OMB WATCH
Promoting Government Accountability and Citizen Participation
ACTION CENTER | BLOGS | DONATE
The Watcher

January 10, 2005 -- Vol. 7, No. 1

Letter from Gary Bass: Washington's Corruption Woes

Guilty pleas by super-lobbyist Jack Abramoff and his partner Michael Scanlon, former key staffer of former-House Majority Leader Tom DeLay, have put a spotlight on graft and corruption in Washington--and the obscene influence money exerts over politics today. Both Republican and Democratic leaders are now poised to offer "solutions" to this unseemly situation. These solutions, however, must do more than simply scratch the surface of this enormous problem. And dramatic changes to this dysfunctional dynamic of Washington politics are unlikely unless the public gets engaged.

It is easy to become jaded about stemming the flood of money which passes hands and influences politics in Washington. PoliticalMoneyLine.com reports $2.42 billion was spent in the 2004 on federal elections in 2004, much more than the 2000 elections. Reported lobbying expenditures jumped 34 percent between 2000 and 2004 from $1.6 billion to $2.1 billion. At the

same time, privately funded travel for members of Congress jumped 38 percent from $2.5 million to $3.5 million.

These figures ignore the gifts and the behind-the-scene deals, of which the Abramoff scandal is likely just the tip of the iceberg. It leaves out the myriad questionable ways money changes hands in Washington through entities such as Senate Majority Leader Bill Frist's (R-TN) charity, World of Hope, which raised $4.4 million in 2004, including $2.7 million from just eighteen donors. According to the Associated Press, World of Hope donors included "several corporations with frequent business before Congress, such as insurer Blue Cross/Blue Shield, manufacturer 3M, drug maker Eli Lilly and the Goldman Sachs investment firm."

Upon closer examination, the conduits through which money flows become incredibly complex. For example, World of Hope's IRS Form 990 shows that Frist's long-time political fundraiser, Catignani & Bond, whose founding partner Linda Bond is the wife of Sen. Christopher Bond (R-MO), received $276,125 from the charity in 2004. In addition, the charity hired the law firm of Jill Holtzman Vogel, who is the wife of Frist's lawyer Alex Vogel. Holtzman Vogel, who is currently raising money for a run for Senate in Virginia in 2007, received thousands of dollars in contributions in 2005 from Catignani & Bond and from her husband, among numerous other sources, according to data released by the Virginia Public Access Project.

Despite the convoluted nature of its flow, one thing is certain: money is flowing through politics at an all-time high. Some might argue that stopping this flow is a bit like trying to holding a bursting dam at bay with a new leak springing up just as one is filled. It is easy to feel powerless as an outsider when it comes to the rich and powerful protecting the interests of the rich and powerful. A recent Washington Post-ABC News poll, in fact, found that 58 percent of Americans believe the Abramoff case is evidence of "widespread corruption in Washington." The survey found broad support for reform in the wake of the Abramoff scandal, which is exactly why it is the perfect time to push for change. The public is outraged, and the moment exists to demand legislation to clean up the situation.

The nonprofit community has long complained about the influence money buys in Washington and argued that there should be a level playing field so that all voices are equally heard. This is a moment when the nonprofit sector should strongly advocate for just such a level playing field.

There are a number of solutions being discussed by Republican and Democrat leaders:

- More disclosure on lobbying contacts--more frequent and substantive reporting on each lobbying contact;
- Stricter limits, if not outright bans, on gifts to legislators, as well as on donated travel, whether through the use of the corporate jet or paid airfare;
- Disclosure of each fundraising event by lobbying firms and organizations that benefit federal candidates and the amount of money raised;
- Disclosure of contributions made to entities, such as universities, created in the name of a member of Congress , as well as contributions to entities established, financed, maintained or controlled by members of Congress, such as charities or foundations; and
- Strengthening the authority of the congressional ethics committees to investigate and punish violations.

More disclosure is certainly a necessary first step, particularly information being made available online in a searchable format. But disclosure is not enough. We need more regulation and enforcement--and ultimately we to move toward getting money out of politics. We have learned from successes in several states that we can genuinely change the rules of the game when it comes to elections. It is time to pick up on "clean money campaign" successes in Arizona,

Connecticut, Maine, Massachusetts, New Mexico, North Carolina, and Vermont, where public financing of some elections has become the rule.

In a representative democracy such as ours, lobbying is a constitutional right that should be cherished and firmly protected by the First Amendment. The right to petition our government--all branches of government--is key to not only ensuring government accountability but also making our government responsive to "we, the people." But moneyed interests now threaten accountability and responsiveness, not to mention the very integrity of our political system, and we must do something to address this threat.

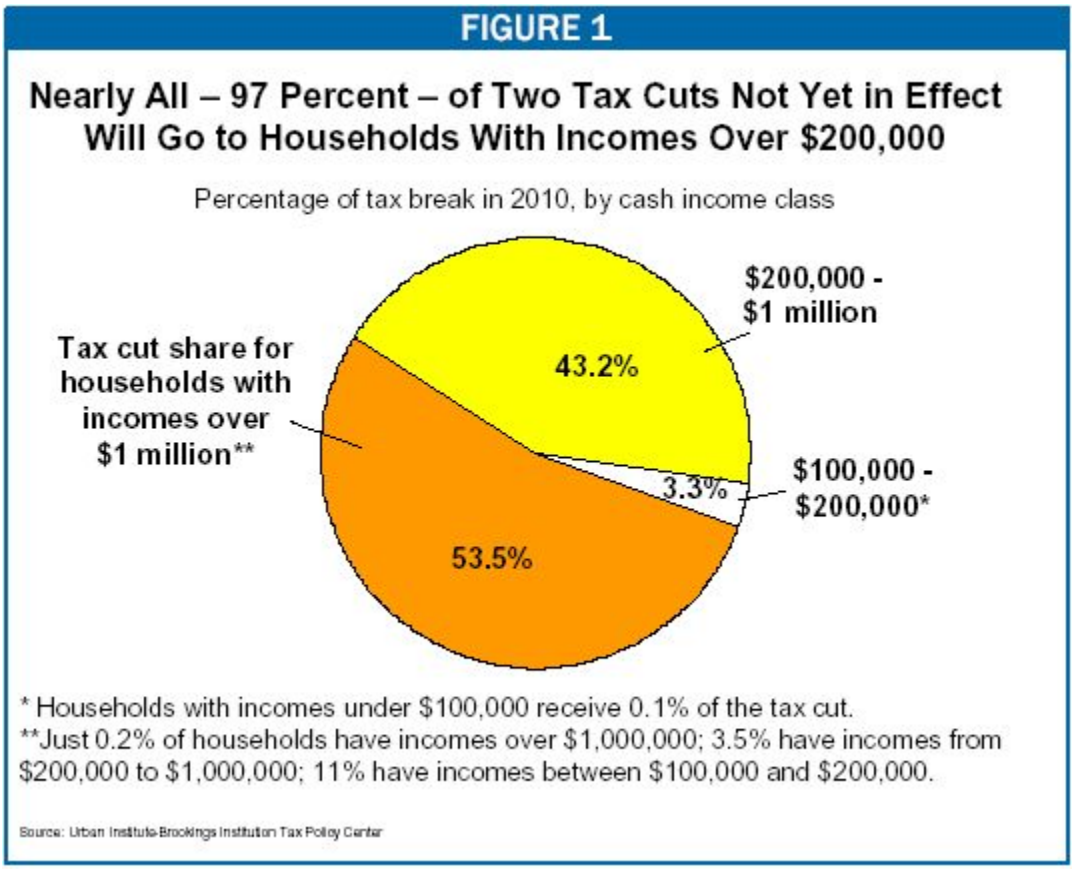
Two New Tax Cuts Benefit the Wealthy

As a fitting kick-start to a year in which President Bush is expected to push hard to make his expensive and unbalanced tax cuts permanent, two new tax cuts went into effect that almost exclusively benefit high-income households. These tax cuts, referred to as "PEP" and "Pease," were enacted in 2001 but did not go into effect until 2006--an underhanded but politically advantageous move that kept the total cost of the 2001 tax cut package within set budget limitations.

PEP, which stands for "personal exemption phase-out," and Pease, named after former Rep. Don Pease (D-OH), were tax increases enacted in the 1990's as part of a true deficit reduction package, and are now being phased out through 2010. The PEP provision prevents high-income earners from claiming a personal exemption ($3,200 in 2005) for each member of their household, while the Pease provision limits the value of itemized deductions for taxpayers with high incomes. With the phase out of these provisions, high income earners will be able to both claim higher exemptions and itemize more deductions.

Together these tax cuts will cost $27 billion over the next five years (roughly two-thirds of the amount Republican leaders claim will be "saved" with the budget cuts bill). These tax giveaways will primarily wind up in the pockets of the rich, who have already benefited enormously under Bush--such as those with annual incomes of over $1 million who have received an average windfall of $103,000 in 2005 from the president's first-term tax cuts.

Now, thanks to the phasing out of PEP and Pease, by 2010 taxpayers earning over $1 million will see an average additional tax kickback of $19,234. Those making between $75,000 and $100,000 will see an average of $1, and those making less than $75,000 will see nothing. As the chart below illustrates, nearly all of the benefits of these two tax cuts will go to households with incomes over $200,000:



Source: Center on Budget and Policy Priorities, http://www.cbpp.org/12-28-05tax.htm

Along with PEP and Pease, President Bush is prepared to take his tax-cutting mania even further, commenting on Jan. 7 on his plans to push for making his 2001 and 2003 tax cuts--which cost roughly $1.7 trillion over ten years--permanent that:

> "We're seeing new evidence of how our tax cuts have created jobs and opportunity, [and] some people in Washington are saying we need to raise your taxes. They want the tax cuts to expire in a few years, or even repeal the tax cuts now."

The tax cuts to which he was referring are largely responsible for the nation's transition from budget surpluses to enormous budget deficits, because they have so significantly reduced the revenue base. Making the cuts permanent would solidify a structural deficit that would ultimately bankrupt the country, as defense and homeland security spending continue to claim an ever-larger portion of the budget, as the Baby Boomers put increasing demands on entitlement programs, and as the interest on the national debt skyrockets.

Congress Has Yet to Pass Budget, Tax Cuts

The budget and tax reconciliation measures laid out in Congress's April 2005 budget resolution took up a good deal of lawmakers' time and energy throughout last fall, and continue to linger unfinished, even as the release of the president's Fiscal Year 2007 budget rapidly approaches. The House of Representatives, in fact, is scheduled to vote on the final budget bill one week before the president is scheduled to release his budget on Feb. 6. The vote will pave the way for

votes on the two remaining reconciliation measures: one to cut taxes by as much as $70 billion and one to increase the national debt limit by $781 billion.

Of the three reconciliation measures, the budget bill has been the most contentious, due to cuts it makes to programs serving low- and moderate-income households, cuts that ultimately do not address the burgeoning deficit. In fact, the net effect of the three bills will be an increase of the deficit by billions of dollars. The cuts are particularly harmful to Medicaid, child support enforcement, foster care, and student loans programs.

Despite these damaging cuts, the budget bill was passed by the Senate on Dec. 21. Senate lawmakers, however, passed a slightly different version of the bill (with three minor modification) than that passed by the House two days earlier. House members, therefore, must vote on the bill a final time before sending it to the president. The first House vote on the budget reconciliation bill was a close one (212-206), and the upcoming vote is expected to be close as well. Nine Republicans voted with Democratic members against the bill. Six Democratic members and ten Republican members did not vote, possibly because the voting took place so closely to the holiday recess.

Moderate House Republicans, a number of whom initially express opposition to the bill but ultimately voted for it, now have the chance to vote their consciences, rather than line up behind their leadership. The Emergency Campaign for America's Priorities is organizing a number of events, including local vigils and phone call blitzes to lawmakers, in an effort to tip the vote against the troubling program cuts. There is still time to **take action** and tell your Representatives to reject the bill.

If the budget cuts bill passes, it will open up an additional $10 billion worth of tax cuts that can be included in the tax reconciliation bill, which still remains unfinished. The House passed a $56 billion bill in early December, on the heels of a $60 billion bill passed by the Senate on Nov. 17. Along with the reconciliation bill, the House passed three tax-cut bills in December. The four bills cost a combined $94.5 billion over five years, twice the total of all cuts to low-income programs being made in the name of fiscal responsibility. The House and Senate still must iron out differences in the tax reconciliation bill in conference--no easy task as the bills are significantly different--and then vote on a final package.

Finally, the House and Senate can be expected to easily pass an increase on the debt limit, which is expected to reach $8.2 trillion in mid-February. As a politically sensitive one, the vote will likely take place late at night, possibility around a holiday, when fewer people are watching. While raising the debt limit will impact few people directly, it is yet another indication of the unsuccessful long-term fiscal policy of the Bush administration and Congress. Bush, who spent $225 billion in federal revenue on tax cuts in 2005 alone, has raised the debt limit three times during his presidency, in June 2002, May 2003, and November 2004. Secretary of the Treasury John Snow recommended to Congress in late December that the debt limit be raised again "as soon as possible."

Collins' Revised Chemical Security Bill: An Improving Grade

Shortly before Congress broke for recess in December, Sen. Susan Collins (R-ME), Chair of the Senate Committee on Homeland Security and Government Affairs, introduced the Chemical Facility Anti-Terrorism Act of 2005 (S. 2145). The bill, which is co-sponsored by Sens. Joseph Lieberman (D-CT), Norm Coleman (R-MN), Thomas Carper (D-DE) and Carl Levin (D-MI), is a

significant improvement over the draft bill previously evaluated by OMB Watch (see Failing Grade on Chemical Security, *The OMB Watcher* [Dec. 13, 2005]), but still fails to require reporting on the use of safer technologies.

The Collins bill would require chemical plants and other facilities storing large quantities of hazardous chemicals to develop vulnerability assessments, site security plans, and emergency response plans, all of which would be sent to the Department of Homeland Security (DHS) for review and approval. Several of the bill's other provisions address ensuring companies adequately address the issue of chemical security. For example, DHS will gain the authority to assess civil and criminal penalties for non-compliance and will even have the power to shut down a non-compliant facility.

Previously, OMB Watch found the draft version of the bill lacking in four areas: 1) not requiring examination and reporting on use of safer technologies; 2) not providing strong universal government standards; 3) not requiring adequate public accountability and disclosure; and 4) preempting state's rights to implement their own chemical security programs. While the introduced legislation makes significant progress in three of these areas, the bill remains deficient on examining safer alternatives, which should serve as the backbone of a strong chemical security bill.

Safer Technologies

The bill fails to include a clear requirement that companies consider and report on potential use of safer technologies to reduce the consequences of a major attack or accident at a plant. A safer technologies provision would not require facilities to adopt safer procedures or chemicals if they exist. Obviously, many factors play a role in the implementation of safer procedures, including cost effectiveness and technological feasibility. Such a provision would merely require facilities to consider and report on possible implementation of safer procedures, technologies or chemicals. In turn, this would significantly improve the ability of DHS to assess best practices and discover national trends in the use of safer procedures.

"This is the biggest oversight of the proposed bill and could endanger its overall effectiveness," according to Sean Moulton, senior policy analyst with OMB Watch. "Any substantial chemical security effort should require companies to conduct such a review as a first step. Safer chemicals and technologies could eliminate the need to implement extensive security and emergency response measures. Moreover, the benefits of the modified bill are limited without the safer technologies provision."

Universal Requirements

Collins' draft bill contained overly broad provisions that encouraged DHS to accept voluntary security forms created by industry associations, which would have created uneven implementation of the law. However, the bill as introduced requires each section of security plans and vulnerability assessments to meet specific standards set by the government. A facility may submit to DHS a plan or assessment developed under other guidelines, such as those under an industry association program. The bill then requires that DHS review the sufficiency of each section of the document to ensure that it meets the government standards. If the document is missing required sections or if sections are found to be insufficient, the company must provide additional materials to DHS.

While an improvement over the draft legislation, this provision should only be used as a temporary measure to ease the transition from any voluntary evaluations currently being conducted to the government standard. Once DHS has established the chemical security program, government reports should become the baseline among industry programs. Allowing submission of alternate documents is intended to avoid duplicative paperwork for companies,

but disparate submissions allow vast differences in emphasis and scope and could result in an uneven playing field of safety standards. The legislation should include a three-year sunset on this allowance to ensure a uniform and reliable chemical security program.

Accountability

Collins' introduced bill also significantly improves public transparency and accountability over its earlier draft. The bill now requires DHS to submit an annual report to Congress that analyzes the performance of chemical facilities in the development and implementation of security plans. In these reports, DHS would detail "common problems, solutions, and industry best practices." The bill also requires DHS to make public all certificates of compliance with the law. While the bill makes individual facility security plans, vulnerability assessments, and other facility-specific documents exempt from requests under the Freedom of Information Act (FOIA), it would allow requests for information regarding certifications, orders for failure to comply, and other data that would not increase security risks for specific facilities. Other provisions grant the Secretary of DHS the authority to order requested material withheld from a FOIA request for 6 months at a time.

The bill also creates a system of problem notification that will allow anyone--chemical facility worker, government official, police officer or member of the public--to alert DHS about a problem regarding security or safety at a chemical facility. This new section recognizes the importance of collecting information from sources other than simply reporting companies. Moreover, the bill protects those who report a problem, stating that "[n]o employer may discharge an employee or otherwise discriminate against any employee" for submitting a complaint. Additionally, the revised bill provides whistleblower protections for workers who notify state or federal agency officials charged with enforcing chemical security plans. A noticeable oversight, however, is that members of Congress are not included among the government officials, to which whistleblowers can disclose information without risk of civil or criminal penalties.

Floor, Not Ceiling

Possibly the most important improvement to the bill is the replacement of the state preemption clause with a state policy protection clause. The previous draft stated that any state legislation that included stronger chemical safety standards than those in the bill would be invalidated. The legislation as introduced states that "[n]othing in this Act shall preclude or deny any right of any State or political subdivision thereof to adopt or enforce any regulation, requirement, or standard of performance respecting chemical facility security that is more stringent than a regulation, requirement, or standard of performance in effect under this Act..." The bill respects the rights of states to provide stronger protections against chemical security vulnerabilities. For instance, a state with major urban centers surrounding chemical facilities, such as New Jersey, which just recently introduced a strong chemical security bill, would have the right to provide stronger security protections for its residents under the Collins' bill.

The Chemical Facility Anti-Terrorism Act of 2005 is expected to be marked up in February by the Committee on Homeland Security and Government Affairs. The bill, which appears to have strong bipartisan support, is expected to move quickly through committee and possibly even the Senate. Before it is considered on the Senate floor, however, we hope a requirement will be added to the bill that companies consider safer technologies, chemicals and procedures in their security plans. This, along with the improvements already made to the bill, would provide a robust chemical security law capable of satisfying its intended purpose: making communities across America safer.

Executive Order to 'Improve' Freedom of Information Act

President Bush issued Executive Order 13392 on Dec. 14 to help improve the processing of requests made under the Freedom of Information Act (FOIA). Open government advocates, however, argue the order is no substitute for legislation in the Senate that would solve many of the underlying problems with FOIA.

Executive Order 13392 requires that each federal agency:

- create a high level chief FOIA officer in each agency;
- conduct an internal assessment of FOIA service problems and develop a work plan for making improvements;
- establish a FOIA Requester Service Center and a FOIA Public Liaison to work with requestors.

Critics are quick to point out, however, that FOIA officers are already in place in each agency, and it is unclear how the new positions differ from these existing agency FOIA positions.

According to a Coalition of Journalists for Open Government analysis, "Best case, these changes will lead to more efficient operations and more posting of routine documents on the Internet... For requesters on the cutting edge of departmental discretion, there's not likely to be much change, although it may now be easier to know that you're a victim of deliberate delay, not inefficiency."

One of FOIA's main problems stems from an October 2001 guidance memo by then-Attorney General John Ashcroft, encouraging government agencies, where defensible, to deny FOIA requests. In his own words, "[w]hen you carefully consider FOIA requests and decide to withhold records, in whole or in part, you can be assured that the Department of Justice will defend your decisions unless they lack a sound legal basis..."

An Executive Order by President Bush or instructions to his Attorney General to change the administration's guidance from the presumption of withholding information to the presumption of disclosure would have gone farther to improving the FOIA system than the new Executive Order.

Other problems with the current FOIA system include increasing FOIA backlogs; excessive search and copying fees; under-funding of FOIA activities; and the increased need to file lawsuits to pry loose information from reluctant agencies.

While the order leaves many of these problems unaddressed, Sens. John Cornyn (R-TX) and Patrick Leahy (D-VT) have proposed two bills--Faster FOIA Act (S. 589) and OPEN Government Act (S. 394)--that would improve the FOIA system.

The OPEN Government Act would:

- allow the public to recoup legal costs from the federal government for improperly withholding documents;
- expand the list of those eligible for fee waivers to include many nonprofits and blog writers;
- establish a tracking system for requests, and require agencies to report on their 10 oldest pending requests, fee waivers approved and denied, and information on how FOIA requests are handled; and

- extend FOIA's reach to information held by federal contractors.

The Faster FOIA Act would require Congress to explicitly state its intention within any bill that would exempt information from disclosure under FOIA.

Both bills have five co-sponsors in the Senate. You can send your elected representatives a customizable email in support of the OPEN Government Act by visiting OMB Watch's Action Center.

After Brinksmanship, PATRIOT Act Is Extended One Month

Among the fireworks at the close of the 2005 congressional session, the extension of the 16 sunset provisions of the USA PATRIOT Act underwent a series of last-minute brinksmanship maneuvers.

On Dec. 13, we reported that the Senate had come to a head in its negotiations on a compromise bill that would renew the provisions while providing sufficient protections of civil liberties. The House and Senate had worked out a compromise in a conference that a number of Senators strongly opposed. Although the House passed the conference agreement, its fate was uncertain in the Senate. On Dec. 16, *The New York Times* reported that the National Security Agency had carried out warrantless domestic spying since shortly after the 9/11 terrorist attacks, tipping the scale in favor of those opposed to the conference agreement.

Later that day, a bipartisan group of six Senators gained the support of 46 colleagues to successfully filibuster the renewal of the sunset provisions of the USA PATRIOT Act. This group demanded that reasonable safeguards be placed on particular provisions to ensure the protection of civil liberties. The president and GOP congressional leaders opposed making any changes to the conference agreement, arguing that enough protections were incorporated into the compromise bill.

After the failure to pass the extension, President Bush remarked that Congress's actions could endanger the lives of Americans. "The terrorists," he explained, "want to attack America again and kill the innocent and inflict even greater damage than they did on Sept. 11--and the Congress has a responsibility not to take away this vital tool that law enforcement and intelligence officials have used to protect the American people."

Bush and Senate Majority Leader Bill Frist (R-TN) said that they would not settle for a temporary extension of the USA PATRIOT Act, maintaining that the six Senators needed to back down and let the conference agreement pass. The Senators refused, and on Dec. 20, 52 senators called for a three-month extension of the USA PATRIOT Act to allow time to work out changes in the conference agreement. With Congress eager to leave for the holidays, it was unclear what would happen since Bush and Frist opposed the three-month extension. At the last moment, a compromise was struck with Republican leadership in the Senate, providing a six-month extension of the law, which was immediately passed in the Senate.

The six-month extension went to the House for a vote by unanimous consent since many members had already left for the holiday. But Rep. James Sensenbrenner (R-WI) rejected the Senate's compromise and replaced it with a five-week extension, creating more theatrics, because it required that the bill then go back to the Senate for a vote. By now, few members of Congress were still in Washington, but the Senate on a voice vote passed Sensenbrenner's five-

week extension. Finally an extension of the sunset provisions of the USA PATRIOT was approved by the Congress just days before Christmas on Dec. 22.

The House is scheduled to reconvene on Jan. 31 in order to address renewal of the Patriot Act, along with budget reconciliation bills. Congress must act by the first week of February on a compromise, which the bipartisan group of six Senators are currently attempting to reshape. Failing a compromise, more fireworks and brinksmanship on the Patriot Act are surely in store.

Is Industry Pulling EPA's Strings?

Correspondences obtained by OMB Watch between the Small Business Administration (SBA) and the Environmental Protection Agency (EPA) raise significant questions about the influence SBA exerted over EPA's decision to pursue its current proposals to reduce chemical reporting under the Toxics Release Inventory (TRI).

The SBA is an independent government agency with a mission to "[m]aintain and strengthen the nation's economy by aiding, counseling, assisting and protecting the interests of small businesses..." The agency has come under fire for its efforts to promote small business interests that come into conflict with environmental, health and safety, and labor standards. Given the extensive correspondence between SBA and EPA on this issue and the profound similarities between the changes SBA sought and those ultimately proposed by EPA, it appears that small business priorities may have been considered over environmental and health concerns.

On Nov. 4, 2002 the EPA announced an On-line TRI Stakeholder Dialogue to "reduce the reporting burden of companies that report to the TRI." Since this dialogue began in late 2002, OMB Watch has discovered that Kevin Bromberg, the lead SBA official on TRI burden reduction and a former chemical industry lobbyist, has held roughly 14 meetings and exchanged numerous emails with EPA officials on limiting TRI reporting requirements.

Many of the emails between Bromberg and EPA suggest a high degree of cooperation on the issue of TRI burden reduction.

- In a Feb. 13, 2004 email, Bromberg wrote to EPA officials crafting the TRI proposals, "We're very appreciative of your cooperation, and look forward to a fruitful partnership."
- An Oct. 6, 2004 email from Bromberg also conveys the level of influence SBA appears to have come to expect from EPA: "At a minimum, I should help EPA refine/tailor its presentation slides for the meeting." A meeting was held shortly after between Bromberg and EPA officials to discuss EPA's presentation at an upcoming stakeholder briefing on burden reduction.
- An Oct. 21, 2004 email from Bromberg to EPA Assistant Administrator Kim Nelson, considered the main architect of EPA's plans to cut TRI reporting, reads, "We've [EPA and SBA staff] been working closely together lately on TRI," to which Nelson responded, "The final product will be better with a partnership up front. Glad to hear things are progressing from your perspective."

The timeline for EPA's selection of TRI changes indicated by the documents also raises suspicion surrounding SBA influence.

- On Nov. 4, 2003 the EPA released its White Paper on the five burden reduction options being considered by the agency.

- On Feb. 4, 2004 EPA closed the public comment period on the Burden Reduction White Paper after having received hundreds of comments from stakeholder organizations and agencies opposing all of the options.
- Two months later, on April 15, 2004, the SBA sent EPA the 80-page report *Proposed Reforms to the Toxics Release Inventory Program: Streamlining Reporting and Preserving Data Integrity*. The report laid out SBA's case for its four most coveted TRI reporting cutbacks:
    1. Raising the general threshold for detailed reporting from 500 to 5,000 pounds;
    2. Allowing facilities to use the program's short form for Persistent Bioaccumulative Toxins (PBTs), like lead and mercury;
    3. Creating the ability for companies to file a no significant change report on the basis of having no major change in production; and
    4. Exempt petroleum and chemical wholesalers from reporting.
- At the National TRI Meeting, held Feb. 9 - 11, 2005, Kim Nelson announced that EPA was planning to allow companies to submit a simple "no significant change" report on the basis having no significant change in production rather than requiring the normal calculation of pollution amounts. Nelson also reported that other options would be included in the proposal.

  In a July 19, 2005 meeting with public interest groups, EPA officials announced that the agency would be pursuing three burden reduction changes which almost directly mirror the SBA changes:

    1. Raising the general threshold for detailed reporting from 500 to 5,000 pounds;
    2. Allowing up to 500 pounds of PBT disposals to be reported on the program's short form; and
    3. Creating the ability for companies to file a no significant change report every other year.
- On September 21, 2005, EPA officially proposed reductions in TRI reporting. The only major change was that EPA shifted from a "no significant change" report every other year to no report at all every other year. Apparently, EPA could not make a "no significant change" system work so that it would be valid and still achieve burden reduction so they substituted alternate year reporting.

In other words, SBA saw three of its four requests reflected in EPA's final proposal. Although the "no significant change" request--because of the infeasibility of its implementation--was ultimately changed to every other year reporting for all facilities. That all of these proposals were either opposed or not even mentioned by EPA during the earlier public comment period makes them particularly suspect. For instance, the option to allow facilities to report PBTs through the TRI program's short form was not even mentioned in EPA's original White Paper. It is also important to note that while the "no significant change" option was not included in EPA's final proposal, the agency initially pursued the option exactly as described in SBA's report, planning to allow companies to complete avoid calculating their pollution levels and instead qualify for the reporting loophole based on having no major change in production.

This is not the first time questions have been raised about SBA's influence over the TRI program. In April 1997, then-Senator Robert Torricelli (D-NJ) raised the similar questions, suggesting that SBA acted unethically in advocating against an EPA proposal to expand the TRI. In an April 8, 1997 letter to SBA, Torricelli called for an ethics investigation into whether Bromberg had "taken actions that aided his former clients and the lobbyists who now work for them in obtaining exemptions from the proposed TRI expansion."

Torricelli went on to write that Bromberg's actions "at best appear improper and inappropriate but may be unethical." The SBA's Inspector General removed Bromberg from SBA's work on the TRI-expansion proposal while conducting the requested investigation; the proposal, however, ultimately passed.

The public comment period on EPA's current TRI proposals closes on Jan. 13. To weigh in on EPA's plans to cut this cornerstone environmental right-to-know program, visit OMB Watch's TRI Action Alert site and send a message to EPA and Congress. To learn more about the proposals, visit OMB Watch's TRI Resource Center.

Concern Grows Over Unauthorized Domestic Spying

The Bush administration's acknowledgement of secret and unauthorized domestic spying since the 9/11 attacks has roiled both Republicans and Democrats in Congress. On Dec. 16, *The New York Times* reported President Bush authorized the National Security Agency (NSA) to eavesdrop on domestic phone calls and emails without a wiretapping warrant, kicking off a storm of protest just as renewal of the USA PATRIOT Act was being considered. OMB Watch responded to the unfolding events in a Dec. 20 statement. The following is a summary of major events since the *Times* story broke.

As news of the surveillance was reported, the president launched a full-scale defense of his actions. On Dec. 20, Vice President Dick Cheney said the president "was granted authority by the Congress to use all means necessary to take on the terrorists, and that's what we've done." The president spoke in national forums on the importance of protecting the American public in the aftermath of terrorist attacks, and acknowledged authorizing the domestic spying as one means for providing such protection.

On Dec. 22, Assistant Attorney General William Moschella sent a letter to Congress, providing a legal justification for the actions. The Moschella letter argues that the President has the authority to authorize the spying, and that it is in the national interest that the spying is conducted. The letter further argues that the inherent powers of the president as Commander in Chief, authorized under Article II of the Constitution, give him the power to protect the nation against attacks and that "[t]his constitutional authority includes the authority to order warrantless foreign intelligence surveillance within the United States..."

Moschella added that the congressional joint resolution passed in September 2001, called the Authorization for Use of Military Force (AUMF), provides additional authority for the presidential action. The AUMF gave the president the power to use "all necessary and appropriate force" against those responsible for the 9/11 terrorist attacks. According to Moschella, "The AUMF cannot be read as limited to authorizing the use of force against Afghanistan..." The Moschella letter assumes the definition of "force" includes domestic spying.

The next day former-Senate Minority Leader Tom Daschle, who helped negotiate the language of the AUMF, responded with an opinion piece in the *Washington Post*: "I can state categorically that the subject of warrantless wiretaps of American citizens never came up. I did not and never would have supported giving authority to the president for such wiretaps. I am also confident that the 98 senators who voted in favor of authorization of force against al Qaeda did not believe that they were also voting for warrantless domestic surveillance." Daschle added that more expansive language sought by the White House, which would have added a provision making clear that the president was grant power to act within the United States, was rejected.

Despite the White House legal justification, legal experts appeared unconvinced. Rather than face these criticisms, however, the White House has now shifted gears. On Dec. 30, the Justice Department announced it would investigate the leaks to the news media, particularly *The New York Times*, of information about the NSA spying program. The White House argued that the government employee(s) who leaked the information had threatened national security. Many have argued that such people are whistleblowers that should be protected under law. The White House, however, strongly disagrees. The Justice Department investigation is ongoing.

Debate over whether the president has the legal authority to authorize this extrajudicial eavesdropping has remained heated. On Jan. 6, the Congressional Research Service (CRS) provided Senators with a report questioning the legal justification provided by the administration. The 44-page memo stated, "It appears unlikely that a court would hold that Congress has expressly or impliedly authorized the NSA electronic surveillance operations here." They continued, saying the administration's legal justification is not "well-grounded."

The CRS authors argue that it is unlikely Bush can claim the broad presidential powers he has relied upon as authority to order the secret monitoring of emails and calls made by U.S. citizens. Congress expressly intended for the government to seek warrants from a special Foreign Intelligence Surveillance Court before engaging in such surveillance. The report also concluded that the AUMF does not appear to give Bush the authorization to eavesdrop, in order to detect and fight terrorists.

On Jan. 9, 14 prominent constitutional experts and former government officials reached a similar conclusion, arguing that the Bush administration lacks "any plausible legal authority" for the secret domestic spying. In a letter to Congress, they rejected the argument that the AUMF implicitly authorized warrantless domestic wiretapping. In addition, they rejected the argument that the president has inherent powers under Article II of the Constitution as Commander in Chief to act when Congress has provided express statutory requirements to get authority from a court established under the Foreign Intelligence Surveillance Act (FISA). Finally, the letter notes that warrantless domestic wiretapping raises serious questions under the Fourth Amendment, which deals with probable cause and warrants.

The signers include deans and former deans of prestigious law schools, a former director of the FBI, a former deputy attorney general, a former acting solicitor general, two lawyers who worked in the executive branch under President George H. W. Bush, and a prominent conservative scholar and fellow at the Hoover Institution.

Public opinion appears to be on the side of these legal experts. An AP-Ipsos poll conducted last week found 56 percent of Americans believe the government should be required to first get a court warrant to eavesdrop on the overseas calls and e-mails of U.S. citizens, even when those communications are believed to be tied to terrorism.

Sen. Arlen Specter (R-PA), the chair of the Judiciary Committee, has said he intends to hold hearings on the administration's actions and the legal justification for the secret authorization of wiretapping. Additionally, five members of the Senate Intelligence Committee, including GOP Sens. Olympia Snowe (ME) and Chuck Hagel (NE), have called for immediate inquiries.

FEC: No Exceptions for Charities to Electioneering Communications Rule

On December 21, the Federal Election Commission (FEC) voted to drop exemptions for 501(c)(3) nonprofits to Bipartisan Campaign Reform Act (BCRA) rules that restrict electioneering communications. The new rule eliminates exemptions for television, radio and cable advertisements that mention a federal candidate 30 days before a primary or 60 days before a general election paid for by charities and religious organizations, as well as "public service announcements," (PSAs) which are aired for free. The Supreme Court will hear oral arguments in a case challenging the constitutionality of the electioneering communications rule on Jan. 17.

The Commission, which voted unanimously for the new rule, stated in the "Justification and Explanation" section that public comments submitted did not demonstrate "to a reasonable certainty" that the Internal Revenue Code's restriction on political activity by 501(c)(3) organizations is sufficiently compatible with BCRA to allow the exemption. The many public comments addressing this issue lacked consensus. The Internal Revenue Service (IRS) also submitted comments making it clear that the tax code's phrase "promote or oppose candidates for Federal office" is not the same as BCRA's "promote, attack, support, oppose" (PASO) standard. Additionally, since no comments provided examples of broadcast ads by 501(c)(3) organizations that referred to a federal candidate or were aired during the 60/30 day blackout period, the Commission felt that the exemption was unnecessary.

The Commission removed the language "for a fee" from the definition of restricted publicly distributed communications, which brings PSAs under the electioneering communication rule. Many nonprofits submitted comments noting that they run PSAs mentioning federal candidates and that these PSAs could be run mistakenly during the blackout period. The Commission addressed the concern, suggesting nonprofits provide broadcasters with expiration dates for PSAs or notices not to air such PSAs during blackout dates. The Commission made clear that it would not hold a charity responsible if an ad was run mistakenly.

Background

BCRA outlawed corporate, including nonprofit, and union funding for TV and radio messages mentioning federal candidates that are aired 60 days before a general election or 30 days before a primary; however, BCRA allowed the FEC latitude in creating necessary exemptions. In 2003 the FEC approved an exemption for 501(c)(3) organizations from the "electioneering communications" rule, because 501(c)(3) organizations are prohibited from electioneering under the Internal Revenue Code.

The new rulemaking came in response to a federal court order to reconsider the exemption, after the court found that the FEC had not adequately justified it. The FEC appealed the ruling, but on Oct. 24 the U.S. Circuit Court for the District of Columbia rejected the FEC's request for full court review of the decision.

The new restrictions will apply to all advertising aired during the blackout period of the 2006 U.S. congressional election cycle. The FEC will also watch the U.S. Supreme Court, which will hear arguments on Jan. 17 in *Wisconsin Right to Life vs. FEC*, involving electioneering communications provisions under BCRA. The case was brought by a Wisconsin anti-abortion group arguing that its ads on judicial selection issues, aired before the 2004 elections and referencing Sen. Russ Feingold (D-WI), were grassroots lobbying and should be exempted from the electioneering communications provision. OMB Watch and other nonprofits have filed a friend of the court brief in support of Wisconsin Right to Life.

More Government Spying on Nonprofits Revealed

New documents released to the press in December 2005 show federal agencies have been infiltrating and conducting surveillance on a wide range of nonprofits, in what appears to be a policy of treating lawful dissent as an act of terrorism. An NBC story revealed that the Pentagon has used a program meant to protect U.S. military installations, in order to spy on peace and other groups. In addition, FBI files released as part of a lawsuit filed by the American Civil Liberties Union (ACLU) in December 2004 show investigations of groups concerned with everything from poverty relief to the environment.

On Dec. 14, 2005 NBC published a story based on a 400-page Dept. of Defense (DOD) document that lists more than 1,500 "suspicious incidents" from the previous year. These included a number of peaceful nonprofit activities, such as a Fort Worth, FL Quaker group planning a protest of military recruitment in area high schools. The DOD document referenced over four dozen anti-war meetings and protests. DOD deemed 24 of these incidents as no threat to national security, but did not delete them from its Talon database.

The information in Talon is sent to the Counterintelligence Field Activity agency (CIFA), whose secrecy has troubled some members of Congress. Rep. Jane Harmon (D-CA), ranking member of the House Intelligence Committee, has raised concerns with CIFA and met with committee chair Pete Hoekstra (R-MI) regarding those concerns. However, the details of that meeting were not made public.

After it came to light that Talon had been used to monitor peaceful groups, the Pentagon ordered a review of the program. *The Washington Post* reported on Dec. 15, 2005 that the Pentagon's preliminary review concluded the Talon database had not been maintained correctly, quoting a senior official, who explained, "You can also make the argument that these things should never have been put in the database in the first place until they were confirmed as threats." The DOD surveillance, however, does not appear to have been inadvertent. A DOD briefing document, cited in the NBC story, indicated a policy of surveillance of protest groups, stating, "We have noted increased communication and encouragement between protest groups using the Internet..."

The FBI's use of Joint Terrorism Task Force (JTTF) resources to spy on domestic groups engaging in peaceful protest has come to light through litigation filed by the ACLU. OMB Watch reported on several instances of surveillance of peace, civil rights and environmental groups last year, based on documents obtained by the ACLU through the Freedom of Information Act. (See FBI Documents Reveal Further Spying on Peace, Civil Rights Groups, *OMB Watcher* [Sept. 6, 2005].)

Similar incidents were revealed in Dec. 2005. First, the ACLU of Colorado announced release of documents showing the FBI had tracked the names and license plate numbers of people that attended a protest at the North American Wholesale Lumber Association's convention in Colorado Springs in June 2002. The documents released to the ACLU showed that JTTF recommended a domestic terrorism investigation of people planning to participate in a training on nonviolent protest.

The Colorado documents also revealed a FBI investigation of the Colorado Campaign for Middle East Peace, because the group's website promoted a Feb. 2003 anti-war demonstration in Colorado Springs. According to the ACLU report, the FBI conducted surveillance of a car pool meeting place for people attending the event. Of the incidents, ACLU of Colorado Legal Director Mark Silverstein explained, "The FBI is unjustifiably treating nonviolent public protest as though it were domestic terrorism. The FBI's misplaced priorities threaten to deter legitimate

criticism of government policy while wasting taxpayer resources that should be directed to investigating real terrorists."

Still more ACLU documents were released later that month. The *New York Times* reported that over 2,300 pages of FBI material revealed surveillance of a wide variety of groups, including the Indianapolis Vegan Project, the antipoverty group Catholic Workers, Greenpeace, and People for the Ethical Treatment of Animals. The documents showed that, in addition to surveillance, the FBI has used informants within targeted groups to collect information.

The FBI countered that it does not target organizations because of their beliefs. Ann Beson, ACLU associate legal director, however, argues the Bush administration "has engaged every possible agency, from the Pentagon to NSA to the FBI, to engage in spying on Americans," calling the current climate reminiscent of "the days of J. Edgar Hoover."

IRS Clears Florida Church of Partisan Activity Accusation

An IRS investigation of a Florida church has found there was no partisan political activity when candidates attended and appeared at services during the 2004 election season.

In late Dec. 2005 the IRS told Guy Lewis, the attorney for Friendship Missionary Baptist Church, that the case would be closed and resolved favorably for the church.

The inquiry was prompted by an Oct. 13, 2004, request to the IRS by the watchdog group Americans United for Separation of Church and State (Americans United) to investigate an October 2004 appearance at a service by Democratic presidential candidate Sen. John Kerry (D-MA). In a 10-page letter to the church, the IRS wrote, "a reasonable belief exists that [the church] engaged in political activities that could jeopardize its tax-exempt status as a church." Included with the letter was a 21-question inquiry into the pastor's alleged endorsement of Kerry, coordination with the Kerry campaign, and solicitation of contributions.

Federal tax law prohibits all 501(c)(3) organizations, including churches, from intervening in political campaigns. According to the Internal Revenue Code, they may not "participate in, or intervene in (including the publishing or distributing of statements) any political campaign on behalf of or opposition to any candidate for public office." The prohibition has been interpreted very broadly in order to prevent charities from using tax-deductible contributions for electioneering, which would result in a taxpayer subsidy for campaigns.

The church defended its actions by explaining services are open to all, regardless of religious or partisan affiliation. The church did not invite Kerry to the Palm Sunday service, but "[B]ecause the church is in a highly accessible location for Liberty City citizens to gather conveniently, community leaders frequently attend Sunday services and ask to be recognized," according to letters from Lewis to IRS investigators last year. Lewis also pointed out that Miami-Dade County Mayor Carlos Alvarez, a Republican, had made an appearance at the church just one week before Kerry's.

Lewis told *The Miami Herald*, "Friendship did nothing more or less than other churches do on a regular basis. They didn't go out and raise money for any candidate. The preacher never told his congregation how to vote, never told them to give money to any particular side, never allowed congregants to have an after-service rally. I'm glad the IRS rightfully looked at this and said this

church was a church. They are not a political organization. They are not dedicated to promoting politics."

The church has reduced their formal policy regarding candidate appearances to writing, which helped convince the IRS that there was no attempt to favor one candidate over another.

Abramoff Plea Brings New Lobby Reform Bills

With the recent plea bargain made by high-powered lobbyist Jack Abramoff, federal lobbying reform bills have gained momentum in Congress, with Democrats and Republicans vying to lead the pack and shake the "Abramoff taint" in time for re-election.

Republican and Democratic leaders in both chambers are preparing to introduce reforms. Senate Majority Leader Bill Frist (R-TN) asked Sen. Rick Santorum (R-PA) just after last Thanksgiving to develop proposals for lobby reform. And House Speaker Dennis Hastert (R-IL) has asked his lieutenants, led by Rep. David Drier (R-CA), to develop similar legislation.

Similarly, a number of lobbying reform bills had already been introduced at the end of last year. Sen. John McCain (R-AZ)--in the Senate--and Rep. Christopher Shays (R-CT)--in the House--have introduced a bill with a host of reforms. A similar, albeit even more detailed, bill was introduced by Sen. Russ Feingold (D-WI). Finally, Reps. Marty Meehan (D-MA) and Rahm Emmanuel (D-IL) introduced similar legislation in the House. Since January, House Democrats have widely backed a recent "good government" bill sponsored by Rep. David Obey (D-WI) that also makes changes to House lobbying rules. These bills generally address campaign contributions, travel, gifts, lobbyist disclosure, and the revolving door between K Street lobbying firms and Congress.

On Dec. 16, McCain introduced S. 2128, the Lobbying Transparency and Accountability Act of 2005. (Shays introduced the same bill in the House.) The legislation was crafted in the aftermath of Indian Affairs Committee hearings that revealed malfeasances by Abramoff in his dealings with Indian tribes, and means to address the problems brought to light by Abramoff's unethical actions: securing large campaign contributions from clients; arranging for and hosting fundraisers; paying for foreign travel; providing gifts through his restaurant's expensive meals; offering personal skyboxes at sporting events; offering lobbying jobs to officials and staff; employing politicians' spouses; setting up a grassroots lobbying operation to collect tens of millions in fees and kickbacks from Indian gaming tribes; and laundering money through a charity to pay lobbyists to influence policy.

Lobby Disclosure: Current Law

Currently, organizations are required to register, under the Lobby Disclosure Act, if its employee/lobbyists meet two conditions:

- The organization must have one or more compensated employee who engage in federal "lobbying." LDA defines "lobbying" as more than one "lobbying contact" by a person who spends at least 20 percent of her time on "lobbying activities" over a 6-month period. A "lobbying contact" is currently defined as an "oral or written communication to a covered official with respect to the formulation, modification or adoption of a law or regulation." The definition of a "lobbying activity" currently includes "lobbying contacts" and activities in support of lobbying contacts.

- An organization must spend, in total expenses for its lobbying activities, $24,500 in a 6-month period. This also includes money spent on outside lobbyists.

Organizations meeting the criteria above are required to file semi-annual reports identifying the lobbyist/s, clients and employers, and the issues discussed in "lobbying contacts."

The provisions of the LDA currently cover only activities described as "direct lobbying," omitting any reference to "grassroots lobbying." Direct lobbying covers communication between the lobbyist and officials and their staff who are subject to the law. Grassroots lobbying is defined in tax law as a "call to action," such as an action alert sent to the general public. Organizations that only engages in grassroots lobbying are not covered by the LDA.

Nonprofits that use the lobbying expenditure test under Section 501(h) of the Internal Revenue Code have the option, under the LDA, to use the IRS Form 990 definitions on their LDA reporting forms. This is because Form 990 requires charities to disclose direct and grassroots lobbying expenditures at the federal, state and local level under IRS definitions, which saves charities from needing to calculate under a different standard. The IRS definitions are far more extensive than LDA requirements.

Proposals for Reform: Grassroots Lobbying

Under McCain's legislation (S. 2128), the definition of lobbyist is altered to include grassroots lobbying, which the bill defines as any attempt to influence the general public, in order to encourage them to engage in lobbying contacts. It excludes any communications to organizations' members, employees, officers or shareholders, unless such grassroots lobbying is done by a paid outside lobbyist. However, neither the LDA nor S. 2128 defines who constitutes a "member." Form 990 filers could ostensibly continue to use the IRS definition of member. Under IRS regulation 56.4911-5, a member is defined as someone that contributes more than a nominal amount of time or money to the organization. Other nonprofits could possibly use their organizations' definition of membership, if membership has been so defined it in the organizational by-laws. For nonprofits using the IRS Form 990 definition on their LDA reporting forms, it would not make much difference, as communications with members are already treated as a direct lobby expense.

H.R. 2412, the Special Interest Lobbying and Ethics Accountability Act (SILEA), introduced by Meehan last year, also includes a grassroots lobbying disclosure provision. The legislation would require lobbyists that meet the LDA threshold (based on direct lobbying expenses only) to disclose amounts spent on grassroots lobbying. Fewer nonprofits would, therefore, fall under the LDA because their grassroots lobbying expenses would not push them over the threshold amount. A similar provision was included in S. 1398, a lobby reform bill proposed by Feingold.

McCain's legislation also increases the frequency of required reporting from semi-annual to quarterly. The bill also adjusts the reporting threshold accordingly, from $24, 500 for a six-month period to $10,000 for three months, which will be adjusted for inflation annually. This change could bring nonprofits not currently required to register over the LDA registration and reporting threshold if they have a quarter in which they are particularly active.

Some nonprofits are concerned that the requirement would chill nonprofit speech, due to the increased financial burdens that come with increased reporting requirements. An increase in cost may preclude small nonprofits from engaging in federal lobbying activities. Proponents of grassroots disclosure argue increased disclosure will deter some lobbyists and clients from improper activities and expose sham nonprofits that operate as fronts for private corporate interests.

Campaign Contributions

After the Abramoff indictment, members of Congress rushed to give back campaign contributions linked to the fallen super-lobbyist or the Indian tribes he represented. Abramoff made or arranged about $4.5 million in campaign contributions to officeholders and party committees since 2000. McCain's bill would not prohibit campaign contributions from lobbyists, but require disclosure on lobbyists' LDA forms, as well as candidates' Federal Election Commission (FEC) forms. Currently, lobbyists are subject to the same $2,100 per election contribution limit as all other individuals. However, contributions are reported to the FEC, and are not part of disclosure reports filed by lobbyists with the Senate or House. Additionally, no restrictions are currently in place on organizing fundraising events. Under McCain's bill, lobbyists and lobbying firms would be required to report dates, total funds raised and recipients of funds at fundraising events, although there would not be an outright prohibition.

Travel

Currently, congressional rules prohibit lobbyists from paying for travel for members of Congress and their staff, although lobbyists may arrange travel and have their clients pay for it. Travel expenses for members of Congress and their staff can be paid for by corporations, and the sponsor and cost of travel must be reported shortly after the event on annual personal financial disclosure forms.

All of the pending lobby reform bills have dealt with the issue of travel, a response, no doubt, to Abramoff's travel junkets with lavish accommodations and recreation for members of Congress and staff that have come to light.

McCain's legislation does not prohibit paid travel outright, but instead requires disclosure of travel paid for by clients of, or arranged by, lobbyists--but does not require disclosure when the travel is paid for or arranged by corporate presidents or CEOs. Both the Meehan bill and the Feingold bills prohibit lobbyists from paying or arranging for travel, but again, do not ban travel paid for by presidents or CEOs of corporations. Feingold's bill is the only one that prohibits lobbyists from accompanying members on a trip.

Additionally, the McCain, Feingold and Meehan bills all subject travel expenses of members and staff to the per diem rates that apply to all other government workers.

Obey's reform legislation takes a harder stance on sponsored travel. It would require House members and staff to file a declaration stating that, among other things, the sponsor of the travel did not conduct lobbying activities as defined in section 501 of the Internal Revenue Code. Consequently, any charity that conducts any lobbying activities would be banned from sponsoring travel--such as travel to conferences or environmental and educational sites. While such nonprofits can legally pay for trips for members of Congress and staff, congressional rules forbid registered lobbyists or registered agents from paying for such travel themselves.

Gifts

Currently, congressional rules cap gifts at $50 per item and $100 per year from any individual to a member of Congress and her staff. The term "gift" covers any gratuity, favor, discount, entertainment, hospitality, loan, or other item having monetary value. In particular, the term includes services, training, transportation, lodging and meals, whether provided in kind, by purchase of a ticket, payment in advance, or reimbursement after the expense has been incurred. A member or employee of Congress may accept a gift only if it is unsolicited and there is no presumption that it is in exchange for influencing a member's governmental duties.

Valuing gifts, such as tickets to sporting events, has become an art form to keep the price within the requirements on gift restrictions.

Both Meehan's and Feingold's legislation ban gifts to members and staff outright, regardless of value. McCain's bill requires reporting any gift larger than $20 and valuing sports tickets, a common commodity for lobbyists, at their face value.

Electronic Filing

According to the LDA, lobby disclosure forms must be made available for public inspection and copying at reasonable times. Both the Senate and House Clerk's office accepts--and now the House requires--electronic forms.

The McCain, Meehan and Feingold bills all require electronic filing. Currently, LDA reports have limited utility because of their lack of timeliness and searchability. The semi-annual reports are often filed after lobbying on a specific bill has been completed, limiting access to information on the amounts spent on specific legislative battles. Mandatory e-filing would eliminate the lag time in data entry for the House and Senate Clerk's office. In an effort to increase transparency, McCain's bill also requires the information be available not more than 48 hours after a report is filed.

Enforcement

Who will enforce these laws if passed? Currently, federal lobbyists that meet a set threshold must report their activities to the Clerk of the House and Senate Offices in the form of semi-annual reports. Neither the Senate nor House Clerk's Office has formal enforcement authority. They are required, under Sec. 10 of the LDA to review, verify, and request corrections in writing to ensure the accuracy, completeness, and timeliness of registrations filed under the Act. The office of the U.S. Attorney for the District of Columbia receives referrals from the Secretary of the Senate and Clerk of the House of Representative's Office. The U.S. Attorney's Office then makes a determination to pursue the "most egregious" cases. Penalties are imposed on a person who "knowingly fails to (1) remedy a defective filing within 60 days after notice of such a defect by the [Senate Secretary or House Clerk's Office] or (2) comply with any other provision of the Act." Penalties involve a civil fine of not more than $50,000.

McCain's legislation increases fine to not more than $100,000 and directs the Comptroller General to review the activities of the Senate and House Clerks' office and report twice yearly to Congress on the levels of compliance and whether the Clerks' office has enough resources. Similar provisions within the Meehan bill require the General Accounting Office to report twice annually to Congress on the effectiveness of the Clerk's office.

Documents released by the Department of Justice (DOJ) provide a window into the world of LDA reporting. Reportedly, over the past two years, the U.S. Attorney's Office has received about 200 referrals of possible LDA violators and pursued 13 cases. What factors led the U.S. Attorney's Office to pursue these cases are unknown. Pam Gavin, superintendent of the Senate Office of Public Records, which oversees the LDA in the Secretary's Office, told *Roll Call* that, "[f]rom my perspective, I think it's working pretty well. Anybody in the world can go to our Web site and look at lobbying reports and see what's being done."

However, details about enforcement activities can be difficult to track down. The LDA is mute on the issue of public disclosure of violations. Gavin's office has never made public the number of LDA-related referrals it has made to the U.S. attorney's office, much less any details about

individual cases. Consequently, it would be difficult to make a clear determination of whether the current law is effective or if adequate enforcement exists.

What's Next?

Reportedly, despite the wide support of the Obey plan, House and Senate Democratic leaders plan to unveil additional extensive lobbying reform proposals later this month. Similar to the legislation discuss above, the proposals would extend the prohibition on lobbying of Congress by former lawmakers and staff members from one to two years, eliminate floor privileges for former members who are registered lobbyists, and place new limits on gifts and congressional travel. New approaches to penalties for violations are reportedly also being considered.

The Republicans are also moving ahead with more lobby reform proposals. It is not clear what will be in the Senate GOP leadership plan. It has been reported that the plan will differ from the McCain bill, but it is unclear in what way. In the House, Hastert has said that he intends to move quickly and in a bipartisan manner on reform legislation. With Democrats seeking to capitalize on GOP ties to Abramoff, however, a bipartisan bill emerging quickly seems unlikely.

White House 'Guidance' to Burden Agencies, Delay Information

A White House proposal will hinder federal agency efforts to provide important information to the public by opening guidance documents to politicization and industry influence, according to comments filed by Citizens for Sensible Safeguards on Jan. 9.

Citizens for Sensible Safeguards, a coalition of labor, consumer, and other public interest organizations, filed comments on OMB's Proposed Bulletin on Good Guidance Practices. The bulletin purports to make agency guidance documents "more transparent, consistent, and accountable" by setting new requirements that include high-level review by senior agency staff of any guidance document deemed "significant" and a lengthy review and approval process for any "economically significant" guidance.

A Solution in Search of a Problem

The bulletin does not solve the problem OMB claims it is addressing. While OMB makes the dubious claim that the bulletin is needed because agencies are announcing new requirements in guidance documents instead of regulations, the administration fails to recognize the burdensome analytical requirements that force agencies to seek alternatives to the rulemaking process via the issuance of guidance. OMB should focus its efforts on removing obstacles to the regulatory process instead of making guidance as burdensome and draining on agency resources as the rulemaking process has become. Onerous requirements created by recent legislation and executive orders have led to "paralysis by analysis." For example, the promulgation of a new OSHA regulation now takes on average over five years, whereas in the 1970s the process took roughly six months.

Making Government *Less* Effective

OMB's proposal also takes a "one-size-fits-all" approach to the vast array of agency documents that address wide ranging public needs. The White House's proposal uses such amorphous definitions that an enormous range of agency information could be at risk. The bulletin could apply to everything from handbooks to advisory opinions to databases of chemical information.

National Weather Service heat advisories, Superfund cleanup instructions, Labor Department guidelines for biohazardous shipment labeling and even USDA recommendations about when meat is done and ready to eat could now face new bureaucratic burdens.

White House Power Grab

The proposal's requirement that so-called "economically significant" guidance documents be subject to a lengthy public comment process represents a White House power grab that contradicts Congress's role in delegating discretion to federal agencies. Despite having had 60 years to consider across-the-board, one-size-fits-all policies of the type proposed by OMB, Congress has chosen to avoid such policy proposals. By requiring agencies to seek approval from OMB to avoid these onerous new requirements, OMB's proposal also opens the door for an unprecedented role for the White House in agency's development of guidance.

Though put forth under the auspices of increasing public participation and transparency in the guidance process, OMB's proposal will have the opposite effect; swamping agencies in new requirements that drain agency resources and limit their ability to respond effectively to the needs of the public.

There's a Better Way

If OMB continues to go forward with the proposal, it should consider several revisions that could limit the burdens on agency resources, bolster public participation and agency responsiveness and keep the balance of powers in check. Suggestions for reform include the following:

- "Economically significant" guidance should not be subject to notice-and-comment requirements. Not only is the term "economically significant guidance" misleading and incomprehensible, but the added burden on agencies for guidance documents that fall under this domain would be onerous and draining on agency resources. Guidance documents are specifically exempt from APA notice-and-comment, and subjecting them to such procedures is an overreach of executive power.
- OMB should vastly limit the scope of guidance documents requiring formal notice and comment so as not to grind agency activity to a complete halt.
- In the interest of transparency, any criteria OMB uses to approve or deny the waiver as well as any rationale provided by the agency for waiving the good guidance practice requirements should be made public on the OMB website.

White House Proposes Guidelines to Control Agency Risk Assessments

When it rains, it pours: the same day the White House closed the comment period on its proposed bulletin to govern agency guidance practices, the White House Office of Management and Budget released a proposed bulletin to govern agency risk assessments.

OMB's Office of Information and Regulatory Affairs (OIRA) released the Proposed Risk Assessment Bulletin on Jan. 9. It will be peer-reviewed by the National Academies of the Sciences and open to public comment through June 15.

OMB Watch will make more information and analysis available at www.ombwatch.org/regs/whitehouse/risk going forward. For now, here are some of the highlights of the bulletin:

- It calls on agencies to apply, where feasible, the risk assessment standards of the Safe Drinking Water Act.
- It gestures in the direction of risk/risk comparison, calling on agencies to write introductions that put the risks they are assessing in the context of other risks with which the public is familiar. Before becoming OIRA administrator, John Graham vigorously advocated a concept of risk/risk tradeoffs as a means of characterizing regulatory policy as irrational. With this approach, Graham once downplayed health risks associated with dioxin, the primary toxin found in Agent Orange, as "on par with other risks."
- The bulletin would apply heightened standards to "influential risk assessments," a new category that parallels the influential information category from OMB's peer review guidelines. New standards would include "substantial[] reproduc[ibility]," comparison against non-agency risk assessments, more emphasis on uncertainty and central tendency in risk ranges, formal response to "significant" comments, incorporating scientific disputes over the adverse or non-adverse nature of human health effects, and more.

Many of the issues now at stake in the risk assessment bulletin were discussed back in 2001 in an insightful report from Public Citizen called *Safeguards at Risk*. Published when John Graham was nominated to head OIRA, the report tracks the relationship of corporate special interest money and the cottage industry of aggressive manipulations of the discourse of risk toward anti-regulatory ends.