In This Issue

The Ever Expanding Superwaiver

A superwaiver provision is moving through the House that would bring a huge shift of power to the Executive Branch and states to override congressional authorizations and funding decisions for a variety of low-income programs.

The superwaiver is part of the TANF welfare reform authorization bill (H.R. 4700) that is expected to come before the House on Wednesday or Thursday of this week (May 15 or May 16). As was feared, the provision is much more troublesome than previous versions (see this article in the last issue of the OMB Watcher). While these superwaiver provisions are in the TANF bill, they go well beyond concerns about welfare reauthorization. If enacted, the superwaiver would represent a huge shift of power from the Legislative to the Executive Branch of government. The superwaiver would undermine the power of Congress, as our elected legislators, to authorize programs and appropriate funds. It would also undermine the power of citizens and taxpayers to affect deliberations and decision-making about federal programs and funding.

The superwaiver or "State-Flex" provisions are being pushed under the guise of giving more flexibility to states to administer low-income programs. However, they go far beyond "flexibility" and provide the means for states and the Executive Branch (through Cabinet Secretaries) to bypass Congressional authority and redirect Congressionally-authorized funds with no public input and little accountability. President Bush is playing a key role in advocating for the superwaiver.

What is the Superwaiver?

It allows a state to apply to each Federal agency with jurisdiction over any of the below-named programs for an unlimited number of waivers to "integrate" two or more of these programs, waiving many of the statutory and regulatory requirements attached to the individual programs.

What programs would be affected?

The following expanded list of programs have all been included in the legislation:

- TANF
- Social Services Block Grant
- Most job-training programs under the Workforce Investment Act (except Title C)
- Job Opportunities for Low-Income Individuals
- Employment Services under the Wagner Peyser Act
- Adult Education and Family Literacy Act
- Child Care and Development Block Grant
- United States Housing Act (except most of the Section 8 rental program and the Section 7 program for designated public housing for occupancy by certain populations)
- Titles I, II, III, IV of the McKinney-Vento Homeless Assistance Act
- Food Stamp Program

Given the substantially expanded number of programs, this version does add some very vaguely defined "safeguards," including the requirement of performance objectives, ongoing and final evaluations, and a presentation and report to Congress (after the fact). There are still only three primary requirements for approval:

- The project has a reasonable likelihood of achieving the objectives of the programs that are included.
- The project must have a reasonable expectation of meeting cost neutrality requirements, i.e., the cost of administering the project shouldn't exceed the cost of the individual programs.
- The project involves the coordination of two or more programs.

As before, a waiver cannot be granted that violates civil rights, the purposes or goals of the program, maintenance of effort requirements, health or safety, labor standards, environmental protection, and some other requirements specific to each of the covered programs. However, waivers of provisions to do with eligibility or benefits or virtually anything else not covered by the previous list ARE allowed.

H.R. 4700 also returns to the legislation the provision that if the Secretary of a Department fails to approve an application for a waiver within 90 days, the waiver is considered granted.

The superwaiver gives unprecedented authority to the executive branch at the expense of congressional appropriating and authorizing committees. It would allow the waiver of the eligibility and benefit standards that were authorized by Congress for each program. It would allow provisions that were congressionally mandated specifically to protect low-income people to be undermined. It would allow funds to be shifted from one program to another program, superceding the appropriations decisions made by Congress every year. Finally, rather than the largely open and transparent Congressional proceedings, the granting of waivers would be a closed-door deliberation between the Executive Branch and a state (or if not approved in 90 days, solely the state's discretion), with no opportunity for outside participation.

For a more detailed analysis see today's Center on Budget and Policy Priorities analysis.

More than 200 nonprofit organizations from around the country and representing a variety of areas of interests, signed on to a letter urging House members to oppose the super-waiver. Read the letter and see who signed on.

Stop Permanent Repeal of the Estate Tax

This alert provides background information on the estate tax and 5 action steps you can take to help prevent repeal of the estate tax. Read through the alert and then contact your Senators through this legislative link -- the talking points included in this alert are also available there to provide suggestions for your letter or call to your Senators.

What is the Estate Tax?

The estate tax is applied when someone leaves behind an estate worth at least $1 million at the time of death. There is no tax on the first $1 million, a limit which rises gradually to $3.5 million by 2009. Additionally, there is no limit on amounts of money that can be given to charitable organizations in order to lower the size of the estate to be taxed.

What is Current Law?

Last summer as part of the massive Bush tax cut, the estate tax was temporarily repealed for one year -- 2010 – and will be reinstated in 2011. This year, the House passed a bill to permanently repeal the estate tax, which will cost $100 billion over the next decade and $850 billion over the next 20 years.

So What's Happening Now?

Sen. Phil Gramm (R-TX), along with Sen. Jon Kyl (R-AZ), have received assurances from Majority Leader Tom Daschle that they can bring up an amendment to permanently repeal the estate tax before June 28.

What Can You Do?

Call or write your Senators and tell them to vote *AGAINST* the Gramm/Kyl amendment for permanent repeal of the estate tax.

The other side is making this their number one issue. According to Dan Danner, a Vice President for the National Federation of Independent Business and a leader in the Family Business Estate Tax Coalition, "It appears the 'death tax' repeal is doable now, so our recommendation is, 'Go for it.'" Groups such as the National Association of Wholesalers-Distributors "are putting as much shoulder behind this as we possibly can. If we can succeed with the 'death tax,' we'll create significant momentum to make the rest of the tax cuts permanent. If we fail, there will be no more action until after the elections."

We need to get our voice heard against these powerful special interests. Here are five things you can do:

1. Fax a letter, call, or email your Senator to vote NO on the Gramm amendment to permanently repeal the estate tax. Go to OMB Watch's Action Page and simply type in your zip code in the box provided. Talking points are provided as suggestions.
2. Visit your Senator during the upcoming Memorial Day congressional recess (May 27 –June 3). Now is a good time to schedule meetings with your Senators (or their staff) to tell them the many reasons why permanent repeal is the wrong choice for your state and the country. We are preparing additional state specific talking points -- so check back here in the next few days.

3. Write letters to the editor or op-eds for your state and local newspapers -- check back here in the next few days. To send a letter to the editor to your newspaper, visit the media section of this Alert System

4. Volunteer to get others engaged. If you are willing to help, contact OMB Watch's Ellen Taylor (taylore@ombwatch.org) or Cate Paskoff paskoffc@ombwatch.org), or United for a Fair Economy's Chuck Collins (ccollins@faireconomy.org).

5. Review our Estate Tax Resource Page for more information about the estate tax.

Talking Points

Permanent repeal of the estate tax:

- **Is fiscally irresponsible and sets the wrong priorities for the country** – Permanent repeal of the estate tax would cost the federal government just under $100 billion over the next 10 years, with $55 billion of this coming in 2012 alone; it will cost $850 billion over the next 20 years. At a time when we have so many other pressing needs – ensuring the strength of Social Security and Medicare, providing for homeland security, and educating our children – we just cannot afford to repeal the estate tax.
- **Violates our nation's sense of fairness** – A founding principle of our country is the notion of an equal opportunity for all. Repealing the estate tax is a gift to multi-millionaires at the expense of 99% of American taxpayers. Ultimately, it will shift more taxes onto the rest of us.
- **Will hurt charities** – The estate tax strongly promotes charitable giving and the creation of charitable foundations. Eliminating it will have an adverse impact on the services provided by nonprofits in our communities – even as repeal also diminished the federal and state revenue for these services.

Agency Data Quality Guidelines Issued

In the last two weeks, most agencies covered by the Paperwork Reduction Act published proposed guidelines to implement the Data Quality Act, which was passed as a rider to an appropriations bill. The agency guidelines are to comport with guidelines developed by the Office of Management and Budget (OMB) earlier this year. The list of agency guidelines is available online. Most agencies provide until the end of May to submit comments on the guidelines.

The OMB guidelines require agencies to establish procedures for ensuring high quality of the information disseminated and used by agencies. OMB notes that as the importance of the information grows so too does the obligation to ensure quality with "influential" information requiring the highest standard. OMB argues that there are three types of "influential" information, each requiring levels of transparency so that the results can be reproducible. For analysis of risks, OMB urges agencies to adopt or adapt its preferred choice for doing risk assessments. Most agencies seem to have adapted the OMB procedures.

OMB also requires agencies to have in place administrative mechanisms by October 1 to allow "affected persons" to seek and obtain timely correction of information disseminated by the agency. In its final action on the guidelines, OMB added a requirement that agencies are to establish an appeals process for those unhappy about agency actions on error correction. The guidelines leave it to agencies -- or perhaps the courts -- to determine how formal the appeals process must be and whether it is an adjudicatory one. It also leaves it to agencies to determine how long the public will have to raise corrections that are needed.

Many in the public interest community are concerned that this administrative mechanism will be a tool for industry to slow down, if not stop, agency regulatory activities since regulations are based on research that will be subjected to the Data Quality Act. The Chamber of Commerce has argued that these Data Quality guidelines are the most important regulatory change since passage of the Administrative Procedure Act in the 1940s.

OMB also instructs agencies to develop pre-dissemination quality reviews for information the agency disseminates after October 1. Agencies may utilize existing practices to meet this requirement.

There are many other requirements agencies must determine, such as how they will use independent, external peer review. OMB urges such peer review, but indicates it, alone, may not be sufficient for determining data quality. OMB also adopts a peer review policy that does not require public disclosure of whether peer reviewers have any conflicts of interest.

Most of the smaller agencies have provided a parroting of the OMB guidelines suggesting that it will still take time to know how these new rules will be implemented. One agency, EPA, notes at the onset that a core mission of the agency is dissemination of environmental information in order to strengthen environmental protections. It appears to be one of the few agencies that starts from that premise.

OMB Watch will be preparing additional materials on the agency data quality guidelines. We will also be speaking at a public meeting EPA is providing on May 15.

PACs Get Extension for Filing IRS Reports

The IRS has extended the deadline for PACs to file their registration and disclosure reports to July 15.

Since the Stealth PAC law became effective in July 2000 there has been confusion about which political committees exempt under Section 527 of the tax code are required to file reports at the Internal Revenue Service (IRS). Many state and local PACs wrongly assumed they were exempt because they do not support federal candidates and file reports at the state level. Efforts to exempt such groups have failed to pass in Congress, and many could have been liable for millions in fines for non-filing.

The IRS has extended the deadline for PACs to file their registration and disclosure reports to July 15. (See IRS Notice 2002-34) After that date any group failing to file will be subject to the penalties. In an effort to encourage voluntary compliance and educate Section 527 organizations about their obligations under the law, the IRS has issued a new fact sheet detailing what forms are needed, and how the deadlines are determined.

Rumors Swirl Around CARE Act

The faith-based initiative compromise bill introduced in the Senate by Sens. Joe Lieberman (C-CT) and Rick Santorum (R-PA) is expected to come before the Senate Finance Committee before Memorial Day, and rumors about substitute bills and amendments continue to circulate.

Senate Finance Committee Chair Max Baucus (D-MT) and Ranking Member Charles Grassley (R-IA) are said to be preparing a substitute that would drop or modify the nonitemizer deduction and possibly add some recommendations from the Joint Tax Committee's (JCT) 2000 report on nonprofit disclosure. It is not known which of these JCT recommendations might be added, but the focus is likely to be on fundraising practices. OMB Watch, Independent Sector, the Alliance for Justice, and other nonprofits joined together to oppose many of the JCT disclosure recommendations for lobbying as being overly burdensome and intrusive.

The substitute bill may also include a JCT recommendation that would simplify the rules governing lobbying by 501(c)(3) organizations that choose the expenditure test to measure their lobbying. This change would eliminate the distinction between direct and grassroots lobbying, but would keep the direct lobbying expenditure cap.

No Alternatives for TOP and CTCs Available in FY 2003

On May 20, the federal Community Technology Centers (CTC) program is expected to release it's third grant notice, to help create and expand technology access within the context of educational opportunity and lifelong learning for the public in underserved and economically distressed urban and rural areas. This may, however, also be the last grant notice for the program.

The program, begun in 1999 under the Department of Education's Office of Adult and Vocational Education, has, to date, distributed some $72 million in matching grants to more than 200 organizations in support of over 500 community technology centers. This third grant notice, will include some 80 matching grants from $75,000 to $300,000 and will help create and expand technology access within the context of educational opportunity and lifelong learning for the public in underserved and economically distressed urban and rural areas.

Under the Administration's budget request for FY 2003, the CTC program would be eliminated, in favor of support of a number of other department initiatives, including the formula grant 21st Century Community Learning Centers (CLC) program. CLC supports academic enrichment opportunities for K-12 students and their families in school districts with high concentrations of poverty and/or low-performing schools during after-school, summer, and weekend hours. Unlike CTCs, CLCs do not provide technology access and training for education or workforce skills as a primary service. CLCs, moreover, are specifically school-based efforts, whose programs are not necessarily open to the wider public.

The Administration proposed to offset the potential gap in community technology investments by providing funding for the Neighborhood Networks program under the Department of Housing and Urban Development. Launched in 1995, the initiative has helped to coordinate public-private collaboration between community partners and residents in low- and moderate-income multifamily housing (as well as individual efforts under other HUD-supported programs) around technology access and skills training for residents.

While the Neighborhood Network centers directly engage residents in their operations and administration, the scope of activity is heavily focused on services to the residents themselves, and not the broader public -- though in many cases centers do provide activities open to residents in surrounding communities. More significantly, the Neighborhood Networks only provide outreach, technical support and assistance, but not federal grants, to centers and their coordinating partners, which in turn must demonstrate self-sufficiency and sustainability -- including income-generating revenue streams -- before their inclusion in Network activities. Though the Administration's FY 2003 budget requests level funding of $20 million, it does not call for any actual funding to support grants activity similar to the existing federal CTC program.

The other key community technology initiative slated for elimination under the FY 2003 budget is the Technology Opportunities Program (TOP), currently funded at $12.5 million. Started in 1994 under the Department of Commerce's National Telecommunications Infrastructure Administration, the program provides matching grants for local collaborative efforts to build advanced telecommunications and information technology infrastructure for delivery of social services -- including education, health, employment, and public safety -- to underserved rural and urban areas. Despite leveraging of $192.5 million in grants with $268 million in matching funds from local sources to develop over 530 public-private efforts, the program has been frequently targeted for elimination. Most recently, it was attacked on an unlikely front.

In late 2001, as much as $390 million of the $400 million available under the E-Rate program -- under which fees collected from telecommunications firms by way of consumers provide a range of discounted telecommunications services to schools and libraries -- was slated to be funneled to support expansion of the Rural Health Care (RHC) program for the next two years. RHC, a universal service initiative designed by the Federal Communications Commission to provide discounts on telecommunication services to rural health care providers for telemedicine and telehealth efforts, is currently capped at $10 million. Because RHC discounts consist only of the difference between rates charged to urban and rural providers, the program has never enjoyed the popularity of E-Rate. Post-September 11 concerns around bioterrorist attacks and inadequate community emergency response systems, however, prompted House Commerce Chair Billy Tauzin (R-LA) to introduce legislation expanding the scope of RHC to enhance community-level capacity to support telemedicine and emergency information.

Concerned that such an arrangement would siphon off funding available for school and library telecommunication connections and services, E-Rate supporters worked with House Commerce Ranking Member Rep. John Dingell (D-MI) on compromise language that instead would have diverted all TOP funding for two years to support RHC expansion for urban, rural and Native American telemedicine projects -- despite TOP's established track record on similar projects. A Senate version of the legislation called for increases in the information and communications technology equipment capacity for health care providers, but without use of TOP or E-Rate to fund expansion or federal-state coordination for such efforts. The differences around the House bill, which passed by an overwhelming vote at the end of February, will be addressed in conference, currently slated for late May. A number of Senate conferees have already expressed support for TOP funds to not be committed exclusively to telemedicine infrastructure improvement.

In addition, Sen. Max Cleland (D-GA), along with Rep. Edolphus Towns (D-NY), introduced legislation in mid-March to establish a digital network technologies program under TOP, which would provide educational and job training opportunities through initiatives aimed at students, teachers and faculty, and related personnel within historically Black, Hispanic, Asian-Pacific Islander, Alaskan and Hawaiian, and tribal-serving institutions of higher learning.

Survey for Nonprofits With Government Grants

Federal agencies are now working to streamline the federal grants process. We are conducting an online survey of nonprofits to provide input to the agencies on priorities.

In 1999, Congress passed the Federal Financial Assistance Management Improvement Act, Public Law 106-107 initiating a process to create uniform grant applications and reports. (The law is the result of nonprofits advocating for this streamlining process and passed Congress unanimously.) Federal agencies are now working to implement the law, and a major focus of the program is E-Grants.

OMB Watch is co-sponsoring with GuideStar and the Urban Institute the Streamlining Nonprofit Grants Management Project, which is a nonprofit sector response to this federal initiative. We are organizing a sector-wide network to address grants management issues of special interest to nonprofits. We will prepare and submit comments and recommendations to the federal government and facilitate implementation of selected recommendations.

Nonprofits that receive government funds are urged to complete the survey and join the Streamlining Grants Management Project's network to help us establish priorities for nonprofit federal grantees.

For detailed information about the Federal initiative see the Grant Streamlining page on our website.

Court Rejects Move to Allow Dumping from Mountaintop Mining

A recent ruling in federal district court casts doubt over a Bush administration plan that would allow dumping of dirt and rock waste from mountaintop mining into valley rivers and streams.

In the May 8 decision (*Kentuckians for the Commonwealth v. Corps of Engineers, S.D. W.Va.*, No. 2:01-0770, May 8, 2002), Judge Charles H. Haden blasted a new "final rule" by the Army Corps of Engineers and the Environmental Protection Agency (discussed in the last issue of the Watcher) to expand the Corps' definition of allowable "fill material," saying it addresses "political, economical, and environmental concerns to effect fundamental changes in the Clean Water Act (CWA) for the benefit of one industry" -- the mining industry.

The rule, which was published in the *Federal Register* a day after Haden's decision, would allow the Corps to approve dumping from mining companies in river valleys -- virtually inevitable in mountaintop mining -- under Section 404 of the CWA. However, Haden found that Section 404 does not permit such dumping for the sole purpose of waste disposal.

"'Fill material,' as regulated under Sec. 404, refers to material deposited for some beneficial primary purpose: for construction work, improvement and development in waters of the United States, not waste material discharged solely to dispose of waste," Haden wrote. "Accordingly, approval of waste disposal as fill material under Sec. 404 is … beyond the authority of either administrative agency, the Corps or the Environmental Protection Agency (EPA). To approve disposal of waste other than dredge and fill regulations rewrites the Clean Water Act."

However, EPA spokesperson Joe Martyak told BNA (a Washington trade publication) that agency officials disagree with the decision and would seek a stay in the ruling pending an appeal; a lawyer for the plaintiffs, Kentuckians for the Commonwealth, countered that the court's decision "effectively invalidates the rule."

Such changes suggested by the Corps' rule, fundamental to the CWA, "should be accomplished and considered in the sunlight of open Congressional debate and resolution, not within the murk of administrative after-the-fact ratification of questionable regulatory practices," Haden declared. Yet Congress does not seem likely to side with the Corps. In fact, Rep. Christopher Shays (R-CT) and Frank Pallone (D–NJ) recently announced legislation, The Clean Water Protection Act (H.R.

4683), which would reinstate the original definition of fill material.

Although expressly prohibited, the Corps has still permitted the dumping of mining waste in streams and rivers over the years -- with devastating consequences. A 1998 study by the U.S. Fish and Wildlife Services, for instance, found that through July 1995, 345 miles of Kentucky streams already had been destroyed by such "valley fills," as noted by Kentuckians for the Commonwealth.

OMB Watch had suggested that John Graham, administrator of OMB's Office of Information and Regulatory Affairs (OIRA), which acts as regulatory gatekeeper across agencies, reject the joint rule from the Corps and EPA. After all, Graham has said that he would stand up for regulation where it's needed, that contrary to his critics, including OMB Watch, he has no anti-regulatory bias. Nonetheless, OIRA granted approval to the dumping rule after a review of just one day. In comparison, it took OIRA an average of 45 days to approve EPA rules proposed in the first four months of this year.

OMB Pushes Consolidated Online Rulemaking

The Office of Management and Budget (OMB) has announced that it will create a single web site where citizens can comment on proposed agency regulations, according to a May 6 memo from OMB Director Mitch Daniels to heads of agencies and executive departments.

There are a number of agency web sites dedicated to online rulemaking, yet they are often difficult to find, and a user must know which agency is proposing which rule in order to find it in the current system. OMB's On-Line Rulemaking Management E-Government initiative (OLRM), as the project is called, will streamline the process so that users may find all proposed rules on one web site.

A recent Pew Foundation survey on how people use government agency web sites found that 23 million Americans used the Internet to comment on proposed rules, regulations, and policies in 2001, a clear sign that more and more people are using the Internet to get involved in government.

The OLRM initiative is part of the President's E-Government Strategy, which seeks to use the Internet to improve government services and transactions.

Secrecy at the EPA

On May 6, 2002, President Bush granted Environmental Protection Agency (EPA) Administrator Christine Todd Whitman the authority to classify information as "Secret." This order was published in the May 9, 2002, *Federal Register*. The delegation of this authority is provided in accordance with Executive Order 12958 of April 17, 1995, entitled ''Classified National Security Information.''

Executive Order 12958 prescribes a uniform system for classifying, safeguarding, and declassifying national security information. According to E.O. 12958, information may be classified at three levels: Top Secret, Secret, and Confidential. President Bush's May 6 order allows Administrator Whitman to classify information as Secret or Confidential, but not as Top Secret. The Executive Order indicates that Confidential should be used for information which an unauthorized disclosure could reasonably be expected to cause "damage" to national security, Secret classification for "serious damage" and Top Secret for "exceptionally grave damage."

Once the information has been classified a person can only gain access to the information if it meets three requirements:

1. An agency head or the agency head's designee determines eligibility for access;
2. The person has signed an approved nondisclosure agreement; and
3. The person has a "need-to-know" the information.

According to EPA sources, the Agency discovered shortly after September 11 that its authority to classify material that could pose a threat to national security was limited. Based upon their concern that some of the information EPA might develop in its efforts to learn more about potential chemical, biological, or radiological threats could potentially have national security implications it re-applied for original classification authority. It is also reported that the authority is expected to be used "sparingly," if for no other reason than the fact that few EPA employees have clearance.

While President Bush's May 6 order only grants this classification authority to Administrator Whitman, under E.O. 12958 the Administrator also gains the ability to delegate the authority to classify original information secret or confidential to other government officials such as senior EPA officials.

EPA's policy over the past dozen years has been to operate in the sunshine. Republican EPA Administrator William Reilly promulgated a "fishbowl" policy where the agency should operate as though it were in a fishbowl for all to see, and a Democratic administration continued this policy. Where it needs secrecy, EPA already has the authority to make confidential business information (CBI) confidential, along with enforcement information being used in a legal case and information that is considered pre-decisional.

The May 6 order follows a March 19 White House memo instructing agencies to carefully consider whether "sensitive but not classified" information should be disclosed to the public. Unlike this new order, the terms "sensitive budget not classified" are not defined.

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