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In This Issue

OMB Watch Unveils Recovery Act Recipient Reports Database

On Dec. 3, OMB Watch released a beta version of a new database on FedSpending.org that gives the public improved access to and searchability of Recovery Act recipient report data. The database allows users to search more than 160,000 reports from recipients of almost $159 billion in Recovery Act contracts, grants, and loans awarded between Feb. 17 and Sept. 30.

FedSpending.org's Recovery Act data tab gives users flexibility to search, either individually or in aggregate, for prime recipients, sub-recipients, ZIP codes, congressional districts, federal awarding agencies, award amounts, and much more through a variety of means, including an Advanced Search function. Additionally, any search results can be downloaded from the site.

The Recovery Act created a new model for reporting on how federal funds are spent. Each quarter, recipients, including sub-recipients and vendors, are to report on FederalReporting.gov on how much money they received, how many jobs they created or saved, and other information. This is the first time there has been timely and transparent reporting by recipients of federal funds. It is also the first time that sub-recipients have reported on money passed through states, contractors, and grantees. This new model expands the opportunities for presenting information to the public about government spending.

For example, for the first time, the public can better understand how much of a grant or contract is retained by the prime recipient or given out through sub-awards. To properly illustrate this, OMB Watch created a new data field to indicate how much of a given award a prime recipient or sub-recipient does not pass on to another entity (such as a sub-recipient or vendor). This field, "Net Amount Retained," shows the extent to which Recovery Act funds are passed from the prime recipient to a sub-recipient or a vendor without double-counting funds in the totals for searches. FedSpending.org's Recovery tab includes the "retained" calculation because it can be useful for understanding the actual amount of Recovery Act funding that stays with a certain entity or at a certain location.

Using data published on Recovery.gov, the website required by the Recovery Act and maintained by the Recovery Accountability and Transparency Board (the Board), OMB Watch augmented FedSpending.org with the ability to search and sort Recovery Act recipient reports. While the Recovery.gov website contains a modicum of search functionality, the Board's site emphasizes searches by location, with results displayed on a map. FedSpending.org, however, allows users multiple search options (e.g., by recipient name, recipient DUNS number, federal award number, funding agency, and more) and presents the results as a streamlined summary.

By giving users more search options, FedSpending.org can return search results more relevant to a user's request. For example, by entering "University of Texas at Austin" in the "Recipient Name" search field, FedSpending.org returns a simple table of recipients that have names matching the search criteria. In this example, the user would see three "University of Texas at Austin" matches.

List of recipients for FY 2009

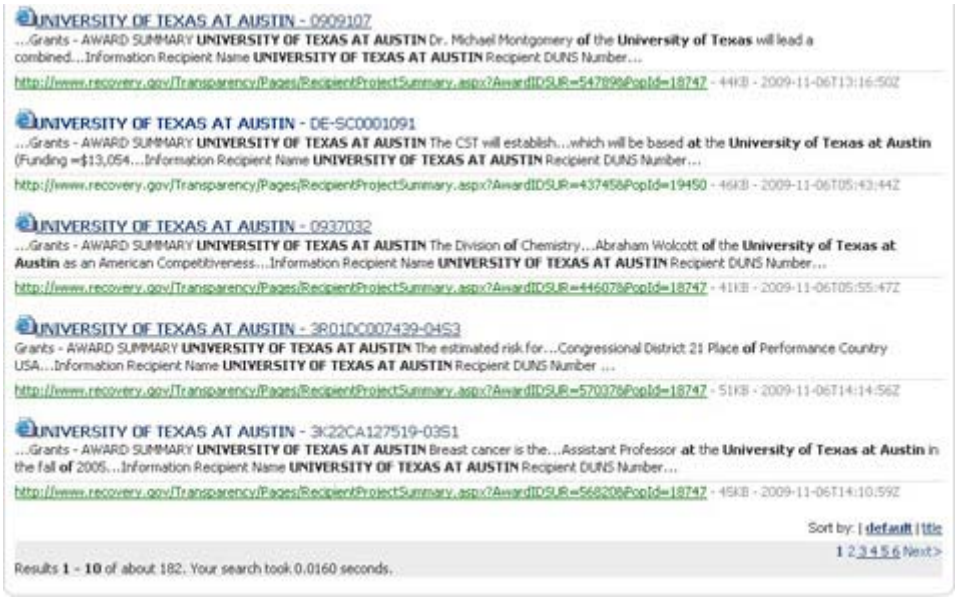
Each line below is for one recipient. Totals are for quantities within the search: there may be other awards for each recipient that were not retrieved by the search. You can click on the column headers below to re-sort the search.

Recipient Name	State	Received as Prime Award	Received as Sub-Award	Number of FTEs	Number of Awards
University of Texas At Austin	TX	$53,026,828	$1,002,001	47.33	109
UNIVERSITY OF TEXAS AT AUSTIN	TX	$416,392	$0	20.00	1
University of Texas At Austin	TX	$0	$1,039,826	0.00	2

A FedSpending.org Recovery database search result

The user can either view information for each match or an aggregation of all three results. Recovery.gov, however, does not easily allow users to search recipient reports by name only, so a search for "University of Texas at Austin" will return all recipient reports if the phrase "University of Texas at Austin" appears anywhere in the report. In this case, 182 matches are

found, including a grant to Florida State University, because the search term appears in the award's description.



A Recovery.gov recipient report search result

OMB Watch created the Recovery Act recipient reports tab on FedSpending.org not only to give the media, watchdogs, and the general public a tool to understand Recovery Act spending, but also as a example of the kind of functionality Recovery.gov should have. Because the Recovery Act recipient data tab was created in about a month and on a small budget, it has been released as a beta version, and small errors and glitches may be present on the site.

Estate Tax Reform Bill Passes House, Moves to Senate

On Dec. 3, the House passed the Permanent Estate Tax Relief for Families, Farmers, and Small Businesses Act of 2009 (H.R. 4154). With time running short, the bill now moves to the Senate, where straight passage of it is uncertain, and passage of any estate tax legislation is anything but assured.

Introduced by Rep. Earl Pomeroy (D-ND), the legislation permanently extends current estate tax law, which taxes the heirs of a deceased individual whose estate is valued above $3.5 million ($7 million for couples) at a 45 percent tax rate. The Pomeroy bill passed the House by a narrow margin – just 225 to 200 – and mainly along partisan lines, though 26 Democrats did join a united Republican caucus in opposition to the measure. The bill essentially mirrors what the president asked for in his FY 2010 budget request. Most importantly, the Pomeroy bill would extend current law and prevent the estate tax from expiring in 2010 and then coming back in 2011 under its pre-Bush tax cut levels.

According to an estimate released by the Congressional Joint Committee on Taxation, the Pomeroy bill would bring in $468 million in 2010, when the government would otherwise collect no estate taxes, but then cost the government $533 billion over the next nine years because of higher exemptions and lower tax rates than would have been in place if current law was left unchanged.

Passage of the Pomeroy bill in the Senate is unlikely because several important senators have misgivings about certain provisions. Sens. Max Baucus (D-MT) and Kent Conrad (D-ND), chairs of the Senate Finance and Budget Committees, respectively, argue that Congress should index the tax for inflation, something the Pomeroy bill does not do. Moreover, the Pomeroy bill includes the Statutory Pay-As-You-Go Act of 2009 (H.R. 2920) that would give PAYGO budget rules the force of law in Congress. The House passed the PAYGO bill in July, but the Senate has yet to take action on it because, according to a recent *CongressDaily* article (subscription required), top Democratic senators are opposed to enacting the provisions.

Estate tax legislation is therefore likely to go down one of two paths in the Senate. One alternative is for the Senate to bring up legislation similar to the Pomeroy bill, debate it, and pass it. The other option is for the Democratic leadership to tack a one-year estate tax extension onto a likely omnibus appropriations bill that insiders say Congress will pass before the end of 2009. Depending on how congressional events play out, either option is possible.

Some members of Congress have suggested that passing an estate tax bill in 2010 could be a possibility. However, passing legislation then means the government would retroactively apply the estate tax, an extremely rare occurrence, according to the aforementioned *CongressDaily* article. There are also questions about the legality of such a measure, something Congress would like to avoid.

Beyond the policy differences, there are several procedural obstacles to the Senate bringing up legislation similar to the Pomeroy bill and passing it before the estate tax expires at the end of 2009.

First, the health care debate is currently consuming the Senate. If the Senate were to move off the current debate to take up the estate tax, senators would need to vote again to take health care back up, an unlikely course of events given the difficulty Senate Democrats went through the first time to enter the health care debate. Yet with the Senate not guaranteed to finish health care before the end of 2009, the chance of squeezing in the estate tax is doubtful at best.

Making matters worse, if the Senate passes stand-alone estate tax legislation, it will have to conference with the House over any differences between the two bills. Once the conference reaches a compromise, each chamber would have to vote to pass the consensus estate tax legislation before Congress could send it to the president for his signature. Again, with time running out to intervene in the expiration of the estate tax, this seems an incredible feat.

Any estate tax legislation brought to the Senate floor would also be vulnerable to amendments. Democratic leaders in the House prevented a competing estate tax proposal (H.R. 3905),

introduced by Rep. Shelly Berkley (D-NV), that sought to reduce the estate tax beyond 2009 levels from coming to the floor. In the Senate, though, language that Berkley based her proposal on passed earlier in 2009.

In March, when the Senate passed its budget resolution to begin the FY 2010 appropriations process, opponents of the estate tax won a small battle by adopting an amendment by Sens. Blanche Lincoln (D-AR) and Jon Kyl (R-AZ) that cut the estate tax to a $10 million exemption per couple at a 35 percent rate. Later, conferees meeting to reconcile House and Senate versions of the budget resolution stripped the provision out. It is not clear at this point that the Lincoln/Kyl amendment could muster the necessary 60 votes in the Senate.

The other option is for Democratic leaders to attach a one-year extension of the estate tax onto a likely omnibus appropriations bill that will come before the end of 2009. If Congress passes a one-year extension, legislators would have to revisit the issue next year, when most expect Congress to take up a comprehensive tax reform package.

House Moves to Give More Access for GAO, SIGTARP, and the Public

While the attention of many transparency advocates has been focused on the first round of recipient reporting under the American Recovery and Reinvestment Act (the Recovery Act), the House has been working on two financial transparency measures dealing with the Federal Reserve and use of the Wall Street bailout funds.

Within the past month, the Financial Services Committee folded Rep. Ron Paul's (R-TX) popular "Audit the Fed" bill into the committee's larger financial reform package, and the House passed Rep. Carol Maloney's (D-NY) bill creating a database collecting Troubled Asset Relief Program (TARP) data. Both bills give oversight agencies more information and access, and, along with the Recovery Act, are part of a pattern of greater fiscal transparency in the federal government. However, both bills have only passed the House and could face significant hurdles in the Senate.

While the financial crisis happened only recently, the effort to audit the Federal Reserve stretches back decades. Every session for the past several decades, Paul has been introducing a bill to abolish the Federal Reserve entirely, along with a more moderate bill calling for an audit of the Fed. While the bill to abolish the Fed usually gains little traction, the other proposal has become very popular in 2009. The audit bill orders the Government Accountability Office (GAO) to audit the Fed and provide Congress, but not the public, with the findings of this audit. The GAO already audits parts of the Fed but is not allowed to investigate the Fed's monetary policy, so how this audit is accomplished is a sticking point. Paul's bill would allow the GAO to audit the entire Federal Reserve, a goal which the Fed, along with some members of Congress, are uncomfortable with.

Critics believe that subjecting the Fed's monetary deliberations to outside scrutiny would lead to political oversight by Congress, or at the very least, hinder the Fed's ability to affect financial markets. These concerns led Rep. Barney Frank (D-MA), chair of the House Financial Services Committee, which has jurisdiction over the bill, to attempt to scale it back.

In late November, however, the committee voted 43-26 to add Paul's bill to the larger financial reform package with a few changes, which ironically Paul has said he will oppose because it is part of the broader financial reform package. The new bill allows uninhibited audits of the Fed's balance sheet, giving the GAO access to the Fed's direct loans to financial institutions (the so-called "discount window"), and lending to foreign banks, both of which were controversial parts of the recent bailout effort. But there are still exemptions for transcripts and minutes of meetings of the Federal Open Market Committee, which deals with monetary policy, and there is also a delay before the Fed's market actions are released by the GAO. Despite these exceptions, the audit would help shed light on underreported aspects of the bailout, while assuaging critics who fear congressional oversight of the Fed.

Recently, supporters of the "Audit the Fed" proposal in the Senate took steps to highlight their concerns about the lack of transparency at the Fed. Demanding a vote on the Senate version of the "Audit the Fed" bill, Sen. Jim DeMint (R-SC) has placed a hold on the confirmation of Federal Reserve Board Chairman Ben Bernanke until the Senate votes on the bill. Sen. David Vitter (R-LA) also placed a hold on the Fed chief's confirmation until the bill sees a floor debate. While a vote to proceed on the Bernanke confirmation will likely receive the 60 votes necessary to overcome the holds, the Fed audit bill has itself drawn a hold from Senate transparency opponents.

The other bill currently moving through Congress involves creating a database to track, in real time, TARP expenditures. Maloney introduced the bill in March, but it lay dormant until November, when it began gathering steam that led to its unanimous passage in the House on Dec. 2. Unlike the Recovery Act, which created an entirely new system for collecting data, the database would only collect already existing data, centralizing a great deal of information from across the federal government, including regulatory data, filing data, news clippings, press releases, public records, and information already reported to the federal government by TARP recipients. It would also collect on at least a daily basis "all data that is relevant to determining the effectiveness of the Troubled Asset Relief Program in stimulating prudent lending and strengthening bank capital." This information would help authorities such as the Special Inspector General for TARP (SIGTARP) follow TARP funds and evaluate the program.

The bill also allows for public access to the database, which would give citizens the ability to track the money themselves. While this clause was not a part of the original bill, it is an important transparency measure. While it is difficult for regulators and government entities to compile such information, it is almost impossible for anyone outside of government to find and aggregate this kind of data. Maloney's bill would allow citizens to easily see which institutions have received TARP funding and what kind of an effect the program is having on the institutions and the economy.

The next hurdle for both bills is the Senate, which could slow progress. While Paul's bill had over three hundred sponsors in the House, only thirty have signed onto the Senate version, most of them Republicans, and the Senate Banking Committee has yet to hold a hearing on the bill. In fact, Sen. Chris Dodd (D-CT), chair of the Banking Committee, specifically did not include an audit of the Fed in his financial reform package. This lack of support is important, since Bernanke and Treasury Secretary Tim Geithner have expressed their opposition to the audit proposal. Similarly, as Maloney's bill moves to the Senate, its prospects are unclear, although Sen. Mark Warner (D-VA), who is chair of the Budget Committee's new Government Performance Task Force, introduced a similar bill, and should be a strong advocate for the proposal as it moves forward in that chamber.

While both bills are significant fiscal transparency measures, due to the Senate's current legislative backlog (health care reform and the appropriations bills will both take precedence), it is unlikely that Congress will pass either bill by the end of 2009.

Open Government Directive Hits the Streets

The Office of Management and Budget (OMB) released the long-anticipated Open Government Directive on Dec. 8. The directive, a memo from OMB Director Peter Orszag to all agency and department heads, requires that all agencies develop and implement an Open Government Plan specific to each agency.

The directive has been in development since the first day of the Obama administration, when the president issued a memo tasking OMB and other key officials to develop the directive. The Office of Science and Technology Policy (OSTP) oversaw a three-phase online dialogue to publicly generate, discuss, and develop policy ideas for the directive. The three phases attracted a great deal of public participation.

The directive continues to emphasize the three principles outlined by President Obama in his original memo – transparency, participation, and collaboration. The directive is comprised of four main components centered on very simple but important themes – publishing information; creating a culture of openness; improving data quality; and updating policies to allow for greater openness. Each section tasks agencies and other key offices with specific goals, complete with deadlines and clear requirements that the public be informed and permitted to participate in almost every project.

Publish Government Information Online

The section on publishing government data online reinforces and broadens the presumption of openness discussed in Attorney General Eric Holder's new guidance on implementing the Freedom of Information Act (FOIA). Agencies are instructed to "proactively" make information available instead of waiting for specific requests under FOIA. "With respect to information, the presumption shall be in favor of openness (to the extent permitted by law and subject to valid privacy, confidentiality, security, or other restrictions)," according to the directive. The section

also breaks new ground by instructing agencies, to the extent practicable, to publish information in open formats that can be "retrieved, downloaded, indexed, and searched by commonly used web search applications."

The section also sets clear deadlines for agencies, including publishing three previously unreleased, "high-value datasets" on Data.gov in 45 days and establishing an Open Government webpage on each agency website within 60 days. The Open Government webpages are to serve as the primary vehicle for each agency to communicate with and get input from the public on open government issues on an ongoing basis.

Improve the Quality of Government Information

This section stresses the need to identify and correct data quality problems, with an emphasis on immediate action on the quality of federal spending data. The section specifically requires agencies to designate within 45 days a "high-level senior official" to be accountable for the quality of federal spending data for the agency. Within 60 days, OMB is to issue guidance on quality of federal spending data that includes a requirement for agencies to submit plans describing internal controls for data quality. At some point, the need for additional data quality guidance for other types of information will be reviewed. Finally, within 120 days, OMB is to issue guidance related to fiscal transparency, including a "longer-term comprehensive strategy" that addresses reporting methods and data quality.

Create and Institutionalize a Culture of Open Government

This section establishes the key deliverables to encourage genuine and consistent progress on open government issues. First, the agencies must produce a detailed Open Government Plan within 120 days that will be used to measure progress. These plans are to be updated every two years. The directive provides details on what is to go into each agency's plan with regard to transparency, participation, and collaboration. Additionally, the agency plans are to identify at least one new "flagship initiative" that addresses transparency, participation, or collaboration. The agencies must also establish a process for soliciting public and employee feedback on the plan and respond to that feedback.

Second, the Federal Chief Information Officer and Chief Technology Officer will create an Open Government Dashboard on the White House website within 60 days that will provide access to the agency plans and track key metrics of openness for each agency. Although not specifically mentioned, it is possible that one example could be a FOIA Dashboard that monitors agency implementation of the law.

Third, an inter-agency working group on open government issues will be established within 45 days to provide a forum for sharing best practices and coordinating interagency efforts.

Fourth, within 90 days, OMB will issue guidance on the use of competitions, prizes, and other incentive strategies for encouraging progress on open government.

Create an Enabling Policy Framework for Open Government

This section acknowledges that current policies governing information management are largely antiquated and in need of updating. The section requires that the Office of Information and Regulatory Affairs (OIRA) review existing policies "such as Paperwork Reduction Act guidance and privacy guidance" to identify problems and issue revisions to allow openness to move forward. This policy review may prove critically important in addressing gaps on policies, such as those regarding disclosure of agency logs on meetings with people outside of government.

OMB Watch's executive director, Gary D. Bass, noted that the new directive marks a new direction for the executive branch. "The directive's presumption of openness – certainly a positive step – reflects a thoughtful understanding that achieving the goal of transparency requires a cultural shift in the way government operates," stated Bass. "The directive's scope and specificity blends both rigorous timelines and agency flexibility that will likely achieve significant improvements in government openness across agencies. The key will be how the public, the White House, and federal agencies work together in implementing the directive," Bass added.

The content of the directive reflects many of the transparency recommendations collaboratively developed by the right-to-know community during a two-year process coordinated by OMB Watch. Those 70 detailed recommendations were delivered to the Obama transition team in a report called *Moving Toward a 21st Century Right-to-Know Agenda*. Among those recommendations were requests for creating incentives for openness, interagency coordination, and publication of high-priority data that is currently unavailable – all of which are addressed in the new directive.

The directive essentially sets the bar for government openness quite high. The task before agencies and officials with responsibilities in the directive is to take the new policy provisions of the Open Government Directive and implement them. Open government advocates are sure to pay extremely close attention to the deliverables and deadlines established in the directive. If agencies or officials miss these deadlines or produce lackluster products, a strong backlash of criticism will likely follow.

Secret Holds Continue in the Senate

Citizens for Responsibility and Ethics in Washington (CREW), a Washington, DC-based watchdog group, recently called upon the Senate Committee on Ethics to investigate the ongoing use of secret holds. The organization contends that senators have failed to abide by Section 512 of the Honest Leadership and Open Government Act of 2007 (HLOGA), which ended the use of secret holds. The group requested the committee discipline senators from both parties who have failed to abide by the procedures, as well as issue guidance to govern future conduct.

In the House, where strict majority rule prevails, the order of business is controlled by the Speaker, in consultation with the majority party leadership and the majority-dominated

Committee on Rules. The Senate lacks such a centralized structure, and much of the chamber's business proceeds by unanimous consent. Holds are among the numerous procedural tools available in the Senate to ensure, ostensibly, that the minority is represented. Officially, a hold is simply a "notice of intent to object to proceeding" without actually objecting, which is used to block votes, as a bargaining tactic to gain concessions, or to buy time to study legislation. Under a secret hold, a senator informs his or her party leader, who informs the Majority Leader that the senator objects to proceeding, but the rest of the Senate and the public are left in the dark as to the identity of the senator placing the hold and the reasons for the hold.

The relevant section of HLOGA was passed in 2007 to bring transparency and accountability to the use of holds by prohibiting their secret use. As CREW explains, the new procedure works as follows:

> (1) a colleague objects to a unanimous consent request on behalf of an unnamed senator; (2) that senator must then submit a "notice of intent to object" letter to leadership explaining his objection; (3) within six days the senator must place the notice, with his name, on the appropriate Senate calendar, under a newly created section.

No new rule or standing order, nor any enforcement mechanisms, were created by the legislation, and subsequently, it relies on self-compliance. CREW found that only twice has the new procedure been followed, whereas for numerous nominations and bills since HLOGA was signed into law, secret holds have continued.

In its request for investigation, CREW argued:

> The Senate Ethics Manual provides that "[c]ertain conduct has been deemed by the Senate in prior cases to be unethical and improper even though such conduct may not necessarily have violated any written law, or Senate rule or regulation." Such conduct has been characterized as "improper conduct which may reflect upon the Senate." This rule is intended to protect the integrity and reputation of the Senate as a whole.

HLOGA was passed to bring greater honesty and openness to government writ large, and Section 512 was designed to bring such transparency to the Senate itself. The requirements to publicly announce holds and the reason why they were placed can restore the hold as a legitimate tool to air concerns of the minority, rather than simply as a tool of willful obstructionism. With clarity on why the hold is being placed and by whom, the Senate may choose to address the concerns raised and then continue its business without undue delay.

The Committee on Ethics is responsible for ensuring that Senate procedures do not violate the laws that the Senate itself has passed. Neither the committee as a whole, nor Sens. Barbara Boxer (D-CA) or Johnny Isakson (R-GA), the chair and vice-chair, respectively, has issued any comment. It also seems unlikely the committee will take comprehensive action on this issue

without greater pressure, as each branch of government is notorious for poor self-policing.

Study Shows Infants Exposed to Hundreds of Harmful Chemicals before Birth

A new study has found up to 232 industrial chemicals in the umbilical cord blood of infants born in 2007 and 2008. The identified chemicals include known carcinogens, neurotoxins, endocrine disruptors, and numerous other compounds toxic to various organs and systems. The study, commissioned by the Environmental Working Group (EWG) and Rachel's Network, reveals the extent of exposure to harmful substances faced by pregnant mothers and underscores the need to create public policies to prevent future exposures.

The report is the 11th biomonitoring investigation commissioned by EWG, which overall have identified up to 486 chemicals, pollutants, and pesticides in 186 people of all ages. Biomonitoring is the direct measurement of people's exposure to toxic substances in the environment by measuring the substances or their metabolites in human specimens, such as blood or urine. Biomonitoring measurements indicate the amount of the chemical that actually gets into people from all environmental sources combined.

The research analyzed the contents of the umbilical cord blood of ten infants from racial or ethnic minorities born in the United States in 2007 and 2008. Fetuses and infants are most vulnerable to negative health impacts from chemical exposure. Five independent research labs in three countries tested for chemicals that are commonly found in American households. Little is known about how the chemicals in this mix interact with one another or what their combined health impacts might be.

Among the harmful substances identified in the cord blood, researchers reported for the first time ever the presence of 21 contaminants in American infants, including bisphenol A (BPA), a synthetic hormone found in numerous plastic products such as baby bottles, metal food cans, and cell phone cases, and eight previously undetected polychlorinated biphenyls (PCBs), which were banned in the late 1970s but are still ubiquitous in the environment.

A relatively new scientific field of study, biomonitoring is a major tool in advancing the public's right to know. Individuals have a right to know what industrial chemicals are contaminating their bodies and what harm those chemicals pose to their health. Biomonitoring helps to fill some of the numerous gaps in the data regarding chemical exposures and the potential for adverse health effects.

Biomonitoring studies, such as the EWG report, can help improve public health policy by identifying trends in chemical exposures, identifying disproportionately affected and particularly vulnerable communities, assessing the effectiveness of current regulations, and setting priorities for legislative and regulatory action. These biomonitoring studies clearly indicate that more needs to be done to protect public health.

However, companies that manufacture or use harmful chemicals have opposed efforts to use biomonitoring. When California state legislators introduced a proposal to create a biomonitoring plan for their state, businesses fought the measure, labeling it a "job killer." The industry claims that expanding the public's knowledge would create unwarranted fear and excessive regulation. After winning several amendments to the measure, some industry groups dropped their opposition and, in 2006, California's biomonitoring program went into effect. The state's first reports are due in 2010.

The Centers for Disease Control and Prevention (CDC) acknowledges that the presence of a chemical in the body does not mean the chemical will cause a problem. However, without the basic exposure data provided by biomonitoring, there is no way to understand what health impacts may result. Exceptionally little is known about the impact of chemicals on developing fetuses and infants and the effects of interactions among numerous combinations of chemicals.

Rather than sowing fear, biomonitoring advocates hold that such information is empowering to citizens, as information about releases of toxic pollution under the Toxics Release Inventory (TRI) has empowered communities to press for reductions. By combining the pollution data from sources such as TRI with local biomonitoring data and information about health trends, a fuller picture of the impacts of chemical exposure emerges. Communities can use the information to hold polluters and public officials accountable and demand actions needed to reduce their exposure to toxics.

The CDC operates a national biomonitoring program that has produced three assessments of the U.S. population's exposure to chemicals. The program's third report was released in 2005 and identified 148 industrial chemicals in the population. A fourth report from CDC is due later in December.

Biomonitoring programs in other countries have had a big impact on public health. Data from a breast milk monitoring program in Sweden first alerted the world to widespread exposure to the toxic flame retardants known as PBDEs after researchers watched levels rise exponentially in nursing mothers in the 1990s. In the 1970s and 1980s, biomonitoring showed a drop in blood lead levels as lead in gasoline was phased out for reasons apart from public health concerns about the heavy metal. This information helped speed the phase-out of lead as an additive in gasoline and other products.

Despite the research undertaken by the CDC and private groups like EWG, there is still much that is unknown about the public's exposure to harmful industrial chemicals and what health effects the chemicals are causing. The ubiquitous presence of industrial carcinogens and endocrine disruptors among the most vulnerable populations – fetuses and infants – raises serious questions about the effectiveness of current chemical policies.

State Governments Follow Federal Lead in Data Reporting Technology

President Barack Obama's Jan. 20 inaugural promise to lead the most transparent administration in history has had a major impact on federal information technology, which has led to new developments in data reporting at the state level. Spurred by federal requirements to report Recovery Act spending, states have created new reporting technologies and new transparency experiments.

Data reporting on stimulus spending has received a great deal of attention at the federal level. The American Recovery and Reinvestment Act (Recovery Act) was the largest emergency federal spending bill in American history, and the executive branch moved quickly to distribute the funds to states. The administration and states moved equally quickly to establish reporting tools to track the spending. In October, states and other recipients began to electronically file details of the spending. Those recipient reports are already available for public review at Recovery.gov or on the Recovery Act tab of OMB Watch's FedSpending.org.

Going beyond stimulus reporting, however, several states have started to experiment with using online tools to increase public access to a broader range of data. Most recently, the state of Massachusetts launched a wiki-based online data catalogue that includes education, health, population, environmental, energy, and transportation data in addition to economic and financial information. Although much of the data included is spotty, citizens can create accounts and receive updates on any datasets they designate of interest to them. Massachusetts also joins other states, such as California, Michigan, and Utah, in focusing on releasing more state-based databases to the public.

State efforts have been supported and encouraged by the National Association of State Chief Information Officers (NASCIO). In September, NASCIO published a report, *Guidance for Opening the Doors to State Data*, that sets out a standard of principles to be considered by states and localities for the democratization of data. These principles attempt to set standard guidelines of civic engagement, data quality, security, and regulation that should be considered in creating data portals.

Localities have also gotten involved in the effort to release data in XML, XLS, CSV, and RSS formats. The City of San Francisco has also launched DataSF, which has similar types of public works and demographic data that the state of Massachusetts is attempting to put online, but is focused on the San Francisco metropolitan area. The city allows the data to be downloaded and even has iPhone mobile applications. Using free and open-source technology, the public is able to provide feedback by voting and commenting on datasets. The City of New York has also begun to release these types of data but in a more formal system that does not enable user feedback other than through a contact form.

The new data and tools have invigorated grassroots use of data. The Sunlight Foundation is using the month of December to host a blog series that spotlights citizen efforts to advance state and local transparency. Called the "24 Days of Local Sunlight," the series has so far made mention of local watchdog efforts in Missouri, Tennessee, and Kansas.

While the release of full databases is certainly a leap forward, most of the general public remains unable to use the information without some sort of user interface that helps people understand what they are looking at and why the data is important. It is critical that all branches of government offer some sort of dashboard for the presentation of data so that it is accessible by all, even users with little to no technical knowledge.

To fill this gap, the federal Office of Science and Technology Policy plans to launch an Open Government Innovation Gallery in the near future. Developers offering new tools to the public will be able to showcase their work in the gallery. Another initiative by Intellitics, Inc., ParticipateDB, has already begun and does a similar thing. ParticipateDB, however, is only in a closed-alpha stage and is focused on a broader spectrum of open-data initiatives, including international efforts.

Individuals interested in federal data user interfaces should go to Apps.gov. To locate raw data available in your state, see Data.gov.

New OIRA Staffer Calls Attention to Office's Role

The White House Office of Information and Regulatory Affairs (OIRA), the clearinghouse for federal regulations, has brought in a conservative economist, Randall Lutter, to review regulatory proposals from agencies. The move has upset OIRA critics and unnerved those who interpret Lutter's past writings as a sign of his views on public health and environmental regulation. Those working inside government and those who know him argue that the criticisms of Lutter, a civil servant on temporary assignment to OIRA, are unfair.

Lutter, an economist formerly with the conservative AEI-Brookings Joint Center on regulation, is on temporary assignment to OIRA from the Food and Drug Administration (FDA), where he most recently served as Deputy Commissioner for Policy, a non-political position. OIRA reviews drafts of proposed and final regulations as well as proposed paperwork requirements any time an agency wishes to survey ten or more people.

White House officials have not commented publicly on Lutter's responsibilities but say that he was detailed to OIRA temporarily because the office is in need of additional staff. According to White House Office of Management and Budget (OMB) spokesperson Kenneth Baer, OIRA was "looking for economists in the civil service who had experience" with OIRA and regulatory issues, and Lutter was a good fit. Lutter was a career employee with OIRA in the 1990s before working for FDA.

Documents show that he has been involved in a U.S. Environmental Protection Agency (EPA) rule that would limit sulfur dioxide emissions. An intra-administration e-mail exchange, made available in EPA's online rulemaking docket, shows that Lutter questioned EPA's estimates of the potential costs to industry of sulfur dioxide regulation. Lutter asked EPA economist Charles Fulcher why the agency had not attributed any costs to certain counties in a cost-benefit analysis. In response, Fulcher attempted to explain EPA's methodology. Lutter then requested

he and Fulcher further discuss the issue by phone. Unlike e-mail exchanges, the details of phone conversations are not subject to public disclosure in this case.

The e-mail exchange took place Nov. 19, three days after the draft proposed regulation was approved by OIRA and sent back to EPA. EPA published the proposed sulfur dioxide rule Dec. 8. The rule and the cost-benefit analysis are available on EPA's website.

Gina McCarthy, EPA's assistant administrator for air and radiation, told OMB Watch that the questions posed by Lutter were "perfectly appropriate." McCarthy said she had not heard complaints from her staff about the role of Lutter or OIRA in the sulfur dioxide rulemaking. She said the relationship between EPA and OIRA thus far in the Obama administration has been productive and that rules are emerging from OIRA review in a "stronger, crisper, more defensible fashion."

OIRA's decision to bring Lutter on staff first sparked controversy when Rena Steinzor, president of the Center for Progressive Reform, posted the news Dec. 2 on her organization's blog. "Few personnel developments could be more discouraging to those hopeful that the Obama Administration will fulfill its many commitments to revitalize the agencies responsible for protecting public health, worker safety, and natural resources," Steinzor wrote.

Steinzor based her concerns on rumors that Lutter would be hired as an OIRA policy advisor, which would be a political appointment. She noted that she raised the Lutter issue in a meeting with senior OIRA officials, and no one provided any clarity about Lutter's employment status.

A *Washington Post* article appeared in the Dec. 4 print edition and described Lutter's role in the sulfur dioxide rulemaking. The article included comments from OMB, of which OIRA is a part, confirming Lutter's employment at OIRA. OIRA Administrator Cass Sunstein has not commented publicly on Lutter.

Lutter is on temporary detail from FDA, OMB said. According to the Office of Personnel Management, "A detail is a temporary assignment to a different position for a specified period when the employee is expected to return to his or her regular duties at the end of the assignment." Detailees are still technically considered employees of the agencies from which they are detailed.

Lutter has "no decisionmaking authority," said Baer, the OMB spokesperson. Baer emphasized that Lutter, like the vast majority of government employees, is a civil servant. His job is to provide technical economic advice and to help implement the plans and priorities for the administration, Baer said.

Lutter's role in the sulfur dioxide rulemaking raises questions, not about his fitness for civil service, but about OIRA's overall role in the rulemaking process. Current and past OIRA officials have maintained that OIRA's responsibility is to vet draft regulations among other federal agencies and/or to ensure draft regulations are consistent with presidential priorities. OIRA desk officers, the civil service staff in the office, are the foot soldiers in this coordination effort.

But past controversies indicate that OIRA can have a larger impact, sometimes to the detriment of public interests. In 2007, OIRA refused to open an e-mail from EPA containing the agency's proposal to declare greenhouse gases a public health threat, according to a House committee investigation. That finding was finalized Dec. 7, almost two years later. OIRA has also been known to chafe at specific details of regulations. For example, in 2008, OIRA persuaded the EPA to reduce the number of air pollution sensors needed to detect concentrations of airborne lead.

OIRA is still operating under the regulatory framework detailed in Executive Order 12866 signed by President Clinton in 1993. President Obama announced Jan. 30 that he would revise and replace that order. Because Obama's executive order is pending, observers remain curious as to whether the role of OIRA, and the regulatory process overall, will change under his administration.

Lutter has wide-ranging experience with environmental and public health regulation. In 2003, he began working at FDA as the agency's head economist. While there, he was promoted to Associate Commissioner of Policy and Planning, then Acting Deputy Commissioner for Policy.

At FDA, Lutter defended the Bush administration's preemption doctrine for medical product regulation. Under President Bush, the FDA argued that product approval should bar state courts from hearing tort cases against manufacturers in the event consumers are harmed by normal use. Lutter testified before the House Oversight and Government Reform Committee in 2008 that, "FDA believes that the important decisions it makes about the safety, efficacy, and labeling of medical products should not be second guessed by state courts."

Critics of preemption say that state courts must be given the flexibility to examine whether manufacturers dutifully considered the effects of their products, especially as new, post-approval information emerges and consumers are allegedly harmed by products. Without the threat of tort suits, manufacturers have reduced incentives to prioritize product safety.

Lutter also contributed to the development of FDA policy that makes it easier for pharmaceutical companies to push doctors to prescribe drugs for unapproved uses. On Jan. 13, FDA finalized its *Good Reprint Practices* guidance document, which permits drug makers to use as a marketing tool journal articles showing a drug can be used to treat symptoms not specified in FDA's approval of the drug. Critics say the journal articles used by the industry do not necessarily meet typical scientific standards and may not have been reviewed by FDA.

The office Lutter headed at FDA, the Office of Policy, Planning and Preparedness, was reconfigured in August when Commissioner Margaret Hamburg reorganized the agency's senior staff structure. Lutter has not represented FDA at a "significant meeting" since May 1, according to calendars for senior officials posted on FDA's website. Lutter has not appeared on the list of senior officials since the reorganization.

Prior to serving at the FDA, Lutter worked for AEI-Brookings, a joint project of the American Enterprise Institute and the Brookings Institution that was often criticized by progressive advocates for taking a hostile view of regulation. (Brookings has since left the partnership; AEI

continues the project on its own as the Reg-Markets Center.) While there, he authored controversial research papers and commentaries on environmental issues, including a 2001 opinion piece titled, "Chill out on Warming," which defended President Bush's refusal to sign the Kyoto Protocol, a multi-nation agreement to cut greenhouse gas emissions.

Lutter previously served at OIRA during the George H.W. Bush and Clinton administrations. He also worked for the White House Council of Economic Advisors under President Clinton. Colleagues from his days in the Clinton White House have defended Lutter. "During my tenure at OIRA, I was unaware of the personal political or philosophical preferences of the staff because, like all good civil servants, they parked these preferences at the door. I was looking for and I got data and analysis, and the decisions were made not by the career civil servants but by the political appointees, as they should be," former OIRA administrator Sally Katzen told OMB Watch. "Randy worked for me for almost five years, and he stood out only because of his obvious intelligence and thoughtful analysis. I think it's a most unfortunate distraction to discuss the role of individuals rather than the merits of the policy decisions," Katzen said.

Several people who have worked inside government are surprised at the attack on Lutter since he is a career employee, not a political appointee. They argue that those who work inside government should not be subjected to political litmus tests. Instead, they argue, it is the responsibility of political appointees to instruct career staff on what policies to follow. Critics note that this approach is particularly difficult to follow at OIRA because the office has such enormous power to review administrative actions taken by agencies. The actions by any one reviewer – even when he or she appears to be non-political – can have enormous policy impact.

MSHA Outlines Policy, Regulatory Agenda

The Mine Safety and Health Administration (MSHA) began outlining its agenda for protecting workers with the announcement of a comprehensive plan to end black lung disease and the publication of its regulatory plan. MSHA had been headed by acting administrators during the last years of the Bush administration and has been slow to address many safety issues after a series of mine accidents and increased incidence of debilitating disease.

On Dec. 3, MSHA announced in a news release a "comprehensive strategy to end new cases of black lung among the nation's coal miners." Black lung and related diseases have been on the rise, according to several reports and studies conducted earlier this decade. According to the release, "over 10,000 miners have died from black lung over the last decade. The federal government has paid out over $44 billion in compensation for miners totally disabled by black lung since 1970."

In announcing the black lung plan in Beckley, WV, MSHA head Joseph A. Main indicated there was widespread support for the initiative among mining associations and unions. The plan has several components. For example,

- MSHA will hold four informational meetings in December in mining communities (including Main's appearance in Beckley).
- An educational "End Black Lung" webpage provides information on dust-related topics and will be the repository for future information on the plan and MSHA's activities.
- MSHA and the National Institute for Occupational Safety and Health (NIOSH) will hold a series of one-day regional workshops to bring together experts on the best practices to control coal dust. The first workshop was in November, and the others are scheduled throughout 2010.
- During the week of Dec. 7, inspectors will focus on the quality of dust-suppression plans and training by industry personnel about the risks of black lung and silicosis, a disease caused by exposure to silica dust in mines.

In addition to the black lung prevention plan, the Department of Labor (DOL) issued its regulatory plan, part of the semiannual Unified Agenda, a collection of agencies' planned regulatory and deregulatory actions. MSHA has several proposed and final actions included in DOL's agenda.

Working with NIOSH, MSHA issued a proposed rule in January to address the requirements for personal dust monitors. The agencies plan to complete the rule by April 2010, allowing for the approval of continuous personal dust monitors. These monitors represent new technology to measure miners' exposure to respirable dust. This rule is part of the black lung prevention plan.

MSHA is working with the Occupational Safety and Health Administration (OSHA) to develop a proposed rule to regulate exposure to silica in order to combat silicosis, another irreversible but preventable disease. According to the plan, "[t]o assure consistency within the Department, MSHA intends to use OSHA's work on the health effects of occupational exposure to silica and OSHA's risk assessment, adapting it as necessary for the mining industry." The proposed rule will not be issued until April 2011, however.

Another action that is likely to cause some consternation among those concerned with miners' health protection is the call to reduce the exposure of miners to respirable dust without necessarily reducing the personal exposure limit, the legal limit for exposure to coal dust. According to a Dec. 7 *Charleston Gazette* article, MSHA's plans to reduce exposure could include verifying the effectiveness of a coal company's dust control plan and/or changing the unit of measurement for exposure to a shift average instead of an average based on specific samples, as is currently the method for determining exposure.

According to a summary of MSHA's regulatory agenda by *Mine Safety and Health News* (subscription required), recent audits conducted by the agency indicated that there were problems with some dust prevention plans and implementation. Correcting these problems could result in better enforcement of the current standards, Main argued at the Beckley appearance, implying that kind of corrective action could replace reducing the exposure limit.

According to the *Gazette*, the current exposure limit is 2.0 milligrams per cubic meter and has been the legal limit since 1972. Should MSHA ultimately choose to use other approaches to

limiting exposure without reducing the exposure limit, the agency will be ignoring years of scientific evidence that calls for reducing the limit, according to Dr. Celeste Monforton of George Washington University's school of public health.

On one hand, MSHA's agenda provides some hope that long-delayed worker protections will finally be addressed by an agency more focused in recent years on protecting mining companies. On the other hand, whether because of scant resources or political calculations, actions on a range of safety issues could still be years away.

Group Asks FEC if Federal Election Law Preempts State Robocall Laws

Robocalls – automated phone messages – are one of the least expensive methods that political candidates use to reach voters. However, restrictions on unsolicited calls have complicated efforts by candidates who want to use political robocalls. While political robocalls are exempt from the national "do not call" registry, some states have implemented restrictions on them. A political organization is now asking whether these state laws run afoul of federal law.

In October, a political action committee, the American Future Fund Political Action (AFFPA), requested an advisory opinion from the Federal Election Commission (FEC) questioning whether federal election law preempts state laws. In AFFPA's request, it urged the FEC to find that statutes enacted in 41 states are preempted by the Federal Election Campaign Act (FECA).

Depending on how the FEC decides, such state laws could be overturned as applied to federal candidates and political committees. AFFPA indicates it wants to conduct nationwide robocall operations during the 2010 congressional campaigns, and these laws prevent it from doing so.

In AFFPA's request for an advisory opinion, it asked whether additional state restrictions on robocalls are preempted by FECA. One question it focused on is, "Are state laws purporting to prohibit all pre-recorded telephone calls by federal political committees preempted by FECA?" In its analysis following this question, AFFPA states that "the Act and Commission regulations establish that limitations and restrictions on Federal candidate expenditures is an area to be regulated solely by Federal law."

Jason Torchinsky, counsel for AFFPA, told *Politics Magazine* that "the FECA [Federal Election Campaign Act] is supposed to be the single national source for regulation of federal campaign expenditures, and the FEC's prior opinions confirm that." He further stated that AFFPA is "simply asking the FEC to confirm this same rationale applies to robocalls."

In response to AFFPA's request, Minnesota, Indiana, North Carolina, North Dakota, Arkansas, and Wyoming have filed comments with the FEC defending their state laws. The states argue that their laws do not place undue restrictions on robocalls. In North Carolina's comments, the state mentions that while robocalls are banned in many instances under its robocall statute, there are also several exemptions.

One exemption applies to a "tax exempt charitable or civic organization," which AFFPA would presumably fall under. The only other requirements that tax exempt organizations have to comply with to meet all of the elements for exemption are refraining from making a "telephone solicitation" and clearly identifying "the person's name and contact information and the nature of the call." North Carolina argues that these requirements are easy to comply with.

North Carolina further states in its response that "North Carolinians receive hundreds of thousands of automated calls each election cycle for local, state and federal elections and almost all such calls provide the disclosure set forth in our law without incident or burden."

Minnesota argues that the FECA does not preempt the typical state robocall statute. Some of the other states that submitted comments echoed the points raised in Minnesota's response. AFFPA argues that state laws requiring prior consent for robocalls "limit expenditures by political committees." Minnesota counter-argues that their statute and other similar statutes "do not prohibit any candidate or political committee from making expenditures on telephone solicitations. Rather, these types of laws merely impose reasonable time, place, and manner restrictions on how such telephone solicitations can be made."

AFFPA chairman Nick Ryan told *CQ Politics* that "these regulations limit the ability of candidates and those of us who seek to advocate. It impinges on our right to communicate."

According to *CQ Politics*, "the 'do not call' registry is broadly popular – a 2007 survey found 72 percent of Americans had registered numbers – and complaints about political solicitations are widespread."

NPAction.org, an OMB Watch website on nonprofit advocacy, published an article that delves into some of the controversy surrounding robocalls. According to the article, robocall supporters "argue these calls can help to increase voter participation and encourage interest in the government. They can be an effective rapid response tool for contacting supporters to take action. Also, they point out that not only is political speech protected by the First Amendment of the Constitution, but that robocalls are already regulated by state and federal laws."

According to *CQ Politics*, the FEC is likely to have a decision before the end of 2009.

How Will Proposed Anti-Prostitution Rules Impact Nonprofits?

On Nov. 23, the Department of Health and Human Services (HHS) issued a proposed rulemaking to revise its implementation of an anti-prostitution policy requirement for organizations that receive HIV/AIDS funding from the agency. The requirement currently compels speech by government grantees.

Presently, HHS grantees cannot engage in HIV/AIDS assistance activities unless they adopt a statement explicitly opposing prostitution and sex trafficking for their entire organizations. Affiliated organizations that do not adopt the pledge must be completely separate entities. The

proposed rule slightly changes the current regulation, but it continues to be quite burdensome for nonprofits and leaves many terms undefined.

In 2003, Congress passed the United States Leadership Against HIV/AIDS, Tuberculosis and Malaria Act (the "Leadership Act"). The Leadership Act contains the "anti-prostitution pledge requirement," mandating that "no funds made available to carry out the Act ... may be used to provide assistance to any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking." Therefore, all organizations receiving such funding are required to adopt an organization-wide policy opposing prostitution. This is troubling for some nonprofits working in areas where prostitution is legal and groups providing aid must work with the culture they are in. Those organizations believe that the service they provide is health-related HIV/AIDS education and treatment, not social and cultural intervention. For that reason, they believe that the prohibition is unwarranted. For an example of such concerns, see an August 2008 policy brief from the Center for Health and Gender Equity.

The proposed rule will amend the regulation that took effect on Jan. 20. Under the current rule, all funding recipients, including sub-recipients, are required to certify compliance with the anti-prostitution rule. It also establishes the standards for determining whether a grantee has sufficient independence from an affiliated organization that "engages in activities inconsistent with a policy opposing prostitution and sex trafficking."

The proposal issued in November would no longer require recipients to submit documentation certifying that they have a policy explicitly opposing prostitution. Instead, grantees would have to agree that they are "opposed to the practices of prostitution and sex trafficking because of the psychological and physical risks they pose for women, men, and children." HHS would be required to include in public documents that funding recipients must agree with this statement.

Currently, organizations that receive HIV/AIDS funding are forced to have "legal, financial, and organizational separation [...] between entities that receive grants [...] and another organization that engages in activities inconsistent with a policy opposing prostitution and sex trafficking." Organizations can establish affiliates that may operate free of the pledge requirement. However, the rules for establishing affiliates are very restrictive. The grantee must have an extraordinary degree of separation between itself and the privately funded affiliate(s).

Currently, separation is required from any organization that engages in restricted activities; the proposed regulation would only require separation from "affiliated organizations" that engage in restricted activities. However, there is no definition of "affiliated," and the proposed rule does not define which activities the agency considers to be "inconsistent with a policy opposing prostitution." Critics claim there are problems with the vague language throughout the proposed rule.

The proposed rulemaking also changes the method for determining whether there is sufficient separation between grantees and the affiliated organizations that engage in prohibited activities. It would change the list of factors taken into account when considering whether there is proper separation. Establishing different standards are meant to ease the burden on recipients.

To determine whether sufficient separation exists, currently there must be "physical and financial separation," while the proposed regulation requires "legal, physical, and financial separation" only "to the extent practicable in the circumstances," without definition. Legal separation, for example, could be one of multiple factors considered in making a conclusion about adequate separation.

The proposed rule states, "Mere bookkeeping separation of Leadership Act HIV/AIDS funds from other funds is not sufficient." Other than this, to decide if proper separation exists, "HHS will determine, on a case-by-case basis and based on the totality of the facts," with no single factor being determinative. Advocates say the proposed regulation is an improvement, in that it removes several explicit factors involved in the overbroad separation requirements (such as the use of equipment and supplies). However, HHS may still take those into consideration. HHS states it will use the following five factors, although it may also consider others that are unnamed:

- Legal separation
- Separate personnel
- Separate recordkeeping
- The degree of separation between the affiliated organization's facilities where restricted activities occur
- The extent of signs and other forms of identification that distinguish the recipient from the affiliate

OMB Watch submitted comments in April 2008 before HHS issued the rule now in place. Some of the concerns expressed then still remain. For example, the proposed regulation continues to compel speech, in that organizations must still agree that they are opposed to prostitution and sex trafficking because of the psychological and physical risks they pose for women, men and children.

Groups would also still be required to establish a separate affiliated organization if they want to exercise free speech rights. Vagueness also remains a problem regarding factors considered in deciding whether recipients are "physically and financially separate." The draft regulation does not define prohibited activities, and therefore, organizations may not know when an affiliate is required. OMB Watch's 2008 comments stated, "The extreme vagueness of the rule, combined with broad proposed powers to enforce them on a case-by-case basis, leaves grantees open to inconsistent enforcement action at best, and political retribution at worst.

The anti-prostitution pledge requirement has been challenged in court by grantees who argue that the requirement violates their First Amendment rights. In *Alliance for Open Society, Inc. v. USAID*, a federal district judge in New York City issued a preliminary injunction in August 2008, prohibiting HHS and the United States Agency for International Development (USAID) from enforcing the policy requirement against U.S. organizations that are members of Global Health Council and InterAction. If that injunction is lifted, those organizations would be subject to the HHS regulation. Under a July 2009 agreement, the government suspended its appeal, but it may choose to restore it by Jan. 8, 2010.

The proposed regulation would apply only to organizations receiving Leadership Act HIV/AIDS funds from HHS. USAID will issue its own revised guidelines, which will probably be very similar to HHS' final regulation.

HHS is currently accepting comments on its proposed regulation, with a deadline of Dec. 23. Comments can be submitted electronically at www.regulations.gov.