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Congress Takes Step Toward Stimulus Transparency

When the Senate took up the $819 billion House-passed economic stimulus package (H.R. 1) the week of Feb. 2, not only did the chamber modify myriad spending and tax measures, but it also altered the bill's transparency and accountability provisions. The Senate's version of H.R. 1, the American Recovery and Reinvestment Act of 2009 (ARRA), contains less detail on specific data the Obama administration must provide on stimulus spending. Neither version provides the level of detail that may be needed to collect and disseminate information about the type of jobs that are created or preserved, the wages paid to workers, or information about who may be getting such jobs. The assumption is that the Obama administration, through its Recovery.gov website, will tackle these thorny implementation issues.

While much of the transparency and accountability language found in the chambers' bills is virtually identical, there are notable differences. OMB Watch has analyzed the differences in the two versions of ARRA and put together a side-by-side comparison of the bills. The analysis

finds that the provisions in both bills are broadly similar, with each mandating that the federal government make available online certain stimulus spending on a designated website. The largest gap between the two bills is specification of who would be required to report detailed information on stimulus-funded projects.

The Senate bill would require that *all recipients*, except for individuals, of stimulus funds report on a quarterly basis to the federal agency that authorized those funds:

- The total amount of recovery funds received from the agency
- The amount of funds expended or obligated to projects
- A detailed list of all projects for which recovery funds were expended, including:
    - The name and description of the project
    - An evaluation of the completion status of the project
    - An analysis of the number of jobs created or retained by the project

The House bill would require similar, but not identical, reporting for infrastructure projects only. That bill would require the federal, state, or municipal agency funding the project to post on the stimulus website a notice to the public of the infrastructure project, with the notice including: a description, purpose, and total cost of the infrastructure investment funded; the rationale of the agency funding the project; and contact information for the person at the government agency in charge of the project. For funds authorized for "operational purposes," the federal, state, or local authority would be required to publish on the website "a description of the intended use of the funds, including the number of jobs sustained or created." The Senate bill does not differentiate between infrastructure and operational expenditures.

Additionally, the House and Senate bills also take different approaches to contracting and oversight. The House bill contains a provision that would require, "to the maximum extent possible," contracts to be fixed-price and competitively bid. Contracts that are not would be posted in a special section of the stimulus website. The House bill also would require inspectors general to investigate concerns raised by the public regarding stimulus spending and to make available on the stimulus website any findings, audits, or reports resulting from an investigation. The Senate bill omits these two oversight provisions but does include a provision identical to one found in the House bill that requires the Comptroller General to conduct bimonthly reviews, and prepare reports on such reviews, of the use of stimulus funds by selected states and localities.

The stimulus oversight provisions in the House and Senate versions of ARRA, while unprecedented and greatly welcome, leave unanswered many questions. For example, what will be the role of USASpending.gov, a congressionally mandated website that provides information about nearly all government spending? Given that USASpending.gov is required to provide information about subgrants and subcontracts but has not accomplished this task, how will Recovery.gov do it? Given a large sum of money will go through states and be subcontracted, will states also be required to post information on their websites about spending within the state? Will the Recovery.gov website incorporate newer Web 2.0 technologies that make access to and use of the underlying data easier for all? These types of

questions are not likely to be answered in the legislation, but rather by the Obama administration.

For a detailed comparison of the two bills, see our analysis here.

OMB Watch Joins Stimulus Transparency Coalition

OMB Watch has joined more than 30 other groups calling for transparency and accountability requirements in federal recovery efforts, including the American Recovery and Reinvestment Act (H.R. 1). The Coalition for an Accountable Recovery (CAR) is an assembly of organizations and individuals who believe transparency and accountability are essential to ensuring that hundreds of billions of dollars of federal spending is disbursed fairly; spent with minimal waste, fraud, and abuse; and can be assessed as effective or ineffective.

CAR released polling data showing bipartisan support for economic stimulus legislation and creation of a searchable website that holds government accountable. The CAR coalition immediately focused attention on the spending bill moving through Congress to ensure it contains adequate disclosure and accountability requirements. The "trans-partisan" coalition – it includes libertarian, progressive, and conservative organizations – is also beginning to monitor how the Obama administration will implement its Recovery.gov website.

The Troubled Asset Relief Program (TARP), a $700 billion bailout to banks, demonstrated the importance of transparency and accountability. TARP has been riddled with minimal transparency, making it difficult for congressional oversight panels, the media, or the public to know how the money is being spent and how taxpayers will benefit. CAR has recognized that now, before a single stimulus dollar is spent, is the time to initiate efforts to impart meaningful transparency and accountability requirements on what will likely be an $800 billion economic stimulus package of spending and tax cuts. The members of CAR agree that:

> There must be requirements for detailed data and research tools on a searchable website to allow the public to effectively track and analyze the actions of the government (federal and state) – as well as bailed-out companies, subsidized companies, and government contractors – to judge how any recovery funds, including those to the financial sector, are being spent.

Only through transparency can the public, analysts, and the news media ascertain whether federal spending has not been wasted on profiteering, pay-to-play arrangements, or unseemly executive compensation. And by improving existing government information infrastructure in addition to deploying the tools of Web 2.0 technology, the federal government can achieve an unprecedented level of transparency. CAR's vision of accountable and transparent spending is one in which accurate spending data are collected in a timely fashion and disseminated through existing government websites like USASpending.gov, as well as external stakeholders through programming interfaces. The coalition recognizes that effective transparency rests not

just on the usability of federal spending websites but also crucially on the data reporting infrastructure within the government.

While federal law requires that the government provide details on federal contracting and grant expenditures through USASpending.gov, existing reporting requirements fall short of enabling full transparency. Currently, once the federal government gives money to a state, those funds are not tracked by USASpending.gov. Yet, the economic stimulus package being debated in Congress would expend significant resources through state and local agencies. Only by capturing data on these expenditures through state-level reporting will Congress be able to ensure that all federal contracting and grant funds are visible to watchdogs within and outside the government.

CAR insists that all recipients of federal funds, including state and local agencies and the contractors and subcontractors working for those agencies, be required to report on the use of stimulus funds and metrics that could be used to gauge the economic impact of those funds. These data should include:

- Information currently collected by USASpending.gov
- The activity/services to be provided under the contract, grant, loan, or subsidy, including copies of the contract
- Relevant performance measures (e.g., jobs saved or created, wages and benefits paid for such jobs, demographics of those hired)
- Performance data about the recipient of federal funds (e.g., on-time performance, quality of work)

Additionally, to facilitate the reporting of these data, the federal government should promulgate clear definitions of and standards for reported data.

But transparency and accountability do not end with expenditure data reporting. CAR believes that reporting the method by which stimulus funds were distributed is also fundamental to implementing accountability. By posting contract bidding procedures online and by specifically identifying those contracts that were not competitively bid would enable the general public, analysts, and the press to readily identify opportunities for waste, fraud, and abuse. Furthermore, CAR believes that information on the lobbying of officials at the state and federal level should also be reported online and on the same site on which stimulus spending data are posted.

CAR sees the enactment of effective transparency and oversight of stimulus spending as the first step in bringing to bear the power of 21st century technology on all federal expenditures. As the Senate debates approving an $800 billion economic stimulus package, and as the Treasury Department disperses $700 billion in capital injections into banks, the public is recognizing a gap in transparency and accountability. According to polling conducted by Lake Research Partners and the Topos Partnership, 79 percent of Americans believe that making the government more open to the public is important, and 83 percent believe that the government should be more accountable to American citizens. By applying CAR's proposed implements of

stimulus transparency, the federal government would not only be addressing the public's concerns, but it would also be taking great strides toward becoming a more responsible steward of the nation's resources.

Congress Again Sets Sights on Toxics Right to Know

Rep. Frank Pallone (D-NJ) recently reintroduced the Toxic Right-to-Know Protection Act (H.R. 776), which would restore the thresholds for reporting of toxic pollution under the Toxics Release Inventory (TRI) program. A 2006 rule from the U.S. Environmental Protection Agency (EPA) raised the thresholds significantly. An identical version of the bill failed to move out of committee in 2008.

In a press statement, Pallone said, "Communities have a right to know what kinds of chemicals are being dumped in their backyards. With the weakening of TRI rules under the Bush administration, communities have lost a lot of power to hold companies accountable. This legislation puts people before polluters, and once again arms communities with the information they need to protect their neighborhoods."

Since 1986, TRI has provided the public with data on releases and transfers of toxic waste at thousands of facilities nationwide. The list of reportable chemicals, as well as the covered industries, has grown over the life of the program. The 2006 TRI rule promulgated by the Bush administration was seen by numerous public health and environmental advocates as a major setback, harming citizens' ability to protect the health of their communities and families.

According to Pallone's office, "The Toxic Right-to-Know Protection Act will undo changes that have seriously undermined the Toxics Release Inventory (TRI), a critical tool that has given communities access to an online database describing what toxic chemicals are being released from nearby plants and refineries. The TRI program has been extremely successful in empowering communities by ensuring that they know what chemicals and how much of these harmful chemicals are being released into the air, water and ground."

The EPA finalized the TRI rule in December 2006 despite enormous opposition. The rule raised the threshold for the amount of pollution facilities can release before they are required to report detailed data on the pollution. As documented in an OMB Watch report, of the more than 122,000 public comments submitted in response to EPA's plans to cut TRI reporting, more than 99.9 percent opposed the agency's proposals.

The introduction of legislation to strengthen the reporting thresholds coincides with the continuation of a lawsuit brought by thirteen states against EPA to restore the old reporting rules. It is unclear whether the new EPA leadership might pursue settlement of the suit. In a break from the Bush administration, the Obama administration recently announced its intention to end its appeal to the U.S. Supreme Court in defense of controversial Bush-era rules affecting mercury pollution from fossil fuel power plants. This action could be interpreted

as a willingness to settle additional pollution-related lawsuits originally defended by the Bush Department of Justice.

The new bill is identical to legislation Pallone introduced in 2007, which would have restored the threshold for detailed reporting of releases to 500 pounds. The 2007 bill managed to get a hearing but never made it to a vote in the House Energy and Commerce Committee. The same committee again has jurisdiction, but no plans for the new bill have been announced. Similar legislation in the Senate has not yet been introduced, and the Senate's plans for dealing with TRI are unclear.

New Director of National Intelligence Promotes Smarter Classification

During his recent confirmation hearing, Admiral Dennis Blair, the new Director of National Intelligence (DNI), derided the current classification system, which promotes over-classification of intelligence-related information. He discussed the need for a cultural change in the intelligence dissemination process that includes new training for analysts and greater accountability.

The problem of over-classification is a long-standing issue that has been addressed by many groups. In 2007, Mark Agrast of the Center for American Progress testified before Congress that too much secrecy, "whether through over-classification or through pseudo-classification—conceals our vulnerabilities until it is too late to correct them." However, despite awareness of the problem, little action has been taken by either Congress or the executive branch to resolve the issue. Blair's testimony may signal a new opportunity to address the issue.

In his response to pre-confirmation hearing questions, Blair said that "we need a classification system that adequately protects information that requires protection, e.g. intelligence sources and methods, but at the same time allows such information to be shared as needed among agencies of the intelligence community." To accomplish this, Blair proposed requiring intelligence analysts to be trained in report writing that removes references to sources and methods so that information could more easily be shared between intelligence agencies. Such actions could help the federal government more effectively share its intelligence with state and local governments without barriers caused by document control labels. Such labels often delay the vital transmission of information to those who need to be informed.

Shifting the Culture of Intelligence

In his answers, Blair also declared the need for a shift in intelligence community culture. He called for increased incentives for the creation of intelligence reports that can be made as widely available as possible. A major problem plaguing the current system, Blair stated, is that "there are many penalties for those who disclose classified information and few rewards for those who take the additional effort to write at lower levels of classification." Blair recognized

that intelligence information should eventually become part of the nation's historical record and that it should be systematically reviewed for disclosure 25 years after classification.

Further, Blair took an expansive view of the role of the DNI. Among the DNI's responsibilities is providing strategic intelligence to policymakers, but the DNI must also meet the needs of "front-line officers of the Department of Homeland Security and state and local law officials." Blair promised to use his authority to encourage combined actions of intelligence agencies to accomplish common missions. Intelligence agencies are not known for such cooperative attitudes. The lack of cooperation and information sharing between various agencies were among the problems highlighted by the 9/11 Commission.

21st Century Intelligence in Democracy

Blair outlined his desire to regain and retain the public trust in intelligence activities, as well. He stated, "The American people are uncomfortable with government activities that do not take place in the open, subject to public scrutiny and review." While the activities of intelligence officers must be secret to be effective, he promised to work candidly with oversight committees and to operate in a manner consistent with the Constitution and the rule of law.

Specifically, Blair addressed the issues of surveillance, detention, and interrogation policies, for which the Bush administration received severe criticism. Blair took clear stances against the use of torture and surveillance activities that circumvent established processes for authorization. He declared torture immoral, illegal, and not effective. Moreover, he called for clear standards for humane treatment in detention and interrogation programs. Working with oversight committees of Congress will be critical in establishing public reassurance that effective accountability exists over these policies.

Repeat Business

Past occupants of the DNI position have attempted to address some of the themes concerning increased information sharing. In the weeks before his departure, outgoing DNI Michael McConnell called for measures to utilize technology to increase information sharing among federal intelligence agencies. These efforts are somewhat similar to the DNI's experimentation with the creation of a cross-agency wiki, Intellipedia, in 2006 that was immediately met with agency resistance.

What appears to be unique to Blair's approach is the focus on cultural change within the intelligence community. While McConnell and previous DNIs worked to maximize agency access to information at the federal level, changing the way officials view their mission and the intelligence dissemination process will make intelligence more useful to those who need it on the ground.

Sen. Dianne Feinstein (D-CA) remarked that Blair "will inherit an intelligence community that has been beset by major failures and controversy over the past ten years."

Obama Begins Regulatory Reform

President Barack Obama took two steps toward reforming the way federal agencies develop public protections. On Jan. 30, the president issued a memorandum to the heads of executive departments and agencies asking for recommendations to help develop a new regulatory executive order. The same day, he issued an executive order overturning two Bush-era executive orders that changed the way regulations were developed.

The memo on regulatory review was published in the Feb. 3 *Federal Register*. It appears to initiate a process that would lead to a new executive order outlining the path agencies need to follow to develop rules and the review of those rules by the White House. The regulatory executive order currently in force, Executive Order 12866, was issued by President Clinton in 1993 and amended twice by President Bush.

Obama's memo differs from other presidential administrations considerably in its tone toward the value of public protections. He writes, "I strongly believe that regulations are critical to protecting public health, safety, our shared resources, and our economic opportunities and security." He also acknowledges the "expertise and authority" of the federal agencies, a philosophy that is in stark contrast from the Bush administration, where agency expertise and authority were often overridden by White House interests. By publicly requesting recommendations from the agencies, Obama is providing a seat at the table for agencies as the administration begins formulating a new order.

The memo directs the Office of Management and Budget's (OMB) director to work with agencies to produce the recommendations within 100 days. Specifically, the recommendations should address the following issues:

- The relationship between the agencies and the OMB office that reviews agency regulations, the Office of Information and Regulatory Affairs (OIRA);
- Disclosure and transparency in the process;
- Encouraging public participation in agency rulemaking processes;
- The role of cost-benefit analysis;
- "The role of distributional considerations, fairness, and concern for the interests of future generations;"
- Ways to keep the process from unnecessary delays;
- The role of the behavioral sciences in producing regulatory policy; and
- The best tools to use in the process to achieve public goals.

Most of these issues have been debated by regulatory scholars, public interest organizations, and business interests for years. Obama's transition team received many proposals on how to improve the regulatory process from think tanks, legal experts, scientific organizations, and public interest organizations. OMB Watch also initiated a project led by 17 regulatory and policy experts that made recommendations to the new administration and Congress.

Observers will pay particular attention to any recommendations on cost-benefit analysis in light of Obama's presumed controversial choice for OIRA administrator. Obama is expected to nominate University of Chicago law professor Cass Sunstein to the post. Sunstein is an ardent advocate of cost-benefit analysis and has written that agencies need guidance from OIRA in order to do the analyses correctly and make them useful as regulatory tools. He also argues that cost-benefit analysis should be a major, but not necessarily a determinative, consideration in justifying agency rulemakings.

The Obama administration has not yet described a process by which the public can offer input on the formulation of a new executive order. The Obama memo provides no requirement for public consultation, nor does it require the agency recommendations to be made public. However, on his first full day in office, Obama announced in a memo on transparency and openness that transparency, participation, and collaboration would be guiding principles in his administration.

The executive order Obama issued, Executive Order 13497, was published in the *Federal Register* on Feb. 4. It revoked a controversial order Bush issued in January 2007 that gave OIRA more control over agency regulatory practices by amending E.O. 12866. Critics of the Bush changes, including OMB Watch, argued that additional delay in issuing regulations would result from two changes: 1) making regulatory policy officers within agencies presidential appointees and giving them power to initiate or kill regulations, thus usurping what had traditionally been a power of the agency heads; and 2) requiring agencies to submit significant guidance documents (nonbinding information documents of all types that clarify how to implement rules) to OIRA for review before releasing the documents. There was no time limit by which OIRA had to act on the guidance documents.

In addition, Bush provided OIRA with another rationale for limiting which rules would be approved. By requiring agencies to identify a "specific market failure," Bush's amendments shifted the criterion for issuing rules from identifying a problem like public health or environmental protection. OIRA could return a rule or kill it if an agency did not convince OIRA of a market failure justifying the agency's actions.

The Obama order also revoked a 2002 Bush order that amended E.O. 12866 by removing the vice president from a formal role in resolving disputes regarding regulations under review. The changes shifted those responsibilities to others in the White House, usually the president's chief of staff. By revoking these two Bush executive orders, Obama has returned to the Clinton-era framework for rulemaking and review, pending the outcome of the process he has begun with the memo asking for agency recommendations.

New Limits on Toxins in Toys Take Effect

Effective Feb. 10, the Consumer Product Safety Commission (CPSC) will begin enforcing new standards for children's products containing lead and phthalates. The standards take effect just

days after a federal court voided a Bush administration effort to legalize the sale of products not meeting the standards if the products had been manufactured before Feb. 10. CPSC is enforcing the regulations in response to a 2008 law that gives the agency new powers and responsibilities to protect the public from potentially dangerous consumer products.

Congress directed the CPSC to set a lead standard for the content of children's products when it passed the Consumer Product Safety Improvement Act (CPSIA, H.R. 4040) in July 2008. The law established a new limit for lead in children's products – 600 parts per million (ppm). Previously, CPSC only limited lead in the paint or coatings on children's products.

Congress overhauled the beleaguered agency and expanded its powers after a record number of children's products were recalled in 2007. Most of the products were recalled for high lead levels. CPSC announced 106 lead-related recalls in 2007, totaling more than 17 million individual products.

In addition to lead, CPSC is restricting phthalates in children's products for the first time. Products may not contain more than 1,000 ppm of the chemical. Environmentalists and consumer advocates hailed Congress's decision to limit phthalates – a compound commonly found in soft plastics – as a victory for children's health. Scientists have linked phthalate exposure to reproductive and developmental abnormalities in fetuses and infants.

The new standards affect manufacturers, importers, distributors, and retailers. Both the lead and phthalate limits apply to products manufactured in the future and products already in inventory. Products already on store shelves, regardless of their manufacture date, cannot be sold if they exceed the new standards.

In 2008, CPSC announced its intent to exempt products already in inventory from the new phthalate limit. A federal court, overruling CPSC, interpreted the CPSIA as clearly prohibiting the sale of any products exceeding the phthalate limit.

The breadth of the new standards' impact has prompted business groups to push back against CPSC. In response, CPSC announced Jan. 30 it will delay enforcement of provisions in the CPSIA that require businesses to test their products for lead and phthalate levels and certify that those products meet the new requirements. However, the new standards will still be put in place on Feb. 10.

Business representatives chafed at CPSC's claim that the delay in testing and certification provides relief. Carter Keithley, president of the Toy Industry Association, an organization that lobbies on behalf of toymakers, said on Feb. 2, "The testing and certification requirements are deferred for one year, but compliance with the new CPSIA standards begins in just over a week . . . and the only way to demonstrate this compliance is through testing."

Another industry lobbying group, the National Association of Manufacturers, petitioned CPSC to delay altogether the effective date of the lead standard. CPSC's two commissioners, Nancy Nord and Thomas Moore, voted to deny the petition.

Meanwhile, public interest groups continue to pressure CPSC to vigorously enforce the new law and subsequent health and safety standards like those for lead and phthalates. "The CPSC is authorized to address most, if not all, the concerns of small business in a way that maintains the integrity of the law while offering relief to independent manufacturers," a coalition of consumer groups said in a statement. "The law's implementation cannot come too soon."

CPSC faces other challenges in enforcing the law. The agency's resources have steadily eroded since it was founded in the 1970s. From FY 1974, when the agency first became fully operational, to FY 2008, CPSC's budget was cut almost 40 percent when adjusted for inflation, according to an OMB Watch analysis of CPSC budget data. Employment at the agency was nearly halved over the same period. CPSC had a budget of $80 million and a staff of approximately 420 in FY 2008.

The CPSIA authorizes $118 million for CPSC in FY 2010, meaning Congress can appropriate up to $118 million when it takes up annual spending bills. The first die in the 2010 appropriations process will be cast when President Barack Obama releases his budget proposal, expected in the next few weeks. FY 2010 begins Oct. 1, 2009.

Conyers Introduces Bills Protecting Voter Rights in Election Aftermath

During the 2008 presidential election season, there were numerous allegations of attempts to disenfranchise legitimate voters. Some of the techniques involved voter caging, voter purging, and deceptive practices. To prevent the use of these techniques in the future, Rep. John Conyers (D-MI) introduced legislation that would ban deceptive practices and eliminate voter caging. He also introduced a bill that would restore voting rights to numerous individuals who have been convicted of felonies and would make Election Day a holiday.

Conyers recently introduced H.R. 103, the Caging Prohibition Act of 2009. The bill bans state or local election officials from prohibiting a voter from registering or voting in a federal election if the decision is based on a voter caging document or list, an "unverified match list," or an immaterial error on an application or registration document. It also prohibits state or local election officials from formally challenging a voter for any of the aforementioned reasons. Also, in order for a person, other than a state or local election official, to challenge a voter, the challenger must have first-hand knowledge that is "documented in writing" and "subject to an oath or attestation under penalty of perjury." Violating the provisions in the bill can result in a fine or imprisonment up to five years.

Voter caging is a practice whereby political parties or officials send a document to a set of registered voters or individuals who have applied to register to vote; any documents returned as "undeliverable despite an attempt to deliver such document to the address of a registered voter or applicant," and any documents with addressee instructions that are not followed, are considered "voter caging documents." An "unverified match list" is then generated; this is a

"list produced by matching the information of registered voters or applicants for voter registration to a list of individuals who are ineligible to vote." The voters and potential voters who end up on this list are then often challenged at the polls, a controversial practice due to individuals who wind up on match lists due to postal service errors, clerical mistakes, and other circumstances beyond their control.

Conyers also introduced H.R. 105, the Voting Opportunity and Technology Enhancement Rights Act of 2009, which protects voter rights, improves election administration in federal elections, prohibits deceptive practices, prohibits voter caging, restores voter rights, and makes Election Day a legal public holiday.

The bill is designed to improve election administration by establishing national standards for write-in absentee ballots, addressing verified ballots, establishing requirements for counting provisional ballots, establishing minimum requirements for voting systems and poll workers in polling places, allowing same-day voter registration, addressing the integrity of voter registration lists, allowing early voting, improving voting systems, making uniform voter registration standards, establishing voter identification standards, and ensuring the election administration is impartial. Some of these provisions may bump up against the traditional role of the states in administering elections.

The bill is also designed to prohibit deceptive practices in federal elections by modifying the penalty for voter intimidation, establishing sentencing guidelines, and setting out methods to report violations. Furthermore, the bill restores voting rights to all citizens except those who are serving a felony sentence at the time of a given election. The legislation also establishes methods that states and the Federal Bureau of Prisons would be required to use to notify individuals that their rights have been restored.

H.R. 103 has been referred to the House Committee on the Judiciary. H.R. 105 has been referred to the House Committee on the Judiciary, as well as to the Committees on House Administration and Oversight and Government Reform.