In This Issue

Election Day Ballot Initiatives Could Affect State and Local Tax Policy

Citizens across the country have been gearing up for this election week for an untold number of months. And while much of the attention has been focused on the too-close-to-call presidential election and the key House and Senate races, when voters hit the polls on Nov. 2 they will also be deciding on a number of different ballot initiatives that potentially could have significant impacts on state and local tax policy.

There are at least 30 initiatives in 13 states that deal with state tax policies. Several raise new revenue and dedicate the money to specific programs. Others shift revenue from one source to another.

While state tax policy differs from federal tax policy, they are similar in that policy adjustments can significantly impact how much revenue is brought in, and how that revenue is allocated. As the growing federal deficit threatens to squeeze the amount of federal support that can be given to states, it becomes more important for states to have tax policies that will ensure responsible revenue-raising and revenue allocation practices. If states become victim to ballot measures that contain disguised reductions in funds for health, education, the nonprofit sector, and various other services, the results could be destructive for the people who rely on funding from state budgets.

The Center on Budget and Policy Priorities has provided a helpful compendium of state initiatives with fiscal implications. Many of these measures are misleading in the level of fiscal impact they will impose on states. Amendment 3 in Missouri, for example, would shift $187 million per year for four years from the state sales tax on motor vehicles out of general revenue funds and into a dedicated road bond fund that would be used to pay back state highway construction bonds. Official literature describes the initiative as having "no net fiscal impact," yet this shift in funds means less money in the general revenue fund. According to the Missouri Budget Project, this will mean less money for activities such as education, health care, nursing home oversight, mental health care and foster care. Too often voters do not understand the implications of such initiatives -- in this case, that some programs will get squeezed in this reallocation.

On the other side of the spectrum, in California voters have the opportunity to reform their tax structure to make it slightly more progressive. Proposition 63 would increase by one percent the state tax on taxable income over $1 million. The additional revenue would provide dedicated funding to expand mental health services. Such popular earmarking of revenue for specific programs has been hotly debated in the state, and raises the concerns that such efforts could reduce public officials' spending flexibility, or lead to a situation in which only politically popular programs with electoral clout are insured dedicated resources. But with continued federal and state cutbacks, this appears to be the more common approaches states are taking.

Completing Appropriations to Dominate Lame Duck Session

Only twice in the last 15 years has Congress been able to complete all 13 of the annual appropriations bills by the end of the fiscal year, and this year is no exception. To address this uncompleted business, the 108th Congress will reconvene Nov. 16 to begin a post-election lame-duck session.

Completing the annual appropriations bills -- required to fund the federal government -- may be Congress's most important constitutional duty. Yet year after year members fail to complete work on these bills, even though they prove over and over that they are capable of acting quickly and reaching agreement when they want to. This was demonstrated earlier this fall when the House and Senate took only one day to pass a supplemental spending bill to help hurricane victims in Florida.

We can expect to see the following development shortly after Congress reconvenes:

- **Debt Ceiling**. Treasury Department officials are predicting that federal spending will hit the spending ceiling some time around the week of Nov. 24, at which point Congress will need to act to increase the debt limit. Increasing the debt limit increases the amount of money that Congress is able to borrow, and thus, spend. This action will be one of the top priorities in the lame duck session. For more information, click here.
- **Finish Appropriations Bills**. Another priority will be passing the remaining appropriations bills, as the president has signed only the Department of Defense bill into law. Four out of 13 appropriations bills have made it through Congress; the other nine will likely be passed in a massive omnibus bill. See recent *Washington Post* and *OMB Watcher* articles for more information.
- **Intelligence Reform Legislation**. As of late last week, House and Senate conferees on the intelligence reform legislation were still deadlocked in trying to reach agreement on implementation of the recommendations from the 9/11 Commission. House Intelligence Chairman Pete Hoekstra (R-MI) said the four conferees were "committed to do whatever we can to try to make this bill a reality." The Senate leaders on the bill, Susan Collins (R-ME) and Joe Lieberman (D-CT), echoed the same message, making it likely for lame duck action and ensuring the bill will not have to start over with the next Congress.

Upcoming 2006 Budget Process Portends Deep Discretionary Cuts

The FY 2006 federal budge, scheduled to be released in February 2005, is important now because federal agencies are already making decisions prior to submitting their individual budgets to the Office of Management and Budget (OMB) in September. The Bush administration has proposed cutting the budget deficit in half over the next five years, while John Kerry has proposed that he will do the same in four years. Because neither presidential candidate seems willing to cut funds from the Defense or Homeland Security programs, there is going to be considerable pressure for them to cut non-defense discretionary spending.

In August, GalleryWatch.com published a report concluding that the FY 2006 budget could very well impose actual dollar cuts in non-defense discretionary spending. The report outlines who the winners and losers will be as the FY 2006 budget will most likely create an unprecedented squeeze.

Congress is also looking ahead to the FY 2006 budget. House GOP leaders will take an annual retreat more than a month early this year, heading to St. Michaels, MD, in early December. The point of this retreat is to give the House leaders a chance to strategize and lay out their priorities for the 109th Congress. They are meeting early so that they will have a chance to figure out their priorities before the new administration, whether it is Republican or Democratic, can map out their agenda.

GOP leaders are expected to spend a significant amount of time discussing priorities for the FY 2006 budget process, especially regarding fiscal responsibility and spending restraints, in light of the $413 billion record high deficit. One Congressman expressed an interest in "staying in budget, doing PayGos, building an emergency fund for emergency supplementals, or a rainy day fund, and just being sensible in how we spend money." Such movement toward greater fiscal responsibility is certainly a wise and valid goal, and one which stands in stark contrast to the 108th Congress's propensity for tax cuts severely skewed toward the wealthy.

NRC Removes All Nuclear Information from Its Public Website

The Nuclear Regulatory Commission (NRC) pulled its entire public reading room offline last week after stories broke about possibly sensitive material on the website. They agency defended its action by saying it is trying its best to balance security and right-to-know.

A Pennsylvania citizen and a national watchdog group recently discovered documents on the NRC website that they believed could aid terrorists. Scott Portzline, an activist, found floor plans and inventories from four university nuclear laboratories, which he thought terrorists could use to acquire nuclear materials. He reported the discovery to a Harrisburg newspaper, which contacted NRC. David Lockbaum, an engineer at the Union of Concerned Scientists, also found nuclear power station diagrams that detailed toxic chemicals and pipelines in the plant. He contacted the NRC directly and suggested they remove the document.

While NRC asserted that portions of these documents should not be publicly available, David Albright from the Institute for Science and International Security disagrees. He told CNN that while NRC's web information might aid terrorists a little, "if someone is determined to do this, it won't help them much. If someone wanted to find this out, they can."

In response to these isolated concerns, NRC pulled all of the roughly 700,000 documents from its site, the second time it has done so, instead of selectively removing the handful of documents thought to be too sensitive for public distribution.

The agency's response to 9/11 was to immediately shut down its entire website, not just the public reading room, and then slowly repopulated the site with selective content. While this time the agency says the public reading room information will be reposted quickly, critics see the move as excessive. Removing its entire library of materials severely hinders the public right-to-know.

EPA Plans for TRI Burden Reduction

The Environmental Protection Agency (EPA) recently held a public meeting to announce two plans for reducing the burden of reporting for the Toxic Release Inventory (TRI). The first, scheduled for sometime in December, would propose simple changes to the TRI reporting forms in an effort to streamline the process. The second rulemaking, scheduled for June 2005, would contain a more substantial programmatic change, although EPA has not yet determined the exact nature of the change.

Previously EPA produced a white paper on TRI burden reduction, which outlined five options for programmatic change. The options include exempting more small businesses, raising reporting thresholds for certain facilities or chemicals, allowing more submitters to use the simpler but less informative form, allowing facilities to report "no significant change" rather than actual numerical data, and switching to reporting toxic releases in ranges rather than specific amounts. For more on EPA's white paper read OMB Watch's previous article.

Based on EPA's presentation of the options at the meeting, as well as previous statements by EPA officials, the "no significant change" option appears to be the option EPA is most seriously considering. Unfortunately this option, along with others considered by EPA, will reduce the reporting burden by sacrificing the quantity or quality of information reported. An option to establish a more aggressive electronic reporting program and harness technology to lighten the reporting burden without reducing the information was noticeably absent from EPA's considerations.

EPA also announced that TRI burden reduction would likely be discussed at the TRI National Conference being held in Washington, DC, Feb. 8-10. The annual meeting is open to the public and anyone interested in attending may register online.

Bush Campaign Restricts Access to Election Website

Last week the Bush-Cheney reelection campaign barred people outside the United States from accessing its website. The restriction was apparently in response to an electronic attack that shut down the both campaign and Republican National Committee (RNC) websites the week before.

The new restrictions prevent anyone trying to access the website except for users in the United States and Canada. All other users only see a message "Access denied: You don't have permission to access www.georgewbush.com on this server."

The campaign and RNC websites were unavailable for six hours after a "distributed denial-of-service attack" flooded the sites with digital data from tens of thousands of computers. Computer security experts report that while blocking individual users or specific countries known for unreliable Internet practices is not unusual, a blanket restriction on all but two countries is unprecedented.

The restriction does not just prevent foreigners, possibly interested in the democratic process, but also blocks American citizens living and traveling abroad from important information during a critical campaign.

Indiana Open Records Audit Finds Improvement but Still Trouble

A recent open records audit by eight Indiana newspapers found the state still needs to make significant improvements in order to comply with its own open records laws. Journalists found mixed results to inquiries in all of Indiana's 92 counties.

Journalists involved in the audit asked for four types of documents -- crime logs and incident reports, a list of public employees' salaries, and court files of sex offenders. Under Indiana's open records law each document must be released. The law only allows officials to deny requests for trade secrets, university research and certain educational and medical records are exempt. Additionally, when individuals request records, they are not required to disclose their name, motives for the request or any other personal information.

During the audit, journalists found that sheriffs complied with requests the least -- they provided 60 percent of crime logs and 43 percent of incident reports. County court clerks were better, disclosing the sex offenders' files in 87 of 92 counties. County auditors released public salaries in 66 percent of counties, although not in the requested electronic format. This is an improvement over a similar audit that occurred in 1997, after which an Office of Public Access Counselor was created. Unfortunately, there are no civil or criminal penalties for public officials who repeatedly violate the law. A denied requestor's only recourse is filing a lawsuit.

Julia Vaughn of Common Cause Indiana explains, "The public shouldn't have to jump through multiple hoops to get information." Although it appears that access in Indiana is improving, there is still much to be done so that the public receives equal access to all information that is required to be public. More information.

IRS 'Examination' of NAACP Exempt Status Based on Criticism of Bush Policies

On Oct. 28 the National Association for the Advancement of Colored People (NAACP) announced that the Internal Revenue Service (IRS) is investigating their tax-exempt status because Chairman Julian Bond criticized the Bush administration's policies in his speech to the group's July convention. The NAACP is a 501(c)(3) organization, and as such is barred from intervening in elections. The nation's oldest and largest civil rights organization questioned the timing of the IRS action, calling it a politically motivated attempt to silence the organization and discourage blacks from voting. The IRS denied political motivation.

The NAACP's problems began Oct. 8 when it received a notice from the IRS that an examination is underway, focused on "whether or not your organization has intervened in a political campaign...." Initially the NAACP response was due Oct. 23, but the IRS granted an extension until Nov. 5.

The IRS notice said, "We have received information that during your 2004 convention in Philadelphia, your organization distributed statements in opposition of George W. Bush for the office of presidency. Specifically in a speech made by Chairman Julian Bond, Mr. Bond condemned the administration policies of George W. Bush on education, the economy and the war in Iraq."

The IRS appears to have equated criticism of policies and actions of office holders with partisan electioneering. This breaks with the long-standing legal distinction between prohibited intervention in a campaign and the constitutionally protected right of 501(c)(3) organizations to speak out on the issues of the day.

Frances Hill, a University of Miami law professor, told Knight-Ridder News Service that she read the speech, and although it criticizes Bush, it appeared to be on safe legal ground because it did not focus solely on the election and had a broad focus, including issues of long standing concern to the NAACP, such as equality and justice. Hill said, "You can be passionate and still have a tax-exempt status. If the IRS thinks that this speech is sufficient to trigger an audit, then I think we have quite a new standard, and they must be planning to audit hundreds of other groups." The IRS is requiring the NAACP to supply a wide range of information, including:

- Who authorized Chairman Bond's speech
- How much the convention cost
- The names, addresses of each person on the board in July
- Copies of minutes of board meetings where the speech was discussed and voted on
- Supportive documentation if they believe the speech was not prohibited campaign intervention.

These information requests imply sanctions beyond loss of tax-exempt status, since the letter notes a tax of 10 percent can be imposed on the group for "political" expenditures and a tax of 2.5 percent on any manager who agreed to it. This is a direct threat of personal sanctions for the NAACP's 64-person board.

A Republican tax and election law lawyer, Jan Baran, told the Washington Post that he could not think of a similar recent IRS action, but that cautionary letters have been sent to churches. On Oct. 29 an IRS announcement said 60 charities are currently being examined, including 20 religious organizations. Tax law prohibits the IRS from releasing names of the groups being investigated. The statement said the investigations are based on decisions made by civil servants following strict procedures, which the statement did not describe. IRS Commissioner Mark Everson said. "Any suggestion that the IRS has tilted its audit activities for political purposes is repugnant and groundless."

Reaction to the IRS examination was swift. Bond said, "I think what's at issue is our right to criticize the president of the United States." He also noted, "We have always been nonpartisan, but we are not non-critical." Rep. Charles Rangel (D-NY) issued a statement on Oct. 28 saying, "This is a tactic of a police state if I've ever seen one."

As the ranking Democrat on the House Ways and Means Committee, Rangel joined Reps. Fortney "Pete" Stark (D-CA), and John Conyers (D-MI) in an Oct. 29 letter to Everson, saying, "It is not against the tax law for the NAACP, or any tax-exempt organization, to discuss or oppose various aspects of the Bush administration's policies. We demand to know why the current administration, through the IRS, is attacking the NAACP."

The same day Senate Finance Committee ranking Democrat Max Baucus (MT) also wrote to Everson asking several questions, including whether the "political activity" limitation imposed on 501(c)(3) organizations has been broadened, what steps lead to the decision to examine the NAACP and if groups critical of Bush's opponent have also been examined. He said, "Mere criticism of an administration's policies is clearly a proper activity for an organization with 501(c)(3) designation." Baucus also noted former President Richard Nixon used the IRS to intimidate groups that disagreed with him and, "As a result, many taxpayers lost confidence in the IRS's ability to enforce the law judiciously, and the agency's reputation suffered immensely." Bush's opponent in the presidential election, Sen. John Kerry (D-MA) requested an investigation by the Department of Justice Civil Rights Division.

In an Oct. 29 statement Ralph Neas of People for the American Way said, "The people running this administration are bullies." OMB Watch posted a statement Oct. 29 that said, "The election-eve IRS investigation regarding the nonprofit status of NAACP, the nation's oldest and largest civil rights organization, is part of a growing pattern of intimidation and suppression of free-speech and advocacy rights of charities and other nonprofits." The NAACP case was announced just days after OMB Watch published Continuing Attacks on Nonprofit Speech: Death by a Thousand Cuts II , which documents retaliatory action by the administration and its conservative allies against nonprofits that publicly disagree with their policies and action.

However, the IRS action against the NAACP goes far beyond any of the abuses cited in our report, attacking the fundamental right of nonprofits to comment on issues of the day. This is exactly what the sector was concerned about in the spring when the 527 rules were proposed to the Federal Election Commission.

Report Finds Growing Pattern of Attacks on Nonprofit Speech

Government agencies and officials and conservative allies are increasingly targeting nonprofit organizations for their free speech activities, as OMB Watch documents in a report published Oct. 26, *Continuing Attacks on Nonprofit Speech: Death by a Thousand Cuts II*. (See press release and statements from the audio news conference.) The analysis found:

- Retaliatory action against government grantees that engage in controversial policy discussions or active advocacy that includes points of view different from the administration, regardless of how well those views are supported by science
- Aggressive application of the global gag rule, and signs of a back-door "domestic gag rule" that illegally imposes government rules on private funds of grantees
- Selective enforcement of laws against nonprofits engaged in direct action
- Overbroad implementation of homeland security policy that chills the nonprofit policy voice.

"Charities should be encouraged to speak out on policy issues even when dissenting from the President's policies," said Gary D. Bass, OMB Watch executive director. Kay Guinane, co-author of the OMB Watch report cited the latest prominent example. "Election eve political intimidation of the NAACP is wrong and a misuse of government funds," she said. (See NAACP story this issue.)

OMB Watch's report describes the experience of a dozen other nonprofit organizations with what appear to be retaliatory audits, funding cuts and similar actions, by IRS and other federal agencies.

One example is IRS's auditing of the National Education Association (NEA) for political activities it is legally allowed to engage in, as the nation's largest teachers union, when paid for from a segregated fund. IRS also audited the Land Stewardship Project in Minnesota last year after it supported a referendum on the "pork checkoff" which favors factory farms to the detriment of small, family farms.

Treasury Department Shuts Down Muslim Charity

On Oct. 13, the Treasury Department designated the Islamic American Relief Agency (IARA), along with five senior officials, as supporters of terrorism. This action froze all accounts, funds and assets of IARA in the United States and criminalizes the provision or donation of money to any of its offices. IARA has no right to appeal or learn of the evidence against it. This effectively allows the government to treat organizations as guilty without the opportunity to demonstrate innocence.

During a search of IARA's Columbia, MO, office building, the FBI seized boxes, computers and file cabinets. Thursday, the search expanded to storage lockers and the home of Mubarak Hamed, who served four years as the charity's executive director. He also worked as the charity's president from 1992 through 1998.

According to the Treasury Department, the charity and five of its senior officials funneled hundreds of thousands of dollars to Osama Bin Laden and al-Qaeda in 1999, and that one of bin Ladin's lieutenants directed the group's operations in Afghanistan. The Islamic American Relief Agency (IARA) is a 501(c)(3) that is focused on charitable work for orphans, disaster and famine relief, and aid to refugees. A spokesman for InterAction, the U.S. coordinating and policy body for more than 160 international charities, said that IARA was a member in good standing and was in compliance with the organization's voluntary standards for administration and procedures.

Federal officials state that the charity belongs to a larger network, with headquarters in Sudan. In a four-page fact sheet on its website, the Treasury Department draws connections between terrorists and some of the charity's many offices and officials. However, no links were made between the Columbia office and terrorism.

The organization's attorney, Shereef Akeel, said IARA-USA is a completely different organization than IARA-Sudan. IARA-USA is legally registered as an independent agency (not as a branch of any other organization) with its own board of directors, administrative structure, executive decision-making process, and legal and financial accountability obligations (for example, the IRS, to whom IARA-USA is subject to review and audit as an independent agency). None of these functions and responsibilities is shared with any other organization.

Since 2001, federal authorities have raided and shut down 25 charities, freezing the assets of the organization and arresting or deporting its staff. Yet, not one staff member has been convicted on a terrorism-related charge.

These recent developments have made American Muslim charities feel that they are in constant danger of ending up on a government watch list for aiding terrorism. This threatens donations to Muslim charities, especially during Ramadan, when giving is required by the Muslim faith. Muslim organizations say members are afraid to give money to Muslim charities -- and those who do are opting to give cash instead of checks.

To make giving easier during Ramadan, Muslim charities requested the federal government draw up a list of Islamic charities to which they could donate without being suspected of terrorist ties. The request was denied by the Justice Department, which said it was impossible to fulfill. "Our role is to prosecute violations of criminal law," a Justice Department spokesman said. "We're not in a position to put out lists of any kind, particularly of any organizations that are good or bad."

In a recent statement, Treasury Secretary John Snow encouraged American Muslims to continue to give to charities, but to educate themselves about the groups to which they donate to make sure the funds are not being used to support terrorism. Yet IARA was not on any government watch list before its assets were frozen. Muslims have no way of knowing which groups the government suspects of ties to terrorism. Consequently, donations to Muslim charities have declined

significantly since last Ramadan.

New Rules, Empty Pockets: Funding Faith-Based Services in a Time of Fiscal Uncertainty

Three executive orders have created centers for the Faith-Based and Community Initiatives in many federal agencies. Booklets have been published which provide guidance to faith-based groups on how to get federal funding, and the government has held a series of educational conferences and a catalog of grant opportunities. Recently, both USAID and HUD published final rules implementing a policy ensuring that faith-based organizations are able to compete on equal footing with other organizations for funding. So why has funding for faith-based organizations in the social service system at the state and local levels deteriorated recently? A new report by the Roundtable on Religion and Social Welfare Policy details the funding problems of the "Faith-Based Initiative."

The report addresses the question of how underlying, long-term fiscal trends are affecting the availability of public funding of services delivered primarily by congregations and congregation-based social service organizations.

State and local governments currently lack adequate resources to expand their social service programs to include new grantees that traditionally do not provide social services. It is possible that some states will reduce contracts with secular nonprofits and transfer funding to the faith-based organization.

Successful funding of faith-based organizations requires both substantial and sustainable growth in fiscal resources at the state and local levels and a desire to fund social service programs.

It may be some time before state and local funding levels rebound to what they were before the economic slowdown. At the federal level, funding cuts and other programs and issues are making the environment for funding more competitive. With the economy still struggling, a continued decline in domestic discretionary funding and social service programs in general will continue to plague the Faith-Based Initiative. Additionally, current military obligations and a growing federal deficit will make it less likely spending on social service programs will increase in the near future.

However, it is not just funding priorities that suggest a de-emphasis on the Faith-Based Initiative. The Bush administration stated, "The federal government must restrain the growth of any spending not directly associated with the security of the nation." The majority of the nation's social service programs are not involved in the physical security of our nation -- but instead the personal security of individuals -- providing much needed food, shelter and childcare services.

Most of these programs are low priority for the Bush administration, which has proposed policies to push responsibility for them onto the states through conversion of funding to block grants or vouchers.

The Bush administration exalts the Faith-Based and Community Initiative as a "bold new approach to government's role in helping those in need," and that "government has ignored or impeded the efforts of faith-based and community organizations." Many Americans find arguments in favor of faith-based funding to be compelling, and a strong majority acknowledges the contributions churches, synagogues and other religious groups make to society. Nearly three-quarters (72 percent) cite the care and compassion of religious workers as an important reason for supporting the concept of faith-based groups receiving government funding. This reflects a public recognition of the strong connection between religious practice and social service.

However, from the beginning, the president's program contained little, if any, new money. The administration aggressively pushes a faith-based agenda, but as corporate tax cuts grow larger and the war in Iraq drags on, the funding of social service programs -- federal, state and local -- declines. This pits the current providers against a raft of new faith-based providers for the crumbs from an increasingly small sliver of federal funding for human needs.

Read more.

Independent Sector Names Members of Expert Advisory Panel

Independent Sector announced the formation of an eight-member Expert Advisory Group that will advise the "Panel on the Nonprofit Sector" formed in response to a request by the Finance Committee to make recommendations to Congress to improve the oversight and governance of charitable organizations. The Expert Advisory Group will provide knowledge and support to the Panel on such issues as government regulation, financial accountability, and tax policy. They will also provide perspective on recommendations from the working groups that will also support the panel.

Joel Fleishman, director of the Samuel and Ronnie Heyman Center for Ethics, Public Policy and the Professions at Duke University and Marion Fremont-Smith, senior research fellow at the Hauser Center for Nonprofit Organizations at Harvard University, will serve as co-conveners. Additional members are Victoria B. Bjorkland, head of the Exempt Organizations Group at the New York law firm of Simpson Thacher & Barlett; Evelyn Brody, professor of law at the Chicago-Kent College of Law at the Illinois Institute of Technology; William Josephson, former assistant attorney general-in-charge of the New York State Law Department's Charities Bureau; Lester M. Salamon, director of the Center for Civil Society Studies at the Johns Hopkins Institute for Policy Studies; C. Eugene Steuerle, senior fellow at the Urban Institute; and Eugene R. Tempel, executive director of the Center on Philanthropy at Indiana University. The advisory group is expected to be one of two advisory groups that will be established to assist the Independent Sector Panel address governance and oversight issues affecting nonprofit organizations. Independent Sector also plans to announce work groups in the near future that will play a central role in the process of developing recommendations for the Senate Finance Committee. For more information on the Independent Sector Panel

FEC Regulations to Stay in Effect Past the Election, Unpaid Broadcast Ban Appealed

Although a federal court judge refused to grant the Federal Election Commission (FEC) a stay of a September decision overturning 15 regulations implementing the Bipartisan Campaign Reform Act of 2002, the rules will remain in effect until after the election on Nov. 2. The FEC has appealed the case to the U.S. Court of Appeals for the District of Columbia, challenging the standing of Reps. Chris Shays (R-CT) and Marty Meehan (D-MA) to bring the suit and defending five of the 15 regulations.

In an Oct. 29 statement the agency said its appeal will include an exemption to the electioneering communications ban on unpaid broadcasts and the definition of what constitutes illegal coordination between federal campaigns and other groups. The other rules will be rewritten in regulatory proceedings. These include a general exemption for Internet communications and the electioneering communications exemption for 501(c)(3) organizations. If the appeals court rules in the FEC's favor on the standing issue, all of the regulations challenged would stand. However, the FEC is likely to begin re-writing the rules before the appeal is concluded, since it did not win a stay from the lower court. A schedule for further regulatory action is likely to be set by the end of the year.

The new rules may not be substantially different from the original rules, since the FEC noted that the court dismissed several of them on procedural grounds. The exemption for 501(c)(3) organizations is among those. FEC Chairman Bradley Smith said: "The Commission will present a strong case to the Court of Appeals that its rules reflect a proper exercise of agency discretion. It is also worth noting that none of the problems the plaintiffs predicted would be caused by the regulations have come to pass."

Dreier Pushes Amendment to Place DHS Above Law

Rep. David Dreier (R-CA) is promoting an amendment to pending intelligence overhaul legislation that would exempt the Department of Homeland Security from all federal law in the course of securing the nation's borders.

Dreier is championing this amendment in the conference committee that is working to resolve differences in the House and Senate versions of a bill to implement reforms suggested by the 9/11 Commission.

The Department of Homeland Security (which now has border control responsibilities formerly granted to the Department of Justice) is already exempted from the National Environmental Policy Act and the Endangered Species Act "to the extent the [DHS Secretary] determines necessary to ensure expeditious construction" of additional physical barriers and roads along the U.S. border "in areas of high illegal entry into the United States" by section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), P.L. 104-208, 110 Stat. 3009-546 Div. C (codified at 8 U.S.C. § 1103 note). The Dreier amendment would expand this waiver to cover all laws in the U.S. Code short of the Constitution itself. It is also drafted to make the Secretary's decision unreviewable in court challenges.

The original iteration of this amendment, as proposed in the House by Rep. Doug Ose (R-CA), would have expanded IIRIRA § 102 by listing a catalogue of environmental laws in addition to NEPA and the ESA. The version pushed by Dreier expands this exemption even further, beyond environmental laws, to put the DHS Secretary above all federal laws, environmental or otherwise, such as the following:

- Child labor laws
- Davis-Bacon wage determinations
- Ethics laws
- Age discrimination laws (which exceed constitutional guarantees)
- Whistleblower laws
- Employee protections
- Procurement and contracting laws designed to assist small businesses

Text of the Dreier Amendment

Sec. 3131. Waiver of Laws Necessary for Improvement of Barriers at Borders

Section 102(c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 * * * is amended to read as follows:

"(c) Waiver -- Notwithstanding any other provision of law, the Secretary of Homeland Security shall have the authority to waive, and shall waive, all laws such Secretary, in such Secretary's sole discretion, determines necessary to ensure expeditious construction of the barriers and roads under this section."

It is unclear what limits, if any, would be placed on the DHS Secretary's power to waive federal law. Although subsection (b) of IIRIRA § 102 specifically charges DHS with building second and third fences along a 14-mile stretch of the southern border, that provision is only a specific instance of the larger charge in subsection (a) to "take such actions as may be necessary to install additional physical barriers and roads (including the removal of obstacles to detection of illegal entrants) in the vicinity of the United States border." The Dreier amendment, which would replace the NEPA and ESA waiver in subsection (c), would permit the expanded waiver power whenever DHS deems it necessary "to ensure expeditious construction of the barriers and roads under this section." The words "this section" apparently apply the waiver power to all of IIRIRA § 102, not just § 102(b) in particular. The Dreier amendment would thus place DHS above the law -- above all law -- whenever it acts to secure the borders and remove "obstacles to detection of illegal entrants."

Mercury Emissions Adversely Affect Minorities

The cap-and-trade method for curbing mercury emissions will greatly harm those from the Great Lakes region, particularly American Indians, according to a new white paper released by the Center for Progressive Regulation (CPR).

The report takes aim at the cap-and-trade mercury rule proposed by EPA, which plans to control mercury emissions from coal-fired power plants by setting an emission standard for mercury and then allowing plants to trade emissions up to a certain cap. Mercury emissions from coal-fired power plants are most dangerous to humans when they deposit in bodies of water. In an aquatic environment, mercury is converted to the toxin methylmercury, which is then absorbed by living tissue, particularly in fish. Humans generally absorb mercury into their bloodstreams through consuming fish.

High levels of mercury in the blood can cause irreversible neurological damage. It is particularly dangerous for pregnant women and children. According to the U.S. Centers for Disease Control and Prevention (CDC), 15.7 percent, or one in six, women of child-bearing age has an unacceptably high level of methylmercury in their blood. EPA predicts that about 630,000 children are born each year with unsafe levels of mercury in their blood. The CDC study also found greater levels of mercury in the bloodstreams of black and Mexican Americans than in non-Hispanic white Americans.

Problems of the Cap-and-Trade Approach

Though EPA has denied that the cap-and-trade strategy will cause "hot spots," concentrated areas of higher or even increased emissions, the CPR report claims that it will in fact create areas of high mercury emission, in particular around the Great Lakes region. CPR relies on EPA's own data to show that, even though mercury emissions will be decreased nationally due to the regulation, emissions will increase locally in specific areas of the Great Lakes region. That region will see total mercury emissions fall by 27 percent, but emissions will increase locally in "20 out of 44 sources in the region. Further, in 2020, emissions are projected to be higher under cap-and-trade than under MACT [maximum achievable control technology] best case for every source in the upper Great Lakes states of Michigan, Minnesota, and Wisconsin but one," according to the report.

An increase in emissions in that region is particularly harmful to the local population. The Great Lakes region geography is 23 percent water bodies, compared to a national average of 7 percent. Thus, mercury emissions in the Great Lakes region are more likely to be deposited in bodies of water where they can more easily be absorbed by the fish. Furthermore, people of the Great Lakes region eat a much greater amount of fish than the rest of the country, and Native Americans in the region eat ten times more fish per day than the average American and four times more than others in the Great Lakes region. Whereas the typical American eats 17 grams of fish per day, those in the Great Lakes regions eat 42 grams of fish per day and Great Lakes Indian tribes eat 190 grams per day. Indian women in the region already have an average of ten times EPA's reference dose of mercury, which is considered the maximum amount that can be ingested over a lifetime without adverse health effects.

An Alternative to Cap-and-Trade

Cap-and-Trade v. MACT

According to the CPR study, "by 2010, the administration's cap-and-trade approach would permit eleven times the mercury emissions in the upper Great Lakes states than the standard maximum achievable control technology [MACT] approach would have achieved in a best-case scenario." Whereas the cap-and-trade strategy would reduce emissions by 61 percent by 2020, according to EPA analysis, the MACT project would reduce emissions by 90 percent by 2007. Compared to cap-and-trade, MACT technology would not only have a greater impact on the overall reduction of mercury emissions, but it would also require that all power plants meet the same standards, thus distributing the burden of pollution fairly and avoiding the potential for hot spots.

Cap-and-trade, however, is the method currently favored by EPA and the administration because it imposes fewer burdens on industry. Rather than enacting a policy that would reduce emissions to an acceptable level, EPA plans to rely on advisories to protect fish consumers. "EPA thus moves to make fish consumption advisories a permanent feature, rather than a stop-gap measure as in the past," CPR notes, adding that this method also entails a significant reversal in responsibility for mitigating the harms of mercury. The EPA plan seeks to have consumers avoid risk by reducing or eliminating their fish intake rather than removing the risk through regulation; in essence, it shifts the burden of reducing risk from the polluters to the consumers:

> Those people who rely on fish as a major part of their diet, especially subsistence fishers and their families, would be warned to reduce their fish intake or to stop eating fish altogether. This approach effectively shifts the burden of addressing mercury pollution from the polluting industries to the people who depend on fish for food.

The EPA strategy is representative of a larger administration approach to regulation that prefers, as CPR says, "risk avoidance over risk reduction."

MACT: Available and Affordable

EPA has claimed that a MACT approach would be too costly and would put undue hardship on industry. A recent report by the National Wildlife Federation (NWF) uses EPA's own data to show that a 90 percent reduction in mercury emissions is achievable by 2010 for the added burden to consumers of only a few dollars per month. Using estimates prepared by EPA, NWF looked at states that rely most heavily on coal-fired power plants and projected the costs of using technology that has already been tested and in some cases is already even in use. In Getting the Job Done: Affordable Mercury Control at Coal-Burning Plants, NWF claims that using existing technology could reduce mercury emissions 90 percent by the end of the decade for the added cost to consumers of only $1 to $3 per month. Costs would be even lower in other states that are less dependent on coal. This claim counters that of EPA administrator Mike Leavitt, who recently sent a letter to Pennsylvania Gov. Ed Rendell saying that reducing emissions by 90 percent would be extremely expensive.

NWF's assertions are backed by several industry groups. In June, the Institute for Clean Air Companies told EPA that control levels of 50 percent to 70 percent were feasible between 2008 and 2010 using currently available technology, and that combinations of technology could reduce mercury by up to 90 percent at low cost. In August, an engineer with Southern Co. told the Merge Symposium on air pollution technology that "tests of activated carbon combined with fabric filters have resulted in the removal of toxic mercury from coal-fired power plan emissions as much as 94 percent, but more testing is necessary before the technology is commercially applicable," according to another report in BNA's *Daily Report for Executives*.

Fish Advisories on the Rise

As the debate rages, national fish advisories for unsafe mercury levels have steadily increased across the country. A report published by PIRG found that 32 percent of fish caught in all U.S. lakes and 22 percent of all river miles were subject to mercury advisories in 2003. According to *Fishing for Trouble: How Toxic Mercury Contaminates the Fish in U.S. Waterways*, 44 states issued warnings in 2003, up from 27 in 1993.

Though the warnings have increased, the levels of mercury emissions have steadily decreased over the past several decades. EPA asserts that the increased advisories are due to increased reporting and testing rather than an increase in mercury levels in fish. That being the case, the rising level of fish advisories indicates that even more Americans may be impacted by mercury pollution than previously suspected.

EPA plans to finalize a regulation to control mercury emissions from coal-fired power plants by March 15, 2005.

Court Rejects Ban on Snowmobiles in Yellowstone

Rejecting a National Park Service ban on recreational snowmobile use in the Yellowstone area as a "predetermined political decision," a federal court in Wyoming found that the Clinton-era snowmobile ban violates the National Environmental Policy Act and the Administrative Procedure Act.

Although early news reports suggested that the new decision conflicts directly with a decision by the district court in Washington, DC, that also addressed snowmobiles in the parks, the two decisions actually covered different rulemakings, and each focused on the propriety of the rulemaking processes rather than snowmobiles as such. In essence, the Wyoming litigation challenged a decision in 2001 to phase out snowmobiles and ultimately ban them entirely in favor of snowcoaches, which are quieter and less polluting, and the DC litigation challenged a subsequent decision in 2003 to reverse the Clinton-era snowmobile ban.

Our accompanying analysis reveals a number of gaps and weaknesses in the reasoning used by the court to justify rejecting the snowcoach rule under NEPA and the APA. These faults in the reasoning are particularly worth noting in light of recent evidence that the partisan affiliation of the president who appointed a judge correlates with a judge's tendency to rule in NEPA cases. True to form, Judge Clarence Brimmer, an appointee of a Republican president, Gerald Ford, made this NEPA ruling against the environmentalists' position. The same judge rejected the Clinton administration's roadless rule in a NEPA challenge.

Click here for details on the ruling, the background of the snowmobile rules, and analysis of the decision.

Interior Gives Exclusive Appeal Rights to Industry

A proposed rule from the Department of Interior would grant those in the hydroelectric industry the exclusive right to appeal rulings about how dams are licensed and operated.

The rule could save the hydroelectric industry hundreds of millions of dollars in settlements while effectively cutting Indian tribes, states, federal agencies and environmental groups out of the appeals process.

The rule comes at a pivotal time for the industry; more than half of licenses for dams on American rivers will come up for renewal during the next 15 years. Many of these licenses were issued before federal environmental laws that required the protection of fish and wildlife. In order to renew their licenses dam owners are now forced to pay large settlements to mitigate environmental harm caused by the dams. These settlements average $10 million and can be as high as $200 million. "By allowing the industry the exclusive right to present alternative settlement ideas, the proposed appeal rule could substantially reduce the cost of renewing a dam license," according to a *Washington Post* article.

The rule is similar to provisions in the Energy Policy Act of 2003 H.R. 6 and S. 2095), which has repeatedly been shut down by the Democrats. By implementing the policy through the rulemaking process rather than through statute, the Bush administration is able to circumvent the Democratic blockade in Congress. According to the *Washington Post*, some DOI lawyers believe the rule violates due process and equal protection. The *Washington Post* quoted one senior Interior Department official who is involved in the dispute:

> It is not legal because one party is being treated very differently than another, and that is very much the opposite of what we have been trying to do for years .... Suddenly, a licensee can walk away from everybody else and have a private meeting with the assistant secretary and bring in new conditions that haven't been reviewed by anybody before.

John Dingell (D-MI), ranking Democrat on the House Energy and Commerce Committee, sent a letter Oct. 25 to Department of Interior Secretary Gale Norton requesting information on the rule and on the process by which the Department of Interior developed the rule. "While I am concerned about the negative consequences that could result from

the adoption of this proposed rule, specifically the one-sided appeals process that effectively eliminates certain parties from participating," Dingell wrote. "I am also very concerned about the process for recommendations that led to its development." In his questions, Dingell requested information about the relationship between the proposed rule to Cheney's National Energy Policy Development Group, questioned the statutory authority of the DOI to promulgate such a rule, and inquired whether the rule would conflict with DOI's responsibility to American Indians, asking, "how can the Department adequately meet its tribal trust responsibility when it grants a dam owner an appeal right for a condition but fails to do so for a tribe?"

Responses to Dingell's questions are due Nov. 15. The proposed rule is open for public comment until Nov. 8.

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