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Commentary: Obama Reform Proposal would Improve Transparency in Financial Markets

Transparency is integral to a responsive, accountable, and ultimately functioning government, but it is also a vital component of a functioning economy. Indeed, a number of federal institutions exist to ensure that depositors, lenders, and borrowers have access to relevant financial data that allows them to engage in mutually beneficial transactions. The Obama administration's financial regulatory reform proposal acknowledges the important role that transparency plays in the economy's financial sector and contains a number of measures to increase transparency in the notoriously opaque financial system.

The financial industry is the sector that allocates capital to the rest of the economy; that is, it pools, pipes, and pumps money from investors to businesses that make the goods consumers buy. If investors cannot trust those to whom they would lend funds, then businesses could not function. It is here that regulation becomes necessary, as federal institutions serve as enforcers of the rules that inculcate trust in the system. And at the heart of financial regulation are those rules designed to enhance transparency in the financial market. Indeed, the Securities and Exchange Commission (SEC) functions by providing "a common pool of knowledge for all investors" because "[o]nly through the steady flow of timely, comprehensive, and accurate information can people make sound investment decisions."

While there were many events over the past few years leading to the near-collapse of the financial system, the opacity of several sectors places them on a likely list of suspects. The financial crisis has its roots in investors from all around the globe, searching for low-risk, high-yield vehicles in which to invest. Discovering what they believed at the time to be such low-risk investments, they began purchasing massive quantities of securities based on the value of residential mortgages (e.g., collateralized debt obligations [CDO], residential mortgage backed securities [RMBS], etc.). It turned out, however, that many of the underlying mortgages in those securities were issued fraudulently, incompetently, and willfully ignorantly.

As a consequence of reckless lending decisions, mortgage-backed securities lost significant value and decimated the balance sheets of the firms that owned them. Critically, potential lenders refused to extend credit to them, because creditors had no idea if those firms would be able to stay in business to be able to repay the loans. In every step of the process, inaccessible information contributed to poor decisions by investors and stymied inter-business lending.

When firms were purchasing CDOs, they believed (or could plausibly claim they believed) they were making risk-free investments, because credit rating agencies (CRAs) – the private entities that grade the riskiness of debt instruments – judged the CDOs to be so. The CRAs failed spectacularly in their assessments. Understanding the methodologies behind the CRAs' ratings and disclosing details of the financial ties between CDO issuers and CRAs might have exposed failures in the securities rating systems, giving pause to potential purchasers.

The financial regulation proposal put forth by the Obama administration would increase transparency in and strengthen oversight of CRAs. Crucially, the proposal also recognizes the role that lack of transparency played in the financial crisis and the need for increased transparency in broader financial regulatory reform.

According to the proposal:

> Securitization, by breaking down the traditional relationship between borrowers and lenders, created conflicts of interest that market discipline failed to correct. Loan originators failed to require sufficient documentation of income and ability to pay. Securitizers failed to set high standards for the loans they were willing to buy, encouraging underwriting standards to decline. Investors were overly reliant on credit rating agencies. Credit ratings often failed to accurately describe the risk of rated products. In each case, lack of transparency prevented market participants from understanding the full nature of the risks they were taking.

In a recent speech on Wall Street, Obama laid out his plan to fill in these information gaps (a detailed description of the proposal is available here). The speech came as the House Financial Services Committee, chaired by Rep. Barney Frank (D-MA), began holding hearings on financial regulatory reform. The committee will likely spend a good part of October holding hearings and conducting markup sessions as the members try to reconcile the administration's plan with many other financial reform plans. However, since Frank currently supports Obama's reform proposal, it appears likely that this plan will receive the most attention.

Obama's plan is divided into five parts:

- Supervision and regulation of financial firms
- Comprehensive regulation of financial markets
- Consumer and investor protections
- Government financial crisis management tools
- Coordination of international standards

Each plank of the plan seeks to address a perceived failing of the financial system that contributed to the current economic crisis, and improving transparency plays a role in the first three major areas.

The first part, the regulation of financial firms, would have the greatest impact on the financial system. The administration would create several new agencies, including the Financial Services Oversight Council (FSOC) and the National Bank Supervisor (NBS). The NBS would combine national banks' federal savings association supervisors, in an effort to prevent regulatory shopping. At the same time, the Federal Reserve would step up its regulation of bank holding companies. The FSOC would serve to coordinate all financial regulation in an effort to prevent regulators from ignoring sectors of the market. Additionally, the FSOC would "facilitate information sharing and coordination among the principal federal financial regulatory agencies regarding policy development, rulemakings, examinations, reporting requirements, and enforcement actions."

As the second plank in its plan, the administration would strengthen the SEC. Noting that "over the counter derivatives" such as credit default swaps, which ultimately caused the $70 billion bailout of insurance giant AIG, were "a major source of contagion through the financial sector during the crisis," the proposal seeks impose new record keeping and reporting requirements on these financial instruments. Additionally, the plan states that "[i]nvestors and credit rating agencies should have access to the information necessary to assess the credit quality of the assets underlying [opaque financial instruments]." And while this section of the plan encourages the SEC to impose more transparency requirements on CRAs, it would not result in new legislation to mandate such rules. Rather, it would leave to the SEC discretion as to which transparency regulations to implement.

The third part of the plan would protect financial consumers by creating the Consumer Financial Protection Agency (CFPA), a sort of financial services version of the Consumer Product Safety Commission. The CFPA, which would "make sure that consumer protection regulations are written fairly and enforced vigorously," would protect consumers from hazards such as sub-prime mortgages. The CFPA would also have a key transparency role, in that it would have the power to require clear and reasonable public disclosures of financial services companies.

The fourth and fifth sections of the reform proposal are somewhat less developed than the other three. The fourth plank pledges that, next time around, the government will have a tool to address "too big to fail" institutions, but it remains unclear what kind of tool that will be. The fifth plank is a vague promise for "international cooperation," which is intended to help prevent another global financial collapse.

The Obama proposal highlights the "lack of transparency [that] prevented market participants from understanding the full nature of the risks they were taking." Indeed, elements of the proposal will take big steps toward filling the information gaps that helped precipitate the financial crisis by mandating the financial services sector to disclose more information. The government will provide much needed transparency while also regulating the most risky financial products. This new level of transparency is warranted, as it will protect not just investors and other players in the financial services industry, but also the millions of Americans who depend on a functioning financial system that allows the economy to grow.

Congress Attempts to Wrap up Appropriations

With the end of the fiscal year quickly approaching on Sept. 30, congressional leaders plan to pass a continuing resolution (CR) to keep government agencies funded through the end of October and allow additional time for appropriations work to continue. Although not a guarantee, the additional time should allow Congress to finish its appropriations work, preventing the need for an omnibus spending bill before the end of the year.

The FY 2010 appropriations process will consume Congress over the coming weeks, as both chambers work to complete the government's twelve annual spending bills and pass them on to the president for his signature. The House moved quickly in 2009 and passed all of its appropriations measures before the August recess. Alternatively, the Senate passed only four spending bills before leaving Washington for the summer. Having completed two more appropriations bills since the break, the upper chamber still has six spending bills to pass and then must reach agreement with the House on a compromise version for each of those bills.

The only appropriations legislation that has successfully passed both chambers and been reconciled is the bill funding the legislative branch. The House agreed to the conference report, which includes the text of the (CR), on Sept. 25, and the Senate is likely to pass the conference report the week of Sept. 28, before the end of the fiscal year.

FY 2010 Appropriations*									
As of Sept. 28, 2009	*FY 2009*	*President's Request*	*House*			*Senate*			*Conference*
			Sub-Cmte	Cmte	Floor	Sub-Cmte	Cmte	Floor	
Agriculture	20.5	23	22.9	22.9	22.9	23.1	23.7	23.7	
Commerce-Justice-Science	57.7	64.6	64.4	64.4	64.3	64.9	64.9		
Defense	631.9	640.1	636.3	636.3	636.3	636.3	636.3		
Energy & Water	33.3	34.4	33.3	33.3	33.3	34.3	34.3	34.3	
Financial Services	22.7	22.6	24.1	24.2	24.2	24.4	24.4		
Homeland Security	40.0	42.8	42.6	42.6	42.6	42.9	42.9	44.3	
Interior & Environment	27.6	32.3	32.3	32.3	32.3	32.1	32.1	32.1	
Labor-HHS-Education	151.8	160.7	160.7	160.7	160.7	163.1	163.1		
Legislative Branch	4.4	5.2	4.7	4.7	4.7	4.7	4.7	4.7	4.7
Military Construction-VA	72.9	77.7	77.9	77.9	77.9	76.7	76.7		
State-Foreign Operations	50.0**	52	48.8	48.8	48.8	48.7	48.7		
Transportation-HUD	55.0	68.9***	68.8	68.8	68.8	67.7	67.7	67.7	

**Numbers are amounts of discretionary spending in billions of dollars. Green boxes indicate approval; grey boxes indicate bill not yet approved by appropriate body.*
***Includes supplemental funding*
****Does not include $39.5M presidential request for general fund appropriations*

(*click to enlarge*)

Two of the six bills remaining for the Senate include what are possibly the most contentious spending measures – the Defense Department and Labor-HHS-Education spending bills. With rancorous debate and an abundance of amendments typifying Senate appropriations proceedings, such as debate on the recently completed Interior-Environment funding bill, legislative wrangling over Defense and Labor-HHS-Education appropriations bills could push lawmakers to the end of their one-month extension under the CR.

Exacerbating defense-spending matters are current foreign policy debates over troop levels in Afghanistan and missile defense in Eastern Europe. The Obama administration also has several demands for the Senate's defense bill, including increased funding for Afghan security forces and the removal of funding for the C-17 transport plane. To date, Congress has largely acquiesced to the administration's defense-spending demands, including cancellation of the F-22 fighter jet, the VH-71 presidential helicopter, and the F-35 alternate engine; the matters over funding for security forces and the C-17 represent some of the remaining defense-spending battles the administration has left to fight. On the other hand, Obama's record on gaining congressional approval for domestic spending demands is less impressive.

Of the five appropriations measures passed by both houses, but that have yet to be reconciled, sizeable differences exist between House and Senate versions of the Agriculture, Energy & Water, Homeland Security, and Transportation-HUD bills. This includes an $800 billion difference between Agriculture bills, a $1 billion difference between Energy & Water bills, a $1.7 billion difference between Homeland Security bills, and a $1.1 billion difference between Transportation-HUD bills.

Despite these sizable obstacles, congressional leaders believe that one month is enough time to sort through all the differences over spending measures. If they are not able to finish before the CR runs out, Congress could either pass another CR or lump all the remaining bills together and pass them at once – what's known as an omnibus appropriations bill. Omnibus spending bills are less transparent and deny the media and watchdogs groups the proper scrutiny of specific spending measures. It is also more likely that legislators can insert controversial provisions at the last second because of the expedited timeframe these bills are usually considered under.

New Policy Marks First Step in Narrowing State Secrets Privilege

On Sept. 23, the Justice Department released a new policy on use of the state secrets privilege. The policy, which parallels several related recommendations from the *Moving Toward a 21st Century Right-to-Know Agenda*, will be implemented on Oct. 1. The long-expected announcement drew mixed reactions from public interest groups, ranging from support to criticism that the policy offers little more than a rehash of the heavily criticized policies of the Bush administration.

Since the Obama administration took power, public access advocates have been vocally disappointed with the lack of change in the use of state secrets claims in court. Over the course of several months, the Obama administration has repeatedly reaffirmed the Bush administration's claims of state secrets in several cases. This has happened despite repeated promises to reform the use of the privilege, as well as June comments by Attorney General Eric Holder that a new policy was imminent.

However, some advocates say the administration took a sizable step toward delivering on its campaign promises with the new policy that establishes several new internal checks and balances over the use of state secrets. At the same time, even supporters of the administration's actions acknowledge that the new provisions should only serve as a first step.

Among the improvements, the new policy establishes:

- A new review process within the Justice Department that concludes with the Attorney General (AG) making a personal recommendation on use of the privilege. Before a state secrets claim reaches the AG, it is first reviewed by the Assistant Attorney General (AAG), which was where the process often concluded in the past. After the AAG's recommendation is reviewed by a review panel, it then passed to the Deputy Attorney General, who sends it to the AG for final review.
- A requirement that agencies must produce detailed evidentiary submissions to the Justice Department when making a state secrets claim.
- Limits on the administration's ability to seek dismissal of an entire case based on the application of the privilege, narrowing nondisclosure to evidence of strict national security concern.
- A commitment to only use the privilege for legitimate national security reasons and not to conceal illegal activities, embarrassment, or to delay the release of information that would not reasonably be expected to cause significant harm to security. "Significant harm" is a new standard, though it remains undefined in the policy.
- Periodic reports on the use of the privilege from the Justice Department to Congress.
- Inspector general oversight of credible allegations of government wrongdoing, regardless of whether the privilege is invoked.

A number of these provisions appear to be exactly what public interest advocates asked the administration for in the *Moving Toward a 21st Century Right-to-Know Agenda* report, which was endorsed by more than 350 organizations and individuals from across the political spectrum, including OMB Watch. For instance, the report called for a declaration that state secrets would not be invoked to hide misconduct. The new policy includes such a statement, along with a requirement that all misconduct claims be referred to the appropriate Inspector General's office.

The recommendations also called for reporting to Congress, which the policy also contains. The recommendations sought a provision indicating that the privilege only be used as a last resort, which the new "significant harm" standard appears intended to do. Other items from the recommendations also made it into the new policy.

However, the new policy fails to meet one key test from the recommendations: judicial oversight. The report included several recommendations on allowing *in camera* review by judges, discovery of non-privileged material, and creation of substitute materials. Though the narrow tailoring of the new policy implies the discovery of non-privileged information, none of the other points appears in the policy.

The Justice Department press release that accompanied the new policy states, "In order to facilitate meaningful judicial scrutiny of the privilege assertions, the Department will submit evidence to the court for review." However, the new policy contains no such prescription, leaving it open to abuse, critics claim. There are rumors that a forthcoming report from a state secrets task force will provide additional details about judicial oversight issues. If so, it is unclear why specific policies or procedures were not included in the policy memo on Sept. 23.

Some critics were upset that the new policy will only apply to new cases, not existing ones. Some noted that the policy was released at the same time that oral argument on a motion for summary judgment in the state secrets case of *al-Haramain v. Obama* was scheduled.

Other critics worry that the policy release is an effort by the administration to forestall larger legislative reforms on state secrets. However, the administration, thus far, has not taken a position on any of the pending legislation, and the policy does not appear to have diminished interest in state secrets legislation from key leaders in Congress. Currently, there is legislation in the House, (H.R. 984, introduced by Rep. Jerrold Nadler (D-NY)) and the Senate (S. 417, introduced by Sen. Patrick Leahy (D-VT)) to curtail the application of the state secrets privilege. Primarily, the bills direct the White House to submit information it deems to be protected by the privilege for *in camera* review. It also prohibits the outright dismissal of a lawsuit without independent review of the evidence. Nadler has specifically indicated that the administration policy is helpful but that legislation is still needed.

Leahy described the new policy as "moving in the right direction to better control assertions of the state secrets privilege." However, Leahy also noted, "I remain especially concerned with ensuring that the government make a substantial evidentiary showing to a federal judge in asserting the privilege, and I hope the administration and the Department of Justice will continue to work with Congress to establish this requirement."

Public interest advocates moved quickly to encourage congressional action to lock in the procedural changes contained in the administration's policies and to do more to ensure proper oversight of the privilege's use. A letter co-signed by seven groups, including OMB Watch, was sent to the chair and ranking member of the House and Senate Judiciary Committees. The letter noted, "Legislative reform is still vitally needed to address a variety of problems not addressed in the new executive policy."

Congress Braces for Patriot Act Battle

On Sept. 22, Congress began hearings on USA Patriot Act provisions that are set to expire on Dec. 31. Some legislators and the president are seeking to retain controversial portions of the act, albeit in modified form.

The Patriot Act was initially passed in 2001 in an environment of heightened fear after the September 11 terrorist attacks. The legislation broadened the authority of the Federal Bureau of Investigation (FBI) to issue national security letters (NSLs), expanded access for law enforcement to personal and business records, and enabled searches of personal and business property without the knowledge of the occupant. Despite courts deeming some portions of the law unconstitutional and Congress amending other sections, several of the original problems identified by civil liberties and government openness advocates remain.

Three key provisions in the act, among the most controversial, are expiring at the end of 2009. However, the Obama administration wants to preserve them. These are the provisions for roving wiretaps to monitor suspects who may try to avoid detection by switching mobile numbers, the ability to obtain business records of national security targets from third parties, and the ability to track lone-wolf suspects who may be planning attacks without belonging to a terrorist group.

Assistant Attorney General Ronald Weich wrote to Congress on Sept. 14 identifying these provisions as "important authorities." Weich indicated that the administration would consider modifications so long as they do not undermine the effectiveness of the powers. Some who questioned these powers have criticized President Obama for his support of the Patriot Act provisions despite his campaign platform, which opposed much of the legislation. However, others who also raise concerns about these powers, such as the American Civil Liberties Union (ACLU), interpret this letter as an announcement that the administration is open to reform.

Congress has already started the debate over reforming the law. Sens. Russell Feingold (D-WI) and Richard Durbin (D-IL) introduced the Justice Act on Sept. 17, which some groups, such as the Electronic Frontier Foundation, were quick to support. The bill would preserve the three controversial provisions but add new checks and balances, which would also cover NSLs. Further, the Justice Act would repeal a provision intended to provide legal immunity to telecom companies that may have illegally assisted the National Security Agency's warrantless wiretapping program. Even if Weich's letter is a signal that the administration is open to reform, Obama was a supporter of telecom immunity when he was a senator. Thus, it is uncertain whether he would veto the Justice Act if it is passed with the immunity repeal.

Sen. Patrick Leahy (D-VT) has introduced a separate bill, called USA Patriot Act Sunset Extension Act of 2009 ([S. 1692]). This legislation includes some oversight and limitations on the expiring provisions but does not include the privacy safeguards and restrictions on non-disclosure provisions that the Justice Act does. The Leahy bill is set to be marked up on Sept. 30, at which time provisions from the Justice Act could be adopted.

The national security letter provision is not set to expire at the end of 2009; however, both pieces of legislation include new restrictions on NSLs. Included in these reforms are increased standards for issuance, limitations on the types of information that can be obtained by NSLs, limitations on non-disclosure orders for NSLs, and limits on emergency use of NSLs.

In the House, Reps. Jerrold Nadler (D-NY) and Jeff Flake (R-AZ) had introduced the National Security Letters Reform Act of 2009 ([H.R. 1800]) on March 30. That legislation would increase judicial oversight of NSLs by limiting the gag order covering the letters to 30 days and requiring that FBI requests for extensions of gag orders be made to a district court within any district that the investigation is taking place. The legislation also requires that the FBI specifically demonstrate how lifting the gag order would endanger evidence, the safety of an individual, or the national security of the United States. Moreover, anyone receiving an NSL would have the right to petition a court to modify or set aside the letter or to suppress the evidence gathered as a result of the letter. That bill has yet to move out of committee.

Other areas that public interest groups have complained about are not addressed by the reauthorization bills. In March, the ACLU issued a [report] calling for reform of the Material Support Statute that criminalizes various activities, regardless of whether they are intentionally meant to further terrorist goals. Opponents of the material support statue complain that the provisions have reduced humanitarian aid to the Middle East as charities worry about possible prosecution if some individuals helped are in some way connected to terrorism. Also, the ACLU has sought to remove the ideological exclusion section of the law, which denies admission to foreign nationals who support political or social groups that endorse acts of terrorism.

Companies Required to Report Greenhouse Gas Pollution

Beginning in 2010, thousands of businesses around the country will have to track their greenhouse gas emissions and report them to the U.S. Environmental Protection Agency (EPA), according to new agency rules. The information collected by EPA will be publicly available and used to inform policies to reduce these emissions and protect against the worst impacts of climate change.

On Sept. 22, the EPA released its [final rule], required by Congress, creating a greenhouse gas (GHG) registry that will compile the emissions data from the largest emitters across the economy. EPA expects the [new registry] will track 85 percent of GHG emissions and cover 10,000 facilities. With a threshold of 25,000 tons, only the largest emitters will be required to monitor and report. Covered facilities must begin tracking their emissions on Jan. 1, 2010, and report them every year, beginning in 2011. The final rule also notes that under Clean Air Act authority, companies that fail to monitor or report their emissions could be subject to enforcement action, including fines up to $37,500 per day per violation.

Soon after the European Union initiated its emissions trading plan in 2005, the price of carbon crashed. The E.U. did not have accurate emissions data, which reduced the effectiveness of its cap-and-trade program. Congress is considering a similar program, and policymakers hope that accurate and consistent monitoring will help prevent a similar price crash.

Potential Benefits of the Registry

Transparent, public data on emissions allows the public to hold polluters accountable for the cost of the pollution. Citizens, community groups, and labor unions have previously made use of such information to obtain pollution reductions from companies, even without government regulation. Such negotiations with polluters will be informed by the data collected in the GHG registry. The information in the GHG registry could also drive new technologies that reduce emissions. The data could also allow businesses to track their own emissions and compare them to similar facilities and help in identifying ways to reduce emissions.

The Toxics Release Inventory (TRI), another program that requires reporting of pollution by individual facilities, has seen much success in prompting voluntary reductions of toxic pollution since the program's inception in the late 1980s. Facility operators frequently first learned of their toxic releases through disclosure under TRI. The database allows governments and technology vendors to identify potential sources for reductions.

The damage to a company's reputation resulting from public awareness of its pollution is another motivator for voluntary pollution reductions. Such a dynamic is expected to be present under the GHG reporting program as well.

In its analysis of the impact of the mandatory reporting rule, EPA cited these mechanisms for promoting voluntary reductions, as well as the expanding use of eco-labels that could inform consumers by rating a product based on emissions data from the GHG registry.

Reaching the Registry's Potential

The GHG reporting rule creates a registry that will also be capable of significantly aiding the nation's climate change policies. However, many questions remain over the implementation of the rule, which will largely determine to what extent the registry reaches its potential to assist the climate change battle.

EPA will require electronic reporting of emissions, which should reduce the reporting burden on companies while increasing the accuracy of reports. However, many of the covered facilities have little or no experience with such reporting, and agency training and outreach will need to be sufficient to head off preventable reporting errors.

The agency will likely gather public comments later in 2009 on the design of the electronic reporting system. Although such plans can get very technical, they are important to the overall usefulness of the database. This basic architecture will determine what kinds of analyses can be done once the data start coming in and how hard it will be to expand the database in future years.

What EPA does with the data is another looming issue. The agency's first release of data will not occur until 2011, and there will only be one year's worth of emissions data at that time. However, there are many other data sets – such as voluntary registries like the Carbon Disclosure Project, which already possess years of emissions data – that can be compared to and compliment EPA data. If EPA provides the data in useful formats, then outside groups should be able to combine them with other data sets, map the data, or otherwise manipulate the information. To maximize the effectiveness of the program, open government advocates have asked that the public have access to information beyond the raw emissions numbers, extending to information on the way facilities track their emissions and what quality control plans are in place.

Another concern raised by transparency advocates is the potential to deny disclosure of important data under trade secrets protections. The final reporting rule does not elaborate on how the agency will handle claims that information being reported is confidential business information and therefore must not be disclosed to the public. Rather, the agency intends to seek additional comment from the public before it decides how to address trade secrets allegations.

This registry could become one of the most anticipated and broadly used environmental data sets ever collected by the government. The potential climate policies impacted by the data include research and development initiatives, economic incentives, new or expanded voluntary programs, adaptation strategies, emission standards, a carbon tax, and a cap-and-trade program. The degree of usefulness of the reporting system will be determined by decisions made during the months ahead.

Sugar Company Ignored Explosion Hazards, Investigation Concludes

The U.S. Chemical Safety Board's (CSB) investigation into the cause of a fatal 2008 explosion at a Georgia sugar refinery concludes that the Imperial Sugar Company and its managers did not take corrective actions to prevent dust explosions, even though they knew of potential hazards. The initial blast and subsequent dust explosions throughout the plant killed 14 workers and injured 36.

On the evening of Feb. 7, 2008, an enclosed, unventilated conveyor belt under two storage silos exploded in the Port Wentworth, GA, plant owned by Imperial Sugar. According to the Investigation Report produced by the CSB:

> "The explosion lofted sugar dust that had accumulated on the floors and elevated horizontal surfaces, propagating more dust explosions through the buildings. Secondary dust explosions occurred throughout the packing buildings, parts of the refinery, and the bulk sugar loading buildings. The pressure waves from the explosions heaved thick concrete floors and collapsed brick walls, blocking stairwell and other exit routes."

The report lists a variety of causes of the explosion, including poor design and maintenance of equipment, poor "housekeeping practices," and inadequate emergency evacuation plans and communications. Although dust collection systems and ducts to transport the collected dust existed throughout the plant, a review of the dust-handling system conducted just prior to the explosion showed "the dust collection equipment was in disrepair, and some equipment was significantly undersized or incorrectly installed. Some dust duct pipes were found to be partially, and in some locations, completely filled with sugar dust."

The CSB is an independent federal agency that investigates industrial chemical accidents, reviews safety codes and regulations, and makes recommendations based on its investigations. It does not have the power to issue citations or fines.

The agency began investigating the incident the day after the accident and worked with various state and local agencies and Imperial Sugar personnel. The 19-month-long investigation was headed by CSB's John Vorderbrueggen. In the press release announcing the final report, Vorderbrueggen said, "Imperial's management as well as the managers at the Port Wentworth refinery did not take effective actions over many years to control dust explosion hazards – even as smaller fires and explosions continued to occur at their plants and other sugar facilities around the country."

The report notes that dust explosions have occurred in sugar plants since about 1925 and that Port Wentworth personnel were worried about the possibility of sequential explosions as far back as 1967, according to internal correspondence. (Imperial bought the Georgia facility in December 1997.) Despite a series of fires over nearly 40 years in Imperial Sugar plants, the CSB wrote, "that the small events and near-misses caused company management, and the managers and workers at both the Port Wentworth, Georgia, and Gramercy, Louisiana, facilities to lose sight of the ongoing and significant hazards posed by accumulated sugar dust in the packing buildings. Imperial Sugar management and staff accepted a riskier condition and failed to correct the ongoing hazardous conditions, despite the well-known and broadly published hazards associated with combustible sugar dust accumulation in the workplace."

In 2006, the CSB recommended to the Occupational Safety and Health Administration (OSHA) that OSHA issue a combustible dust standard generally for industries that face dust-related workplace hazards. OSHA did not begin a rulemaking but issued a National Emphasis Program (NEP) in 2007 that directed federal inspectors to increase inspections at plants that could be subject to dust explosions and that were already subject to certain OSHA requirements. The NEP does not impose a new combustible dust standard, however, or impose additional requirements on industry.

In 2008, OSHA issued 211 citations for violations at the company's Georgia and Louisiana plants, resulting in $8.7 million in initial fines, according to a Sept. 24 Associated Press article. The company is appealing the fines, and OSHA has set a hearing to resolve the issue for May 2010, according to a *Savannah Morning News* article on April 4. The article also notes a 2008 study by the Senate Health, Education, Labor and Pensions Committee criticizing OSHA's tendency to collect a significantly lower level of fines than the amounts initially levied against violators.

OSHA announced on April 29 that it would begin a combustible dust standard rulemaking as the CSB urged the agency to do in 2006. In the press release announcing the intent to issue an advanced notice of proposed rulemaking (ANPRM), Secretary of Labor Hilda Solis said, "OSHA is reinvigorating the regulatory process to ensure workers receive the protection they need while also ensuring that employers have the tools needed to make their workplaces safer." The release specifically cites the CSB's consistent message that a broad combustible dust standard is necessary.

On Sept. 25, OSHA submitted the ANPRM to the Office of Information and Regulatory Affairs for review. The ANPRM is expected to cover issues such as data collection, dust hazard assessment, and a discussion of different regulatory approaches. The rule would seek to broadly establish a combustible dust standard potentially across metal, wood, plastic, rubber, coal, flour, sugar, and paper industries. The submission summary notes OSHA's intent to have a stakeholders' meeting in December. OSHA is notoriously slow to produce rulemakings, and the breadth of the industries covered could mean it will be years before a standard is completed. The CSB report says that OSHA's NEP for combustible dust will remain in place until a new standard is complete.

In the meantime, the CSB made a series of recommendations to Imperial Sugar, its insurance company, and others, encouraging them to use similar regulations in place for other industries with comparable hazards to reduce the risk of major accidents. The recommendations to Imperial Sugar include implementing a corporate-wide "housekeeping program" to control dangerous dust accumulation, developing training materials that focus on dust hazards, and improving emergency evacuation policies and procedures.

The Georgia plant was rebuilt and began operating again in June.

Agencies and Courts Beat Congress to the Punch in Climate Change Fight

Unprecedented regulatory proposals and a paradigm-shifting federal court ruling are converging to put big polluters on the hook for their contributions to global warming. The developments raise the stakes for Congress as it considers whether to curb greenhouse gas emissions and how to do so.

On Sept. 21, the U.S. Second Circuit Court of Appeals ruled that state and local governments and other groups can sue individual power companies over heat-trapping greenhouse gas emissions. Eight states, the city of New York, and three conservation groups brought a public nuisance suit against six major coal utilities.

The decision overturned that of a lower court, which had said the issue was too complex and inherently political to be decided judicially. The Second Circuit sent the case back to the lower U.S. District Court for the Southern District of New York. The district court must now decide on the merits of the case and issue remedies, if appropriate.

Environmentalists are calling the decision a game changer. The ruling will open the door for other state and local governments or environmental groups to sue major emitters of greenhouse gases.

Polluters could increasingly feel themselves pinned between litigation and oncoming federal regulations being developed by the Obama administration. The threat of tort lawsuits and prescriptive requirements imposed by government agencies may compel polluters to reduce their carbon dioxide emissions.

During the week of Sept. 28, the U.S. Environmental Protection Agency (EPA) is expected to announce the first-ever proposed limits on carbon dioxide emissions from stationary sources such as power plants, oil refineries, and other large industrial facilities, according to BNA news service (subscription required).

Insiders say EPA will require any facility meeting an annual 25,000-ton emission threshold to install best available technologies for limiting emissions of carbon dioxide, the most abundantly emitted greenhouse gas.

EPA usually caps pollution at 250 tons, but carbon dioxide is emitted in much greater quantities than most other pollutants. The tailored limit should quiet concerns voiced by opponents of carbon dioxide regulation who claim EPA would impose requirements on minor emitters like small retailers, schools, or churches.

The Obama administration has already released a proposal attempting to tackle the other major source of carbon dioxide emissions – vehicles. On Sept. 15, EPA and the National Highway Traffic Safety Administration (NHTSA) jointly issued a proposed regulation covering carbon dioxide emissions from passenger cars and light-duty trucks.

EPA's part of the rule would – for the first time ever – set a limit on carbon dioxide emissions from vehicles. The average car in a manufacturer's line of vehicles would be allowed to emit no more than 295 grams of CO_2 per mile in 2012. The rule would ratchet the limit down to 250 grams per mile by 2016.

To stay within the limits, manufacturers would be forced to improve vehicle fuel efficiency under the existing Corporate Average Fuel Economy (CAFE) program administered by NHTSA. CAFE standards set miles-per-gallon requirements on cars and trucks. NHTSA's portion of the rule revises CAFE standards to match EPA's proposed emissions limits. The new standards will require the average car to travel 30.1 miles on a gallon of gas in 2012 and 35.5 miles by 2016.

The agencies published the rule in the *Federal Register* on Sept. 28 and will accept public comments through Nov. 27. The agencies will also hold three public hearings on the proposal in Detroit, Los Angeles, and New York City.

EPA is pursuing both the vehicle and stationary source regulations using its authority under the Clean Air Act. In 2007, the U.S. Supreme Court ruled that the EPA must determine whether greenhouse gases should be considered a pollutant under the act. The act has previously been used to curb more traditional forms of pollution like smog and soot. In April, EPA proposed a formal finding declaring greenhouse gas emissions a danger to public health and welfare. If EPA finalizes the endangerment finding, which it is expected to do soon, it will obligate the agency to finalize regulations on greenhouse gas emissions, such as those under development now.

The proposed limits on both vehicles and stationary sources come on the heels of EPA's establishment of a greenhouse gas registry. Beginning Jan. 1, 2010, major greenhouse gas emitters will be required to keep track of their emissions, the agency announced Sept. 22. After receiving reports from facilities, EPA will make the data publicly available on its website. (Read more about the greenhouse gas registry.)

Advances on the regulatory and judicial fronts stand in stark contrast to the lack of progress in Congress, where climate change legislation has taken a back seat to health care reform and other priorities.

In June, the House passed its version of a cap-and-trade bill, which would set a national limit on carbon dioxide emissions and create an economy-wide system in which polluters buy, sell, and trade emissions credits. However, action has stalled in the Senate. Sens. Barbara Boxer (D-CA) and John Kerry (D-MA) are expected to introduce a companion cap-and-trade bill during the week of Sept. 28, according to ClimateWire, but Democratic leaders have said a vote on the bill will likely be delayed until 2010.

The legislation holds the potential to dramatically alter the emerging system in which greenhouse gas emissions would be regulated by lawsuits and sector-specific rules. The House bill would prohibit EPA from finalizing any greenhouse gas regulations using its Clean Air Act authority. If passed, the bill would scuttle both the stationary source and vehicle emissions regulations. Instead, the agency would help to administer the cap-and-trade program.

It is less clear how passage of cap-and-trade legislation would affect tort lawsuits filed in the wake of the Second Circuit decision. Passage of the bill could provide polluters with the legal cover to avoid liability.

The cap-and-trade system would be partially dependent upon EPA's greenhouse gas registry, which is unaffected by any pending legislation.

Unlike regulatory approaches, cap-and-trade legislation would fit emissions reductions into a broader framework. Congress faces a choice: It could act itself by mandating a comprehensive, market-based, and tightly controlled emissions-reduction regime, or it could let EPA continue with more familiar command-and-control regulations and preserve a role for the courts, both of which would yield less predictable results.

White House Moves to Limit Lobbyists on Federal Advisory Committees

The White House announced Sept. 23 that it informed executive branch agencies and departments that federally registered lobbyists are not to be appointed to federal agency advisory boards and commissions. This is the latest attempt at removing the influence of federally registered lobbyists within the executive branch.

The blog post announcing the policy was written by Norm Eisen, Special Counsel to the President for Ethics and Government Reform, and did not clearly ban federally registered lobbyists from advisory committees. Instead, Eisen used rather ambiguous language, saying it is "our aspiration that federally-registered lobbyists not be appointed to agency advisory boards and commissions." Many nonprofit advocates say this narrow focus on federally registered lobbyists remains misguided, and some are concerned that qualified experts will be excluded from participating in advisory panels.

Executive branch agencies use Federal Advisory Committees (FACs) as a means of furnishing expert advice, ideas, and diverse opinions to the government on a variety of public policy matters. The Federal Advisory Committee Act (FACA) was enacted to ensure that the advice to government is open, time-limited, and objective. FACA requires that committees be fairly balanced in their views, that the public is given notice of meetings, and that advice given to government is properly disclosed. Information about people serving on FACs must also be disclosed. According to the General Services Administration, in Fiscal Year 2007, 52 government agencies used 915 advisory committees with a total of 65,000 members.

Eisen promoted the policy statement as "the next step in the President's efforts to reduce the influence of special interests in Washington." President Obama's Jan. 21 executive order on ethics banned federally registered lobbyists – for two years – from working in an agency they previously lobbied, but the order did not apply to advisory boards. Eisen's post states, "Keeping these advisory boards free of individuals who currently are registered federal lobbyists represents a dramatic change in the way business is done in Washington."

Craig Holman of Public Citizen told *The Hill* that it "would be a natural extension of the existing revolving-door prohibitions that prevent administration officials from working on issues on which they recently lobbied. It makes sense that the same conflict of interest concerns would apply to the panels, which administrations often rely upon to develop policy."

This decision will likely affect the make-up of some agency committees, and some experts suggest that it may negatively impact discussions about important policy matters. Others note that the policy could backfire and not reduce the influence of special interests but reduce useful information that is publicly logged.

A way around the administration's "suggestion" is to have someone who is not a federally registered lobbyist, but who is from the same industry that such a lobbyist would represent, sit on an advisory panel. This would meet the White House's newest objective but certainly would not reduce the influence of special interests in the executive branch.

The "suggestion" also provides no distinction between lobbyists working for nonprofit public interest organizations and those working for for-profit concerns. Additionally, the "suggestion" would mean the expertise that the federally registered lobbyist might have would be lost to the committee. Finally, the "suggestion" does not address the fact that many agencies already provide online disclosure of FAC members or that some have strict guidelines about conflict of interest.

As occurred after the order was issued on executive branch hiring, many observers questioned whether or not there would be an increase in the number of lobbyists deregistering. Recently, Reuters reported that restrictions on lobbyists have resulted in "unexpected consequences with some lobbyists giving up their formal registrations and finding other ways to influence policy as they try to maintain access to key agencies or hope for future government jobs."

Additionally, lobbyists on the committees are not the only ones who exert influence within government. For example, those who make large contributions to lawmakers have not been included in attempts to reduce influence on government agency decisions. Influence exists, whether it comes from a federally registered lobbyist or those who do not quite meet the definition of "lobbyist."

Currently, there is no other specificity or guidance related to the new policy besides Eisen's blog post. Therefore, whether or not the announcement about lobbyists on advisory committees should be taken as policy is questionable at this time.

Government watchdogs note that FAC panels may need to be reformed in a way that can allow lobbyists with subject-matter expertise to serve while addressing existing deficiencies. For example, during the 110th Congress, the House passed a bill that would have resulted in stricter conflict of interest disclosure requirements on advisory committee members and prohibited the practice of outsourcing advisory duties. Open government advocates supported those disclosure requirements and noted that making public the identities of advisory committee members would go a long way toward neutralizing the special interest effect on advisory committees. The bill died in the Senate.

In November 2008, a diverse group of regulatory experts and advocates coordinated by OMB Watch made the following recommendations to the incoming Obama administration that would strengthen FACA and the advisory committee system in several ways:

- Require agencies to appoint to scientific advisory committees individuals from the disciplines relevant to the charge of the advisory committees. Such appointments should be made without consideration of political affiliation or activity.
- End the practice of hiring private contractors to develop advisory committees to avoid FACA requirements. This practice has been used by some agencies to claim under a legal loophole that they do not have strict management over the committees.
- Extend FACA requirements to all subgroups of covered advisory committees.
- Make the processes by which committees operate and by which their members are selected fully transparent.

Nonprofits Active in Efforts to Prevent Use of Courts to Discourage Public Participation

Nonprofit organizations have recently been active in efforts to prevent the use of lawsuits designed to discourage public participation. Nonprofits across the country have played a role in the campaign to eliminate Strategic Lawsuits Against Public Participation (SLAPPs). These efforts coincide with a pending legislative proposal to combat SLAPP suits on the federal level.

SLAPPs are "meritless lawsuits brought on the basis of speech or petition activity" and "silence and punish those who engage in public participation, chilling speech that is essential to the functioning of our democracy and to the public interest," according to the Federal Anti-SLAPP project.

SLAPPs are increasingly getting more attention due to the chilling effect that they have on the speech rights of individuals and organizations. Both national and local nonprofits are active in the anti-SLAPP movement.

Many organizations have taken the lead in bringing this issue to a larger audience. The Citizen Media Law Project has blogged about a case involving an ex-congressman who sued an individual for defamation after a court ruling revealed the individual's identity. That individual had commented anonymously on the ex-congressman's online news article. The case was dismissed as a result of New York State's anti-SLAPP law.

Nonprofits are also involved in helping to defend against SLAPPs. The Electronic Frontier Foundation (EFF), the American Civil Liberties Union (ACLU), the First Amendment Project, Public Citizen, and the California First Amendment Coalition are some of the organizations that are assisting individuals and organizations when SLAPPs are filed. For example, EFF has represented individuals and obtained dismissals by citing state anti-SLAPP statutes in cases involving anonymous posting on blogs and websites. Similarly, the ACLU represented the sponsor of a successful California ballot initiative that made marijuana use Santa Barbara's lowest law enforcement priority after the city sued the initiative sponsor.

The City of Santa Barbara filed suit in the marijuana case challenging the constitutionality of the initiative, which was passed by two-thirds of Santa Barbara voters. The ACLU argued that, "While the City is free to challenge the duly enacted initiative – however baseless its claims – it cannot name [the initiative sponsor] as the defendant solely because she exercised her right to sponsor a petition that the voters enacted. California law protects defendants like [the initiative sponsor], sued in their capacity as participants in the political process, from strategic lawsuits against public participation ("SLAPP")."

The nonprofit organizations involved in the anti-SLAPP movement have highlighted various methods to defend against SLAPPs. Often, the first step is to determine if others have been hit with the same SLAPP and, if so, to strategize together. If the SLAPP was filed due to an individual's vocal opposition, it is common for the filer to sue all opponents, according to the California Anti-SLAPP Project. Informing the media and getting positive coverage is another technique used to defend against SLAPPs. SLAPPs are also a way to retaliate against public interest lawsuits, so organizations that are regularly involved in such suits should be prepared for such actions. Additionally, having other organizations join a lawsuit can be helpful in preventing a SLAPP counterclaim. "Often, the mere existence of several groups opposing a single project or opponent can add a note of importance to your lawsuit," according to the California Anti-SLAPP Project.

Individuals and organizations can prevent becoming a SLAPP target by being knowledgeable about anti-SLAPP statutes, checking homeowner and business insurance policies and being aware of what is covered, making sure that all statements are factually accurate, and seeking legal advice if there is uncertainty concerning whether planned written or oral statements may subject the individual or organization to a lawsuit.

On the federal level, Rep. Steve Cohen (D-TN) plans to sponsor anti-SLAPP legislation during the 111th Congress. The Citizen Participation in Government and Society Act of 2009 will prevent individuals or groups from using the federal court system to intimidate or discourage citizens from public participation. Many nonprofit groups have signed on as supporters of the proposed legislation, including OMB Watch, the Natural Resources Defense Council, the Alliance for Justice, Public Citizen, and the Center for Science in the Public Interest. Cohen also sponsored anti-SLAPP legislation in Tennessee when he was a state senator.