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Commentary: Issa Releases New Spending Transparency Bill

On June 13, House Oversight and Government Reform Committee Chair Darrell Issa (R-CA) introduced a bill to revamp federal spending transparency. The new bill, called the Digital Accountability and Transparency Act (DATA Act), would create a new board to oversee spending transparency, as well as implement full multi-tier recipient reporting. While the bill is a welcome effort to improve federal spending transparency, it still lacks some key details, contains a few worrisome provisions, and does not go far enough in broadening transparency in federal spending.

The most significant action in the DATA Act is the creation of a new independent agency, the Federal Accountability and Spending Transparency Board, or FAST Board. The Board would essentially be a reinvention of the current Recovery Accountability and Transparency Board, which oversees the American Recovery and Reinvestment Act's transparency provisions and investigates potential abuses. The new FAST Board would extend its powers to all of federal spending while also taking control of USAspending.gov from the Office of Management and Budget (OMB).

Also on June 13, President Obama issued an executive order that creates a similar oversight board, called the Government Accountability and Transparency Board. In describing how the order will be implemented, Vice President Joe Biden noted that the administration has been working with Issa and other Republicans and Democrats in Congress to create the oversight board. Issa also stated that his FAST Board idea is being developed in collaboration with the administration.

Under the Issa bill, the Board would be led by a chairperson, who would be Senate-confirmed in a similar process to how the Comptroller General – the head of the Government Accountability Office (GAO) – is chosen. The Board itself is made up of a handful of agency inspectors general, deputy secretaries, and OMB officials. The DATA Act grants the Board subpoena power, as well as a limited ability to set federal data standards.

The FAST Board would then be charged with overhauling federal spending transparency procedures. Most notably, the DATA Act calls for recipient reporting to supplant the current system, the Federal Funding Accountability and Transparency Act (FFATA), which mostly relies on agency reporting (OMB Watch was involved in the creation of both FFATA and USAspending.gov). Similar to the Recovery Act model, under the DATA Act, all recipients of federal funds would be required to report on their use of the money. This is an important improvement over the current model.

The DATA Act also calls for the FAST Board to create common data elements and data standards to be used throughout all of the federal government's spending information systems. These improvements to financial reporting data could significantly enhance the ability of various federal data systems to communicate with each other, furthering data accessibility to the public and federal agency workers. To help ensure that recipient reports are accurate, the DATA Act also requires that agencies continue to report on their awards. These reports would be used to help verify recipient-reported data.

All of this information, the recipient reports and the agency-reported data, would be stored and displayed on a new website created by the FAST Board. Since the Board is independent, it could also serve as a "transparency portal," combining its spending data with other data sets it might find relevant.

However, what is most striking about the DATA Act is what is not in it. While the new legislation does improve federal spending in a number of ways, it still needs further refinement. The definition of "recipient" in the legislation is so vague that it is unclear if private entities (e.g., corporations) must report on their federal awards or if the DATA Act requires full, multi-tier reporting. And while the list of data points recipients must report is similar to both FFATA's and the Recovery Act's, it is missing some important points, such as place of performance and project status. Unfortunately, the new legislation also fails to require a new unique identifier for companies, a problem that has plagued federal data sets for years.

Similarly, it is strange that the DATA Act calls for agency-reported data, despite the fact that the bill is supposedly premised on the idea that agency-reported information is not high quality (an accompanying press release from the House Oversight and Government Reform Committee notes USAspending.gov data quality issues). Far better would be the inclusion of Treasury spending data, which is information on the actual cash outlays of the federal government. Treasury accounts are like the checkbook of the federal government: they are considered the gold standard for federal spending information. Information from these accounts would show exactly how much federal money was given to which entities. (This morning, June 14, during a hearing on the bill, Issa suggested that there may be a floor amendment mandating Treasury information, but as it is currently written, the bill does not do so.)

The DATA Act also does not include what is possibly the most obvious data check: having recipients report on their sub-awards. In the bill, as it is currently drafted, recipients only report on what they receive, not also what they give as sub-awards. If the recipient and subrecipient are reporting both what they received and what they gave out, the two reports can serve as checks on each other. Including such a requirement would substantially improve recipient report data quality, as well as cut down on waste, fraud, and abuse.

At the same time, the DATA Act doesn't require any performance information, either in the recipient reports or on the new website. One of the important lessons of the Recovery Act is that recipient reports are most useful when they include some kind performance metric. For instance, a housing project should note how many houses were built, or a road project should specify how many miles of roads were paved. Such information can help users understand if federal programs are meeting their performance goals, which should also be displayed on the new spending website. Linking spending and performance information on the same public website is the next important step in transparency, and the DATA Act does not take that step.

In addition to these issues is the FAST Board's exemption power. Under the DATA Act, the Board would be able to unilaterally exempt whole classes of recipients from the reporting requirement. While the Board would be required to publish aggregated data on "information that is exempt from recipient reporting ... but that is reported by an Executive agency," the Board would not be required to disclose why it exempted the recipients. Thus, not only would the public not know what information was left out of the recipient reports, they would not know why the information was exempted.

Strikingly, the DATA Act does not address a key area of government spending that has remained hidden – tax expenditures. Tax expenditures now account for about $1 trillion per year but largely go unreported. While it is challenging to make such information publicly accessible, the bill should at a minimum require the FAST Board to develop a plan for such disclosure.

Perhaps the most worrisome aspect of the DATA Act is that it also repeals FFATA, to date the most important spending transparency law ever passed. This action is especially problematic because the DATA Act has a sunset provision, which would require Congress to reauthorize the law in seven years. If Congress fails to act in time, the sunset provision would eliminate the entire DATA Act. So, after seven years of recipient reporting and new data standards, all of the new transparency provisions would have to be fought for all over again.

It is a bad idea to repeal a permanent law and replace it with a temporary law, especially when there is no reason to repeal FFATA outright. FFATA, as a law, is far from fatally flawed. As it is currently written, FFATA simply no longer goes far enough for today's transparency community. The DATA Act's recipient reporting and data standardization provisions are good, but the obvious solution is not to erase a perfectly good law. Instead, Congress should focus on amending FFATA with the positive provisions of the DATA Act and other language that will permanently improve federal spending transparency.

Commission on Wartime Contracting: Iraq Contracting Disaster Looming

On June 6, the Commission on Wartime Contracting (CWC) held a hearing to examine the Department of State's (State) continued preparations for taking control of operations in Iraq from the Department of Defense (DOD). In the past, the CWC has been less than sanguine about State's ability to run contingency operations in Iraq and has chided the agency for slow-walking reforms, especially in relation to contract oversight.

On Oct. 1, State will take full responsibility for the U.S. government's presence in Iraq, as the vast majority of U.S. combat troops are scheduled to depart the country by the end of 2011. At that time, the agency will begin performing many tasks the Pentagon has been carrying out for the last eight years. State has experience providing standing and moving security and training security and military personnel – duties the agency currently performs and will continue to perform in Iraq. However, State will also have to supply quick-reaction combat teams, route clearance, recovery of wounded personnel, removal of damaged vehicles, and the detection and disposal of explosive devices – none of which the agency has experience with.

To perform these tasks, State will rely on a large number of private security contractors (PSCs). In addition to the current small army of roughly 19,000 PSCs in Iraq right now, the agency estimates it will need another 6,000 to 7,000 contractors to carry out its responsibilities. The problem is that State does not have a reputation for vigilant contract oversight, and the CWC has been warning the government since the summer of 2010 of the potential serious consequences that would befall it if State and DOD failed to coordinate better before the Iraq transition.

In February, the CWC released its second interim report to Congress and again raised concerns about the DOD-to-State transition in Iraq. The interim report made 32 recommendations that attempted to address the underlying causes of contracting failures and included policy, statutory, and administrative suggestions. Prior to the June 6 hearing, the CWC asked State to comment on any recommendations that would affect its operations.

The CWC found some of State's responses "cursory" and others "logically dubious." Commissioners also told Under Secretary of State Patrick Kennedy, who was the sole witness at the CWC hearing, that the agency's argument against requiring a written rationale from contracting personnel for not pursuing a proposed suspension or debarment – it would be a "burden" – "approaches the borderline of government negligence."

Commissioners became even more incensed when, according to Jake Wiens at the Project On Government Oversight (POGO), "Kennedy could not answer how often recommendations for suspension or debarment are overturned," leading a co-chair, former Rep. Christopher Shays (R-CT), to wonder how the requirement "could be so burdensome if State didn't even know how frequently it occurred."

The CWC was similarly skeptical of State's rejection of the recommendation for the creation of a permanent office of inspector general for contingency operations, an idea pushed by some in Congress, as well. Wiens notes that commissioners cited State's well-documented history of antagonism toward IGs, including a recent example of the agency blocking an investigation by the Special Inspector General for Iraq Reconstruction (SIGIR) with minor bureaucratic excuses.

Despite Kennedy's assertions to the contrary, a recent Inspector General (IG) report provides justifications for the commission's concerns, which, according to Shays, "remain very much alive." In May, the State Department IG released a troubling report on the agency's performance on planning the Iraq transition. While State has "put in place planning and management mechanisms to effectively transition to a civilian-led presence in Iraq," "several key decisions have not been made, some plans cannot be finalized, and progress is slipping in a number of areas."

One of the biggest challenges that lie ahead for the agency is the successful transfer of reconstruction projects to Iraq, an area flush with opportunities for waste, fraud, and abuse. U.S. taxpayers have poured billions of dollars into projects throughout Iraq, yet the Iraqi government will not be able to maintain many of them, a finding recently highlighted by the commission. The State IG found that the agency has transferred over 5,400 projects to Iraq, valued at roughly $15 billion, but security concerns and "poor contractor performance" are "major hindrances to project completion."

While State has made progress in preparing for the day when DOD cedes control of operations in Iraq, there is still much for the agency to do. However, State should not carry all of the blame for potential failures. In July 2010, CWC recommended that Congress "immediately provide additional resources to State to support its increased contracting costs and personnel needs" in relation to the Iraq transition. The fiscal year (FY) 2011 continuing resolution provides just $48.3 billion to State, almost $5 billion less than the Obama administration's request of $53.1 billion – a funding level that did not even reflect the CWC's recommendation.

EPA Continues to Improve Chemical Transparency under TSCA

On June 8, the U.S. Environmental Protection Agency (EPA) unveiled the identities of more than 150 chemicals that had previously been claimed as confidential by industry. The EPA's action was the latest step in the agency's initiative, announced in 2010, to disclose more chemical information to the public.

Under Section 8(e) of the Toxic Substances Control Act (TSCA), companies that manufacture, process, or distribute chemicals must notify the EPA if they learn that any of their chemical substances present a "substantial risk of injury to health or the environment." However, TSCA allows companies to treat as confidential the chemical's identity in the public version of these reports if that information is entitled to such treatment. Although EPA suggests that companies provide a reason for the confidential business information (CBI) claim, an explanation is not required. The reports are made available on EPA's website, but when the company labels a chemical as confidential, the chemical's name is removed from the report's public version.

Following EPA's recent action, 150 chemical names will no longer be redacted from 104 health and safety studies. The newly disclosed chemicals involved in the studies are used in dispersant formulations and consumer products such as air fresheners, non-stick and stain resistant materials, and fire resistant materials.

The disclosure is the result of new EPA confidentiality decisions, as well as voluntary decisions by some companies in response to the EPA's challenge to industry to disclose such data. In many cases, the disclosed information often involves a company's original report, requesting confidentially, with additional pages indicating the name of the chemicals that were originally redacted. For example, one company updated its report with the addition of a cover letter, indicating the name of the chemical.

Public health advocates have long pushed for EPA to make public the names of chemicals in order to evaluate their health and safety. The Environmental Working Group published a study in January 2009 documenting that the names of 17,000 of more than 83,000 chemicals in commerce had been labeled a "trade secret" and thus remain hidden from the public. The Government Accountability Office (GAO) testified that about 95 percent of notices that companies send to the EPA include information labeled "confidential."

Beginning in 2010, the EPA has taken several steps to disclose more chemical information to the public. In January 2010, it announced a new policy of rejecting, with limited exception, CBI claims for publicly available health studies when the chemical name is already disclosed in the public portion of the TSCA Inventory – a list of all chemical substances in commerce. In March 2010, the agency provided free public access to the TSCA Inventory, which previously had only been available for a fee, and in that same month, EPA challenged industry to reduce the number of CBI claims in new TSCA filings. In May 2010, it began reviewing all CBI claims for chemical identities in health and safety studies, and it added chemical information to its Envirofacts online public database.

During the first half of 2011, EPA continued to make progress. In February, it announced that it would no longer protect the identities of 14 chemicals, which manufacturers had claimed were trade secrets, and in March, the agency declassified the names of chemicals in 42 other health and safety studies.

Though public health and environmental advocates have hailed EPA's June 8 announcement as a significant move toward greater openness, they continue to seek improvements to EPA procedures to reduce the amount of illegitimate CBI claims and to promote transparency. Several such recommendations are included in a report to improve the public's right to know about environmental, health, and safety issues, published by OMB Watch in May 2011 and endorsed by more than 100 organizations. They include:

- Upfront Substantiations – requiring chemical manufacturers to justify requests for secrecy when the information is submitted to the agency. Such upfront substantiation of the need for secrecy reduces the burden on agency staff to evaluate CBI claims.
- Fees for CBI Process – required fees to be paid by submitters of CBI in order to cover administrative costs and reduce illegitimate claims.
- Penalties for Illegitimate CBI Claims – impose fines and penalties against companies that illegitimately request CBI protections, such as for a chemical identity that is already publicly disclosed.

The right-to-know report also recommends that certain workers, including workers risking exposure to chemicals and health professionals such as emergency medical technicians, nurses, and doctors, have access to vital chemical information. Medical personnel must have complete access to names of chemicals in products – including CBI – to which their patients may have been exposed to accurately assess and treat signs and symptoms, care for injuries, and protect themselves.

The chemical industry is still wary of disclosure. Both the American Chemistry Council (ACC) and Society of Chemical Manufacturers and Affiliates (SOCMA) voice support for the EPA's effort to make public potential chemical risks, but not at the expense of trade secrets. Scott Jensen, spokesman for the American Chemistry Council, noted that "[i]t's important that EPA continue to recognize legitimate claims to safeguard intellectual property from competitors." Proctor & Gamble is concerned that the EPA will continue to require chemical companies to disclose more and more proprietary chemical information.

In its June press release, EPA announced its plans to regularly declassify and post materials under TSCA on its website. According to Steve Owens, assistant administrator for EPA's Office of Chemical Safety and Pollution Prevention, "[a] health and safety study with the chemical name kept secret is completely useless to the public."

Administration Lays Foundation for New CUI System

Seven months after President Obama issued an executive order on controlled unclassified information (CUI), the outlines of a new CUI system are taking shape. On June 9, the National Archives and Records Administration's (NARA) CUI office released initial guidance on implementing the order.

The notice lays the foundation for a system of CUI categories overseen by NARA and disclosed to the public, as called for in the executive order. Previously, agencies established methods for controlling unclassified information on an ad hoc basis, often without standards or oversight, resulting in an opaque and confusing jumble that stymied public access and inhibited information sharing.

Contents of the Guidance

The guidance requires agencies that handle CUI to establish a program for implementing the new CUI system, including training, markings, dissemination instructions, and decontrol procedures. Each agency is required to develop CUI training for its personnel. Transparency advocates have expressed concern that without adequate training, misunderstandings of CUI among agency staff could result in improperly applying the new system in a manner that unduly restricts public access. Agencies are also required to conduct self-inspections to assess compliance.

The guidance also establishes a uniform system for marking documents as CUI and encourages agencies to mark only the portions of a document subject to controls, rather than the entire document. Portion marking, which is required for classified information, can facilitate public access by limiting the amount of information controlled. The guidance makes clear that if a document bearing pre-CUI labels is reused, the prior labels are to be removed and the information is only to be designated as CUI if it meets the current requirements.

Besides the dissemination controls attached to specific categories, the guidance states that "agencies shall disseminate CUI only to individuals who require the information for an authorized mission purpose." Open government experts have raised concerns that this vague requirement could unduly restrict information sharing or public disclosure.

The guidance states that "CUI shall be decontrolled as soon as possible" and that "CUI may not be controlled indefinitely unless law, regulation, or Government-wide policy so stipulates." Each CUI category will have a "specific time frame or event" for decontrolling information. The guidance does not indicate what the time frames or events for decontrol will be, other than that a few categories may be controlled indefinitely.

In addition, the guidance states that CUI will be decontrolled prior to public release but does not specify the procedures to decontrol information. If the procedures are cumbersome, it could lead to delays or otherwise inhibit public access.

The guidance provides for NARA to oversee agency compliance with the new system, which could include formal reviews and audits. Advocates expect active involvement from NARA will be crucial to smoothly transitioning to the new system and overcoming inertia in the agencies.

Missing Components

While the guidance logically lays out many of the needed components of a CUI program, there are several aspects missing that open government advocates sought. First, the guidance does not include any firm requirements for agencies or NARA to consult with the public when developing policies to implement the new CUI system. Such participation and collaboration is credited by many public interest groups as a vital aspect to the development of the E.O. on CUI.

The guidance also does not require agencies or NARA to publish any information about CUI policies or the operation of the CUI system, other than the registry of categories. The open government community had recommended that agency CUI policies, self-inspection reports, and NARA implementation reports, for instance, be required as public records for all agencies. Open government groups had also asked for statistical data on the use of each CUI category.

In addition, the guidance does not include a mechanism for the public to request that information be decontrolled or that a CUI category be removed from the registry. The comparable procedure for classified information, Mandatory Declassification Review, is seen as a powerful tool for expanding public access and providing a check on overclassification.

The guidance also does not require the use of personal identifiers to indicate the individual who controlled a document. This practice is required in the classification system as a means to ensure accountability, such as identifying personnel who inappropriately classify information.

Next Steps

Agencies now have six months to develop a plan for complying with the guidance. Following that, NARA will establish deadlines for the agencies to phase into full implementation. NARA is also expected to issue additional guidance in the coming months, providing additional detail on how the new CUI system will function.

Perhaps the most critical decisions will be over approving categories for inclusion in the CUI registry. NARA will determine approved CUI categories based on agency submissions and publish a list online by November. The registry will cite the law, regulation, or government-wide policy that authorizes each category, as well as any sanctions established in the law or regulation. The executive order states that NARA cannot turn down categories with a solid basis in law, regulation, or government-wide policy. However, some agencies will likely argue doggedly to retain legacy categories without such a basis. In addition, the order authorizes NARA to "resolve conflicts among categories," which raises the promising but logistically challenging opportunity to replace multiple similar categories across several agencies with a uniform set of rules.

U.S. Chamber of Commerce Advances the Attack on Regulations

The U.S. Chamber of Commerce (the Chamber) continues to attack public protections and will advance the anti-regulatory community's agenda with a series of planned public events across the country later in 2011.

To help spread its message, the Chamber has enlisted former Sen. Evan Bayh (D-IN) and former Bush White House chief of staff Andrew Card for a national "roadshow" of "speeches, events, and media appearances," said Chamber president Tom Donohue in a June 2 memo. Bayh, who now works for lobbying/law firm McGuireWoods and serves as a Fox News commentator, will join Card in carrying out "a bipartisan message of regulatory reform." The Chamber is expected to officially announce Bayh's involvement and provide more details on the tour later in June.

Donohue also applauded the Chamber's efforts to "persuasively" link "over-regulation" to job loss and credited the group with helping delay or destroy several rules promulgated by the Occupational Safety and Health Administration (OSHA) and the U.S. Environmental Protection Agency (EPA). Bayh and Card will take part in an expansion of the Chamber's communications campaign, speaking about the dangers of the so-called "regulatory overload" facing the nation.

The Chamber also criticized the Obama administration's regulatory record at a hearing held June 3 by the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce. Following up on a Jan. 26 hearing on "The Views of the Administration on Regulatory Reform," the hearing examined how the White House Office of Information and Regulatory Affairs (OIRA) is implementing President Obama's Executive Order 13563, Improving Regulation and Regulatory Review.

The order, among other things, directed agencies to conduct retrospective reviews of existing significant regulations to determine whether they should be "modified, streamlined, expanded, or repealed so as to make the agency's regulatory program more effective or less burdensome in achieving the regulatory objectives." In response, federal agencies submitted preliminary plans for conducting these reviews to OIRA. (See the June 1 issue of *The Watcher* for a summary of agency plans.)

William Kovacs, Senior Vice President of Environment, Technology & Regulatory Affairs, testified on behalf of the Chamber. While the Chamber has expressed tepid support for Obama's executive order and the release of the review plans, Kovacs called for greater reform of what he characterized as "the bloated regulatory state."

OIRA Administrator Cass Sunstein testified that agencies "have already eliminated hundreds of millions of dollars in annual regulatory costs" and could produce over $1 billion in future savings. But according to Kovacs, the administration's retrospective review effort is "not nearly enough."

Kovacs, echoing a sentiment expressed by many opponents of public protections, told the committee that regulatory agencies are overstepping their bounds. Agencies now have the ability to "'legislate by regulation' and possess legislative power nearly equal to that of Congress," he said. Sunstein defended agencies, noting that statutory intent is the administration's guiding principle and that agencies cannot act without first being authorized by Congress to regulate.

Kovacs asserted that regulatory compliance costs are now up to $1.75 trillion a year, a number cited often by the Chamber and other regulatory opponents. This cost estimate comes from a heavily criticized report prepared by economists Nicole Crain and Mark Crain for the Small Business Administration. The report fails to consider the benefits of regulations, uses a series of flawed methods, and reaches cost estimates that differ dramatically from those reported by the Office of Management and Budget (OMB), which issues annual reports that consistently show that the economic benefits of regulation far outweigh compliance costs.

The $1.75 trillion figure "is the result of secret calculations, an unreliable methodology and a presentation calculated to mislead," said Professor Sidney Shapiro of the Center for Progressive Reform. The Congressional Research Service conducted its own assessment of the report and also identified serious problems with assumptions made in Crain and Crain's estimates. The Economic Policy Institute (EPI) also criticized the report in an assessment of regulations released in April. Under questioning during the hearing, Sunstein noted that he disagreed with the Crains' analysis.

The Chamber also attacked the volume of existing regulations. Based on numbers compiled by Wayne Crews of the conservative Competitive Enterprise Institute, Kovacs stated that 170,000 rules accumulated from 1976 to 2009. The Chamber prepared a chart illustrating the "growth of federal regulations." At a glance, it appears that regulations grow in number every year, but the numbers in the table show that fewer final rules were promulgated in 2009 than in *any* other year after 1976. In stacking up the finalized rules year by year, these calculations exclude actions that clarify, modify, repeal, or phase-out regulations. (View Kovacs' testimony.)

Kovacs also affirmed the Chamber's support for the Regulations from the Executive In Need of Scrutiny (REINS) Act, a bill that would require congressional approval for all major regulations, as well as amendments to the Regulatory Flexibility Act that would require agencies to consider the indirect impacts of rules on small entities. In addition, the Chamber recommended that the "arbitrary and capricious" standard for agency rulemaking in the Administrative Procedure Act be replaced by a "substantial evidence test," which would impose a higher burden on agencies in defending against challenges to both major regulations and guidance.

Advocates for health, safety, and environmental protections oppose most of the regulatory "reform" proposals the Chamber and its congressional allies are pushing and take issue with some of the data the Chamber uses to bolster its arguments. For example, in February, 72 public interest organizations wrote to Congress asking representatives to oppose the REINS Act. On June 9, the Coalition for Sensible Safeguards asked senators to vote against the Snowe amendment, which would have burdened agencies and made it more difficult for them to write and enforce rules. (The amendment was defeated the same day.) Additionally, new research by EPI shows that the claims that regulations harm the economy and cost jobs, the crux of the

Chamber's arguments, are unfounded.

Disclosing Dissension: Shareholders Push for More Control of Corporate Political Spending

Although the Federal Election Commission (FEC) is again trying to implement the *Citizens United* decision, shareholders across the country are refusing to wait for more control over corporate political spending.

On June 8, shareholders of Target Corporation sharply questioned the retailer's political contribution policy during the company's annual meeting. This close scrutiny is a result of the corporation's controversial decision to contribute $150,000 to a conservative political action committee in August 2010.

After weathering harsh public criticism last fall, Target voluntarily changed its policy on political spending. According to the "Civic Activity" section of the Target website, future decisions on contributions will be made based by "balancing [the retailer's] business interests with any other considerations that may be important to [its] team members, guests or other stakeholders." The company publishes a statement on its political contributions, including a list of all contributions of $5,000 or more, twice each year.

For many, policies like Target's are not enough. "Shareholders – not self-interested corporate managers – should, and can, decide policies on corporate political contributions," John C. Bogle, the founder and former CEO of Vanguard Investment Strategy Group, wrote in a recent *New York Times* op-ed. In the U.S. Supreme Court's opinion in *Citizens United v. Federal Election Commission*, Justice Anthony Kennedy wrote that a corporation's right to political speech depended on shareholders' ability to guide that speech. Any difference, he wrote, could be corrected "through the procedures of corporate democracy."

According to Bruce Freed, president of the Center for Political Accountability, shareholders of 28 corporations have voted on political spending resolutions in 2011. The diversity of the resolutions reflects the complexity of corporate political spending choices. Companies may, for example, choose to establish a political action committee (PAC) of their own, make independent expenditures, or contribute to trade organizations or other nonprofits.

Shareholder resolutions were made possible by a "no-action" letter issued to shareholders of Home Depot, Inc., by the Securities and Exchange Commission (SEC) in March. The Home Depot resolution, proposed by NorthStar Asset Management, requested the company disclose both actual and planned political contributions, alongside an analysis of how the spending matched the company's values or policies. It also requested that shareholders be given a non-binding advisory vote on the company's political spending policies and plans.

An attorney for NorthStar said that, "Although disclosure proposals are routinely filed and found nonexcludable, to our knowledge this was the first time the SEC ruled directly on a proposal providing an annual shareholder advisory vote on electioneering spending. ... This first time decision has cleared the way for further efforts, building upon the model established by the Home Depot proposal." In fact, at least 17 companies will face shareholder resolutions on political spending in 2011, in addition to the 28 votes that have already occurred.

While the SEC has been moving to authorize historic votes on corporate political spending, the FEC – the agency charged with regulating contributions and spending in federal elections – has been much slower to act. In January, the agency failed to issue a Notice of Proposed Rulemaking (NPRM) to begin implementing *Citizens United*. On June 15, the agency will again take up two versions of an NPRM: one from the Democratic commissioners and another from the Republicans.

While the revised NPRMs have changed since January, the ideological entrenchment plaguing the FEC has not. Unless the commissioners reach a surprising breakthrough, shareholders will have to depend on the SEC and themselves to enforce basic political spending transparency.

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