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The Watcher
October 10, 2007 Vol. 8, No. 20

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Bush Administration Delays Import Safety Changes While Congress Debates Solutions

The Bush administration and several of its regulatory agencies have been reluctant to address the safety of consumer goods as more recalls of harmful toys and contaminated foods occur. They seem content to delay substantive changes that could improve product safety. Congress, meanwhile, is trying to sort through the many legislative proposals to restore regulatory capacity to agencies and fix the fragmented U.S. import system.

In July, President Bush created by executive order an Interagency Working Group on Import Safety (IWG) and charged it with 1) reviewing or assessing current domestic and

foreign approaches for ensuring the safety of products, 2) identifying ways that importers can enhance product safety, and 3) surveying practices of federal, state and local government agencies to identify best practices and improve agency coordination. Recommendations for improvements were to be submitted to the White House within 60 days of the order unless the chair chose to extend the deadline.

On Sept. 10, the IWG transmitted to Bush an initial report that did not make recommendations. Instead, it proposed a model for a cost-effective, risk-based approach to be followed by an action plan to be issued in mid-November. The letter of transmittal accompanying the report, addressed to Bush and signed by Health and Human Services Secretary Michael Leavitt, who chairs the IWG, dismissed a substantially increased regulatory role for agencies. Since the "federal government cannot and should not attempt to physically inspect every product entering the United States," the model the report proposes increases responsibility of U.S. importers and foreign governments to ensure product safety.

Several agency representatives testifying before Congress during the first week of October used the pending work of the IWG to deflect criticisms from Congress. Representatives from the U.S. Department of Agriculture (USDA), the U.S. Food and Drug Administration, and U.S. Customs and Border Protection, among others, testified before a joint subcommittee hearing of the House Ways and Means Committee Oct. 4. Each cited the work of the IWG as important to its efforts to address import safety, particularly the issuance in November of the action plan. When asked specific questions by committee members about staffing, the agency representatives avoided direct answers and spoke about the IWG recommendations and action plan to come to help them identify adequate resources. Rep. Sander Levin ☼ (D-MI) accused the witnesses of using the IWG "as cover" to avoid their responsibilities. Several members wondered why there was no sense of urgency among the agencies.

Congress, meanwhile, is sorting through legislative proposals to address product safety issues domestically and internationally. For example, the Subcommittee on Consumer Affairs, Insurance and Automotive Safety of the Senate Committee on Commerce, Science and Transportation held a hearing Oct. 4 on S. 2045, the CPSC Reform Act of 2007. The bill would increase funding, staffing and authority for the Consumer Product Safety Commission (CPSC), ban lead in children's products, and raise the amount of civil penalties CPSC can impose on companies for unsafe products.

According to a BNA article ($), the current CPSC commissioners took opposite positions on S. 2045 before the subcommittee. Acting Chairman Nancy Nord supported parts of the bill but opposed provisions expanding CPSC authority and increasing penalties on businesses. Commissioner Thomas H. Moore supported the bill, especially provisions increasing CPSC enforcement tools so that manufacturers and importers know they will be held accountable.

On Oct. 9, the House passed several consumer protection bills. One bill (H.R. 2474) raises the cap on civil penalties CPSC can levy to $10 million, from $1.825 million. Another, H.R.

1699, requires manufacturers of durable goods to include product registration cards that allow companies to more easily track purchases and provide recall notices. These are two more examples of the many legislative proposals Congress is considering.

While federal agencies are slow to respond and Congress tries to define workable solutions, product recalls of a range of domestic and foreign products continue. In one case, the Centers for Disease Control and Prevention said 29 people in eight states had *E. coli* infections from eating contaminated hamburger, according to a *Washington Post* story.

The meat was produced by Topps Meat Co., and it was eighteen days after the contamination was discovered before USDA notified the public about the contamination and issued a recall of 21.7 million pounds of hamburger. USDA explained the delay as necessary for agency officials to conduct more complete tests on the hamburger that led to the hospitalization of a Florida teenager in August. USDA did not issue the recall until the contamination was confirmed by New York officials, who conducted their own tests on suspect beef. Topps Meat went out of business Oct. 6 due to the economic hardship imposed by the recall.

States Sue Bush Administration over New Children's Health Insurance Requirements

Several states have sued the Bush administration over new policies governing the State Children's Health Insurance Program (SCHIP). The suits follow broad opposition from state public health experts and congressional Democrats and Republicans who urged the administration to abandon the new policies. The suits also come as Congress attempts to reauthorize SCHIP after a presidential veto.

On Oct. 1, New Jersey sued the Department of Health and Human Services (HHS) seeking relief from new administration policies regarding federal approval of SCHIP eligibility requirements. The state filed the complaint in the U.S. District Court in New Jersey.

On Oct. 4, four other states sued HHS in a joint suit. Those states — New York, Maryland, Illinois and Washington — filed their complaint in the U.S. District Court in Manhattan. Their complaint is similar to that of New Jersey.

The Center for Medicare and Medicaid Services (CMS), a division of HHS, announced the new policies in an Aug. 17 letter to state health officials. CMS issued the new policies to reduce the chance state plans would extend SCHIP coverage to individuals who may be eligible for private coverage. Opponents of extending SCHIP eligibility often refer to this as "crowd-out."

The SCHIP program and the CMS letter carry federalism implications. The SCHIP program grants states discretion in constructing plans most appropriate for their populations. SCHIP intends for states to maintain discretion over the eligibility level for citizens based on

factors which may vary among the states, such as cost of living. However, SCHIP also grants CMS the authority to approve or disapprove state plans.

Currently, each state and the District of Columbia set their own eligibility requirements as a percentage of the poverty level. Children in families earning below or up to the set percentage are eligible for medical coverage under the SCHIP program.

The new CMS policies target those states that set their eligibility requirements above 250 percent of the poverty level. The new policies require those states to meet several criteria in order to obtain federal approval from CMS.

Among other things, states must now: prohibit SCHIP coverage for at least one year after individuals lose or withdraw from private coverage; assure at least 95 percent enrollment for eligible individuals whose family income is below 200 percent of the poverty level; and assure "children in the target population insured through private employers has not decreased by more than two percentage points over the prior five year period."

For states that have already received CMS approval for plans extending eligibility to children in families with incomes above 250 percent of the poverty level, the new policies require resubmission of plans that fulfill the new criteria. If states fail to do so, CMS "may pursue corrective action," according to the letter.

The states argue the new policies are overly burdensome and would reduce SCHIP eligibility. For example, CMS has approved SCHIP plans for New Jersey on eight occasions, yet the new policies may lead CMS to disapprove a revised plan. In its complaint, New Jersey finds the 95 percent enrollment criteria to be particularly burdensome: "Even under Medicare, which has nearly universal eligibility and automatic enrollment, the participation rate is less than 95 percent."

The states argue the new CMS policies outlined in the letter should be ruled to have no effect, citing violations of both the SCHIP statute and the Administrative Procedure Act (APA). In order to make its case, the states first argue the letter constitutes a "rule" as defined by the APA.

The APA requires rules to go through a prescribed process including the publication of a notice of proposed rulemaking in the *Federal Register* and an opportunity for public comment. If agencies violate these requirements for rules, as the states argue CMS has in this instance, a court may invalidate the rule.

The states make additional arguments as to why the new policies should be invalidated. Under the APA, a court shall "hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."

Citing its arguments, the states ask the respective courts considering their cases to grant

relief from the new policies and preclude CMS from pursuing "corrective action."

Since releasing the letter in August, CMS has been broadly criticized for its attempts to impose new requirements on states. Two national groups representing state healthcare professionals, the American Public Human Services Association and the National Association of State Medicaid Directors, have requested CMS abandon the new policies. A bipartisan group of 44 senators also requested CMS rescind the letter or, "at the very least," subject the new policies to the proper rulemaking procedures described in the APA. Senior Democratic members of the House Energy and Commerce Committee wrote to HHS Secretary Michael Leavitt expressing concern over the proposed changes and have requested further information from HHS.

Both the House and the Senate are considering legislation that would legally prohibit CMS from implementing the new policies. The two bills, S. 2049 and H.R. 3555, await consideration in their respective committees.

Another bill aimed at reauthorizing and expanding the SCHIP program would invalidate the new policies, according to a press release from the House Energy and Commerce Committee. That bill, which was passed by both chambers but vetoed by President Bush, will be reconsidered in Congress in the coming days. (For more, see a related story in this edition of the *Watcher*.) In its current form, the bill would prohibit CMS from enacting policies that would "Impose (or continue in effect) any requirement, prevent the implementation of any provision, or condition the approval of any provision under any State child health plan" based on the argument SCHIP programs may lead to decreased enrollment in private plans.

House Energy and Commerce Committee Proposes Climate Change Legislation Framework

The House Committee on Energy and Commerce and its Subcommittee on Energy and Air Quality issued the first in a series of white papers that will outline designs for complicated climate change legislation and regulation. The first white paper, released Oct. 3, outlines a design for a cap-and-trade program covering major greenhouse gases (GHG) that would form the cornerstone of comprehensive federal climate change legislation.

In a letter to all the committee members, John Dingell (D-MI) and Rick Boucher (D-VA), chairs of the committee and subcommittee, respectively, announced the series of papers to "focus the discussion in the Committee as we move to the development and eventual passage of comprehensive climate change legislation. It is worth noting that while the use of white papers is not a policy-making tool frequently used by the Committee, this topic in its scope and complexity is unlike any we have confronted and time is of the essence."

The white paper addresses key components of a climate change program as well as specific elements of a cap-and-trade program. Some of the components outlined in the paper

include:

- The U.S. should reduce its greenhouse gas emissions between 60 and 80 percent by the year 2050;
- The federal program should be an economy-wide, mandatory reduction program;
- A cap-and-trade program should be the main component of this reduction program; and
- The program should obtain the maximum emissions reduction "at the lowest cost and with the least economic disruption."

Carbon dioxide, methane, nitrous oxide, and fluorinated gases are the four gases the program will cover. These gases are produced by electricity generation, transportation, industrial processes, and commercial, residential and agricultural sectors. The white paper identifies these sectors of the economy as those that need to be covered by the climate change program.

Cap-and-trade systems are common market-based approaches to regulating pollutants. According to the committee's paper, one advantage of this type of program is the certainty that the targeted reductions will be reached. Other methods, such as setting standards, may limit the rate of pollution that can be emitted by a source but do not address total pollution limits (a cap), so the amount of pollution may increase as the number of sources increases. Another benefit of a cap-and-trade program is the economic incentives it creates for industries to find the least expensive method of achieving the required pollution reductions. Companies that can achieve reductions at relatively low costs can then sell (or trade) their pollution permits to other companies.

Cap-and-trade programs require accurate accounting of emissions levels and an understanding of the place in the chain of economic activity that is the best point to track the emissions. To use this type of emissions reduction strategy successfully, any legislation must recognize that the sectors of the economy are very different. Thus, it may make sense to allow trading at the point where a fuel is produced or at a point further "downstream" in the chain of economic activity.

The white paper addresses these complexities and describes how the cap-and-trade program should cover each economic sector. For example, for electricity generation, the generators would become the point of regulation where emission caps and trading allowances are set. In the transportation sector, however, because emissions come from so many mobile sources like cars, planes and trucks burning petroleum-based fuels, the point of regulation might be vehicle manufacturers or further upstream to petroleum refiners and importers.

In addition, the paper recognizes that multiple approaches are needed to address the complexities associated with regulating GHGs. The committee plans to issue more white papers that will address additional elements of the cap-and-trade approach, carbon sequestration and other complementary approaches. For example, the paper states that the

federal government should "distribute allowances" (the pollution permits), but it does not outline whether these initial allowances are to be sold or would be free. Presumably, these and many other details will be addressed in subsequent white papers.

The committee also plans to hold hearings on the white papers. No timetable for hearings or for introducing legislation was put forward by the committee. There are other congressional committees with jurisdiction over individual parts of the issues contained in the design framework, and several other legislative proposals have already been introduced, so it is unlikely that legislation will pass soon.

EPA Cut Corners in TRI Rule

The U.S. Environmental Protection Agency (EPA) came under tough scrutiny at an Oct. 4 hearing of the House Energy and Commerce Subcommittee on Environment and Hazardous Materials for reducing the reporting standards of the Toxics Release Inventory (TRI) in December 2006.

The hearing focused on the Toxic Right-To-Know Protection Act (H.R. 1055), which would restore the TRI program, and the Environmental Justice Act of 2007 (H.R. 1103), which would codify a 1994 executive order requiring agencies to consider environmental justice issues.

John B. Stephenson, director of the Government Accountability Office's (GAO) Natural Resources and Environment Division, testified that EPA deviated in several ways from the agency's rulemaking procedures. "EPA did not follow guidelines to ensure that scientific, economic, and policy issues are addressed at appropriate stages of rule development." Stephenson testified that EPA failed to conduct a proper internal review of all the changes pursued in the rulemaking and rushed an economic analysis that was only finalized days before the rule was officially proposed.

Despite being required under Executive Order 12898 to analyze the environmental justice impacts of the rule, GAO concluded EPA had failed to adequately perform such a review. Stephenson reported that prior to the rule being proposed, "EPA did not complete an environmental justice assessment before concluding that the proposed TRI rule did not disproportionately affect minority and low income populations." Stephenson's testimony also explained that after congressional pressure forced EPA to later review the environmental justice impact that "EPA assumed that although minority and low-income communities disproportionately benefit from TRI information, this fact was irrelevant to its environmental justice analysis."

The GAO used new Google Earth mapping applications to illustrate the significant environment justice impacts on communities. Focusing on the Los Angeles area, the maps displayed a strong correlation between the location of facilities that would report less

information and minority and low-income communities.

GAO found that the failure to follow rulemaking guidelines stemmed from interference from the Office of Management and Budget (OMB). "EPA's deviations from its guidelines were due, in part, to pressure from the Office of Management and Budget to significantly reduce industry's TRI reporting burden by the end of December 2006." Apparently, OMB intervened late in the rulemaking process and re-introduced a provision to raise the reporting thresholds, which EPA personnel had already eliminated as a pursuable option. This late inclusion meant that the option received less review and more rushed analysis during the rulemaking process.

Molly A. O'Neill, Assistant Administrator for Environmental Information and Chief Information Officer at EPA, testified that the new TRI reporting thresholds "provided incentives to encourage pollution prevention and improved waste management." In response to the GAO conclusions that substandard analysis was conducted, O'Neill testified that all requirements had been met during the rulemaking.

Subcommittee Chair Rep. Albert Wynn ☼ (D-MD) questioned O'Neill about the agency's assertion that the reduced reporting would create incentives to reduce pollution. O'Neill explained that EPA believed that facilities would strive to reach the lower pollution levels in order to avoid the TRI reporting, hence driving reductions in pollution. Stephenson countered that if such incentives did exist, then it made more sense to leave the threshold at 500 pounds and get even more pollution reductions. O'Neill was unable to cite any study or analysis conducted by EPA to support the hypothesis that the new thresholds would create reductions in pollution.

On the hearing's second panel, several environmental justice advocates noted the importance of TRI information to communities. Jose Bravo, Executive Director of Just Transition Alliance, testified on behalf of the Communities for a Better Environment and stated that reports using TRI data have led to elimination of toxic pollution at some facilities. Bravo said, "This is tragic, because TRI has been so useful in identifying and prioritizing pollution sources, because reporting is so easy to do, and because the act of reporting itself makes companies much more aware of their toxics use."

Alan Finkelstein, an Assistant Fire Marshal from Strongsville, OH, testified about the importance of TRI information when planning for emergencies. "One of the first things that we learn in fire school is the importance of preplanning for incidents. Accessing TRI chemical data is just one piece of the puzzle for preplanning." Finkelstein acknowledged that TRI was not designed for emergency responders, but concluded that when planning for emergencies, you want to use all information available, and as such, the TRI has become an important tool in the emergency responders' arsenal.

Small business representatives including Thomas Sullivan, Chief Counsel for Advocacy in the Office of Advocacy at the Small Business Administration, and Andrew Bopp, Director of Public Affairs for the Society of Glass and Ceramic Decorators, testified that the TRI

reporting changes represented an important reduction in the regulatory burden faced by small businesses. Though GAO's analysis indicates the changes would only save reporting facilities an estimated $900, both Sullivan and Bopp reported that for small businesses, such amounts were much more important and represented several work days taken away from other money-making activities.

House Moves to Reform Expansive Surveillance Authority

On Oct. 9, the House introduced two bills to reform the Protect America Act (PAA), passed in haste before Congress' August recess. PAA grants the government the authority to wiretap anyone, including U.S. citizens, without court approval as long as the "target" of the surveillance is reasonably believed to be located outside the country.

The Responsible Electronic Surveillance that is Overseen, Reviewed, and Effective Act of 2007 (RESTORE Act) (H.R. 3773) was introduced by Reps. John Conyers (D-MI), chairman of the House Judiciary Committee, and Silvestre Reyes, chairman of the House Intelligence Committee.

The RESTORE Act would require a finding of probable cause for surveillance targeting American citizens, including Americans located overseas. The legislation would also permit a blanket order for surveillance of multiple foreign targets to be granted by the Foreign Intelligence Surveillance Court but would require the Justice Department Inspector General to regularly report on the use of blanket orders and the number of U.S. persons' communications collected in the orders' use. The Justice Department Inspector General would also be required to audit the Terrorist Surveillance Program and other warrantless surveillance programs.

"Earlier this year, President Bush signed a short-term surveillance law that exposed innocent Americans' phone calls and emails to warrantless intrusion," stated Conyers. "Speaker Pelosi immediately asked us to fix this problem and to ensure court oversight while preserving our ability to fight against foreign threats. This bill shows that it is possible to protect civil liberties and fight terrorism at the same time."

President Bush reacted to the RESTORE Act on Oct. 10. "While the House bill is not final, my administration has serious concerns about some of its provisions, and I am hopeful that the deficiencies in the bill can be fixed," said Bush on the South Lawn of the White House. "The final bill must meet certain criteria: It must give our intelligence professionals the tools and flexibility they need to protect our country. It must keep the intelligence gap firmly closed, and ensure that protections intended for the American people are not extended to terrorists overseas who are plotting to harm us. And it must grant liability protection to companies who are facing multi-billion-dollar lawsuits only because they are believed to have assisted in the efforts to defend our nation following the 9/11 attacks."

The civil liberties community predominately supports the RESTORE Act with some

reservations regarding its allowance of blanket orders for overseas surveillance. "We welcome the [RESTORE Act] as an important first step towards restoring civil liberties protections lost in August," stated Kate Martin of the Center for National Security Studies. "The RESTORE Act contains important privacy protections the administration has unreasonably opposed. However, Fourth Amendment rights and national security can only be fully protected with individualized warrants."

Mark Agrast of the Center for American Progress said that H.R. 3773 "would begin to restore checks and balances to the means by which the government conducts electronic surveillance of the international communications of Americans."

The American Civil Liberties Union (ACLU), however, opposes the RESTORE Act. "The RESTORE Act does not require individualized court orders for anything collected under the new surveillance program," stated Caroline Frederickson of the ACLU. "The program can collect any communication as long as one leg of it is overseas, leaving open the distinct possibility--and probability--that the other leg is here in the U.S. and is an American. If Americans' communications are swept up by this new, general program warrant, there is no requirement that a court actually review whether those communications are seized in compliance with the Fourth Amendment."

The ACLU instead fully supports the Foreign Intelligence Surveillance Modernization Act of 2007 (H.R. 3782), introduced by Rep. Rush Holt ☼ (D-NJ). The bill reaffirms that the Foreign Intelligence Surveillance Act is the exclusive means for collecting foreign intelligence and requires individualized warrants for foreign intelligence collection activities.

The House Judiciary Committee passed the RESTORE Act today, Oct. 10, by a vote of 20-14, and the House Intelligence Committee passed the bill, 12-7. The legislation is scheduled to go to the floor of the House the week of Oct. 15. No Senate bills have been introduced, but there is great concern within the civil liberties community that a Senate bill may include retroactive immunity for the telecommunications industry, a provision that is strongly advocated by the White House and is excluded from the two House bills. The Senate Intelligence Committee is scheduled to mark up an expected bill on Oct. 18.

Secrecy Surrounds Interrogation Practices

After Alberto Gonzales took over as Attorney General at the Justice Department in February 2005, the Department issued secret memoranda justifying extreme interrogation techniques, reported the *New York Times* in early October. The importance of such secret opinions and the lack of independent oversight was magnified on Oct. 9 when the U.S. Supreme Court refused to review a case involving the alleged secret rendition and torture of a German citizen.

The Office of Legal Council (OLC) issued the memoranda supposedly stating that the

combined effects of particularly harsh interrogation tactics are not in violation of the law or international treaties against torture, nor are certain extreme tactics, possibly including waterboarding (i.e., simulated drowning) or sleep deprivation. The *Times* reported that the memo's finding was issued in response to Sen. John McCain's (R-AZ) Detainee Treatment Act prohibition on cruel, inhuman and degrading treatment and would not force any changes in the Central Intelligence Agency's (CIA) interrogation tactics.

The OLC has the responsibility for issuing advisory opinions regarding the legality of executive branch activities. It has come under the spotlight due to its role in attempting to provide the legal foundations for the administration's counter-terrorism programs, including the National Security Agency's spying program and the CIA's rendition program and interrogation procedures.

In 2002, the OLC issued a memorandum limiting the definition of torture to that which causes pain akin to "organ failure, impairment of bodily function, or even death." This memo was later withdrawn by the OLC in 2004, after it created a firestorm of controversy and was replaced with a memo finding, "Torture is abhorrent both to American law and values and to international norms." The secret OLC memos reported by the *Times* appear to revise this 2004 memo.

The executive branch's questionable practices are made more troubling by the lack of oversight being exercised in this area by the courts, as evidenced by the Supreme Court's refusal to hear the case of Khaled el-Masri. Masri was allegedly subject to extraordinary rendition by the CIA, in which he was captured and transferred for interrogation purposes to countries that permit the practice of torture. The government claimed that Masri's lawsuit could not move forward due to state secrets, which allows the executive branch to declare certain materials or topics exempt from disclosure or review due to reasons of national security. A three-judge panel of the Fourth Circuit unanimously upheld the use of the state secrets privilege, and this decision will now stand after the Supreme Court's denial to review the decision.

The Supreme Court's decision underscores the lack of oversight and accountability of the executive branch's legally questionable counterterrorism programs. The OLC, an office which is now highly deferential to the views of the White House, offers secret legal memoranda for the executive to engage in questionable interrogation practices, and due to the state secrets privilege, the courts are unable to review the merit of the OLC's opinions. In essence, the OLC is given the unchecked legal authority to declare the legality of interrogation practices and rendition programs, in addition to the administration's other secret national security programs.

Some members of Congress advocate increasing Congress's oversight powers over intelligence agencies to alleviate such concerns. Sen. Daniel Akaka ☼ (D-HI) introduced the Intelligence Community Audit Act of 2007 (S. 82), which would give the Government Accountability Office the power to oversee intelligence agencies. In a letter to the Senate Intelligence Committee, the Director of National Intelligence opposed S. 82, stating that it

"could risk upsetting the historic balance struck between the two branches of government in national security matters." Given the current lack of oversight and accountability of the executive branch's national security programs, the balance between the branches clearly needs to be re-struck.

What You Don't Know Might Be More than You Think

Often, the first step in addressing any environmental or health issue is making sure the public is properly notified and informed. Several recent examples illustrate governmental failures, which too often occur, to perform even this basic informational task.

In environmental issues, the old saying, "What you don't know, can't hurt you," gets turned on its head, because without knowing about potential exposures to toxic chemicals, members of the public are powerless to protect themselves and may well get hurt. Government has numerous responsibilities, both formal regulatory requirements and more fundamental ethical obligations, to keep people informed about potential health risks they or their children may face. Unfortunately, when government fails in its notification responsibilities, the rest of the environmental protection process suffers and often fails because the public is not sufficiently engaged. Three recent situations demonstrate the importance of public notification and awareness and the impact of insufficient information on environmental protection efforts.

Toxic Schools

Fox News reported in late September that the Information Technology High School in Queens, NY, is built on a toxic site, and that no one was informed of this fact. Information Tech opened in 2003 on the leased site of a former metal plating warehouse. Though tests show no air contamination, an expert review of the tests found thresholds too high for comfort. Parent and citizen groups are outraged that the city cut them out of determining whether or not the school is safe. "The city may have done its due diligence, but because it was hidden from us, I don't have full confidence," said Ivan Valle, who might be pulling his ninth-grade son from the school.

City councilmen James Gannaro and Eric Gioia have accused the city of negligence in allowing public schools to be built on toxic property without disclosure. A loophole in state law exempts schools in leased buildings from public and environmental reviews. For any new school construction or addition plan, the School Construction Authority (SCA) must provide public notification of the proposed site, do an environmental review and obtain City Council approval of the plan. Because leased buildings are not city owned, and therefore, any renovations are not considered city construction, they are exempt from these requirements, a policy upheld by New York state courts.

Unfortunately, Information Tech is not the only school of concern related to this issue. New York Lawyers for the Public Interest (NYLPI) became aware of the city's use of the loophole

with the Soundview Education Campus in the South Bronx. The local community board was not informed about the site's previous use or any potential health risks associated with the location of the school. The community only discovered the issue because, after problems with odors from the site, a resident approached construction workers and found out that the location used to be a weapons manufacturing factory. NYLPI's research indicates that five out of 18 proposed leased sites have potential problems. Legislation is pending to change the law and make policies for leased buildings consistent with those that are city-owned.

Missing Superfund Site

The U.S. Environmental Protection Agency (EPA) failed to keep the communities near the Ringwood Mines site in New Jersey properly informed about the contamination and health risks associated with the site. In fact, for almost a decade, the EPA sent the wrong message. With the site's removal from the Superfund program in 1994, the agency essentially told residents that the site had been cleaned up to an acceptable level. But in 2004, the EPA, for the first time in the history of the Superfund program, re-listed a site — Ringwood Mines.

The former iron mine was Ford's dumping ground for manufacturing wastes, including paint sludge, and was also a municipal landfill for a short stint until leaching to nearby water was detected in 1976. After 11,000 tons of sludge were removed and two five-year reviews were conducted showing restricted contamination, it was de-listed from Superfund's National Priority List. The reviews, which were supposed to be subject to public examination, were never disclosed, and the public notice of the delisting was not run in any local newspapers. Since being re-listed in 2004, another 24,000 tons of sludge have been removed from the site.

EPA's Office of Inspector General released a Sept. 25 report criticizing the agency's inadequate clean-up plan for the 500-acre site. Sens. Frank Lautenberg (D-NJ) and Robert Menendez (D-NJ) and Rep. Frank Pallone ☼, Jr. (D-NJ) requested the investigation when the site was re-listed.

Air Fresheners

Despite the widespread use of product labels to keep people informed about health concerns ranging from nutritional content to toxic chemicals, the EPA and the Consumer Product Safety Commission (CPSC) have resisted the idea of labeling air fresheners. In the first study of the toxicity of American air fresheners, the Natural Resources Defense Council (NRDC) found 86 percent of tested products to contain phthalates — more than half with two or more types of phthalates, which may have a more toxic cumulative effect.

Phthalates are chemicals suspected to cause reproductive problems and birth defects and are associated with allergies and asthma. There are no labeling requirements for products containing phthalates, so consumers do not know when they are exposed. In addition to phthalates, air fresheners also harbor other chemicals of concern, including volatile organic

compounds (VOCs).

Air fresheners are used in 75 percent of U.S. households, and sales have increased 50 percent in the last four years, ironically fueled by associating scented air with a clean environment. NRDC, Sierra Club, the Alliance for Healthy Homes and the National Center for Healthy Housing filed a petition to EPA and CPSC on Sept. 19 to start comprehensively testing air fresheners, ban phthalates from all consumer products, require labeling and require manufacturers to research the human toxicity of phthalates.

These three examples illustrate that environmental and public health notification failures occur at all levels of government. A system with stronger incentives for proper and timely public notification and more substantive oversight is imperative on all levels of government: federal, state and local. Without the right to know about health risks, the government is stripping members of the public of their ability to act and protect themselves.

Congress Avoids Tough Questions of FY 2008 War Funding

President Bush and Congress continue to deny the fiscal realities of prosecuting two simultaneous wars that cost about $12 billion per month. By classifying the president's FY 2008 $193 billion war funding request an "emergency supplemental" and stifling discussion of war financing, Congress sidesteps the critical task of setting and adequately funding national priorities.

By the standards set forth by the executive branch, spending requests must meet the following criteria to be considered "emergency":

1. Necessary expenditure — an essential or vital expenditure, not one that is merely useful or beneficial;
2. Sudden — quickly coming into being, not building up over time;
3. Urgent — pressing and compelling, requiring immediate action;
4. Unforeseen — not predictable or seen beforehand as a coming need; and
5. Not permanent — the need is temporary in nature

The first criterion is a matter of debate. When Congress approves a budget resolution, it sets a spending limit which appropriators must abide when allocating spending levels for all federal agencies. That Congress and the president have classified the $193 billion war supplemental as "emergency" presumes that the Iraq war is, in fact, a "necessary expenditure" — far from a consensus opinion. The allocation of $193 billion underneath a $955 billion budget limit would be a true test of the necessity of the spending, yet Congress has obviated this debate by extricating war spending from the normal budget process.

The wars in Afghanistan and Iraq fail the tests of being sudden and unforeseen. The conflict in Afghanistan has been prosecuted for nearly six years, while the Iraq war saw its fourth

anniversary in March. The president has stated his intention to keep over 130,000 troops deployed in Iraq until at least March 2008. Further, continued violence makes prospects for near-term military withdrawal from Afghanistan untenable.

The classification of war spending as an emergency supplemental allows appropriators to sidestep discretionary budget limits and hence the attendant thorny decisions regarding which and by how much program funding will be reduced. Congress can also maintain the veneer of consequence-free spending by restricting discussion about the source of revenues that will be required to fund the two wars.

When a trio of House legislators — House Appropriations Chair David Obey (D-WI), Chair of House Appropriations Subcommittee on Defense John Murtha (D-PA), and Rep. Jim McGovern (D-MA) — attempted to throw light on the proposition that war spending is not without consequence, they were quickly sidelined by congressional leaders hoping to avoid an explicit discussion of who exactly should pay for the wars. Within hours of their proposal to charge a surtax to fund the wars, House Speaker Nancy Pelosi (D-CA) punctured any hope of consideration of revenue sources:

> "Just as I have opposed the war from the outset ... I am opposed to a war surtax."

On the other side of the aisle, House Minority Leader John A. Boehner (R-OH) declared identifying revenue sources as "the most irresponsible public policy [he had] seen in a long, long time."

A debate about a war surtax, however, would make stark the set of options from which legislators must chose in order to continue war funding. They can pay for the wars today through taxation; they can place the financial burden on our children and grandchildren and finance the wars by taking on more debt; or they can curtail spending on school lunch programs, bridge and road repair, space exploration, or other domestic investments. Congress has instead refused to engage in actively setting and adequately funding national priorities.

The apparent erroneous classification of the president's latest war funding request as "emergency supplemental" spending has relieved Congress of making difficult spending decisions. House leadership's dismissal of Obey's call for a war surtax underscores the unwillingness of Congress to identify and debate the choices that must be made in order to continue to devote such large sums of money to prosecuting the wars in Iraq and Afghanistan.

Congress, President Spar Over Children's Health Insurance

Congress overwhelmingly approved the State Children's Health Insurance Program (SCHIP) reauthorization at the end of September, with $35 billion in new funding that would provide health care coverage for about four million more uninsured children. As

expected, President Bush vetoed the reauthorization, and the House is scheduled to hold what promises to be a close override vote on Oct. 18.

SCHIP was started in 1997, and it provides health care primarily for uninsured children in families whose incomes are too high to qualify for Medicaid. Under this bill, about 70 percent of families who would gain SCHIP coverage earn less than twice the poverty level, which is $40,000 for a family of four, according to the Urban Institute.

Both the Senate and the House approved the bill by wide margins. The House voted 265-159 to pass the bill President Bush vetoed. All but eight Democrats, and 45 Republicans, voted for it, while 11 members did not vote at all. This total is short of the two-thirds majority needed to override the president's veto. The Senate supported the SCHIP reauthorization by a veto-proof majority, 67-29.

Despite Congress's votes and overwhelming public support for the bill, Bush vetoed SCHIP reauthorization on Oct. 3. This opposition to children's health care programs is not a new policy for the president. The Bush administration also recently issued a rule severely restricting which states can give SCHIP coverage. Several states have sued the administration over the rule, and the bill passed by the House and Senate would replace it with more inclusive guidelines (See a related *Watcher* article on the state lawsuits).

Only a few votes in the House will make the difference between sustaining the president's veto or overturning it and taking the first step toward forcing the bill into law. Since a two-thirds majority of voting members is required to overturn a veto, approximately 15 to 25 House members will have to switch their votes. A large coalition of advocacy groups and labor unions has launched a campaign to pressure members of the House to overturn the president's veto and enact the SCHIP bill. Democratic leaders in the House have announced the vote will be held on Oct. 18.

Some House members have already pledged to change their votes. Rep. Dan Boren (D-OK), who voted against it, has said he will now support it, and Rep. Bobby Jindal ☼ (R-LA), who did not vote, said he would support the bill. If the House is able to override the veto, it is likely the Senate will follow suit as the initial vote passed the bill by a margin large enough to override the veto.

In an encouraging sign, Bush has backed down from his position that he would veto bills that provided more funding than he requested in his budget, including the SCHIP bill. During his weekly Saturday radio address, Bush said he would consider accepting more funding but would likely need Congress to compromise as well. Democratic leaders have said repeatedly they will not reduce the $35 billion funding increase currently in the bill.

Research Questions Cost-Efficiency of Privatization

Public debate over government contracting has centered largely on issues of accountability.

But recent scholarship on the *efficiency* of using contractors to deliver government services shows that a broader discussion is warranted. The assumptions about the relative efficiency of government contracts are on shaky ground, and cost measurements show no clear advantage to private contractors.

Holes in the Theory

The belief that private contractors perform more efficiently than government agencies rests on the expected effects of competition and private ownership. But privatization advocates often fail to examine the extent to which these conditions pertain in contracting markets. In his book *You Don't Always Get What You Pay For: The Economics of Privatization*, Professor Elliott Sclar, director of the Center for Sustainable Urban Development (CSUD) at Columbia University's Earth Institute, takes a critical look at contract markets and performance. As it turns out, the conditions needed for efficient contracting are often not present or are costly to obtain.

Sclar found governments often buy services in uncompetitive markets. In contract markets where there are few buyers or sellers, prices can be out of line with the benefits of a purchased service. Governments often buy things nobody else does, such as garbage collection or sewer maintenance. Companies may collude with each other, or only a small quantity of suppliers may be able to compete for a contract.

Contracts themselves are often very complex and expensive to monitor. Sclar found government agencies fail to write contracts appropriately, with clear definitions for the purchased goods. Governments also typically ask for goods or services that are not immediately available on the market. Companies have to make a service to order, and governments need to expend resources to ensure they get what they paid for. Sometimes, Sclar found, the contracted services may just be too complex to oversee efficiently.

Contracting relationships are also jeopardized by conflicts of interest and informational imbalances. For example, long-term contracts are particularly hard to administer. Sclar found contractors may begin by providing a cost-efficient service, but later on, they may be in a position to leverage market power over an agency and charge high prices.

No Clear Cost Savings to Contracting

Sclar's analysis, which was drawn from case studies of privatization, seems to be accurate even when contractor performance in entire sectors is measured. Many surveys of certain types of privatization have shown no clear advantage to privatization.

In one study, where all published econometric analyses of city water and waste production services were compiled, no strong link was found between how the service was provided (by contractor or by government workers) and how much it cost. Other factors were much more important in determining costs, including market structures, industrial organization and the capacity of government to hold contractors accountable for performance.

Another study of contracting also found no discernible savings when governments used

private contractors to administer prisons. While half of all private prisons surveyed may have generated cost savings, a quarter resulted in losses, and the final quarter showed no change. A 2002 study produced similar findings with regard to contracting out administrative staffing for child welfare programs.

Recent experiments with privatization on a large scale have also produced unsatisfactory results. The state of Texas gave a comprehensive contract for the administration of nearly all social benefit services. But severe service delays developed, and the state had to end the contract for many of the services it outsourced.

At the federal level, an ongoing effort to contract out tax collection services has suffered from massive inefficiencies. Government workers have been shown to be nearly four times as efficient as the contractors in collecting past due debts. Indeed, the only tenable argument made for tax privatization is that it is politically difficult to secure enough funding to hire government workers to do the same job. The House passed a bill to repeal this program on Oct. 10.

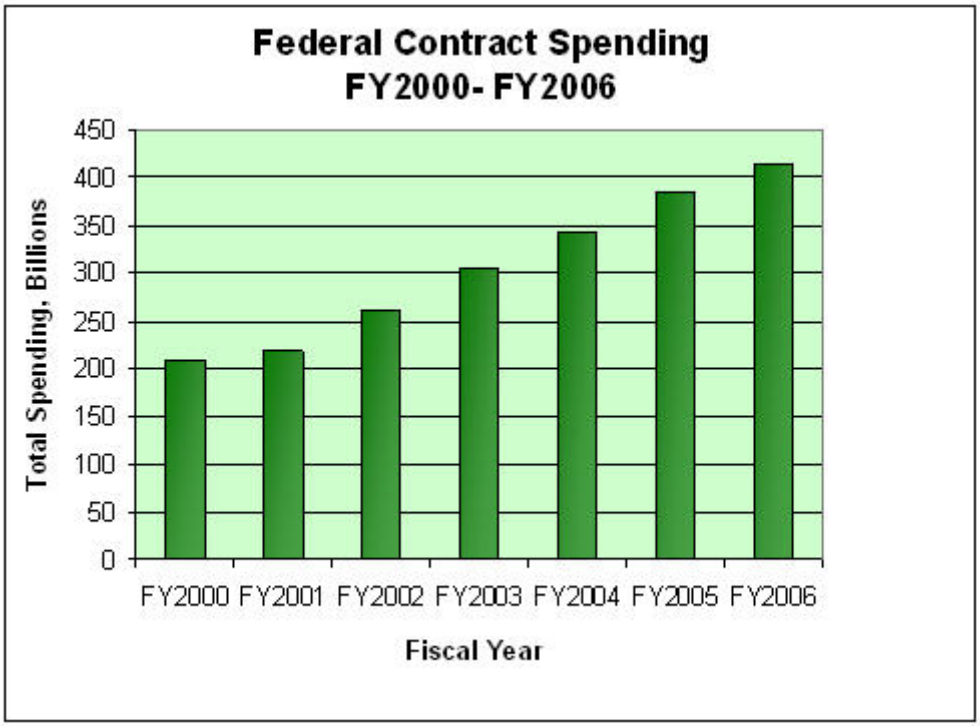
A Pragmatic Approach to Contracting

Most of the academic literature shows government contracting is a sensitive business that requires diligence, planning and management resources, and that it may be unsuited to certain goods and services. Additional rules for overseeing contracting processes may be necessary to ensure agencies prepare properly for contracting, and weigh all options for service provision. In Massachusetts, for example, a commission evaluates proposals for using private contractors prior to implementation.

In a separate paper, Sclar found the commission saved money in Massachusetts by preventing inefficient contracting. He concluded:

> The privatization law has created an atmosphere where state agencies are forced to think like private firms as opposed to assuming that a private provider working under contract will automatically solve any problem at a lower cost. It compels state agencies to think through the pitfalls that lie ahead and prods them to be sure they are making the highest and best use of scarce resources in difficult fiscal times. It avoids the squandering of public funds on untested ideas that has plagued privatization efforts in so many other places.

When agencies do not take it for granted that contracting is always efficient, they should be better prepared to manage contracts and may be more willing to reform service delivery systems by more effective means than privatization. At the very least, this research shows that policymakers have good reason to examine the cost-efficiency of the rapidly expanding federal contracting industry — which has doubled in size in the last five years. Any review of contracting practices should determine the conditions under which privatization is a viable way of improving government performance.



Internet Access Tax: The Immodest Moratorium

With a federal moratorium on state and local Internet access taxes set to expire on Nov. 1, Senate Commerce, Science and Transportation Committee Chair Daniel Inouye (D-HI) withdrew a bill on Sept. 27 that would extend the tax moratorium rather than face the likelihood members would approve a Republican-backed permanent moratorium. Inouye said a compromise among those seeking an extension of the moratorium and those proposing a permanent ban had not yet been worked out. There has been no formal action in the House to date, other than a full Small Business Committee hearing on Oct. 3 on the potential negative impact on small businesses of allowing the Internet tax moratorium to expire.

The Internet tax moratorium issue is being debated on the national level, but it would impact the revenues of states and localities. Nine states — Hawaii, New Hampshire, New Mexico, North Dakota, Ohio, South Dakota, Texas, Washington and Wisconsin — started imposing Internet access taxes similar to the taxes that appear on monthly telephone bills in the mid-90s. Then in 1998, Congress barred for three years any new state and local taxes on Internet access providers who bundle telecom products to consumers, including e-mail and digital subscriber line (DSL) services. The ban was extended until late 2003, then lapsed for over a year, during which time no states acted to institute new taxes. In 2004, Congress extended the moratorium through Nov. 1, 2007.

The sentiment is almost universal in Congress that this tax moratorium should be extended again, but there are different opinions about the length of the extension. Many believe it is

necessary to encourage continued investment in the high-speed lines crucial to making new online activities possible, particularly video. But changing Internet usage has complicated the issue, slowing the pell-mell rush to extend or make permanent a moratorium that has not slowed the United States' steady descent in the global rankings of broadband penetration.

Senate Commerce Committee Ranking Member John McCain (R-AZ) and the Don't Tax Our Web coalition (an industry-funded coalition composed of telecommunications giants including AT&T Inc., Google Inc., Time Warner Inc., as well as the business-friendly U.S. Chamber of Commerce, National Association of Manufacturers, and American Legislative Exchange Council) seek to prohibit Internet access taxes permanently. The paradox regarding Internet access taxes is captured by McCain: "If Americans want to know what their access bill will look like if this moratorium expires, all they need to do is look at their phone bill. Taxes and government fees add as much as 20% to Americans' telephone and cellphone bills. We can't let that happen to the Internet, which is likely the most popular invention since the light bulb." Perhaps McCain forgets that access to telephones has not been hindered by long-accepted state and local taxes.

Those opposing a permanent ban, led by the U.S. Conference of Mayors, the National Governors Association, the Council of State Governments, the American Federation of State, County, and Municipal Employees, and the National Association of Counties, worry about the estimated $11.7 billion that state and local coffers would lose annually and question the pre-emptive nature of the current federal law. They further claim because technology is changing, freezing tax policy in this area makes little sense. As Jean Kinney Hurst, head of tax and revenue policy for the California Association of Counties has said, "A permanent ban seems frankly completely irresponsible. We don't know what's going to happen with technology." Given this uncertainty, these groups endorse a four-year extension of the ban at this time.

According to an August report from the Center on Budget and Policy Priorities, the current ban allows Internet access providers to escape a host of general taxes that other businesses must pay, such as sales taxes on equipment purchases. In addition, the taxes imposed by the nine states mentioned earlier have not adversely affected household subscriptions to access the Internet or the availability of broadband access in those states. Furthermore, each of the 14 developed nations that outrank the U.S. in broadband access have taxes on Internet access services — and at rates many times higher than the 4-9 percent applied by the nine states in the U.S. The U.S. ranked in the top five globally in broadband access prior to the ban in 2001, but has dropped to 15 out of the 30 Organization for Economic Cooperation and Development (OECD) nations in just six years.

Unfortunately, the debate in Congress has hitherto involved surprisingly little examination of a singular and immodest moratorium enjoyed by a robust, thriving, well-capitalized and mature sector of the American economy. Typical of the rhetoric on the issue in Congress is this view, expressed by Rep. Anna G. Eshoo (D-CA): "There would be a revolution in the country if every time you went online you had to pay a tax. The dome of the Capitol would

cave in."

The debate will continue, but history shows that even if it is not resolved by Nov. 1, dire consequences will not follow. As a Senate Commerce Committee staffer noted last month, recalling the moratorium's one-year lapse in 2004: "As far as I can tell, the world didn't stop spinning."

Conference Focuses on E-mail Frustration Felt by Congress and Advocacy Groups

On Oct.1, the Congressional Management Foundation (CMF), a nonpartisan nonprofit organization working to improve the effectiveness of Congress, held a forum on constituent communications with Congress. The goal of the conference was to "identify ways to make it easier for citizens to express their views to Congress in an effective way and for congressional offices to manage and get value from the communications they receive." The massive amount of e-mail Congress receives from constituents was the main topic of discussion. Both nonprofit advocacy groups and congressional staffers agreed that the current approach to e-mail communications works for neither side, but they were unable to find common ground on solutions. CMF will release a draft report in early 2008 on the conference and its research on the topic, with the goal of fostering a new model of constituent communications with Congress.

E-mail communications have provided advocacy groups and citizens with a cheap and easy way to communicate with their representatives in Congress. In 2004, according to a CMF chart, Congress received over 200 million e-mails, up from 50 million in 1995. In a survey CMF conducted of congressional staff, nearly eighty percent agreed that the Internet has made it easier for Americans to engage in public policy.

In his conference presentation, Doug Pinkham of the Public Affairs Council argued that Internet and e-mail technologies have given rise to a boom in grassroots activity by both companies and nonprofits. Looking ahead, Pinkham believes grassroots advocacy, and the constituent communications to Congress that come with it, will only increase. According to Pinkham, "Public policy issues are becoming increasingly high stakes, which motivates all sorts of groups to weigh in. At the same time, many of these issues — from trade promotion authority to stem cell research to environmental restrictions — are also becoming increasingly complex, which means that there will be an even more urgent need in congressional offices to figure out 'what the voters really want' back home."

Congressional staffers, however, are finding it difficult to manage and respond to the mass amount of e-mail they receive on a daily basis. Congressional staffer Judson Blewett, from the office of Sen. John Cornyn ☼ (R-TX), identified a set of problems he sees in the current approach to e-mail communications. Blewett testified, "Logistically speaking, many of these problems seem to fall into a set: 'insufficient man hours available.' They also all seem to fit into a 'complete lack of standards between Congress and advocacy groups' box as well. I

think that co-operation and a set of rules or procedures between advocacy groups and Congressional offices is critical to resolving this problem."

Alan Rosenblatt of the Center for American Progress Action Fund discussed the issue of e-mail communications from the perspective of the advocacy community. He argued that this type of dialogue with Congress, on behalf of citizens, is a critical means for advocacy organizations to try to realize their objectives. Rosenblatt observed, "Perhaps the biggest problem in this morass is that Congress, more often than not, seeks to manage their communications with constituents, often at arms' length. But e-mail offers an enormous opportunity to deepen relations with constituents....It is very sad that this golden opportunity often is seen as a problem."

In its summary of the testimony, CMF identified four implications from the conference of importance to the advocacy community.

- *Quality is more important than quantity* (Because congressional offices prioritize personalized messages over bulk e-mails they perceive not to be "real", advocacy groups would likely benefit from encouraging constituents not to send e-mails with the exact same message.)
- *The organization behind a grassroots campaign matters* (Congress pays attention to the messenger as well as the message. Consequently, campaigns where the leading organization fails to identify itself are unlikely to have impact.)
- *Grassroots organizations should develop a better understanding of Congress* (Better understanding of how congressional offices manage e-mail and other communications would allow advocacy organizations to convey their ideas more effectively.)
- *There is a difference between being noticed and having an impact* (E-mail communications affect an organization's reputation with congressional members and staffers. Aim for influence, not annoyance.)

Nonprofits File Comments on Proposed Electioneering Communications Rule

On Oct. 1, comments were due to the Federal Election Commission (FEC) on its proposed new rules to make the agency's regulations consistent with the U.S. Supreme Court decision in *FEC v. Wisconsin Right to Life* (WRTL II). That case held that paid broadcasts that cannot be reasonably interpreted as appeals to vote for or against a federal candidate must be allowed to air in the period before federal elections. These broadcasts were restricted by law. The FEC will hold a hearing on Oct. 17, and it plans to vote on a final rule by the end of November, in time for the presidential primaries.

The FEC's Alternative 1 would require sponsors of grassroots, non-electoral broadcasts to file disclosure reports on their funding sources to the FEC, while Alternative 2 would not require disclosure. In the comments the FEC received, the disclosure issue is the main point

of contention. OMB Watch submitted comments opposing the FEC disclosure of permissible electioneering communications (Alternative 1), saying, "There is no justification for burdening broadcasts that are unrelated to federal elections with FEC reporting obligations. The WRTL II opinion made it clear that where there is doubt, it must be resolved in favor of the speaker." Under Alternative 1, if a labor union, corporation or nonprofit spends more than $10,000 in a calendar year on grassroots lobbying communications, it would have to disclose the date and amounts of payments made for the communications and the name and address of donors who contributed more than $1,000. If an organization uses a separate segregated fund (SSF) for these ads, the donors to that fund would have to be reported. The comments OMB Watch submitted expressed concern that this "leaves a nonprofit with two bad choices: either disclose donors for the entire organization, or have the difficult job of separate fundraising for the SSF."

Independent Sector offered similar concerns about the disclosure proposal. The organization argued that "following complicated FEC reporting regulations would discourage, and would effectively prevent most charities from running issue ads during election periods. The reporting requirements would be an unnecessary obstacle for communications that are actually grassroots lobbying advertisements."

Those who favor maintaining the disclosure requirements, led by the Campaign Legal Center, argue that the FEC has every right to require disclosure because the Supreme Court only addressed whether the paid broadcast is permissible, not whether it should be disclosed. Hence, the FEC has no restrictions in calling for disclosure. However, the OMB Watch comments point out, "Congress has not authorized the FEC to regulate grassroots lobbying through disclosure requirements. In fact, earlier this year Congress clearly rejected proposals (supported by OMB Watch) to extend the Lobbying Disclosure Act to cover grassroots lobbying." Additionally, the IRS already collects information from charities on grassroots lobbying activities.

Another issue of contention in the proposed rulemaking is whether the FEC should have a general rule along with safe harbors or one specific rule. The rulemaking proposes a general rule and two limited safe harbor exclusions. OMB Watch argued, "The proposed general rule would exempt communications that are 'susceptible of a reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate.' We do not believe this is the best approach, since the proposed general rule is too vague, and the proposed safe harbors are overly restrictive."

In 2006, OMB Watch, the U.S. Chamber of Commerce, the AFL-CIO, Alliance for Justice and the National Education Association filed a petition with the FEC seeking a rulemaking for an exception to the electioneering communication rule that exempts grassroots lobbying activity. Both the comments the Chamber of Commerce and OMB Watch submitted support the 2006 suggested general rule. It said to be exempt the broadcast must:

- Be directed at the lawmaker in his capacity as an incumbent officeholder, not a candidate;

- Discuss a public policy issue currently under consideration;
- Urge either the officeholder or the general public to take a specific position on an issue, and in the case of the general public, urge them to contact the officeholder.

But the broadcast *could not*:

- Discuss the officeholder's character or fitness for office;
- Reference any political party or election; or
- Promote, support, attack or oppose any candidate for federal office.

Alliance for Justice also warns against the requirement in the rule that the communication must satisfy all four "prongs" of the safe harbor in order to be exempt. This approach would be inconsistent with the understanding that there can be as-applied challenges. "By making every element a condition of protection, the Commission would undermine the administrative and constitutional benefits attributable to adopting a safe harbor in the first place, and we urge the Commission to adopt a more flexible approach to the safe harbor."

The safe harbors also do not account for non-legislative issue advocacy, public service announcements or other broadcasts that may be unrelated to elections. The American Cancer Society expresses its concern with public service announcements. "Charities and the communities they serve can benefit from these individuals helping to disseminate mission-related information. We would like to ensure that these practices do not run afoul of any federal election laws."

Congress Misses Oversight Opportunity on Charities and Anti-Terrorist Financing Laws

Both houses of Congress have now approved S. 1612, a bill that expands penalties for violations of economic sanctions against countries like Iran and designated terrorist organizations. The bill also expands the scope of prohibited activity to include vaguely defined conspiracy and aiding and abetting language that could lead to unpredictable results for the unwary. While penalty increases were needed to address violations by companies like Chiquita, which paid a designated terrorist organization for protection in Colombia, passage of the bill without review of how the economic sanctions laws negatively impact humanitarian aid, development and human rights programs could prolong what is seen as a bad situation. OMB Watch is among the nonprofits that are calling for congressional oversight of the difficulties charities face.

S. 1612, the International Emergency Economic Powers Enhancement Act (IEEPA), was approved by the House on Oct. 2, after the being approved by the Senate in June. It increases fines for violations of economic embargoes declared by the president, from $50,000 to $250,000, or twice the amount of the illegal transaction. It also expands criminal penalties for intentional violations or for helping support violations by others with fines up to $1 million and prison terms up to 20 years. The definition of criminal activity is

expanded from a prohibition on willful or attempted violations to include any conspiracy to violate the law or aiding or abetting an unlawful act. These terms are undefined and could criminalize behavior far removed from the actual illegal act, such as charitable relief provided in disaster areas where terrorist groups operate or bankers with an indirect role in a financial transaction.

The bill went through Congress relatively quickly. It passed the Senate after a hearing that only included Bush administration officials, and there was no hearing before the House Foreign Affairs Committee. OMB Watch wrote to the House Democratic leadership asking for a delay on the vote on S. 1612 until the Foreign Affairs Committee could investigate how the IEEPA has affected the charitable sector. The appeal noted that use of IEEPA to prevent terrorist financing through charities may have made sense as a short-term, emergency solution in 2001 but is not a good long-term strategy. Although the bill passed, the call for oversight continues. Key questions for Congress include:

- How has Treasury treated charities under Bush's Patriot Act executive orders?
- Why does Treasury refuse to meet with charities about ways to release frozen funds for genuine charitable programs?
- Why is there no independent review of designation of charities?
- Why do charities get shut down, but companies like Chiquita pay fines that are small relative to their assets?

The potential for penalties for unintentional violations could be a problem for both charities and businesses. In a floor statement before the House voted on the bill, Rep. Donald Manzullo ☼ (R-IL) expressed concern that small businesses may be assessed penalties for "unintentional, accidental or inadvertent violations." No changes were made to provide protection in these situations. Instead, the Departments of Commerce and Treasury sent Manzullo assurances that they will not abuse their new authority. In the long term, more formal protection may be needed, as information about errors in evidence used to shut down charities has come to light in the recent Holy Land Foundation trial in Texas.

Background on IEEPA

Charities and other entities are subject to asset seizure under Patriot Act amendments to IEEPA, which give the president discretion to declare an emergency for "any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States." President Bush used these powers on Sept. 24, 2001, granting the Treasury Department (among other powers) the ability to freeze the assets of all persons the Secretary of the Treasury determined ". . . assist in, sponsor, or provide financial, material, or technological support for . . . such acts of (foreign) terrorism . . . or to be otherwise associated with those persons listed in the Annex to this order." (Executive Order 13224, 66 Fed. Reg. 49079 (2001), at Sec. 1(d)(i), (ii).) The threshold for asset seizure is low. Under the Patriot Act revisions to IEEPA, the Treasury Department can freeze an organization's assets pending an investigation into possible associations with a designated terrorist group.

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