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In This Issue

Stalled Lobby Reform Bills to be Resolved Before August Recess

The House and Senate have now overwhelmingly passed their respective pieces of lobbying and ethics reform legislation, but a partisan impasse in the Senate has stalled progress. Before the Independence Day recess, Senate Majority Leader Harry Reid (D-NV) was unable to reach an agreement with Republicans to go to conference. The House

and Senate bills both increase current disclosure requirements for paid lobbying activities under the Lobbying Disclosure Act, but a few discrepancies between the two have to be worked out in conference. Reid promised to complete work on the lobbying and ethics bill before the August recess.

On May 24, the House adopted H.R. 2316, the Honest Leadership and Open Government Act of 2007, on a 396-22 vote, and the Senate passed its own version, S. 1, on Jan. 18, 96-2. For weeks, aides from both chambers have been negotiating a final bill in pre-conference meetings.

On June 26, Reid tried to name conferees on the lobbying bill, but Senate Minority Leader Mitch McConnell (R-KY) blocked the appointment of any Senate conferees. Reid tried again, and Republicans objected at McConnell's request, saying they would allow action on the measure only if promised a vote on a separate bill that would require electronic filing of campaign finance reports, S. 223, as well as an unnamed amendment. Republicans did not disclose the details of their amendment, but Sen. Bob Bennett (R-UT) said it relates to election transparency. BNA reported that it likely deals with eliminating the caps on the amount parties can spend in coordination with candidates. Because Democrats had not seen the amendment, they would not agree to vote on it. According to *Congressional Quarterly* ($), McConnell's first objection was given because Reid moved to go to conference before the GOP was ready to sign off on the motion; McConnell actually has no objections to beginning negotiations with the House.

Two days later, McConnell was getting ready to sign off on the creation of a conference committee without any conditions about the electronic filing bill, when Sen. Jim DeMint (R-SC) told McConnell he objected to S.1 moving forward until he secures a guarantee that new earmark disclosure rules will remain in the legislation; DeMint renewed his objection July 9. DeMint's action delayed any progress to move to conference. Unlike in the House, which passed a House rule that required disclosure of earmarks, the Senate put its earmark disclosure measures in S.1. Until the bill becomes law, the Senate has no disclosure rules on earmarks.

In the meantime, work is going forward to resolve differences between the two bills. One major obstacle is the "revolving door" provision aimed at preventing members of Congress and senior staff from quickly moving into lobbying jobs after they leave Capitol Hill. Under the Senate bill, senators would be prohibited from engaging in lobbying for two years and senior aides for one year, but the House bill made no changes to the law's current one-year rule. Another contentious issue is a House-passed provision that would extend gift and travel rules to lobbyists for state and local institutions such as universities.

According to *Congressional Quarterly* ($), a provision that would prohibit law firms that have contracted out services to congressional offices from doing any lobbying will also be controversial. The provision would prohibit the attorney's firm from lobbying Congress

while the lawyer is also working for a congressional office.

Both the House and Senate bills would require lobbyists to reveal whether they bundled political contributions, and it would create a new electronic disclosure system for lobbying expenditures and activities. The Senate bill would prohibit lobbyists from sponsoring parties at national conventions, but the House legislation removed that measure. For a more in-depth breakdown of the differences between the chambers' bills, see this comparison chart prepared by the Campaign Legal Center.

With so much deliberation occurring behind the scenes in pre-conference meetings, advocates of reform worry that strong provisions could be weakened. The Campaign Legal Center, Common Cause, Democracy 21, the League of Women Voters, Public Citizen and U.S. PIRG sent a letter to House Speaker Nancy Pelosi (D-CA) and Reid calling on them to keep the strong provisions in each of the bills intact. The groups expressed special support for the bundling provision and maintaining lobbyist disclosure of their fundraising events. The letters stated, "Our organizations urge you to ensure that the final conference report on lobbying reform legislation includes strong and effective provisions to provide for the disclosure by lobbyists of the fundraising events they hold and the contributions they 'bundle' for Members. We also urge you to ensure that the strong Senate ethics reforms and earmark reforms passed by the Senate are included in the final conference report."

The lack of action on lobby reform is quite striking. The House and Senate bills passed decisively. The public, in the aftermath of the Jack Abramoff and other scandals, sent a strong message in the last election that reform is necessary. Yet final action has been slow — and it is beginning to take its toll. Just as the president's popularity has plummeted, congressional approval ratings have also decreased significantly. The Democrats are beginning to feel the heat for not getting laws like lobby reform sent to the president for his signature.

Acknowledging the situation, Reid has threatened to take time away from the August recess to force final action. Reid said he was not going to offer any more motions to go to conference on the lobbying bill. Instead, he intends to wait for Republicans to say they want a deal. On the Senate floor June 29, Reid warned, "Everyone should understand that prior to the August recess, we are going to complete ethics and lobbying reform. We are going to do it if we have to spend nights, weekends, take days out of our August recess." If that is true, the promise of acting on lobby and ethics reform will have only taken seven months to complete.

Aftermath of Supreme Court's Ruling Exempting Grassroots Lobbying from Campaign Finance Restrictions

Reactions to the U.S. Supreme Court's ruling in *Federal Election Commission v. Wisconsin Right to Life* (WRTL) include dire predictions of massive amounts of soft

money spent on sham issue ads before the 2008 elections, and even the end of the entire campaign finance regulatory regime. But the actual impact of the decision, which exempts grassroots lobbying broadcasts from the "electioneering communications" ban on corporate funded broadcasts that refer to federal candidates within 60 days of a general election or 30 days of a primary, is likely to be much more limited. The Federal Election Commission (FEC) must decide whether or not it will establish a rule implementing the decision, while a similar case has been sent back to a lower court for a ruling consistent with the Supreme Court's opinion.

FEC Rule or Case-by-Case Enforcement?

At its June 28 meeting, the FEC made no decision about how it will respond to the ruling in the WRTL case. The day before, FEC spokesperson Bob Biersack told *Roll Call* ($) that the FEC's options are to:

- conduct a full rulemaking process, taking about one month to draft a proposed rule, allowing 30 days for public comment, and possibly holding a public hearing. The final rule, including any revisions, would then be published. Biersack said the process could be a "special interest slugfest."
- use the emergency rulemaking process to put a rule in place quickly, without public comment. Such a move would likely draw strong criticism from stakeholders that want input on the rule.
- proceed with no rule, implementing the exemption on a case-by-case basis. This approach would leave the public with no clear standards and could have a chilling effect on nonprofits unwilling to risk enforcement action by the FEC.

Former FEC Commissioner Michael Toner suggested that the Supreme Court's opinion in *WRTL* provides a useful framework for a rule. As a commissioner, Toner supported a 2006 proposal from Commissioner Hans von Spakovsky and supported by OMB Watch and other nonprofits that would have exempted grassroots lobbying broadcasts similar to the test set by the Court. The Democrats on the FEC blocked the rule, saying they preferred to wait for guidance from the courts.

The Supreme Court's Definition of a Genuine Issue Ad Should Guide FEC

The WRTL case makes a significant contribution to the evolving definition of what constitutes issue advocacy as opposed to partisan electoral messages. These factors suggest that a case-by-case approach to future enforcement of the electioneering communications rule would not provide a sufficiently objective standard. Chief Justice John Roberts' majority opinion said the standard "must be objective, focusing on the substance of the communication rather than amorphous considerations of intent and effect." In other words, the rule must be limited to content of the broadcast, and the context, including the subjective intent of the speaker, is irrelevant. By removing these vague and contentious factors from consideration, the Court has made the job of drafting

a rule much easier.

The FEC can look to pages 16 and 21 (footnote 7) of the Court's opinion for the major factors in any proposed rule. These identify a genuine issue ad as follows:

- The focus of the broadcast is on a legislative issue, takes a position on the issue, urges a federal officeholder to support that position, and calls on the public to contact the officeholder. This is essentially the same as the IRS regulation defining grassroots lobbying.
- There is no reference to the "election, candidacy, political party, or challenger"
- Takes no position on a candidate's character, fitness for office or qualifications

The Court also made it clear that the fact that issue advocacy occurs close to the time of the election does not weaken constitutional protections. Similarly, the relevance of the issue to election debates cannot be considered. The bottom line is that any FEC rule or other action must give the benefit of the doubt to the speaker.

In addition, enforcement of the electioneering communications rule cannot unduly burden nonprofit or corporate speakers, since the Court said it must "entail minimal if any discovery to allow the parties to resolve disputes quickly without chilling speech..."

Maine Case Revived

Within days of its decision in *WRTL*, the Supreme Court sent a similar case, the *Christian Civic League of Maine, Inc. v. Federal Election Commission* back to a lower court for a new ruling consistent with its decision in *WRTL*. The Christian Civic League (CCL) appealed to the Supreme Court after the lower court ruling dismissed its challenge to the electioneering communications rule.

The facts in the CCL case are similar to those in *WRTL*. CCL wished to broadcast ads referring to Sen. Olympia Snow (R-ME) during her re-election campaign last year. A three-judge panel dismissed the CCL lawsuit in September 2006 because the ads were about legislation that had already been voted on by the time the case came before the court, making it moot. In its WRTL decision, the Supreme Court held that this situation fits an exception to the general rule against judicial consideration of moot cases, since it is a dispute capable of repetition, and the timing of the event is so short, it cannot be litigated prior to the conclusion of an event, in this case a legislative vote. Without the exception, the issue would evade judicial review.

U.S. Attorney Firings Expose Political Nature of Attack on ACORN's Voter Mobilization Efforts

Current congressional investigations into the Bush administration's 2006 firing of nine U.S. attorneys have revealed that one motivation behind the firings may have been the

attorneys' refusal to pursue allegations of voter fraud as aggressively as the administration would have liked. Unfortunately, the attorneys were not the only casualty of the hunt for voter fraud. ACORN — an organization dedicated to empowering low-income communities across the country — also became a victim in what appears to be a politically motivated assault on its voter registration efforts.

One of ACORN's central strategies in working for social justice for low-income people and families is increasing civic participation among these citizens. According to a report by the U.S. Census Bureau, the voting rate in the 2002 elections among citizens living in families with annual incomes of $50,000 or more was 57 percent, compared with 25 percent for citizens living in families with incomes under $10,000. To address this imbalance, in 2004, ACORN registered more than 1.1 million voters across the country. During the 2006 election cycle, ACORN reported that it ran the largest voter registration drive in the country, registering over 540,000 citizens. ACORN workers in fifteen states contacted 1.5 million households to encourage citizens to vote.

One of the places ACORN conducted voter registration and get-out-the vote campaigns in 2006 was the Kansas City, MO, metro area, where the electoral stakes were high. A tight race for Senate was heating up between Republican incumbent Jim Talent and Democrat Claire McCaskill, with the outcome potentially deciding the balance of power in the Senate.

According to a May 2007 press release, ACORN notified law enforcement authorities after its quality control program discovered that four of their temporary workers had submitted registration cards with falsified information. The faulty registrations were invalidated by state authorities prior to Election Day, so there was no potential impact on the election results.

However, just five days before the election, the interim U.S. Attorney for western Missouri — Bradley J. Schlozman — filed indictments against four employees of ACORN, accusing them of voter fraud. Schlozman further asserted that "this national investigation is very much ongoing." He pressed charges despite Justice Department regulations which discourage "overt" pre-election action established to protect against the appearance or the effect of electoral intervention.

In reaction to the indictments, conservative leaders and some media asserted ACORN purposefully committed voter fraud. An example of the attacks that followed included the words of Paul Sloca, who was then serving as the communications director for the Missouri Republican Party. Sloca criticized ACORN, saying, "It is very disturbing that members of this left leaning group have been indicted for engaging in serious voter fraud designed to cause chaos and controversy at the polls in order to help Democrats try to steal next week's elections." Sloca and many commentators failed to mention the fact that ACORN had aided the investigation and that ACORN itself was the primary victim of fraud, not voters.

As it turns out, Schlozman only came to the interim U.S. Attorney position after his predecessor — Todd Graves — was asked to step down, possibly for the same reasons the other nine U.S. attorneys were dismissed. According to the *Boston Globe*, Graves was asked to leave in March 2006 after refusing to pursue voter fraud prosecutions as aggressively as the Bush administration wanted. Graves was then replaced by Schlozman, despite the fact that Schlozman had no prosecutorial experience. Prior to stepping down, National Public Radio reported that Graves acknowledged he and Schlozman had disagreements about a lawsuit Schlozman wanted to pursue involving allegations of falsified voter registrations.

The court cases against the four former ACORN employees are mostly resolved, with ACORN's cooperation. Charges against one defendant were dropped. After pleading guilty in February to filing false registration forms, a second defendant recently received probation. Another of the four also pleaded guilty to similar charges and is awaiting sentencing. The final person who was indicted is scheduled to go on trial in July.

In testament to their dedication to social justice, ACORN is continuing to press ahead with its voter engagement activities, actively preparing for the 2008 elections, despite the unwarranted criticism its organization received for its registration activities in the fall of 2006.

States Failing to Implement National Voter Registration Act

In its biennial report to Congress on the status of the National Voter Registration Act (NVRA), the Election Assistance Commission (EAC) provided data showing that states have failed to fully implement the 1993 law.

The primary goal of the NVRA was to increase the number of people who vote in federal elections. To do so, the law required that public agencies — such as those which distribute welfare benefits — take steps to increase voter registration among low-income Americans. A coalition of nonprofits — Project Vote, DEMOS and the Lawyers' Committee for Civil Rights Under the Law — released a joint statement July 3 calling attention to the failure of the states to enforce Section 7 of the NVRA and called for the Department of Justice (DOJ) to take action to force states to do so.

The EAC report to Congress was based significantly on data from the 2006 Election Administration and Voting Survey, which was completed by states in accordance with the requirements of the NVRA. Forty-four states completed the survey. Some of the key results:

- From the 2004 to 2006 elections, most states have experienced a decrease in the absolute number of registered voters and the percentage of voting age citizens registered to vote
- Among the registration applications received by states in the last two years,

motor vehicle agencies were the most frequent recipient — collecting 45.7 percent of all applications
- Registrations by public agencies have decreased by 80 percent from 1995-1996 (when the NVRA went into effect) to 2005-2006
- Only 59 percent of citizens in households making less than $15,000 registered to vote in 2005-2006 — compared to 85 percent in households making $75,000 or more
- Only six states provide training at least every two years to public agencies on conducting voter registrations, indicating that untrained individuals may be conducting voter registration efforts, where they are occurring

With the lack of apparent voter registration training, the EAC recommended that all states conduct in-person trainings with all agencies conducting voter registration activities. Other recommendations in the report included 1) modernization of electronic reporting and list maintenance systems, 2) development of statewide voter registration databases to enable states to track citizens' voting patterns over time, and 3) establishment of data collection systems within each state to track the data required by the NVRA. In commenting on this third recommendation, the EAC report states that the value of the biennial Election Administration and Voting Survey is "limited when States and jurisdictions report data in an inconsistent and noncomparable fashion or do not collect relevant data, even when required to do so by the NVRA."

In their press release, Project Vote, DEMOS and the Lawyers' Committee highlighted the fact that the DOJ has only brought one lawsuit to enforce the NVRA, despite solid evidence that there is widespread under-compliance. The nonprofits argue that DOJ intervention is important because when the DOJ has taken action, the impact has been significant. The one lawsuit DOJ filed was against the state of Tennessee. After taking steps to rectify their poor record of voter registration, Tennessee has seen a dramatic increase in the number of voter registrations completed by public agencies. In 2006, almost a quarter of all registrations filed by public agencies were in Tennessee.

This is not the first time that this coalition of nonprofits has pressed the DOJ to enforce the NVRA. In 2004 and 2005, in an effort to assess the state of implementation of the NVRA, Project Vote, DEMOS and ACORN conducted site visits with public agencies across several states, reviewed available evidence from the EAC and the Federal Election Commission and interviewed state officials. Through this investigation, they confirmed that in nearly all fifty states, the NVRA had not been implemented. The groups subsequently published a report documenting their findings.

In its report, the coalition called for state agencies to incorporate voter registration more comprehensively into their daily activities. To ensure that agencies do so, the coalition made a similar demand as the EAC report does, recommending that states maintain more comprehensive and efficient databases on voter registration records. Without this type of accountability, the nonprofit coalition argued, state agencies will be unlikely to fulfill their tremendous potential as channels of voter engagement for low-income

Americans as was envisioned by the NVRA legislation.

SIDEBAR

House Passes Deceptive Practices and Voter Intimidation Prevention Act

In other election news, the House passed the Deceptive Practices and Voter Intimidation Prevention Act of 2007 (H.R. 1281) on June 25. The bill would make it a felony to knowingly communicate false information during a federal election with the intention of preventing a person from voting. If the bill becomes law, those who violate the prohibition could face up to five years in prison. No one expressed opposition to the bill during the voice vote.

The bill was sponsored by Rep. Rahm Emanuel ☼ (D-IL) and garnered 60 cosponsors in the House. Emanuel was quoted in a *USA Today* article on the bill's passage and said, "This reform will put an end to campaign practices that disenfranchise thousands of American voters and will give citizens the right to cast a ballot free from intimidation and misinformation."

The bill was widely supported by House Democrats, who raised objections during the 2006 elections about campaign tactics used by Republicans. Republicans, on the other hand, have asserted that voter fraud is the most pressing issue related to elections. H.R. 1281, however, makes no mention of voter fraud.

A companion bill (S. 453) has been introduced in the Senate by Sen. Barack Obama ☼ (D-IL) and 15 cosponsors. On June 7, the Senate Judiciary Committee held a hearing on the bill, but the full Senate has not taken action.

House Votes to Stop Funding for Bush's Regulatory Changes

The House passed an appropriations bill June 28 that prevents parts of the executive branch from spending Fiscal Year 2008 funds on the implementation of President George W. Bush's controversial executive order amending the regulatory process. The Financial Services and General Government Appropriations Act, FY 2008, (H.R. 2829) was amended by voice vote late on the night of June 27 and was passed the next day. The bill provides funding for everything from the Treasury Department and the Executive Office of the President to the Federal Election Commission and the U.S. Tax Court.

Among a series of amendments to the appropriations bill offered on the House floor was an amendment sponsored by Reps. Brad Miller (D-NC) and Linda Sanchez (D-CA). The amendment prohibits the Office of Management and Budget (OMB) from spending money to implement any part of Executive Order 13422, which was signed Jan. 18. The Miller-Sanchez amendment reads:

> *Sec.* 901. None of the funds made available by this Act may be used to implement Executive Order 13422.

The Senate is expected to take up its general government appropriations legislation in July. It is not clear whether the Senate will address this issue, and, if it does, whether it will use the same language as the House. If the language is the same as the House, then the item will not be debated during a House-Senate conference. If the Senate language is different than the House or is absent, then it will the subject of a conference. Even before the defunding language was inserted in the House appropriations bill, Bush's senior advisors indicated in a Statement of Administration Policy they will recommend a veto of the legislation because of other provisions in the bill.

Miller, the chair of the Science Committee's Subcommittee on Investigations and Oversight, and Sanchez, the chair of the Judiciary Committee's Subcommittee on Commercial and Administrative Law, through their respective subcommittees, held hearings on the E.O. to investigate the potential impacts of Bush's amendments. Hearing witnesses and other critics of the E.O., including OMB Watch, argued the changes will further centralize regulatory power in the White House and shift power away from agencies to which Congress gives the power to enact public health and safety protections.

E.O. 13422 amended a Clinton-era executive order governing how the regulatory process works within federal agencies and OMB's Office of Information and Regulatory Affairs (OIRA). E.O. 13422:

- shifts the criterion for promulgating regulations from the identification of a problem like public health or environmental protection to the identification of a "specific market failure";
- makes the agencies' Regulatory Policy Officer a presidential appointee and gives that person the authority to commence an agency rulemaking and to decide what is included in the Regulatory Plan, unless specifically otherwise authorized by the agency head;
- requires each agency to estimate the "combined aggregate costs and benefits of all its regulations planned for that calendar year to assist with the identification of priorities"; and
- requires "significant" and "economically significant" (those that are estimated to have at least a $100 million effect on the economy, among other criteria) guidance documents to go through the same OMB review process as proposed regulations before agencies can issue them.

On the same day that E.O. 13422 was issued, OMB issued its *Final Bulletin for Agency Good Guidance Practices* which further explains how agencies are to comply with the new requirements governing guidance documents. Agencies issue guidance documents to clarify regulatory obligations of regulated industries and to explain complicated technical issues to those agency employees overseeing regulatory issues and to regulated industries. The E.O. and the Guidance Bulletin take effect July 24. The appropriations bill covers government spending for the fiscal year beginning Oct. 1, 2007.

U.S. Ability to Regulate Chinese Imports in Question

The United States government is struggling to ensure the safety of consumer products and food imported from China, as evidenced by a recent spate of controversies involving dangerous Chinese-made products. While America's consumer product safety net is relatively strong, China's young market economy is largely unchecked by government regulators. Subsequently, dangerous Chinese products are finding their way to American shores where federal agency officials are unable to monitor the volume of imports.

In March and April, contaminated pet food sickened and killed pets across the country. The pet food contained ingredients, imported from China, tainted by the chemical melamine. A pet food recall was organized, but the melamine was detected in animal feed which led to human exposure. Federal scientists concluded the human risk to be low.

In May, the U.S. Food and Drug Administration (FDA) began to warn of Chinese-made toothpaste contaminated with diethylene glycol, which is commonly found in antifreeze. FDA is still not fully certain of the details and has been forced to warn consumers to avoid using any dental products made in China.

An even more recent surge of incidents has kept the issue in the national spotlight. On June 13, the Consumer Product Safety Commission (CPSC) announced a recall of 1.5 million Thomas & Friends toy trains. The toys, imported from China, had been coated with lead-based paint.

On June 26, the National Highway and Traffic Safety Administration (NHTSA) ordered a New Jersey tire importer to recall 450,000 defective Chinese-made tires. The importer, Foreign Tire Sales, complained of potential bankruptcy, but NHTSA threatened to levy millions of dollars in fines if the importer did not comply. Foreign Tire Sales has initiated the recall and will continue until it is forced to declare bankruptcy, according to CNN.

On June 28, FDA announced an import ban on five different types of Chinese farm-raised seafood products. While no illnesses have been reported, the agency "repeatedly found that farm-raised seafood imported from China were contaminated with antimicrobial agents that are not approved for this use in the United States."

A lack of transparency and accountability within China has complicated the matter. Chinese manufacturers have repeatedly denied product flaws. The response of Chinese government officials has been slow and at times peculiar. In June, Chinese officials closed 180 manufacturers after finding rampant food safety violations.

However, China has not taken full responsibility for its regulatory failings. Government officials have attempted to downplay Chinese culpability by accusing the American media of exaggerating coverage of dangerous imports. More importantly, officials are not aggressively addressing problems.

China's most widely publicized move to take responsibility for product safety came in May when a court sentenced to death former head of the State Food and Drug Administration Zheng Xiaoyu. Zheng was convicted of taking bribes that ultimately led to the approval of pharmaceuticals with deadly side effects. He was executed July 10. Another former senior official from the agency, Cao Wenzhuang, was also sentenced to death for corruption. Cao's sentence comes with a two-year reprieve.

On the American side, a patchwork of federal regulations is partially to blame. A number of federal agencies monitor imports with little coordination between them. In addition to FDA, NHTSA, and CPSC, the United States Department of Agriculture, U.S. Customs and Border Patrol and others are responsible for a variety of imported products.

Vigilance by American importers is also necessary. Recognizing the need for a safe product, American fireworks importers created the American Fireworks Standards Laboratory. The laboratory is able to monitor and inspect approximately 75 percent of the Chinese fireworks imported into the United States, according to *The Washington Post*.

The issue has drawn the attention of lawmakers on Capitol Hill. Sen. Charles Schumer ☼ (D-NY) has unveiled a plan that would address the safety of Chinese imports. Schumer's plan would create a federal office to oversee and coordinate the efforts of the numerous entities currently monitoring imports. It would also toughen federal inspection measures by requiring FDA to conduct more surprise inspections of foreign manufacturing facilities and requiring other agencies to initiate foreign inspection programs.

Schumer's plan has not yet taken the form of a legislative proposal. According to a statement, Schumer hopes to clear up the "maze of federal oversight." Schumer claims the current system "prevents the government from effectively stopping dangerous goods from getting through to American consumers."

EPA Suspends Fish Kill Rule

The U.S. Environmental Protection Agency (EPA) has suspended a fish protection rule in response to a January court decision. The decision vacated parts of the rule, which White

House officials had edited and weakened. EPA will now have to begin a new round of rulemaking in order to address the ecological problem.

Electric power plants withdraw water from natural sources in order to cool their equipment. Larger fish and shellfish are often trapped on a plant's intake screen and die there from lack of oxygen and movement. A single plant may kill millions of fish in a year.

Closed-cycle cooling systems operate differently. Plants using a closed-cycle system recirculate or reuse water, withdrawing only 2 percent to 28 percent of the water used by the other systems. Closed-cycle systems can save a substantial number of fish and other organisms.

The Clean Water Act requires EPA to set standards protecting fish from power plants by requiring those plants to use the "best technology available." The closed-cycle system, used by 69 facilities in 2002, is widely believed to be the best technology available.

EPA sent a draft rule, which would have complied with the Clean Water Act, to the White House Office of Information and Regulatory Affairs (OIRA) in January 2002. As originally prepared, EPA's proposed rule sought to require the 59 largest plants in the most ecologically sensitive areas of the country to meet the performance achievable by a closed-cycle cooling system. EPA sought less stringent requirements for the roughly 500 remaining plants subject to the rule.

Under Executive Order 12866, Regulatory Planning and Review, EPA's draft rule was subject to review by OIRA. After the OIRA review, the rule appeared markedly different. OIRA stripped EPA's proposal to require any plant to use a closed-cycle system and instead required only minor upgrades. Plants would be able to avoid even these minor changes if costs were found to exceed benefits. This version of the rule was finalized in 2004.

In January 2007, the U.S. Court of Appeals for the Second Circuit decided large portions of EPA's rule did not comply with the Clean Water Act. The court ruled EPA's determination of minor upgrades as the best technology available was not adequate. The court also ruled EPA could not use cost-benefit analysis in developing the rule or in defining exceptions as it had done at OIRA's behest.

The decision in the case, *Riverkeeper v. EPA*, effectively nullified the rule. Since then, EPA has been weighing its options about how to proceed.

On July 9, EPA published a notice in the *Federal Register* suspending most of the requirements of the rule. "This suspension responds to the Second Circuit's decision, while the Agency considers how to address the remanded issues," EPA stated in the notice.

With the suspension in effect, the fish protection issue has effectively made no progress since EPA proposed its rule in 2002. EPA will initiate a new round of rulemaking in October, according to BNA news service ($).

Two questions remain. First, in light of the Second Circuit's decision, what definition of best available technology will EPA pursue? In the *Riverkeeper* decision, the court found the definition in the published rule to be inadequate. EPA may pursue the same definition it originally proposed before OIRA's interference. However, the current EPA administrator, Stephen Johnson, was not the head of EPA at that time and has not publicly indicated how he would like to see the agency move forward.

Second, how will OIRA revise or edit the next draft rule when it is once again submitted for review? Even after the *Riverkeeper* decision, OIRA may attempt to weaken the rule. Because the review process lacks full transparency, it will be difficult for the public to determine OIRA's exact impact. In the end, though, the courts will hold EPA accountable, not OIRA's hidden hand.

Coal Miners Experience Unusual Occurrences of Black Lung Disease

The Centers for Disease Control and Prevention (CDC) released July 6 the results of studies prompted by reports that underground coal miners are still experiencing unusual occurrences of black lung disease despite federal regulations to prevent exposure to coal dust. The "clusters of rapidly progressing and potentially disabling pneumoconiosis," or black lung disease, were found in 2005 and 2006 in some eastern Kentucky and southern Virginia miners, according to CDC's *Morbidity and Mortality Weekly Report* (*MMWR*).

In response to the 2005 and 2006 reports, the CDC's National Institute for Occupational Health and Safety (NIOSH) conducted surveys of miners in three Kentucky counties and in four Virginia counties. The results of the NIOSH testing of 975 miners indicated that four percent (37 miners) of those tested had advanced cases of black lung disease.

According to MMWR, the 37 miners with advanced cases of pneumoconiosis were categorized into two groups of workers — those who worked in jobs exposing them to silica dust (roofbolters) and those who were exposed to coal dust (coal-face workers). Both groups of miners had worked in these jobs an average of nearly 30 years.

The results, according to NIOSH, were unusual. Sixty-four percent of the coal dust workers and 42 percent of the roofbolters developed black lung. What was unexpected was the rapid advancement, in less than 10 years, of the disease among the workers exposed to coal dust. There were more cases of advanced black lung disease among these workers than among the roofbolters who were exposed to silica dust. Silica is more toxic

to the lungs, and silicosis, one type of black lung disease, develops more quickly.

NIOSH proposed several possible explanations for the unexpected results. There might be inadequacies in the dust exposure standards, failures to comply with existing regulations and missed opportunities for miners to be screened for early disease detection through voluntary chest radiographs (a type of x-ray). The NIOSH study, however, made no attempt to determine why these unusual disease results occurred.

Ellen Smith, Owner and Managing Editor of *Mine Safety and Health News*, wondered why the NIOSH team that conducted the surveys did not include an examination of the working conditions in the mines they visited. "Did anyone look at the history in these mines of ventilation, dust control, and water spray violations?" she asked in a telephone interview.

Federal laws have regulated exposure to coal mine dust since 1969, with amendments in 1977, and are credited with a reduction of black lung among underground coal miners. According to *MMWR*, the "prevalence of all pneumoconiosis...among underground miners with [at least 25] years on the job dropped from approximately 30% in the early 1970s to [less than] 5% in the late 1990s."

Legislation introduced in the House (H.R. 2769) in June would revise the 1977 standards for respirable coal dust to those NIOSH recommended in 1995. (See the *Watcher* article on the legislation.) In addition, according to *MMWR*, NIOSH is examining mining environments to evaluate current exposure levels and conducting investigations to gather more data on disease clusters.

GAO Issues Report on EPA Mishandling of Katrina

On the heels of a congressional hearing blasting the handling of public information about air quality after 9/11, a June 25 Government Accountability Office (GAO) report indicates the U.S. Environment Protection Agency (EPA) similarly failed the public post-Katrina.

The GAO report, *Hurricane Katrina: EPA's Current and Future Environmental Protection Efforts Could Be Enhanced by Addressing Issues and Challenges Faced on the Gulf Coast*, found inadequate monitoring for asbestos around demolition and renovation sites. Additionally, the GAO investigation uncovered that "key" information released to the public about environmental contamination was neither timely nor adequate, and in some cases, easily misinterpreted to the public's detriment.

Hurricane Katrina was the first implementation of the National Response Plan (NRP), created in 2004 as result of the difficulties responding to the 9/11 disaster. Under the NRP, EPA is the federal emergency support coordinator for collecting, monitoring and effectively dealing with hazardous materials, specifically authorized to regulate asbestos

emissions and maintain the National Priorities List of Superfund sites. By the time Katrina made landfall on August 29, 2005, EPA had already put air monitoring stations in those prioritized sites and coordinated state efforts to double their air quality sampling elsewhere.

However, according to the report, EPA failed to effectively monitor the air quality around New Orleans neighborhoods as they engaged in demolition and renovation, most notably the Ninth Ward. Merely conceiving of the agency's role to assist state and local officials to do the actual work, EPA only maintained the expanded air monitoring program for the first few months, shrinking back to its pre-Katrina scope by July 2006.

EPA also used its authority to suspend certain air quality laws via "no action assurance letters" to allow a faster building demolition process without requiring asbestos testing and removal. Though the regulation relaxation to speed demolition may have been reasonable, the failure to aggressively test for asbestos with known heightened risks was not. More worrisome, the July 2006 program reduction was due, in part, to not having found asbestos sampling concerns, but these lack of findings may have been due to the lack of aggressive testing.

While EPA made a significant effort to inform the public about environmental health risks, the report showed that it failed to do enough in this area. The first environmental assessment took three months to complete and contained information with confusing and sometimes contradictory messages. The GAO report details one instance in which the most common flyer stated that only buildings built prior to 1970 were an asbestos risk, while EPA's website used 1975 as the cutoff year, with the disclaimer that more recent buildings could also contain asbestos.

Echoing the 9/11 situation, EPA subtly manipulated information to portray New Orleans' air quality more positively than people might have concluded from the complete facts. For example, EPA's December 2005 assessment stated the "majority" of sediment exposure was safe. But eight months later, the agency revealed that this measure was for "short-term" visits, such as to assess immediate exposure damage, not to live near or in the area. Additionally, the 2005 assessment used data from outside sediment to generalize the safety of both outdoor and indoor areas, a dangerous assumption as buildings can act as traps collecting contaminants.

In the aftermath of Hurricane Katrina, EPA was presented with an enormous task, and limitations imposed upon it by the National Response Plan made its job even more difficult. Disturbing parallels with 9/11, however, are apparent: misleading the public through over-generalized and insufficient information and avoiding responsibility by blaming other agencies or local governments. In her response to the president about lessons learned from Katrina, Homeland Security Advisor Frances Townsend wrote, "The response to Hurricane Katrina fell far short of the seamless, coordinated effort that had been envisioned by President Bush when he ordered the creation of a National

Response Plan."

Lawsuit Frees OSHA Toxic Exposure Data

A June 29 U.S. District Court decision ordered the Department of Labor (DOL) to disclose its Worker Exposure to Toxic Substances Database, the largest known compilation of workplace toxic chemical sampling data.

Adam Finkel, former Occupational Health and Safety Administration (OSHA) chief regulator and regional administrator, filed two Freedom of Information Act (FOIA) requests with OSHA for the exposure data in June 2005. After failing to receive any response to his requests or administrative appeals, Finkel filed a lawsuit against OSHA for the data in November 2005. The database contains worker exposure data critical to Finkel's research to evaluate the outdated beryllium standards and current industry and OSHA practices.

Beryllium is a naturally occurring metal mined mostly for its use in electronic parts, nuclear and medical technology. Potentially carcinogenic, beryllium is directly linked to pulmonary conditions called Acute and Chronic Beryllium Disease. General scientific consensus is that the sixty-year-old OSHA exposure limit (2 micrograms per cubic meter) is unsafe. EPA, for instance, estimates that a lifetime exposure of 0.00004 micrograms per cubic meter can result in a one-in-one thousand chance of cancer.

In court, OSHA claimed that the database should be withheld because disclosure of the information would reveal trade secrets and compromise inspector privacy. However, the agency received no support from industry to support the claims of trade secret threats. After OSHA appealed to companies for examples, not a single company claimed it asked for sample result protection. Finkel explained, "Industry knows it has nothing to fear from a scholarly analysis of trends in workplace exposure." Judge Mary Cooper found DOL's claims of trade secrecy and privacy insubstantial and ordered the agency to release the database.

Finkel's work on beryllium exposure began in 2002. As regional administrator in the Rocky Mountain states, he revealed OSHA's refusal to provide basic follow-up and screening for workers likely exposed to beryllium in their inspections. After being fired for trying to protect active and retired inspectors at risk from beryllium exposure, Finkel sued OSHA for whistleblower retaliation and successfully negotiated a settlement. He then returned to academia, where he has continued research about beryllium hazards in the workplace.

Results from OSHA's own medical monitoring program, initiated primarily due to Finkel's whistleblowing, support the need for expanded research. Four percent of the inspectors tested positive for sensitization, an unexpectedly high incidence.

It may be that OSHA sought to withhold the data for self-serving purposes. If the data reveals a vastly flawed system for analyzing and appropriately responding to occupational toxic exposure, as researchers suspect it will, then OSHA would be held accountable.

Federal Appeals Court Dismisses NSA Spying Case

On July 6, a divided Sixth Circuit Court of Appeals vacated a 2006 federal district court finding that the National Security Agency's (NSA) Terrorist Surveillance Program (TSP) violated the Foreign Intelligence Surveillance Act (FISA), the Fourth Amendment's protection against unreasonable searches and seizures and the First Amendment's protection of free speech. Without ruling on the constitutionality of the TSP, the judges dismissed the case based on the plaintiffs' lack of standing.

The TSP was first revealed by the *New York Times* in December 2005. The *Times* reported that President Bush authorized NSA to eavesdrop on domestic phone calls and e-mails without a wiretapping warrant.

The American Civil Liberties Union (ACLU) brought a suit on behalf of several journalists, lawyers and academics who stated they were unable to continue freely communicating with people in the Middle East due to the chilling effect caused by the TSP. In August 2006, Judge Anna Diggs Taylor of the U.S. Court for the Eastern District of Michigan ruled that the TSP violated the First Amendment because of the program's restricting effect on communications between U.S. citizens and people in Middle Eastern countries. Taylor also found the program to be in violation of the Fourth Amendment because Internet and telephone communications were seized without a warrant or court approval. This was also in violation of FISA.

The government immediately appealed the decision and received a stay from the Sixth Circuit on Judge Taylor's decision to shut down the program. The White House, however, shut the program down in January 2007 after repeated calls from Congress for additional oversight and amidst multiple lawsuits making headway in the courts.

The Sixth Circuit decided 2-1 that the plaintiffs could not demonstrate that they were harmed by the program. Because the government invoked state secrets privilege, the court and the plaintiffs were unable to access details about the program, which may have more clearly demonstrated harm to the plaintiffs in the form of monitored communications.

Judge Alice Batchelder wrote in the majority opinion, "None of the plaintiffs in the present case is able to establish standing for any of the asserted claims. ... But even to the extent that additional evidence may exist, which might establish standing for one or more of the plaintiffs claims, discovery of such evidence would, under the circumstances of this case, be prevented by the State Secrets Doctrine." Hence, the court ruled that

since the plaintiffs could not demonstrate harm from the program, the lower court's decision had to be dismissed.

In a dissenting opinion, Judge Ronald Lee Gilman argued that the attorney-plaintiffs had satisfied the requirements for standing in that the TSP interfered with the relations with their clients in the Middle East. "The closest question, in my opinion, is whether the plaintiffs have the standing to sue. Once past that hurdle, however, the rest gets progressively easier." Gilman stated that he would have upheld the conclusions of the federal district court on the constitutionality of the TSP.

In response, ACLU Legal Director Steven Shapiro stated, "We are deeply disappointed by today's decision that insulates the Bush administration's warrantless surveillance program from judicial review." Shapiro went on to note, "It is important to emphasize that the court today did not uphold the legality of the government's warrantless surveillance activity."

Shapiro stated the plaintiffs are considering appealing the case to the U.S. Supreme Court but that no final decision has been made. There are several other cases making their way through the legal system. In particular, the Sixth Circuit decision is expected to have little impact on a consolidated Ninth Circuit case, in part because specific evidence of surveillance in that case may buttress the plaintiffs' claims.

Federal Government Kept Nuclear Accident Secret

Details on an accidental release of highly-enriched uranium at a nuclear fuel processing plant in Tennessee were kept secret from the public and Congress by the Nuclear Regulatory Commission (NRC) for thirteen months.

On March 6, 2006, Nuclear Fuel Services (NFS) in Erwin, TN, spilled approximately nine gallons of highly-enriched uranium. The yellow solution was noticed escaping under a doorway and into a hallway within the plant. Initially, the highly-enriched uranium accidentally spilled into a glove box, which had a well-functioning drain, and came within four feet of falling down an elevator shaft. If the solution had pooled and achieved a depth of a few inches, a self-sustaining chain reaction would have resulted, endangering the lives of those in the vicinity.

After NRC became aware of the NFS event, the agency changed the terms of its license and concealed all information regarding the event from Congress and the public. The agency marked information regarding the incident as Official Use Only (OUO), a sensitive but unclassified (SBU) category intended to keep truly sensitive information secret. Federal agencies have dramatically increased use of SBU categories since 9/11, but the rise of SBU has been accompanied by the unnecessary restriction of important

health and safety information.

The OUO policy was developed in August 2004 in response to a request from the Department of Energy's Office of Naval Research to restrict public access to sensitive security information. In addition to the highly-enriched uranium spill, the OUO policy motivated the removal of 1,740 previously public documents regarding the NFS plant. In a July 3 letter to the chairman of the NRC, Reps. John Dingell (D-MI), chairman of the House Energy and Commerce Committee, and Bart Stupak (D-MI), chairman of the House Energy and Commerce Subcommittee on Oversight and Investigation, wrote, "NRC went far beyond this narrow objective [from the Department of Energy] when it acceded to the Naval Reactor's request to withhold all information that is neither classified nor safeguards related. As a result, NRC has removed hundreds of otherwise innocuous documents relating to the NFS plant from public view" (emphasis original).

Modification of NFS's Special Nuclear Material License is supposed to require public notice and allowance for public comment. "Due to the August 2004 OUO policy, the NRC inspection reports, changes to license conditions, and the Confirmatory Order are all marked 'OUO' and withheld from the public," said Dingell and Stupak. Hence, public participation was preempted by the failure to provide notice. The OUO policy itself is marked OUO and withheld from public view.

The *New York Times* recently reported that the issue came to light in part due to the efforts of one of the five commissioners of the NRC, Gregory B. Jackzo. Jackzo said, "Ultimately, we regulate on behalf of the public, and it's important for them to have a role."

With the unnecessary restriction of safety information under SBU categories, it is impossible for the public to play such a role. The *Times* reported that NRC's OUO policy is under review. Dingell and Stupak reported that NRC has agreed to reissue the Confirmatory Order and allow public participation.

EPA Holds off Industry Attack on Health, Safety and Environmental Data

The U.S. Environmental Protection Agency (EPA) has rejected the U.S. Chamber of Commerce's Data Quality Act (DQA) challenge and appeal of supposed inconsistencies across several EPA databases. While agreeing to make a few changes, the agency refused the Chamber's demands that all variations between the EPA databases on chemicals be eliminated, stating that they were not errors but acceptable differences based on different scientific models.

Dating back to May 2004, the Chamber has argued that the variations in information across sixteen EPA databases on characteristics of chemicals should be resolved, because "use of this erroneous information leads, for example, to widely varying — and hence

unreliable or ambiguous — determinations of human health risk impacts."

EPA rejected this claim in January 2005 and stated, "There are valid and specific reasons why databases may contain differing values for physical or chemical parameters. A specific property value for some chemical may differ due to site-specific circumstances, as your letter acknowledges, and will also depend on the source of the information and the methodologies used."

Finding this response unacceptable, the Chamber appealed the decision in April 2005. The Chamber claimed, "[EPA's response] rejects a requested review of erroneous data, largely disclaims or ignores the fact that problems exist, and blatantly fails to address the public need for quality information, thereby placing the onus for examining and assuring data quality upon the users of such information and leaving them to employ such information at their own risk."

An executive panel composed of senior EPA officials reviewed the appeal and on June 22 responded to the Chamber. EPA said, "There are valid reasons why databases may contain differing values of physical or chemical parameters." EPA also noted in its response to the Chamber that "slight variations in assessments values noted between tools do not reflect errors in the predictions or databases, but rather reflect differences in the structures chosen by the scientific development staff. To further clarify, there is currently no harmonized, universal set of procedures ... Inevitably, variations in decision points will occur and it is not uncommon for these small variances to be observed when reviewing multiple databases, or when making quantitative predictions..."

EPA has otherwise taken a number of actions to resolve the concerns raised by the Chamber. The executive panel noted, "There would be potential benefit to the Agency from participation in an interagency workgroup that evaluates the quality of data being used across the federal government." The agency has investigated current opportunities for such engagement. EPA also posted information on its website which "describe data limitations, suggest appropriate uses for the data, and, where appropriate, offer a range of values instead of one value." Finally, EPA conveyed the concerns of the Chamber to a private sector company, Syracuse Research Company (SRC), which owns two databases identified by the Chamber in its challenge because they are linked to on EPA's website. SRC reportedly made changes to their databases pursuant to EPA's request.

EPA's response to the appeal has not satisfied the Chamber. Bill Kovacs, vice president for environment, technology, and regulatory affairs for the Chamber, issued a statement on July 3 and stated, "EPA has publicly declined to assume responsibility for the integrity for the data it provides, disseminates or sponsors."

In an interview with BNA, Kovacs also noted his frustration with the Office of Information and Regulatory Affairs (OIRA) at the Office of Management and Budget in handling the matter. Stating that, "OIRA is officially dead," Kovacs reportedly tried to meet with OIRA administrators concerning variations across EPA databases but was

apparently rebuffed.

The DQA tasked OIRA with overseeing implementation of information quality guidelines at executive agencies. OIRA issued the initial guidelines that shaped how agencies established DQA procedures and has issued several memos on DQA providing additional advice to agencies on implementation. One such memo included a request that agencies involve OIRA in negotiations with data quality challengers — a provision that seemed potentially inappropriate as it would insert a political office with little or no expertise into complex debates of highly scientific information. There has been no evidence that OIRA has gotten directly involved in any DQA challenges, but as the office's activities are difficult at best to monitor, its role in individual challenges has always been a mystery.

The DQA process has been used by industry associations and companies attempting to stymie the release of environmental and health information and slow down health, safety and environmental regulations. EPA's rejection of the Chamber's request may serve as a statement that the DQA should not be used in such a manner. Perhaps Kovacs' reaction is indicative of a realization that the DQA is not always effective as a tool to slow down regulations.

House Misses Opportunity to End IRS Private Tax Collection Program

On June 28, the Internal Revenue Service's (IRS) private tax debt collection program survived an effort by the House to bring it to a halt. House legislators struck language in the Financial Services and General Government Appropriations Act (H.R. 2829) that would have put a tight cap on how much funding could have been used to administer the program.

The private tax collection program lets private companies track down taxpayers who have not paid a small amount of outstanding taxes (see a summary of the program here). If IRS did the same work in-house, it could bring in nearly three times as much money as the private debt collectors. Additionally, letting profit-motivated companies handle sensitive tax matters has raised concerns regarding privacy and taxpayer rights.

The House passed the Financial Services and General Government appropriations bill by a vote of 240 to 179 (roll call). It would appropriate over $21 billion for an assortment of programs, including the Treasury Department, General Services Administration and the federal courts system. Before coming to the House floor, the bill included language that would have curtailed the debt collection program by limiting the amount of money IRS could spend administering it to less than $1 million in FY 2008. Such a low figure could have effectively killed the program. The IRS spent over $70 million administering it as of May 23, the last time IRS gave a public accounting of program's finances. At the time, private debt collectors had only raised $19 million — a net loss.

The language to limit funding was taken out of the bill on procedural grounds. By a House rule, tax or tariff measures have to be reported by the House Ways and Means Committee, the tax writing committee. The debt collection language could have violated the rule, because it would have, in effect, prevented the IRS from executing a tax measure, and it was reported by the House Appropriations Committee, not the tax writing committee.

Rep. Jim McCrery (R-LA) challenged the provision, and Rep. Jose Serrano ☼ (D-NY) assented, striking the language. The House Rules committee could have made a special rule to protect the language from procedural challenges, but no rule was issued.

The fight over the program's funding, however, is not over. The Senate's equivalent of the Financial Services and General Government bill has not been approved by its subcommittee or the full Appropriations Committee. A similar provision could be included in this version and ultimately in the bill that becomes law. Furthermore, the White House has only said that it opposes the appropriations-limiting language; it has not indicated that it intends to veto the bill if it includes the language.

Congress may take action on other bills, as well. Two popular bills in Congress — H.R. 695 (Taxpayer Abuse and Harassment Prevention Act of 2007) and S. 335 (A bill to prohibit the Internal Revenue Service from using private debt collection companies, and for other purposes) — would also end the private debt collection program. S. 335, introduced by Sens. Patty Murray (D-WA) and Byron Dorgan (D-ND), currently has 21 cosponsors, and H.R. 695, introduced by Reps. Steve Rothman (D-NJ) and Chris Van Hollen (D-MD), has 140 cosponsors, including 16 Republicans.

Wall Street Tax Break Comes under Scrutiny

After decades of flying below the radar screen, a tax policy allowing private equity fund managers to claim their fee-based income as capital gains rather than ordinary income has suddenly become the subject of media scrutiny, congressional hearings and legislation. In June, the Blackstone Group, a large private equity firm, went public with an initial public offering, which resulted in billion-dollar profits for the principals. This triggered House Ways & Means Committee and Senate Finance Committee chairs Rep. Charles Rangel ☼ (D-NY) and Sen. Max Baucus ☼ (D-MT) to question the tax breaks that helped enable the billion-dollar profits. They announced their intention to examine tax policy regarding so-called "carried interest," a type of performance fee that is a major source of compensation for fund managers. Rep. Sander Levin ☼ (D-MI) has introduced a bill to eliminate the carried interest tax loophole altogether. In response, high-powered lobbyists have gathered to fight back. A classic confrontation between industry and taxpayer interests may be looming.

The policy question concerns part of the fee that fund managers usually collect for their services. They typically negotiate a percentage of any profits on their fund's investments,

called "carried interest" because, oftentimes, funds do not produce profits for several years. Because the income comes, when it does, following the sale of the fund's security assets, the argument is made that this income is like dividends or capital gains and so should be taxed at a maximum rate of 15 percent.

However, some tax experts have argued that carried interest is no different from ordinary income, which is taxed at rates of up to 35 percent. The risk element in fund managers' compensation for services is quite different from investors' risk. The latter may lose every penny they have invested in the funds; they may also reap capital gains if fund assets are sold at a profit. Fund managers may not be personally invested in the funds they manage at all — in this case, they have no "downside" risk of financial loss; they may simply fail to be due compensation if the fund does not perform well enough. It is a form of contingency fee.

Advocates of current policy, such as Lisa McGreevy, executive vice president of the Managed Funds Association, say that "the whole issue is fundamental to entrepreneurship in the United States and the ability to use sweat equity to build long-term investments." Victor Fleischer, a University of Illinois tax professor, believes that perhaps private equity funds, hedge funds and others benefiting from the tax treatment have total assets under management of up to $1 trillion. It is unclear whether taxes on fund managers relate at all to investor activity.

Advocates of closing the carried interest tax loophole question the equity of current policy, which, Fleischer estimates, reduces fund managers' taxes by $4-6 billion a year. Rep. Peter Welch ☼ (D-VT) says that "there is absolutely no reason some of the richest partnerships in the world should be able to rip off American taxpayers because of a tax loophole." On the other side, the lobbyists are trying to convince Congress that such legislation would hurt the average citizen. Rep. Eric Cantor ☼ (R-VA) was quoted in the July 10 *Washington Post* as saying, "This is a tax increase not only on those working on Wall Street, but also on all blue-jean-wearing Americans because of its effect on their retirement funds."

A key moment in the debate came on June 12, when former Treasury Secretary Robert Rubin, speaking to a tax reform conference run by Brookings' Hamilton Project said,

> It seems to me what is happening is people are performing a service, managing people's money in a private equity form and fees for that service would ordinarily be thought of as ordinary income.

A week and a half later, Levin introduced his bill to end the tax treatment of these fees as capital gains. A dozen other House members have now co-sponsored the bill, including Rangel and House Financial Services Committee Chair Barney Frank (D-MA). Rangel subsequently announced that he would hold a hearing on the legislation in July. Baucus has scheduled the first of two hearings by the Senate Finance Committee, to be held July

11.

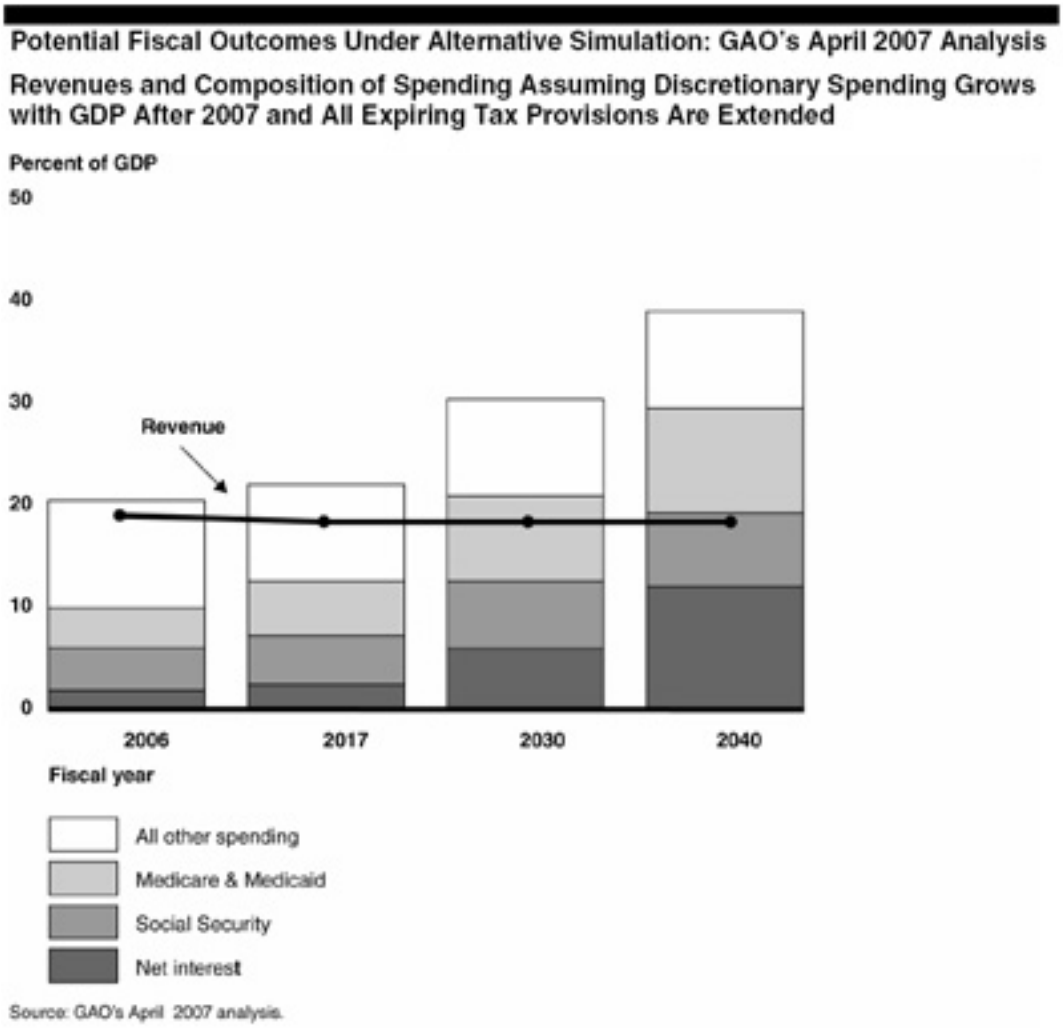
The prospects for the Levin legislation in the House seem favorable, given the heft of those who have endorsed it. However, the Cantor-led forces include some of the most powerful lobbyists in town. In the Senate, Baucus and Finance Committee ranking member Charles Grassley (R-IA) have not taken a position on the issue. But in his most direct statement on it to date, Grassley, who has strongly supported tax breaks for business in the past, implied that the carried interest tax preference is

> failing to maintain the integrity of the 15% capital-gains rate... What I'm doing is an effort to ward off the demagogues on Capitol Hill that can say this is just a way for the rich to get richer, and the middle class to be stung... I would ask my Republican colleagues to look at it from that standpoint, that we want to make sure we aren't feeding the demagoguery of class warfare that the other party is always getting blue ribbons for doing.

Whatever Congress decides, it is possible that President Bush will declare that ending this tax loophole is a tax increase and veto it on those grounds.

CBO Director Emphasizes Role of Health Care Costs in Long-Term Fiscal Imbalance

Congressional Budget Office (CBO) Director Peter R. Orszag is the latest policy thinker to highlight the underlying cause of the long-term fiscal imbalance. Testifying before the Senate Budget Committee on June 21, Orszag emphasized the centrality of health care costs in long-term fiscal imbalances, the reasons for the exploding cost of health care and health care policies that could restrain those costs.



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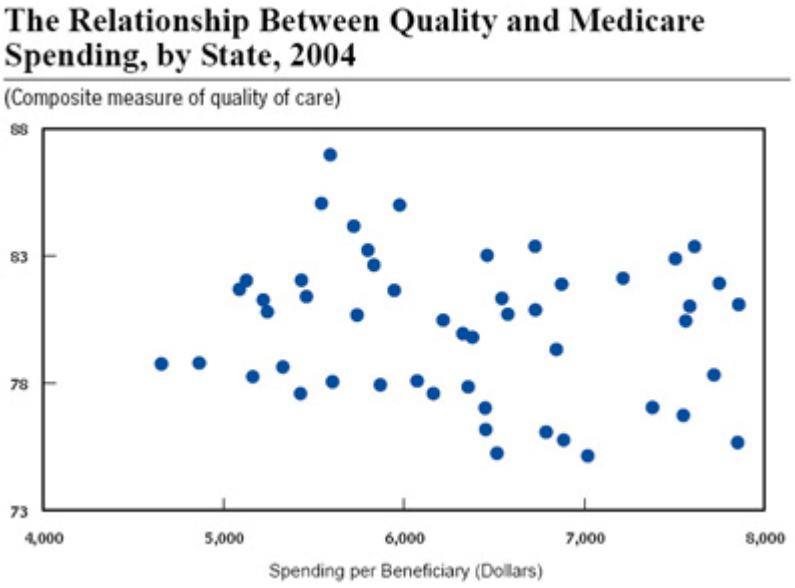
Since the 1960s, Medicare and Medicaid costs have outpaced the growth of the economy by 2.5 percent annually. At that rate, spending on these federal programs will increase from 4.5 percent of GDP today to 20 percent of GDP in 2050. Today, the entire federal budget, including all discretionary and mandatory spending, represents roughly 20 percent of the economy. Medicare and Medicaid compose about one-fifth of the entire federal budget. Should federal health care spending increase as projected, the Government Accountability Office predicts that total federal spending will be 40 percent of GDP by 2040, resulting in "a federal debt burden that ultimately spirals out of control." But, as Orszag testified, the rapid growth in federal health care program costs are not inherent in their designs; rather, it is a symptom of a much larger problem:

> Many analysts believe that significantly constraining the growth of costs for Medicare and Medicaid over long periods of time, while maintaining broad access to health providers under those programs, can occur only in conjunction with slowing cost growth in the health care sector as a whole.

Medicare and Medicaid reform that does not address the rapidly rising cost of health

care will merely shift the burden of health care expenditures to individuals and private companies. The same worrisome percentage of GDP dedicated to health care spending will persist regardless of who pays for it. Indeed, the outlook is similar for private health care providers, as the growth of health care spending nationwide has paralleled per-beneficiary expenses in Medicare and Medicaid. In 1975, total U.S. health care expenditures represented 8 percent of economic output; by 2016, that number will total almost 20 percent. However, Orszag noted there are several opportunities that will enable health care cost reductions without sacrificing health outcomes.

Available evidence suggests that health outcomes in the United States do not track with health care expenditures, indicating outcomes are not directly dependent on expenditures: more money does not buy more health. As the figure below shows, a region-to-region comparison of health care expenditures and quality of health care does not reveal a correlation between the two. Orszag believes further study is necessary to determine the reasons for this disparity.



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Orszag cited evidence that overall health care cost increases are driven by several factors. The first is the method by which insurers reimburse beneficiaries. As health care costs spiked in the late 1980s, enrollment in managed care plans (HMOs) increased. The shift from fee-for-service plans to HMOs contained cost increases in much of the 1990s, but as consumers complained about restrictions on treatments and other health care constraints, HMOs adopted less aggressive cost-control measures, and health care costs began accelerating again.

The second factor that has been pushing up the cost of health care is a decline in out-of-pocket payments by beneficiaries. From 1975 to 2005, the percent of out-of-pocket costs to beneficiaries declined from 33 percent to 15 percent. This disconnect of health care delivery from patient costs increased demand for health care, thereby prompting

beneficiaries to consume more health care, which exacerbated cost acceleration.

Another explanation is that higher-cost, high-technology treatments have become widely available in the past 30 years. As a result, there are many conditions for which several treatment options exist, all with varying costs, but there is a dearth of information regarding what treatments work best for which patients. Access to data on the effectiveness of the multitude of treatment options, in Orszag's opinion, could carry significant weight in restraining the growth of health care costs.

Orszag believes that research on so-called "comparative effectiveness" shows promise in revealing the most effective treatments. Allowing doctors and patients to "use fewer services or less intensive and less expensive services than are currently projected," via comparative effectiveness analysis, Orszag suggests, could be the basis for a range of solutions.

Insurers, Medicare and Medicaid could use the data simply as informational guidelines. Citing a health insurance experiment by RAND, Orszag indicated that increased cost sharing results in reduced spending with "little or no evidence of adverse effects on health." The data could therefore be a cornerstone of a financial incentive scheme in which patients may opt for less efficient treatments, but they would pay increased out-of-pocket expenses. Alternatively, Medicare and Medicaid could use the information to tie payments to physicians to the cost of the most effective or most efficient treatment.

Orszag's inventory of causes and remedies represents only a subset of the work of the health policy community that analyzes the cost of health care. But more than a comprehensive policy prescription, Orszag's testimony shines a light on where policymakers can look for restraining increases in health care costs, and subsequently for solutions to long-term fiscal challenges.

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