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Consumer Product Safety Reform Clears Congress

Congress has approved a bill that will revamp the nation's consumer product safety net. The legislation reforms the Consumer Product Safety Commission (CPSC) to enable the agency to better enforce safety standards in a market dominated by cheap imports and requires new standards for dangerous substances like lead and phthalates.

After months of fits and starts, a conference committee of House and Senate leaders approved a package on July 28, bringing negotiations on the Consumer Product Safety Improvement Act (H.R. 4040) to a close. The final version of the bill passed the House on July 30 in a 424-1 vote. The bill passed the Senate the next day in an 89-3 vote.

The act will infuse CPSC with much-needed resources. A recent OMB Watch report found that resource shortfalls have left the agency hobbled and unable to police a growing marketplace flooded with imported goods like toys and all-terrain vehicles. The act will raise CPSC's budget to $136 million by FY 2014, nearly a 75 percent increase over current levels. However, the

increases must still be approved in the spending bills Congress takes up every fall.

Despite a significant increase in 2008 to $80 million, CPSC's budget is still lower than it was in the early 1980s. Budget shortfalls have translated into staffing cuts. CPSC's staff is 420, according to President Bush's most recent budget request — less than half of what it was in 1980. The act will require CPSC to increase its staff size to at least 500 by FY 2014.

One part of the bill bans certain phthalates, a class of chemicals found in a variety of plastic products, in children's toys. The provision bans three types of phthalates outright. Scientists have linked phthalates to reproductive and developmental abnormalities in fetuses and infants.

Three other phthalates would be banned temporarily pending further study. The phthalate provision in H.R. 4040 represents a dramatic shift in the federal government's approach toward regulating toxic substances. Usually, chemicals enter and stay on the market without regulation and are only pulled if scientists prove a definitive health risk. In this case, the banned substances will only be allowed back on the market if their safety is proven.

In a statement, OMB Watch Executive Director Gary Bass said, "The bill turns our usual system of chemical regulation on its head by requiring proof of safety, not proof of harm, an approach we strongly support."

The Act will also ban lead in children's products to trace amounts. Although consumers and lawmakers have known for years about lead's damaging effects on neurological development, CPSC does not limit the lead content of children's products, only paint and coatings.

The spate of recalls for lead-contaminated toys and children's jewelry in 2007 highlighted problems with both lead in paint and lead in other product components. The Consumer Product Safety Improvement Act will set a general ban on lead in children's products by requiring CPSC set a standard of 0.01 percent within three years. The act will also tighten the federal standard on lead paint to 0.009 percent from 0.06 percent.

Although the White House has said it disagrees with aspects of the bill, spokesperson Dana Perino indicated President Bush will sign the bill into law. "We still have a few concerns, but not enough that would keep us from signing the bill," Perino said at a July 31 press briefing. "So the President will sign [the bill] as soon as [Congress] can get it to us."

Changes Made by the Consumer Product Safety Improvement Act

	The Consumer Product Safety Improvement Act (H.R. 4040)	*Current laws and regulations*
Product Safety	**Phthalates** The act will permanently ban any children's products containing more than 0.1 percent of three specific types of phthalates: di-(2-ethylhexyl) phthalate (DEHP), dibutyl phthalate (DBP), or benzyl butyl phthalate (BBP).	Phthalates are not regulated by CPSC though some U.S. states have taken or are considering action. The European Union has banned phthalates in children's products.
	Lead The act will set a general ban on lead in children's products by requiring CPSC set a standard of 0.01 percent within three years. The act will also tighten the federal standard on lead paint to 0.009 percent. No general standard for lead exists. The current standard for lead paint is 0.06 percent.	No general standard for lead exists. The current standard for lead paint is 0.06 percent.
	All-Terrain Vehicles The act will require CPSC to adopt and enforce mandatory safety standards for four-wheel all-terrain vehicles.	Current safety standards are voluntary.
	Tracking Labels The act will require manufacturers, "to the extent practicable," to place tracking labels on children's products in order to help consumers identify the source of a product in the event of a recall or report of harm.	No tracking label requirement exists.
	Third-Party Testing The act will require third-party testing for imported children's products for compliance with U.S. safety standards.	Children's products must legally comply with safety standards, but certification is not required.
Enforcement	**Product Safety Database** The act will require CPSC create and maintain a "publicly accessible searchable database" containing "reports of harm relating to the use of consumer products" submitted by consumers, state and local health officials, health care providers, or others.	A database does not exist.
	Whistleblower Protections The act will extend to private sector employees protection against retaliation in the event an employee exposes violations of federal consumer product safety standards.	Sector-specific whistleblower protections do not apply to employees in most private consumer product firms.
	Civil Penalties The act will raise to $100,000 the civil penalty cap CPSC can fine a firm for a single violation.	The current civil penalty cap is $8,000.
	Criminal Penalties The act will allow CPSC to purse asset forfeiture in criminal cases and remove the requirement that violators knowingly violate federal consumer product safety standards.	Directors, officers, or other agents of a firm must knowingly violate safety standards to be subject to criminal prosecution.

CPSC Reform		
	CPSC Budget The act will authorize a budget of $118 million for FY 2010, $116 million for FY 2011, $124 million for FY 2012, $132 million for FY 2013, and $136 million for FY 2014. These figures will still need to be approved during the annual appropriations process.	CPSC's budget for FY 2008 is $80 million. Its budget in FY 2007 was $63 million. Its budget in FY 1976 was $142 million, when adjusted for inflation.
	CPSC Staffing The act will require CPSC to maintain a staff of at least 500 employees by FY 2014.	CPSC's staffing level for FY 2008 is 420. Its staffing level in FY 2007 was 393. Its staffing level in FY 1976 was 1,067.
	Number of Commissioners The act will restore to five the number of commissioners at CPSC.	CPSC has a commissionership of three.
	Commission Quorum The act will allow CPSC to operate with a two-member quorum for one year.	CPSC has been unable to conduct formal business, including mandating product recalls, since January 2007 because of a commissioner vacancy. (Congress passed a law allowing CPSC to temporarily operate, from August 2007 to February 2008, with a two-member quorum.)
	Expedited Rulemaking The act will allow CPSC to begin writing new regulations without publishing an Advanced Notice of Proposed Rulemaking, an extra comment period that takes place before an official regulatory proposal.	CPSC must publish an Advanced Notice of Proposed Rulemaking.
	Industry-Sponsored Travel The act will forbid CPSC commissioners from accepting gifts of travel from industries subject to CPSC regulation.	Former CPSC chair Hal Stratton and current acting chair Nancy Nord were discovered to have received $60,000 in gifts of travel, much of it from the consumer product industry.

Secret Risk Assessment Rule Aims to Halt Worker Safety Protections

The Bush administration is trying to rush through a Department of Labor (DOL) draft rule to require new worker safety standards to be based on a new risk assessment process that would potentially tie the hands of future administrations. The new rule was sent to the Office of Information and Regulatory Affairs (OIRA) for review in secret, violating the process OIRA has insisted agencies use for rulemaking.

The new rule would require the Occupational Safety and Health Administration (OSHA) and the Mine Safety and Health Administration (MSHA) to alter their current risk assessment approaches and to take an additional step in the rulemaking process before a workplace safety

rule can be proposed. The current process is the outgrowth of the legal requirements Congress put in place decades ago to ensure these two agencies adequately safeguard worker health.

The new rule is the first attempt by the administration to put a new risk assessment process in place since a failed effort to change risk assessment in 2006. Then, OIRA administrator John Graham put forward a draft risk assessment bulletin that would have imposed a one-size-fits-all process on all regulatory agencies. The draft bulletin called for some of the same changes the new rule contains but was vigorously opposed by the scientific community and public interest groups, including OMB Watch. The Graham proposal was reviewed by a panel of the National Academy of Sciences (NAS). In the report issued by NAS in January 2007, the panel called the draft bulletin "fundamentally flawed" and urged the administration to withdraw it. The draft bulletin was withdrawn and replaced in September 2007 with a statement of risk assessment principles for agencies to follow.

The Bush administration's proposed rule would change the process in several ways. First, it would require OSHA and MSHA to collect data from each regulated industry sector and develop profiles of the industries and their job categories. Second, among the numerous ways the agencies could collect this information, they would now be required to issue an Advanced Notice of Proposed Rulemaking (ANPRM) as one method. The requirement to use an ANPRM can add years to the rulemaking process and in many instances would be completely unnecessary. These two changes have the potential to add years to the regulatory process just by the sheer quantity of information to be collected and analyzed.

Third, from these new profiles, which would have to be continually updated as the industries supply more information, the agency would have to calculate new assumptions about the numbers of years workers stay in their jobs in each industry. The draft rule states, "In the Department's view, customizing the number of hours, days, weeks and years attributed to a 'working life,' on an industry-specific basis, most closely hews to Congress's intent in directing the Secretary to set standards based upon the 'best available evidence' and upon consideration of the 'latest available scientific data.'" But the new calculation would focus on the *average number of years* a worker stays in that industry. The result would be a less protective standard for those who spend more than the average number of years in an industry.

Fourth, the rule would require the agencies to use a central estimate and disclose the endpoints of the risk estimates used when producing a protective standard. Again, this would provide a less protective standard, especially for sensitive populations such as older workers. NAS criticized the use of central estimates in OMB's draft risk assessment bulletin. In its report, NAS wrote, "Those numerical quantities are meaningful only in the context of some distribution that arises when variability and uncertainty are taken into consideration. A central estimate and a risk range might be misleading in situations when sensitive populations are of primary concern."

Fifth, the rule would require the agencies to quantify the level of uncertainty, if possible, a practice the NAS panel also criticized. According to the NAS report, there aren't good analytical tools to conduct uncertainty analyses, and the use of them may actually lead to lower

quality risk assessments. OSHA and MSHA would have to spend considerable time developing these analytical approaches in the absence of reliable methods and across a range of issues.

Analyzing and quoting from the proposed rule is quite an achievement because of how secret this rulemaking process has been. DOL did not disclose the proposed rule in any of the department's regulatory agendas or plans that agencies are required to develop and disclose to the public twice every year. It first appeared July 7 on OIRA's website as a rule OIRA was reviewing but was identified only by its title, *Requirements for DOL Agencies' Assessment of Occupational Health Risks*. It was developed not by the workplace safety and health experts within OSHA and MSHA, but by political appointees at the highest levels of DOL, the regulatory policy officer and his staff. Knowledge about the contents of the proposed rule is purely a result of agency whistleblowers and intrepid reporters and investigators.

In addition, White House Chief of Staff Josh Bolten issued a memo May 9 to all agencies, directing that any new rules the agencies wish to finalize during this administration be proposed by June 1 and finalized by November 1. If DOL really is trying to rush this through the rulemaking process, it violates the White House memo (although the memo does not have the force of law and can be waived by OIRA at its discretion).

When President Bush issued changes in January 2007 to the executive order that governs the regulatory process, OMB Watch expressed fears that the new responsibilities given to regulatory policy officers (RPOs) would result in a direct line of reporting and regulatory control between the RPOs and OIRA, sidelining the agencies' experts. This rule appears to be an example of the backdoor, behind-the-scenes manipulation of the rulemaking process we feared would result from the enhanced powers given to RPOs.

On July 30, Rep. George Miller☼ (D-CA), chair of the House Education and Labor Committee, introduced H.R. 6660, which would prohibit the Secretary of Labor from issuing this specific rule. The bill follows a letter sent July 10 by Miller and Sen. Ted Kennedy☼ (D-MA) that called on Secretary of Labor Elaine Chao to brief them on the content of the rule and the reasons why DOL did not follow the procedural requirements for disclosing the rule. The proposed rule is currently under review at OIRA. There is no word yet on when the Labor Department will propose the rule or whether the agency might try to directly issue a final rule.

Voter Registration Barriers Challenged in New Mexico, at Veterans Affairs

Throughout the country, new rules on nonpartisan voter registration efforts are making nonprofit voter mobilization drives more difficult — and groups are fighting these rules. After the Department of Veterans Affairs' (VA) May 5 directive banning voter registration drives at veterans' facilities, a multi-front advocacy effort developed to get the VA to change its policy. Voting rights advocates also have been fighting state restrictions, including a New Mexico voter registration law.

The VA continues to assert that voter registration activities on its properties would be too partisan and interfere with their medical mission. Several secretaries of state have been pressuring the VA to allow voter registration drives at its facilities. Connecticut Secretary of State Susan Bysiewicz and Connecticut Attorney General Richard Blumenthal were prevented from entering a West Haven facility to help register voters and distribute information on the state's new voting machines. Bysiewicz was able to register 12 veterans outside the facility. According to the *New Haven Register*, they registered a 92-year-old vet. "There was nobody here to do this last year," said Martin Onieal, a resident of the VA center since 2007.

Afterwards, Bysiewicz requested that elections officials have access to the facilities to distribute voter registration materials and to instruct residents on the use of new voting machines. The request was rejected. According to an AlterNet article, VA Secretary James B. Peake said his agency would not allow registration drives unless "these efforts be coordinated through the VA Voluntary Service (VAVS) office at each VA medical center." The July 15 letter said, "This policy is the result of careful deliberation and consideration for the needs and rights of our patients, concerns about disrupting facility operations, and the need to ensure VA is not involved in partisan political activities."

On July 11, Washington Secretary of State Sam Reed and Bysiewicz announced a national bipartisan effort among secretaries of state to get the VA directive overturned. In a letter to Peake, the state officials assert that "voter registration drives have historically been a critical outreach tool for veterans in facilities to ensure that they get the opportunity to register to vote. Many veterans simply are not able to get out on their own, rendering registration much more difficult."

A July 18 press release from Bysiewicz's office stated, "Our next step is a final demand to the VA, which we are sending by letter today: allow legally required non-partisan voter registration drives, including both in-patients and outpatients, staff and visitors; permit voter education and demonstration of the new machines; lift unreasonable and restrictive restraints on access. If these demands are unmet by August 1, we will take appropriate action to fight for these veterans rights — just as they fought for ours — including potential action in court."

By July 18, 20 secretaries of state had signed on to the effort, representing Ohio, Minnesota, Vermont, Montana, Connecticut, Idaho, Rhode Island, North Carolina, New Hampshire, West Virginia, Maine, Kansas, Kentucky, Oregon, Iowa, Pennsylvania, Massachusetts, Missouri, Washington State, and the District of Columbia.

Meanwhile, four voting rights organizations called for the VA to change its policy. On July 21, the American Association of People with Disabilities (AAPD), Common Cause, Demos, and the League of Women Voters wrote to Peake urging the approval of future state requests to allow voter registration on VA property. The groups also sent letters to secretaries of states nationwide in conjunction with their state-based chapters, asking that they request the VA to designate its offices in their states as voter registration agencies.

Legislatively, the Veteran Voting Support Act has been introduced in the House (H.R. 6625)

and in the Senate (S. 3308). On July 30, the House Administration Committee approved the bill by voice vote, and it has now been referred to the House Veterans' Affairs Committee.

According to Senate sponsor Dianne Feinstein (D-CA), the measure would allow nonpartisan groups and election officials to provide voter information and registration information to veterans and require an annual report to Congress. In addition, the VA would have to assist veterans who choose to receive and use absentee ballots.

Shortly before the House adjourned for the August recess, Reps. Chris Murphy (D-CT) and Patrick Murphy (D-PA) offered an amendment to the VA appropriations bill to prevent the VA from spending taxpayer dollars to enforce its directive and obstruct voter registration at VA facilities. The amendment passed and was included in the final version of the appropriations bill. However, it is uncertain if this appropriations bill will pass in 2008, let alone the rider restricting the VA policy.

On July 27, the National Association of Secretaries of State (NASS) passed a resolution urging Congress to designate the VA as a registration agency under the National Voter Registration Act and to ensure that election officials have access to facilities to provide assistance.

The VA is not the only entity with a restrictive policy for voter registration activities. The Brennan Center for Justice, along with pro bono law firms, filed a lawsuit in Albuquerque challenging a New Mexico law that makes it difficult for groups to conduct voter registration drives. The law is similar to a Florida law that is also being challenged.

Voting rights advocates want a judge to overturn New Mexico's law. It requires that before registering voters, every volunteer or employee has to first pre-register and submit an affidavit to the state and, in some counties, go through an in-person, hour-long training session. The training is conducted only during business hours and only a few times each month. The law also limits organizations to 50 registration forms at a time. Completed registration forms must be returned to county or state officials within 48 hours, and any "intentional" violation of these rules may be punishable with a jail sentence. Most alarming, no extenuating circumstance, such as a flood or an earthquake, will excuse a failure to submit a completed form within the allotted time period, bringing along civil penalties of up to $5,000.

The lawsuit was filed in state district court on behalf of four organizations, the American Association of People with Disabilities (AAPD), the Federation of American Women's Clubs Overseas Inc. (FAWCO), New Mexico Public Interest Research Group (NMPIRG), and the Southwest Organizing Project (SWOP), which all typically register low-income, minority, disabled, and young citizens. The complaint requests that the 2005 law be declared unconstitutional and that the New Mexico Secretary of State be barred from enforcing it. The plaintiffs charge that the law restricts their ability to register new voters and threatens to block thousands of eligible New Mexico citizens from registering and voting. The lawsuit states, "These unduly onerous laws, regulations, and policies have chilled and continue to chill core political speech and association, and have forced Plaintiffs to seriously curtail or halt their

voter-registration activities."

"The law aggressively discourages civic organizations from helping New Mexico citizens to exercise their basic right to vote, and threatens voter registration drives across the state," Robby Rodriguez of SWOP stated.

Nonpartisan voter registration drives are one of the most important tools to get more citizens involved in the electoral process. Registering to vote should be made easier, not harder, and the role of nonprofit nonpartisan voter registration activities must be protected, not distrusted.

Maryland State Police Surveillance of Advocacy Groups Exposed

On July 17, the American Civil Liberties Union (ACLU) of Maryland disclosed documents revealing that state police engaged in covert surveillance of local peace and anti-death penalty groups for over a year during the administration of former Maryland Governor Robert L. Ehrlich (R). In response, House Majority Leader Steny Hoyer (D-MD) said he might support a Justice Department investigation into why this surveillance occurred. Rep. Bennie Thompson☼ (D-MS), chair of the House Homeland Security Committee, wrote to Department of Homeland Security Secretary Michael Chertoff requesting a full account of the surveillance actions and further information regarding the funds used.

The ACLU of Maryland was concerned that the Maryland State Police were hiding information on the surveillance of local peace activists. On June 12, it filed a lawsuit against the state police for refusing to disclose records in response to a public information request. Plaintiffs include the American Friends Service Committee, Jonah House, Baltimore Pledge of Resistance, Baltimore Emergency Response Network, and several individuals.

A June ACLU press release states, "Documents disclosed during a prosecution for disorderly conduct and trespass against two individuals arrested at a protest at the National Security Agency (NSA) in October 2003 indicated that a 'Baltimore Intel Unit' had been monitoring protestors from these groups as they assembled and traveled to the NSA for a protest in July 2004. In order to discover the identity of this 'intel unit,' and why the unit was monitoring their peaceful protest activities, the groups filed requests under the federal Freedom of Information Act (FOIA) with several federal agencies, including the NSA, in August of 2006."

The press release describes the 43 pages of summaries and computer logs. Maryland State Police's Homeland Security and Intelligence Division sent agents to infiltrate the Baltimore Pledge of Resistance, a peace group, the Coalition to End the Death Penalty (CEDP), and the Committee to Save Vernon Evans. The surveillance continued even though there were no reports of illegal activity and consistently indicated that no violent protests were being planned. Reports of the surveillance were also sent to at least seven federal, state, and local law enforcement agencies. The press release went on to say, "Agents from the Division monitored private organizing meetings, public forums and events held in several churches, as well as anti-

death penalty rallies outside the state's SuperMax facility in Baltimore and in Lawyer's Mall in Annapolis."

The ACLU of Maryland will be filing additional requests under the Maryland Public Information Act. It called on activists across the state to find out if their organizations have been spied on. The ACLU will work with groups that are willing to provide the names of key individuals who could be listed in surveillance records to document the full extent of any surveillance and will ensure that the targets have an opportunity to review the files that relate to them and have those files purged.

The *Washington Post* reported, "Then-state police superintendent Tim Hutchins acknowledged in an interview yesterday that the surveillance took place on his watch, adding that it was done legally."

Reaction to news of the surveillance was swift and negative. Hoyer's statement said, "While it is the job of law enforcement to protect the public and keep the peace, it is difficult to understand how non-violent peace activists and opponents of the death penalty constituted a threat to public safety. We need to understand why the monitoring of these and other citizens took place — and whether any federal funds were used in support of this program." Thompson said, "The politically motivated surveillance of dissident domestic groups that have neither a link to terrorism nor promote violence is ... a deplorable use of taxpayer funds." In addition, Maryland Gov. Martin O'Malley (D) announced an investigation to be led by civil rights attorney Stephen H. Sachs, working with State Attorney General Douglas Gansler and state police chief Col. Terrence Sheridan. The 30-60 day review is aimed at developing new intelligence guidelines.

IRS Directive Broadens Scope of Prohibited Web Links on Issues

On July 28, the Internal Revenue Service (IRS) sent a memo to revenue agents that contradicts earlier guidance relating to 501(c)(3) organizations' use of web links for issue advocacy. The memo indicated that web links may be considered prohibited intervention in elections, depending on their context, the number of clicks between a site and a partisan message on the linked site, and whether an organization has a position on an issue and links to candidates' positions.

IRS guidance in Rev. Rul. 2007-41 and Rev. Rul. 2004-6 indicated that an organization's track record of ongoing advocacy on an issue is a factor that demonstrates genuine issue advocacy, as opposed to prohibited electoral intervention. However, the July directive appears to state the opposite, saying that when a 501(c)(3) organization takes a position on an issue and also posts information on candidate positions on the same issue, it is "at risk of having intervened in a political campaign. The risk arises *and the case should be pursued*, even if the two elements are in separate parts of the organization's Web site, or if one element is on the Web site and the other is not." (emphasis added) This seems to say that the more central an issue is

to a 501(c)(3) organization's mission, the less right it has to address it publicly during election season.

The directive follows up on an April letter from IRS Exempt Organizations Director Lois Lerner that announced continuation of the Political Activities Compliance Initiative for the 2008 election cycle. In that letter, the IRS was extremely vague about treatment of web links to sites of unrelated organizations, saying only that it "will pursue the case if the facts and circumstances indicate that the 501(c)(3) organization is promoting, encouraging, recommending, or otherwise urging viewers to use the link to get information about specific candidates and their positions on specific issues." However, there are many legitimate reasons a 501(c)(3) organization might use such links, including online nonpartisan voter education guides.

The July directive addresses "whether material on a linked Web site is attributable to the section 501(c)(3) organization," saying the context and directness of links are major factors. No specific number of clicks is specified and the "context" is not defined, since "neither of these characteristics appropriately reflects the facts and circumstances in all cases."

However, the directive says the IRS will limit its investigations to cases involving links to sites of unaffiliated organizations, because of the implications of the U.S. Supreme Court case *Taxation with Representation v. Regan*. The decision upheld limits on the amount of lobbying 501(c)(3) organizations may engage in because they can have an affiliated 501(c)(4) entity that has no lobbying limits. This, the IRS said, "can complicate the analysis in this area."

The directive is unlikely to address criticisms in a June report by the Treasury Inspector General for Tax Administration that said IRS employees differently interpret the criteria for evaluating cases of alleged political intervention. It further points out the need for the IRS to develop bright-line rules that clearly delineate what is and is not permissible.

Pesticide Problems Go Unnoticed by EPA

The Center for Public Integrity (CPI) has discovered that two groups of common pesticides, generally considered to be "safer" chemicals, are responsible for one quarter of reported human pesticide poisonings, based on the U.S. Environmental Protection Agency's (EPA) own data. CPI spent several years demanding the release of the data through repeated Freedom of Information Act (FOIA) requests. A trade association representing the interests of the consumer specialty products industry denounced the report.

Report Findings

The CPI report, *Perils of the New Pesticides*, analyzes the number of reported human health problems, including severe reactions and deaths, linked to two families of pesticides, pyrethrins and pyrethroids, over the past decade. Pyrethrins are a class of chemicals derived from chrysanthemum plants. Pyrethroids have similar properties but are created synthetically.

Pesticides made with these chemicals are found in thousands of common household products such as flea and tick poisons, ant and roach killers, delousing shampoos, lawn-care products, and carpet sprays.

The data reveal that reported incidents of fatal, major, and moderate exposures to the two classes of pesticides increased 300 percent since 1998. There were 1,030 incidents reported to EPA in 2007 alone, up significantly from the 261 reported in 1998. Pyrethrins and pyrethroids accounted for more incidents than any other class of pesticide over the last five years. The EPA's reporting system receives up to 6,000 reports of pesticide exposures annually.

The CPI report concludes that the increase in reported health problems may be a result of increased use and popularity of pyrethrins and pyrethroids following the ban on residential use of another popular group of chemicals, organophosphates, which are thought to be more toxic. However, the EPA data show at least 50 deaths attributed to these supposedly safer classes of pesticides since 1992.

Similar data provided by the American Association of Poison Control Centers were compared to the results. The association's data also show a large increase in reported health problems linked to pyrethroid and pyrethrin exposure over the last decade, with instances increasing 63 percent from 1998 to 2006. Additional data from the association show that the number of hospital visits resulting from pyrethrin and pyrethroid exposures is increasing and approaching the level caused by organophosphate exposures at their peak in the early 1990s, according to the CPI report.

As a result of the investigation, the director of the EPA's Office of Pesticide Programs said the agency this year would begin a broad study of the human health effects of these chemicals and examine further any trends. According to CPI, the EPA originally had not planned to review the data until 2010.

Medical studies have suggested that people with ragweed allergies and those with asthma may be especially sensitive to developing skin or respiratory disorders following exposure to pyrethrins and pyrethroids. Children and infants are also more susceptible than adults to health problems, including neurological disorders.

The Food and Drug Administration currently requires warning labels regarding the risks to people with allergies or asthma on anti-lice shampoos containing these chemicals. CPI also reports that researchers are urging more scientific studies of the effects of the use of these chemicals, more specific warning labels, and, in certain situations, allowing only trained professionals to apply them.

Data Access and Improvement

CPI produced its analysis using EPA's Pesticide Incident Data System, an aggregation of more than 90,000 pesticide exposure incidents from 1992 through 2007. The data system has been regarded by right-to-know advocates as one of the most important databases to which public

access was restricted. The database made the 1999 Top Ten Most Wanted Government Documents list produced by the Center for Democracy and Technology and OMB Watch. After repeated efforts to obtain information under FOIA, the agency finally released the database in early 2008.

Along with the report, CPI has launched a new interactive online database where the public can search for incidences of pesticide exposures, creating the only online public access to the long-sought EPA data. Searches can be conducted by product name or chemical name, and by city, state, and type of exposure.

Most of the information is reported by pesticide manufacturers, who are only required by law to report all instances that they become aware of — such as through a lawsuit. This means many poisonings may go unreported to EPA. The data also do not include incidents of medical problems caused by long-term exposure to the pesticides, which are much harder to diagnose. Only incidents that were classified in the EPA database as unknown or adverse were included in the analysis.

The Consumer Specialty Products Association (CSPA) responded to the CPI report claiming that the report distorts the truth. According to a CSPA press release, the EPA data system, which CPI relied on, includes all incidents without validation or investigation. Thus, cases resulting from misuse, abuse, and exposures resulting from attempts at self harm such as suicides are included. According to CSPA President Chris Cathcart, "The basic premise behind the report — that incident data in its raw form is signaling a serious health threat from these ingredients — is fundamentally flawed. There was no evaluation by expert clinical and medical toxicologists to sort out incidents that, under further scrutiny by EPA's team of expert toxicologists and medical professionals, would have been excluded from the raw data set to allow for a meaningful analysis."

The Center for Public Integrity reports that in response to its inquiries, the EPA has begun reviewing how incident data are collected and analyzed. The director of the EPA's Office of Pesticide Programs announced that an EPA working group will develop short- and long-term goals for improving the system. The EPA pesticide data has been a factor in previous agency decisions to ban, restrict, or negotiate voluntary cancellations of harmful products.

State Secrets Problems are No Secret to Congress

On July 31, the House Judiciary Committee heard testimony concerning the State Secrets Protection Act (H.R. 5607), sponsored by Rep. Jerrold Nadler☼ (D-NY), which would grant the judiciary greater authority to question executive branch secrecy. The act would establish a set of procedures and standards for assessing executive branch claims to the state secrets privilege.

Openness advocates have argued that abuse of the state secrets privilege has severely undermined government accountability in recent years. During his testimony, Steven Shapiro

of the American Civil Liberties Union (ACLU) stated, "Over the years we have seen the state secrets privilege mutate from a common-law evidentiary rule ... into an alternative form of immunity that is used more and more often to shield the government and its agents from accountability for systemic violations of the Constitution and core human rights principles."

Over the past seven years, the executive branch has gained what appears to be an upper hand on controlling information when civil actions have touched upon a claimed secret; the courts have rarely questioned claims of state secrets and have almost universally dismissed cases based on the claims. Meredith Fuchs of the National Security Archive commented upon this fact, stating, "The information that is claimed to be secret is controlled by a system in which there is a strong incentive to keep it from the public, especially if the government is overreaching or has engaged in some misconduct."

Since Sept. 11, 2001, courts have frequently assumed that only an agency has sufficient knowledge and expertise to understand the implications of secret information. Hence, the courts have been extremely deferential to the executive branch's stated need to keep information from being made public or even examined by a court. However, Shapiro argued that the courts are a "constitutional safety valve," a role that several laws have affirmed, including the Classified Information Procedures Act (CIPA), Freedom of Information Act (FOIA), and the Foreign Intelligence Surveillance Act (FISA).

The Nadler bill is based upon CIPA standards for the use of classified information in criminal cases. In civil cases, the court would review information that the government seeks to protect as well as evidence supporting the government's request for protection. The court would then make a decision assessing the likelihood that harm would result from evidence disclosure. Shapiro explained that H.R. 5607 "restores the state secrets privilege to its common law origin as an evidentiary privilege by prohibiting the dismissal of cases prior to discovery." Fuchs also supported the bill, arguing, "These procedures have worked well in the criminal CIPA context."

Similar legislation (S. 2533) was introduced in the Senate in January by Sen. Ted Kennedy (D-MA) and was referred to the Judiciary Committee; no action has yet been taken.

Attorney General Michael Mukasey has threatened that President Bush would veto S. 2533. In his March 2008 letter to the Senate committee, Mukasey elaborated on the administration's opposition to increased court authority by questioning Congress's own authority to alter the state secrets privilege. The administration argues that the privilege is protected by the Constitution and surrounding case law including *United States v. Nixon*. However, there is also case law that contradicts this argument, particularly the U.S. Supreme Court's decision in *New York Times v. U.S.* to protect the public release of the Pentagon Papers leaked by Daniel Ellsberg in light of government misconduct and administrative abuse of power.

The state secrets privilege was first recognized in 1953 by the Supreme Court in *United States v. Reynolds*. Ever since, the executive branch has used it to maneuver around traditional checks and balances. The executive branch has utilized this privilege increasingly since the events of Sept. 11. According to a September 2007 report by OpenTheGovernment.org, "the

administration used the privilege only 6 times between 1953 and 1976. Since 2001, it has been used a reported 39 times — an average of 6 times per year in 6.5 years that is more than double the average (2.46) in the previous 24 years."

Fuchs stated that the bill "provides substantial protection to the government's interest in maintaining secrecy" while also "protect[ing] against government overreaching." The legislation was introduced in March, and July 30 marked the first hearing on the bill. The bill has seven co-sponsors, six Democrats and one Republican.

Bills to Reign in Controlled Unclassified Information Fly through House

A bill to reduce and standardize Controlled Unclassified Information (CUI) designations moved quickly through the House in July, passing in both committee and on the House floor just a single week after it was introduced by Reps. Henry Waxman (D-CA) and Tom Davis (R-VA). This bill, along with a similar piece of legislation that focuses solely on the Department of Homeland Security (DHS), now goes to the Senate where it may have a tougher time given the limited amount of legislative time left in this congressional session.

The Waxman-Davis bill, the Reducing Information Control Designations Act (H.R. 6576), gives new authority to the National Archives and Records Administration (NARA). Under the bill, the Archivist of the United States must establish narrowly constructed standards for CUI designations that maximize public access to information as well as develop penalties for employees and contractors who repeatedly fail to comply. NARA is already the statutory designee for setting classification standards. The act also calls for random audits of unclassified information with control designations by the inspector general of each federal agency.

Among the provisions that encourage greater openness, the bill seeks to clarify how agencies handle these designations, which are often not mandated by Congress, under the Freedom of Information Act (FOIA). Openness advocates have expressed concern that records were being withheld improperly under FOIA due to uncertainty caused by the use of control designations on unclassified documents. In her June 11 testimony to the Committee on Homeland Security, Meredith Fuchs of the National Security Archive recommended that agencies be discouraged from using CUI labels as "*de facto* determinations of FOIA exemption." If passed, the bill would prevent agencies from using the CUI markings to determine how information is disclosed under FOIA.

The bill would require training for employees and contractors on the proper use of CUI categorization and designations and would establish penalties for employees and contractors who repeatedly fail to comply with NARA-issued CUI standards.

The Congressional Budget Office (CBO) estimates that the total cost of random audits, training, and regulatory implementation over the 2009-2013 period will be approximately $45

million. While the legislation could have an impact on agencies not funded through annual appropriations, the CBO did not estimate any significant net increase in spending by such agencies, stating that "enacting the bill would have no significant impact on directing spending or revenues."

This legislation builds on the May 2008 memorandum issued by President Bush on CUI to establish rules governing its designation and sharing. While the memo was a step toward streamlining the problem of multiple pseudo-classification markings, it only required a standardized system for "terrorism-related information" and makes no statement on limiting the use of these markings. Further, the president's order pertains solely to material used in the Information Sharing Environment (ISE) created by the Intelligence Reform and Terrorism Prevention Act in 2004. That act called for reducing disincentives for information, but overclassification is still prevalent.

Waxman's bill is similar to, but broader in scope than, the Improving Public Access to Documents Act (H.R. 6193). Introduced by Rep. Jane Harman☼ (D-CA) in June, H.R. 6193 seeks many similar changes but only for DHS, whereas H.R. 6576 will have an impact throughout the federal government. OpenTheGovernment.org has published a useful analysis of the differences between the two bills. Harman's bill passed the House at the same time as the Waxman bill and is also waiting for action in the Senate.

The two bills have now been referred to the Senate Committee on Homeland Security and Governmental Affairs. However, given that the Senate plans to reconvene in September for only three weeks, it is unlikely that it will be able to move these bills along with appropriations bills and other pressing matters that must be addressed before adjournment.

Overclassification Legislation

Both Waxman and Harman had also introduced related bills on overclassification, H.R. 6575 and H.R. 4806, respectively. However, in this case, it was Harman's bill, the Reducing Over-Classification Act, that the House passed, during the same July 30 voting session in which Waxman's CUI bill was passed. The legislation seeks to limit excessive classification at DHS with increased oversight by NARA, greater accountability for DHS employees who overuse classification stamps, and training of DHS employees.

Harman summarized the importance of this bill as it pertains to ensuring openness at DHS, stating, "Unfortunately, the amount of material that is classified is growing exponentially making it harder and harder for our first responders to do their jobs." If passed and implemented properly, the bill could establish DHS as an example to other agencies. Harman's overclassification bill has also been referred to the Senate Homeland Security and Governmental Affairs Committee and faces the same unlikelihood of passage given the Senate's tight September timeframe.

Contracting Reform Agenda Makes Gains

When President Bush signed the FY 2008-2009 war supplemental bill into law on June 30, he approved a pair of contracting reforms that had long been stalled in Congress. The enactment of these provisions has validated the legislative strategy of reform-minded legislators to pass federal contracting measures.

After the House passed a series of contracting reforms in April, the measures were held up in the legislative logjam in the Senate. Nevertheless, the bills' sponsors worked doggedly in the 2008 legislative year to attach these non-controversial contracting reform bills to other legislation that would likely get through the Senate and be signed into law by the president.

When OMB Watch reported on this strategy in May, one such contracting reform bill had already been signed into law, suggesting that the coattail strategy would yield results. In the last two months, two additional reforms have become law.

The two measures enacted with the war supplemental are part of a raft of bills offered by several members of Congress in the past two years aimed at bringing accountability and transparency to the federal contracting process. The first of these provisions, the Close the Contractor Loophole Act of 2007 (H.R. 5712), holds contractors working oversees to the same fraud reporting requirements as contractors performing work in the U.S. The second, the Government Contractor Accountability Act (H.R. 3928), requires private contractors that receive more than 80 percent of their revenue from federal contracting and at least $25 million in federal contracts to report the names and salaries of their five highest-paid executives.

These two reforms were attached to multiple bills between the time they were passed by the House on April 23 and when they were signed by the president on June 30. After House passage, both bills were attached to the FY 2009 Defense Authorization Act. However, when it became clear that expedient passage of the Defense reauthorization bill in the Senate was not guaranteed, House contracting reformers hedged their bets by also attaching the provisions to the war supplemental. After a tortuous path to passage, the supplemental was signed into law.

Still left in legislative limbo are measures that would bar contractors with federal tax debt from winning new federal contracts (H.R. 4881, Contracting and Tax Accountability Act of 2008) and that would establish a database of contractors found in violation of federal laws and regulations (H.R. 3033, Contractors and Federal Spending Accountability Act of 2008). However, House Oversight and Government Reform Committee Chairman Henry Waxman (D-CA) was successful in attaching his Clean Contracting Act as an amendment to the House's version of the National Defense Authorization Act for FY 2009. Waxman's amendment is a bundle of contracting reforms, which includes H.R. 3033, the contractor fraud database, as well as the two measures already enacted with the war supplemental.

Although the House approved the Defense reauthorization bill in May, the Senate will not consider the legislation until they return from August recess. It is still possible the contractor misconduct database (H.R. 3033) will be enacted into law through the Defense reauthorization

bill, although that is not yet guaranteed.

The Path to Contracting Reform					
Policy Proposal	Original Bill	First Attached To	Then Attached To	Finally Passed On	Chances of Approval in 2008
Creating contractor misconduct database	HR 3033 *(4/23/08)*	FY 2009 Defense Authorization bill *(5/22/08)*			Good
Closing fraud loophole in FAR	HR 5712 *(4/23/08)*	House version of war supplemental bill *(5/15/08)*	FY 2009 Defense Authorization bill *(5/22/08)*	FY 2008-2009 War Supplemental Spending Bill *(6/30/08)*	*Approved*
Requiring disclosure of names and salaries of top executives	HR 3928 *4/23/08)*	House version of war supplemental bill *(5/15/08)*	FY 2009 Defense Authorization bill *(5/22/08)*	FY 2008-2009 War Supplemental Spending Bill *(6/30/08)*	*Approved*
Prohibiting using offshore tax havens to avoid payroll taxes	HR 5602 *4/15/08)*	Taxpayer Assistance and Simplification Act *(4/15/08)*	HEART Act *(5/22/08)*	HEART Act *(5/22/08)*	*Approved*
Prohibiting tax deliquent contractors from obtaining new contracts	HR 4881 *(4/14/08)*				Unlikely

When Congress returns in the second week of September, it will have only three weeks remaining in its legislative year. Excepting the provisions already within a version of the Defense reauthorization bill, there is little chance that Congress will send other contracting reform legislation to the president during the remainder of 2008. Despite this, contracting reform agenda items are likely to float to the top of legislative heap in January 2009.

Additionally, investigative efforts by the 110th Congress are laying the groundwork for even more and perhaps broader reforms in the next Congress. The Webb-McCaskill Wartime Contracting Commission has seated seven of eight commissioners who will begin investigating war contracting abuses; Sen. Byron Dorgan's☼ (D-ND) Democratic Policy Committee has been holding regular hearings on contractor malfeasance in Iraq; and Waxman's committee has conducted extensive investigations of contractor waste, fraud, and abuse. These efforts continue to show major contracting problems exist and that additional reforms are necessary. At this point, Congress seems focused on increasing the transparency and accountability of the

federal contracting process as opposed to changing the process itself.

Congress Fails to Act on Tax Legislation as Clock Winds Down

Congress left town for the month-long August recess having failed four times to act on a popular package of tax cuts that are set to expire at the end of 2008. With only three weeks in session left in September before the door is expected to close on the 110th Congress, and with remaining differences between opposing sides, there is still significant work to be done before $123 billion in tax cuts can become law.

The hold-up in Congress on this legislation is once again the U.S. Senate. During June and July, the Senate voted four times to begin debate on the tax "extenders," a $123 billion tax cut proposal over the next ten years. The latest version of this proposal includes a one-year "patch" for the Alternative Minimum Tax (AMT) and $56 billion in other tax cuts that will benefit a wide variety of individuals and businesses, from motor sport race track operators to married couples, from teachers to mine operators, and from anyone who pays state and local sales taxes to children's toy arrow producers.

With minor exceptions, the underlying tax cuts within the package are widely supported by both Republicans and Democrats. To be sure, some of the tax cuts have likely lost their usefulness in a wider economic context, and Congress failed again to adequately review whether some aspects of the bundled "extenders" package should be discontinued. At this point in the congressional calendar, the opportunity for such a needed review has passed. Delay in enacting this bill is not due to its content, but rather Democrats' attempts to structure it as a fiscally responsible piece of legislation.

The House passed its version of the extenders package on May 21 by a vote of 263-160. House Ways and Means Committee Chairman Charles Rangel (D-NY) constructed a fiscally responsible bill by including $55 billion in revenue offsets that would increase taxes on hedge fund managers and modify tax rules on corporations. The Bush administration issued a veto threat opposing the revenue offsets, even as over 300 corporations wrote to the U.S. Senate leadership making it clear that the extenders package was such a high priority that they would rather have it paid for if that would enable its passage.

Senate Majority Leader Harry Reid (D-NV) attempted to put the House-passed bill before the Senate for consideration three times (on June 10, June 17, and July 29), but each time, a group of at least 40 Republicans blocked consideration of the bill.

As the August recess approached, seeing that the House bill could not reach the floor for debate, Senate Finance Committee Chairman Max Baucus (D-MT) introduced his draft of an "extenders" bill, including a "patch" for the AMT, which was absent from the House-passed bill. Reid attempted to bring that bill to the Senate floor on July 30, but he was blocked again. The reasons for blocking this bill became less about a debate over the inclusion of offsets or the AMT in the "extenders" bill and more about a political struggle between the two parties over

gas prices and energy policy heading into the fall elections. Though Congress has left town, the parties continue to maneuver in the media in order to blame the other side rather than pass legislation.

Even through Reid cannot get the tax extenders bill on the Senate floor, there are behind-the-scenes negotiations that may be making some progress on finding a compromise on the question of offsets in the "extenders" package. Baucus' package includes just over $54 billion in offsetting revenue increases for portions of the bill. The $63.5 billion AMT patch was not offset, leaving less than half (approximately 44 percent) of the bill paid for. In order to comply with Senate pay-as-you-go (PAYGO) rules, the entire cost of the bill would need to be offset, a near-impossible goal given Republican opposition to offsetting any tax cuts.

Yet Senate Finance Committee Ranking Member Charles Grassley (R-IA) appears to be willing to allow the $54 billion in offsets included in the draft bill, assuming Democrats exempt any provisions impacting individuals from PAYGO and use cuts in future years' discretionary spending to offset additional tax cuts. While Baucus has announced this proposal concerning discretionary spending is a non-starter for Democrats, Grassley's acceptance of the pay-fors already in the bill is a step in the right direction.

Even though less than half of the proposed bill is paid for, there are a number of very popular provisions within the "extenders" tax cut package, including a $250 deduction for teachers' expenses and tax-free distributions from IRAs to charities for those over seventy-and-a-half years old. Most notably, both the House and Senate have included an expansion of the Child Tax Credit (CTC) by lowering the income threshold that parents must meet to qualify for the refundable portion of the tax credit, from $12,050 to $8,500.

This change would benefit over 13 million children, according to data from the Tax Policy Center. The Center on Budget and Policy Priorities has also pointed out that many children who stand to benefit come from families with parents who work year round, include individuals with a disability, and/or contribute to a broad range of jobs in critical services that often pay low wages, such as caring for the elderly or teaching young children. This is a progressive change in the tax code long sought by a wide variety of low-income, religious, direct service, labor, child welfare, and poverty advocates.

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