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Portman Out, Nussle Tapped to Head OMB

On June 19, Office of Management and Budget (OMB) Director Rob Portman announced his resignation, effective in August. President Bush has chosen former House Budget Committee chairman Jim Nussle to be the next OMB director — a candidate whose reputation and policy record suggest the White House is prepared to clash with Democrats in Congress, particularly over the FY 2008 budget.

Portman said he made the decision to leave OMB because he wanted to spend more time with his wife and children. White House Chief of Staff Josh Bolten said he had hoped Portman would stay for the rest of Bush's term but had compelling personal reasons to

leave.

As Budget Committee chairman, Nussle presided over the massive 2001, 2003 and 2005 tax cut bills and failed to usher through a budget resolution three out of the six years he chaired the committee. Nussle also supported radical budget process changes that would have, if enacted, cut public investments and opened the door to more irresponsible tax cuts. Nussle left Congress in 2006 to make an unsuccessful bid for governor of Iowa.

While in Congress, Nussle was known for his combative style, earning him the nickname "Knuckles." He was part of a group of Republican representatives — the "Gang of Seven" — who tried to embarrass Democrats during the House banking scandal in the early 1990s. A particularly memorable sequence occurred when Nussle put a paper bag over his head on the House floor to caricature the House leadership's refusal to disclose which Democrats had overdrafts in the banking scandal.

Timing of the Move

Given the strong relationships Portman enjoys with members of Congress on both sides of the aisle and his months-long advocacy in Congress on behalf of the president's $2.9 trillion budget, the timing of the change at OMB appears less than ideal. The changing of the guard, which came as a surprise to almost everyone outside the White House, will occur during the heat of the FY 2008 appropriations season, as the first of 12 spending bills are just starting to make their way through Congress.

The Bush administration has threatened to veto any bill that exceeds the president's discretionary spending requests, with one threat — against the recently-passed $36.3 billion Homeland Security bill — issued on the grounds that "it includes an irresponsible and excessive level of spending." The administration had requested $34.2 billion. The $2.1 billion difference represents 0.2 percent of total discretionary spending.

While the change at OMB could exacerbate tensions in the relationship between the president and Congress, there maybe more to the move for Portman than spending more time with his family. Portman, who is regarded as one of the most talented and respected members of the GOP, may well be looking toward a return to electoral politics. He served for six terms as a Congressman from Cincinnati and plans to return to Ohio in August. President Bush is particularly unpopular in Ohio, which has seen thousands of jobs in its eroding manufacturing base cut or shipped overseas. Portman may be leaving quickly to break ties with the Bush administration in order to try to save a chance at running for office in Ohio. With the next statewide race not until 2010, his departure now could help his cause.

Process and Politics

Further complicating matters is not just the timing but also the process and politics surrounding the confirmation of Nussle. The Senate Budget and Homeland Security and Governmental Affairs Committees have joint jurisdiction over the OMB director confirmation process. If both committees take action on the nomination (whether

favorably or not) within 30 days of each other, the nomination moves to the floor for consideration by the full Senate.

In the two most recent OMB director nominations (for Bolten and Portman), the confirmation process took five weeks. Both Bolten and Portman were non-controversial nominees. This cannot be said about Nussle. Reaction on Capitol Hill to word of his nomination was swift and strong among some key budget process committee chairs:

- **House Appropriations Chair David Obey** (D-WI) told the *New York Times*: "Nussle is ideological as hell...[the nomination is] an act of absolute confrontation."

- **Senate Budget Chair Kent Conrad** (D-ND) commented in the *Washington Post*: He's "an intense partisan more given to confrontation than cooperation — he's coming here with baggage" and could have problems with his confirmation.

- **Another Democratic senator** said the announcement was made at the Democrats' regular Tuesday policy lunch and told *Roll Call*: "There was an audible reaction" and called Nussle a "bare-knuckled brawler ... I don't think he's got very high standing with anybody in the Congress who's worked with him."

- However, **House Budget Chair John Spratt** (D-SC) said in a statement: "Our relationship was one of comity and cooperation ... Even though Jim and I disagreed on policies, the disagreements never were personal. Indeed, Jim was a fair and honorable chairman."

Since Nussle is more controversial and time is limited before the upcoming month-long August recess (when Portman plans to leave), it may be difficult for the Senate to pass a final verdict on Nussle before the fall. On the other hand, the Senate may act quickly, but use Nussle's confirmation battle to serve as a proxy fight between Bush and Congress on fiscal issues. Whatever the outcome, Nussle's nomination is likely to heighten tensions over the federal budget process between the White House and Congress, who are already locked in a heated struggle over federal budget priorities and government spending.

House Battle over Earmarks Procedure Resolved

A fiercely partisan impasse in the House was resolved on June 14 when Appropriations Chair David Obey (D-WI) and Minority Leader John Boehner (R-OH) reached a comprehensive procedural agreement following months of confusion and vituperation over the chamber's earmarks disclosure and approval process. The agreement outlines rules for consideration of earmarks for the House to follow for each of the 12 FY 2008 appropriations bills and appears to be operating smoothly thus far: on June 21, the House Appropriations Committee approved the lists of earmarks for two spending bills

by voice votes.

In late May, Obey announced he would ignore the January reforms adopted by the House requiring that earmarks and their sponsors be identified in spending bills when they are introduced. Instead, he said he would delay inserting earmarks into spending bills until conference, when they can no longer be removed from the bills by amendment. Obey argued he needed several months to vet and sign off personally on over 32,000 earmarks requests, after which point full review on the House floor of the earmarks he approved would be impractical and unnecessary.

Obey's decision and reasoning set off a furious reaction among House Republicans and advocacy groups who argued such a procedure effectively insulated earmarks from any meaningful legislative review, a reversal of practice in the 109th and earlier GOP-dominated Houses and quite contrary to Democratic pledges to bring transparency to the House. National media outlets covered the issue, the *New York Times* alone writing three stories on it in the space of a week.

After two weeks in which Obey was subject to increasingly intense criticism and changed his position a couple of times — consenting to publish earmarks during the August recess but not allow them to be amended or removed — he and Boehner entered discussions on procedures that would quell the tempest. Within 48 hours, after the House GOP leadership prematurely announced a deal at a press conference, the Democratic leadership confirmed the following agreement:

- **Homeland Security and Military Construction-VA**: No earmarks will be included in these bills until conference, but challenges to earmarks added to bills *during* conference negotiations will be permitted.

- **Energy-Water**: No earmarks will be included in this bill, but the House will act separately on a package of earmarks to be added to the bill prior to conference.

- **Financial Services**: The bill, already adopted by the Appropriations Committee without earmarks on June 11, was remanded to the committee and marked-up with earmarks added on June 21.

- **Interior-Environment**: The bill, adopted by the Appropriations Committee without earmarks on June 11, will be accompanied by a supplemental report detailing specific earmarks.

- **The remaining seven bills**: Earmarks will be included in these bills when they reach the House floor and, therefore, subject to amendment.

On June 18, the House formally approved these new earmarks procedures, permitting points of order on any appropriations conference reports containing earmarks added during conference. After only twenty minutes of debate following such a point of order,

the House will vote on whether to consider the conference report in an up-or-down vote. The rule only applies to spending, not tax earmarks; it also requires earmark sponsors to certify that they have no financial interest in a project.

Three days later on June 21, the Appropriations Committee took up the Financial Services bill with earmarks included and the Interior-Environment supplemental report consisting of earmarks for that bill, adopting both by non-contentious voice votes. The two bills are scheduled for floor votes the week of June 25. The earmarks provisions in these bills comprise small fractions of the total spending approved. The $21 billion Financial Services bill now includes $33.7 million in earmarks; the Interior-Environment supplemental report earmarked $119 million of its overall $27 billion in spending. It should be noted this is not additional spending, but merely specific instructions about how to spend money already included in the bills.

The harsh rhetoric in the House earlier this month seems long-forgotten. The practical fallout from the earmarks battle may be that House Democrats have scaled back their ambitious goal of passing 11 of the 12 FY 2008 spending bills by the July Fourth recess. But the bitterness of the debate both in and outside of Congress also serves as a reminder of the powerful resonance that remains with transparency and accountability issues linked to the several scandals that plagued the House starting in early 2006 with Jack Abramoff, through the Duke Cunningham episode, and continue to the present with the recent indictment of Rep. William Jefferson ☼ (D-LA).

President Promises Slew of Vetoes

As Congress looks forward to the July 4 recess, it continues to fulfill a primary responsibility — passing legislation that funds the activities of the federal government. Five of 12 FY 2008 spending bills have passed the House and await Senate approval. But President Bush has signaled he intends to veto bills that could push spending above the $933 billion cap specified in his budget request earlier this year.

Shortly after House-Senate budget resolution conferees began negotiating the spending blueprint for FY 2008, OMB Director Rob Portman warned Congress that he would recommend the president veto spending bills that exceed the president's budget request.

On May 16, Portman issued a press release stating:

> I will recommend the President veto any appropriations bill that exceeds his request until Congress demonstrates a sustainable path that keeps discretionary spending within the President's topline of $933 billion and ensures that the Department of Defense has the resources necessary to accomplish its mission.

This statement is consistent with the administration's historical insistence that annual discretionary spending be kept below the president's discretionary spending cap. But this

year, President Bush faces a Democratic Congress willing to challenge his spending priorities.

The White House has been careful in choosing which spending bills to sign, given the numerical imperatives the president faces if he wants to hold Congress to his $933 billion topline. For example, Portman never issued a veto threat for the Military Construction-VA ("MilCon") appropriations bill prior to certain House approval. It was not necessary for Portman to issue this threat in order to make good on his May statement, because the $4 billion by which it exceeds the president's request does not *per se* render a $933 billion topline mathematically impossible for Congress to achieve.

How does the president's approval of MilCon comport with his insistence that spending bills remain on a "sustainable path"? The House and Senate's 302(b) allocations indicate they will approve four appropriations bills that are less than that the president's request. The total amount that these four bills are below the president's budget is $5.1 billion. This $5.1 billion budgetary wiggle room enables the president to sign a MilCon bill that is only *$4 billion* more than the president's request.

Any additional appropriations bill that exceeds the president's request by more than $1.1 billion would render the "path to the topline" unattainable, and will, according to Portman's statements, necessarily elicit a veto. Therefore, OMB's latest veto threats on the Homeland Security and Energy-Water spending bills should be taken at face value.

Congress and the president seem headed toward full-scale confrontation over purported fiscal principles. There is a $21 billion difference between his and Congress's budgets. The president's budget request is a 7 percent increase over last year's enacted spending; Congress's budget is a 9 percent increase.

The president's appropriations requests may not be seen as the standard of fiscal responsibility. Since he took office over six years ago, President Bush has signed every spending bill that came to his desk, even as the national debt exploded by $3 trillion.

If the president vetoes an appropriations bill, it is not clear how Congress will react. Will all the vetoes be sustained? Will Congress be forced to pass spending bills below its preferred levels to avoid blame for a government shutdown? Resolution to these questions is months way, but the president's stated position is clear: $933 billion and not a penny more.

EPA Announces Proposed Smog Standard

The U.S. Environmental Protection Agency (EPA) has announced proposed changes to the national standard for ground-level ozone, also known as smog. Scientific consensus supports a limit substantially lower than the current standard. EPA's proposal has drawn criticism for being too weak to fully protect the public from the adverse health effects of

ozone. A lack of transparency in the rulemaking process has left the public in the dark as to whether EPA, the White House or industry lobbyists may be to blame.

EPA's National Ambient Air Quality Standard (NAAQS) program regulates a variety of air pollutants found to be harmful to public health. NAAQS is the seminal regulatory program enforcing the Clean Air Act. The Act requires EPA to periodically revise all NAAQS standards, including the ozone standard, to reflect changes in the scientific understanding of air pollutants and the technological feasibility of regulating them.

EPA was under a court mandate to propose a revised standard by June 20. On the morning of June 21, EPA announced a proposed range of exposure. The proposed range is 0.070 to 0.075 ppm. The current standard is 0.08 ppm.

Although any standard within the proposed range would be tighter than the current standard, it would not be stringent enough to adequately protect public health, according to a growing body of scientific evidence. An EPA staff paper finalized in January states a recommendation for a standard "somewhat below" the current standard and as stringent as 0.060 ppm. In March, EPA's Clean Air Scientific Advisory Committee (CASAC) recommended EPA adopt a standard no greater than 0.070 ppm. Later in March, EPA's Children's Health Protection Advisory Committee sent a letter to EPA Administrator Stephen Johnson urging EPA to adopt a standard of 0.060 ppm. In April, 111 independent scientists and medical professionals sent a letter to Johnson endorsing CASAC's recommendation.

EPA Administrator Stephen Johnson called an exposure limit of 0.08 ppm inadequate and recognizes the need for a more stringent regulation. However, Johnson will not endorse a standard within the range proposed by CASAC, EPA's premier scientific panel on air quality issues.

EPA assessed exposure benchmarks of 0.060, 0.070 and 0.080 ppm. According to the preamble to the proposed rule, Johnson believes the data for health effects at the 0.060 ppm level are "too limited." While Johnson does not question the science behind data at the 0.070 ppm benchmark, EPA provides no rationale for considering a range in which 0.070 ppm is the low end as opposed to the high end.

EPA's proposal will follow the scientific recommendation that the standard be specified to the thousandth decimal place. The current standard, 0.08 ppm, has effectively been manipulated to be 0.084 ppm due to rounding. EPA's final rule will close that loophole.

In addition to the proposed range, EPA announced it would accept comments on an even broader range from 0.060 ppm to the current standard. EPA is required to accept all public comments regardless of scope. No aspect of the legal framework governing the rulemaking process requires EPA to make this added distinction. The language is likely a political move which incorporates the views, albeit rhetorically, of public interest groups

advocating for a stricter standard and industry groups calling for no change.

EPA has come under fire from environmentalists for even entertaining the thought of maintaining the current standard when, by its own admission, the standard is inadequate. Frank O'Donnell, president of the nonprofit advocacy group Clean Air Watch, calls it "an outrageous idea, driven by politics instead of science."

The White House has also been implicated in manipulating the proposed standard. During the regulatory review process, the White House Office of Information and Regulatory Affairs (OIRA) held three closed-door meetings with non-governmental interest groups. Two of these meetings included lobbyists representing the auto manufacturing, chemical and other industries. In the third meeting, public interest organizations including the American Lung Association expressed their views. Because the proposed standard is less protective than the scientific community has recommended, the White House is perceived to have given the views of industry undue priority.

One meeting also included a representative from the Office of Vice President Dick Cheney. In 2002, President Bush officially ended the role of the vice president in the rulemaking process. Since then, a representative from the office has been present in only five of 482 regulatory review meetings.

The exact influence of industry interests or the vice president's office is unknown because of a lack of transparency in the rulemaking process. The public is not readily afforded the opportunity to view EPA's pre-review proposal. While EPA staff scientists and two advisory committees suggested markedly tighter standards, it is unclear what agency officials ultimately decided to submit for White House review.

A lack of transparency in the records of regulatory review meetings further obscures public understanding of the decision-making process. OIRA maintains on its website a log of all meetings that identifies which rule was discussed and who attended. However, although Executive Order 12866, Regulatory Planning and Review, requires OIRA to disclose "the subject matter discussed" during these meetings, that information is rarely revealed.

EPA will accept comments on the proposed standard for 90 days after publication in the *Federal Register*. EPA's draft of the final standard will be subject to another review by OIRA. EPA is under court order to publish the final standard by March 2008.

House Legislation Would Force Regulatory Review

The House has approved legislation that would expand the ability of the Small Business Administration (SBA) to aid small businesses in complying with federal and state regulations. However, the bill would also allow SBA to target regulations that the small

business community finds objectionable.

The SBA Entrepreneurial Development Programs Act of 2007 (H.R. 2359), would give new responsibilities to existing regional Small Business Development Centers (SBDCs) to provide small businesses with regulatory compliance advice. SBDCs would provide free training and educational services and free "in-depth counseling" to small business owners and operators. The bill would also expand Internet sharing of regulatory compliance assistance information.

The bill would also require the administrator of SBA to prepare an annual report of federal regulations and recommend regulations to be reviewed. The regulations addressed would be those the administrator determines to be the "most burdensome to small business concerns."

In preparing the list, the SBA administrator would consult with the SBA Office of Advocacy, which typically serves as a liaison between the small business community and the White House or federal agencies. SBA would then transmit the list to the president and the House and Senate small business committees.

Once the list is established, the Office of Advocacy would then identify listed regulations eligible for review under the existing legal framework for rulemaking. The Office of Advocacy would notify federal agencies and the White House Office of Management and Budget of these rules and request the appropriate agency perform a review.

Specifically, the bill focuses on rules for which agencies have not performed a regulatory flexibility analysis or for which the analysis has proved inaccurate. Under the Regulatory Flexibility Act of 1980, while developing rules agencies must perform a regulatory flexibility analysis, which assesses the impact a rule will have on small entities.

The objective of the bill is to reduce or eliminate the burden imposed on small businesses by those regulations SBA identifies. The bill would also raise the profile of those regulations and subject them to greater scrutiny by the White House and lawmakers.

However, the bill's focus on the regulatory flexibility analysis could become problematic. An agency's decision to move forward with a regulation is based on how that regulation will affect society as a whole. While a rule may impose a cost on businesses, it may also hold great benefit for public health, the environment, national security or the economy. The bill would require agencies to review a regulation only from the perspective of businesses.

The provision is also duplicative. The Regulatory Flexibility Act provided that regulations affecting small entities be reviewed every ten years. The bill would expand the burden of agencies by forcing agency officials to review the impacts of regulations at the behest of SBA and possibly on an annual basis.

On June 20, the House voted 405-18 in favor of the bill. The Senate Small Business and Entrepreneurship Committee is scheduled to mark up a similar bill on June 26. Currently, the Senate version does not contain this regulatory review provision.

House Bills Address Mining Health and Safety Shortfalls

Two House bills introduced June 19 address health and safety issues left out of the MINER Act passed in 2006 after coal miners died in three separate accidents in Kentucky and West Virginia. The bills also include provisions that will allow the Mine Safety and Health Administration (MSHA), often criticized for slow implementation of mining laws, to better address new and existing protections.

Rep. George Miller ☼ (D-CA), chairman of the House Education and Labor Committee, and Rep. Nick Rahall ☼ (D-WV), chairman of the Natural Resources Committee, introduced H.R. 2768, the Supplementary Mine Improvement and New Emergency Response (S-MINER) Act and H.R. 2769, the Miner Health Enhancement Act of 2007. In introductory remarks, Miller described the bills as part of an effort "to clean up years of neglect and backsliding" by President George W. Bush's administration and a "complacent" mining industry. The bills come after a series of committee hearings, reports and requests for information from the administration.

The MINER Act of 2006 was passed to address immediate safety concerns after 47 people died in mining accidents that year at the Sago, Aracoma Alma, and Darby mines. Many health and safety provisions discussed after those accidents were not included in the MINER Act. Following the accidents, however, the Kentucky and West Virginia state legislatures passed significant new health and safety measures designed to take advantage of new technology and to improve state enforcement of safety violations. These state actions are considered model proposals for improving mine safety.

The House bills address some of the states' concerns and are intended to supplement the MINER Act and provide a variety of improvements to safeguard miners' health and safety. The bills would also provide services to the families of miners. The S-MINER Act, for example:

- would require mine operators to develop more detailed emergency plans and implement new safety features such as improved communications during emergencies, upgraded standards for conveyor belts, gas and smoke monitoring systems, and sealing abandoned areas of mines;

- would supplement enforcement authority of mine inspectors, establish new penalties on mine operators for violations, provide MSHA with subpoena powers, and create an ombudsman to hear miners' safety complaints and to protect whistleblowers;

- would enhance rescue, recovery and accident investigation authority by requiring prompt notice of serious accidents and "near misses," require improved logistical support for rescue teams, and allow supplemental mine accident investigations by the independent Chemical Safety Board; and

- would revise the 1977 congressionally-mandated standards for respirable coal dust to those long recommended by the National Institute of Occupational Safety and Health (NIOSH).

H.R. 2769 addresses directly other critical health issues Congress mandated in 1977 but never revised or updated. The bill would require MSHA to use the asbestos standard that the Occupational Safety and Health Administration (OSHA) uses for other workers instead of the weaker asbestos standard currently in place for miners. It would also require MSHA to update the list of permissible exposure limits in its air quality standards to the recommended exposure limits set by NIOSH.

In addition, H.R. 2769 would require MSHA to use the hazard communication standard issued in October 2000, which was in place when the Bush administration came into office. According to Miller's statement, the administration amended the hazard communication rule in June 2002 to weaken the timeliness of scientific information on workplace health risks provided to miners.

Also on June 19, Miller and Rahall, along with Reps. Lynn Woolsey (D-CA), Sen. Edward Kennedy ☼ (D-MA), and Sen. Patty Murray ☼ (D-WA), announced a Mine Safety and Health Initiative to help improve health and safety in U.S. coal mines.

H.R. 2768 and H.R. 2769 are part of the initiative. Both bills have been referred to the House Education and Labor Committee. Similar legislation is expected to be introduced in the Senate.

Supreme Court Upholds Right to Run Genuine Issue Ads during Elections

On June 25, the U.S. Supreme Court announced its decision in *Federal Election Commission vs. Wisconsin Right to Life, Inc.*, ruling 5-4 that the federal electioneering communications ban is unconstitutional when applied to genuine issue ads. The case challenged a provision in the Bipartisan Campaign Reform Act of 2002 (BCRA) that bars corporations, including nonprofits, from paying for broadcasts that mention federal candidates 60 days before a general election or 30 days before a primary (known as the blackout period). Though the Court ruled in favor of groups that run issue ads during elections, the debate will likely continue throughout the upcoming presidential election and beyond.

Chief Justice John Roberts wrote the majority opinion, finding that Wisconsin Right to

Life's (WRTL) ads opposing judicial filibusters during the 2004 election season were not the equivalent of express advocacy — supporting or opposing a candidate — but were genuine issue ads. The Court determined that an ad can be regulated and considered express advocacy "only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate. Under this test, WRTL's three ads are plainly not the equivalent of express advocacy." The ads in question were considered genuine issue ads for two reasons: the ads' focus on a legislative issue and the absence of a reference to an "election, candidacy, political party, or challenger; and they do not take a position on a candidate's character, qualifications, or fitness for office."

The Court determined that the content of an ad should be considered, not the context. This rejects the government's argument that genuine issue ads cannot exist during the blackout period because all discussion of issues at that time would essentially become an electioneering ad. The majority disagreed with the government's reasoning; contextual factors are irrelevant, and the fact that WRTL engaged in express advocacy through other, separate actions does not qualify for censorship of issue advocacy. Roberts wrote, "Discussion of issues cannot be suppressed simply because the issues may also be pertinent in an election. Where the First Amendment is implicated, the tie goes to the speaker, not the censor."

Advocates including OMB Watch agree that issue advocacy should be permitted even in the days before an election. Since 501(c)(3) nonprofit organizations cannot support or oppose candidates, they would have been prohibited from conducting any lobbying, or issue advocacy, during the blackout period prior to the Court's decision. Thus, this decision is regarded as a free speech victory for nonprofit organizations.

The Court's decision does not mean the end of campaign finance reform or BCRA, or even an end to the ban on mentioning a candidate by name in an ad within the blackout period. However, it creates an exemption to the ban. The Court's decision is significant because a standard is set — it must be obvious that an ad supports or opposes a federal candidate for it to be forbidden. Yet the test set down by the Court appears vague: one can argue that an ad is always open to interpretation. Issue ads could come remarkably close to express advocacy ads without passing the test of having "no reasonable interpretation other than as an appeal to vote for or against a specific candidate."

Some, however, are concerned about how corporations and unions will now interpret the decision. As an article in the June 26 *Washington Post* stated, "Critics said the decision will encourage a financial arms race between well-heeled special interest groups." Many groups that are concerned about the role of money in elections see the decision as a sign that future chipping away at BCRA is now inevitable.

As an editorial in the June 26 *New York Times* observed, "Although the court's five most conservative justices voted in the majority and the four more liberal justices were the dissenters, the outcome was not easy to categorize simply along ideological lines. Both sides of the campaign finance debate have always attracted unusual coalitions." Indeed,

OMB Watch joined with liberal and conservative groups to file an amicus brief urging the Court to protect the right of charities to broadcast grassroots educational and lobbying communications even during the blackout period.

There remains an uncertain standard for assessing ads during the blackout period, and concerns of money in politics and the possibility of future litigation still exist. The precise impact of the decision and its extent are unclear, but it importantly protects the First Amendment rights of nonprofit organizations that have a valuable voice in public policy debates.

Americans United Calls on IRS to Investigate Rhode Island Catholic Diocese

The Internal Revenue Service (IRS) has cautioned that it will closely watch the partisan political activities of charities as the 2008 election approaches. This enforcement may address new complaints about alleged political intervention, including a June 13 Americans United for Separation of Church and State (AU) letter to the IRS asking for an investigation into the Roman Catholic Diocese of Providence, RI, for possibly violating its tax-exempt status.

In a May 31 editorial, dubbed "My R.S.V.P. to Rudy Giuliani" in the official diocesan publication, *Rhode Island Catholic*, Bishop Thomas J. Tobin wrote he "would never support a candidate who supports legalized abortion." Tobin's article criticized Giuliani's position on abortion. "Rudy's public proclamations on abortion are pathetic and confusing. Even worse, they're hypocritical."

The IRS's recent Revenue Ruling 2007-41 states that in order for an organization "to remain tax exempt under section 501(c)(3), leaders cannot make partisan comments in official organization publications or at official functions of the organization." A column in a 501(c)(3) newsletter that endorses a candidate violates the prohibition, even if the author is speaking as an individual and/or pays for the space. The AU letter to the IRS pointed this out and noted that federal tax law forbids nonprofits from using organizational resources to support or oppose candidates for public office. "Although Tobin may express his individual views on political candidates, federal tax law prohibits the use of non-profit groups' resources to engage in partisan politics. The IRS has repeatedly warned non-profits not to use organizational resources to intervene in elections."

Barry Lynn, director of AU, was quoted in the AU press release saying, "If the bishop wants to join the political fray, he should do so as an individual without dragging along his tax-exempt diocese. A church is not a political action committee, and it should not act like one." The diocese is a nonprofit organization with a 501(c)(3) tax-exempt status. It has rejected AU's claims as having no merit.

Grantmakers Without Borders Challenges Treasury's Senate Testimony

On June 20, Grantmakers Without Borders (Gw/oB), a philanthropic network of 130 organizations, sent a letter to the leaders of the Senate Homeland Security and Governmental Affairs Committee objecting to the Department of the Treasury's portrayal of the agency's relationship with the charitable sector as an alliance on counter terrorism issues. The letter states, "Ironically, Treasury's anti-terrorism policies often chill the valuable work of international grantmakers, including Gw/oB's member organizations. Thus, philanthropic money that funds, for example, farming projects or support for tsunami victims is too often delayed or discontinued."

On May 10, Chip Poncy, the Director of Treasury's Office of Strategic Policy for Terrorist Financing and Financial Crimes, testified before the committee during a hearing on "Violent Islamist Extremism: Government Efforts to Defeat It." Poncy highlighted Treasury's revised Voluntary Anti-Terrorist Financing Guidelines, which he claimed are "based on extensive consultation between Treasury and the charitable and Muslim communities." While there was consultation on the guidelines, in December 2006, a group of more than 40 U.S. charitable sector organizations called for withdrawal of these guidelines.

Despite Poncy's claims about Treasury's outreach efforts, nonprofit requests for dialogue have gone largely unanswered. As Gw/oB's letter states, "Objections from the charitable sector to the Department of the Treasury's anti-terrorism policies have largely fallen on deaf ears." For example, in March, Treasury's Office of Foreign Assets Control (OFAC) published a Risk Matrix for the Charitable Sector on its website without public announcement or comment. This action ignored a June 2006 request from a group of nonprofits that asked Treasury for a public comment period. Similarly, Treasury has not responded to a November 2006 letter from a group of charities seeking a meeting to discuss ways to release frozen funds of charities Treasury has designated as supporters of terrorism to alternative charitable programs.

During the question and answer portion of his testimony, Poncy highlighted Treasury's "dual purpose" analysis of the charitable sector and terrorist organizations, saying all of the 44 charities it has designated as supporters of terrorism were engaged in both real charitable work and terrorist support. He said this gray area must be addressed "rather than the unfortunate fiction that there are charities that pretend to be, but aren't, and charities that just do charitable work." He also said Treasury considers that if any aspect of an organization is engaged in terrorist support, then it considers the entire charitable organization to be complicit. Poncy acknowledged that this approach "raises operational issues as to whether or not Treasury can look at minimalizing collateral damage." To date, it has made no efforts to contain "collateral damage."

Gw/oB's letter noted that no representatives from the charitable and Muslim

communities were called to testify at the congressional hearing, although this would have provided committee members with a more accurate, complete description of the impact Treasury's counter terrorism procedures have had on charitable programs and the lack of trust and credibility Treasury has within the nonprofit sector on these issues.

IRS Seeks Comments on Proposed Revisions to Annual Filing by Nonprofits

For the first time since 1979, the Internal Revenue Service (IRS) has proposed major revisions to Form 990, the annual information return filed by tax-exempt organizations. The draft form, supplementary schedules and instructions are available on the IRS website. The changes include a new Schedule C for all 501(c) organizations to report information on lobbying efforts and activities that support or oppose candidates for public office. It proposes significant increased reporting on lobbying by charities and religious organizations that do not use the expenditure test to measure their lobbying limit. Public comments can be filed electronically or mailed to the IRS by Sept. 14.

The IRS released the proposed revisions for Form 990 on June 14. IRS officials said the redesigned form is meant to enhance transparency for the IRS and the public, promote compliance with IRS rules and minimize the burden on nonprofits. The proposed core form is 10 pages long, and there are 15 proposed schedules for supplemental information.

Reporting on election related activities

Proposed Schedule C, Political Campaign and Lobbying Activities, should be carefully reviewed by nonprofits. The format could be confusing, since the IRS has proposed one schedule for all tax-exempt organizations, even though the largest segment of the nonprofit sector, 501(c)(3) organizations, operate under more restrictive rules than action/civic organizations, labor unions or trade associations.

Part I-A of Schedule C asks all 501(c) and 527 organizations (political action committees) to describe direct and indirect political campaign activities, including volunteer hours and expenditures. Part I-B asks 501(c)(3) organizations about excise taxes imposed for these activities and whether a correction was made, without stating the prohibition against direct or indirect intervention in candidate elections. The Instructions provide minimal guidance on what is and is not allowed, referring to the IRS' recent Revenue Ruling 2007-41 for further details. The instructions also note that "Political campaign activity does not include any activity intended to encourage participation in the electoral process, such as voter registration or voter education, provided that the activity does not directly or indirectly support or oppose any candidate."

The IRS Rationale and Overview says, "The enhanced political activity questions reflect the Service's concern with the results of its Political Activities Compliance Initiative

(PACI)." It notes that the service will "follow up in appropriate circumstances with a flexible array of compliance tools." This array of tools could include an investigation by IRS staff, written warnings to cease certain activities, excise taxes on the organizations and its managers, or loss of tax-exempt status.

Part I-C asks 501(c)(4),(5) and (6) organizations for expanded information on ties between the organizations and political campaigns by asking for information on "all section 527 organizations to which payments were made." This encompasses political parties, candidate campaigns and political committees at the local, state and federal levels.

Reporting on legislative lobbying activities

Part II-A covers reporting of lobbying expenditures by charities that have opted to use the expenditure test to measure their lobbying limits. There are no significant changes in the first part of this section, since the expenditure test only counts money spent on lobbying toward the limit. However, the proposed form also includes historical reporting of total lobbying expenditures over a four-year period. The Instructions say this is because, "if over a 4-year averaging period the organization's average annual total lobbying or grassroots lobbying expenditures are more than 150% of its dollar limits, the organization will lose its exempt status." Pages four through seven of the Instructions provide a good summary of the definitions and rules.

Part II-B applies to 501(c)(3) organizations that have not filed Form 5768, which allows them to use the expenditure test to measure lobbying limits. All other 501(c) groups also report their lobbying activities here. This section could dramatically increase the recordkeeping and reporting burden on charities, since only about three percent have opted to use the expenditure test. All others default to the vague requirement that no more than a substantial part of the activities shall be attempts to influence legislation. The impact of the proposed increased detail in reporting could deter some charities from taking on lobbying activities or move them to file Form 5768 in order to take advantage of the expenditure test's more limited reporting.

The additional detail about lobbying sought from "no substantial part" 501(c)(3) organizations includes:

- volunteers
- paid staff
- media advertising
- mailings to members, legislators or the public
- publications and broadcasts
- grants to other organizations for lobbying purposes
- rallies, demonstrations, seminars, conventions, speeches, lectures, etc.
- other

The form then asks if these activities "cause the organization not to be described in section 501(c)(3)". However, the Instructions provide limited guidance for answering this question. Pages 11-12 explicitly state that these organizations cannot rely on the definitions that apply to the expenditure test. The failure to state a clear limit on what is "unsubstantial" lobbying activity reflects the larger flaw and lack of clarity in the law.

Vice President Avoids Oversight, Claims Office not Part of Executive Branch

On June 21, the House Committee on Oversight and Government Reform released communications between the National Archives and the Office of the Vice President (OVP) detailing how Vice President Dick Cheney has exempted himself from an executive order about safeguarding classified information. The order requires all executive entities to comply with procedures for safeguarding classified information and to disclose basic information on classification practices. In response to repeated requests to comply with the order, Cheney argued that his office is not an entity within the executive branch. Additionally, the OVP has supposedly suggested eliminating the National Archives' oversight authority for classified information security.

Executive Order 12958, which was reaffirmed and amended by President Bush in 2003, requires the National Archives to issue uniform procedures for the classification, declassification and safeguarding of information. The order gave the Information Security Oversight Office (ISOO) at the National Archives the authority to ensure compliance with the requirements by requesting information on classification and declassification activities. This information is then included in an annual ISOO report for the president.

Between the initial release of E.O. 12958 in 1995 and 2002, the OVP annually submitted information to ISOO and operated in compliance with the order. Since 2002, however, Cheney has failed to submit information on classification and declassification activities to ISOO and has refused to recognize its authority. Despite repeated attempts by the director of ISOO to require compliance, the OVP has maintained that it is not an entity of the executive branch. According to William J. Leonard, Director of ISOO, because of its dual legislative and executive functions, the OVP "does not consider itself an 'entity within the executive branch that comes into the possession of classified information.'"

In a Jan. 9 letter to Attorney General Alberto Gonzales, Leonard states that this is an inappropriate and inconsistent understanding of the executive order. First, it is inconsistent in that annual reports were submitted to ISOO until 2002. Second, the OVP's interpretation violates the plain reading of the text of the order. Third, it would have negative policy implications for the authority of the OVP. "I am concerned that this could impede access to classified information by OVP staff," states Leonard, "in that such access would be considered a disclosure outside the executive branch."

The House Committee on Oversight and Government Reform has learned, however, that the OVP has attempted at different times to revise the order to exempt itself from ISOO's authority or to abolish ISOO entirely. "According to Mr. Leonard, your office urged the inter-agency committee considering revisions to the executive order to abolish the Information Security Oversight Office which he heads," stated Rep. Henry Waxman ☼ (D-CA), chairman of the House Committee on Oversight and Government Reform, in a June 21 letter to Cheney. "Mr. Leonard said that your office also proposed a change to the definitions in the executive order that would exempt the Office of the Vice President from oversight."

White House spokeswoman Dana Perino reaffirmed the OVP's position that it is not subject to the executive order, but also stated that the president does not believe that ISOO should be eliminated and that no one has suggested doing so.

ISOO referred the matter to Gonzales in January, requesting clarification of ISOO's authority and whether or not the OVP is an entity of the executive branch and subject to the requirements of the executive order, but Gonzales has not responded. A Justice Department spokesman states that the matter is currently under review.

Congress Moves to Create a Greenhouse Gas Inventory

In an effort to combat the causes of climate change, proposals to collect and publicly disclose accurate information on releases of greenhouse gases are moving forward in Congress. Two recently introduced bills seek to create an inventory of greenhouse gas emissions, and during the week of June 18, the Senate Interior Appropriations Subcommittee included a provision in its bill that would require the U.S. Environmental Protection Agency (EPA) to create such an inventory. These efforts move in the direction of collecting accurate information on such a broad environmental challenge and, if the EPA's Toxics Release Inventory is any indication, could help to reduce emissions through the mere disclosure of information.

The FY 2008 Interior appropriations bill, which was approved by the Senate Appropriations Committee on June 21, includes a provision that would require EPA to issue a rule on reporting greenhouse gas emissions under the Clean Air Act. The bill provides $2 million to establish a program for reporting greenhouse gas emissions from all industry sectors. "This funding is a first step towards helping to understand and reduce our nation's carbon footprint," stated Sen. Dianne Feinstein ☼ (D-CA), chairwoman of the Interior Appropriations Subcommittee, who issued a press statement along with Sen. Barbara Boxer ☼ (D-CA), chairwoman of the Environment and Public Works Committee, in support of the measure. The House FY 2008 Interior appropriations bill does not include similar language, but it does dedicate $2 million to EPA to begin a rulemaking on reducing carbon emissions.

Congress has also introduced two stand-alone bills to create a greenhouse gas inventory

at EPA. Rep. Eliot Engel ☼ (D-NY) introduced the Greenhouse Gas Accountability Act of 2007 (H.R. 2651) on June 12. "To construct a comprehensive, economy-wide global warming policy, we have to know what we are currently emitting, who is emitting it, and data on where in the economy it makes sense to regulate," said Engel. "A comprehensive registry will give us all the data we need to craft future legislation and intelligently decided [*sic*] how to allocate credits in a cap and trade system."

The Greenhouse Gas Accountability Act would require all publicly traded companies and "significant emitters" of greenhouse gases to report to the EPA and for the agency to make the data available in a publicly searchable format. It also requires publicly traded companies to include data on greenhouse gas emissions in their annual financial reports to the Securities and Exchange Commission.

Sens. Amy Klobuchar (D-MN) and Olympia Snowe (R-ME) introduced the National Greenhouse Gas Registry Act of 2007 (S. 1387) on May 14. Their bill amends the Emergency Planning and Community Right-to-Know Act of 1986 to require the EPA to collect and publicly disclose information on greenhouse gas emissions under the annual Toxics Release Inventory (TRI) program. "If weight watchers can have a calorie counter, we can have a national 'carbon counter' so we can figure out the best way to reduce emissions that is good for business and good for the environment," said Klobuchar. The TRI program has been highly successful in demonstrating that simple disclosure of information on toxic pollution can generate significant voluntary reductions. Since the program launched in 1988, it has tracked an almost 60 percent reduction in release and disposal of the chemicals it covered.

With these three efforts moving forward, it is looking like the 110th Congress may pass greenhouse gas inventory provisions in some form. Both S. 1387 and H.R. 2651 have been sent to committee, but no markup dates have yet been scheduled. The House is expected to vote on the FY 2008 Interior appropriations bill this week; it is unclear when the full Senate may vote on the legislation.

Congress Critical of EPA's Information on 9/11

In recent House and Senate hearings, Congress called to task the U.S. Environmental Protection Agency (EPA) and former EPA Administrator Christine Todd Whitman for misrepresenting the health dangers World Trade Center (WTC) dust posed to the public in the aftermath of the 9/11 attacks. The Senate hearing, chaired by Sen. Hillary Clinton ☼ (D-NY), was held by the Committee on Environment and Public Works' Superfund and Environmental Health Subcommittee on June 20; the House hearing, chaired by Rep. Jerrold Nadler ☼ (D-NY), was held June 25 by the Judiciary Subcommittee on the Constitution, Civil Rights and Civil Liberties.

The hearings focused on two main areas: (1) EPA's public communications about outside air quality immediately after the towers' collapse; and (2) EPA's programs to sample and

clean inside residential air. In both instances, EPA's information greatly impacted the public's ability to make responsible decisions for their self-protection.

The EPA, Whitman and other government officials continued to affirm that the assurances about air quality in the weeks after the attacks have been confirmed by scientific evidence. At the hearings, however, officials made a vital distinction between the air in and outside the WTC site and asserted that the safety assurances only pertained to asbestos outside of the pile. While this information may have been included in press releases, it was not verbally announced to the public. As Nina Lavin, a resident in the vicinity of the WTC, testified before the Senate, "What remains crystal clear is Christie Todd Whitman ... assuring New York and the nation that 'the good news is the air is safe to breathe.'"

Experts have questioned whether or not EPA had scientific backing to tell the public that the air was safe. Whitman stands by her outdoor air samples showing relatively low concentrations of asbestos, but as Dave Newman of the New York Committee for Occupational Safety and Health pointed out in the House hearing, asbestos was detected in 76 percent of the dust samples and ranged from 110 percent to 449 percent above the legal limit. Asbestos is just one chemical of concern among many carcinogens that were known to exist in the tower debris.

Whitman and others also assured Congress that workers understood the need to wear protective gear. However, the fact that a 2006 Mount Sinai Medical Report found 70 percent of WTC responders had "new or worsened respiratory symptoms as a result of their work on the WTC site, many with severe conditions," may demonstrate that EPA was not effective in spreading that message during the clean up.

EPA's voluntary programs for residential testing and cleaning tell a similar story. New York City's Department of Environmental Protection's notice to building owners included an EPA statement "that the potential presence of ACM [asbestos-containing material] in dust and debris is minimal." Such statements insinuated that a professional cleaning was most likely unnecessary and not urgent. Not surprisingly, only about 4,000 of the 20,000 eligible residents participated in the program.

A New York City Department of Health Study cited in EPA's Inspector General report found that "most residents did not follow the City's recommended cleaning practices." In a recent second program for testing and cleaning residential buildings, EPA convinced residents to believe their air was safe by using test results from the first program that showed asbestos risks as "very small." What was not explained, but was clarified in the hearings, was that eighty percent of these results were found after a professional cleaning.

John Stephenson, director of National Resources and Environment in the Government Accountability Office (GAO), testified before the Senate committee and indicated EPA has not guaranteed the safety of New York's residents: "We think the data is quite

inconclusive. We don't think EPA has done a comprehensive study on a single building, let alone [all of] lower Manhattan." The majority of the Senate and House subcommittee members present at the hearings agreed with Stephenson's assessment.

Though tough questions were asked and honest testimony given, the hearings ultimately became mired in a blame game that obfuscated the most fundamental reality of EPA communications with the public and WTC workers after 9/11: they didn't work. Given the intense interest of lawmakers, legislation to establish more clearly the EPA's responsibilities during a disaster, including information disclosure requirements, may be forthcoming.

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