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Nonprofits Urge Supreme Court to Protect Grassroots Communications

A diverse coalition of charities filed an amicus brief on Nov. 14 in the Supreme Court case *Wisconsin Right to Life v. Federal Election Commission* urging the court to protect the right of nonprofits to broadcast grassroots lobbying communications.

Wisconsin Right to Life (WRTL) a 501(c)(4) social action organization, wanted to conduct a grassroots lobbying campaign before last year's national election airing ads urging Sens. Russ Feingold (D-WI) and Herb Kohl (D-WI) to oppose upcoming Senate filibusters of President Bush's judicial nominees. Because Feingold was up for re-election, the ads conflicted with campaign finance legislation. The Bipartisan Campaign Reform Act of 2002 (BCRA) prohibits broadcast ads referencing a federal candidate within 30 days before a primary election or 60 days before a general election. WRTL filed suit seeking an injunction to this restriction.

Both the lower court and federal appeals court denied WRTL's bid for an injunction, relying on language in the Supreme Court's decision in *McConnell v. Federal Election Commission* that might be read as disallowing as-applied challenges (i.e., "this law is unconstitutional as applied to me") to the provision. The Supreme Court initially declined to intervene, but James Bopp, the

lead attorney representing WRTL, pursued the case, arguing that the Supreme Court, in its 2003 ruling in *McConnell*, did not preclude all "as applied" challenges to BCRA's electioneering communication provisions. The language in *McConnell* suggests that because the largest number of ads that are run around elections will be sham issue ads, genuine issue ads - such those of WRTL - were entitled to constitutional protection on an "as applied" basis. Bopp also argued that an exception for a provision is constitutionally required for ads aimed at influencing opinion on policy issues.

Oral argument is expected in early 2006. The court will be considering two issues:

- whether challenges to specific applications of the electioneering communications rule are even allowed, and
- whether WRTL's grassroots lobbying ads must be exempted from the rule for constitutional reasons.

The grassroots lobbying exception Bopp is asking the Supreme Court to consider contains numerous criteria that distinguish the ads that BCRA is intended to target from the genuine issue ads that get caught in the crossfire. Qualities characteristic to genuine issue ads, according to Bopp, include: communications are about a legislative matter; communications only references the candidate in asking him/her to take a position; there is no reference to a political party; and no reference is made to the candidate's character or qualifications. For a complete list of factors, see the WRTL brief.

The multi-party amicus brief was filed on behalf of thirty-five charities (exempt under 501(c)(3) of the federal tax code). The brief argued that the electioneering communications restrictions deny charities the right to petition the government for redress of grievances, which is protected by the First Amendment. The electioneering communication restrictions in BRCA cannot be constitutionally applied to 501(c)(3) charities because such organizations are, and must be to retain their tax-exempt status, nonpartisan and nonpolitical.

"Unlike the corporations producing 'sham issue ads' that the electioneering communications provision was designed to prevent," explains OMB Watch policy analyst Jennifer Lowe-Davis, "charities cannot establish federally registered political action committees to engage in political spending. While these corporations may take comfort in knowing they can engage in free speech through a segregated fund, charities are silenced."

The friend of the court briefing also points out no evidence has been found to support claims that the activities of charities have led to corruption of public officials or that they distort the political process. In contrast, charities enhance the political process by serving as a counterweight to the immense resources that corporations use to influence government. "Charities represent the otherwise unrepresented in the deliberations of government," Lowe-Davis continued.

OMB Watch organized the nonprofit coalition, which includes Independent Sector; Independence Institute; Alliance for Justice; American Conservative Union Foundation; Center for Lobbying in the Public Interest; NARAL Pro-Choice America Foundation (along with some NARAL state-level organizations); National Counsel of Jewish Women; National Legal and Policy Center; National Council of Nonprofit Associations (along with some state- and city-level nonprofit associations); National Low Income Housing Coalition; Violence Policy Center;

Association of American Physicians & Surgeons Educational Foundation; Eden Housing, Inc.; Clients Council of the Legal Aid Society; Massachusetts Council of Human Service Providers; Michigan League for Human Services; Montana Conservation Voters Education Fund; Bronx AIDS Services, Inc.; The Urban League of Greater Cleveland; Housing Alliance of Pennsylvania; New Morning; and Liberty Legal Institute.

Revised Nonprofit Anti-Terrorism Guidelines Expected This Week

This week the Treasury Department will likely release its revised anti-terrorism financing guidelines with broad implications for the nonprofit sector. The revision will likely emphasize that the guidelines are voluntary. It will also urge nonprofits to check the terrorist watch lists when doing business with any group or individual.

The Treasury Department's *Anti-Terrorism Financing Guidelines: Voluntary Best Practices for U.S. Based Charities* were published in 2002 as one measure to implement President Bush's Executive Order 13224, signed shortly after the Sept. 11 terrorist attacks in order to cut funding to terrorist networks. According to the Treasury Department, the guidelines "are intended to assist charities in developing a risk-based approach to guard against the threat of terrorist abuse."

The guidelines, however, have been mired in controversy since their inception. For example, despite the Treasury Department's insistence that the initial guidelines were voluntary, many foundations have begun checking against terrorist watch lists the names of potential grantees, including grant seeker's key staff and board members. Some nonprofits have instituted similar list-checking policies when re-granting funds, and several workplace giving programs, such as the United Way, have also taken up the practice when selecting participating organizations.

Even the Combined Federal Campaign (CFC), the government's charitable workplace giving program, instituted list-checking requirements in its 2004 and 2005 applications. On Nov. 7, following a legal challenge brought by several nonprofit groups including the American Civil Liberties Union (ACLU) and OMB Watch, however, the CFC issued new regulations for 2006 which move away from mandating list checking requirements. The new CFC rules do, however, encourage nonprofits to follow the Treasury guidelines and to check terrorist watch lists.

The emphasis on following the Treasury guidelines is somewhat surprising since they have from the start been intended to be voluntary. Moreover, the guidelines are far more limited in scope than the nonprofit sector's implementation of them has been. For example, the guidelines only suggest list checking and other checks of "questionable activity" for "potential foreign recipient organizations," not for all organizations.

On the other hand, the guidelines offer broad advice on a range of other topics only indirectly related to anti-terrorism. For example, the guidelines urge nonprofit boards to meet at least three times a year with the majority of members attending in person and to collect from board members home address, Social Security number, citizenship and other information. It is unclear the extent to which nonprofits have incorporated such advice.

A Treasury Department official said the new guidelines would be made public prior to the Thanksgiving holiday and that there would be a comment period allowed, even though the new guidelines would be operational the day they are published. According to a Treasury spokesperson, the revised guidelines' first section will emphasize the voluntary nature of the best practices and demonstrate a "recognition of flexibility" in embracing the suggestions that the original guidelines did not show. Another new section will provide fundamental principles similar to the Principles of International Charity, developed by a working group of nonprofits and foundations.

The spokesperson also indicated the new guidelines would substantively change other recommendations. Instead of suggesting checking a number of different watch lists, the revised guidelines will refer only to the Treasury Department's Office of Foreign Assets Control Specially Designated Nationals List.

Fate in Senate of Nonprofit Gag Provision Uncertain

Nonprofits Monitoring Other Legislation for Advocacy Restrictions

After a stinging five vote loss in the House, nonprofit groups continue their efforts to oppose the inclusion of any restrictions on the use by nonprofits of private funds for nonpartisan voter registration and advocacy in the Senate's version of an affordable housing provision. At the same time, Head Start advocates are examining pending reauthorization legislation to determine if new language in it would restrict the use of private funds for Head Start grantees.

Led by the affordable housing community, nonprofit groups have rallied against an appalling set of anti-advocacy provisions in a House bill dealing with affordable housing and are continuing to work to ensure the language is not included in the Senate version. The affordable housing language is part of a broader bill providing oversight of Fannie Mae and other government sponsored enterprises (GSE). On Nov. 18, a coalition of 108 nonprofit organizations sent a letter to Sens. Bill Frist (R-TN), Harry Reid (D-NV), Richard Shelby (R-AL) and Paul Sarbanes (D-MD) declaring strong opposition to the inclusion of any anti-advocacy language in the GSE regulatory reform bill.

H.R. 1461, the Housing Finance Reform Act, passed the House 331-90 on Oct. 26, despite a provision that disqualifies nonprofits from receiving affordable housing grants if they have engaged in voter registration and other nonpartisan voter activities, lobbying, or produced "electioneering communications." Organizations applying for the funds are barred from participating in such activities up to 12 months prior to their application, and during the period of the grant even if they use non-federal funds to pay for them. Most troubling, affiliation with an entity that has engaged in any of the restricted activities also disqualifies a nonprofit from receiving affordable housing funds under the bill.

The Senate GSE bill, S. 190, currently does not contain an affordable housing fund provision, to which the anti-advocacy language could be attached. The Senate Banking Committee approved the bill last July on a party-line vote after rejecting a substitute offered by Sen. Jack Reed (D-RI) that would have included an affordable housing fund.

The fate of the Senate's GSE bill is questionable. Although many agree a new regulator providing oversight for Fannie Mae and Freddie Mac is needed, some predict that key areas of disagreement between Democrats and Republicans could doom the legislation next year. The Senate bill includes tight restrictions on Fannie Mae and Freddie Mac's portfolio holdings and also limits the types of mortgage investments Fannie and Freddie could include in their portfolios.

Meanwhile, nonprofits in other issue areas are looking out for possible restrictions on their private funds hidden in other legislation. An example of this is S. 1107, the Head Start Improvements for School Readiness Act. The legislation, which reauthorizes Head Start through fiscal year 2010, could create new barriers to voter registration by slightly tweaking a prohibition on program funds to encompass the program itself, including Head Start grantees' private funds. Twenty percent of Head Start monies are private funds.

The older Head Start language stated that the restrictions applied to program funds. The new proposed language is less clear and refers to restrictions that would be applied to the program - which is not defined under the Head Start Act.. This slight revision could have significant implications for how Head Start grantees may use their private funds, as such funds might be considered part of the program.

Reportedly, the language came out of a compromise between Sens. Judd Gregg (R-NH) and Edward Kennedy (D-MA), after Gregg offered more restrictive language in committee. It is unclear why Gregg offered the language, as regulations in the Head Start Act and OMB Circular A-122 already prohibit a Head Start agency from using Head Start federal funds, federal matching funds (including in-kind donations), Head Start services, or Head Start employees in carrying out any political activities, including voter registration and transportation to or from the polls.

The House Head Start reauthorization bill, H.R. 2123, passed by a 231-to-184 margin on Sept. 22, does not contain the modified language proposed in the Senate.

Experts are now examining possible implications of the language. Nonprofit organizations should be aware that there may be language in other bills that infringe on a grantee's private funds, and to report it to their national association or OMB Watch.

A New Ultra-Secret Government Agency

Legislation is moving in the Senate to create a new government agency to combat bioterrorism that will operate, unlike any other agency before it, under blanket secrecy protection.

Sen. Richard Burr (R-NC) has introduced the Biodefense and Pandemic Vaccine and Drug Development Act of 2005, S1873, that would create a new agency in the Department of Health and Human Services (HHS) to research and develop strategies to combat bioterrorism and natural diseases. While Congress has created several agencies recently in response to homeland security concerns, most notably the Department of Homeland Security, Burr proposes for the first time ever to completely exempt this new agency from all open government laws. The

legislation has already passed out of the Committee on Health, Education, Labor, and Pensions and is now before the full Senate.

The Act creates the Biomedical Advanced Research and Development Agency (BARDA) to work on countering bioterrorism and natural diseases. Apparently in an attempt to protect any and all sensitive information on U.S. counter-bioterrorism efforts or vulnerabilities to biological threats, Burrs has included in the legislation the first-ever blanket exemption from the Freedom of Information Act (FOIA). The legislation states that, "Information that relates to the activities, working groups, and advisory boards of the BARDA shall not be subject to disclosure" under FOIA "unless the Secretary [of HHS] or Director [of BARDA] determines that such disclosure would pose no threat to national security."

Neither the CIA nor the Defense Department has such an exemption. Burr's spokesperson argues that the exemption is necessary to protect national security claiming that "there will be times where for national security reasons certain information would have to be withheld." For instance, the BARDA should not, according to the spokesperson, be required to publicly disclose information pertaining to a deadly virus.

FOIA, however, already includes an exemption for national security information, as well as eight other exemptions ranging from privacy issues to confidential business information and law enforcement investigations. If the public disclosure of information would threaten national security, then the government may withhold the requested information. "The well-established and time-tested FOIA provisions already address Burr's concerns," explains Sean Moulton, OMB Watch senior policy analyst, "thereby making the blanket exemption for BARDA unnecessary and unwise."

Congress established and strengthened FOIA over the years to create a reasonable, consistent level of accountability among government agencies. Under FOIA, when the public requests agency records, the agency is compelled to collect and review the requested information. The only decision for the agency is whether specific records can or can not be released under the law based on the exemptions from disclosure written into the law. However, the Burr legislation reverses the process: it does not require BARDA to collect or review the requests for disclosure. Instead, the agency can automatically reject requests. Still more troubling, the law prohibits any challenges of determinations by the Director of BARDA or Secretary of HHS, stating that the determination of the Director or Secretary with regards to the decision to withhold information "shall not be subject to judicial review."

Mark Tapscott at the Heritage Foundation writes that "BARDA will essentially be accountable to nobody and can operate without having to worry about troublesome interference from courts or private citizens like you and me."

This move to restrict the reach of FOIA appears in stark contrast to the recent Senate vote to strengthen open government. Sens. John Cornyn (R-TX) and Patrick Leahy (D-VT) co-sponsored FOIA reform legislation, passed by the Senate in June, that "will bring additional sunshine to the federal legislative process, and was another step toward strengthening the Freedom of Information Act."

The Biodefense and Pandemic Vaccine and Drug Development Act also exempts BARDA from important parts of the Federal Advisory Committee Act, which requires public disclosure of advice given to the executive branch by advisory committees, task forces, boards and commissions.

Other provisions of the bill compound the troubling secrecy provisions. They include:

- Giving BARDA the authority to sign exclusive contracts with drug manufacturers and forbidding the agency from purchasing generic versions of these drugs or vaccines.
- Authorizing BARDA to issue grants and rebates for drug companies to produce vaccines.
- Providing liability protection to drug manufacturers for drugs and vaccines not approved by the Food and Drug Administration, by requiring the secretary of HHS find that a drug company willfully caused injury.

The FOIA exemption in combination with these provisions would prevent the public from knowing whether BARDA is effectively completing these duties. Only information on agency actions could establish if the new agency is protecting the public from bioterrorism and infectious disease or if it is simply providing handouts to drug companies that creates no added security.

"It is essential that open government safeguards remain in place for all agencies," Moulton continues. "It is extremely important to ensure that the nation is protected against pandemics and bioterrorist attacks, but such efforts must not be excluded from open government. By providing the mechanisms for government accountability, these safeguards ensure that the government meets its responsibility to protect the public. In the end, an accountable government is a stronger government which acts to effectively meet all threats, including pandemics and bioterrorism."

Burr is still in the process of revising the Biodefense and Pandemic Vaccine and Drug Development Act, and, with the Senate's incredibly tight schedule, the timing of the bill's introduction on the floor remains uncertain. In the meantime, supporters are rumored to be seeking out a Democratic cosponsor to give it momentum.

Developments Could Hamper, Help Effort to Preserve TRI

In response to a petition from public interest groups, the EPA has extended the deadline for public comments on its proposed cutbacks to the Toxics Release Inventory (TRI) to Jan 13. In an unrelated change, the agency also moved the electronic docket of public comments from its own website to the federal government's www.regulations.gov. The transition was far from seamless, and the possible effects of the location change in the midst of the rulemaking process are uncertain.

In an Oct. 27 letter, several public interest groups, including Environmental Defense, National Environmental Trust, U.S. Public Interest Research Group, and OMB Watch, requested a 60-day extension to EPA's original Dec. 5 comment deadline. The groups argued that the extension was necessary for organizations to submit, "...substantive comments that would illustrate the potential impacts of the rulemaking on community right-to-know." On Nov. 22, EPA Assistant

Administrator Kim Nelson formally granted a 39-day extension of the public comment period. The curious length of the extension appears to be a compromise between the requested 60-day extension and the 30-day extension EPA officials reportedly planned to offer. A 30-day extension would have placed the deadline immediately after the New Year holiday and made it difficult for groups to finalize and submit comments in time. The new deadline, Jan. 13, should allow groups sufficient time following the holidays to finish comments to the agency.

On Nov. 25 EPA shutdown its online docket and moved the TRI rulemaking, along with all of its current regulatory actions, to the regulations.gov site. The transition is part of an effort to consolidate e-rulemaking activities and improve consistency across agencies. EPA, however, has been criticized for its handling of the transition to the new system. Visitors to the old e-docket site receive a brief message which reads: "EDOCKET No Longer Available. As of Friday, November 25, 2005 at 8 am, EDOCKET is permanently unavailable. If you would like to submit an electronic comment for an EPA docket, please visit the Federal Docket Management System (FDMS) at www.regulations.gov." Interested parties could easily misinterpret the message, believing the opportunity to participate in the TRI rulemaking has been missed. Several important functions on the regulations.gov site also appear to be malfunctioning, leaving users unable to download or view documents in the docket. Managers of the site claim the problems will be fixed in a few days. "The agency should have maintained rulemakings begun on the EPA system in that system until they're concluded," explains OMB Watch senior policy analyst Sean Moulton. "The EPA could have managed the transition better by posting new regulatory activities on the new site. At the very least, it should have waited until regulations.gov was functioning properly and then posted a more comprehensive message explaining the transition." OMB Watch staff have confirmed that comments on the TRI proposals are still being accepted through the earlier methods:

- Email comments directly to EPA at: oei.docket@epa.gov
- Fax comments to: 202-566-0741
- Mail comments to: Office of Environmental Information (OEI) Docket, Environmental Protection Agency, Mail Code: 28221T, 1200 Pennsylvania Ave., NW., Washington, DC 20460. Attention Docket ID No. TRI--0073

To submit comments online or review the TRI docket, including background documents and previously submitted comments:

- Go to: www.regulations.gov
- Search by Keyword for EPA-HQ-TRI-2005-0073
- Click on 'Docket ID' (furthest left), to review submitted comments, proposals and background documents
- To submit comments online through the site: Click on 'Add Comments' which appears furthest right

Post-Katrina Survey Finds Wariness, Desire for Change

Shortly after Hurricane Katrina, OMB Watch launched an online survey seeking feedback and reaction to the possibility of launching an investment agenda, not just for the affected states, but

for the entire country. The response was tremendous, as over 800 respondents from nearly every state completed the survey and contributed a multitude of thoughtful, in-depth comments. The overwhelming consensus among respondents held not only that now is the time for a comprehensive, long-term investment agenda for the country, but that such an initiative is long overdue.

OMB Watch released a summary of respondent comments and a statistical overview of the reactions we received to our proposed outline for an investment agenda. The results of this survey mirror what has been shown in polls and focus groups from the past three months: Americans believe the country is headed in the wrong direction and are ready for a fundamental change.

The survey was conducted between Sept. 21 and Oct. 7 and sought reaction on a preliminary five-part agenda that encompassed investments in communities, the economy, people, the environment, and infrastructure.

While respondents strongly supported the idea of an investment agenda, with many suggested elements of such an agenda scoring very high, the substantial body of comments provided a more nuanced understanding of respondents' beliefs about such an agenda. A review of these comments captures not only the frustration and disillusionment people experienced in the aftermath of a horrible natural and human disaster, but also broader themes important to informing the investment agenda that must be defined post-Katrina and Rita.

Particularly troubling to and consistently lamented by respondents were themes of corporate influence over government, cronyism and incompetence within the government, and politicians working for the benefit of the few instead of the many. These concerns' ubiquity points to the need for a realignment of our national priorities and a renewed commitment to shared sacrifice, unity, and citizen engagement. While respondents overwhelmingly support an investment agenda, they were cautious about its utility if these broader concerns are not addressed.

"Survey respondents were also emphatically clear that it is time to end the 'starve the beast' mindset that has become so pervasive among our elected officials," explained survey author Adam Hughes, senior policy analyst with OMB Watch. "Hurricanes Katrina and Rita illustrated in stark terms the importance of a strong, vital and responsive government, as well as the consequences of underfunding government services."

A summary of the comments and statistical analysis are available at www.ombwatch.org/KatrinaSurveyReport.pdf.

For additional analysis and updates on Hurricane Katrina's aftermath in relation to OMB Watch's work, visit our Katrina blog.

House, Senate To Battle Over Budget Cuts

Among the top priorities for Congress, when its members return to Washington next week, is the construction of a conference report for spending cuts that is acceptable to both chambers. The

House and Senate versions of the reconciliation bill for entitlement spending contain significant differences, particularly with respect to cuts to Medicaid, student loans, and food stamps. The razor-thin margin by which these bills passed in each chamber and the scandals that have increasingly embroiled the Republican Party will likely make reaching consensus during the conference still more arduous by splintering the Republican caucus, decreasing the chances of the cuts being enacted into law.

The House passed its version of the bill cutting just under $50 billion early in the morning on Nov. 18 by only two votes (217 - 215). With the resignation of Rep. Randy Cunningham (R-CA) on Nov. 28 that margin is cut in half. The Senate had already passed its bill two weeks earlier on the evening of Nov. 3, including a provision--removed from the House version--that would allow drilling in Alaska's Arctic National Wildlife Refuge. The Senate reconciliation bill cuts $39.1 billion from entitlement programs over a five-year period and passed 52 - 47.

The Senate cuts are not nearly as contentious or damaging to low-income beneficiaries as those being considered on the other side of Capitol Hill. To what extent Senate provision will be reflected in the final bill is difficult to speculate, however, as the select few Representatives and Senators chosen as conferees will wield considerable power,and the bill emerging from conference for a final vote in each chamber could be drastically different than either version.

Adding to the Republican leadership's woes, more bad news surfaced yesterday as Cunningham, a supporter of the budget cuts in the House, resigned from Congress for taking bribes from defense contractors. His absence this December will further complicate the calculus needed to craft a consensus package and may make pushing through a final version of the bill in the House untenable this year. A special election to replace Cunningham must be held within 120 days.

Help Stop These Harmful Cuts
There is still time to make your voice heard and stop this dangerous reconciliation bill. Email your Representatives and Senators to tell them you do not support more budget cuts in a time of such need to pay for tax cuts for the rich.

Tax Cut Measure Guarantees Increasing Deficits

The House of Representatives will return to session next week after a two-week Thanksgiving break, with the first item on its agenda being a bill to cut taxes--primarily for high-income Americans--by an additional $56 billion. When combined with its companion reconciliation spending bill, which barely passed the House in the early hours of Nov. 18, the bill will actually increase deficits over the next five years - directly contradicting the original intent of the reconciliation process.

The House was originally scheduled to vote on the tax cut bill just before the Thanksgiving recess on Friday, Nov. 18, but the vote was postponed because too many Republicans were getting a headstart on their break, leaving town early that day. Many Republicans reportedly also had misgivings about passing additional tax cuts for the wealthy that would increase the deficit *in the very same day* that they voted to cut programs for low- and middle-income Americans, the stated intent of which was to hold down the deficit.

It remains unclear if the House leadership has sufficient backing from moderate Republicans to pass the tax cut bill. A host of moderate House Republicans have presented a major problem for the leadership team over the past few weeks, refusing to fall into line and lend their support to the spending cuts bill. The initial House vote on the spending cuts bill was postponed one week and required a significant amount of arm-twisting to pass following the delay. The amount of energy and political capital expended by the House leadership on that vote--coupled with the increasing public scrutiny of and faltering confidence in the Bush administration and a number of Republican members of Congress--may make it more difficult to pull the caucus together to pass the tax cut bill.

Even if the House leadership prevails, passage in the House is only the first hurdle the tax cuts will face before being enacted. On Nov. 17, the Senate passed its version of the tax cut bill, which is dramatically than the House version. Among the major provisions that appear in the Senate, but not House, version are tax incentives and cuts related to Hurricane Katrina, inclusion of an one-year Alternative Minimum Tax patch, charitable giving incentives, and a host of revenue raisers. Also of note, an extension of capital gains and dividend tax cuts appears in the House, but not Senate, version. The extension of the 15 percent tax rate on capital gains and dividends is believed by House leadership to be the heart of the Bush tax cuts. Accordingly, the cut should prove to be contentious if there is a conference between the House and the Senate. Negotiating a compromise will be difficult with Senate moderates unwilling to vote to extend the cut with large deficits and program cuts, on the one hand, and conservatives in the House demanding it to be part of the tax cut package on the other.

Comparison of House and Senate Tax Cut Bills

(in billions of dollars)

	House Committee Version	Senate Passed Version
Capital Gains/Dividends	-20.6	-
AMT One-Year Patch	-	-28.8
Research and Develop Credit	-9.9	-9.2
Charitable Giving Changes	-	-0.6
Katrina-related Relief	-	-7.0
Other	-25.7	-28.5
Subtotal	**-56.1**	**-74.1**
Revenue Offsets	-	14.5
Net Total Cost	**-56.1**	**-59.6**

source: Joint Committee on Taxation, Senate Finance & House Ways and Means Committees

With only three weeks to complete this bill before a likely adjournment at the end of the year, and a number of other priorities, Congress will be hard pressed to finish both the spending reconciliation bill and this tax bill before Christmas. It may very well be forced to revisit the reconciliation bills in January when the second session begins.

Help Stop These Harmful Cuts
There is still time to make your voice heard and stop this dangerous reconciliation bill. Email your Representatives and Senators to tell them you do not support more program cuts with so many in need, in order to pay for more tax cuts for the rich.

TABOR: A Losing Proposition for Colorado

Earlier this month, voters in Colorado demonstrated their dissatisfaction with the state's constitutional spending limit law — otherwise known as TABOR--by voting in favor of suspending its spending limits for five years. TABOR, the "taxpayer's bill of rights," had contributed to a significant decline in the state's public services since its enactment in 1992. Unfortunately, this victory in Colorado has come after years of disastrous tax and spending practices eroded state services, harming Colorado's education system, health care programs, and transportation infrastructure.

Despite the lessons learned in Colorado, other state legislatures are attempting to pass measures that would restrict spending in much the same way TABOR did in Colorado. Proponents of these measures argue their initiatives are vastly different than Colorado's TABOR, but despite superficial differences all share one underlying intent: to drastically reduce the size of state governments or "starve the beast." Residents of these states would be wise to study the example of Colorado, lest they become victims of the same draconian spending constraints that have proven so detrimental to that state's economy and to its citizens' quality of life.

TABOR laws are initially appealing because they appear on the surface to be responsible attempts to scale back state spending and give tax breaks when there is an excess of state revenue. However, Coloradans found with TABOR that any minimal savings they received from tax refunds were lost in higher cost and deteriorating quality of services. Residents were forced to pay more for such public services as education, health care, access to parks and recreation areas, public transit, where the state had previously covered a greater share of the cost. TABOR works by limiting state spending to a formula based on population growth plus an inflation factor. The formula has proven insufficient over the long-term for providing adequate revenue to continue important state services as population increases, particularly when unexpected needs arise, such as a natural disaster or economic downturn.

Anti-Tax Advocates Continue to Push TABOR
During the 2005 legislative session, 23 states considered TABOR proposals at one level or another. Most never made it past the committee level or floundered before being brought up for floor debate.

Voters in California, however, were presented with a TABOR-like ballot initiative in the state's Nov. 8 special election. Sixty-two percent of voters rejected the TABOR measure, which would have established a new limit on state spending by restricting it to the previous years' spending plus the average annual growth in revenues over the previous three years. The measure was defeated over concerns that it would have led to a significant reduction in future state spending similar to that experienced in Colorado.

Despite their initiatives having met with little success in 2005, anti-tax advocates plan to continue pushing proposals in 2006, including in the legislatures of Arizona, Kansas, Michigan, Missouri, Ohio, Oklahoma, Oregon, Nevada, and Wisconsin. Many are also expected to attempt passage of TABOR-like ballot initiatives in November when voters will elect federal representatives in mid-year elections. The outcome of the vote in Colorado, however, sends a strong message to these states that TABOR-like laws are ultimately a losing proposition.

The fight over unsustainable spending limits is already heating up. In Nevada, for example, the State University Chancellor Jim Rogers is already planning to use his political action committee in an effort to block gubernatorial candidate Bob Beers' TABOR-like tax cut measure. Rogers has criticized Beers' Tax and Spending Control for Nevada initiative and hopes to educate state lawmakers, regents and community members about the harm done in Colorado by its TABOR law. Rogers and others are using resources and materials developed for the Colorado fight against TABOR to effectively make their case in Nevada. Hopefully the people of Nevada will absorb some of this information and avoid the near-guaranteed decline in state services seen in Colorado.

Such wariness would pay off. As David Bradley from the Center on Budget and Policy Priorities aptly points out, "The only state to actually live under TABOR has had to suspend it for five years. [The recent TABOR] vote reflected the actual experience of deteriorated government services." The "starve the beast" philosophy encapsulated by TABOR laws starved Colorado of the funds necessary to provide the most basic of state services. The successful reversal of this law has now illustrated just how out of sync the "starve the beast" philosophy is with the will of the public.

It's Not the Most Wonderful Time of the Year (for Appropriations Work)

Although five of the 11 appropriations bills remain to be signed into law by President Bush, Congress has completed work on all but two: the Defense and Labor/Health and Human Services bills. While a massive omnibus has been avoided this year, an equally contentious (and still quite large) bill--a so-called "minibus"--could be passed containing those two final bills. With all the items on the schedule for December and likely only three weeks to complete them, Congress still has a lot of work left to do before they are finished for the year.

Besides working to finish appropriations after returning from the Thanksgiving recess on Dec. 5, Congress will be busy trying to find consensus on the vastly disparate House and Senate budget reconciliation bills, moving forward with work on the tax cut reconciliation bills, and attempting to pass a border security measure and a pension reform bill.

It is almost assured some of these priorities will not be completed in 2005. Even some House members are doubtful about the prospects of completing such an ambitious schedule. Rep. Jim McCrery (R-LA) of the Ways and Means Committee told reporters that he doubts the House can pass a tax package, hold conference negotiations with the Senate, and pass a final conference report before adjourning for the year.

But the appropriation bills must be passed before Congress recesses again unless the continuing resolution (CR) the federal government is currently operating under is extended for a third time. The Labor/HHS bill was all but finished a few weeks ago. House and Senate conferees approved the final conference report, and passage was assumed to be a mere formality. But in one of the biggest legislative surprises of the year, 22 House Republicans defied their leadership and joined with all Democrats to reject the conference report on Nov. 17.

Whether the Defense and Labor/HHS measures--the two largest spending bills--will be combined or passed separately remains unclear. The Senate prefers to return to conference and negotiate a solution to the Labor/HHS bill that will satisfy enough House members to pass it as a stand alone bill. Yet House Appropriations Chairman Jerry Lewis (R-CA) prefers to skip what could be difficult negotiations and extend funding for the programs under the bill with a long-term extension of the CR.

If passed separately, the Defense bill will still undoubtly serve as a "catch-all" for other unrelated spending items. It will become something of a *de facto* omnibus, containing a number of non-military items such as a reallocation of Hurricane Katrina reconstruction funds, and funding for avian flu countermeasures. If the Defense bill is passed by itself in that manner, the Labor/HHS bill will most likely be funded throughout the rest of this fiscal year by the CR.

In addition to signaling Congress' failure to complete its work in a timely and responsible manner, omnibus appropriations bills serve as vehicles for reckless pork barrel spending. They give legislators the opportunity to pack specialized earmarks into the appropriations process with little oversight, because few people either inside Congress or out have the time or access to know the details of all the provision of such massive bills before they are voted on.

Unfortunately, regardless of how Congress decides to fund the Labor/HHS bill, programs it covers will see cuts this year. Funding under the CR will impose a real across-the-board cut on all programs due to population increases and inflation. The conference report for the bill also slashes services by $1.4 billion below the CR level, particularly for low-income families. Moreover, groups that depend on federal funding are currently hampered in their efforts to plan for the forthcoming year because of funding uncertainties.

Weak Roof Crush Rule Threatens Victims' Rights

Based in part on flawed cost-benefit analysis, a proposed rule to reduce injuries sustained when vehicles roll over and their roofs are crushed inward fails to require the level of safety available in current technology and threatens to eliminate the rights of roof crush victims to sue manufacturers.

Caving in on Roof Strength

During rollover crashes, vehicle occupants are forced upward into the vehicle roof, and weak roofs compound the risk by crushing inward. A crushing roof can compromise other safety features, such as side air bags and door latches, and automakers' failure to implement rollover pretensioners in seat belt technology means that seat belts can likewise fail during rollovers.

Rollover crashes kill 10,000 people each year, including the 50,000 who have died since the Ford-Firestone debacle in 2000 revealed in shocking detail the dangers of rollover crashes to a horrified public. When the news media began covering the Ford-Firestone scandal (and exposed the federal government's inaction despite early warning signs of the threat), the National Highway Traffic Safety Administration (NHTSA) began work on the first improvement in over 30 years to the standards governing roof strength.

The result was unveiled in August: a proposed rule that NHTSA claims will require vehicle roofs to sustain a force of 2.5 times the vehicle weight, up from the current standard of 1.5. As Public Citizen observes, however, in comments filed last week, NHTSA proposes simultaneously changing the way vehicles would be tested for compliance with the 2.5 standard. Citing analysis from a veteran automotive engineer, the consumer safety group argues that the combination of these changes will result in effectively requiring a much more modest increase to a mere 1.64 times vehicle weight.

Moreover, secret industry documents reveal that the auto industry has available to it feasible, cost-effective technology that can strengthen vehicle roofs more effectively than NHTSA's proposed standard would require, but NHTSA's proposed rule fails to mandate the use of this technology or set the standard at a level commensurate with it. Meanwhile, NHTSA refuses to release those records to the public.

Crushing Victims' Rights

While setting a standard lower than the automakers are capable of achieving, NHTSA simultaneously insists that compliance with the weak rule should shield auto makers from lawsuits by victims of roof crush.

If reviewing courts defer to the agency's assertions about preemption, NHTSA will have shut the court house doors on severely injured victims, many of whom can be left so crippled that they will be unable to care for themselves. Eliminating victims' recourse to the courts will shift the financial burden of rollover injuries from the auto industry to the taxpayer.

Crunching the Numbers

One of the bases for the weak rule is a preliminary regulatory impact analysis (PRIA) that auto safety advocates argue is "riddled with errors":

- It underestimates the benefits to be gained from stronger standards by manipulating the universe of vehicle occupants whose deaths and injuries would be averted.
- It also underestimates benefits of stronger standards by basing its estimates on post-crash observations of vehicle conditions. In the dynamics of rollover crashes, vehicles can be so crunched that the occupants have zero (or less than zero) headroom, even as subsequent changes to the vehicle architecture from further rolls can leave a vehicle showing more headroom or less visible inward crush.
- It *over*estimates the costs to the auto industry by failing to account for existing technology, such as the lightweight, high-strength material used in the Volvo XC-90, that could result in cost-effective achievement of more stringent standards.

- Finally, it assumes away ethical and moral questions that complicate the simple comparison of costs and benefits. It translates serious injuries into the fractional equivalent of a fatality (with the most severe injuries counted as 0.7124 deaths), and then it monetizes the resulting figure with a lowball $3.5 million estimate. Additionally, it fails to account for the automakers' profits in the period when they knew about the need for stronger roofs but failed to manufacture them. "In this case," Public Citizen argued in its comments, "automakers have known for years about the costs of inaction for occupants and have instead resisted or even acted to aggravate risks."

White House Asserts Authority Over Agency Guidance Documents

The White House released a draft bulletin on the day before Thanksgiving that establishes new guidelines for non-rulemaking agency guidance documents.

The proposed bulletin from the Office of Information and Regulatory Affairs (OIRA) within the White House's Office of Management and Budget (OMB) establishes what it calls "good guidance practices" for the content, development, and revision of guidance documents.

The term "guidance documents" generally refers to a wide range of materials used by agencies to clarify or articulate information or further explain regulatory requirements. Guidance documents can include compliance guides that explain how a regulation applies to an industry sector in sector-specific terms, supplemental materials that assist companies preparing applications for agency approval, and much more. Guidance documents are not subject to the procedural requirements that apply to rulemakings, such as the Administrative Procedure Act and Executive Order 12,866.

About the OIRA Bulletin

In an attempt to make guidance documents "more transparent, consistent and accountable," the new draft bulletin provides guidelines for a class of guidance documents deemed "*significant* guidance documents," including requiring approval by senior agency officials for new significant guidance documents, creating standards for the content of guidance documents, and increasing transparency and public comments.

Significant Guidance Documents

The draft defines a broad range of documents as significant guidance document, including the following:

- documents that "raise highly controversial issues related to interagency concerns or important Administration priorities";
- guidance documents that establish "initial interpretations of statutory or regulatory requirements" or announce changes in such interpretations; and
- documents detailing "novel or complex scientific or technical issues."

An additional subset of significant guidance documents are *economically* significant guidance documents, defined as those that are "[r]easonably anticipated to lead to an annual effect of $100 million or more or adversely affect in a material way the economy or a sector of the economy." It is unclear, however, how a guidance document, which is not legally enforceable, could have an economic impact.

The bulletin proposes a number of exclusions, such as "contractor instructions," litigation and other legal documents, scholarly articles, interagency memoranda of understanding, media relations, and "warning letters." The definition section of the bulletin does not specifically exempt other documents used in enforcement actions, but a later section clarifies that the bulletin does not "in any way affect [agencies'] authority to communicate their views in court or other enforcement proceedings."

New Requirements

The OIRA bulletin calls for new requirements to apply to all significant guidance documents:

- **Review and Approval:** The draft bulletin requires that agencies establish procedures requiring the review of significant guidance documents by senior agency staff.
- **Content:** The draft also established content requirements, such as restricting the use of words that suggest mandatory duties and standardizing guidance documents by including the date, agency, docket number and other relevant information.
- **Transparency:** Agencies are also required to make significant guidance documents publicly available on the Internet and compile a yearly list of all significant guidance documents.
- **Public Participation:** Agencies are also required to develop a means for receiving public comment on guidance documents, including requests for review or modification of existing guidance documents or proposals for new guidance documents. The draft bulletin makes clear that agencies do not have to respond to public requests, as the comments would be strictly "for the benefit of the agency." There is, at least not in the current draft of the bulletin, no burdensome equivalent of the procedures related to the Data Quality Act provision for guidance documents, which can be misused by industry to delay the issuance of guidance or derail an agency's priorities.

The guidance makes clear that despite the notice-and-comment requirements, guidance documents are still not legally enforceable.

The draft bulletin requires additional procedures when an agency is preparing a draft economically significant guidance document. In such cases, the agency will be required to publish the draft guidance in the *Federal Register*, invite public comments, and formally respond to the comments.

The bulletin insists that agencies must not avoid the new "good guidance practices" by communicating guidance in forms that escape the bulletin's reach, but it does permit agencies--"in consultation with OMB"--to identify specific guidance documents or entire classes of guidance documents that should be exempted from the new policy.

Next Steps

The proposed bulletin is now open for public comment through Dec. 23.

Public interest groups will likely approach the bulletin with some healthy skepticism. On the one hand, respected bodies such as the Administrative Conference of the United States (ACUS) have called for similar good guidance practices (although the two ACUS recommendations suggested leaving matters up to the agencies without requiring any decisions be made "in consultation with" OIRA). The Bush administration's pattern of failure to develop new protective standards has been aided, in part, by some agencies' use of non-binding, voluntary guidance instead of real protective standards that apply across the board to ensure the public's protection.

On the other hand, corporate-conservative anti-regulatory discourse has aggressively promoted a vision of "regulation by information" as a "problem" in need of correction by such cumbersome overlays as the Data Quality Act and OIRA's peer review guidelines.

InsideEPA (subscription-only) reported that EPA sources expressed concern that the good guidance practices would delay agency's ability to issue new guidance documents, particularly "new risk assessments for controversial chemicals in a major agency risk database known as the Integrated Risk Information System," as well as clean air and drinking water advisories.

It is not clear, however, if the criticism of agency insiders is based on the new notice-and-comment requirements or on the perception that the draft bulletin would increase OMB's review of agency rules. According to the draft bulletin, OMB would not review guidance documents; rather, agencies would develop internal procedures for senior staff to review significant guidance documents.