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Commentary: Celebrating One of the Recovery Act's Legacies: Transparency

Feb. 17 marked the one-year anniversary of the American Recovery and Reinvestment Act, commonly called the Recovery Act. Both political parties celebrated the occasion with partisan attacks. Democrats heralded the act as having saved the nation's economy, while Republicans savaged it for being an expensive government program with little to show by way of jobs. While the two parties can argue over how effective the act actually has been, both can agree on one thing: the lasting legacy of the Recovery Act's transparency provisions.

While the act might have included too many tax cuts, too few tax cuts, or not enough infrastructure projects, or the Democrats might have undersold the stimulus, or oversold it, the one thing that cannot be denied is that the act has substantially advanced the cause of fiscal

transparency. While the act is far from perfect, without it, advocates would have nothing to gripe about. The debate would be stuck on whether timely recipient reporting is a feasible goal or not.

In this sense, the Recovery Act provided a convenient pilot program for fiscal transparency. Now, one year later, the act has not only proved that broad-based [recipient reporting](#) is feasible, it has shown that the reporting is useful. By showing how multiple levels of recipients (although not [all levels of sub-recipients](#)) have used their federal funding, the Recovery Act has provided the government and its citizens an unprecedented ability to see where its money has gone.

There are also [the Agency Reports](#), which provide weekly updates of spending levels for every Recovery Act program. These reports have received very little attention and are largely overshadowed by the recipient reports. But these agency reports, along with the agency and program plans, provide citizens with a timely snapshot of what the federal agencies are doing. These reports, if they were presented better and expanded to include all federal spending, could evolve to become powerful transparency tools by linking spending and performance measures.

This is not to say that the act is without flaws. As mentioned before, the reporting requirements only extend to second-tier recipients, not all recipients, limiting the reach of the act's transparency. Despite [new guidance](#) from the Office of Management and Budget (OMB), recipients are still left to decide what constitutes a "full-time equivalent" job, making it difficult to compare jobs across states and industries. Moreover, due to the way the data are collected, it is next to impossible to add reports from one quarter to another, making it extremely difficult to track cumulative spending or jobs. Add in that Recovery.gov does not effectively display the recipient reports, nor does it link the recipient data to other federal spending data sources such as USAspending.gov. Finally, beyond the information collected about jobs, there is little in the way of performance data or information about who benefited from the stimulus spending.

More importantly, the act is hobbled by bad data quality, a problem which plagues many government datasets. The first round of recipient reporting resulted in many news articles about bad data, from phantom congressional districts to recipients who did not understand how to count jobs created or saved under the act. But the problems with data quality go further than that and include issues such as incorrect addresses, bad unique company identifiers, erroneous dollar amounts, and other data entry issues. These data quality problems can serve to undermine support for the act itself and future federal spending if the public believes the government is being less than fully honest about how it spends taxpayer dollars.

Transparency under the Recovery Act is also hobbled by limited disclosure. Only about one-third of stimulus spending is disclosed. None of the details about the \$288 billion in tax breaks or the \$224 billion in entitlement spending will be disclosed through Recovery.gov. We will never know who benefited from the tax cuts, for example.

Despite these problems, the act has shown that there is a demand for spending transparency. At its height, [Recovery.gov](#), the act's homepage, had millions of visitors a day and still receives significant levels of traffic. Journalists and analysts, in addition to average citizens, routinely use the site as a resource. The site could benefit from improvements, but it is a marked departure

from the status quo and will serve as the starting point on the road to better fiscal accountability, following a pattern established by USAspending.gov.

[The Federal Funding Accountability and Transparency Act of 2006](#), which created [USAspending.gov](#), helped advance federal spending transparency. When [FedSpending.org](#), OMB Watch's first attempt at a federal spending website and the basis for USAspending.gov, was first released, it relied solely on existing databases that were out of date; now, [USAspending.gov](#) has more timely spending data from many federal agencies and is an important part of federal fiscal transparency. Appropriately, the focus for USAspending.gov has shifted to improving data quality and complying with the law's requirement to collect sub-recipient information. Indeed, only four years after its authorizing legislation, USAspending.gov will certainly be a vital part of any spending transparency reform that comes from President Obama's recent [Open Government Directive](#).

As time passes, and the transparency community moves on from the Recovery Act to new challenges, open government advocates from both sides of the aisle will likely look back at the act as continuing USAspending.gov's transparency mission. The act is not perfect, and it may be a contentious political issue, but its effect on the drive for an open, accountable government is a real reason for celebrating its anniversary.

President Obama's Progressive Tax Initiatives

When President Obama rolled out his [Fiscal Year 2011 budget](#) in early February, many focused [attention](#) on the potential negative effects of the administration's proposed three-year freeze on non-security discretionary spending. Moreover, the possible effects of the president's hawkish rhetoric toward the federal budget deficit dismayed those in the progressive community who are concerned with social equity. However, a detailed examination of the [tax section](#) of the president's budget reveals several progressive proposals designed to aid in the fight against poverty and bolster the middle class.

While media attention on President Obama's proposed tax cuts, or tax expenditures, has [focused](#) on the extension of certain small business or green industry credits, many of the proposed tax reductions benefit low- and moderate-income people. These include temporary extensions of certain measures of the American Recovery and Reinvestment Act of 2009 (Recovery Act) and the modification of existing tax expenditures.

Proposed extensions of a pair of Recovery Act tax credits would be vital for working families and families that have fallen victim to the dismal economy. The first is a temporary extension of the Making Work Pay (MWP) credit. A temporary provision of the Recovery Act slated to expire at the end of 2010, the MWP credit provides a refundable income tax credit of up to \$400 for individuals and \$800 for married couples making less than \$75,000 and \$150,000 a year, respectively. The government quickly phases out the credit for those making more than the top limit. Those eligible receive the credit through reduced withholdings from their employers, which means that most of the money goes into the pockets of low- and middle-income families

right away rather than after the end of the tax year. President Obama has proposed extending the provision through calendar year 2011 at a cost of roughly \$61 billion.

The second provision of the Recovery Act that the White House has proposed extending is COBRA premium assistance. COBRA requires certain employers to offer former employees the opportunity to pay for continued coverage provided under the employers' group health plan. The Recovery Act provided COBRA-eligible recipients that lost their jobs during the height of the recession with a reduced premium rate of 35 percent while allowing employers a credit against payroll taxes for the remaining 65 percent of the premium. The assistance is currently available for 15 months. COBRA is often the only choice for families to retain health coverage after a head-of-household loses his or her job, but the coverage rates can be too expensive. The rate assistance under the Recovery Act has helped many distressed families retain needed health insurance at a lower cost. At a cost of roughly \$5.5 billion, the Obama administration is proposing that all COBRA-eligible employees that lose their jobs up through 2011 qualify for the reduced rate for 12 months.

Of the proposals to modify existing tax expenditures, three also merit remark. The first is a \$15 billion expansion (over ten years) of the Earned Income Tax Credit (EITC) for families with three or more children. Enacted in 1975 and expanded dramatically under the Clinton administration, the EITC provides low- and moderate-income working people with a refundable income tax credit based on the individual's income, marital status, and number of children. For 2010, the maximum credit for families with three or more children is \$630 higher than the maximum for those with one or two children, and, due to a provision in the Recovery Act, the phase-in rate – where each additional dollar of earned income results in a larger credit – for three-child families is higher. By encouraging and rewarding work, the EITC has been one of the most successful anti-poverty measures in history and has lifted more children in working families out of poverty than any other single program.

The second existing tax expenditure that the White House has proposed modifying that would provide much-needed support to low- and moderate-income families is the child and dependent care tax credit. The child and dependent care tax credit allows families to deduct up to 35 percent of up to \$3,000 in eligible childcare expenses for one child and up to \$6,000 for two or more children. Currently, the tax credit begins to phase out for families making more than \$15,000 a year and provides no benefit for those making more than \$43,000 a year. The president has proposed raising the phase-out point from \$15,000 to \$85,000 a year and has proposed indexing the credit for inflation, which would prevent time from eating away at the benefits of the tax expenditure. This modification would cost roughly \$12.5 billion over 10 years.

Lastly, President Obama proposes to maintain the 10 percent tax bracket, which was enacted with the Bush tax cuts of 2001. This lowest bracket applies to those earning less than \$7,000 (\$14,000 for married couples). The 10 percent bracket, however, also keeps a portion of all workers' incomes from being taxed at higher rates. Obama would also extend lower tax rates currently in effect for other working families (those earning less than \$200,000 per year).

The White House plans to offset the costs of these proposals through the modification and cessation of several other tax expenditures, including a Financial Crisis Responsibility Fee on financial institutions, reforms of the international tax system, elimination of certain oil and gas subsidies, and expiration of the 2001 and 2003 Bush tax cuts for the wealthiest of Americans, those making more than \$250,000 per year. According to calculations from the White House, the above provisions would generate over the course of 10 years \$90 billion, \$122 billion, \$39 billion, and \$969 billion, respectively. While some of these revenue raisers seem less than likely to pass Congress, especially the Financial Crisis Responsibility Fee, the use of savings from closing loopholes for the oil and gas industry, cracking down on overseas tax avoiders, and raising taxes on the wealthy to provide benefits to low- and moderate-income families makes the president's budget that much more progressive.

Despite the salutary effects of the Recovery Act, unemployment and underemployment continue to plague millions of families, and most economists believe that the situation will continue for several years. Although the president's proposed spending freeze will not help families struggling through this bleak economy, an expansion of the tax expenditures noted here can mitigate their plight.

Leaders and Laggards in Agency Open Government Webpages

Complying with [requirements](#) of the [Open Government Directive](#) (OGD), federal agencies launched transparency pages on their websites Feb. 6. The content and functionality of the pages varied from non-compliant to barely compliant to above and beyond expectations. OMB Watch conducted an assessment of the webpages between Feb. 15 and 22, based on factors that make for sound accountability and transparency.

The OGD required agencies to create open government webpages as the first step toward Open Government Plans, which are required by April 7. The transparency webpages are intended to serve "as the gateway for agency activities related to the [Directive]." A standard for these webpages was set at [www.\[agency name\].gov/open](http://www.[agency name].gov/open).

OMB Watch's review sought to be more expansive than the administration's grading through the White House's recently launched [Open Government Dashboard](#). The dashboard assesses the state of progress on initial deliverables required by the OGD. The dashboard does not grade the quality of the products produced by the agencies; instead, it is simply a check-off on whether the agency has complied. Thus, for the requirement to establish the open government webpage, the dashboard simply indicates whether the agency has a webpage and does not provide any information about the quality or usefulness of the page. The administration did issue some [content recommendations](#) for agency open government webpages, but it remained limited in specifics and has not evaluated the agencies' performance on content. OMB Watch's assessment is the first to review how well the agencies did in creating their pages.

Methodology

Since the administration has offered agencies limited guidance on what components should be included in an open government page, OMB Watch developed [criteria](#) that cover basic information that should be provided in a central space on an agency's openness page. We have included all requirements of the OGD, such as the designation of a Senior Accountable Official for the quality of spending data. Additionally, OMB Watch included some items that were not specifically identified by the administration but that fall within a reasonable and logical application of the OGD. Therefore, OMB Watch identified several basic disclosure functions that would make agency open government pages more useful to the public.

In assessing the information available to the public, OMB Watch utilized a simple method of locating specified information on the site. First, the information must be accessible from the [agency.gov/open](#) page and not require the use of a search engine to find. Second, the information must be located in an intuitive manner, requiring no more than three mouse clicks to access. If those requirements were not met, then the website was deemed to not have the information and received no points. An agency could receive half points for the criteria if it attempted to comply. For example, if the agency did not list the Senior Accountable Official for the quality of spending data on the website, but did list another contact person, it would receive half points. The maximum score an agency could receive was 57.5.

Leaders

While agency scores varied greatly in the review, some agencies made clear efforts to go beyond the required minimum stated in the OGD. The top five open government webpages were the National Aeronautics and Space Administration (NASA), the General Services Administration (GSA), the State Department, the Department of Education, and the U.S. Agency for International Development (USAID) (see Table 1 below). These agencies scored highest because they attempted to integrate the new open government webpages into each agency's existing disclosure policies and activities.

Table 1. Top Five Open Government Webpages – Scores

Agency	Score
National Aeronautics and Space Administration	40.5
General Services Administration	37
State Department	36.5
Department of Education	35.5
U.S. Agency for International Development	35

For example, all five lead agencies had easy links from new open government pages to their already existing agency-wide contact systems that allow users to find any employee and get his

or her contact information. Some agencies, such as the U.S. Environmental Protection Agency, had such an employee locator feature but did not make it easy to find from the open government page. Linking to pre-existing reports, such as Inspector General reports, budget justifications, and reports to Congress, were other areas that many of the higher-scoring agencies seemed to gain ground over their counterparts.

Some agencies led in specific areas, garnering points that almost no other agencies received. For instance, NASA is the only agency that has communication and disclosure policies easily found from its open government page. Similarly, USAID was the only agency that not only included a summary of where agency funds were spent but provided information on top vendors, as well as spending by program area. Additionally, the Nuclear Regulatory Commission, though low-scoring in the review overall, was the only agency to not only link to Freedom of Information Act (FOIA) reports and plans but to also list the FOIA requests received in the last month. Further, some, such as the State Department and the Department of Health and Human Services, even went so far as to list information on their records management and declassification programs, as called for in the OGD.

Laggards

While agencies did generally meet the minimum requirements of the OGD for the new webpages, several scored particularly low in this review. The bottom five agencies, excluding those that failed to put up any open government page, were the Office of Management and Budget (OMB), the Department of Agriculture, FDIC, the Department of Health and Human Services, and the Department of Justice (see Table 2 below). These agencies scored poorly for the exact opposite reason the leaders succeeded – failure to integrate the new open government page into existing agency information and activities – or not having adequate information on their pages. For instance, none of the bottom agencies' have Inspector General reports, a link to Recovery Act data, reports to Congress, budget justifications, or performance results that can be easily found from the new webpages. Similarly, several laggard agencies, including FDIC, Department of Health and Human Services, OMB, as well as others, failed to link to public participation tools for collecting input and open government ideas as mandated by the OGD.

Table 2. Bottom Five Open Government Webpages – Scores

Agency	Score
Office of Management and Budget	6
Department of Agriculture	15
FDIC	16.5
Department of Health and Human Services	18.5
Department of Justice	18.5

In some cases, however, agencies lost points and fell behind others because the information provided was outdated. The Defense Department's backlog report for its FOIA responsibilities is from the 2008 fiscal year, not from Fiscal Year 2009. Further, the Department of Veterans Affairs presented both outdated performance and financial reports. This could represent a significant problem if the administration is not considering the quality and timeliness of information disclosed when determining if the agencies are meeting OGD requirements.

The OMB and White House webpages are somewhat unique. Even though OMB is charged with overseeing much of the OGD, it is not clear whether the agency views itself as covered by the requirements of the directive. It does have an open government webpage and done a dashboard for its regulatory work. But, OMB has no directory of its employees, and its openness webpage is sparse, at best. In fact, it doesn't even link to its own regulatory dashboard. The White House does not view itself as an agency and has used its openness webpage to describe what all agencies are doing and to blog on progress on the OGD. The White House may produce an Open Government Plan, but no official decision has been made yet.

Missing in Action

Some federal agencies are lacking openness pages entirely. These include the National Transportation Safety Board, the Federal Election Commission, and the Consumer Product Safety Commission. These offices all collect data, the public release of which could benefit citizens.

There were some areas of information that were omitted by almost all agencies throughout the government. This included communications policies that govern how information can be disclosed by employees, senior officials' calendars that would offer a window into the agency's priorities, lists of FOIA requests received that indicate demand for information, and visitor logs that would indicate with whom agencies are meeting. Many agencies also fail to provide the public with basic organization information such as organizational structure or employee and leadership contact information.

Several items reviewed are ones that are not required by the OGD but that each agency can easily undertake to enhance the usefulness of its openness portal to the public. Oftentimes, information that is important to the public was buried in other sections of an agency's website, requiring tedious searching to locate. Instead, the openness pages should serve as easy-to-use portals to information of public interest.

Ultimately, these issues reinforce the paramount importance of public participation in the OGD implementation process. The agencies utilize a collaborative online tool to solicit public input in their progress. Through this tool, the public is able to push the administrative agencies to further their efforts to be more open.

Public Speaks on Ideas to Open Up Environmental Agencies

Agencies, including those dealing with environmental and public health issues, are seeking ideas on how to improve transparency, public participation, collaboration, and innovation, and the agencies are receiving numerous suggestions. The challenge for individual agencies is to shape the diverse ideas into the strategies and goals that will comprise their Open Government Plans.

Under the [Open Government Directive](#) (OGD), the government began rolling out [new agency webpages](#) earlier in February to serve as hubs for their open government activities. As part of these pages, each agency includes a forum for the public to submit ideas, comment on others' ideas, and cast "votes" for or against specific ideas. The agencies are soliciting and grouping ideas among categories generally labeled "Transparency," "Participation," "Collaboration," "Innovation," and a category for ideas on improving the forum website.

A review of the ideas submitted by the public to four agencies with environmental or public health missions reveals that although there are numerous ideas for greater openness, they are often narrow in focus and do not consider actions that would apply across the agency. This leaves it to each agency to translate the public's recommendations into strategies that address broader issues. The open government discussion forums for the U.S. Environmental Protection Agency (EPA), Department of the Interior (DOI), U.S. Department of Agriculture (USDA), and Department of Energy (DOE) were reviewed for this article.

The open government websites allow users to cast votes for ideas by selecting "I agree" or "I disagree" with each posted idea. Among the ideas with the most agreement are live webcasting of EPA meetings associated with rulemakings, improving public access to Geographic Information System (GIS) data, calculating and reporting the lifecycle costs of environmental problems, improved warning labels to identify harmful chemicals in household products, publishing more research data online, and publishing the list of chemicals in commerce for free online.

U.S. Environmental Protection Agency

The EPA is among the top agencies in terms of volume of ideas and comments received from the public, many of which are insightful and aggressive ideas for improving transparency that will impact the public. For example, EPA received a suggestion to require public notice by a municipality that dumps untreated sewage into any waterway. Although [legislation](#) has been proposed to address this gap in the public's right to know, the commenter's idea challenges the agency to use its existing authority to find new ways to communicate health threats to the public.

Another [suggestion](#) on the EPA site called for a "One-Stop-Shop model" for data. "Right now the data is all there, you just have to go to three to five different places within the site to find out all the information about a particular [Superfund] site or a group of sites," the submitter noted.

One commenter to EPA's forum [explained his belief](#) that agencies can better communicate with the public by creating an intimate connection between the public and the data, as well as providing the tools to make that connection:

I'd start by focusing on things that are tangible to the public ...Water quality comes to mind. To start with, the public needs to know that (1) water is only tested for a limited set of pollutants, etc. (2) Then they need to be informed of what the EPA is doing about it. And (3) then they need to have access to tools that will help them to learn about the subject and take on personal measures if desired.

The commenter cites the nonprofit [Environmental Working Group's](#) (EWG) online databases as excellent examples of useful tools that relate well to citizens' concerns. EWG's website provides useful information on popular concerns such as drinking water quality, health hazards of cosmetics, and chemical threats to children.

Department of Interior

At the Interior Department, the issue of management of wild horses by the Bureau of Land Management (BLM) has so far dominated the discussion. Despite the large volume of single-issue comments, many ideas are giving the agency much to consider while developing its Open Government Plan. Commenters are especially concerned about a "culture of secrecy" that has taken hold at the BLM. One commenter [suggested](#) that the agency should ensure that "[BLM] employees who resist this culture must have a safe and secure pathway to report grievances, and be rewarded rather than punished for their courage and integrity."

Another popular idea at the Interior Department calls for a "[database of databases](#)" – an easy-to-access public registry of all DOI databases. The commenter believes, "When citizens go to these databases, they will be able to decide for themselves whether each division is addressing subjects they care about, and living up to it's mission statement." Other commenters went beyond calling for a simple directory of databases (many of which are now available through [www.data.gov](#)) and suggested linking datasets across programs and across agencies, as well as making the data easy to search and understand.

Department of Agriculture

One suggestion to the USDA is to provide easier access to data on violations of the [Wilderness Act of 1964](#), which prohibits various human activities such as motor vehicle use on public lands designated as wilderness (USDA houses the U.S. Forest Service). This particular issue goes beyond USDA because wilderness lands are managed by several units within the Department of the Interior as well, which highlights a challenge of the Open Government Plans – cross-agency issues and data.

The suggestion to disclose the dataset of Wilderness Act violations also highlights another challenge agencies face – identifying which datasets are of high value to the public. The USDA,

and other agencies, should consider those datasets mentioned most or even voted most popular for disclosure. In many cases, the public might not be aware of what datasets the government possesses. The USDA Open Government Plan should address how to provide not just the dataset specified by this commenter, but all datasets possessed by the agency and ways to work across agencies to link related datasets.

Department of Energy

The discussion forum for the Department of Energy's Open Government Plan is poorly moderated. Whereas at EPA and DOI, the forum moderators actively keep discussions on topic and encourage productive discussion threads, the DOE site is allowed to be populated primarily by off-topic ideas.

Despite sound, relevant suggestions to publicly webcast DOE meetings and restore access to the unclassified technical report library at [Los Alamos National Laboratory](#), most comments seek to win support and federal funding for the "next big thing" in renewable energy technologies rather than address how DOE can be a more open and collaborative agency. With posts titled "[I have an idea for an electric car. However no funding](#)" and calls to "[Kill DOE](#)" because the agency is "a worthless enterprise," the forum is not being exploited as successfully as in other environmental agencies.

Although most of the postings by the monitor of the EPA's online forum merely explain why a particular idea or comment was moved to the "off-topic area" of the site, the agency's active use of a forum moderator has helped spread crucial information. One commenter suggested EPA be more involved in online social media, such as Facebook. The moderator replied, "EPA has been involved in FaceBook and other Social Media for some time now" and directed the participants to the EPA's [social media website](#).

Common Themes

Each environmental agency also received [calls for greater fiscal transparency](#), including ways to easily track where grants and contracts are awarded and what goals were met or missed by the recipients. Other ideas that were common to more than one agency include training agency workers in new technologies and methods for public outreach ("The entire DOI workforce needs to be brought up [to] speed from the Managers and Directors at the top down to the employees in the field"), greater release of agency e-mail communications, and improved monitoring of environmental trends and agency progress toward meeting goals.

Expanding use of GIS systems and the public's ability to use such systems also is a popular idea among the several discussion forums. According to [one commenter](#), "As they say, 'a picture is worth a thousand words,' so why not disseminate information contained in the hundreds and hundreds of stove-piped DOI databases, systems & applications, etc. to the public through more complete cross-cutting spatial viewers and portals."

The agencies are accepting ideas until March 19. Users must create an account, which requires an e-mail address and password, before comments, ideas, or votes will be accepted. Each Open Government Plan is to be published on the agency's open government webpage by April 7.

SEC Guidance Addresses Disclosure of Climate Change Impacts

The Securities and Exchange Commission (SEC) took a significant step last month toward expanding the scope and quality of corporate disclosures as they pertain to the environment. On Jan. 27, the SEC [voted](#) to provide guidance "clarify[ing] what publicly-traded companies need to disclose to investors in terms of climate-related 'material' effects on business operations, whether from new emissions management policies, the physical impacts of changing weather or business opportunities associated with the growing clean energy economy."

Periodically, the SEC provides guidance to public companies subject to federal securities laws and SEC regulations interpreting disclosure rules established to provide their investors with a sense of the true financial health of the corporation. In the climate change disclosure guidance, the SEC cited the impact of legislation and regulation, the impact of international accords, indirect consequences of regulation or business trends, and physical impacts of climate change as areas that should be considered by companies in preparing their disclosures to investors. Rather than establish any new reporting requirements, the SEC is attempting to clarify the responsibility companies have under existing disclosure requirements. Since the guidance applies to ongoing disclosure processes, it is immediately in effect.

SEC Chair Mary Schapiro clarified the reporting guidance: "We are not opining on whether the world's climate is changing, at what pace it might be changing, or due to what causes. Nothing that the Commission does today should be construed as weighing in on those topics. Today's guidance will help to ensure that our disclosure rules are consistently applied." The new reporting is, however, an acknowledgement that climate change and a company's contribution to it are being recognized as genuine investment risks that should be considered.

Pressure on the SEC and on individual companies to disclose climate-risk information – a component of what are referred to as environmental, social, and corporate governance (ESG) issues – began to mount in 2007. After failing to receive a response from the SEC to prior entreaties, environmental and investor groups, as well as several state treasurers, attorneys general and other officials, [filed](#) a formal petition asking that the Commission require companies to disclose this information.

In October 2008, the Investor Network on Climate Risk (INCR), a coalition of 80 institutional investors with combined assets of \$8 trillion, issued [comments](#) in response to the SEC's [21st Century Disclosure Initiative](#), an effort to modernize its disclosure system in a more transparent manner. This initiative is focused primarily on modern technology, but INCR noted:

Because ESG information is increasingly of interest to investors and other stakeholders, companies are already disclosing it in their annual reports, in

sustainability reports, and on their websites. Just as companies have been modernizing their reporting to include ESG issues, it is incumbent upon the SEC to catch up with these trends in order to provide timely, relevant disclosure and to ensure the competitive position of U.S. investors For the U.S. disclosure system to remain competitive – and for U.S. investors to be as well informed as investors in other markets – the SEC should integrate reporting of material ESG risks into its new disclosure system.

Concurrent with the efforts of environmental and investor groups to pressure the SEC, in response to subpoenas issued by New York State Attorney General Andrew Cuomo, several energy companies [agreed](#) to voluntarily release their climate risk information. Their efforts finally came to fruition with the SEC's decision in January.

Next on the agenda for those groups advocating for increased ESG disclosure? "[A]s rising populations, rapid economic growth in developing countries, climate change and growing regulation are triggering growing water availability concerns in the U.S. and abroad," a new [report](#) from the Ceres investor coalition, UBS, and Bloomberg "builds on the SEC's [climate-risk disclosure] guidance with specific recommendations for companies to improve their water-related disclosure."

Patchwork Improvements Continue for E-Rulemaking

Several federal government websites have recently incorporated changes that better highlight regulatory issues and expand online access to rulemaking information. However, the changes appear independent of one another, not parts of a conscious effort by the Obama administration to transform the government's beleaguered e-rulemaking systems.

On Feb. 16, the White House announced a new effort it claims will shed more light on the activities of the White House Office of Information and Regulatory Affairs (OIRA). The so-called OIRA Dashboard, www.reginfo.gov/public, "will make it easier for people to identify the rule or category of rules they are interested in, and will allow them to monitor progress," Office of Management and Budget Director Peter Orszag wrote in a [blog post](#). "Simply put, the Dashboard democratizes the data."

The launch of the OIRA Dashboard does not add new data to RegInfo.gov, which has for years provided users with online access to information about OIRA activities. RegInfo.gov indicates which draft proposed rules, final rules, and information collection requests are under review at OIRA, as well as the status of all previously reviewed rules and requests.

OIRA reviews agencies' significant rules under the authority of [Executive Order 12866](#) and, under the [Paperwork Reduction Act](#), must approve all agencies' attempts to collect information from ten or more people. The information on RegInfo.gov gives the public a partial look at how OIRA fits into the overall regulatory process.

The new OIRA Dashboard page on RegInfo.gov includes graphical representations of the number of draft proposed and draft final rules currently under review at OIRA, organized by agency, stage in the rulemaking process, length of the review period, and economic significance (those rules expected to have an annual impact of \$100 million or more). Additionally, the launch of the dashboard coincides with a sitewide aesthetic redesign.

In addition to the updates to RegInfo.gov, the administration [announced](#) on Feb. 2 minor changes to the federal government's main e-rulemaking website, [Regulations.gov](#). While RegInfo.gov illuminates OIRA activities, Regulations.gov is an online portal where users can find information about, and comment on, all agencies' rules. Among the changes to Regulations.gov, the homepage now includes an instructional video for using the site, and the site has added an alphabetical index of topics covered by regulation.

The federal government launched its e-rulemaking program in 2002. The intent of e-rulemaking is to give interested citizens and stakeholders a one-stop location to view documents related to a pending regulation and to file comments on regulations. Almost every federal rulemaking agency has incorporated its online rulemaking docket into the government-wide system. Partly because of prior success with its own e-rulemaking portal, the U.S. Environmental Protection Agency (EPA) was tasked with managing Regulations.gov.

Despite its potential to expand and facilitate participation, the e-rulemaking system has fallen short of expectations. One of the major challenges has been public education: many citizens simply are not aware of how regulations affect them or do not know where and how to comment on regulations.

Regulations.gov has already gone through several changes, [most recently](#) in July 2009, aimed at making the site's functionality and navigation more useful and intuitive. However, problems remain. For example, the search and sort functions are limited, making it difficult for users to easily find what they are looking for. Also, the online rulemaking docket is not necessarily identical to the authoritative paper docket housed in agency offices, undermining user confidence in the reliability of the online system.

Also on Feb. 2, the EPA announced an online forum for discussing changes to Regulations.gov, [Regulations.gov/Exchange](#). Regulations.gov/Exchange solicits user feedback on the most recent batch of changes to Regulations.gov and identifies opportunities to expand new features.

This is the second iteration of Regulations.gov/Exchange. In May 2009, EPA [launched](#) Regulations.gov/Exchange to gather feedback on changes it was proposing for the main site. That version was taken down and has now been re-launched with new content. In both instances, the site has focused on receiving feedback on site upgrades the EPA has already decided to pursue.

While minor changes are being made to the government-wide e-rulemaking websites of RegInfo.gov and Regulations.gov, at least one agency has taken unilateral action to improve access to its own rulemaking process. On Feb. 18, EPA launched its [Rulemaking Gateway](#), an

online portal for tracking EPA rulemakings, learning more about issues EPA covers, and participating in the process. The "Rulemaking Gateway provides information as soon as work begins and provides updates on a monthly basis as new information becomes available," [EPA says](#). "Time-sensitive information, such as notice [*sic*] of public meetings, is updated on a daily basis."

Each EPA rulemaking now has its own webpage with basic information about the rule, including an abstract and timeline for the rulemaking with projected milestones where appropriate. Users can search for rules by stage in the rulemaking process or topic, as well as by a variety of economic and social sectors the rule is expected to impact.

The Rulemaking Gateway also gives users an opportunity to comment on EPA rulemakings. Typically, rules are only open for public input during a legally required comment period immediately following publication of a notice of proposed rulemaking. On the Rulemaking Gateway, users can comment on rules at any time outside of the formal comment period.

EPA notes that comments submitted outside the formal comment period will not carry the same legal weight as those filed with the agency in the usual fashion. By law, agencies must respond to comments filed after publication of a notice of proposed rulemaking, but EPA may or may not respond to comments filed through the gateway.

EPA's online Rulemaking Gateway is integrated with Regulations.gov, which the agency also runs, but the gateway includes only EPA documents and issues. If information on EPA rulemakings is already available on Regulations.gov, or if a rule is open for public comment on Regulations.gov, the gateway includes links that give users quick access to relevant pages on Regulations.gov.

Missing from the recent flurry of activity is an overall framework for the Obama administration's approach to e-rulemaking. While administration officials have indicated a desire to transform e-rulemaking practices and, more generally, to make government information more accessible and expand public participation, the administration has failed to articulate its intentions.

It is unclear if such a strategy is in development. The White House's Open Government Directive, [released in December 2009](#), references "transparency initiative guidance" on e-rulemaking. No announcements or documents about e-rulemaking have been issued. However, the launching of the OIRA Dashboard reflects the principles of the Open Government Directive, Orszag says.

Some e-rulemaking advocates, including OMB Watch, have called on the administration to adopt the framework detailed by the American Bar Association (ABA) in a November 2008 report. The report, [Achieving the Potential: The Future of Federal e-Rulemaking](#), was written by regulatory and open government experts from outside the government. The authors wrote the report to provide the administration and Congress with a comprehensive roadmap for reforming e-rulemaking.

Among other things, the report recommends:

- An improved search function that allows users to better define search parameters and sort results
- The use of innovative techniques such as wikis and blogs to stimulate participation
- The creation of comment portals on individual agency sites in addition to the current, centralized portal found at Regulations.gov
- The formation of a public committee to advise the federal government on the status of, and changes to, the e-rulemaking system
- Greater and more consistent funding for e-rulemaking efforts (currently, a dedicated funding source does not exist, requiring agencies to divert funds from other activities)

The recent changes to the e-rulemaking system only begin to address the greater reforms identified by the ABA report. Absent the adoption of an administration-wide e-rulemaking strategy, further reforms are likely to lack the cohesiveness necessary to achieve an effectively managed system.

FDA Announces New Approach to Inspections of Imported Products

On Feb. 4, the Food and Drug Administration (FDA) announced a new approach to regulating imported products – including food and medical devices – to enhance the agency's ability to respond to the increased globalization of commerce. The new risk-based approach to inspections and product tracking will be in place nationally in 2010.

Dr. Margaret Hamburg, FDA's commissioner, announced the new approach in a [speech](#) at the Center for Strategic and International Studies, a Washington, DC, policy and research organization. The new safety strategy shifts the agency from one that reacted to problems after they occurred to one that tries to prevent product safety problems.

During the Bush administration, FDA was criticized for its inability to respond to crises afflicting the public because the number of imported products outstripped the [agency's ability and willingness](#) to protect the public. Although the Obama administration has increased [the budget for FDA](#), "FDA-regulated products are currently imported from more than 150 countries, with more than 130,000 importers of record, and from more than 300,000 foreign facilities. This year, we expect that nearly 20 million shipments of food, devices, drugs, and cosmetics will arrive at U.S. ports of entry. Just a decade ago, that number was closer to 6 million, and a decade before only a fraction of that," according to Hamburg's speech.

FDA has fewer than 500 inspectors to handle the 20 million shipments. As a result, the agency inspects less than one percent of imported products and only about eight percent of foreign drug manufacturers, Hamburg said. FDA has begun to shift its approach to the growing burden it faces by, for example, setting a goal of [dramatically increasing inspections](#) of overseas food facilities and hiring new inspectors.

The plan that Hamburg described in her speech has several dimensions. First, FDA's overall strategy to import safety is changing. Hamburg described it this way in her speech:

To assure the safety of imported products and fulfill our public health mission in a global age, the FDA must adopt a new approach ... an approach that takes into account the entire supply chain and its complexity; and an approach that will address product safety by preventing problems at every point along the global supply chain ... from the raw ingredients ... through production ... and distribution ... all the way to U.S. consumers.

Second, FDA has developed several new objectives. The agency is focusing on point of production issues by working with manufacturers, suppliers, and foreign governments to create collaborative networks and build the regulatory capacity of countries without well established regulatory infrastructures. According to Hamburg, for example, "We now have permanent FDA offices in Beijing, Shanghai and Guangzhou, China, in New Delhi and Mumbai, India, in San Jose, Costa Rica, Mexico City, Santiago, Chile, and—soon—Amman, Jordan." FDA now has more than 30 agreements with countries with more sophisticated regulatory systems to share information and provide inspection data.

FDA also intends to hold importing companies responsible for their supply chains by requiring them "to effectively demonstrate that safety, quality and compliance with international and U.S. standards are built into every component of every product and every step of the production process," Hamburg said.

To maximize its inspection resources, Hamburg announced that FDA is putting in place a new system called PREDICT (the Predictive Risk-Based Evaluation for Dynamic Import Compliance Targeting). This new risk assessment tool will allow the agency to rank the public health risks posed by various products so FDA can target more carefully its inspections to those products. PREDICT has been used in Los Angeles and is being implemented in New York. Hamburg said FDA intends to have it implemented nationwide by the end of summer.

According to [materials prepared for industry](#) and available on FDA's website, the new ranking tool will use compliance histories, shipper and producer information, inspection results, and other entry data to identify which products pose fewer risks, thus allowing goods to be imported more quickly. If sufficient information is not available, or if anomalies appear that could indicate fraud, FDA will require additional information before products are released for shipment throughout the U.S.

The shift by FDA to a preventative approach is consistent with food safety legislation Congress is debating. The Food Safety Enhancement Act of 2009 ([H.R. 2749](#)) establishes risk-based preventative controls and hazard analyses while giving FDA expanded authority to set high-risk triggers and issue regulations in a range of food safety areas. The House passed the bill in 2009 and referred it to the Senate, which has not acted.

Citizens United: Additional Legislative Responses

Multiple legislative responses have followed the U.S. Supreme Court's ruling in [*Citizens United v. Federal Election Commission*](#), a decision that permits independent election spending by corporations, including certain nonprofit organizations. Following three rigorous congressional hearings, lawmakers have expressed a sense of urgency and the intent to continue working on legislation to curtail the impacts of the ruling, even as some critics charge that reaction to the decision is inflated.

On Feb. 11, Sen. Chuck Schumer (D-NY) and Rep. Chris Van Hollen (D-MD) released [a summary](#) of their proposed legislation to address issues raised in the hearings. Reportedly, Schumer and Van Hollen will introduce their bill during the week of Feb. 22.

Schumer and Van Hollen's extensive proposal includes a ban on expenditures by foreign interests, as well as corporations that have federal contracts and those that received funds through the Troubled Asset Relief Program (TARP). They also call for new disclosure rules on corporate spending, both to the government and to shareholders.

Specifically, the Schumer-Van Hollen bill would:

- Ban corporations from spending money on U.S. elections if they have a foreign ownership of 20 percent or more, a majority of their board of directors is foreign principals, or their U.S. operations are under the control of a foreign entity.
- Prohibit government contractors, including TARP recipients, from making political expenditures.
- Require corporations that release political ads to have their CEOs appear on camera to say they "approve this message." The "top funder" of the ad must also record a stand-by-your-ad disclaimer, and the top five contributors that donate for political purposes will be listed on the screen at the end.
- Require the creation of separate "political broadcast spending" accounts and require that the finances of these accounts be reported to the Federal Election Commission (FEC). All funds spent or transferred from the accounts would have to be publicly reported to the FEC.
- Require all political expenditures made by a corporation to be disclosed within 24 hours on the corporation's website and to be disclosed to shareholders in quarterly reports and in the corporation's annual report.
- Require federally registered lobbyists to disclose information on all campaign expenditures over \$1,000.
- Strengthen current coordination rules for House and Senate campaigns by banning coordination between a corporation or union and candidates on ads referencing a congressional candidate within 90 days of the beginning of the primary-through-general election season. For all federal elections, coordination would be prohibited, regardless of timing, when the ads promote, support, attack, or oppose a candidate.

While it remains to be seen if the Schumer-Van Hollen plan will receive bipartisan support, there is a very real possibility that certain provisions could be challenged in court. For example, if the proposal moves forward to ban political commercials paid for by corporations that receive government funding, it may face a constitutional challenge.

Other criticism of the Schumer-Van Hollen proposal abounds from both opponents and supporters of the *Citizens United* decision. Some consider it only an initial step and offer suggestions for improvement. The Sunlight Foundation, while expressing pleasure that many of its "disclosure-related recommendations appear to have been embraced," also highlights the inefficiencies of the FEC reporting structure and the need for lobbyist disclosure to go further.

"The enhanced disclosures of lobbyists' campaign expenditures is a good start, though again we would note that to be meaningful, the disclosures must be in real time, online and publicly available and a user-friendly, searchable database," said the Sunlight Foundation in a [recent blog post](#). The post further stated that "while the Schumer/Van Hollen framework rightly strengthens the ban on coordination to prevent such anti-democratic behavior, without a new disclosure requirement mandating that lobbyists report who they met with, there is no effective way to discern the possibility that such coordination took place."

An editorial in the [Washington Post](#) warns, "The prohibition on government contractors is so broadly worded as to sweep in nearly every major corporation that sells goods to the government; at the very least, some significant dollar threshold should be applied here."

In a [press release](#) from the Center for Competitive Politics (CCP), CCP President Sean Parnell expressed further concerns, saying that "[a]ny legislative attempt to dismantle the Court's ruling in *Citizens United* must be narrowly tailored and backed up by evidence of a compelling government interest." Parnell further stated that "[t]his rush to ram a bill through before such a record could possibly be established does neither."

Some of the proposals in the Schumer-Van Hollen legislative framework have been introduced already as standalone bills. Between the Jan. 21 ruling and today, 14 bills have been introduced in the House, including two proposed constitutional amendments, and three in the Senate to address the Court's decision.

With regard to disclosure requirements for independent campaign spending:

- The [Corporate and Labor Electioneering Advertisement Reform \(CLEAR\) Act](#) (H.R. 4527), sponsored by Rep. Steve Driehaus (D-OH), would require communications related to campaigns to include a statement identifying the corporation's CEO or the president of the organization.
- The [Stand By Your Ad Act of 2010](#) (H.R. 4583), sponsored by Rep. John Bocchieri (D-OH), would require that campaign-related communications paid for by certain tax-exempt organizations or political organizations include a statement naming their five largest donors."

Bills that seek to limit corporations receiving government funding from spending money on elections include:

- [No Taxpayer Money for Corporate Campaigns Act of 2010](#) (H.R. 4550), introduced by Rep. Niki Tsongas (D-MA), would prohibit corporations from using any federal funds to contribute to political campaigns or participate in lobbying activities.
- [H.R. 4617](#), sponsored by Timothy Walz (D-MN), would prohibit TARP recipients from using any TARP funds for political expenditures or electioneering communications.

[The Pick Your Poison Act of 2010](#) (H.R. 4511) introduced by Rep. Alan Grayson (D-FL), would prohibit corporations that employ registered lobbyists from making expenditures or disbursements for electioneering communications.

A few bills call for shareholder approval before a corporation spends money on any campaign-related message:

- [H.R. 4487](#), also introduced by Grayson, would "require the approval of a majority of a public company's shareholders for any expenditure by that company to influence public opinion on matters not related to the company's products or services."
- Similarly, Rep. Michael Capuano (D-MA) introduced [H.R. 4537](#), which amends the Securities Exchange Act to require the authorization of a majority of shareholders before a company makes political expenditures.
- In the Senate, [S. 3004](#), introduced by Sen. Sherrod Brown (D-OH), requires that political expenditures be approved by the shareholders of a public company.

Multiple bills introduced echo President Barack Obama's publicly expressed concerns regarding the possible role of foreign-controlled corporations making independent expenditures. Seven bills, five in the House and two in the Senate, have been introduced to address these concerns. All of them seek to "amend the Federal Election Campaign Act of 1971 to apply the ban on contributions and expenditures by foreign nationals to domestic corporations" in certain circumstances. The circumstances covered in the different bills include when foreign principals have control or an ownership interest, when shareholders include any foreign principals, and when domestic corporations are subsidiaries of foreign principals. One bill specifically seeks "to protect Federal, State, and local elections from the influence of foreign nationals."

Examples of these bills are:

- H.R. 4510, another Grayson bill, would "amend the Federal Election Campaign Act of 1971 to apply the ban on contributions and expenditures by foreign nationals to domestic corporations in which foreign principals have an ownership interest."
- H.R. 4517, introduced by Rep. John Hall (D-NY), would "amend the Federal Election Campaign Act of 1971 to apply the ban on contributions and expenditures by foreign nationals to domestic corporations which are owned or controlled by foreign principals, to increase the civil penalties applicable to foreign nationals who violate the ban, and for other purposes."

- S. 2959, introduced Sen. Al Franken (D-MN), would "amend the Federal Election Campaign Act of 1971 to protect Federal, State, and local elections from the influence of foreign nationals."

Legislators have also proposed two amendments to the U.S. Constitution. H.J.Res.68, sponsored by Rep. Leonard Boswell (D-IA), would prohibit "corporations and labor organizations from using operating funds for advertisements in connection with any campaign for election for Federal office." H.J.RES.74, sponsored by Reps. Donna Edwards (D-MD) and John Conyers (D-MI), would permit "Congress and the States to regulate the expenditure of funds by corporations engaging in political speech."

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