OMB WATCH
Promoting Government Accountability and Citizen Participation
ACTION CENTER | BLOGS | DONATE
The Watcher
May 28, 2008 Vol. 9, No. 11

In This Issue

White House Involved in EPA's California Waiver Decision

A report released May 19 by the House Committee on Oversight and Government Reform concluded the White House improperly intervened in a decision by the U.S. Environmental Protection Agency (EPA) to deny California's request for a waiver under the Clean Air Act. The waiver would have allowed the state to set standards for greenhouse gas emissions from new vehicles. In denying the waiver, EPA Administrator Stephen Johnson went against the recommendation of EPA staff, who concluded there was no legal or scientific basis to deny the waiver.

The Clean Air Act allows for two separate standards for controlling motor vehicle emissions, a federal standard and a waiver for one state, California, which already had in place its own standard. The latter may be adopted by other states, but those states do not have the authority

to create different standards. The law requires the EPA to grant a waiver to California if the agency determines that the state's standard is at least as protective of public health as the Clean Air Act regulations.

EPA may deny California's waiver requests, under this section of the law, if the Administrator finds that "(A) the determination of the State is arbitrary and capricious, (B) such State does not need such State standards to meet compelling and extraordinary conditions, or (C) such State standards and accompanying enforcement procedures are not consistent with" certain federal statutory requirements.

According to the report prepared by the majority staff of the committee, California has historically been granted waivers by EPA over "several decades." The discretion given to California to set its own standards is quite broad due to the unique characteristics of the state, and therefore, the burden of proof is on those opposing the waivers. The report details the process used internally at EPA regarding this particular waiver request, which California submitted to EPA in December 2005. The report concludes that the "career staff at EPA unanimously supported granting California's petition."

The investigators interviewed or deposed eight EPA officials and subpoenaed documents that EPA refused, at first, to provide to the oversight committee. On April 8, committee chair Henry Waxman (D-CA) issued another subpoena for documents related to the communications between the EPA officials and the White House, but EPA has withheld some of the documents requested. Investigators have reviewed more than 27,000 pages of documents from EPA.

The staff report chronicles the series of briefings EPA staff gave to Johnson. These briefings, conducted between June and late October 2007, made clear the conclusions of the technical and legal experts at EPA, including:

- That California's unique geography, climate, and driving population "remain compelling and extraordinary" and that the state is "highly vulnerable to climate change."
- The impacts of climate change are likely to exacerbate California's existing ozone problem. More importantly, "climate change impacts on California's wildfire, water resources, and agricultural situation may be the state's greatest concerns."
- "California exhibits a number of specific features that are somewhat unique and may be considered compelling and extraordinary with regard to both the need for mitigation actions and its potential vulnerability to climate change."

These briefings apparently led Johnson to conclude in the fall of 2007 that he should grant the waiver or at least a partial waiver (granting the waiver for only few car model years). According to the deposition of one EPA official, Associate Deputy Administrator Jason Burnett, after Johnson met with officials in the White House, he changed his conclusion and moved to deny the waiver. Burnett refused to tell the committee with whom Johnson and other EPA officials communicated. Burnett also did not confirm that Johnson's change was a direct result of those communications, but, in answering questions from the investigators, Burnett provided some

evidence that such was the case. He had been directed by EPA not to answer questions about those internal deliberations between the agency and the White House.

Johnson announced his decision to deny the waiver Dec. 19, 2007, in a letter to California governor Arnold Schwarzenegger, citing California's lack of compelling and extraordinary conditions. Burnett told committee investigators that there was "White House input into the rationale in the December 19th letter."

According to the staff report, EPA administrators typically announce these final decisions and issue formal legal justifications for the decisions at the same time. In this instance, EPA did not release the justification document until March 6. It included additional justifications for the denial, including that the waiver provisions of the Clean Air Act were not intended "to allow California to promulgate state standards for emissions from new motor vehicles designed to address global climate change problems." The legal justification also stated that Johnson did not believe the impacts of climate change are greater on California than the rest of the nation.

Johnson's denial of the waiver not only led to the investigation by the Committee on Oversight and Government Reform but also to congressional proposals to overturn the decision. Sen. Barbara Boxer☼ (D-CA) introduced legislation in January to override Johnson's decision and to approve this particular waiver request. The legislation would allow California and as many as nineteen other states to move forward with adopting California's motor vehicle emission standards. On May 21, the Senate Committee on Environment and Public Works, which Boxer chairs, reported the bill out favorably. A companion bill, H.R. 5560, was introduced in the House March 6 by Rep. Peter Welch☼ (D-VT) and has been referred to the House Committee on Energy and Commerce.

For Bush-Era Regulations, the Clock Is Ticking

In a memorandum to regulatory agencies, White House Chief of Staff Joshua Bolten has set a Nov. 1 deadline for any new regulations agencies wish to finalize by the end of the Bush administration. The memo will shape the work of White House officials and federal agency heads as they consider which regulations to push through in the coming months, with an eye toward securing an administrative legacy for President Bush.

Bolten issued the memo under the guise of reversing "the historical tendency of administrations to increase regulatory activity in their final months" — commonly known as midnight regulations. In reality, the memo may simply change when the clock strikes midnight in order to insulate potentially controversial rules from disapproval by a new administration. Other rules moving slowly through the regulatory pipeline may be delayed until after Bush leaves office.

Bolten sent the memo on May 9 to the heads of executive branch departments. The memo states, "Except in extraordinary circumstances, regulations to be finalized in this Administration should be proposed no later than June 1, 2008, and final regulations should be

issued no later than November 1, 2008."

While the November 1 deadline is clear, the June 1 deadline can be interpreted in two ways. The term "proposed" likely refers to a federal agency's publication of a notice of proposed rulemaking in the *Federal Register* — the usual point at which a rule is first revealed to the public and opened for comment. However, because the memo does not specify to whom the rule must be proposed by June 1, it may also refer to the Office of Management and Budget review process, which is the final intra-governmental clearance before public release of a proposed rule.

The memo gave agencies 22 days, including weekends, to adjust to this new schedule. Inevitably, this will have an impact on the ability of agencies to complete work that may have been in the pipeline for later in 2008. While there is no way to know which rules will be delayed and which accelerated, it is clear that rules still in the developmental stage as of June 1 are not likely to be finalized if the Bolten memo is followed.

For example, President Bush said in 2007 that he would act on climate change. In response, EPA Administrator Stephen Johnson described plans to publish an advanced notice of rulemaking on climate change in a March 27 letter to the Senate Committee on Environment and Public Works. The advanced notice is expected to be issued some time in June. Presumably, this would mean that the administration has decided it will not finalize any rules on this topic during the remainder of Bush's term.

This may also create a series of unintended consequences. For example, there is a controversial rule being considered that would force international HIV/AIDS grantees to choose between adopting government policy explicitly opposing prostitution and sex trafficking for their entire organization or setting up a completely separate affiliated organization. The rule is in response to a 2003 law requiring a pledge to oppose prostitution and sex trafficking in order to receive government funding, and that law is being challenged in court. According to the Brennan Center for Justice, "During oral argument, the government's attorney informed the court and the plaintiffs that USAID and HHS [Department of Health and Human Services] intended to issue guidelines that would permit Global AIDS Act grantees to form privately funded affiliates that could operate free of the pledge requirement....HHS has informed the court that it will put its July 2007 guidelines through a notice and comment process by April 2008. The court will wait to assess the constitutionality of the guidelines until after that process has ended."

The comments on the proposed guidelines were issued before June 1, which means it is possible that the agency could issue a final rule during Bush's remaining time in office. HHS would need to review the comments, draft a final rule, clear it internally within HHS, send it to OMB for review, and publish it by November 1. If that schedule is not followed, there will be no final rule, according to the Bolten memo. If there is no final rule, it is unclear how the court will proceed.

The only publicly available list of rules in the pipeline is the most recent Unified Agenda, the semiannual listing of an administration's planned regulatory actions. It is notorious for

inaccurate timetables but may provide some clue as to what regulations could be affected by the Bolten memo.

The following is a list of important environmental, public health, and public safety regulations that might or might not make the cut off date for the Bolten memo. All of these rules have been proposed and opened for public comment. Most of these are efforts to weaken public protections. If they were to be stopped by the Bolten memo, it would allow the next administration to revisit the decisions to chip away at the regulations. On the other hand, if accelerated, it would simply move the midnight regulations up in time to November 1.

Rule topic, agency	**Timetable***	**Description**
Revision of the definition of solid waste to allow recycling of hazardous materials (Environmental Protection Agency).	Proposed Oct. 28, 2003. Planned completion date: July 2008.	This rule would redefine the term solid waste to exclude certain hazardous materials. The rule would allow more industrial waste to be introduced into the recycling stream.
Revision of federal standards for roof strength in passenger vehicles, National Highway Traffic Safety Administration (Department of Transportation).	Proposed Aug. 23, 2005 and Jan. 30, 2008. Planned completion date: July 2008.	This rule would strengthen existing standards for roof-crush resistance in order to reduce injuries and fatalities during vehicle rollovers. Critics charge the rule is too weak to make a marked improvement in vehicle safety and does not require automakers to adopt readily available technology that would significantly increase roof strength. The rule would also prohibit future damages claims brought by injured persons in state courts. More information...
Mandatory public notification of retail outlets that have received recalled meat and poultry products, Food Safety Inspection Service (Department of Agriculture).	Proposed Mar. 7, 2006. Planned completion date: July 2008.	This rule would require USDA to disclose to the public the names of retailers that have received recalled meat or poultry products. Currently, neither USDA nor meat and poultry processors are required to release the information. While the rule would be a positive step, critics fear USDA may only require disclosure for Class I recalls (the most serious kind) and not Class II and III recalls. More information...

Permitting exemption for farms claiming "no discharge" into waterways (Environmental Protection Agency).	Proposed June 30, 2006 and Mar. 7, 2008. Planned completion date: July 2008.	This rule would exempt concentrated animal feeding operations, sometimes called factory farms, from applying for discharge permits if they claim they do not discharge pollution into waterways. Critics charge EPA would be unable to substantiate the farms' claims. Critics also claim, by waiving permitting requirements, EPA would be unable to monitor and enforce provisions of the Clean Water Act.
Revision of air pollution control requirements for industrial facilities operating near national parks (Environmental Protection Agency).	Proposed June 6, 2007. Planned completion date: October 2008.	This rule would change the way air pollution in national parks is measured and, in turn, allow more power plants to meet air emissions requirements. Critics charge the revision would lead to more pollution in national parks, which would increase health risks and reduce visibility. More information...
Permission for surface mining operations to place excess material in waterways, Office of Surface Mining (Department of the Interior).	Proposed Jan. 7, 2004 and Aug. 24, 2007. Planned completion date: November 2008.	This rule would allow mountaintop mining within 100 feet of streams and allow for the deposition of excess material in waterways. Currently, mining in the so-called stream buffer zone is prohibited, but rules are poorly enforced. According to Earthjustice, "1,208 miles of streams in Appalachia were destroyed from 1992 to 2002" because of mountaintop mining. More information...
Reporting exemption for farms emitting air pollution from animal waste (Environmental Protection Agency).	Proposed Dec. 28, 2007. Planned completion date: November 2008.	This rule would exempt farm animal waste from the definition of solid waste. Because of the exemption, farms would no longer be required to report air pollution caused by animal waste. More information...
Revisions to rules implementing the Family and Medical Leave Act, Employment Standards Administration (Department of Labor).	Proposed Feb. 11, 2008. Planned completion date: November 2008.	Critics charge this rule would make it more difficult for workers to claim unpaid leave under the Family and Medical Leave Act. Among other things, the rule would make it more difficult for workers to use paid vacation or personal time during FMLA leave; allow employers to speak directly to an employee's health care provider; and

		require chronic condition sufferers to visit their doctors every six months in order to recertify their condition. More information...
Limit on the number of hours a truck driver can drive in one day, Federal Motor Carrier Safety Administration (Department of Transportation).	Interim final rule issued Dec. 17, 2007. Planned completion date: December 2008.	In July 2007, a federal court rejected a rule allowing truck drivers to drive for up to 11 hours per day. On Dec. 17, 2007, FMCSA issued an interim final rule reinstating the 11-hour standard that the court had struck down. It is unclear what FMSCA will require if it finalizes the rule. More information...
Repeal of the ban on carrying loaded guns in national parks, National Park Service (Department of the Interior).	Proposed April 30, 2008. Planned completion date: Not given.	This rule would end the 25-year-old ban on carrying loaded guns in national parks. Critics say the proposal is unnecessary because of the safety of national parks. More information...

* Proposal dates are based on when the notice of proposed rulemaking (NPRM) was published in the *Federal Register*. Where two dates are given, an NPRM was republished or a supplemental NPRM was published. Planned completion dates are based on projections from the Spring 2008 Unified Agenda of Regulatory and Deregulatory Actions, available online here.

Worker safety rules are conspicuously absent from the list above. The Bush administration has consistently failed to develop regulations necessary to protect workers under the Occupational Safety and Health Act. The administration apparently does not plan to finalize exposure standards for harmful chemicals such as beryllium or crystalline silica or safety standards for construction workers working in confined spaces, according to the most recent Unified Agenda. The administration may finalize rules to improve mine safety, as required by the Mine Improvement and New Emergency Response Act.

Options for the Next Administration and Congress

A new presidential administration, regardless of party affiliation, will have difficulty stopping rules the Bush administration finalizes by November 1 if those rules are not to his or her liking. Shortly after taking office in 2001, Bush rejected several Clinton-era rules. However, those rules had not yet taken effect. (The Administrative Procedure Act requires final rules take effect no less than 30 days after publication.) Both Bush and President Clinton suspended all rules that agencies had completed but not yet published in the *Federal Register*.

The Nov. 1 deadline should allow enough time for controversial rules to take effect before a

new president enters the White House. In those cases, the only option for a new president would be to initiate a brand new rulemaking to cancel out the other rule.

Congress will likely have options if it finds fault with any Bush administration rules. Congress could invoke the Congressional Review Act — a little-used tool that gives Congress a 60-day window to disapprove of executive branch regulations.

Under the act, congressional members have 60 working days after a rule is finalized to introduce a resolution to reject it. In order for the rule to be rejected, a majority of both houses of Congress must then approve the resolution, and the president must not veto it. Since a president is unlikely to disapprove of one of his own agency's rules, and since presidential vetoes are difficult to overcome, the act is virtually impossible to utilize successfully.

However, if that 60-day window does not close by the end of a session of Congress — a likelihood for regulations finalized later in 2008 — the time period starts over. Indeed, the only time Congress has used a Congressional Review Act challenge successfully was in rejecting a Clinton administration rule (setting standards for ergonomics in the workplace) shortly after Bush took office.

Krill Protection Rule Clears White House

The National Oceanic and Atmospheric Administration (NOAA) is proposing to prohibit fishing for krill, an important species in the marine ecosystem, in U.S. waters. The proposed rule comes after NOAA responded to objections from the White House.

The proposed rule, published in the *Federal Register* on May 20, would ban any harvesting of krill in the Pacific Ocean from three to 200 miles off the west coast, the so-called U.S. Exclusive Economic Zone. State regulations in California, Oregon, and Washington ban krill harvest up to three miles off the coast of those states.

NOAA is proposing to provide krill with federal protection because of krill's critical position in the marine food chain. Krill are small, shrimp-like crustaceans abundant in the Pacific Ocean, and they serve as a food source for a variety of marine animals including whales, salmon, and some sea birds.

Conservationists hailed the proposal as a victory for the Pacific ecosystem. Michael LeVine, an attorney with Oceana, a nonprofit conservation group, called the proposal "a watershed moment for responsible ocean management and conservation."

NOAA proposed the ban on krill harvests at the behest of its Pacific Fishery Management Council. The Council is one of several councils that make recommendations on fishery management for various bodies of water adjacent to the U.S. The Council is comprised of representatives from federal and state government agencies, commercial and recreational

fisherman groups, and fishery-dependent businesses.

In a prior attempt to propose the ban on krill harvests, NOAA was rebuffed by the White House Office of Information and Regulatory Affairs (OIRA). In an October 2007 letter returning the rule to NOAA for reconsideration, OIRA Administrator Susan Dudley complained NOAA did not adequately identify the need for regulation since krill is "completely unexploited" and "there are no known plans for exploitation."

NOAA had acknowledged a market for krill does not exist but framed its proposal as a proactive measure. In support of the ban, the Pacific Fishery Management Council said, "The Council has agreed it is critical to take preventive action at this time to ensure that a krill fishery will not develop that could potentially harm krill stocks, and in turn harm other fish and non-fish stocks."

NOAA resubmitted a draft proposed rule on Feb. 27 for OIRA's review. On May 13, OIRA cleared the proposal for publication.

LeVine, of Oceana, is pleased the review period has ended and the proposed rule is moving forward. "We commend all the policymakers involved in implementing the kind of proactive visionary protection we need to move forward with healthy and resilient ocean ecosystems," he said.

To meet OIRA's objections, NOAA did not alter the details of its proposal to ban krill harvests; rather, it changed its justification for the proposed action. As a result of the OIRA review, NOAA includes a more robust discussion of the economics of the rule.

Unlike the original proposal submitted to OIRA in 2007, the agency now claims a market for krill does exist. The proposal states, "A market for krill currently exists in Washington and Oregon, where salmon farms use krill products as a supplemental feed."

NOAA also weighed the costs and benefits of alternatives to an outright ban. The proposal says the agency also considered creating exemptions from the ban if potential harvesters met certain conditions; the agency also considered taking no action. In the October 2007 letter, Dudley criticized NOAA for failing to consider options other than an outright ban.

The public may comment on the rule until June 19.

USDA Dropping Shroud over Pesticide Use Data

The U.S. Department of Agriculture (USDA) announced May 21 that it is eliminating the only program that tracks pesticide use in the United States. The USDA claimed it can no longer afford the program, known as the Agricultural Chemical Usage Reports. Consumers, environmental organizations, scientists, and farmers oppose the move.

The Agricultural Chemical Usage Reports, collected by the National Agricultural Statistics Service (NASS), are the only publicly available data on pesticide use in the country. Since at least 1991, NASS has produced the detailed annual report widely used for scientific, consumer, and business research. The U.S. Environmental Protection Agency (EPA) and local governments have also depended on this information in developing chemical risk assessments and pesticide use policies.

The USDA announcement marks the final blow to a program that has been steadily eroded over the last few years. The annual survey had been reduced to a biennial report, and in 2007, reports were only collected on cotton, apple, and organic apple crops. NASS announced that only "key" surveys will be done during the 2008 growing season. According to NASS acting administrator Joe Reilly, these will include monthly crop and livestock reports, meaning a comprehensive year-end survey or report will not be produced.

NASS officials claimed they regret having to cut the program but said that they can no longer dedicate the resources required to run the program, which costs $8 million of the service's $160 million annual budget. Reilly said he "hates eliminating any program that is actually needed out in the American public," but justified doing so since similar data is available from private sources.

The private reports are cost-prohibitive to most, however — as much as $500,000 per year for some — and only a few of the major agricultural chemical companies buy them. According to a coalition of environmental and public interest organizations, these private data sets are of lower quality and reliability than the NASS data. Proprietary concerns inhibit the disclosure of collection methodology and perhaps even compromise it. NASS's Advisory Committee on Agricultural Studies estimated that "a large number of the area wide estimates ... are based on individual or statistically unrepresentative observations."

Without these reports, farmers' decisions about what pesticides to use on their crops will be less informed and could lead to significant errors. Don Lipton from the American Farm Bureau also sees the accurate reports as the best defense against allegations of irresponsible chemical use. "Given the historic concern about chemical use by consumers, regulators, activist groups, and farmers," he said, "it's probably not an area where lack of data is a good idea."

For the American public, the lack of information on pesticide use is also a problem. "If you don't know what's being used, then you don't know what to look for," said Charles Benbrook, chief scientist at The Organic Center. "In the absence of information, people can be lulled into thinking that there are no problems with the use of pesticides on food in this country."

"What we'll end up doing," said Steve Scholl-Buckwald, managing director of Pesticide Action Network, "is understanding pesticide use through getting accident reports." A coalition of 44 environmental, sustainable farming, and health advocacy organizations called on USDA to reverse its plan to eliminate the pesticide reporting program and to restore surveys of a wide variety of crops on an annual basis.

Committee Passes Sewage Right-to-Know Bill

The House Transportation and Infrastructure Committee approved the Raw Sewage Community Right-to-Know Act (H.R. 2452) May 15, bringing the American public one step closer to knowing when it is safe to swim in local waters. The bill amends the Clean Water Act to provide stricter standards for public notification of sewage overflows.

Over 850 billion gallons of raw sewage are released into local waterways each year. H.R. 2452 requires publicly owned water treatment facilities to provide timely notice of any overflow to local authorities, public health officials, and the public at large. More detailed weekly and monthly reports would also be mandatory. Should the full Congress pass the legislation, it would create the first national public notification requirement for this type of pollution.

Introduced a year ago by Reps. Tim Bishop (D-NY) and Frank LoBiondo (R-NJ), the Sewage Right-to-Know Act has recently picked up speed in Congress. Following the committee vote, it now awaits consideration by the full House. With bipartisan support, the bill is expected to be scheduled for a vote before the August recess.

American Rivers, a prominent supporter of the bill, has been joined by over 150 other organizations to promote the legislation's passage. "Clean water isn't and shouldn't be a political issue," said American Rivers president Rebecca Wodder. She added, "Passing this law isn't about assigning blame, but rather shining a light on a rather odious problem to build support for solutions."

The main culprit in the massive sewage overflows is the aging — and in many cases, broken — water quality infrastructure in the country. As *USA Today* reported on May 7, billions of dollars will be spent over the next 20 years to repair and upgrade what the U.S. Environmental Protection Agency (EPA) estimates to be 1.2 million miles of aging sewer lines.

A Gannett News analysis found that at least one-third of the sewage treatment systems the bill is aimed at were in violation of the Clean Water Act and other laws over the past five years. Gannett has developed a site to search for these sewage discharge violations on a state-by-state basis.

The Senate companion bill, S. 2080, was introduced by Sen. Frank Lautenberg☼ (D-NJ) on Sept. 20, 2007, and has been referred to the Committee on Environment and Public Works. The National Association of Clean Water Agencies, which represents publicly owned wastewater utilities, is in full support of the bill.

A Failure of Access, a Shortcoming of Technology

Access to government data and other information often falls behind expectations due to the government's failure to use advanced technologies to meet the needs of modern day society. In "Hack, Mash, & Peer," Jerry Brito, Senior Research Fellow of the Mercatus Center at George

Mason University, discusses the shortcomings of government access and technological solutions to create broad access to government records.

The analysis, published May 14 in the *Columbia Science and Technology Law Review*, shows that many government data sources are essentially inaccessible to the general public. For instance, the government only permits information regarding the financial disclosures of members of Congress to be viewed in paper format at the House or Senate offices in Washington, DC. Even though disclosure of the records is required by law, and even though those records are stored in a searchable electronic database, government denies the general public easy online access to that information.

Other data the government makes available online in centralized locations but publishes in cumbersome formats, which makes it difficult to search and find information. "While efficient in theory," states Brito, "consolidation may be a step backward if the centralized database does more to obscure data than to make it easily accessible."

Filling the access gap, private sector third parties have stepped in with "ingenious hacks" to provide the functionality the government has failed to achieve. The Center for Responsive Politics (CPR) runs the OpenSecrets.org website, which provides the general public with easy online access to many useful government data sources including campaign finance information, lobbying information, and congressional travel. CPR took upon itself the labor-intensive effort to digitize the paper records of congressional members' financial disclosures and posted the data in a searchable database. Another example is the FedSpending.org website, developed by OMB Watch, that provides access to federal contract spending and financial assistance. The GovTrack.us website, developed by a linguistics graduate student, provides access to legislation information by scraping and collecting information from government web pages.

Often these "hacks" present the government data in a structured and open format that allows others to combine various data sources in "mashups" that represent new novel tools for reviewing information. For instance, the MAPLight.org website pulls together data on voting records and campaign finance information to generate unique insights into the interaction of money and politics. The website shows when and how much money was contributed to campaigns by those supporting and those opposing legislation and then how votes on legislation turned out.

Third-party groups seeking to solve the problem of large amounts of information provided in cumbersome formats recently developed the "peer production" or "crowdsourcing" approach. Crowdsourcing is when massive numbers of documents or other information are reviewed en masse by a community of online users. The paper details an example in which over 3,000 pages of documents related to the firing of eight U.S. Attorneys were reviewed overnight by TPMMuckraker.com blog readers. The blog posted a request for help reviewing the materials and provided readers with a system for posting comments on read pages. In approximately seven hours, the site visitors had read and commented on almost all of the pages. Crowdsourcing leverages the cooperative effort of large numbers of people to accomplish huge

information tasks in an extremely short amount of time. The explosion of blogs also creates an online environment rich with opportunities to pursue crowdsourcing projects.

Rather than just relying on third parties to hack, mash, and peer government data, Brito recommends that government encourage the process itself by making data available online in "structured, open, and searchable formats." Structured means that the information should be provided in a way that can be read by feed readers and search engines. Open means that the data should be provided in a nonproprietary fashion to enable the combination of data with other sources and creation of different types of products, like overlapping housing data with mapping or providing information about toxics in a searchable format on a local community website. Finally, the data should allow for full-text searches.

To accomplish such access to government information, "Hack, Mash, & Peer" recommends that legislation specifically require such disclosure methods. However, if Congress fails to act, agencies should take it upon themselves to provide government information in robust and useable formats.

IRS Drops Investigations of United Church of Christ and First Southern Baptist

The Internal Revenue Service (IRS) has closed two investigations into accusations of illegal partisan electioneering by two religious organizations. The IRS determined that the United Church of Christ (UCC) did not violate its tax-exempt status by inviting Sen. Barack Obama☼ (D-IL) to speak at the denomination's national meeting in 2007. The IRS also found Pastor Wiley Drake's endorsement of Mike Huckabee to be a personal endorsement and not made on behalf of his church, the First Southern Baptist Church in Buena Park, CA. The IRS concluded the two investigations relatively quickly, compared to cases from the previous two election cycles.

All 501(c)(3) organizations, including religious organizations and charities, are prohibited from supporting or opposing candidates in elections. This includes endorsing candidates, making donations to their campaigns, or distributing statements for or against them. There are no set rules that define what is and is not allowed, although the IRS released guidance in a 2007 Revenue Ruling.

The IRS began investigating the UCC in February following a complaint regarding Obama's speech to 10,000 people at the church's General Synod in Hartford, CT, in June 2007. On Feb. 26, the UCC publicly released a letter from the IRS announcing the agency had launched a church tax inquiry. At the time of his appearance, Obama was a candidate for the Democratic presidential nomination. The IRS was also concerned that Obama volunteers staffed campaign tables to promote the campaign outside the center where Obama spoke. However, after the UCC responded to the inquiry, the IRS found the church took the necessary steps to avoid any appearance that Obama's participation in the meeting was an endorsement of his candidacy. Their letter stated, "The activity about which we had concern did not constitute an intervention

or participation in a political campaign in violation of the requirements of section 501(c)(3)."

According to the IRS letter, several factors led to the agency's determination, including:

- The invitation to Obama was issued in May 2006, before he announced his candidacy for president
- Obama was invited to speak in a non-candidate capacity about how his personal faith connected with his public life
- The UCC told those in attendance that Obama was there as a member of the church and not as a candidate for office and that the audience should not engage in any political activities
- The church's legal counsel advised the campaign of the rules for his speech
- Campaign volunteers set up tables near the entrances of the Hartford Civic Center, on public property and outside the control of the synod
- The UCC's website provides a link to the IRS fact sheet on Election Year Activities and the Prohibition on Political Campaign Intervention for Section 501(c)(3) Organizations, and the UCC Nationwide Special Counsel advised UCC leaders about Revenue Ruling 2007-41

The IRS did not notify the UCC of the investigation until six months after the speech. UCC counsel Donald C. Clark told the *Washington Post* On Faith column, "Congress should require that the service communicate with the church before an inquiry, with its attendant costs and chilling effect on constitutionally protected associational rights, is launched. However, that currently is neither a Congressional mandate nor IRS practice, and was not done in this case."

Experts questioned the need for the investigation when it was announced. Attorney Gregory L. Colvin, an expert on tax law and exempt organizations at Alder & Colvin in San Francisco, told *Tax Analysts* on May 22 that the UCC case illustrates the difficulty the vague facts and circumstances standard creates for charities and religious organizations. He said, "We still need better guidance from the Service that organizes the relevant facts and circumstances into an analytical framework. Which factors are fatal and which are exculpatory? Which create a presumption of intervention and which may rebut such a presumption? And how do those factors mesh with rules of the Federal Election Commission that regulate the same behavior?" Americans United for Separation of Church and State Executive Director Rev. Barry Lynn released a press statement saying, "We looked into the situation and did not see a violation of IRS rules. We saw no evidence of UCC officials seeking to appear to endorse his candidacy."

Another IRS investigation into possible partisan electioneering was also closed with no finding of a violation. Pastor Wiley Drake of the First Southern Baptist Church in Buena Park, CA, announced that the IRS cleared him of any unlawful activity for endorsing Republican presidential candidate Mike Huckabee. In August 2007, Drake issued a press release on the church's letterhead that announced his endorsement of Huckabee, asking all Southern Baptists to support the candidate. He also announced his endorsement on his Internet radio show. Americans United for Separation of Church and State (AU) filed a complaint with the IRS

about Drake in August 2007.

Drake released the IRS letter May 12. It said the IRS found that Drake's endorsement was made as an individual and not on behalf of his church. The news release endorsing Huckabee listed his church position only for identification purposes. The IRS letter states, "The press release was sent from Rev. Drake's personal email account and sent to personal acquaintances and was not sent to any of the church's congregants. [...] and no church resources were utilized in preparing or sending the email. Additionally, the Wiley Drake Show is a separate entity.... The church does not own, financially support, sponsor, or have any legal rights to the Wiley Drake Show."

AU, disappointed with this outcome, commented in a blog posting, "There are some gray areas in federal tax law, but the bottom line remains the same: Pastors who choose to cross the line into politicking may get away with it or they may not. They must ask themselves if it is worth risking their tax exemption to endorse some candidate."

Drake was represented by the Alliance Defense Fund (ADF) and is part of their "Pulpit Freedom Sunday" initiative, which is encouraging pastors to preach about politicians on Sept. 28 in a manner that could spark an IRS investigation. ADF hopes an investigation will lead to a lawsuit challenging the ban on partisan electioneering.

Senate Report on Homegrown Terrorism and the Internet Generates Criticism

On May 8, staff for Homeland Security and Governmental Affairs Committee (HSGAC) Chair Joe Lieberman (I-CT) and Ranking Member Susan Collins (R-ME) published a report on homegrown terrorism and the Internet that has raised free speech and guilt-by-association concerns. A coalition of nonprofits and a group of Muslim organizations have both sent letters objecting to the assumptions in the report. In addition, YouTube parent company Google rejected a request from Lieberman to remove all content posted by terrorist organizations, saying videos with legal, nonviolent, and non-hate speech content would remain online.

The report, *Violent Islamist Extremism, The Internet, and the Homegrown Terrorist Threat*, follows six Senate hearings on the subject and is the first in a series planned by committee staff. It focuses on "how violent Islamist terrorist groups like al-Qaeda are using the Internet to enlist followers into the global violent Islamist terrorist movement ..." While the report frequently refers to "domestic radicalization" and "violent Islamist ideology," it never defines these terms. It cites the attacks on public transit systems in London and Madrid and three examples of terrorist plot arrests in the United States as evidence of a "growing trend that has raised concerns within the U.S. intelligence and law enforcement communities." It goes on to note that unlike Europe, the U.S. history of absorbing immigrants has provided a layer of protection against "homegrown terrorism," but "the terrorists' Internet campaign bypasses America's physical borders and undermines cultural barriers that previously served as a bulwark against al-Qaeda's message ..." It then provides examples of "highly sophisticated

operations that utilize cutting-edge technology", including websites, chat rooms, online magazines, songs, news updates, and more.

The report's exclusive focus on the Internet and on American Muslims generated an immediate response from the American Civil Liberties Union (ACLU). Senior Legislative Counsel Timothy Sparapani said, "Focusing on people with specific religious beliefs or backgrounds will not protect against the Timothy McVeigh's of the world. This narrow focus could cost us dearly in the future." On May 14, a coalition of Muslim organizations sent Lieberman and Collins a joint letter noting the committee's failure to get input from American Muslims at its hearings and expressing concern that the report encourages "suspicion of several million Americans on the basis of faith." The letter was signed by the American Arab Anti-Discrimination Committee, the Council on American-Islamic Relations, Muslim Advocates, and the Muslim Public Affairs Council.

Prior to release of the report, a broad-based coalition of nonprofits sent the committee recommendations that urged caution, saying, "It is critically important the articulation of the problem does not cause people merely exercising their First Amendment rights to fear being swept into the net of suspicion." It also pointed to the long-established principle, based on the 1969 U.S. Supreme Court ruling in *Brandenburg v. Ohio*, that "speech can only be curtailed when it is intended to and has the effect of causing imminent lawless conduct. Mere abstract advocacy of violence, however objectionable, may not be barred."

The coalition of nonprofits noted that the Internet has "become an essential communications and research tool for everyone. Our concern is that this focus on the Internet could be a precursor to proposals to censor and regulate speech on the Internet. Indeed, some policy makers have advocated shutting down objectionable websites." However, the committee report acknowledges that content is "mirrored" on many sites, so that "propaganda remains accessible even if one or more of the sites are not available."

Additional Nonprofit Concerns Cited

The nonprofit coalition that had earlier expressed its concerns to committee staff also criticized the report's heavy reliance on a 2007 New York City Police Department (NYPD) model of the radicalization process. The NYPD report describes a four-stage "path to radicalization" consisting of pre-radicalization, self-identification, indoctrination, and jihadization. The report applied this template to its analysis of Internet communications by terrorist organizations. The problem, according to the nonprofit coalition, is that the model "fails to note that millions of people may progress through these 'stages' and never commit an act of violence." The letter from the Muslim organizations also noted that the NYPD model had "prompted criticism for examining a statistically insignificant, unrepresentative sample set, as well as for drawing conclusions based on logical fallacies. In fact, federal counterterrorism officials have privately repudiated the NYPD report."

Google Rejects Lieberman Request

Fears of attempts to censor content on the Internet were quickly realized on May 19 when Lieberman sent a letter to Google asking them to "immediately remove all content produced by Islamist terrorist organizations from YouTube." Lieberman's letter cited the staff report and noted, "Searches on YouTube return dozens of videos branded with an icon or logo identifying the videos as the work of one of these Islamist terrorist organizations." As a result, Lieberman says YouTube "unwittingly" permits these groups to use the Web "to disseminate their propaganda, enlist followers, and provide weapons training." The letter says YouTube's Community Guidelines are not adequately enforced.

Google posted a response on its Public Policy Blog, which said "hundreds of thousands of videos are uploaded to YouTube every day. Because it is not possible to pre-screen this much content, we have developed an innovative and reliable community policing system that involves our users in helping us enforce YouTube's standards." However, it said that it had reviewed videos flagged by Lieberman's staff and removed those that "depicted gratuitous violence, advocated violence, or used hate speech." However, it did not remove videos that did not violate its Community Guidelines.

The Google response disagreed with Lieberman's request that all videos referring to or featuring terrorist organizations be removed, including content that is legal, nonviolent, or non-hate speech. It said, "While we respect and understand his views, YouTube encourages free speech and defends everyone's right to express unpopular points of view....users are always free to express their disagreement with a particular video on the site, by leaving comments or their own response video. That debate is healthy." The statement encouraged users to continue using the flagging tool in the Community Guidelines to report violent and hate-speech videos.

What's Next?

The committee's report concludes that, despite calls for a comprehensive approach to counterterrorism programs, "the U.S. government has not developed nor implemented a coordinated outreach and communications strategy to address the homegrown terrorism threat..." It asks what new laws or tactics are needed to "prevent the spread of ideology in the United States," and what a communications and outreach strategy should be.

Several members of the House and Senate have floated a legislative proposal to address concerns similar to those raised in the report. S. 1959, a bill that its sponsors say is designed to study "violent radicalization" and "extremist belief systems" that can lead to homegrown terrorism, passed the House in late 2007 but has stalled in the Senate. Free speech advocates vigorously oppose the bill and say it would usher in an era of "thought crimes" and violate the First Amendment.

Advocates say that for more appropriate answers, HSGAC staff should consult the recommendations from nonprofits, which suggest that "efforts to prevent people in the United

States from turning to terrorism can only succeed if we protect the free speech, religious and associational rights of those against whom these efforts are directed."

Comments Blast Proposed Affiliation Rule for HIV/AIDS Grantees

A proposed U.S. Agency for International Development (USAID) rule for international HIV/AIDS grantees has generated criticism and calls for change. If implemented, the proposed rule would force such grantees to choose between adopting government policy for their entire organizations or setting up completely separate affiliated organizations. Comments from OMB Watch, the Brennan Center for Justice, and two members of Congress contrast the harshness of the proposed separation requirements with the much more flexible standards the agency has adopted for its faith-based initiative.

The government proposed the rule after losing the first round of litigation challenging a provision of the United States Leadership Against HIV/AIDS, Tuberculosis and Malaria Act (the "Leadership Act"), which mandates that "no funds made available to carry out the Act ... be used to provide assistance to any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking." *Alliance for Open Society, Inc. v. USAID* is currently pending in the District Court for the Southern District of New York, which will assess the policy's constitutionality after a final rule is announced.

The plaintiffs argue that the requirement violates their First Amendment rights by forcing them to apply the government's viewpoint to their privately funded activities. They also say adopting the anti-prostitution "pledge" would make it difficult for them to provide effective outreach programs and stigmatize and alienate the people in need of HIV/AIDS prevention services.

The proposed rule purports to give grantees that object to the pledge requirement the option of creating an affiliate that could adopt the pledge in order to qualify for program funding. However, the degree of separation proposed is so severe that it is impractical to implement. As a result, as OMB Watch's comments noted, the proposed rule "is so overbroad that it would turn private, nongovernmental organizations into mouthpieces of government by imposing policy statements governing all activities, including those not funded by the federal government." The comment urged the Department of Health and Human Services (HHS), which wrote the proposal, to: "1. Withdraw the rule and allow the courts to decide the issue on the merits, or 2. Re-write the rule based on the superior framework provided by regulations and guidance adopted for the faith-based initiative."

The Brennan Center for Justice faulted the proposed rule on several fronts, saying it:

1. "does not even attempt to address the policy requirement's impermissible mandate that independent NGOs espouse the government's viewpoint;
2. "fails to define the most basic terms such as 'activities inconsistent with a policy

opposing prostitution';
3. "does not afford recipients a means to speak freely through privately funded affiliates;
4. "imposes separation requirements so burdensome that recipients will not be able to set up affiliates;
5. "violates Congressional intent to promote efficiency in foreign aid;
6. "undermines Congress's desire to promote public-private partnerships in the delivery of HIV/AIDS services; and
7. "contradicts HHS's own acknowledgment in the context of the faith-based initiative that separation requirements of the sort it imposes here are excessive."

Two members of Congress, Reps. Henry Waxman (D-CA) and Barbara Lee (D-CA), sent HHS comments asking that the rule be revised, saying it "represents poor policy for public health, inappropriately restricts free speech of grantees, and undermines Congress' intent that HIV/AIDS funds be spend in an efficient and integrated manner." They go on to say that the legal, physical, and financial separation requirements proposed "would unduly burden the cooperating agencies participating in our AIDS program and introduce wasteful duplication of costs. This is of particular concern because many funding recipients operate in multiple countries, and registering separate entities in each may be difficult or impossible."

President Bush: Veto Rhetoric vs. Fiscal Reality

Although Congress has not yet begun to consider any of the appropriations bills that will finance the federal government in FY 2009, the White House threatened to veto Democratic spending bills — even before any details were unveiled. With the flurry of veto threats late in his presidency, President Bush appears to be attempting to erase seven-plus years of reckless fiscal management of the federal government with token gestures that feign fiscal responsibility. Despite these recent actions, budget watchdogs say the Bush legacy on fiscal policy will be one of irresponsibility, inattention to detail, and futility.

Earlier in 2008, OMB Director Jim Nussle sent a pre-emptive letter to the House and Senate Budget and Appropriations committees, warning that "appropriations bills that exceed the President's reasonable and responsible spending levels will be met with a veto." This pre-emptive action is quite a change from the majority of Bush's tenure. Until he vetoed the Stem Cell Research Enhancement Act on July 19, 2006, Bush was approaching the record of Thomas Jefferson as the president who served the longest without issuing a single veto (he fell two years short). Even today, Bush has vetoed fewer bills than any president since Warren G. Harding, who served only two years.

But when the Democrats took control of Congress in 2007, Bush abruptly reversed course. According to the Office of Management and Budget (OMB), Bush issued a total of 28 veto threats during his first six years in office. Then, in 2007 alone, that number grew to 52, half of which were directed at congressional appropriations or authorization measures on the grounds that Congress was engaging in excessive spending.

During the years of his presidency when the GOP held control of Congress, Bush never saw fit to issue a veto threat against an appropriations bill on fiscal grounds. But on May 11, 2007, then-OMB Director Robert Portman announced a new White House legislative strategy, saying that Bush would veto "any appropriations bill that exceeds his request." During the course of the FY 2008 appropriations season, the House and Senate routinely approved spending bills larger than Bush had requested in the budget he submitted to Congress.

This sudden shift in White House strategy came, however, on the heels of years of approving larger increases in government spending than any president had approved since *before* the administration of Lyndon Johnson. The Cato Institute calculated that the annual growth of federal spending under Bush has risen 5.3 percent, compared to 4.6 percent during the Johnson years. The national debt under President Bush has increased by more than 60 percent, from under $6 trillion to just shy of $10 trillion.

The major factors accounting for this deterioration of the nation's fiscal position are well known and have been championed by Bush over the course of his presidency. The war in Iraq has cost approximately $525 billion in unanticipated spending. The 2001 and 2003 Bush tax cuts reduce federal revenues by about $200 billion a year. And Bush was also unwilling to veto some big ticket items sent to him when Republicans controlled Congress, including a 2002 farm bill that increased agricultural spending 76 percent over 1990s levels and the 2003 Medicare prescription drug bill costing an additional $60 billion a year. All three of these bills were deficit-financed.

Comparing Bush to some of his predecessors also shows his support for large increases in spending, not the fiscal rectitude he portrays lately, as the Cato Institute has pointed out:

> George W. Bush will likely leave office with a government spending burden higher (around 20%) than it was when he came to office (18.5%). That's the way things trended in his first six years. Presidents Reagan and Clinton, on the other hand, presided over drops in the spending burden by this measure.

The contrast between Bush's veto-borne rhetoric of responsibility and the reality of his record aside, more specific analysis shows his new strategy has not even been targeted effectively. Last year, the Center for Budget and Policy Priorities (CBPP) looked at the funding levels of the veto-threatened appropriations bills for FY 2008 and compared those levels with inflation-adjusted figures from appropriations bills already passed by Republican-controlled Congresses and signed by Bush, from FY 2002 through FY 2006. What CBPP found is that the bills Bush said he would veto in 2008 cost *less* in 2008 than the corresponding bills had cost, on average, during 2002-2006. CBPP concluded the president's veto threats of appropriations bills had little to do with fiscal responsibility:

> In short, the President will likely sign those appropriations bills that are more costly than in the past (after adjusting for inflation and population growth). Yet he is likely to veto — purportedly on fiscal grounds — those appropriations bills, such as the Labor-HHS-Education bill, whose costs are lower than the

corresponding bills he signed in the past.

The facts behind Bush's fiscal record point to a president who not only squandered opportunities to fix the fiscal health of the country, but repeatedly made decisions and supported policies that helped that fiscal health to deteriorate further. Budget watchers note his attempts at such a late hour to stand firm against minor spending increases in discretionary spending bills also fall far short, both in timing and substance, of fixing his legacy on fiscal issues.

War Supplemental Bill Awaits Final House Approval

When Congress returns from its Memorial Day recess, the House will take up the Senate's $250 billion supplemental war spending proposal. After the Senate added on $165 billion for war funding to the House's bill (which contained no money for the wars), it also tacked on some $10 billion in additional non-defense discretionary spending above the House's level of $21.1 billion. Although similar to the House version, the Senate's bill differs in a few key aspects, and the House will have to approve the Senate version or continue negotiating by amending it and passing it back to the upper chamber.

On May 15, the House approved a war spending bill but curiously failed to provide funding for the wars in Iraq and Afghanistan. Democratic House leadership sliced the war bill into three amendments: one for the war funding itself; one for war policy; and one for non-defense spending. To avoid some potential parliamentary pitfalls, Democratic leadership decided to skip a markup in the Appropriations Committee and move the war funding measure through Congress by hollowing out and amending the previously approved but unsigned Military Construction-VA FY 2008 Appropriations bill (H.R. 2642).

In response to this strategy, 132 Republican House members expressed their ire by voting "present." Combined with the votes of anti-war Democrats, the amendment that would have added $163 billion to the bill for funding the wars in Iraq and Afghanistan through the first few months of the next president's term was defeated 141-149.

The other two amendments up for a vote — war policy language and non-defense spending measures — fared much better. By a vote of 227-196, the House approved language that would require troop withdrawals from Iraq to begin within 30 days of the bill's enactment, with a target for full withdrawal by the end of 2009.

The non-defense spending amendment garnered even more support, passing 256-166. Its adoption was secured only after Democratic leadership appeased the fiscally-responsible Blue Dog Coalition by including an offset to the measure's $52 billion expansion of the G.I. bill. The $54 billion revenue raiser would impose a half-percentage point increase to income taxes on individuals earning over $500,000 and married couples earning more than $1 million each year. The Blue Dogs insisted on including an offset for the G.I. bill provision to comply with

PAYGO rules because that program is mandatory, not discretionary, spending.

In addition to expanding the G.I. bill, the non-defense spending amendment would:

- Extend unemployment insurance benefits 13 weeks beyond the current limit of 26 weeks
- Prevent the enactment of several Medicaid regulations designed to reduce payments to states
- Provide $10 billion in foreign aid, including over $1 billion to help ease the global food crisis
- Partially close funding gaps for various federal agencies, including $200 million for U.S. Census Bureau cost overruns
- Fully fund President Bush's request for $5.8 billion for levee repairs in New Orleans

One week after House approval, the bill was taken up by the Senate, which overwhelming approved (70-26) the addition of $165 billion in war funding while striking the war policy language requiring soldier withdrawal from Iraq . Surprisingly, the Senate not only agreed to up the House non-defense spending level by $10 billion but passed this spending by a veto-proof margin (75-22).

The Senate's non-defense spending provisions differ somewhat from the House's, however. Although the Senate approved the G.I. bill expansion, it elided PAYGO and dropped the tax provision that would offset its costs. And, in addition to the $5.8 billion in levee repair provided for in the House bill, the Senate's version would add $4.6 billion for Gulf Coast reconstruction. The Senate amendment includes the House initiatives but also increases funding for local law enforcement grants; the Federal Highway Administration; federal food and drug inspection, rural schools, and firefighting; and various science initiatives.

When Congress reconvenes the week of June 2, the House Blue Dog Coalition and anti-war Democrats have decisions to make. If the House Blue Dogs or the Out of Iraq Caucus rejects the Senate's proposals, the Senate may think twice about its generous non-defense spending package and strip most of it out — except the G.I. bill extension — in order to attract enough Republican votes to ensure passage in the House.

House Relentless in Pursuing Contracting Reforms

In the last several weeks, the House has continued its efforts to address federal contracting reform. With bills stalling in the Senate, the House has begun to attach various reform provisions to legislative vehicles that are more likely to be enacted into law this year. Marrying these proposals to the war supplemental bill and the Defense Authorization bill, for example, greatly increases the chances these important reforms will be implemented in 2008.

This strategy has already paid dividends with the Fair Share Act (H.R. 5602). The Fair Share Act was originally introduced March 13 and would require U.S. firms that employ American

citizens overseas through foreign subsidiaries to pay Social Security and Medicare taxes when contracting with the federal government.

The House first attached the Fair Share Act to the Taxpayer Assistance and Simplification Act (H.R. 5719), a collection of provisions aimed at facilitating income tax compliance — especially among elderly and low-income taxpayers. The House passed H.R. 5719 by a vote of 238-179 on April 15, but the bill has not moved at all in the Senate and received a veto threat from President Bush, threatening the Fair Share Act provisions.

Tired of waiting for the Senate and not wanting to take their chances with a veto-happy president, the House amended another bill extending tax cuts to veterans (the HEART Act, H.R. 6081) to include the original provisions of the Fair Share Act shortly before the Memorial Day recess. The HEART Act was approved without opposition by both the House and Senate on May 22 (House vote: 403-0, Senate vote: approved by voice vote) and is expected to be signed by the president shortly.

The strategy employed to pass the Fair Share Act is being seen with other contracting reform legislation. Two bills, the Close the Contractor Fraud Loophole Act (H.R. 5712) and the Government Funding Transparency Act of 2008 (H.R. 3928), passed the House as independent bills on April 23. The first bill would close a loophole in the Federal Acquisition Register, a set of regulations governing the federal procurement process, that did not require contractors working oversees to report fraud to the government. The second would require the disclosure of the names and salaries of the five highest paid executives of private companies that receive more than 80 percent of their revenue from the government.

Both of these bills were added to the House's version of the war supplemental bill, which passed on May 15. After various changes, the Senate sent the bill back to the House for final approval, retaining the two contractor reform amendments.

The Path to Contracting Reform				
Policy Proposal	**Original Bill**	**First Attached To**	**Then Attached To**	**Chances of Approval in 2008**
Creation of contractor misconduct database	HR 3033 *(4/23/08)*	FY 2009 Defense Authorization bill *(5/22/08)*		Good
Closing fraud loophole in FAR	HR 5712 *(4/23/08)*	House version of war supplemental bill *(5/15/08)*	FY 2009 Defense Authorization bill *(5/22/08)*	Good
Requiring disclosure of names and salaries of top executives	HR 3928 *4/23/08)*	House version of war supplemental bill *(5/15/08)*	FY 2009 Defense Authorization bill *(5/22/08)*	Good
Prohibiting using offshore tax havens to avoid payroll taxes	HR 5602 *4/15/08)*	Taxpayer Assistance and Simplification Act *(4/15/08)*	HEART Act *(5/22/08)*	Approved
Prohibiting private tax collection at IRS	HR 695	Taxpayer Assistance and Simplification Act *(4/15/08)*		Unlikely
Prohibiting tax deliquent contractors from obtaining new contracts	HR 4881 *(4/14/08)*			Unlikely

Given the uncertain future of the war supplemental bill (it has been opposed at various points by the Bush administration), the House has also acted to include these two contracting provisions on the 2009 National Defense Authorization Act (H.R. 5658). While this bill will likely pass Congress in 2008, the scope of the contracting reforms would be limited to contracting activities related to the Defense Department and other agencies covered under the Defense Authorization bill. Nonetheless, on May 22, the House approved an amendment by voice vote offered by Rep. Henry Waxman☼ (D-CA) that would enact multiple contracting reforms, including the provisions of H.R. 5712 and H.R. 3928.

In addition, the Waxman amendment covered yet another important contracting reform by requiring the publication of a contractor integrity database that would provide information about criminal, civil, and administrative cases involving federal contractors. This proposal was introduced in the summer of 2007 as the Contractors and Federal Spending Accountability Act of 2007 (H.R. 3033) by Rep. Carolyn Maloney☼ (D-NY) and passed the House unanimously on April 23. While it is possible this proposal will be amended before the Defense Authorization bill is finalized, it is unlikely the misconduct database proposal will be stripped from the bill altogether.

For the most part, these contracting reform proposals are non-controversial efforts to bring transparency and accountability to the federal procurement process, no doubt aiding the

potential success of the strategy to attach them to multiple bills in 2008. There are additional proposals related to federal contracting, such as prohibiting the IRS from using private debt collectors to collect back taxes (H.R. 695) or prohibiting contractors from receiving contracts if they owe federal taxes (H.R. 4881), that might still be included in such a strategy. These proposals are unlikely to be enacted into law on their own.

Unfortunately, the window of opportunity to attach those bills to legislation that will pass Congress in 2008 is slowly closing. It is possible the war supplemental and Defense Authorization bill are two of the last pieces of legislation Congress will be able to enact before they adjourn before the fall elections.

1742 Connecticut Avenue, N.W., Washington, D.C. 20009
202-234-8494 (phone)
202-234-8584 (fax)

Combined Federal Campaign #10201