorial Air Pollution Program Administrators (STAPPA) and the Association of Local Air Pollution Control Officials (ALAPCO) to create a Model Rule, based on the California standard, that states could adopt to ensure diesel emissions would still be regulated in the event that the federal standard is not implemented or is weakened. STAPPA and ALAPCO are comprised of air pollution control officials from the states, territories, and major metropolitan areas. On Sept. 29, 2004 11 states and the District of Columbia announced plans to implement California's standards for diesel fuel emissions as a backup to the federal regulation promulgated by EPA.

Like the federal regulation, the model rule, if implemented, will reduce emission levels by 90 percent for particulate matter and 95 percent for nitrogen oxide. According to a STAPPA/ALAPCO press release, the adoption of these regulations by these 12 jurisdictions will require more stringent emissions standards from about one-third of truck sales. To date, the states that have implemented or plan to implement the California standard are Connecticut, Delaware, the District of Columbia, Georgia, Maine, Maryland, Massachusetts, New Jersey, New York, North Carolina, Pennsylvania and Rhode Island. (Read more about this example here).

Local governments have also stepped in to create more robust public protections than the federal government has mandated. Seattle led the way for a US Mayors Climate Protection Agreement, which committed US mayors to enforcing the provisions of the Kyoto Protocol on climate change in lieu of a federal policy.

### *Why Federal Mandates Matter*

Action by state and local governments has increased the level of public protection in these cases, but state legislatures can also lower the bar on public protections. Though 175 cities joined the effort to combat climate change through reducing emissions, some states have passed policies that weaken efforts to control greenhouse gasses. A new law in Maine, for instance, requires the Maine Department of Environmental Protection to conduct analysis into the cost effectiveness of

regulations aimed to reduce greenhouse gas emissions, which will ultimately impede the state's ability to regulate greenhouse gases.

In other cases legislative action has caused more immediate harm to state citizens. In Florida, for instance, the repeal of a motorcycle helmet law has lead to a significant increase in death and serious injury. With the repeal of the law on July 1, 2000, only motorcyclists under the age of 21 or with less than $10,000 worth of medical insurance coverage are required to wear to protective helmets. A recent report by National Highway Traffic Safety Administration (NHTSA) has found that the repeal of the law has led to a 75 percent increase in motorcycle fatalities, from 181 motorcyclists killed in the 30 months before the law was repealed to 280 killed in the 30 months following repeal. The costs to treat head injuries for motorcyclists more than doubled to $44 million in 2002, and fewer than 25 percent of the hospitalized cases for head, brain or skull injuries cost less than $10,000, the required level of insurance to ride without a motorcycle.

### *States Fail at Worker Safety*

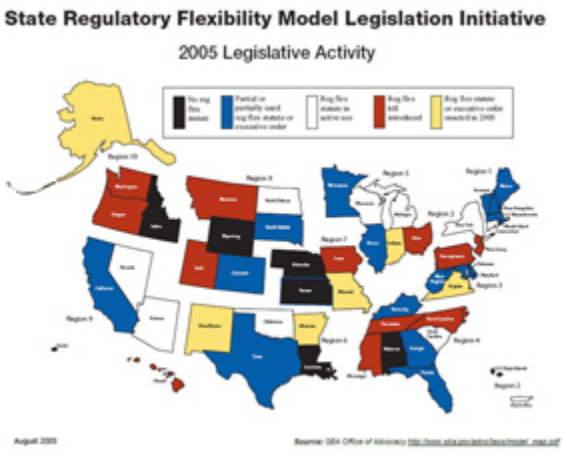
When states are responsible for enforcing or implementing regulations, standards may be applied unevenly or poorly. For instance, both states and the federal government are responsible for enforcing workplace health and safety protections. States are solely responsible for regulating work place health and safety in twenty-one states and U.S. territories, while the Occupational Safety and Health Administration (OSHA) oversees regulation in the rest. This unique situation provides an opportunity to examine how enforcement and compliance are impacted when regulation is left to the states. A recent paper examining enforcement data in the construction industry found that state inspectors tend to be more lax than OSHA officials in enforcing regulations. State inspectors tend to impose lower fines per violation and have "less measurable impact on inspected firms' regulatory compliance." Moreover, the frequency of construction injuries increases by approximately ten percent when states are responsible for enforcement.

Unlike state standards, safeguards enacted at the federal level provide the same protections for all Americans, regardless of where they happen to live. Thus, developing basic federal standards is necessary for ensuring equal protection for all. Nationwide problems call out for national solutions rather than a patchwork of efforts by states that could be prompted by economic dislocation into racing to the bottom rather than striving for the top. Moreover, as business learned with worker right-to-know regulations, it is less costly to comply with one federal standard than with potentially 50 different standards at the state level.

### *Easy Targets for Bad "Reforms"*

In Congress, bad regulatory legislation is often too political to move forward, or other legislative priorities simply take precedence. Conservative groups, however, have made regulatory "reform" a priority at the state level and have found much success there. Several states have already enacted legislation similar to regulatory reform bills introduced in Congress. In fact, the Small Business Administration's Office of Advocacy has drafted model legislation for states to implement their own version of the Regulatory Flexibility Act ("Reg flex") that mirrors the federal statute. The Regulatory Flexibility Act requires agencies to analyze the impacts of regulations on small businesses before an agency can promulgate a new rule. At the state level, such analytical burdens will ultimately only serve to further bog down already taxed agencies while putting the interests of business above needed protections.

Still, through SBA's model legislation initiative 44 states have either implemented or introduced regulatory flexibility legislation. Just this year, Arkansas, Missouri, Alaska, Virginia, Indiana and New Mexico passed regulatory flexibility statutes or executive orders.



"Reg flex" is not the only initiative making its way through the states. Sunset and results commissions are another regulatory "reform" initiative that has caught on at the state level. In fact, legislation in Congress to establish federal sunset and results commissions is modeled off of the Texas Sunset Advisory Commission. Other regulation overhauls that originated at the state level were eventually adopted in Congress, such as the Unfunded Mandates Reform Act.

***A PLAN for Better Safeguards?***

Much of the regulatory "reform" successes at the state level have been made possible by the American Legislative Exchange Council (ALEC) which provides policy support for conservative state legislators. Progressive leaders recently launched the Progressive Legislative Action Network (PLAN), which seeks to be an alternative to ALEC "by providing coordinated research support for a network of State legislators, their staff's and constituencies, in order to equip them with coherent logistical and strategic advocacy tools necessary for advancing key progressive economic and social policies." Yet as myriad examples show, the states can provide just as many foils as they do opportunities for health, safety and environmental safeguards, and ultimately state protections can not replace the need for strong federal protections.




1742 Connecticut Avenue, N.W., Washington, D.C. 20009
202-234-8494 (phone)
202-234-8584 (fax)