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Regulatory Matters

Information & Access

Nonprofit Issues

Federal Budget

Risk Bulletin Advances Graham Anti-Reg Agenda

From cost-benefit guidelines to the new draft policy on risk assessments, White House regulatory czar John Graham has steadily proceeded with a long-range plan laying the groundwork for dramatic limits on public safeguards.

In light of this long-range agenda, the White House's recent Proposed Risk Assessment Bulletin, already problematic in its own right, is also troubling as the latest element in a sequence of policy changes designed to undermine protective policies by making regulatory league tables possible.

Endgame: Rationing Regulatory Protections Through League Tables

Graham is a champion of anti-regulatory league tables. Long before his tenure in the Bush administration, Graham advocated (misleadingly) the use of tables that, like league standings charts in the newspaper sports page, would rank regulatory protections according to cost-effectiveness ratios.

Graham's position has long been that such tables could be the basis for selecting among potential regulatory protections. In the FY 03 budget submission, Graham reiterated that position. Graham cautioned that the dream of using league tables for interagency comparisons of regulations "depends

on achieving a degree of analytical consistency across agency evaluations of health and safety risks" -- that is, to have interagency consistency of the "data" that would be plugged into such tables.

Regulatory Budgeting

One use of league tables would be in regulatory "budgeting," an industry dream policy that would limit the fictional compliance costs that an agency is allowed to impose through new regulations in any given year. Once an agency hits its pseudo-budget cap for compliance costs, it would be forbidden from promulgating any new protective standards.

Risk/Risk Comparisons

Another use for league tables would be as a decision-making tool that supplants precautionary approaches with risk-vs.-risk tradeoffs. As Graham explained the approach in OMB's 2003 regulatory accounting report, precautionary regulation supposedly creates new risks of its own:

For example, regulations that reduce the level of disinfection byproducts in the water supply may reduce potential adverse health effects from by-products of the disinfection process. However, it may also reduce the effectiveness of disinfection and thereby increase the health risk from microorganisms. Likewise, restricting latex use to prevent allergic reaction in health care workers may increase the risk of infections that latex products are used to prevent.

Having slickly shifted the conversation away from polluters and other corporate malfeasors and onto regulatory protections themselves, Graham thus co-opted precautionary discourse and turned it into a basis for new analytical limitations: "Therefore, precaution may be necessary on both sides of the equation and a formal consideration of risk-risk trade-off may be necessary when both risks cannot be easily reduced in tandem." League tables make such "risk-risk trade-off[s]" possible.

The Graham Agenda

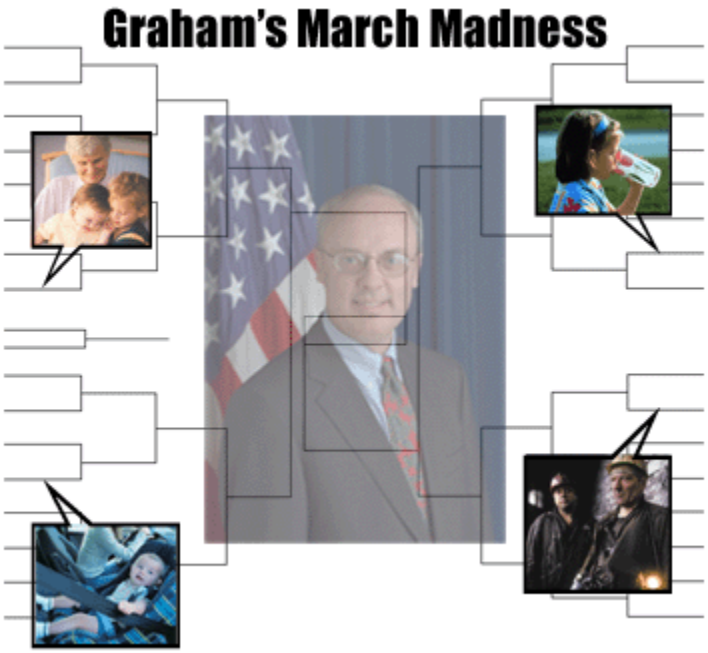
Ever since explaining the agenda in 2002, Graham has been working incrementally to make league tables possible:

- His first move was mandating consistency in cost-benefit analysis and requiring that agencies conduct cost-effectiveness analyses.
- His most recent move was the Jan. 9 release of the Proposed Risk Assessment Bulletin. Graham signaled his intention to systematize risk assessment information four years ago in the 2002 annual regulatory accounting report, in which he called for both (1) the application of Safe Drinking Water Act risk assessment standards to all assessments and (2) "methods of risk assessment that supply central estimates of risk as well as upper and lower bounds on the true yet unknown risks." The latter is particularly important for league tables: risk assessments typically report ranges of risk probabilities, but league tables need a single risk figure in order to produce clear rankings. The new proposed risk assessment bulletin now advances both goals announced in 2002.
- The same week that the proposed risk bulletin was released, the National Academies of Sciences' Institute on Medicine released a White House-commissioned report on measuring health benefits for use in cost-effectiveness analysis. The NAS report now serves as an authoritative commentary agreeing with what could likely be next from Graham: a new guideline mandating greater consistency in the use of mortality and morbidity measures, such

as a quality-adjusted life years, in cost-effectiveness analysis. Such a policy would be the final step needed to establish consistent analytical approaches that, in turn, will make league tables possible.

More about league tables:

- Richard W. Parker, Grading the Government: How Reliable are the Tests?
- Lisa Heinzerling, Five Hundred Life-Saving Interventions and Their Misuse in the Debate Over Regulatory Reform
- Lisa Heinzerling & Frank Ackerman, The Humbugs of the Anti-Regulatory Movement
- Lisa Heinzerling, The Perils of Precision
- Lisa Heinzerling, Reductionist Regulatory Reform



Reform Must Illuminate Channels of Money, Influence

Both Republican and Democratic lawmakers have proposed principles and introduced legislation to purge the excessive influence of lobbyists in Washington, since corruption scandals highlighted the inappropriately cozy relationship between Capitol Hill and K Street. Neither party, however, appears to be making full use of one the best weapons against corruption and abuses of power--sunlight. Reform proposals would all be strengthened with more comprehensive use of the tools of transparency.

A wave of proposals have come out of Washington in recent days. Senate Minority Leader Harry Reid (D-NV) and 34 other Democrats introduced the Honest Leadership and Open Government Act of 2006 (S. 2180) on Jan. 20, For his part, Sen. John McCain (R-AZ) has been rounding up support for his Lobbying Transparency and Accountability Act of 2005 introduced last December.

At a Jan. 17 press conference on lobbying reform held by Republican congressional leaders, House Speaker Dennis Hastert (R-IL) voiced support for a ban on privately sponsored travel and stricter gift-giving rules.

Unfortunately, none of the reform proposals to date offer a meaningful answer to the problem of enforcing the rules (both existing and proposed) and none create the transparency that the system so desperately needs and that could be the best corruption deterrent around. The Senate Democrats propose new criminal penalties for non-compliance, but nothing to ensure enforcement of the new penalties. And, while the Democrats plan would require that lobby disclosure information be available in a searchable online database, it stops short of meaningfully opening government.

Reform proposals will fail to make a dent in Washington's culture of corruption without the following key elements to improve transparency:

- A one-stop centralized database on key monetary activities between government and the private sector
- Public disclosure of outside job negotiations
- Improved access to conference committee activities
- Stronger investigative and enforcement mechanisms for disclosure requirements

Some of these elements are included in legislation already introduced, but if Congress is to impede the corrupting influence of lobbyist money, it is essential that transparency and openness play a central role in the reform package.

Centralized database on lobbying activity

Since there is no easy way to eliminate money from politics, proposals must eliminate the ability to hide the money. The Honest Leadership and Open Government Act of 2006 expands disclosure requirements for lobbying activities to include who is funding lobbying firms, paying for travel, gifts, and who is making campaign contributions to individuals, PACs, and party committees. All of this information would be available to the public in a searchable database. This is a significant step forward, but because it would only apply to those required to register under the Lobby Disclosure Act, it would shed light on only a portion of the money that flows in and out of Washington. Money would likely shift to other less scrutinized avenues.

A serious lobby reform package should include an effort to bring together in a meaningful way information about government contracts, political contributions from non-lobbyists, earmarks in appropriations bills and more. Legislation should also require members of Congress to maintain and submit information on donations, trips, gifts and other transactions. Such data could be cross-checked with lobbyists' disclosures to help identify inconsistencies and inappropriate activities. Members of Congress should also be required to maintain data on such transaction on their official websites. Without improved tracking of the flow of money in and out of government, a solution to the corruption that plagues politics will continue to elude us.

Public disclosure of outside job negotiations

Much of the current ethics scandals centers around accusations that government officials and employees have swapped political influence for private sector jobs. The Honest Leadership and Open Government Act "requires lawmakers to disclose when they are negotiating private sector

jobs, and requires Executive Branch officials who are negotiating private sector jobs to receive approval from the independent Office of Government Ethics."

While we applaud the disclosure requirement of lawmakers, we believe it should be extended to Executive Branch officials. Obviously, individual privacy and the sensitive nature of job negotiations are concerns, but disclosure of Office of Government Ethics approval for such negotiation after a reasonable time period, say 6 months or a year, seems reasonable enough. Concerns have been raised that obtain such permission is too easy. Public disclosure would enable lawmakers and the public to determine if a pattern of laxity exists or if the internal system monitoring such negotiations is flawed.

Improve access to conference committee activities

Lawmakers who sit on conference committees wield enormous power in our political process, in some instances making last-minute changes to legislation without the support or knowledge of other members of Congress. To ensure oversight and accountability of lawmakers during the introduction and initial crafting of a bill, conference committee negotiations should be made transparent and all committee members should vote on any changes to the bill. The Honest Leadership and Open Government Act would enact these changes and would additionally require the public release of conference reports 24 hours before the committee begins their consideration.

OMB Watch believes that the Act should also include a provision requiring committees to release the text of bill markups as well as other committee documents such as draft bills and amendments prior to voting. Access to such information is essential for meaningful public accountability over conference committee activities.

Investigative and enforcement mechanisms

All the various provisions and requirements proposed will have little effect if reform legislation does not establish some form of oversight authority to ensure the requirements are met and to investigate malfeasances. The Honest Leadership and Open Government Act would create the Senate Office of Public Integrity to receive lobbyist disclosures and investigate possible violations.

Lobbyists, however, are only part of the equation. In addition to the disclosure requirements on members of Congress, OMB Watch believes that any office or agency charged with overseeing lobby disclosure requirements should also be granted the authority to enforce congressional disclosure requirements, such as the requirement of lawmakers to maintain data on their travel, gifts and donations on the member's website. Additionally, legislation should authorize any such oversight entity to use enforcement mechanisms, including public notice of violations and even fines on congressional offices that fail to meet disclosure requirements.

In the coming weeks, the House and Senate will act on reform packages to infuse public oversight and accountability into the relationship between lobbyists and lawmakers. Including the elements outlined above would enormous benefit reform legislation and its ability to bring about needed change.

EPA Gets an Earful on Plan to Reduce Toxic Reporting

More than 70,000 citizens voiced opposition to the Environmental Protection Agency's (EPA) proposals to cut chemical reporting under the Toxics Release Inventory (TRI), during the agency's public comment period that ended Jan. 13. Those speaking out against EPA's proposals included state agencies, health professionals, scientists, environmentalists, labor, Attorneys General, and even Congress, all of whom raised substantive concerns with the plan.

A first look at the comments submitted on EPA's proposed rule to change the threshold for detailed reporting shows extensive opposition and little support for the agency's plans.

Reps. Frank Pallone (D-NJ), Hilda Solis (D-CA) and Luis Gutierrez (D-IL) coordinated a letter signed by over 50 members of the U.S. House of Representatives urging EPA to "immediately withdraw [the] proposed changes to TRI requirements." As previously reported, members of both the Senate and House have written EPA expressing their misgivings about the proposed changes.

Twelve state Attorneys General submitted detailed comments suggesting that EPA lacks authority to finalize the proposals and that the current EPA plans violate several laws. "In addition to being contrary to the public interest and sound policy," their comments explain, "the proposed changes would violate the Emergency Planning and Community Right-to-Know Act (EPCRA), the Pollution Prevention Act (PPA), and the Administrative Procedure Act (APA)." The comments were submitted by the attorney general offices of New York, California, Connecticut, Illinois, Iowa, Maryland, Massachusetts, New Hampshire, New Jersey, New Mexico, Vermont, and Wisconsin.

Maine's Department of Environmental Conservation also questioned the legality of EPA's proposals and expressed fear that the proposals would inflict significant harm on Maine's 'toxic reduction' program. According to the agency's comments, "Such a change inherently conflicts with the intent of the Community Right to Know Act and the goals of the TRI program. Furthermore, because Maine has a Toxics Reduction Program centered on public accountability, this proposal would significantly curtail what the public can review." Maine, according to the comments, would lose almost 70 percent of its TRI inventory and the ability to track 70 percent of Toxic Release data in the state.

Joseph A. Gardella, Jr., Ph.D., an award-winning chemist and professor with the University of Buffalo, in comments submitted to EPA, strongly opposed the changes. Gardella, who works to forge partnerships between industrial facilities and exposed communities to foster pollution prevention and remediation, wrote, "[f]or almost 20 years, the TRI program has been successful in making communities around the country safer and healthier by providing critical information on the toxic chemicals released into our land, water, and air... [EPA's proposal] poses a significant threat to our nation's health, safety, and environmental quality."

OMB Watch submitted extensive comments detailing the numerous problems and shortcomings of EPA's plans. As did many other comments, the organization highlighted the fact that "EPA's proposed changes would greatly reduce the amount of information available to communities, state officials, first responders, and health professionals on the releases and disposals of toxic chemicals, which pose significant health risks to workers and the general public." OMB Watch urged the agency to withdraw the proposals and begin the process of identifying changes that would reduce reporting burden without increasing risks to public health or harming state pollution prevention efforts.

While EPA has not officially announced the number of comments it received, according to the more than a dozen organizations that provided online tools for submitting comments, at least 70,000 comments were submitted. According to EPA sources, comments against the proposals continue to pour in, despite the comment period having ended on Jan. 13.

Now, EPA must compiling and review the comments, and prepare a set of responses to all the issues they raise. During that time the EPA may modify its proposals based on the comments or even withdraw the proposals entirely. Given the volume, not to mention the variety of reasons and sources of opposition, the agency will likely take several months to prepare a full response. Officials report that the agency hopes to have a final rule published by December 2006.

In the meantime, EPA has begun gathering stakeholder input on another proposal to limit the TRI, the possibility of alternate year reporting under TRI. Under the law, EPA must notify Congress about its intent to alter the frequency of TRI reports. Then, the agency must decide whether the change would harm the usefulness of the program to states, health professionals and the general public. The agency's stakeholder outreach appears to be the first stage of its investigation into the matter. After concluding this process, if the agency elects to move forward with this other cutback to TRI reporting, that rule change could not be proposed before October 2006, after which roughly a year would be needed to conclude the rulemaking process.

While congressional approval is not required for either the TRI threshold reporting changes or reduction in the frequency of TRI reporting, Congress can intervene before either proposal is finalized; and, given the level of concern over both proposals that a number of senators and representatives have expressed, such intervention does not seem out of the question.

Government Secrecy's Latest Victims: Whales

According to documents released to the Natural Resources Defense Council, all references to the possibility that naval sonar may have caused 37 whales to swim ashore and die in North Carolina last year were deleted from a government report on the incident. The revelation came as the Department of the Navy nears the close of its public comment period on its plans to build an underwater sonar training range in the same North Carolina location.

More than three dozen whales beached themselves within a few hours of one another on North Carolina's Outer Banks on Jan. 15, 2005. At the time, the Navy was testing offshore sonar at the site of a proposed 600-square-mile Undersea Warfare Training Range on the continental shelf off North Carolina, less than 200 miles from the Charleston jetties.

The government was asked to investigate the incident and issued a preliminary report with no mention of sonar blasts as possibly contributing to the mass beaching. However, in an earlier draft, Teri Rowles, coordinator of the National Marine Fisheries Service's stranding response program, concluded that the whales' injuries may have been indicative of damage from sonar sound blasts. Rowles noted that the injuries were similar to other mass whale strandings, in which sonar was the suspected cause.

Yet, the official draft report released by the National Oceanic and Atmospheric Administration contained no mention of sonar anywhere. Rowles told the Washington Post that all references to sonar were removed because it was only one of several possible causes and had not been proven.

NRDC attorney Andrew Wetzler characterized the public draft as "more like spin than science."

Oddly, that active sonar is harmful to whales is neither a new or hotly contested issue. Environmentalists have long worked to bring to light the damage sonar inflicts on marine life. The Navy has even acknowledged sonar's harmful effects in a report on the stranding of 17 whales in the Bahamas in 2000 that concluded that sonar from Navy ships was the most likely cause.

So why no mention even of the possibility that sonar played a role in this early report? The answer may lie in the timing of the Pentagon's plans to build a controversial sonar training facility nearby. Public hearings are being held right now on the proposal, and the public comment period will close at **the end of January**. The final report on the whale beaching, according to Rowles, should be completed by this March. NRDC has argued that the hearings should not be allowed to close until all of the information on the 2005 strandings has been released to the public. The Navy's environmental impact statement on the proposal is expected to be submitted this fall.

The issue is reminiscent of the Environmental Protection Agency's Draft Report on the Environment in 2003, which received broad criticism for its total lack of information on climate change. Later, leaked drafts of the report revealed that a section on climate change was included in earlier drafts but was deleted by the agency after sweeping editing by the White House's Council on Environmental Quality made the section all but meaningless.

Update: "Is Industry Pulling EPA's Strings?"

On Jan. 23 Thomas Sullivan, chief counsel for advocacy with The Small Business Administration (SBA), contacted OMB Watch in response to "Is Industry Pulling EPA's Strings?", an article recently published in *The Watcher* that describes a troubling pattern of close cooperation and extensive communication between the SBA and the Environmental Protection Agency around reducing chemical reporting under the Toxic Release Inventory (TRI), in order cut down on governmental paperwork for companies. Sullivan asked that OMB Watch clarify that the 1997 investigation by SBA's Inspector General into possible unethical actions around the TRI by SBA lawyer Kevin Bromberg, who has previously advocated for an industry coalition on TRI, found no evidence of inappropriate action. During his conversation with OMB Watch, Sullivan acknowledged that all of the facts cited in the article about recent interactions between EPA and SBA are correct. The article has been updated to reflect SBA's request.

Amid Reform Frenzy, Senate Democrats Introduce Lobby Reform Bill

Since the guilty plea by lobbyist Jack Abramoff, Congress has been hurriedly preparing lobby and ethics reform legislation. Republicans announced their ideas at a Jan. 17 press conference that seemed mostly designed to pre-empt the unveiling of Democrats plan on Jan. 18. The Senate Democrats followed their press event with the introduction of a comprehensive bill authored by Minority Leader Harry Reid (D-NV). In our view, the Reid bill is a solid beginning, but falls short of adequately addressing the culture of corruption that surrounds Washington politics today. To follow is an analysis of the Reid bill and its impact on lobbying generally and nonprofit lobbying

specifically.

While Senate and House Republican reform bills are certainly in the works, neither plan has taken shape. In fact, at their joint press conference, Republican leaders in the House and Senate appeared not to have reached full agreement on all the ideas that were advanced. Senate Majority Leader Bill Frist (R-TN) has asked Sen. Rick Santorum (R-PA) to develop the Republican plan for the Senate. Reportedly, Santorum is working from legislation drafted in December by Sen. John McCain (R-AZ). House Speaker Dennis Hastert (R-IL) has asked House Rules Committee Chairman David Drier (R-CA) to head up the Republican House proposal. Hastert has mentioned bringing a House bill to the floor in the first week of February.

The House and Senate Democrats, on the other hand, offered a unified voice on reform, presenting a set of principles including:

- Expanded lobby disclosure,
- An extended ban on lobbying by former members of Congress, senior congressional staff, and senior Executive Branch officials from one to two years after they have left office
- An end to the "pay-to-play" schemes propagated by Republicans that pressured associations and lobby firms to hire Republicans supportive of their leadership agenda and demanded campaign contributions in return for access to lawmakers.
- A requirement of lawmakers and senior congressional staff to disclose negotiations for private sector jobs and of Executive Branch officials seeking private employment to first receive approval from the Office of Government Ethics.
- A requirement that conference committee activities be done in sunlight with a 24-hour review period (except in emergencies), thus adding greater fairness and transparency to the legislative process.
- Strong enforcement mechanisms, such as criminal penalties for not complying with many of the new reforms. They also would require annual ethics training for all congressional staff.

The Senate Democrats followed up with a legislative proposal on Jan. 20, when Reid introduced S. 2180, the Honest Leadership and Open Government Act of 2006. The bill was co-sponsored by 34 other Democrats in the Senate, which may give it momentum.

Lawmakers are determined to pass a bill quickly, possibly as early as March 1. On Jan. 25, the Senate Homeland Security and Governmental Affairs Committee will hold a hearing on the various lobby reform proposals, including Sen. John McCain's (R-AZ) S. 2128, Sen. Russ Feingold's (D-WI) S. 1398, and Sen. Barack Obama's (D-IL) (S. 2179).

For the nonprofit sector, it is important to understand that none of the bills would restrict direct or grassroots lobbying by any organization. Instead the focus is on greater disclosure, recognizing that lobbying is a First Amendment right to be protected. Moreover, under the Lobbying Disclosure Act, which all the bills would amend, nonprofits that elect to follow the expenditure test can continue using the definitions from the tax code, with which they are already familiar.

Even if the most comprehensive bill that has been introduced is enacted, much more will be needed to stop the pervasive and corrupting influence of money in the political process. For example, none of the bills address publicly financed or clean election laws. Until Congress addresses the root

problems, influence peddlers will continue to find ways to circumvent the rules.

For the nonprofit sector and those that cannot "pay to play" in the policymaking process, every change Congress makes to reduce the influence of money will help. Such efforts ensure an open and level playing field in accessing elected leaders, giving nonprofits a more equal footing as those representing moneyed interests.

Summary of Key Lobby Disclosure Provisions in the Reid Proposal

Increase in Frequency of Reporting--from Semiannual to Quarterly

Currently, organizations are required to register, under the Lobby Disclosure Act, (LDA) if its employees/lobbyists meet these 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 his or her time on "lobbying activities" over a six-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 lobbyists, clients and employers, and the issues discussed in "lobbying contacts."

Under the Reid bill, the trigger for registering would change from $24,500 in a 6-month period to $10,000 in a 3-month period. Given that the registration requirements have not changed substantially, few additional nonprofits would now be required to register. Filing by lobby firms would also be shifted to quarterly filing.

Grassroots Lobbying Disclosure Requirement

The LDA currently only covers activities described as "direct lobbying," omitting any reference to "grassroots lobbying," which has grown over the years, particularly through firms that generate grassroots responses. Under Reid's legislation, grassroots lobbying would now be disclosed if the organization is required to file an LDA report. Thus, if a nonprofit is not required to register because of its direct lobbying expenditures, it would not need to disclose grassroots lobbying costs. Grassroots lobby firms, however, would be required to disclose their activities if they receive income of or spend $50,000 or more in a quarter, thereby capturing most grassroots lobbying firms under the disclosure requirements. (Firms that receive or spend $250,000 or more must report more frequently.)

Those who are required to disclose grassroots lobbying must provide an estimate of the total costs as well as the total amount related to paid advertising. Communications with members, employees, officers or shareholders are exempted under grassroots lobbying unless a lobbyist pays the organization to undertake such communications.

The Reid bill definition of grassroots lobbying is broader than the definition in the tax code that applies to charities. The bill calls grassroots lobbying any effort to get the "public to communicate their own views on an issue to Federal officials..." For those charities choosing to operate under the IRS expenditure test, grassroots lobbying has a prescribed "call to action" that only applies to attempts to influence legislation. (Charities, however, disclose grassroots lobbying at the local, state and federal level. This bill would only apply to the federal level.) **However, the bill does not change the provisions of the LDA that allow charities that elect to fall under the IRS expenditure test to use IRS definitions of lobbying when filling out their LDA reports.**

Coalitions

In an attempt to root out puppet coalitions being used as a front for big-money lobbying, Reid's bill would require those filing LDA reports to disclose the name, address, and principal place of business of any organization that contributes more than $10,000 to the lobbying activities semiannually and participates in the "planning, supervision or control" of such lobbying activities. However, the legislation makes an exception for the disclosure requirement if it is publicly available knowledge that the client--the original organization that hired the lobbyist--and the organization that contributed more than $10,000 in the 6-month period to the lobbying campaign are affiliated. This is true unless the organization contributing money controlled or totally planned the lobbying activities. The legislation also protects the privacy of an organization's members or donors

Campaign Contributions

With respect to campaign contributions, Reid's bill is similar to legislation, S. 2128,, recently introduced by McCain. Neither bill would prohibit campaign contributions from lobbyists, but the Reid bill would expand the LDA reporting to include information about campaign contributions from lobbyists to individuals, PACs, and party committees. Under both the Reid and McCain bill, lobbyists and lobbying firms would be required to report dates, total funds raised and recipients of funds at fundraising events.

Travel and Gifts

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 or nonprofit organizations, and the sponsor and cost of travel must be reported 30 days after the event and on annual personal financial disclosure forms.

The current limit on gifts to a member of Congress and staff is $50 per item and $100 per year from any individual. 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.

Reid's bill bans gifts from "lobbyists" outright, but does not ban gifts from non-registered advocates.

Travel is not usually treated as a gift. Under Rule 35 of the Standing Rules of the Senate, a

reimbursement to a Member, or employee from an individual (other than a registered lobbyist) for necessary transportation, lodging and related expenses for travel to a meeting, speaking engagement, fact-finding trip or similar event is not a gift prohibited by the rule, as long as it is in connection with the duties of the member or employee, and it is disclosed to the Select Committee on Ethics.

Reid's legislation does not ban travel outright. Instead it modifies Rule 35 of the Standing Rules of the Senate to state that a Member of Congress or congressional employee may go on a trip sponsored by a 501(c)(3) organization, as long as a lobbyist does not take a major role in planning or financing the trip, or participate in the trip. The charity must then provide certification to the Select Committee on Ethics that the lobbyist did not plan or attend the trip. Additionally, any 501(c)(3) organization that is affiliated with any group that lobbies before Congress is prohibited from arranging or paying for travel.

Electronic Filing/Online Database

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.

Like bills introduced by McCain, Rep. Marty Meehan (D-MA) (H.R. 2412) and Sen. Russ Feingold (D-WI) (S. 1398), Reid's bill requires electronic filing, and, like McCain's bill, requires the information be made available not more than 48 hours after a report is filed.

Reid's legislation also directs the Secretary of the Senate to maintain a free searchable database containing the information filed under LDA requirements. It does not go as far as McCain's bill, however, which requires the database also link to relevant Federal Election Commission filings.

See "Reform Must Illuminate Channels of Money, Influence" for more on the database and transparency.

Enforcement

Reid's bill establishes a Senate Office of Public Integrity to receive lobbyist disclosures with authority and resources to conduct audits to ensure compliance with the LDA. Currently, the Secretary of the Senate receives lobbyist disclosures, and it is not clear how the offices will interact. The Reid bill also gives authority to the Office of Public Integrity to refer violations to the Select Committee on Ethics and the Department of Justice (DOJ) for civil and criminal penalties.

The penalties the DOJ can hand out are also increased under Reid's bill. The civil penalties rise from $50,000 to $100,000, subject to the severity of the violation. Reid's bill would also empower the DOJ to impose criminal penalties if an individual knowingly makes defective filings, the penalty not more than 5 years and a fine. If the filings were both knowingly and corruptly defective, the penalty is upped to not more than 10 years and a fine.

High Court Opens Door to Campaign Finance Rule Challenge

Less than a week after oral arguments were held the Supreme Court ruled on Jan. 23 that the Bipartisan Campaign Reform Act of 2002's (BCRA) ban on "electioneering communications" can be

challenged on a case-by-case basis. The ruling opens the door for the Wisconsin Right to Life Committee (WRTL) to pursue its claim that BCRA is unconstitutional as applied to its grassroots lobbying communications. The unanimous opinion in *Wisconsin Right to Life Committee v. Federal Election Commission* referred the case back to the lower court to determine if WRTL's broadcast is a genuine grassroots lobbying communication that should therefore be exempt. For nonprofits looking to the 2006 election cycle, the ruling will likely leave in place the prohibition on ads that mention a federal candidate 30 days before a primary and 60 days before an election, since the Federal Election Commission (FEC) has revoked its earlier exemption for 501(c)(3) organizations, and the lower court may not act quickly enough.

In 2004 WRTL, a 501(c)(4) social action organization, sought to broadcast grassroots lobbying messages urging Sens. Russ Feingold (D-WI) and Herb Kohl (D-WI) to oppose Senate filibusters of President Bush's judicial nominees. Because Feingold was running for re-election, the ads violated BCRA's electioneering communications rule, which prohibits corporate (including nonprofit) funding of broadcast ads referencing a federal candidate within 30 days before a primary election or 60 days before a general election. WRTL filed suit seeking an injunction to this restriction.

Both the lower court and federal appeals court denied WRTL's bid for an injunction, relying on language in the Supreme Court's decision in *McConnell v. Federal Election Commission* that upheld the constitutionality of the rule on its face, and that it read as disallowing as-applied challenges (i.e., "this law is unconstitutional as applied to me") to the provision.

The Supreme Court opinion holds that such challenges are not foreclosed by its opinion in the *McConnell* case, noting that, "In upholding Sec. 203 [electioneering communications] against a facial challenge, we did not purport to resolve future as-applied challenges."

On Jan. 24 WRTL asked the lower court to expedite its consideration of the case, noting that BCRA mandates speedy consideration of all challenges to it. WRTL also noted that "throughout 2006 there are 30 day blackout periods befor each state's primaries, beginning with the Texas primary of March 7th, and any exemption for grassroots lobbying will benefit not just WRTL but all lobby groups."

In related news, on Dec. 21, 2005 the FEC voted to drop exemptions for 501(c)(3) nonprofits to 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) that are aired for free.

During oral argument the court appeared split on whether WRTL's ad should be exempt as a pure grassroots lobbying communication. WRTL's political action committee opposed Feingold in the election. This issue could again come before the Supreme Court, if the lower court's ruling is appealed by the losing party.

A diverse coalition of charities filed an amicus brief in the case on Nov. 14, 2005,urging the court to protect the right of nonprofits to broadcast grassroots lobbying communications. The brief, filed on behalf of 35 charities, argued that the electioneering communications restrictions deny charities the right to petition the government for redress of grievances, which is protected by the First Amendment. The electioneering communication restrictions in BRCA cannot be constitutionally applied to 501(c)(3) charities, according to the brief, because such organizations are, and must be to

retain their tax-exempt status, nonpartisan and nonpolitical.

IRS to Step Up Nonprofit Enforcement in 2006

Internal Revenue Service (IRS) Commissioner Mark Everson, speaking to the Greater Washington Society of CPAs, recently announced that in 2006 the IRS will increase its enforcement efforts for exempt organizations, building on a trend of the past few years. Among the agency's top priorities, according to Everson, will be enforcement of the ban on political intervention by charities and religious organizations. The announcement comes as the IRS continues to draw criticism for its Political Intervention Program (PIP) of 2004, which included audits of organizations based on statements critical of administration policies.

The IRS, whose budget for investigating nonprofits rose 23 percent last year alone, has increased its compliance contacts with nonprofits from 14,000 in 2003 to more than 20,000 in 2005. While no such budget increase will take place this year, the agency plans, according to Everson, to "catch [its] breath and train the few hundred employees that came on last year..."

Some of the agency's unfinished work includes audits of 130 charities, specifically "501(c)(3) organizations" the IRS suspects of conducting prohibited partisan political activities. Everson said almost half these organizations are churches, and that most problems stemmed from one-time events that were easily resolved. He anticipated the IRS will continue to receive questions from the public and Congress about its examination of religious organizations.

The 2004 PIP program came under fire for audits under the program of the NAACP and other groups that criticized Bush administration policies. Although a report by the Treasury Inspector General found no partisan retaliation, the problem of interpreting criticism of public officials as partisan intervention remains unresolved in 2006.

Without Addressing Budget Process, Lobbying Reform Doomed to Fail

Since lobbyist Jack Abramoff pleaded guilty to charges of conspiracy, mail fraud and income tax evasion, Democrats and Republicans have eagerly jumped on the lobbying and ethics reform bandwagon. Amid the flurry of proposals to overhaul Washington's lobbying system, however, one of the primary mechanisms through which lobbyists see their influence pay off--the system of budget earmarks--has been largely ignored.

Most of the reform proposals released so far deal directly with lobbying, prohibiting trips arranged by lobbyists, limiting gifts, requiring greater disclosure of lobbyist-lawmaker contacts, and addressing the "revolving door" between public service and lobbying jobs. If enacted wisely, these are worthwhile first steps to cleaning up the culture of corruption in Washington. Unfortunately, they do nothing to address a central aspect of the lobbying scandals--the ability of individual lawmakers to alter major legislation, often with little disclosure, to include changes in regulatory policy or funding for individual, special projects--a process known as earmarking.

Earmarks, often referred to as "pork," have been an integral part of the appropriations process for

decades. Individual legislators seeking re-election will often develop and promote lists of special projects or district-specific funding they were able to secure to convince voters of their ability, influence, and value. There is a dark side to this process, however, involving earmarks being traded between congressional leaders and other members of Congress in exchange for allegiance on crucial votes, or when they are inserted in the dead of night because powerful lobbyists who contribute money to campaigns request them.

Just today, for example, a front-page Washington Post story reports that legislation was dropped at the last minute from one of this year's budget bills, saving private HMOs $22 billion over the next decade. "That change," according to the story, "was made in mid-December during private negotiations involving House Ways and Means Chairman Bill Thomas (R-CA), Senate Finance Committee Chairman Charles E. Grassley (R-IA) and the staffs of those committees as well as the House Energy and Commerce Committee. House and Senate Democrats were excluded from the meeting." The bill was passed by the Senate and will be reconsidered by the House as early as next week.

While these last-minute edits rarely make the news, they are often significant, and some lawmakers are now proposing reforms to begin addressing the problems of earmarks and flaws in the congressional budget process. Sen. John McCain (R-AZ) has recently called for greater accountability and disclosure of earmarks in bills. His proposals would make it easier to strike earmarks from appropriations bill by requiring that they appear in the bill's actual text instead of its accompanying report--usually a less publicized document that even some lawmakers do not see until after a vote on the legislation. McCain's proposal would create more time for reviewing important legislation, a change supported by Sen. Tom Coburn (R-OK) among a number of other senators. Rep. Jeff Flake (R-AZ) has offered a companion proposal to McCain's in the House.

Four House Democrats have also taken up problems with earmarks and other aspects of the budget process, proposing a 14-point reform package. Reps. David Obey (D-WI), Barney Frank (D-MA), Tom Allen (D-ME), and David Price (D-NC) have introduced legislation that would amend House ethics rules to prohibit members from advocating for earmarks without disclosing any financial interests they may have in organizations directly benefiting from those earmarks. Obey's reform package, which has the support of 120 Democrats, including Minority Leader Nancy Pelosi (D-CA), would also:

- prevent congressional leaders from securing votes by offering members earmarks on related legislation or policy proposals
- prohibit last-minute additions of earmarks to conference reports without a full public vote by the conference committee
- prohibit reconciliation bills that increase the budget deficit compared to the CBO baseline, and
- create a mandatory minimum time for consideration of all appropriations legislation.

The latest in a growing roster of reform proposals was announced Jan. 23 by Sens. Norm Coleman (R-MN) and Ben Nelson (D-NE), who intend to introduce legislation to create an independent commission to study and recommend a comprehensive set of lobbying reforms. The Commission to Strengthen Confidence in Congress would be made up of 10 members (five Democrats and five Republicans) who are not currently in Congress. While supportive of current reform efforts, Coleman and Nelson believe the unique perspective of such a commission was needed, with Coleman noting "we also need long-term reforms that can only be achieved from the outside

looking in."

These packages face an uncertain future, despite their obvious merits, in the current Republican-controlled Congress. Early word from members of the Republican leadership reveals a plan for reform that does not address many of the widely-recognized problems tackled in the above-mentioned proposals. GOP lawmakers seem reluctant to bite the hand that feeds them. The budget process, which lacks the public outcry that blatant lobbyist malfeasances received, but which also gives individual lawmakers enormous political clout, will likely end up on the cutting room floor. Even Democratic plans, while more developed and comprehensive, fall short of solving Washington's corruption ills.

Challenges notwithstanding, House Speaker Dennis Hastert (R-IL) has tasked Rules Committee Chairman David Dreier (R-CA) with developing a consensus reform package, including a focus on the process of earmarking. Dreier has not commented on what proposals he is currently considering, saying only that he was reviewing a variety of options.

In addition, the House Appropriations Committee is putting together a slightly different proposal for limiting the influence of earmarks rather than outlawing them. Their reforms would standardize a system for lawmakers to request a limited number of earmarks each year. The Appropriations Committee hopes to reduce the number of earmarks requested from the current estimate of 35,000 per year to a number that could be manageably reviewed for merit and then prioritized. The committee is also considering increasing the process' transparency by requiring projects' sponsors be listed in the Congressional Record and that request letters be publicly published.

This plan, doing nothing to fundamentally change the system, would only alter the rules slightly. Simply reducing the number of earmarks while still allowing legislators to broker deals for the highest bidder will do little to end Washington's culture of corruption. In fact, by limiting the number of opportunities a legislator has to leverage his or her influence for outside interests, the proposal may actually exacerbate the problem by forcing far greater competition for the smaller number of opportunities for influence. The system may wind up rigged even more in favor of powerful and wealthy interests.

Proposals offered thus far fall short of the type of reforms needed to truly stem the flow of money and influence between government, well-funded special interests and high-powered lobbyists. Without more comprehensive changes to the system, including earmark, pay-as-you-go, and other appropriations process reform, lawmakers will continue playing the same game, only with slightly different rules. True lobbying reform means budget process changes to help level the playing field for all interests, particularly the public interest.

Still Fewer Heirs Will See Fortunes Taxed in 2006

On Jan. 1, the value of assets that can pass tax-free from one generation to the next rose from $1.5 million to $2 million (or $4 million per couple), an increase that was scheduled under the Economic Growth and Tax Relief Reconciliation Act (EGTRRA), passed by Congress in 2001. This expansion of tax-free inheritance means an even smaller fraction of a percent of Americans will be subject to the tax.

Underscoring this fact, United for a Fair Economy released new estimates last week indicating that

less than one-third of one percent of all U.S. estates will be affected by the federal estate tax in 2006. Only 0.27 percent--or one in every 370 estates--will pay any estate tax in 2006, according to the UFE report. This is down significantly from the 2.18 percent who paid the tax in 2000.

A pervasive misconception, often put forward by anti-tax interests, is that the estate tax hits many taxpayers who can't afford to it. This year, every penny of 99.73 percent of all estates will be passed on tax-free. The estate tax--which is the nation's most progressive tax--provides important balance to a tax code that has shifted a greater and greater part of the burden onto low- and middle-income Americans.

While the House voted to repeal the tax last April, the Senate has yet to vote on the issue during this Congress. Sen. Jon Kyl (R-AZ), the GOP point-person on the estate tax, recently said he will ask Majority Leader Bill Frist (R-TN) to hold an estate tax vote early this year, in order to avoid a vote on the divisive issue too close to the November elections.

Last year, the Senate was forced to postpone a vote on the estate tax because of Hurricane Katrina, and many believe a vote will be difficult for Republican leadership to schedule any time soon. U.S. Chamber of Commerce Vice President Bruce Josten recently commented, "I suspect the budget, the deficit, expecting another supplemental request for Iraq this year at some point, the probability of raising the debt limit, makes the forecast on [estate] tax full repeal pretty cloudy."

Under current law, the estate tax exemption level will gradually rise through 2009--when it peaks at $3.5 million (and $7 million for couples)--then the tax is completely repealed in 2010, only to return in 2011 at 2001 levels ($1 million exemption). How and when this strange situation, which is unacceptable to either side of the estate tax debate, will be resolved remains unclear.