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In This Issue

Senate Passes Limited "Audit the Fed" Amendment

During the ongoing Senate debate on the financial reform bill, Federal Reserve transparency briefly took center stage. Sen. Bernie Sanders (I-VT) introduced an "Audit the Fed" amendment to the bill during the week of May 16, which the Senate approved in a 96-0 vote after the amendment was greatly scaled back. The amendment would instruct the Government Accountability Office to "conduct a one-time audit of all loans and other financial assistance provided during the period beginning on December 1, 2007 and ending on the date of enactment of this Act."

Supporters of the Audit the Fed movement, led by Rep. Ron Paul (R-TX), are disappointed that the amendment would not require full, regular audits of the Fed, which would include audits of the setting and execution of monetary policy, communications among or between employees of the Fed, and transactions with foreign banks. Instead, the amendment the Senate passed is a narrowly focused accounting of the Fed's actions during the financial crisis, specifically its use of so-called Section 13(3) powers.

Section 13(3) of the Federal Reserve Act gives the Fed broad powers. The important sentence in the statute reads, "In unusual and exigent circumstances, the Board of Governors of the Federal Reserve System" may provide discounted "notes, drafts, and bills of exchange," provided they are properly secured (collateralized), and the institution in question could not obtain credit from another bank. In other words, so long as the Fed believes there are "unusual and exigent circumstances," the Fed can decide to lend money to almost any financial institution, even non-depository institutions (not all of the Fed's emergency actions were under Section 13(3), but the most controversial actions were).

Beginning in 2008, the Fed began to use these powers for the first time since the 1930s. The Fed set up several programs, with names such as the Asset-Backed Commercial Paper Money Market Mutual Fund Liquidity Facility, the Term Asset-Backed Securities Loan Facility (TALF), and the Commercial Paper Funding Facility, all of which were variations on the same theme: the programs were all designed to function as the lender of last resort. If no other institution will lend to a financial firm, it can turn to the Fed and receive loans. While the rates provided by the Fed through these programs were not very favorable compared to market rates, they provided important lifelines to struggling firms that rely on open market borrowing for their daily business.

However, there is virtually no oversight over these programs. The Fed can choose to declare "unusual and exigent circumstances" whenever it wants to, and it can lend as much money as it wants to almost any institution it wants, so long as the loans are collateralized. Congress has no oversight over these actions. Also significantly hindering oversight of the Fed’s actions is the fact that the Fed is not required to disclose which institutions receive aid from Section 13(3) programs. Outside of the Fed, no one knows who is receiving public funds through these programs. There is no guarantee, for instance, that firms receiving these loans were struggling because of liquidity problems and not because they were on the brink of collapse due to over-exposure to subprime loans. The Fed is supposed to be helping the former institutions, not the latter.

Supporters of the Audit the Fed movement were hoping to use the recent exercise of Section 13(3) powers to bring about a full audit of the Fed. Capitalizing on populist distrust of the Fed, Paul's Audit the Fed bill, which mandates a full audit, had over 300 cosponsors in 2009 when it passed the House as part of that chamber's financial reform package, far more than it has garnered in sessions past. That momentum died in the Senate, where Sanders' companion bill had far fewer cosponsors, and Sanders eventually had to pare back his amendment in order to gain enough support. The Senate version is a step back from the House version; specifically, it would not audit the Fed's monetary policy decisions, one of Paul's main targets. Both chambers’ versions would, however, require an audit of the Fed's international currency swaps, which are outside of the Fed's Section 13(3) powers but have garnered criticism.

Importantly, the Senate amendment does include a provision the House version does not. It requires the Fed to publish information on recipients of Fed emergency support, such as name, amount of support, type of support, and rationale for providing the support. As noted earlier, who received the Fed's support to troubled financial institutions is a closely held secret, as the Fed argues that releasing this information would constitute a black mark against the firms, hurting their ability to borrow in the open market. Only firms in danger of collapsing would need such help, the argument goes, so announcing which firms were receiving aid would be like announcing which firms are on the brink of collapse, making it even harder for them to recover.

Transparency advocates and members of the media have long fought for disclosure of the identities of these institutions, arguing that the public has a right to know how its money is being used. Bloomberg News is in the process of suing the Fed for these names.

While the House bill calls for an audit of the Fed's emergency lending actions, it does not require publishing information on recipients of the aid. This addition will bring significant transparency to the Fed's actions over the past several years and will help give a better picture of the financial crisis.

Observers say even this limited Audit the Fed amendment is meaningless if the Senate does not approve the larger financial reform package. Senate Majority Leader Harry Reid (D-NV) filed cloture on the bill late on May 17, setting up a final vote on May 19. It looks likely that the bill will pass the Senate, setting up a conference committee between the House and Senate. The recipient disclosure provisions from the Senate's version will likely stay in, but it is unclear how broad the final audit will be. It seems that the president and Fed officials have been persuasive, at least in the Senate, where they have successfully lobbied for Sanders' weaker amendment, and Rep. Barney Frank (D-MA), chair of the House Financial Services Committee, was initially reticent to support a wide-ranging audit. These factors make it more likely the Senate's narrow audit will be the version that comes out of the conference committee later in 2010.

Long-Delayed Senate Climate Bill Considers Need for Transparency

Sens. John Kerry (D-MA) and Joe Lieberman (I-CT) recently introduced long-awaited Senate climate change legislation. The bill seeks to reduce greenhouse gas emissions in the United States by 17 percent of 2005 levels by 2020 and 83 percent by 2050, matching targets set in a House bill passed in 2009. The bill includes several provisions calling for transparent and participatory policies, especially relating to measures that would create new financial markets for buying and selling the right to pollute. How well such transparency would be implemented is a major question, and the success of the emissions reductions may depend on the level of openness that is built into the nation's climate change policy.

A lack of transparency in key parts of the financial sector is considered to be a major contributing factor to the ongoing economic hardships now afflicting the U.S. and other nations. Numerous recent market crises, such as the 2008 petroleum price spike, the crash of the subprime mortgage and credit default swap markets, and the Bernard Madoff Ponzi scheme have raised significant concerns about the transparency and stability of financial markets. The proposed climate legislation would create enormous new financial markets in an attempt to reduce greenhouse gas emissions. Many are concerned that a lack of transparency in U.S. climate policies would undermine progress in reducing emissions, resulting in the loss of precious time.

The Kerry-Lieberman bill, known as the American Power Act (APA), calls for an expanded greenhouse gas registry to track emissions, public disclosure of key data sets related to emissions reductions, and stresses the need for transparent and participatory design and implementation of market-based programs, which provide greater flexibility to polluters seeking emissions reductions, among other transparency measures. Requiring openness and accountability from the early stages of climate policy development would help ensure the policies make real emissions reductions and would help identify poorly performing measures.

The APA includes market-based policies for reducing emissions, such as the creation of a carbon exchange that uses quarterly auctions to trade the right to emit decreasing "allowances" of greenhouse gases, and the use of "carbon offsets," which allow polluters to meet some of their required reductions by paying for emissions reduction projects elsewhere in the U.S. or in foreign countries. According to the Pew Center on Global Climate Change, "Congress has the opportunity to design the carbon trading market oversight framework at a point in time before long-standing carbon trading practices and systems have been fully established."

Greenhouse Gas Registry

One fundament of a transparent, accountable climate change program is a clear and accurate system for reporting who is emitting greenhouse gases and how much. As a result of language inserted into a 2008 appropriations bill, the U.S. Environmental Protection Agency (EPA) created a mandatory greenhouse gas reporting rule for thousands of large emitters across the U.S. economy. The first reports from facilities are due in 2011. The APA calls for EPA to build on this program to meet the bill's expanded information needs.

The APA would amend the Clean Air Act to expand the existing registry by covering additional sources such as vehicle fleets, requiring reporting on the capture and sequestration of greenhouse gases, requiring more frequent reporting, and placing limits on what information can be withheld from the public by claiming it as a trade secret. The revised registry would also authorize EPA to collect data from 2007 forward, whereas the existing registry only collects emissions data from 2010 onward.

Carbon Offsets Transparency

Carbon offsets are a mechanism whereby a polluter can meet a portion of its required emissions reductions by investing in a project that reduces emissions or sequesters carbon elsewhere. For example, a cement factory could pay to have trees planted or a refinery could pay for citizens to install solar panels. Offsets theoretically allow more flexibility for polluters to comply with the law because paying others to reduce emissions can be cheaper than reducing the polluters' own emissions.

Transparency is again critical to realizing real emissions reductions through offsets. The U.S. Forest Service advises that to be legitimate, offsets must be real, measurable, verifiable, and additional (meaning the offset would not have occurred under a business-as-usual scenario). In a 2008 study, the Government Accountability Office (GAO) determined that "any use of offsets for compliance that lack credibility would undermine the achievement of the program's goals." GAO emphasized the need for transparency to ensure the offsets projects are creating reductions that are real, measurable, and would not have otherwise happened.

The Kerry-Lieberman bill establishes criteria to assure that offset credit is earned only for real and permanent actions that would not have occurred otherwise. The APA includes requirements for the public disclosure of the government's approval or disapproval of specific offsets projects and the information relevant to making the decision. Additionally, the APA calls for audits of offsets projects; however, the results of the audits would be aggregated before being disclosed, likely denying the public information about specific projects.

The transparency of offsets projects in foreign countries receives special attention in the APA. There are many opportunities for offsets projects in developing countries, such as reforestation projects. Questionable practices surrounding past voluntary offsets programs have drawn criticism of their accountability and veracity. One section of the APA requires that "local communities (particularly the most vulnerable communities and populations in the communities and indigenous peoples in areas in which any activities or programs are planned) are engaged through adequate disclosure of information, public participation, and consultation, including full consideration of the interdependence of vulnerable communities and ecosystems to promote the resilience of local communities." Similar language calling for transparency and public participation appears elsewhere in the offsets provisions of the bill.

Scientific Review

The EPA and other relevant agencies are required to make periodic reports to Congress on new scientific information, on whether the U.S. program is meeting its goals, and on whether the nation's efforts are sufficient to avoid the most devastating impacts of climate change. For example, a new technical advisory committee will be created to analyze carbon capture and sequestration technologies. All of this committee's studies must be made public.

Auctions

The Kerry-Lieberman bill authorizes the U.S. Commodity Futures Trading Commission to create rules for the transparent operations of a carbon allowance market, including the public disclosure of carbon market participants. Bidders in auctions must disclose whom they are bidding for, and the identity of winning buyers and the final carbon price must be disclosed. The bill specifies that a greenhouse gas allowance tracking system must be available to the public on the Internet.

Other Transparency Provisions

One controversial feature of the APA calls for expedited and expanded licensing and construction of nuclear power plants. The bill calls on the Nuclear Regulatory Commission (NRC) to report to Congress on ways to move forward on this nuclear expansion. The bill states that the NRC's recommendations must provide ways for "interested parties that have standing" to have their "legitimate concerns" heard.

Another significant measure in the APA is the requirement that companies drilling for natural gas that use a common yet controversial technique known as hydraulic fracturing must publicly disclose the identities of the chemicals used in the drilling process. Hydraulic fracturing has been linked to numerous cases of drinking water contamination, but the chemicals used in drilling, many of which are known to be toxic, are concealed from the public by drilling companies that claim the information is proprietary.

The prospects for the Senate bill are unclear. The House passed its bill in June 2009. Little time remains for the Senate to act on its bill, which technically is considered a "discussion draft." Climate change legislation must get through the Senate, conference committee, and a full congressional vote before the end of the session. Otherwise, a new Congress must take up the matter anew in 2011.

Public Online Information Act Introduced in Senate

On May 6, Sen. John Tester (D-MT) introduced the Public Online Information Act (POIA) (S. 3321) to require the federal government to post currently available public information on the Internet. Although this legislation would increase the amount of federal information that is posted online, some open government groups have concerns regarding certain provisions in the bill.

According to Tester, the purpose of POIA is to "make sure that transparency is keeping up with online technology." POIA seeks to ensure faster and more complete access to records held by the executive branch. To accomplish this, the bill requires federal agencies to post public government records on the Internet. This includes records such as reports disclosing lobbying activities and filings by high-level government officials concerning their financial interests.

The bill would impose several specific mandates on federal agencies. The bill first requires agencies to establish clear accountability by appointing a designated person to be responsible for implementation of the law. The bill also requires agencies to provide for permanent online access to the public records they post, so that once posted, the records cannot be removed at a later time. Rulemaking authority on the format of published records and the publication timeframe is granted to the E-Government Administrator at the Office of Management and Budget (OMB).

Each agency would also be required to publish on the Internet a comprehensive, searchable, machine-readable list of all records it makes publicly available. This list must include a description of the records, where they can be found, and whether the records are available to the public at no cost or for a fee. Agencies must also maintain a list of records not made available on the Internet and must publish that list online.

In addition to making most public records permanently available on the Internet, the bill would also establish an advisory board to determine best practices. The board would consist of 19 members with five-year, renewable terms. The board members would represent a range of perspectives, including those from nonprofit organizations and relevant subject areas, with not more than six government employee members. The board would meet at least six times per year and would provide recommendations on how to make public records available on the Internet. The bill also mandates that the E-Government Administrator take the recommendations of the committee into consideration in its rulemaking process.

Although the board is not subject to the Federal Advisory Committee Act (FACA), the bill includes several measures to enhance its transparency. The board must still publish transcripts, documents, and any video recordings of its proceedings. Further, it must publish a report on its activities at least every two years.

The legislation is limited to posting public information online, and it provides an exception to its posting requirements. The bill is clear than any information that is withheld under the Freedom of Information Act (FOIA), for reasons such as privacy, national security, and confidential business information, shall not be made available online. For information that is public, whether through FOIA or other means, another provision in the bill allows agencies to petition the E-Government Administrator at OMB (or, if an independent agency, the appropriate designated agency official) to prevent online disclosure when they can present "clear and convincing evidence" demonstrating "harm of disclosure significantly outweigh[ing] the public's interest." The bill does not state why certain information, not covered by any of the standard FOIA exemptions, may be harmful if disclosed on the Internet.

The Senate bill was preceded by similar legislation (H.R. 4858) introduced in the House on March 16 by Rep. Steve Israel (D-NY) and cosponsored by Rep. Jared Polis (D-CO). The bills contain some key differences but are similar overall. The House bill does not define the membership of the advisory committee to include nonprofit organizations and area experts. The Senate bill expands the House bill's definition of records that must be made available on the Internet to include the contracts for those entities acting as agents of the government and the records of such government contractors. Further, the Senate bill expands the limitation on agencies seeking exemptions to posting records on the Internet by requiring "clear and convincing evidence" as opposed to a "clear and convincing reason" in the House bill.

Although the aim of the bills is simple, the exception provisions may complicate their overall mission to make government more open. Open government groups have been divided on this issue. The Sunlight Foundation has consistently referred to the exceptions in the bill as "commonsense" measures. However, other groups argue that they legitimize an unproven idea that information can be public but not releasable for online publication. Patrice McDermott of OpenTheGovernment.org told OMB Watch that the "provisions in POIA cause some concern in the government openness community by presuming a need that has not been clearly proven to exist."

Such exceptions to online publication, while extremely rare, are not entirely unprecedented. The one clear example is in the Chemical Safety Information, Site Security, and Fuels Regulatory Relief Act (CSISFRA) of 1999, which restricts public access to certain Risk Management Program (RMP) information. RMP data is collected under amendments to the Clean Air Act to inform the public about safety risks at chemical facilities throughout the United States. Under CSISFRA, the Off-Site Consequence Analysis (OCA) section of RMP information, also known as the worst-case scenario, is prohibited from electronic distribution and only available through public reading rooms. However, even though this restriction was limited to only one section, since shortly after the Sept. 11, 2001, terrorist attacks, none of the RMP data has been available on any federal websites. OMB Watch has argued against this for years, because the public safety interest rests in disclosure since no threat has been proven. Additionally, OMB Watch has continued to publish RMP data without interruption since 2000.

As was learned in the aftermath of the 9/11 terrorist attacks, even when federal agencies remove public information from agency websites, such information surfaces on non-government websites. Once information is public, it will likely make its way to the Internet, regardless of agency actions.

Neither bill defines the threshold of a "clear and convincing reason" or "clear and convincing evidence," nor do the bills define what is meant by "harm." However, Steven Aftergood of the Federation of American Scientists noted to OMB Watch that the impact of the exception may, in the end, be negligible. Aftergood stated, "Personally, I can't think of a justifiable exception, because I cannot conceive of a category of government information that would be subject to FOIA but that should also be kept offline on policy grounds." Overall, Aftergood asserted that the bill is still positive from a public access standpoint because it places the burden on agencies "to justify any departure from the norm of online publication."

The House bill was referred to the Committee on Oversight and Government Reform the same day as its introduction. A coalition of organizations quickly released a letter concerning POIA that called for hearings to explore the implications of the bill, but none have occurred, and it is unknown whether any will be scheduled. The Senate bill has been referred to the Homeland Security and Governmental Affairs Committee. It is unclear if either chamber will move soon on the legislation.

Commentary: White House Misadventures in Coal Ash Rule

Developments behind the scenes of a new EPA proposal to regulate coal ash undermine several core tenets of the Obama presidency, conflict with pledges to reform the way government works, and expose the flaws in a regulatory process that too often does not do enough for the public.

On May 3, the U.S. Environmental Protection Agency (EPA) released a proposed rule that would, for the first time, regulate the disposal of coal ash. Calls for regulation of coal ash, a byproduct of coal combustion that can contain arsenic, lead, chromium, and other heavy metals, began in earnest after an impoundment in Kingston, TN, failed, releasing 5.4 million cubic yards of coal ash. Reports have linked exposure to the toxic components in coal ash to cancer and other health problems.

EPA proposed two options for regulating coal ash under the Resource Conservation and Recovery Act (RCRA). The first proposal would list coal ash as a hazardous waste under subtitle C of RCRA, requiring federal monitoring and control of coal ash's handling, transportation, disposal, and any potential reuse. (Coal ash can be recycled into other products, including cement and wallboard. Subtitle C regulation would continue to allow beneficial reuse, EPA says.) The other proposal would regulate coal ash under subtitle D, which has typically been used to control solid wastes such as household garbage. Under the subtitle D option, EPA would have little authority over coal ash management.

Environmentalists see a clear choice between the two options. The subtitle D option "treats this hazardous waste as if it were not loaded with high levels of arsenic and other toxic metals," Scott Slesinger, legislative director for the Natural Resources Defense Council, said in a statement. "We expect EPA to choose the option that adequately protects the public, particularly our precious groundwater, and treats this hazardous waste as a hazardous waste."

Just days after unveiling its proposed rule, EPA released other documents showing significant changes that were made to the proposal while under review at the White House Office of Information and Regulatory Affairs (OIRA). (See sidebar at right.) EPA's original plans, prepared in 2009, did not include the subtitle D option.

One document, made available in EPA's online rulemaking docket at Regulations.gov, shows all the edits that were made during the OIRA review. Large tracts of text were moved or deleted and hundreds of new paragraphs added. The document shows changes made at any time during the six-month review with no indication of when the edits were made or who made them.

Observers have assumed a cause-and-effect relationship: the proposal was changed while under OIRA review – OIRA must have made the changes. Of course, it is possible that EPA changed its mind in light of some new evidence or upon greater reflection, but that scenario is only plausible if EPA's original draft was flawed or haphazardly crafted. Both EPA and OIRA have kept quiet about what happened during the review, but OIRA maintains that agencies remain in control of all decisions during the review process. However, neither EPA nor OIRA has offered any new factual evidence that would have led to the inclusion of the subtitle D option.

The original draft, sent to OIRA on Oct. 16, 2009, included language asking for public comment on possible subtitle D regulation. It did not, however, go so far as to include the subtitle D option as a co-proposal and clearly showed that EPA's first preference was to regulate coal ash under subtitle C.

In the past, OIRA has said its review process – in which the office circulates throughout the executive branch drafts of agencies' proposed and final rules before they are released to the public and makes edits or suggestions it deems appropriate – improves rules. The argument in favor of OIRA review says that the additional perspectives offered by OIRA and other agencies make rules more efficient and more defensible – legally, scientifically, or otherwise. OIRA maintains the same is true with the coal ash rule.

Yet from the perspective of many in the environmental and public health community, the coal ash proposal represents all that is wrong with the rulemaking process. The proposal came out worse, meaning the draft may lead to a less protective rule even before the public comment process begins. Even if some other agency or some other corner of the White House made the changes, both OIRA and EPA need to accept responsibility. OIRA Administrator Cass Sunstein has been part of President Obama's team of officials attempting to bring more openness and accountability to government, but, for the coal ash rule, his office failed to live up to this administration's lofty expectations.

The rule was not without controversy; unquestionably, powerful corporate interests opposed the focus on regulating coal ash under subtitle C. During the pre-public OIRA review, opposition to subtitle C regulation came from far and wide within the federal government, the documents also show. The Departments of Energy, Interior, Transportation, and Agriculture (USDA) all encouraged EPA to avoid designating coal ash a hazardous waste under subtitle C. The departments fear a hazardous designation will limit the amount of coal ash that can be beneficially reused, despite EPA's attempt to carve out reuse in the proposed rule. Some, including USDA, objected to the stigma that the hazardous designation carries. The Agricultural Research Service asked, "What farmer would want to apply 'hazardous waste' to his fields?"

The White House Council on Environmental Quality (CEQ) also opposed subtitle C regulation, the document shows. Despite being an environmental office, CEQ cited economic concerns as a reason to avoid the hazardous designation.

In a truly perverse turn of events, OIRA allowed the Tennessee Valley Authority (TVA) to comment on the pre-public proposal. TVA, a government-owned corporation that was created by Congress as a public works program during the Great Depression, is the owner of the Kingston Fossil Plant responsible for the 2008 coal ash spill. Not surprisingly, TVA also opposed subtitle C regulation.

It's almost as though the process is designed to create less protective rules. An agency spends months, sometimes years, writing regulations consistent with statute and responsive to some public need, only to be second-guessed by those without the substantive or technical expertise possessed by the agency that proposed the rule. It's like replacing all the plumbing in your brand-new house after the walls are painted and the carpets installed – and your plumber is actually an electrician!

EPA's coal ash rulemaking illustrates exactly how the public can get snookered in OIRA's process. Issues were debated, alterations were made, and tones were set during a process that completely shuts out the public.

What's so wrong with edits made during an OIRA review? That's a valid question, especially in this instance, when a second regulatory option was added for the public to comment on. It's not as though EPA's original idea was supplanted by a weaker version; it was supplemented by another option. And in the face of political pressure from corporate interests, this seems like a reasonable compromise, especially since EPA still has to write the final rule.

However, the way the second option was added, and the impetus for its addition, should worry the public. In an opaque process that only Washington insiders can possibly access, changes were made, or at least encouraged, to an environmental protection rule that seem to weaken the overall regulation. Years of similar activity have left the public distrustful of its government's ability to make decisions in the public interest, and even if the Obama administration's motives in the coal ash case are pure, the controversy only feeds into a culture of mistrust born of years of decisions made in secret.

The time that elapsed during OIRA's review impacts the public as well. The coal ash proposal's review lasted more than six months. According to longstanding policy, OIRA reviews are to be completed within 90 days. If the rulemaking agency agrees, OIRA may extend the rule once by 30 days, for a total of 120 days. OIRA reviewed the coal ash rule for 200 days. By comparison, the public's opportunity to comment in the formal process is only expected to last 90 days.

Ultimately, EPA will be free to finalize a rule fully protective of public health and the environment. Nothing occurring during the OIRA review, or even the public comment process, can force EPA to choose a certain option.

The changes can, however, alter the debate. The addition of a second, weaker regulatory option tilts the proposed rule away from public and environmental protection. Advocates at groups like the Natural Resources Defense Council, Earthjustice, and Ohio Citizen Action have a steeper hill to climb in making their case that coal ash ought to be regulated as hazardous waste. Opponents of the regulation now have a decided advantage.

Moreover, since these decisions are made in a black box, without transparency, what is to stop the same interests that changed the draft proposed rule from altering the final rule?

All of these issues are symptomatic of a faulty process that has survived for decades because those who operate it see too many risks to their power to reform it. On Jan. 30, 2009, President Obama issued a memo asking the Office of Management and Budget (OMB) for recommendations on a new executive order to replace the order that currently governs the OIRA review process (E.O. 12866, signed in 1993). OMB then asked the public for its views. More than 170 groups and individuals submitted comments.

OMB Watch and others called for an end to the myopic, rule-by-rule review OIRA currently engages in and instead encouraged the office to transform itself into a facilitator and a resource for agencies. Since the public comment period ended, Obama administration officials have given no indication as to the status of the recommendations or the replacement order. OIRA and others seem content to continue to operate the same old process.

While the process has remained the same, the regulatory landscape has changed in other ways. One of the starkest changes witnessed during the Obama administration has been in personnel, specifically, agency heads. Top agency posts are no longer filled with people who come through a revolving door, regulating the same interests they had been employed by for years. Strong and dedicated leaders like EPA's Jackson have shown a willingness to make tough and sometimes unpopular choices when they believe the public's interest would be well served.

The coal ash rulemaking has been an uncharacteristic turn of events for Jackson. After moving aggressively in the face of great anti-regulatory and industry pressure on issues like climate change and smog emissions, Jackson allowed the proposed coal ash rule to be co-opted by OIRA's review process.

That begs the question of whether other officials in the White House were involved, officials with more clout than Cass Sunstein or even Lisa Jackson. Coal ash regulation is one element in a complex suite of legislative and regulatory issues the Obama administration faces in trying to reform energy policy in the United States. One of the Obama administration's top priorities, climate change legislation, is bound to be an important consideration in any related decision making.

We may never know the answer because the OIRA review process offers little transparency. EPA is one of the few agencies to provide detailed information on the review of its rules. While disclosure of the changes made is helpful in promoting accountability, too many questions are left unanswered when OIRA and agencies fail to disclose who made what changes and for what reasons.

Determining the reasons for the changes made to EPA's coal ash proposal, and assigning motive more broadly, is nearly impossible. Was the White House overly sensitive to the reactions of industry-friendly congressional Democrats whose support is necessary on climate change legislation? Was it a philosophical shift at the urging of Cass Sunstein, or was it something else entirely?

Many have pointed to industry's potential influence on the coal ash rulemaking. While the rule was under review, OIRA and EPA met with outside stakeholders on at least 43 different occasions. 30 of those meetings were with representatives of a variety of industries opposed to or fearful of coal ash regulation. These included electric utilities, chemical companies, and many whose businesses rely on the beneficial reuse of coal ash. (The remaining meetings were with environmental groups and citizen advocates.)

Even if the changes to EPA's coal ash proposal were made completely independent of industry opposition, the appearance of impropriety can be just as damaging, both to the administration's credibility and public confidence. President Obama came into office pledging to stem the influence of special interest lobbyists and has taken steps toward that end. The coal ash rulemaking is a blemish on an otherwise positive record.

The OIRA review process clearly does not always comport with some of President Obama's stated goals and priorities. It is time for Cass Sunstein and OIRA to come to this realization and urge Obama to recommit himself to regulatory reform. In the case of coal ash, if the rule is not legally or scientifically defensible, let the public see that debate through the notice and comment period. If other agencies have additional evidence about why the original EPA draft was unacceptable to them, that evidence and feedback should be part of the public record, not provided behind closed doors in what looks to the public like some cloak-and-dagger maneuver designed to evade accountability. Instead of providing an open and accountable exchange of data and ideas that would benefit all stakeholders, the current process makes it possible for special interests to influence a rule long before the public even has an opportunity to comment.

Let's keep an eye on how the final rule is developed. If it runs counter to scientific information about the health dangers of coal ash and the substance remains unregulated under subtitle C, the public loses – and the Obama administration should be held accountable.

Minerals Management Service Acted More like Agent than Regulator

The federal agency responsible for regulating oil and gas extraction let oil companies like BP write their own safety regulations, ignored or downplayed the environmental threats from drilling, and issued drilling permits before fully consulting with other regulatory agencies. The Obama administration has launched an overhaul of the agency and has sent to Congress a legislative proposal to address the looming disaster in the Gulf Coast region.

The Minerals Management Service (MMS), the Department of Interior (DOI) agency responsible for regulating energy and mineral resources, has badly mismanaged the oil and gas permitting process. The agency has abdicated its responsibility for ensuring that energy extraction is done safely, according to numerous sources investigating the BP oil spill in the Gulf of Mexico.

The April 20 BP Deepwater Horizon oil rig explosion left 11 workers missing and the subsequent oil spill continues to spew thousands of gallons of oil into the Gulf. Investigations of the explosion are beginning to show that BP and its partners in the Deepwater Horizon project did not implement safe oil drilling practices that are used in other areas of the world. MMS left decisions about drilling practices to the companies rather than issuing strong regulatory requirements that may have prevented the explosion.

On May 12, the Oversight and Investigations Subcommittee of the House Committee on Energy and Commerce held a hearing to begin assessing what committee chair Rep. Henry Waxman (D-

CA) called "a calamitous series of equipment and operational failures." The hearing focused on the actions by BP; Transocean Limited, the operator of the oil rig; and Halliburton, an oil services company responsible for a critical seal designed to stop the flow of oil.

The Senate's Energy and Natural Resources Committee and the Environment and Public Works Committee also held hearings on the spill in which executives associated with the Deepwater Horizon rig testified.

President Obama also named MMS as a culpable party in this disaster. On May 14, for example, after getting another briefing on the federal government's response to the spill, Obama said, "For too long, for a decade or more, there has been a cozy relationship between the oil companies and the federal agency that permits them to drill. It seems as if permits were too often issued based on little more than assurances of safety from the oil companies. That cannot and will not happen anymore."

In a scathing August 2008 report by the agency's inspector general, MMS employees were found to have accepted gifts from oil industry representatives, improperly socialized with lobbyists, engaged in unauthorized business activities, and flaunted the agency's ethical standards. The report summarized MMS's royalty-in-kind program personnel as lacking professional conduct standards and believing the rules of ethics did not apply to them.

Obama asked DOI Secretary Ken Salazar to reform MMS so that the part of the agency responsible for collecting oil and gas royalties is separated from an office with regulatory safety and enforcement. The separation is intended to reduce conflicts of interest within an agency responsible for both managing a revenue stream and developing and enforcing regulations.

On May 17, amid the criticism of MMS, associate director for offshore energy and minerals management Chris Oynes announced his retirement, effective May 31. Before being named associate director, Oynes oversaw oil and gas leasing in the Gulf of Mexico. A May 17 *Washington Post* article reported that Oynes had been criticized by former MMS officials as being too close to industry.

A May 13 *New York Times* article highlighted the importance of creating a new office with regulatory powers. According to the *Times*, MMS:

- Issued dozens of permits to oil companies to drill in the Gulf without the approval of the National Oceanic and Atmospheric Administration, which oversees dangers to endangered species;
- Ignored staff scientists who raised concerns about engineering and environmental impacts and threatened retaliation if the scientists continued to voice concerns;
- Gave BP and other oil companies exemptions from requirements to file environmental impact statements;
- Silenced agency scientists and changed reports that raised the specter of oil spills; and
- Issued at least five permits for new drilling projects since Salazar announced a moratorium on new permits May 5.

The article quotes one former MMS scientist as saying, "You simply are not allowed to conclude that the drilling will have an impact ... If you find the risks of a spill are high or you conclude that a certain species will be affected, your report gets disappeared in a desk drawer and they find another scientist to redo it or they rewrite it for you."

Scientific integrity issues at DOI have been a concern for years. An April 29 report by the agency's inspector general found that DOI has never had a scientific integrity policy despite a mandate from 2000 to produce one. The report documents a variety of problems the agency experienced during the Bush administration. The report recommends an agency-wide policy be established and a person assigned the primary responsibility for its implementation.

The *Washington Post* reported that MMS liberally applied "categorical exclusions" to reduce its NEPA workload and give companies a pass on the rigors of environmental review. MMS granted such a waiver to BP's Deepwater Horizon operation. BP had appealed to the White House Council on Environmental Quality as recently as April 9 to use categorical exemptions more broadly, according to the *Post*.

On May 12, the administration also put forward a legislative proposal to enhance its ability to address the Deepwater Horizon spill. According to a White House fact sheet, the proposal calls for additional funding to several agencies to pay for current expenses resulting from the spill and to monitor the impacts. It would provide additional funding for DOI to conduct additional inspections and enforcement while slowing the pace of issuing permits so that relevant issues are explored more thoroughly. The proposal also calls for additional federal support to states to supplement unemployment assistance programs to those on the Gulf Coast who lose wages as a result of the spill. Additional assistance may be provided if Congress approves provisions for additional economic development efforts within affected communities. The proposal would also raise liability caps on those held responsible for the disaster and raises the tax on oil companies to fund the federal Oil Spill Liability Trust Fund.

Members of Congress have introduced numerous bills to address some of the issues contained in Obama's more comprehensive legislative proposal. To date, there has been no progress on the bills as Congress awaits more information from different investigations into the causes of the explosion and spill.

House Hearings Highlight Criticisms of DISCLOSE Act

During the first House hearings on the DISCLOSE Act, disagreements and debate arose over the scope and potential impacts of a bill that sponsors say is designed to create new disclosure requirements for various corporate entities that are promoting or opposing candidates for federal office. As Congress continues to move forward with the bill, controversy will likely follow.

On April 29, Rep. Chris Van Hollen (D-MD) and Sen. Charles Schumer (D-NY) introduced the DISCLOSE Act (the Democracy Is Strengthened by Casting Light On Spending in Elections Act), and two House hearings have occurred since that time. The DISCLOSE Act seeks to diminish the impact of the U.S. Supreme Court decision in *Citizens United v. Federal Election Commission*, which allows corporations (including certain nonprofit organizations) and unions to use general treasury funds to directly and expressly advocate for the election or defeat of candidates for federal office.

The Committee on House Administration held both hearings, during which distinct ideological differences indicated that the bill will face a tough road in Congress. The first hearing was held on May 6. In his opening statement, Chair Robert Brady (D-PA) said, "The DISCLOSE Act recognizes that American voters are at minimum entitled to full and accurate reporting of campaign spending so that voters may know who is attempting to influence their vote."

The committee held the second hearing on May 11, and witnesses included two former Federal Election Commission (FEC) commissioners, Trevor Potter and Michael Toner, both of whom served in Republican slots on the commission. The panel also included Harvard Law School professor John Coates and attorneys Elizabeth Lynch and William McGinley.

A largely partisan divide emerged quickly after the bill was introduced and was clearly revealed during the hearings. Some on the committee showed support for the Supreme Court decision and expressed skepticism of any attempt to reign in the ruling. They and other critics charge that the DISCLOSE Act is meant to protect Democratic incumbents and deter speech.

Discriminatory Impact?

All corporations, 501(c)(4) nonprofit organizations, 501(c)(5)s (unions), 501(c)(6)s (trade associations), and 527 organizations that spend money on independent expenditures or electioneering communications to influence a federal election are "covered" under the bill. However, some skeptics are concerned that the DISCLOSE Act does not treat all of these entities the same.

During both hearings, committee Republicans contended that the bill creates special protections for labor unions. This argument stems from provisions that limit certain corporations from spending money to influence federal elections. Those that received Troubled Asset Relief Program (TARP) funding and have not yet paid the government back, and corporations that receive federal contracts worth more than $50,000, would not be able to spend any money on elections. This provision may indeed affect certain for-profit corporations more, considering that financial services companies are more likely to have received TARP funding, though it is unclear whether this would rise to the level of "discrimination."

Supporters of the bill argue that all types of corporations, including unions, are treated equally. In addition, the DISCLOSE Act would subject all corporations, including nonprofit organizations, to the same disclosure rules.

Controversy Surrounding Donor Disclosure Provisions

The bill's donor disclosure requirements are another major issue of contention. These provisions include the following:

- The top funder of the ad would be required to record a "stand-by-your-ad" disclaimer, and the top five donors to the organization would be listed on the screen at the end of the message.
- If an organization spends more than $10,000 in a 12-month period on independent expenditures or electioneering communications (including transferring funds to another organization for the purpose of influencing an election), all donors who have given $1,000 or more to the organization during that period would have to be disclosed.

Many fear that donors, who might have an interest in becoming more involved in political advocacy, may not want to do so if the bill passes as currently written. These concerns remain even though a donor can specify that a contribution may not be used for campaign-related activity. If a donor makes such a request, an organization is prohibited from using the donation for that purpose and would not disclose the donor's identity.

Committee debate notwithstanding, eight members of the Court agreed on the need for disclosure when *Citizens United* was published. Potter noted in his statement on May 11 that Justice Kennedy "made two things very clear: First, it is generally constitutional to require disclosure of the sources of funding for spending in federal elections, whether or not that spending 'expressly advocates' the election or defeat of a federal candidate. Second, he and seven other Justices were clear that they thought such disclosure was entirely appropriate and useful in a democracy."

Toner, on the other hand, expressed opposite views on the bill and said it should not be enacted. Toner specifically criticized the bill because its requirements would take effect 30 days after enactment, even if the FEC does not write clarifying regulations.

Other Points of Contention

Opponents have additional concerns about the DISCLOSE Act, including that the bill could stifle speech by creating expensive obstacles. For example, critics charge that the time it would take for groups to make statements standing by their ads would end up being overly burdensome.

During the May 11 House hearing, McGinley said that the DISCLOSE Act could lead to regulation of Internet communications and blogs. Craig Holman of Public Citizen fired back in a blog post the next day. Holman stated that the DISCLOSE Act "leaves in place the carefully worked out provisions of FEC regulations that exclude blogging and similar internet activity from the definitions of 'expenditure' and 'public communication' under campaign finance laws. The additional reporting requirements of the DISCLOSE Act do not change the existing exemptions for Internet communications and blogging under federal campaign finance law at all."

Despite the intense opposition from some quarters, others have suggested that the DISCLOSE Act does not go far enough and should also include provisions for public financing of congressional elections and shareholder approval of corporate campaign expenditures. For instance, advocacy groups such as Public Citizen and the Brennan Center for Justice would like the bill to incorporate provisions from the Shareholder Protection Act sponsored by Rep. Michael Capuano (D-MA), but there is some concern that those provisions could threaten passage of the DISCLOSE Act. That legislation would require companies to hold a shareholder vote to approve annual corporate political spending.

The House Administration Committee is expected to mark up the bill soon. It remains unclear when the full House or Senate will vote on the measure, despite an earlier push to have the bill signed into law in time for the general election in the fall.

Nonprofits Work to Restore Ex-Offender Voting Rights

Voting is a fundamental right and a cornerstone of our democracy, yet millions of Americans have had their right to vote revoked for periods ranging from the time spent incarcerated to a lifetime. Nonprofit organizations are playing a major role in efforts to restore voting rights to ex-offenders with felony convictions, and recent developments in Virginia and Washington State highlight the importance of nonprofit involvement in the issue.

In Virginia, there is a huge backlog of ex-offenders seeking to have their voting rights restored. Virginia's current governor, Robert McDonnell (R), inherited approximately 650 of those cases from the previous administration, according to *The Washington Post*. The *Post* also asserts that McDonnell's office has received additional applications from 213 nonviolent and 55 violent ex-offenders.

Groups working on the issue told the *Post* that Virginia has not restored the voting rights of any ex-offenders since McDonnell took office in January. Those that have filed applications have not heard anything regarding their applications. McDonnell said during his gubernatorial campaign that his goal is to have applications processed within 90 days from time of receipt.

Many nonprofits in the state are helping ex-offenders restore their voting rights. The Hampton Roads Missing Voter Project, created to increase voter participation among underrepresented groups, including ex-offenders, has played a major role in those efforts. It has been involved in grassroots efforts to educate ex-offenders and encourage them to complete an application to have their voting rights restored.

Other nonprofits have played a continuing role in efforts to restore ex-offender voting rights in Virginia, as well. The American Civil Liberties Union, the NAACP, the Virginia Interfaith Center for Public Policy, and Citizens United for Rehabilitation of Errants met with Janet Polarek, Secretary of the Commonwealth of Virginia, to discuss the process to restore voting rights.

Nonprofit organizations have also been instrumental in efforts to ensure that the process is not too difficult for ex-offenders to manage. Some civil rights groups have complained that adding a requirement for ex-offenders in Virginia to write a letter seeking to restore their rights will have a disparate impact on minorities and the poor. In most states, voting rights are automatically restored after an individual finishes a prison sentence, parole, or probation.

Nonprofit organizations have also been involved in efforts to restore ex-offender voting rights in Washington State. In *Farrakhan v. Gregoire*, a Ninth Circuit Court of Appeals panel held that current restrictions, which strip individuals convicted of felonies of the right to vote while incarcerated or under Department of Corrections supervision, unfairly discriminate against minorities and violate Section 2 of the Voting Rights Act of 1965.

The NAACP Legal Defense and Education Fund (LDF) and the ACLU both played roles in that case. LDF played a key role as part of the litigation team representing a group of African American, Latino, and Native American ex-offenders who allege that Washington's felon disfranchisement statute disproportionately denies racial minorities the right to vote. The ACLU also filed an amicus brief in the case.

"Plaintiffs' evidence showed that the rate at which Blacks, Latinos and Native Americans are convicted of felony offenses and then disqualified from voting is not reflective of their actual participation in criminal behavior," said Ryan P. Haygood, Co-Director of LDF's Political Participation Group, in a press release.

On April 28, the Ninth Circuit ordered a rehearing of the case by an *en banc* panel of 11 judges.

In addition to litigation, LDF has also sought to educate the public about felon disenfranchisement issues. In April, LDF released *Free the Vote: Unlocking Democracy in the Cells and on the Streets*, a report highlighting the impact that felon disfranchisement laws have on communities of color. "[N]ew efforts to reform felon disfranchisement policies suggest that many lawmakers are beginning to understand that felon disfranchisement is not only discriminatory in its application, but also undermines the most fundamental aspect of American citizenship: the right to participate in the political process," said Haygood.

This issue has not gone without attention in Congress. The Democracy Restoration Act was introduced by Sen. Russ Feingold (D-WI) and Rep. John Conyers (D-MI) as S. 1516 and H.R. 3335 on July 24, 2009. The Democracy Restoration Act would allow ex-offenders to vote in federal elections. Resistance to the bill comes from concerns that the legislation would unconstitutionally violate the rights of the states, since most re-enfranchisement issues are dealt with under state law.

Felon disenfranchisement played a significant role in the 2000 and 2008 presidential elections. However, nonprofit organizations throughout the country served to balance the effects, with grassroots and nonprofit organizations educating ex-offenders about their legal rights and urging eligible ex-offenders to vote.