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Congress Passes Supplemental War Funding Bill

President Bush signed an $ 82-billion emergency war funding supplemental into law on May 11, one day after the bill received Senate approval. The Senate voted unanimously for passage despite some questionable provisions. And with the ink barely dry on the emergency fiscal year 2005 (FY05) supplemental, House appropriators are already discussing the next round of war funding, which the Pentagon may request as early as August.

The FY05 supplemental contains $ 75.9 billion for military operations, yet many House members believe an additional "bridge fund" will be needed to pay for war operations between the start of the fiscal year on Oct. 1, and the time when Congress will be able to pass an FY06 supplemental. This next supplemental is estimated to fall between $ 35 billion and $ 40 billion.

Besides funding war operations, lawmakers also managed to tack some pork-barrel spending onto the bill. A small portion of the emergency war supplemental funds will go toward studying preservation of Rio Grande River silvery minnows, providing debt service on a firefighting training academy in Elko, NV, and allowing oil and gas exploration along Mississippi's Gulf Islands National Seashore.

Senate Majority Leader Bill Frist (R-TN) was also able to quietly attach another non-war related provision to the bill. His measure will create a temporary worker program for up to 10,500 Australians. Many lawmakers are criticizing the provision because they believe immigration policy should be left to the Judiciary committees. Frist's case for the immigration provision was bolstered when the House attached the "REAL ID" measure to the legislation, which mandates tougher application requirements for driver's licenses and asylum standards.

Besides making asylum claims more difficult to pursue, the controversial REAL ID provision gives Secretary of Homeland Security Michael Chertoff the right to waive all law in his efforts to secure the border. This dramatic and dangerous provision could threaten existing public protections and safeguards. As OMB Watch analyst Robert Shull commented in a statement released last week, "This new power comes completely without limit; every law, from child labor to ethical contracting, can now be waived." (For more on this provision, see this background article.)

No government official should be given the power to unilaterally waive any law. Even worse, the House attached this provision to the supplemental, which was a must-pass bill for the Senate. Emergency war supplemental bills should be exempt from unrelated riders such as the REAL ID Act.

President's Tax Panel Hosts Two-Day Meeting on Reform Proposals

The President's Advisory Panel on Tax Reform met May 11 and 12 to discuss specific proposals, which had been publicly submitted to the panel during a brief comment period, for reforming the federal tax code. The two-day hearing covered some of the plans submitted and heard testimony from a number of tax experts and advocates. Notably, the panel expressed overwhelming skepticism regarding proposals that would fully repeal the federal income tax in favor of a national sales tax or other system.

Panel Chairman Connie Mack and Vice Chairman John Breaux both questioned witnesses on the practicality and progressivity of a national sales tax. Breaux observed a sales tax would have to include complex rebates and incentives in order to make the system more progressive, while Mack challenged witnesses on compliance levels. Members of the panel were quick to point out that no country has adopted a national system of taxation centered around a sales tax, most likely for a good reason.

Thomas Wright of the conservative advocacy group Americans for Fair Taxation was one of the most outspoken witnesses pushing a national sales tax. While Wright suggested a 23 percent sales-tax rate would bring in sufficient levels of national revenue, Breaux disagreed, saying the Tax Policy Center had proven a sufficient rate of taxation would be much closer to 30 percent. Mack was overtly skeptical about compliance rates, telling reporters during a break that compliance has always been an issue with a national sales tax. Wright acknowledged "people will cheat, as they do today," but argued tax evasion would be significantly less than it is under the current system.

Besides discussing proposals for a national sales tax, the panel also heard testimony about the value-added tax, the consumed-income tax, the flat tax, and additional proposals for reform. John Podesta, president of the Center for American Progress (CAP), presented the panel with the center's Progressive Tax Plan. CAP's proposal promotes fairness, simplicity, and overall economic growth -- the three main tax-reform goals President Bush stated he wants to achieve.

The second half of the two-day meeting focused less on specific plans and more on how businesses and international transactions should be taxed.

The panel will hold a ninth meeting May 17 at the Georgetown University Law Center. Witnesses will evaluate tax reform proposals and discuss issues associated with "return-free" filing. Information and supporting documents from all previous panel meetings can be found on OMB Watch's tax panel webpage.

Update: More States Consider 'Taxpayer's Bill of Rights'

In 1992, Colorado passed a constitutional amendment instituting a "taxpayer's bill of rights" (TABOR) in order to make it more difficult for the state to increase taxes during the good times and spend during the bad times. Although Colorado's TABOR law has resulted in a structural cycle of drastic disinvestment in public services, many other states have either considered enacting tax and expenditure limiting legislation (TELS) in 2005 or will likely consider it in 2006.

Although proven to be harmful to state budgets and citizens in Colorado, TABOR laws are easily marketable to the public because they force legislators to stay within a predefined budget and also appear to fight the public perception of out-of-control "government waste." In reality, TABOR laws limit a state's flexibility to alter spending levels from one year to the next. This effectively prevents states from being able to allocate money to different programs to reflect new or differing priorities.

Colorado's TABOR amendment forced that state to significantly cut education and other programs and to refund $ 3.25 billion in tax collections during the decade 1992-2002. As a result, today Colorado is ranked 48th in per-student funding, 47th in K-12 education relative to state income, and 50th in funding for the arts.

In 2005, a number of states introduced TELS amendments, which would restrict state revenue, appropriations, or both. Fortunately, a combination of grassroots pressure and other more important legislative priorities has so far prevented any state from actually altering their constitution.

However, TABOR laws may prove to be a greater threat in the 2006 election year. Politicians may be more likely to introduce TABOR to voters along with other state initiatives of public interest and importance. Arizona, Idaho, Kansas, Michigan, Missouri, Nevada, New Mexico, Oklahoma, Oregon, and Wisconsin have been identified as states closest to passing TELS. Ohio, where the General Assembly is considering a TABOR-type amendment that would specifically restrict spending, is the closest state to altering the constitution. This could happen as early as November 2005.

The Center on Budget and Policy Priorities released a report documenting how Ohio's state spending would have been impacted had this law been adopted in 1994, in order to show how the law would have affected the state over a number of years. Had this expenditure-limiting law been in place for the past eleven years, a total of $ 19 billion would have been cut from state programs and services such as education, Medicaid, public safety, transportation and the environment. Fiscal year 2005 expenditures alone would have been approximately $ 3 billion (17 percent) less than they actually were this year.

Not only would Ohioans, and mostly poor Ohioans, receive less in services because of decreases in state spending, but those reductions would be compounded by loss of federal matching funds. For example, Ohio receives $ 1.43 from the federal government for every $ 1 it spends on Medicaid. A TABOR amendment would drastically reduce state spending on Medicaid by hundreds of millions of dollars every year.

States should not be fooled into believing laws setting tax and spending limits will help limit government waste. Instead those laws will methodically cut spending and decrease revenues on important social programs regardless of need. Grassroots pressure against such laws is growing and must be maintained through the 2006 elections.

Appeals Court Overturns D.C. Hazmat Ban

The U.S. Court of Appeals for the District of Columbia ruled against Washington, DC (D.C.), on its law requiring that shipment of hazardous chemicals be rerouted around the nation's capital. The three-judge panel released its unanimous opinion May 3, overturning a lower court's decision to uphold the ban. The city may either appeal the panel's opinion to the full appeals court or return to the lower court for a hearing on the law.

The appeals court ruled that the federal government has authority over rail security as a part of interstate commerce. The court opinion also explained that a state or city may only intercede in these matters if the federal government abandons its responsibilities. D.C. officials argued that the federal government's actions on rail security were so inadequate they constituted a failure to act. However, the court rejected this viewpoint.

The ruling was a victory for CSX, a rail company that challenged the city's ban and then appealed the district court's decision. The Bush administration supported CSX's position, claiming that D.C.'s new law was unconstitutional. White House officials testified that a secret rail security plan was in place, but its details could neither be disclosed to the public, shared with city officials, nor submitted into evidence before the court.

Ironically, the appeals court decision came on the same day that the Department of Homeland Security announced a $ 1 million grant to D.C. to study rail security risks and the possibility of rerouting.

Should the case go back to the district court, a trial will be expensive. But it will go before the judge who believed the federal government had abandoned its responsibilities to develop a plan for rail security -- a position that is more friendly to D.C. than to CSX. Several other cities are monitoring the case as they consider passing similar laws.

Cheney Task Force Documents to Remain Secret, Judge Dismisses Lawsuit

A federal appeals court judge dismissed a lawsuit May 10, which sought to uncover secret documents from Vice President Cheney's energy task force. The judge ruled the task force was not subject to the disclosure requirements of the Federal Advisory Committee Act (FACA).

The plaintiffs, Sierra Club and Judicial Watch, alleged that energy industry executives participated in the task force that led to the development of the administration's energy policies. Under FACA, any advisory body consisting of individuals outside the government must follow specific guidelines: the committee must issue a charter for approval, include diverse and representative members, and hold open meetings that the public is notified about in advance.

The Court of Appeals for the District of Columbia Circuit unanimously found that the plaintiffs did not provide sufficient evidence that industry executives were members of the task force. The judge ruled that FACA does not apply to a committee of governmental officials even if nongovernmental individuals participate in the meetings, so long as these outside parties are not allowed to vote. Therefore, the court argued that any documents about the task force were not required to be publicly disclosed. In other words, so long as the industry executives did not vote on the committee, they can participate without being required to inform the public.

The administration has long argued that industry had no formal role in the task force, and that releasing any documents about it would hamper the executive branch's ability to acquire information and advice. The court did not allow plaintiffs to verify through discovery whether people outside the executive branch had voting authority. Instead the court relied solely on statements from the administration.

Many open-government advocates believe the court's actions -- defining participation for FACA as voting on issues and disallowing discovery to verify participation by nongovernmental individuals -- will tip the scale in favor of greater executive branch power. Since taking office, President Bush has pushed for centralizing power in the White House and enhancing executive branch powers.

This ruling could end the long legal battle through many courts to disclose the energy task force records. In June 2004, the Supreme Court declined to hear the case and remanded it to the lower court.

House Hears Changes Needed to Improve Freedom of Information Act

The House got a bipartisan earful last week about the need to address the growing problem of secrecy in government. At a hearing May 11 on putting teeth into the Freedom of Information Act, witnesses testified about how FOIA is becoming increasingly weaker in meeting public needs. On the same day, Rep. Henry Waxman (D-CA) announced he would reintroduce a bill to strengthen government transparency, addressing issues beyond FOIA.

The House Government Reform Committee's Government Management, Finance and Accountability Subcommittee held a hearing to assess how the 39-year-old FOIA is functioning. It was not a pretty picture.

Advocates for open government described the need to expand both the incentives for federal agencies to respond more quickly to FOIA requests and to invoke penalties for delay and noncompliance. Witness after witness, both conservative and progressive, including working journalists and the Government Accountability Office (GAO), described problems with public efforts to obtain documents from federal agencies through FOIA.

GAO Director of Information Management Issues, Linda Koontz, provided new data. Between 2002 and 2004 the number of FOIA requests by federal agencies jumped 71 percent, she reported, with about 4 million requests in 2004. While agencies have been processing more requests, the backlog has also increased, rising 14 percent since 2002.

Roughly half of FOIA requests go to one agency, the Department of Veterans Affairs (VA) because the agency treats requests for medical records as a FOIA request. (In fact, the VA and Social Security Administration accounted for 82 percent of all FOIA requests in 2004.) But the VA is not driving the increase -- in fact, the number to the VA declined between 2003 and 2004. Overall, FOIA requests increased 25 percent from 2003 to 2004; when dropping the VA from the equation, the increase jumps to 61 percent.

According to GAO, three federal agencies -- State, the Central Intelligence Agency (CIA), and the National Science Foundation -- made full grants of FOIA requests in less than 20 percent of the cases they handled. Less than 40 percent of the FOIA requests to the Department of Homeland Security, for example, were granted in full. GAO also noted that backlogs of pending FOIA requests increased between 2002 and 2004 for 13 of the 25 agencies they surveyed.

One witness representing the Department of Justice asserted small budgets and too stringent requirements on disclosing information posed the biggest problems to FOIA's implementation.

The same day, Waxman announced he would reintroduce legislation to reverse many of the new secrecy regimes put in place in recent years. The Waxman bill, the Restore Open Government Act, would eliminate the various ill-defined "pseudo-classification designations," such as "Sensitive But Unclassified." Such categories apply to information that government agencies wish to withhold even though it is public and cannot be classified. The proliferation of such vague, ill-defined categories of information begs the question whether new restrictions are needed when the existing classification system is riddled with well-documented overclassification.

The bill would also fund the Public Interest Declassification Board, which has five of seven members already appointed but has never met due to lack of funds. In addition, it would provide for the timely release of presidential records and nullify the "Ashcroft memo," which shifted agencies from disclosing documents to withholding them whenever possible.

See expert testimony from the May 11 hearing.

House Members to Offer Bill to Expand Lobbying Disclosure

In the wake of allegations of violations of House rules, particularly about lobbyists paying for congressional travel by Majority Leader Tom DeLay (R-TX), two Democrats plan to introduce a bill to increase disclosure of federal lobbying and tighten other rules affecting the influence of lobbyists. At the same time, Republicans announced their own plans aimed at tightening and enforcing House ethics rules. However, the Democrats' bill appears to have picked up steam when House Administration Committee Chairman Robert Ney (R-OH) expressed interest in crafting a bipartisan approach to reform.

Rep. Marty Meehan (D-MA), lead sponsor of the Lobbying and Ethics Reform Act of 2005, and co-sponsor Rep. Rahm Emanuel (D-IL) described their bill, not yet filed, in a press conference May 4, saying their purpose is to restore public confidence in Congress. They noted the Lobbying Disclosure Act has not been changed since 1995, but during the past decade the lobbying industry "has grown exponentially, while disclosures have become more infrequent and incomplete."

A decade ago the House, awash in scandal over banking violations and lavish travel junkets, reworked congressional gift and lobbying laws, which included passage of the Lobbying Disclosure Act. Many of the House rules and disclosure requirements were filled with loopholes and simply did not address various issues.

The Meehan-Emanuel bill is an attempt to revisit the loopholes and gaps left from 10 years ago. The bill will cover four major areas: increasing federal lobbying disclosure, slowing the revolving door between working for Congress and lobbying firms, rules for congressional travel, and tougher enforcement and congressional oversight.

More specifically on lobbying disclosure, the bill will:

- Change reporting under the Lobbying Disclosure Act from semi-annually to quarterly
- Require disclosure of grassroots lobbying expenditures
- Require coalitions to disclose lobbying activities and their funders

- Require disclosure of lobbying contacts with members of Congress and senior officials in the executive branch instead of simply reporting broad subject areas.
- Create a searchable electronic database so the public can easily access information in the lobbying disclosure reports

Nonprofits that lobby Congress and meet the registration requirements must report under the Lobbying Disclosure Act. Those charities that opt to use the lobbying expenditure test rather than the vague "substantial part" test can use the IRS Form 990 in lieu of the Lobbying Disclosure Act reporting forms. This was because the IRS Form 990 already requires charities to disclose direct and grassroots lobbying expenditures at the local, state and federal level -- far more than the Lobbying Disclosure Act. Although the Meehan-Emanuel bill is not expected to affect this provision, groups that remain under the substantial part test would need to comply with the new requirements.

The provisions relating to grassroots lobbying and coalition membership disclosure are said to be similar to the Stealth Lobbying Disclosure Act of 2005 Rep. Lloyd Doggett (D-TX) introduced earlier this year. (See summary in the April 4 *OMB Watcher*.) It appears the sponsors do not intend the bill to require registration based on grassroots lobbying expenses, and the coalition disclosure provision will exempt 501(c)(3) organizations. Other 501(c) groups that have "substantial" activities other than lobbying on a specific issue would also be exempt, but the term "substantial" is not defined.

Emanuel's participation in this bill heightens the political jockeying between Republicans and Democrats for political high ground on these ethical issues. Emanuel chairs the Democratic Congressional Campaign Committee. Republicans suspected Emanuel -- and Democrats generally -- were using this issue as a political sledgehammer to bash Republicans. They noted that the DCCC created the "Tom DeLay House of Scandal" on its website which ties Republicans to DeLay or his fundraising every week. Ney was the first Republican to be featured on the website.

On May 10, Emanuel made a statement on the House floor explaining the need for the bill. He noted that federal lobbying expenditures have almost doubled in the past six years, reaching $ 3 billion annually, and that 210 of the 250 top lobbying firms have failed to file complete lobbying disclosure reports under the Lobbying Disclosure Act. Emanuel pointed to "nonexistent oversight and toothless penalties" as a key reason why compliance has been a problem. According to the Center for Public Integrity, almost 20 percent of lobbying forms were filed late and some were not filed at all.

While Republicans reacted coolly to Emanuel's participation, Ney had already been expressing interest in pursuing a bipartisan bill. Emanuel said he would remove his name from the bill if that would help its chances of success. But even before that, Ney had said, "Despite having Rahm's name on the bill, I'm still going to consider it because of Marty Meehan. Everything that Marty Meehan says has credibility." This has given the bill new life in the House.

Meehan filed a similar bill last year, which also included provisions relating to the rights of the minority party in the House. See July 16, 2004 *OBM Watcher* for details. We will post a copy and summary of the bill when it is filed.

North Carolina Preacher Accused of Church Politicking Resigns

On May 5, nine members of the East Waynesville Baptist Church in North Carolina were excommunicated by their pastor for voting for former Democratic presidential candidate John Kerry. The pastor, Rev. Chan Chandler, allegedly told his congregants that voting for Kerry was against the tenets of the church. The pastor has since resigned from his position. There has been no information whether the Internal Revenue Service (IRS) is looking into the allegations of wrong-doing, although Americans United for Separation of Church and State has requested an investigation.

Congregants of the 100-member church stated that on Oct. 3, 2004, Chandler told his congregation, "If you vote for John Kerry, you need to repent or resign." Church members also told the media that prior to the election, Chandler frequently endorsed President Bush from the pulpit and attacked Kerry.

Church members have said that Chandler continued to preach about electoral politics after Bush won re-election, culminating in a church gathering last week in which nine congregants were ousted. Reportedly, Chandler called a meeting of the deacons on May 2, a day after a heated discussion during a Sunday service about his continuing political statements. A number of congregants also attended. Some reported Chandler announced the church was going to become politically active and anyone who didn't like it could leave. At that point, nine congregants left the meeting.

Other sources said about 20 members of the church voted out the nine members, who have retained a lawyer to look into the legality of their ouster.

The controversy brings increased attention to the issue of political partisanship in religious organizations. Under current law, churches and religious organizations are exempt from federal income taxes under Section 510(c)(3) of the IRC. To be eligible for tax-exempt status the 501(c)(3) must not: "participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office." This is an absolute prohibition. Violation of the regulation can result in the loss of tax-exempt status for a nonprofit.

Valerie Thornton, an IRS spokeswoman, could not comment on the East Waynesville case, but remarked, "in general if a church engages in partisan politics, it could put their tax-exempt status in jeopardy."

In his resignation sermon, Chandler implied that his endorsement of Bush was due to his strong feelings on abortion. He could have advocated on the abortion issue without limit or sanction, since non-electoral advocacy, focused on issues, is always permissible. However, there is an important distinction between partisan political campaign activities and issue-oriented advocacy activities. Tax law allows 501(c)(3)s to engage in issue activities during an election season if it is part of ongoing work and related to the group's mission. But these activities should not be increased or timed in order to influence the outcome of an election. By crossing the line into partisan electoral politics, Chandler has placed the tax-

exempt status of his church in jeopardy.

The prohibition on campaign intervention has brought 501(c)(3) organizations under increasing scrutiny. In a recent letter to Congress, IRS Commissioner Mark Everson reported that the IRS has seen an increase in the political activity of tax-exempt organizations during the last election. "Each election cycle we become involved with significant allegations of wrongdoing and this problem shows no indication of abating. In 2002, a midterm election year, our records indicate that we received approximately 70 complaints alleging campaign activity by charities. In 2004, a presidential election year, that number was over 200."

The current prohibition on partisan activity protects the integrity of charitable nonprofits by preventing individuals from using tax-deductible contributions to avoid campaign finance laws. It also prevents individuals from using charitable nonprofit organizations, which by definition are organized for public purposes, to advance their personal partisan political views.

Some members of Congress would like to open up religious organizations to campaign contributions and activity. Rep. Walter Jones (R-NC) has introduced a bill, H.R. 235, The Houses of Worship Restoration Act, that allow houses of worship to engage in political campaigns in support of or in opposition to candidates for public office.

As demonstrated by the East Waynesville case, this can lead to problems. Because of partisan politics, nine people were discriminated against because of their political beliefs. On a larger scale, mixing religion and partisan politics could lead to religious divisiveness. Under the Jones legislation, a large church, or a number of churches working together, could form a political machine. Religious groups could select candidates and support their campaigns. This would inevitably allow the largest denomination in each community to dominate political life.

Organizations classified as 501(c)(3) receive a tax exemption because their work is educational, religious or charitable, and benefits society as a whole. However, political parties and candidates could abuse the church's tax-exempt status and give generous sums of money to houses of worship, write off the donations as tax-deductible, then have the churches do political work on their behalf, essentially making churches part of a campaign money-laundering scheme.

Additionally, allowing churches to engage in partisan politics results in undue preference for religious speech. The Jones legislation would give religious organizations the right to engage in activities that would remain prohibited for secular 501 (c)(3) groups. Both types of groups receive tax-deductible donations, which costs the national treasury. Taxpayers should not be required to fund partisan activities.

Conservative Coalition Opposes Further Nonprofit Regulation

On April 28, a coalition of conservative groups sent a letter to Senate Majority Leader Bill Frist (R-TN) objecting to the Senate Finance Committee's effort to tighten rules governing charities. Shortly after that, the Independent Sector Panel on the Nonprofit Sector released its second set of draft regulations for review and comment by the sector.

The conservative coalition appealed to Frist to block Finance Committee Chairman Charles Grassley's (R-IA) efforts, which they said threaten the role of charities to further social and educational goals. "We request that, as majority leader, you do not allow proposals of the Senate Finance Committee staff or similar proposals, the effect of which would be to undermine the role of charities in American public life, to come to the floor of the United States Senate."

The groups cited proposals that would limit non-cash contributions and add new paperwork requirements for small nonprofits. They also criticized proposals to limit donations and impose new requirements on the way foundations and other charities are run, saying they would hamper many charities that are not involved in abuses.

Since Grassley's staff released a paper on ideas for changes in tax law last year, many charities have formed coalitions and hired lobbyists to slow down or influence the legislation. The largest effort has been undertaken by Independent Sector, which organized the Panel on the Nonprofit Sector to develop specific recommendations. The Panel issued a first round of recommendations and appears focused on tinkering with the proposals that might appear in Grassley's legislation. The coalition letter takes a different approach by demonstrating that religious and conservative groups oppose Grassley's efforts.

Sen. Rick Santorum (R-PA), who publicly stated his opposition to the reform measures at a Finance Committee hearing on nonprofit accountability, has been working to shore up opposition to the bill. In March, Santorum sent a letter to Adam Meyerson, president of the Philanthropy Roundtable, a consortium of conservative foundations and donors, asking it to convene a group to respond to Grassley's proposals.

Santorum also asked the Philanthropy Roundtable to provide his office with "specific facts, specific situations and possible 'unintended consequences' of the published proposals, as well as your suggestions for any alternatives to the existing proposals". Santorum is concerned a number of proposals in a Joint Committee on Taxation (JCT) report and the Finance Committee's staff discussion draft would impose too onerous a burden on small nonprofits. He has encouraged the committee to push for enforcement of current laws before enacting new legislation.

Santorum is not alone in his concerns. At the same Finance Committee hearing, Sen. Charles Schumer (D-NY) said the $ 300 billion in tax revenue that goes uncollected each year due to tax avoidance and evasion could be collected through better enforcement of existing laws, without new legislation.

Grassley has postponed introducing his bill, which was reported to look similar to the staff committee draft, in response to members' skepticism and pressure from outside groups.

At the same time, the Panel on the Nonprofit Sector, formed by Independent Sector in October 2004 at the request of the Senate Finance Committee, announced its Phase II recommendations hoping to influence the outcome of whatever legislation is introduced.

The Phase II recommendations, following the publication of the interim report in March, delve into issues that the Panel thought too technical for its initial report.

Among the Panel's Phase II recommendations are:

- Disclosure of the services provided by board members in return for compensation on the Form 990 or 990-PF by any organization that provides compensation to board members
- CEO compensation should be reported on the Form 990 or 990-PF, and nonprofits would be required to report whether they followed the "rebuttable presumption" procedures in determining compensation
- A minimum of three directors on the board of every 501(c)(3) organization, and periodic reviews of board size and structure
- A definition of "independent" board members incorporated into the tax code, and a requirement that one-third of the board be "independent"
- A best practices policy regarding payment and reimbursement of travel expenses, and Form 990 disclosure of such policy
- Legislation defining a "donor advised fund" and authority to the secretary of treasury to exclude specific types of funds
- Require every supporting organization to provide its supported organizations with its governing documents, Form 990 and an annual report of its activities
- Make tax-exempt entities subject to the same reporting requirements as taxable entities
- Require 501(c) applicants to provide more detailed information, and
- Require that the standards regulating non-cash contributions be strengthened and clarified.

Comments on the Panel's Phase II recommendations are due May 19, and can be submitted online. Additional recommendations regarding performance data of charitable organizations' activities and suggested revisions to Forms 990 & 990-PF will be forthcoming from the Panel.

Homeland Security Wins Power to Waive All Law

A stroke of the pen makes it final: President Bush signed into law the Iraq war supplemental, which includes a controversial provision giving the secretary of homeland security the power to waive all law when securing U.S. borders.

The provision was conceived originally in the previous Congress as a measure to give DHS the power to waive several specified environmental laws in order to expedite construction of fencing in the San Diego area. Reps. Duncan Hunter (R-CA) and David Dreier (R-CA) pushed an expanded version in the conference committee working on the 9/11 bill, which almost failed to reach an agreement until House GOP leadership promised that an immigration reform bill would be a top priority in this Congress.

That promise was realized early when the 109th Congress convened. The House moved quickly to pass H.R. 418 (the REAL ID Act), an immigration bill better known for restricting the rights of persons seeking asylum and for implementing more stringent national standards for driver's licenses. The Hunter/Dreier language from the previous Congress was included as section 102 of that bill.

The REAL ID Act faced an uncertain future in the Senate, so House Republicans guaranteed its passage by attaching that bill as a rider to the emergency supplemental spending bill for the Iraq war. Although some in the Senate at first threatened to delay the spending bill unless the REAL ID was stripped from it, the Senate Democrats caved into the political pressure to pass the Iraq spending bill at all costs. The fix was in when Minority Leader Harry Reid (D-NV) told the press, "I've had a senator come to me and say, 'We're going to filibuster this.' I said, 'Get real. It's not going to happen. It's a defense bill.'"

A *USA Today* story that was first to report Reid's concession is also an example of a larger pattern of incomplete reporting that has failed to inform the public of the imminent passage of this provision to give Homeland Security the power to waive all law. *USA Today* described it charitably as allowing DHS only to "waive local environmental laws to allow the federal government to complete a 14-mile fence near San Diego that separates the United States and Mexico." This provision will instead give the secretary of homeland security unprecedented power to waive any and all law, environmental or otherwise, anywhere in the vicinity of the borders, in order to expedite construction of fences and barriers and remove obstacles to the detection of illegal immigration. *USA Today* was not alone in this failure to describe the bill accurately.

The version of the measure that came out of the House-Senate conference committee left the breadth of this new power intact. A part of the measure stripping the courts of any power to hear cases arising from the decisions to waive law still denies access to the courts but was revised to permit court review of constitutional claims. Given that existing case law already demands access to the courts for constitutional claims, this revision is not a real improvement. Another change requires DHS to publish its decisions to waive the law in the *Federal Register* before they can go into effect.

The Senate passed the Iraq spending bill unanimously on May 10, and the White House signed it into law the next day. Already, some states are threatening not to comply with the driver's license standards.

Bush Allows Governors to Challenge Roadless Rule

In yet another attack on our nation's wildlife, the Forest Service published a final rule May 13 that will allow governors to petition for changes to state forest management plans, effectively undoing the Clinton-era forest regulations known as the "roadless rule."

Before leaving office, President Clinton protected 58.5 million acres of American untouched Forest Service land from any development, including logging and road building. The Forest Service received two million comments supporting the measure, a record amount of comments on a federal environmental action. Despite the overwhelming public support for the rule, the Bush administration immediately delayed the rule's effective date upon taking office and then later refused to defend the rule against legal challenges.

A new regulation will now open up 34.3 million acres of that land to potential development. The rule will allow governors to petition the Forest Service for changes in the land management plans protecting the roadless areas. Governors have 18 months to file petitions challenging the current land management plans.

This rollback is the culmination of a steady attack on the roadless rule. Several states have challenged the rule in court, seeking to overturn it. In 2001, a federal judge in Idaho overturned the measure, but it was reinstated on appeal in December 2002. In July 2003, a Wyoming federal court struck down the rule again. The Tenth District Circuit Court of Denver heard appeals earlier this month from environmental groups seeking to have the rule reinstated.

House Hearing Reveals Unethical Marketing of Vioxx

During a congressional hearing on May 5, the House Government Reform Committee harshly criticized both the Food and Drug Administration and drug makers for their role in approving and marketing Vioxx, an arthritis painkiller linked to heart disease.

Last September, Merck voluntarily pulled Vioxx from the market after it was found the drug's use led to increased risk of heart failure. Both Merck and FDA were aware of the potential dangers associated with Vioxx in 2000. Still, Merck continued to aggressively market it while FDA sat quietly on the sidelines. At the time Merck pulled the drug, Vioxx had already been on the market for 5 years and used by more than 8 million people. An estimated 88,000 to 140,000 Americans have suffered serious medical complications due to Vioxx.

Representatives from FDA and Merck both testified at the hearing. House members were critical of the questionable behavior of both the drug maker and the agency, whose financial ties to the pharmaceutical industry and legal limitations precluded it from acting despite mounting evidence of Vioxx's failures.

Aggressive Marketing

The committee released documents detailing Merck's aggressive marketing strategy. The product of the committee's six-month investigation of the Vioxx crisis, these documents revealed a pattern of using carefully crafted sales techniques and questionable presentation of scientific information in a campaign to push Vioxx and minimize its risks. The documents gave insight not only into the operations of one drug company but also to the sales and marketing strategies employed by a multi-billion dollar industry. As Rep. Henry Waxman (D-CA) asserted, "the documents may offer the most extensive account ever provided to Congress of a drug company's efforts to use its sales force to market to physicians and overcome health concerns." Merck's meticulous marketing strategy instructed its army of 3,000 Vioxx field representatives on everything from how to shake the doctor's hand to how to eat bread at dinner.

At the center of the controversy was a March 2000 study called *Vioxx Gastrointestinal Outcomes Research* (VIGOR), which showed that Vioxx was five times more likely to lead to a heart attack or stroke than naproxen. Rather than informing doctors about the study, Merck field representatives were instructed to avoid bringing up VIGOR. If doctors asked about the study, drug representatives were instructed to say, "I cannot discuss the study with you," and to refer the doctors to file a request for drug information with Merck.

According to Waxman's statement to the committee:

> Merck instructed these representatives to show physicians a pamphlet indicating Vioxx might be eight to 11 times safer than other anti-inflammatory drugs, prohibited the representatives from discussing contrary studies (including those financed by Merck) that showed increased risks from Vioxx, and launched special marketing programs -- named "Project XXceleration" and "Project Offense" -- to overcome the cardiovascular "obstacle" to increased sales.

Drug representatives also tried to persuade doctors that Vioxx is safe by using a "cardiovascular card" that purported to show Vioxx was safer than other painkillers. The card used aggregated data from several pre-approval studies but excluded the findings from the VIGOR study. FDA scientists told the committee the cardiovascular card used by Merck was not only misleading but "said that the relevance of Vioxx's pre-approval studies to the drug's cardiovascular safety was 'nonexistent' and that it would be 'ridiculous' and 'scientifically inappropriate' to present mortality comparisons from these trials to physicians."

Committee members were highly critical of both the drug maker for its use of such highly misleading information and FDA for allowing such a questionable practice. Several asked Stephen Galson, director of the Center for Drug Evaluation and Research at FDA, about the legality of such a card. Galson said the card was technically legal. FDA Director of the Office of

New Drugs (OND) John Jenkins did concede that, though technically legal, the card did not "present the entire picture."

Dennis Erb, Merck's vice president for global strategic regulatory development, testified that it is Merck's policy that field representatives only discuss data from the drug's label. Since the VIGOR study came out after the drug's approval, Erb argued, it was not included on the label and therefore excluded from the sales pitch. This answer prompted harsh language from several lawmakers. As Waxman pointed out, drug makers are barred from discussing off-label *uses* of a drug but can legally discuss *health risks* not mentioned on the label. Rep. Gil Gutknecht (R-MN) questioned whether FDA's response was ethical, even if it did follow the letter of the law. Galson responded that "ethics is an important part of what we do."

An Industry-Wide Pattern of Aggressive Marketing

The influence of drug makers on doctors' prescribing habits extends far beyond the pitch of a sales representative. Drug companies are the single leading source of information on drugs for many doctors, according to testimony by Dr. Michael Wilkes, vice dean for medical education at the University of California, Davis, School of Medicine, and drug companies spend $20 billion annually to market their products.

As Wilkes asserted in testimony, aside from sales representatives, doctors receive much of their information on new drugs from Continuing Medical Education (CME) conferences and journal advertisements, both of which are underwritten by drug companies. According to Wilkes, "CME has become an important part of doctors' professional lives and PhRMA money has become the life-line of CME." Drug companies and doctors "have an unhealthy symbiotic relationship that is pulling down the medical profession.... Medical journals, medical societies, and even medical schools fight to woo drug company sponsorship of educational events."

The pharmaceutical industry does much of its marketing to doctors through the guise of "educational outreach," but as is clear from the Merck investigation, the presentations of drug companies are intended to sell products rather than educate doctors. Wilkes pointed to one study of pharmaceutical advertisements that "showed that much information (42 percent) failed to comply with one or more FDA regulations, including 35 percent which lacked fair balance between risks and benefits." Wilkes' research has also shown that "40 percent of print ads in medical journals did not present fair balance, 58 percent contained images that expert reviewers felt minimized concerns about side effects, and that 47 percent of the ads did not appropriately highlight risks and contraindications in special populations such as the elderly."

Wilkes made it clear that Merck is not alone in its aggressive marketing of drugs and that the problems found at Merck are pervasive throughout the pharmaceutical industry. When questioned, Wilkes conceded that Merck's reputation is better than most other pharmaceutical companies. This admission prompted several representatives to call for another hearing featuring Merck's competitors.

FDA: An Ailing Agency?

Not only does the pharmaceutical industry have an unhealthy symbiotic relationship with medical professionals, it also has considerable influence over the FDA, the agency responsible for assuring drug safety.

In 2002, FDA began to work with Merck to change the label of Vioxx. Initially FDA wanted the label to explicitly warn physicians that Vioxx could cause heart attacks and other cardiovascular problems, but after negotiations with Merck, FDA backed away from its initial recommendations and listed the cardiovascular risk as merely a precaution. The agency also allowed Merck to include several studies that showed no increased cardiovascular risk in the label material and permitted the exclusion of some important findings.

The agency also argued that it is limited by law in its ability to regulate the drug industry after a drug has been approved. According to Jenkins, FDA has limited authority to require post-marketing trials of approved drugs. FDA can require post-marketing trials on pediatric drugs or when a drug is approved through accelerated approval. In other cases, according to Jenkins, FDA's authority to require more trials is "not so clear." The agency can, however, encourage a drug company to run more trials. FDA often advises companies on clinical trials and will occasionally request a written commitment from a drug company to run a trial. The agency will also review the protocol of studies and give the drug maker feedback.

FDA's ability to ensure the safety of pharmaceuticals may also be hampered by its internal structure. FDA's Center for Drug Evaluation and Research (CDER) houses both the Office of New Drugs (OND), which approves new drugs for the market, and the Office of Drug Safety (ODS), which investigates the safety of drugs already on the market. The first Vioxx hearing last November revealed mounting tension between these two offices. Though they are theoretically independent of one another, testimony revealed that the Office of New Drugs exerts considerable influence over the Office of Drug Safety. Many advocates believe such influence is inevitable when the same agency both approves drugs and evaluates their post-market safety. The agency is often reticent to release criticism of drugs already on the market, and this reluctance to act leaves patients at risk for serious side effects. The OND also receives money from drug companies to expedite the drug approval process.

In response to criticism of FDA's drug oversight, Secretary of Health and Human Services Mike Leavitt announced in February the creation of a Drug Safety Monitoring Board. The board will be responsible for overseeing drug safety policies and resolving internal disputes over drug risks as well as approving information and content for a new government website on drug safety information. Though a step in the right direction, the creation of the board does not address many of the maladies of FDA.

Strengthening FDA to Respond to These Unmet Needs

Several members of Congress asked about FDA's authority to discipline Merck or other drug companies that, as Rep. Dennis Kucinich (D-OH) put it, "unscrupulously continue promotion" of a dangerous product. Though FDA has some

authority to discipline a drug company, Merck's actions were permissible under FDA regulation, and that fact underscores the wide chasm between what is legally permissible and what is ethical.

Rep. Maurice Hinchey (D-NY) has put forward a proposal to reform FDA. His bill, the FDA Improvement Act of 2005, would prohibit FDA from taking money directly from drug companies. Instead, industry payments would go directly to the Treasury general fund. The bill would ensure that FDA funding would not be impacted but that drug makers would no longer have direct influence on FDA's funding. The bill would also attempt to bar conflicts of interest on FDA advisory panels, create an independent center for post-marketing research, and give FDA the authority to require drug makers to perform post-market research and change labels. The bill does not address, however, the aggressive marketing by the pharmaceutical companies or attempt to curb their influence over doctors.

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