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In This Issue

OMB Watch Executive Director Gary D. Bass Comments on USDA's Private Information Breach

On April 20, the *New York Times* broke a story about the U.S. Department of Agriculture (USDA) disclosing personally identifiable information (Social Security numbers and taxpayer ID numbers) of some people who have received financial assistance from the department. The practice, which, according to USDA, affected 38,700 people, has been going on for roughly a decade. The problem was discovered a week earlier by a user of OMB Watch's FedSpending.org, a website providing easy access to information about government spending.

On Friday the 13th no less, Marsha Bergmeier, president of Mohr Family Farms in Fairmount, IL, typed the name of her company on a Google search page, found

FedSpending.org listed, and clicked through. Pulling up information about a loan she received from USDA, she found a field that uniquely identifies information about the financial award also had her Social Security number embedded in it. After Bergmeier notified OMB Watch and the government, it became apparent this was not a unique situation and involved at least two agencies within USDA.

Within a week, there were at least 155 news stories and 88 blog posts about this issue. And the USDA, initially reluctant to acknowledge its mistake, ultimately did so, and agreed to provide free credit monitoring for a year to those affected. The information in the data field, which is called the Federal Award ID, has now been restricted throughout government for all financial assistance awards, which include grants, cooperative agreements, and loans.

The Federal Award ID is a vitally important data field, as it provides a unique identifier about the financial transaction. For anyone investigating particular transactions, that identifier is essential. For example, to request information through the Freedom of Information Act, you need that identifier. Thus, the redaction of the data field is as unacceptable as is disclosing personally identifiable information.

Prodded by Rep. Zack Space (D-OH), the House Agriculture Committee is holding a hearing on May 2 to explore "how the breach happened, the proposed remedies, and recommendations on how to make sure that this never happens again." Additionally, on April 27, Sens. Barack Obama (D-IL) and Tom Coburn (R-OK) wrote a letter to USDA Secretary Mike Johanns stating that the disclosure of personally identifiable information was "improper and unacceptable." They added, "We all should be grateful for the watchful eyes of American citizens," implying support for FedSpending.org and gratitude for people like Bergmeier.

Obama and Coburn called on USDA to provide three things by May 18:

1. An assessment of the harm caused by disclosing Social Security numbers and a report on utilization of the credit monitoring service;

2. A report on what is being done to ensure that data security problems are fixed; and

3. A detailed plan and timeline for adopting a new unique identifier without disclosing personally identifiable information.

On April 16, before the *New York Times* story, the government requested that OMB Watch temporarily remove the unique identifier from the entire database on FedSpending.org. (In the spirit of full disclosure, our website provides a full chronology of communication we had with government officials and others regarding this issue.) We agreed to do so, but only on the condition that the government provide a plan within 30 days on how it will re-generate the unique identifier. This is the same information that

Obama and Coburn requested from USDA.

While USDA has acknowledged its mistake in disclosing Social Security numbers, this issue raises a number of concerns:

1. In an electronic age, there will certainly be mistakes with regard to disclosing personally identifiable information resulting from legacy systems. Government needs a comprehensive approach to inspecting agency websites to discover any problems that may exist today. And it needs a comprehensive plan for addressing problems once it finds them. Reacting by the seat of its pants is not a solution.

2. Should the government establish a uniform approach to applying the unique identifier for financial transactions? The problem arose because every agency employs its own system for crafting a unique identifier, and one department used Social Security numbers as part of its format. Wouldn't it make more sense to create a government-wide format that helps the public understand more about the transaction through the identifier and does not disclose personally identifiable information? For example, the identifier might have a common format that starts with agency code, followed by location of assistance, type of assistance (e.g., a grant or loan), and a sequential numbering.

   This unique identifier is required by law under the Federal Funding Accountability and Transparency Act, commonly called Coburn-Obama, which was signed into law last fall. Coburn-Obama requires the Office of Management and Budget to establish a website like FedSpending.org by January 1, 2008. So the government better get this right — and soon.

3. Why has USDA taken so long to provide re-generation of the unique identifiers? It has now been more than two weeks since USDA was first notified of the problem. Yet OMB Watch still has not received new identifiers to put on FedSpending.org. This is not rocket science, even if USDA cannot make a permanent change in its internal database, which apparently links to its accounting system. What it could do is generate new numbers, without personally identifiable information, as a cross-walk to the older numbers for external use, such as with FedSpending.org. We could post the corrected numbers, and those who still are eager to track government spending could do so.

OMB Watch remains proud of creating FedSpending.org and its role in uncovering USDA's mistake in disclosing personally identifiable information. Since its launch in October 2006, there have been more than four million searches on FedSpending.org. In March, there were about one million searches, and in April there were more than 1.7 million, demonstrating rapid growth in the online service. FedSpending.org was created with support from the Sunlight Foundation, and we plan to continue improving and

expanding the site.

Mapping out the Post-Veto Supplemental Landscape

President George W. Bush and Congress are continuing their power struggle over policies related to the war in Iraq, with a war funding bill containing a "goal" timeline for withdrawal of soldiers headed for an almost certain veto. The funding bill was sent to the president today, May 1, on the fourth anniversary of Bush's "mission accomplished" visit aboard an aircraft carrier, and he is expected to veto it shortly thereafter. With the House unlikely to override a veto, Democrats in Congress are faced with the difficult task of finding a compromise in the next month.

The battle lines have been drawn between the president and Congress, now that the latter has passed H.R. 1591, the supplemental appropriation bill providing all the remaining funding Bush has requested for the wars in Afghanistan, Iraq, and the wider "Global War on Terror" for Fiscal Year 2007, which ends September 30 of this year.

The House cleared the supplemental bill conference report on April 26, 218-212. The Senate did likewise the following day, 51-46. The supplemental bill provides $124 billion in funding for the war and wider military needs, as well as other domestic spending, benchmarks for the Iraqi government to achieve, readiness and equipment standards and combat tour limits for U.S. soldiers, and a deadline "goal" of removing soldiers by March 31, 2008. The bill also provides for an increase in the minimum wage, from $5.15 an hour to $7.25 an hour over two years — the first such increase in close to a decade — and a $4.8 billion dollar tax cut package.

The president promised to veto the bill because he opposes the timelines for the withdrawal of soldiers from Iraq and additional domestic spending items. The House is expected to attempt an override vote that will likely be far short of the necessary two-thirds support to succeed. Democrats have set a May 31 deadline to get a new supplemental bill to the president should Congress be unable to override his veto.

The current impasse has become a momentous confrontation between a president who demands executive authority over war funding and policy, and a Congress that believes it has a mandate to pressure the president for a plan to end the war. The immediate challenge for congressional Democrats should Bush veto the bill is to craft a new version of the bill that will appease the president while not weakening conditions for soldier withdrawal so much that it causes currently supportive anti-war legislators to oppose it. Because of the narrow margin of passage in both chambers, this may be a difficult compromise to strike.

Congressional leaders are scheduled to meet with Bush on May 2 to discuss areas of compromise. Administration officials have suggested that they have flexibility regarding the Iraqi benchmark provision, but the real impasse lies with deadlines for withdrawal of

American soldiers. Some leaders such as House Defense Appropriations Subcommittee chair Rep. John Murtha ☼ (D-PA) have suggested that a pared-down version, stripped of any troop restriction and providing only two months' worth of spending, be sent to the president, enabling all parties to evaluate the progress of the "surge" policies in Baghdad. The chances that the president would find this approach acceptable are likely to be remote.

Another possible compromise that might succeed is for Congress to adopt funding on the president's terms without troop withdrawal provisions, but use the upcoming defense authorization and appropriations bills as vehicles for soldier withdrawal language. Murtha supports this approach, which indicates its viability within the Democratic caucus.

Yet another alternative that some Republicans are interested in would identify benchmarks for accomplishments in the war. In some way, funding might be tied to achieving those accomplishments.

While the impasse continues and Congress awaits the probable veto and subsequent override vote, recent polling shows that a large majority of Americans continue to oppose the war in Iraq and favor a complete withdrawal of soldiers by the end of calendar 2007.

Senate Still Without Strong Earmark Disclosure Provisions

While the House passed earmark disclosure provisions in its initial rules package in January, a stronger proposal for earmark disclosure passed by the Senate as part of a larger lobbying and ethics reform bill has languished for months. Despite the delay, recent rumors of possible action on the companion House ethics and lobbying reform bill have renewed hope the stronger Senate language on earmarks will eventually be adopted in both chambers.

On Jan. 5, the Senate passed S. 1, the Legislative Transparency and Accountability Act of 2007. The bill contains key earmark reform measures that require disclosure of all spending earmarks and targeted tax benefits, the identity of members requesting them, and an explanation of their "essential governmental purpose." In addition, the bill requires earmarks' sponsors to certify that neither they nor their spouses had a personal financial interest in the item and that all this information be made available in a searchable format on the Internet at least 48 hours before a vote. The last requirement was added to the Senate version through an amendment offered by Sen. Jim DeMint (R-SC) and is the key difference between the Senate and House on earmark disclosure issues.

Despite it being a high priority for the House, it has been months since the Senate passed its lobbying and ethics bill, and there is still no House version. Media outlets have once again reported that House leaders plan to introduce their own version this week and

move it quickly to the floor sometime during the first two weeks in May.

Because the House passed a rule change about earmark disclosure, but the Senate chose to enact its provisions on earmarks through legislation, the Senate still does not have any earmark disclosure requirements with the appropriations season fast approaching. In response to this, over the last two weeks, DeMint has tried to introduce his earmark disclosure language as a stand-alone Senate rule (S Res 123), but was met with objections from Sens. Bob Menendez (D-NJ) and Robert C. Byrd (D-WV).

After DeMint's attempts, Byrd, along with appropriations committee ranking member Thad Cochran (R-MS), sent out a press release applying a version of DeMint's language to appropriations committee guidelines.

However, the Byrd/Cochran proposal proved unacceptable to DeMint because it lacked a sufficient enforcement mechanism in the full Senate to ensure appropriations committees "adopt disclosure." Further, there is no requirement in the Byrd/Cochran proposal to make earmark lists searchable online and no requirement that earmark information be made public *before* consideration of the bill.

Because of objections to adopting DeMint's language as a straight Senate rule, it appears disclosure advocates and the general public will have to wait until the House begins work on its version of the lobbying and ethics reform bill for a more rigorous earmark disclosure system to be made accessible to the public.

The Entitlement Crisis That Isn't

On April 23, the Social Security and Medicare Board of Trustees released its annual reports on the two programs. These reports reveal there is not, in fact, an "entitlement" crisis, and that the alarmist language often placing blame on entitlements is generally a pernicious shorthand that glosses over the complicated fiscal challenges facing an aging society with rapidly rising health care costs.

There are no significant changes since last year's reports from the Trustees, but the insolvency date of Social Security — the year in which benefits exceed the program's income — has been pushed back one year to 2041. A more serious concern, however, are Medicare costs, which are being driven almost entirely by faster-than-GDP growth of all health care costs.

While these programs are often mistakenly grouped together in debate about long-term fiscal imbalances, there are different causes of these forecasted imbalances, requiring different solutions. At the recent annual conference of the Committee for a Responsible Federal Budget, current Congressional Budget Office Director Peter Orszag underscored this point by stating, "We do a disservice by uniting the health care issue with the aging issue," adding that neither aging nor "entitlements" in and of themselves are the

problem. Instead, the real problem is health care costs that are spiraling out of control.

Henry Aaron, Senior Fellow in the Economic Studies Program at the Brookings Institution, made a similar argument at a recent Economic Policy Institute forum entitled *Beyond Balanced Budget Mania*. In his PowerPoint presentation, Aaron showed how health care costs are the main factor in driving long-term fiscal imbalances in the federal government.

The imbalance in Social Security is caused by demographic changes — the retirement of the Baby Boom generation — and can be fixed with minor adjustments to taxation and benefit levels or a combination of both. This year, Social Security benefit payments will equal 4.3 percent of GDP. In 75 years, benefit payments are projected to rise to 6.3 percent of GDP, according to the Trustees report.

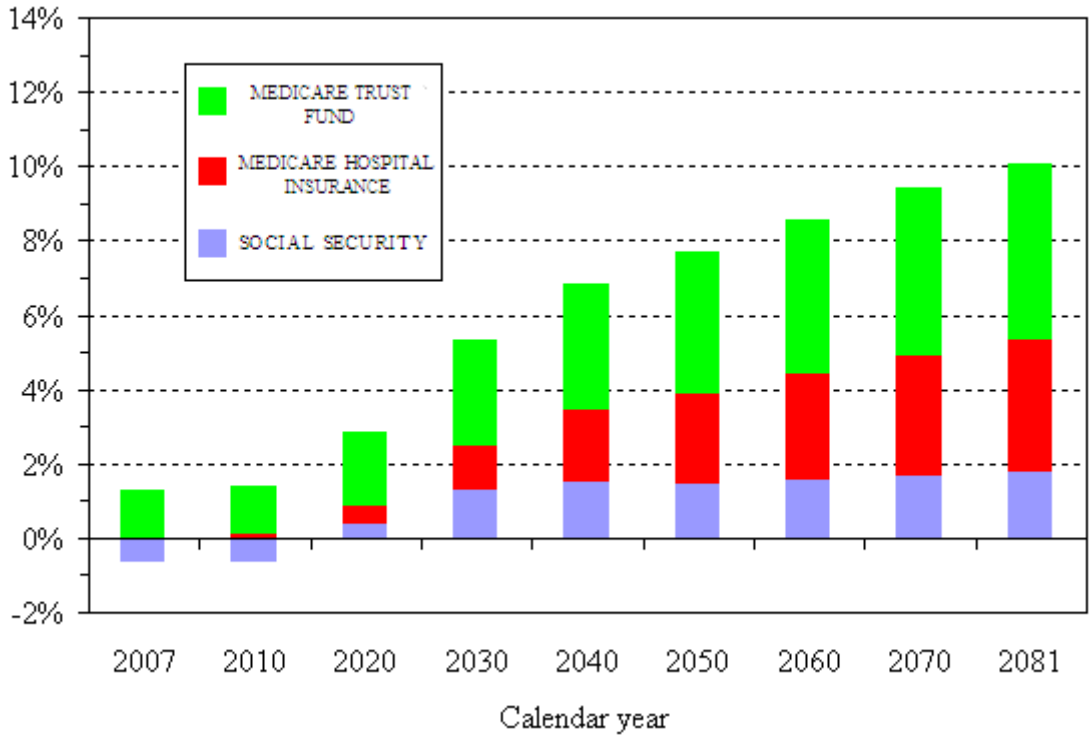
Despite this significant increase, the Social Security program has been bringing in more money from payroll taxes than it pays out in benefits, and will continue to do so until 2017. This is referred to as the Social Security trust fund and has been building a surplus in preparation for Baby Boomer retirements. From 2017 to 2041, projections show that Social Security benefits will be fully paid by a combination of revenue from payroll taxes each year and the Social Security trust fund. In 2041, the trust fund will be exhausted, but the Social Security program itself will continue to collect enough revenue from payroll taxes to pay three-quarters of promised benefits.

The Trustees conclude that Social Security would be fully funded if small changes to the payroll tax rate and benefits paid to retirees over the next 75 years were enacted. In fact, a comparison from the Center on Budget and Policy Priorities helps to put the challenges facing the Social Security program in the proper perspective:

> [t]he cost over the next 75 years of making the [Bush] tax cuts permanent will be about triple the size of the Social Security shortfall. Moreover, the cost over 75 years of the tax cuts just for the top 1 percent of Americans — people with annual incomes over $400,000 in today's dollars — is nearly equal to the cost of closing the Social Security shortfall.

This is hardly worthy of elevation to crisis status.

Unlike Social Security, Medicare's rapidly rising expenditures are more complicated because they are not driven solely by demographic changes, but also rising health care costs. Because of this, the magnitude of the fiscal challenge is significantly greater. As the Trustees report demonstrates, the vast majority of the large increase in future entitlement obligations in these two programs is composed of costs within Medicare (the red and green bars combined):



Projected Social Security and Medicare Shortfall
(Percentage of GDP)

While the demographic changes of the Baby Boomers generation will have an impact on the Medicare program as well, it will face more significant challenges from the steep increase in the cost of health care throughout the U.S. health care system. In both the public and the private sector, health care costs have been increasing significantly faster than economic growth and inflation and are expected to continue to do so.

Over the next 75 years, Medicare expenditures are projected to increase from 3.1 percent of GDP to over 11 percent in 2081. One of Medicare's trust funds, The Hospital Insurance Trust Fund, is projected to be exhausted in 2019. The other, Supplementary Medical Insurance Trust Fund, will never be insolvent because the law ensures that a combination of fees and taxes will keep pace with expenditures.

Because of these factors, controlling Medicare costs should have more to do with reforming and managing the skyrocketing costs in many different areas throughout the U.S. health care system, and less to do with a myopic focus on the structure of the Medicare entitlement program.

None of this is to imply the fiscal challenges that will face the United States are not significant and even alarming. The trustees warn of the extent of the combined financial imbalances in both Social Security and Medicare, noting that "[i]n 2081, the combined cost of the programs will represent 17.6 percent of GDP. As a point of comparison, in

2006 all Federal receipts amounted to 18.5 percent of GDP." While this appears to be a big number, disaggregating it helps to understand the dynamics within the two programs, and yields two very different solutions — neither of which require drastically overhauling either program.

OSHA's Lack of Standard Setting under Fire

This year's Workers Memorial Day, April 28, included criticism of the Occupational Safety and Health Administration (OSHA) — the federal regulatory body charged with ensuring worker and workplace safety. On Capitol Hill and in the media, critics chided OSHA for not fulfilling its mission and falling behind in promulgating new standards to protect the American workforce.

America has observed Workers Memorial Day on April 28 every year since 1989. The day is intended to recognize workers injured or killed on the job and raise awareness of workplace safety. In the week leading to this year's Workers Memorial Day, both chambers of Congress held hearings investigating the record of OSHA.

On April 26, the Senate Health Education and Labor Committee subcommittee on Employment and Workplace Safety held a hearing called "Is OSHA Working for Working People?" AFL-CIO Director of Safety and Health Margaret Seminario criticized OSHA for not creating a progressive standard-setting agenda and instead relying on voluntary industry compliance. "Under the Bush Administration, voluntary efforts and partnerships with employers have been favored over mandatory standards and industry-wide enforcement initiatives," Seminario said in testimony.

During the Bush administration, OSHA has adopted a policy whereby the agency responds to and cooperates with industry in efforts to improve workplace safety. Seminario continued, "With this approach, OSHA has abandoned its leadership role in safety and health, choosing to work with individual employers, rather than taking bold action to bring about broad and meaningful change in working conditions on an industry-wide and national level."

On April 24, the House Education and Labor Committee subcommittee on Workforce Protections held its own oversight hearing. The House hearing maintained a similar tenor. Subcommittee Chairwoman Lynn Woolsey (D-CA) derided OSHA under the Bush administration, saying, "The Administration has the worst record of standard setting of any administration in the history of the law."

OSHA head Edwin G. Foulke Jr. testified at the House hearing and defended his agency. He touted OSHA's enforcement record, saying the agency has "proposed more than three-quarters of a billion dollars in penalties for safety and health violations and made 56 criminal referrals to the Department of Justice, which represents more than 25

percent of all criminal referrals in the history of the Agency."

However, the focus of the hearing continued to be on standard setting. Woolsey claimed a rule protecting workers from hexavalent chromium — a carcinogen found in a variety of industrial products, particularly coatings — to be the only significant standard set during this administration. As Woolsey pointed out, OSHA promulgated that rule in response to a court order.

Franklin Mirer, an expert and occupational health professor from Hunter College, blamed OSHA management for the lack of standard setting. Mirer's testimony repeatedly states OSHA has the resources it needs but is not utilizing them, in one instance stating, "OSHA has staff and other resources to set standards, but that staff has not been permitted to operate."

OSHA's standard setting resources have been consistent for the last several fiscal years. The OSHA program responsible for setting standards was appropriated approximately $17 million in FY 2006 and 2007. For the same years, the program has employed 83 people. However, OSHA promulgated only four standards during FY 2006 and expects to promulgate three in FY 2007. Only one of these, the hexavalent chromium standard, is considered "significant," a term that means the regulation has an annual impact of $100 million or more and is subjected to review by the Office of Management and Budget. FY 2008 resource requests are similar.

Congress is pursuing legislative solutions to the problems at OSHA. Sen. Edward Kennedy ☼ (D-MA) and Woolsey have introduced, in their respective chambers, The Protecting America's Workers Act (S. 1244, H.R. 2049), a bill resurrected from two prior Congresses. The legislation proposes, among other provisions, severe penalties for employers in violation of safety laws, employer-paid protective equipment for workers, and increased protections for whistleblowers.

Off of Capitol Hill, OSHA received its most conspicuous criticism in a front page *New York Times* article published April 25. The article focused on exposure to diacetyl, a food-flavoring agent commonly found in microwave popcorn, which can cause severe lung disease if not properly ventilated. The article chronicled years of neglect by OSHA to promulgate a safety standard for workers who handle diacetyl.

The article frames the issue of diacetyl as reflective of "OSHA's practices under the Bush administration, which vowed to limit new rules and roll back what it considered cumbersome regulations that imposed unnecessary costs on businesses and consumers."

The article quotes David Michaels, occupational health expert and director of George Washington University's Project on Scientific Knowledge and Public Policy, as saying, "The people at OSHA have no interest in running a regulatory agency."

White House Tightens Grip on Regulatory Power Grab

The White House has released a memo instructing agencies on how to implement President George W. Bush's recent changes to the regulatory process. OMB Watch had anticipated the release of such a memo due to the need for clarification of certain controversial provisions within Bush's executive order. However, the memo offers little new information and further confounds issues in some areas.

On April 25, the White House Office of Management and Budget (OMB) and OMB's Office of Information and Regulatory Affairs (OIRA) jointly released a "compliance assistance" memo regarding implementation of Executive Order 13422 (amending E.O. 12866) and OMB's Final Bulletin for Agency Good Guidance Practices. OMB addressed its statement to agency heads. OIRA addressed its statement to agency Regulatory Policy Officers, and the memo was signed by Susan Dudley — her first communiqué as OIRA administrator.

The memo serves to clarify several points of the amended E.O. and the Bulletin. Those documents provide for OIRA review of "significant guidance documents." Under the E.O., "each agency shall provide OIRA, at such times and in the manner specified by the Administrator of OIRA, with advance notification of any significant guidance documents." However, the way in which agencies would transmit guidance documents to OIRA was unclear, as was the timetable for OIRA review.

According to the April 25 memo, after an agency transmits a request to promulgate guidance, OIRA will notify the agency within ten days whether additional consultation is necessary. The agency's transmittal should include, among other things, a description of the agency's intent and how the guidance will address the issue. It should also include, where applicable, a summary of public comments on the guidance.

If the administrator of OIRA deems additional consultation necessary, OIRA will ensure the guidance is consistent with the president's regulatory philosophy. OIRA will also maintain regular contact with the agency in question as well as other agencies. The memo states, "OIRA will complete its consultative process within 30 days or, at that time, advise the agency when consultation will be complete."

The Bulletin requires special consideration for "economically significant" guidance documents — those with an economic impact of $100 million or more or those deemed to have a material impact on the economy or a sector of the economy. Because guidance documents are non-binding statements, OMB Watch has been concerned the designation of economic significance would be impossible to determine.

In its report *A Failure to Govern: Bush's Attack on the Regulatory Process*, OMB Watch states, "This creates a largely speculative analysis to be conducted by the agencies, even assuming reasonably anticipated effects." OMB Watch also points out, "The Bulletin does not, however, require a formal regulatory impact analysis, so it is unclear just how this

determination is to be conducted."

The compliance assistance memo addresses these concerns. OIRA says, "We expect agencies to use common-sense principles and readily available facts" in determining whether a guidance document is economically significant. OIRA urges agencies to anticipate the adoption rate of guidance as well as the potential for costs and benefits. In cases where such assumptions prove too difficult, OIRA suggests agencies consider guidance "as if it were adopted widely by all affected parties," thus magnifying the estimation of an economic impact.

The memo also addresses the issue of agency Regulatory Policy Officers (RPOs), which are to oversee agency decisions about regulations and communicate with OIRA about regulatory matters. The amended E.O. increases the responsibilities of RPOs and requires that those officials be presidential appointees. OMB Watch and other critics have expressed concern these provisions will further politicize the regulatory process and ultimately allow the White House to exert greater influence in agency proceedings. Not only does the memo fail to allay these concerns, it begs additional questions on the RPO appointment process.

One amendment to the E.O. states "no rulemaking shall commence" without the approval of the RPO. Previously, the White House made no attempt to define the point at which a rulemaking commences.

The memo does little to clarify this point, stating, "As a general matter, a rulemaking commences when the agency has decided as an institutional matter that it will engage in a rulemaking." The memo does not define the terms "institutional matter" and "engage." The memo does state rulemaking shall commence no later than when it receives a Regulation Identification Number (RIN). An RIN is assigned to a proposed regulation upon its first publication in the *Federal Register*. This leaves open issues about the role of the RPO in influencing research that may lead to regulatory activity.

Another amendment to the E.O. states, "Each agency head shall designate one of the agency's Presidential Appointees to be its Regulatory Policy Officer." This implies an existing agency official who the president has appointed to an office will take on new responsibilities as an RPO.

However, the memo implies a position, not an individual, will acquire new responsibilities. According to the memo, non-presidentially-appointed officials would be able to serve as RPOs if the individual is serving temporarily: "If a person who is not a Presidential appointee is serving in the acting capacity in a position that is presidentially-appointed (PA), the amended Executive Order does not require an agency head to designate another official to serve as the Regulatory Policy Officer."

The memo also fails to address whether the newly conferred RPO will require Senate confirmation. Considering the significantly expanded responsibilities of the RPO, this

question will need to be addressed. This might be one area in which Congress may wish to exert its constitutional authority and challenge the RPO provision.

Another amendment to the E.O. places an increased emphasis on identifying a market failure before regulating. In *A Failure to Govern*, OMB Watch expressed concern about this revision: "The new language will institutionalize an anti-regulatory approach by using a market failure criterion in place of actually identifying threats to public health and safety."

The memo addresses this issue only briefly. It states, "This is not a substantive change to the Regulatory Principles of Executive Order 12866. Rather, this change makes clear that agencies must state 'in writing' the problem the regulation seeks to address." If this is true, it is unclear what problem the amendment intended to address with the change in language emphasizing market failure. In other words, the Bush administration did not need to modify an Executive Order to require agencies to submit existing work "in writing"; it simply could have issued a memo to agency heads.

Moreover, it is unclear what the statement "in writing" should entail. The memo gives no further guidance as to what kind of assessment agencies should perform when determining a market failure as a reason to regulate.

Agencies were to have designated an RPO by March 19 and have until July 24 to comply with most other provisions of the E.O. amendments and the Bulletin. As of today, there is no list of the RPOs, no description of their roles in agency rulemaking, or any information on how to communicate with these people who now have enhanced powers to influence rulemaking outcomes. OMB Watch continues to oppose the implementation of the White House directives. As OMB Watch states in *A Failure to Govern*, "There is real danger to our constitutional system from this arrogation of power. Equally significant, in our opinion, is the real danger presented to the American public from the delay or refusal to regulate dangerous activities."

House Subcommittee Steps Up Oversight on Regulatory Changes

A House subcommittee held a second hearing April 26 on the regulatory changes President George W. Bush issued in January. Subcommittee Chairman Brad Miller (D-NC) hoped to discover the reasons that the White House issued the changes, but the hearing turned stormy as Miller's inquiries were repeatedly rebuffed by an administration official. After tense exchanges with the official, Miller promised to seek additional documents from the Office of Management and Budget (OMB) and to hold additional hearings on regulatory changes "that affect the lives of millions of Americans."

The Subcommittee on Investigations and Oversight of the House Science and Technology Committee held the first hearing on Executive Order 13422 and OMB's Good

Guidance Practices Bulletin in February. This time, the hearing focused on the internal process OMB used in drafting the E.O. and how OMB intends to implement the changes these two documents require. Miller summed up the changes in his opening remarks:

> Under this order, not just major regulations, but guidance is subject to review by OIRA. And the order creates a new requirement—"market failure"—for any agency to promulgate any regulation. "Market failure" does not appear in any statute as a consideration in rule-making; in fact, Congress flatly rejected the argument that the market will solve the problem when Congress enacted the legislation granting rule-making authority.

In March, OMB Watch released a report on the potential impacts of these changes. On the same day as the second hearing, OMB released its compliance assistance memorandum to agencies on how they are to implement the E.O. and the guidance bulletin. (See the related article in this issue of the *Watcher*.)

The hearing had two separate panels. The first panel featured Steven D. Aitken, the deputy general counsel for OMB and former acting administrator of OMB's Office of Information and Regulatory Affairs (OIRA). Aitken was testifying solely in his capacity as acting administrator of OIRA, as he held that position at the time Bush issued the E.O.. Aitken is a civil servant, not a political appointee. It is highly unusual for the Bush administration to allow a civil servant to testify before Congress, particularly now that OIRA has an administrator, but the congressional committee decided that Aitken had the most knowledge about the E.O. and, therefore, would testify.

In seeking clarification of the process that led to the E.O., Miller and Aitken sharply disagreed on the range of issues Aitken could discuss without violating what Aitken called the "deliberative process." The executive branch often withholds information from the public during the development of ideas, which is often called the deliberative process, since the public will see the final outcome. Courts have upheld this reason for withholding information, but the claim is less certain when it comes to Congress requesting information about the development of policy approaches.

Miller wanted to discover how the administration, in its seventh year in office, determined that the regulatory process needed changes and who was responsible for the various requirements in the amendments. Aitken described generally the process for issuing executive orders but refused to disclose internal deliberations or identify who participated in the order's creation.

The hearing quickly turned tense when Aitken refused to provide details. Apparently, Aitken was prepared to testify about the content of the E.O. — requirements for market failure analyses, agency guidance reviews by OIRA, and regulatory policy officers (RPOs) — according to his written testimony. Miller was clearly expecting that information relevant to the decision to issue the E.O. would be provided. According to Miller, that was the reason Aitken was testifying instead of the new OIRA administrator, Susan

Dudley, who was not involved in developing the amendments. Dudley was named as one of Bush's recess appointments April 4, before the Senate could complete its planned confirmation hearing.

The second panel consisted of four witnesses who addressed the regulatory changes and their perceived impacts. Robert W. Hahn of the AEI-Brookings Joint Center for Regulatory Studies argued that the Bush amendments are not very substantial but nevertheless represent improvements in accountability, especially by bringing agency guidance documents under OIRA review. He also argued that the changes did not go far enough because independent regulatory agencies, like the Federal Communications Commission and the Federal Energy Regulatory Commission, are not covered by E.O. 13422.

Two experts in administrative law testified that different aspects of the Bush amendments are very problematic. Professor Peter Strauss addressed the constitutionality of giving regulatory policy officers additional responsibility.

> Our Constitution very clearly makes the President the overseer and coordinator of all the varied duties the Congress creates for government agencies to perform. Yet our Constitution's text, with equal clarity, anticipates that Congress may and will assign duties to executive officials who are not the President. Respecting those duties, he is not "the decider," but the overseer of decisions by others. When the President fails to honor this admittedly subtle distinction, he fails in his constitutional responsibility to "take Care that the Laws be faithfully executed."... The important point, in my judgment, is to preserve this distinction between presidential oversight — entirely appropriate and constitutionally commanded — and presidential decision. For any agency's unique responsibilities, Congress's delegation makes the precise formulation of its priorities and plans the legal responsibility of the agency head. Honoring and protecting that responsibility is an important element of the President's obligation to assure that the laws are being faithfully executed. And the recent Executive Order amendments reflect a different view, in effect making the President not just the overseer, but the decider of these matters.

Professor Richard W. Parker argued that expanding OIRA review and requiring further cost-benefit analyses takes us down "the wrong path and the wrong direction." According to Parker, what is needed is an accurate evaluation of the costs and benefits of regulations already in place instead of the estimates industry provides prior to regulations taking effect.

OMB Watch executive director Dr. Gary D. Bass testified about the lack of transparency in the regulatory process in light of E.O. 13422. The improvements he proposed focus on 1) the extent to which RPOs, who now will be initiating regulations within agencies, will allow politics to supersede the need for health, safety, environmental and civil rights protections as determined by the scientific and technical experts within agencies, and 2) the extent to which the regulatory changes create mini-OIRA offices in agencies which

may result in the RPOs dictating agency rulemaking and further decreasing agency discretion, especially in the pre-rulemaking stage. "In addition to helping to restore trust in government by providing transparency, the ability to evaluate regulatory outcomes is greatly enhanced by having the substantive basis of decisions available to the public," Bass concluded.

Court Picks Illusion of Safety over Protecting Public

The Second Circuit U.S. Court of Appeals recently ruled that the U.S. Environmental Protection Agency (EPA) is not liable for any harm resulting from their intentional misinformation about air quality around the World Trade Center (WTC) site following the September 11 attacks. The lawsuit, *Lombardi v. Whitman*, was filed by five emergency responders who worked at the WTC site without adequate safeguards, in part because of the misguided assurances of safe air quality. The April 19 court decision favors protecting government liability over the public's right to know about environmental risks that could compromise their safety.

Based on an investigation into the agency's overall response to the 9/11 attacks, the EPA Inspector General released an Aug. 21, 2003, report revealing that EPA communications to the public immediately after 9/11 were misleading. Statements made by EPA did not fully represent the data the agency possessed and were strongly influenced by the White House. News releases omitted important information on risks, such as potential health effects for vulnerable populations like children and the elderly. Even though EPA did not have sufficient data and analyses to determine if the air was safe to breathe, they issued such reassuring statements anyway.

The court held that EPA's actions did not constitute a "shock to the conscience" and so could not be held responsible for harm caused by misinformation, whether deliberate or not. The "pull of competing obligations" — EPA's mandate to inform the public about environmental dangers and the apparent conflicting duty of the federal government to keep peace and order — neutralizes any claim that government action amounts to "deliberate indifference," the standard required to shock the conscience. Creating such loopholes in the standard severely undermines any attempt to hold the government responsible for publicizing flawed and arguably dangerous information. This decision also encourages the government to "spin" health and safety information in future crises.

Though *Lombardi v. Whitman* did not substantively address whether EPA knowingly endangered WTC emergency and clean-up workers, there is considerable evidence that such a "lesser evil" was chosen. The Environmental Law and Justice Project requested under the Freedom of Information Act (FOIA) hazardous material and water samples EPA took in the month after the WTC collapse. The more than six hundred pages received from the request reveal that EPA found unhealthy levels of toxins after three weeks, yet the agency didn't advise area residents or workers to use respiratory protection. An internal Oct. 5, 2001, EPA letter to the head of New York City's

Emergency Operations Center, found through discovery in another court case, refers to potential health concerns for WTC workers from "asbestos and other contaminants...present in the air." However, none of the health concerns or information on the presence of dangerous toxins were voiced to the public. Instead, only assurances on the safety of the air quality were released.

EPA was not alone in neglecting to adequately provide safeguards for the WTC workers. In response to the EPA's Oct. 5 letter, New York City considered ongoing worker exposure monitoring but never implemented the plan since the "costs of this operation appear[ed] to outweigh the benefits." The five plaintiffs in *Whitman* now suffer from chronic medical conditions most likely caused by their work at WTC. They did not wear protective gear because they thought it was unnecessary expressly because of EPA's assurances and lack of any recommendation to use protection, as well as their own agencies' failure to provide any.

It is understandable that government agencies will make mistakes in the aftermath of a crisis for which they are unprepared. EPA's errors, however, were avoidable, but instead, the government chose to make political perception more important than public safety. This failure is yet another example of the current administration's penchant for suppressing scientific evidence. The Inspector General report also implicated the White House Council of Environmental Quality as having "influenced, through the collaboration process, the information EPA communicated to the public through its early press releases when it convinced EPA to add reassuring statements and delete cautionary ones."

The plaintiffs have decided not to appeal this ruling.

Intelligence Agencies' Contracting Practices Remain a Secret

The government refuses to release the findings of a comprehensive study on contracting at the Central Intelligence Agency (CIA), National Security Agency, and other federal intelligence agencies on the grounds that it is classified information and is sensitive to national security. The amount spent on federal contracts government-wide has doubled, from $209 billion in FY 2000 to $384 billion in FY 2005, but this does not include money spent on intelligence contractors, the figures for which are unknown to the public.

The *New York Times* reported last week that, concerned about the heavy reliance on contractors, senior intelligence officials completed a study on the number of contractors working at federal intelligence agencies. There has been greater reliance on contractors to conduct intelligence work since 9/11 due to a rapid increase in demand. The *Times* states that 25 percent of intelligence work is contracted out. The rest of the findings of the study, though, remain classified, as do the budgets and number of employees for all

intelligence agencies.

Since 1999, the CIA has refused to disclose its budget, and it also refuses to release its annual budgets dating back to 1947, except for 1997 and 1998, in which the overall intelligence budget information was voluntarily disclosed by then-director George Tenet, and 1963, in which the CIA budget was shown to be in the public domain and was released under FOIA.

Steven Aftergood of the Federation of American Scientists has sued the CIA multiple times to release budget information under the Freedom of Information Act (FOIA). The best argument for the refusal to disclose, according to Aftergood, is that the decision to disclose would create a precedent for the disclosure of additional information, which could potentially threaten the nation's security. "I have yet to meet any intelligence professional at any level who claims that disclosure [of the intelligence budget] would pose a threat," states Aftergood. "It's a rhetorical straw man that's been empirically refuted."

There was no documented harm following the release of the 1997 and 1998 budgets and no further disclosure of sensitive intelligence information. Moreover, John Negroponte, the former director of national intelligence, publicly revealed that there are an estimated 100,000 federal intelligence employees, another example of disclosure without harm or further disclosure of sensitive information.

When it comes to intelligence activities, the government needs to ensure that potentially damaging information is not released, but it is just as important that other information essential for exercising oversight and accountability is publicly available. Unfortunately, the balance has traditionally been skewed towards concealment due to the general nature of intelligence work. As the 9/11 Commission recommended, the overall intelligence budget and spending by individual agencies should be publicly released in order to promote accountability and reduce secrecy and unnecessary complexity. To institute the Commission's recommendations, the Senate passed Improving America's Security Act (S. 4), which requires the disclosure of the aggregate totals requested and appropriated for intelligence activities. This provision has been formally opposed by the White House. The companion House bill, Implementing the 9/11 Commission Recommendations Act (H.R. 1), does not include a similar provision.

Supreme Court Hears Oral Argument in Grassroots Lobbying Case

The U.S. Supreme Court heard oral argument on April 25 in Wisconsin Right to Life's (WRTL) challenge to the constitutionality of a campaign finance law that limits certain broadcasts, including grassroots lobbying messages, during federal campaigns. The issue before the Court is whether the law is unconstitutional as applied to the facts of WRTL's 2004 grassroots lobbying radio ads. Much of the argument addressed what standard

should be used to define "genuine issue ads" entitled to constitutional protection. For nonprofits, much depends on whether the Court sets a clear standard for the 2008 election year. A decision is expected during the summer, which allows enough time for Congress or the Federal Election Commission (FEC) to establish rules that comply with the Court's decision.

A Short History

The electioneering communications rule is part of the Bipartisan Campaign Reform Act of 2002 (BCRA), commonly called McCain-Feingold after its sponsors in the Senate. It bars corporations, including nonprofits, from funding broadcasts that mention federal candidates 60 days before a general election or 30 days before a primary. WRTL's radio ads encouraged listeners to contact their U.S. Senators on the issue of judicial filibusters. Because Sen. Russell Feingold ☼ (D-WI) was running for reelection at the time, WRTL had to discontinue the ads when the 60-day blackout period began, even though the ad was not about support or opposition to Feingold's election.

The Supreme Court upheld the overall constitutionality of the electioneering communications rule in *McConnell v. FEC* in 2004, but left the door open to challenges to specific applications of the rule involving genuine issue ads. WRTL brought such a challenge, but the FEC argued in court that the *McConnell* decision barred such "as applied" challenges. In early 2006, the Supreme Court rejected the FEC argument and sent the case back to a lower federal court to review the facts. In December 2006, the lower court ruled in favor of WRTL, finding that ads about a public policy issue that do not link the issue to a candidate/officeholder's fitness for office cannot be banned. The lower court argued that the determination of whether the ad was electioneering should be based on the content of the message in the ad, not on the context of the ad. In other words, while WRTL's political committee opposed Feingold's reelection, the ad in question was solely about contacting the senator to oppose a judicial filibuster. Thus, the court concluded that the ad was not electioneering and is protected free speech that cannot be banned even during the blackout period provided by the McCain-Feingold law. The FEC appealed.

The Arguments against WRTL and Questions and Comments from the Court

Press coverage tended to focus more on the changed make-up of the Court since it upheld the general constitutionality of the rule and less on the actual issue before the Court, which was whether the specific facts of the WRTL ad require an exemption from the rule based on the First Amendment. However, the Justices' questions showed that the Court is taking a close look at the factors to be considered.

Attorneys for the FEC and congressional interveners led by Sen. John McCain ☼ (R-AZ) argued that exemptions should be rare in order to avoid undermining BCRA. They said the vast majority of issue ads in studies before the Court in *McConnell* were meant to influence elections. But Justice Antonin Scalia noted at that time, "We didn't have a

concrete case such as this one, in which the assertions of the other side are very appealing as far as the rights of citizens to band together for an issue ad..."

When asked how to determine which broadcasts should be exempted, the FEC's attorney, Solicitor General Paul Clement, declined to suggest a standard. Instead, he said other challenges could be stronger that WRTL's, noting that 501(c)(3) organizations would have an "inspirational" challenge because it would be "difficult" to set up a political action committee to fund grassroots lobbying broadcasts. He also cited a case in Maine where the federal candidate referenced in the ad was unopposed in the election.

Justice Anthony Kennedy pointed out that public attention is often more focused on issues prior to elections, making it a strategic time to air issue ads. Clement responded that groups can air ads without mentioning the official who is also a federal candidate. Kennedy said a group might want to target an official, "in order to affect his conduct or her conduct once they're reelected, so that they'll take a different position, a second look." This raised the issue of dual purpose broadcasts, and Clement said this is what Congress intended to regulate.

Seth Waxman, arguing for McCain, said the standard should be whether a challenger can show an ad "has characteristics such that no reasonable voter could view it as promoting, attacking, supporting or opposing a candidate." He offered no definitions of these terms. Chief Justice John Roberts replied, "Do we usually place the burden...on the challenger to prove that they're allowed to speak, as opposed to the Government to prove — to carry the burden that they can censor the speech?"

The FEC's defense of the rule is that it does not ban broadcasts that mention federal candidates, but only requires them to be paid for with funds raised separately by a political committee subject to contribution limits under federal election law. Justice Samuel Alito asked Waxman, "What do you make of the fact that there are so many advocacy groups that say this is really impractical?" Waxman responded with examples of groups that have not named members of Congress in their broadcasts, but Roberts responded that the fact that one groups chooses not to do so "doesn't seem particularly pertinent to me."

WRTL's Arguments and Questions and Comments from the Court

James Bopp. Jr., representing WRTL, emphasized that the government has "refused to state a test to determine what's a genuine [issue] ad." Responding to Roberts' question of whether it is possible for a fact-specific challenge to the electioneering communications rule to succeed without overturning BCRA, Bopp cited three key features that would protect grassroots lobbying and genuine issue ads. These are based on the content of the communication. Such ads:

- "focus on a current legislative matter, take a position on it, urge people to contact them, their congressmen and senators, to take a particular action or position."

- "the ads do not mention an election, candidacy, political party, challenger, or the official character, qualifications, or fitness for office."
- "as long as the ad meets this pattern...the fact that the ad mentions the name, the position of a public official on an issue and praises or criticizes him or her for that does not affect its genuineness."

Many of the questions the Justices asked Bopp addressed whether the test should be limited to the content of the ad, or take the political context into account. Justice Stephen Breyer gave the example of ads by former Sen. Lauch Faircloth in North Carolina that said he was fighting against trial lawyers' efforts on liability laws, when "one of the parties had spent millions trying to paint Faircloth's opponent, John Edwards, as the creature of the trial lawyers, that anyone in North Carolina knew it....tell me how anyone could know such a thing without looking at the context." Justice David Souter asked, "Why should we ignore the context?"

Bopp responded that "that test....would invite ads to be prohibited based upon the varied understandings of the listener..." to which Souter replied, "It is impossible to know what the words mean without knowing the context in which they are spoken." Bopp also pointed out, "If there is no workable test that is reasonably ascertainable by small grassroots organizations that separates genuine issue ads from sham issue ads — this court said in *Ashcroft* you cannot throw out the protected speech in order to target the unprotected speech," noting that Congress continues to meet during the blackout periods.

Some of the questions related to the portion of the WRTL ad that referred listeners to a website. Although WRTL had a political committee that was working to defeat Feingold, the special website was limited to the filibuster issue.

What's Next?

The Court's decision could go in many directions. It could decide the lower court was wrong not to consider the context of WRTL's ad and send the case back for further consideration. This would make it next to impossible for nonprofits to know what grassroots lobbying broadcasts are worthy of constitutional protection when the primary elections begin in early 2008. Hopefully, the Court will provide clear guidance by setting a concrete standard to apply to WRTL's fact situation. The standard could be based solely on the content of the broadcast. It could include consideration of the speaker's tax-exempt status and ability to establish and fund a political committee. If no such clear standard emerges from this case, we are likely to see multiple challenges to the electioneering communications rule as applied to myriad fact situations. Since the law now allows these cases to be brought in any federal district court, inconsistent standards could emerge and apply throughout the 2008 election year.

House Bill Seeks Accountability for Anti-Terrorist

Financing Programs

Legislation was recently introduced in the House that would require the Departments of State and Treasury to adopt recommendations of an October 2005 Government Accountability Office (GAO) report, which addressed the effectiveness of the U.S. government's efforts to assist other countries in the war on terrorism. Among other things, the bill would require the Treasury Department to submit in an annual report to Congress more complete information on how the agency tracks and blocks terrorist assets. Although the bill does not include all the GAO recommendations, it opens the door to discussions on the effectiveness of Treasury's strategy, including how it deals with charities, especially since the strategy is inconsistent with the State Department's December 2006 "Guiding Principles on Non-Governmental Organizations".

Reps. Gwen Moore (D-WI), David Scott (D-GA), and House Financial Services Committee Chair Barney Frank (D-MA) introduced H.R. 1993, the Counter-Terrorism Financing Coordination Act, on April 17. In addition to the annual reports to Congress, the bill requires each agency to fully outline and agree to responsibilities in carrying out counter-terrorism financing training and technical assistance in a "Memorandum of Agreement."

The major problems highlighted in the 2005 GAO report, "Terrorist Financing: Better Strategic Planning Needed to Coordinate U.S. Efforts to Deliver Counter-Terrorism Financing Training and Technical Assistance Abroad", reflect the overall flaws with anti-terrorism financing programs that also greatly impact charities. For example, since the assets of U.S.-based Muslim charities were frozen, no information has been provided about what Treasury plans to do with the money or even an exact amount of how much charitable aid is dormant. In Treasury's 2005 Terrorist Assets Report to Congress, Treasury estimated these designations have resulted in more than $13.7 million in frozen assets.

As the GAO report also notes, a lack of meaningful measures only leaves uncertainty as to how effective, if at all, freezing charities' assets has been in stopping terrorist financing. "The lack of accountability for Treasury's designations and asset blocking program creates uncertainty about the department's progress and achievements. U.S. officials with oversight responsibilities need meaningful and relevant information to ascertain the progress, achievements, and weaknesses of U.S. efforts to designate terrorists and dismantle their financial networks as well as hold managers accountable."

The detailed reports called for in H.R. 1993 could shed light on the fate of charitable funds and demonstrate the need for procedures to allow the funds to be used for the charitable purposes for which they were intended.

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