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In This Issue

OMB Watch Releases Analysis of Bush FY 08 Budget Request

During the week of Feb. 5, OMB Watch issued a multipart analysis of President George W. Bush's Fiscal Year 2008 budget request to Congress. In an overview of the president's budget, OMB Watch examined the overall impact of the request and found that it puts tax cuts ahead of domestic needs. The budget uses gimmicks and omissions to mask the true impact of the president's proposals and allows him to project an artificially balanced budget.

Also available are several fact sheets on specific issues within the budget: the Program Rating Assessment Tool, budget process and the IRS budget and the tax gap.

House Passes FY 2007 Spending Resolution that Restores

Some Funding

On Jan. 31, the House cleared a $463.5 billion joint resolution that boosts spending or maintains service levels in health, education and housing programs while staying under a tight budget cap. The resolution also makes $10 billion worth of cuts in 60 programs and eliminates earmark language from bills that were drafted but not passed during the last Congress. If the Senate passes the resolution, the new Congress will finish the FY 2007 budget bills, which the last session of Congress failed to do.

The bill (H.J. Res. 20) was considered under a rule that blocked amendments, which angered Republicans who wanted to change the resolution. One slighted Republican — House Appropriations Committee Ranking Member Jerry Lewis (R-CA) — urged all members of the appropriations committee to vote against the bill on these procedural grounds, but 57 Republicans ended up voting in favor of the bill. It passed 286-140.

The resolution marks the beginning of the end of a dysfunctional budget year. The last session of Congress succeeded in passing only two of 11 appropriations bills for FY 2007. It opted instead to punt the unfinished appropriations bills to the current Congress by passing a stop-gap continuing resolution (CR) that flat-funded or cut many programs for several months. The House resolution is a mixture of the nine unfinished appropriations bills with a limited number of funding boosts in specific program areas.

H.J. Res. 20 is similar in many ways to some of the priorities contained in appropriations bills proposed in the 109th Congress. The resolution would keep the total amount of appropriations under the $873 billion spending cap that the last Congress set. And the resolution takes its funding formula from the December 2006 CR.

But the joint resolution also signals a departure from the policies and priorities of the last Congress. Many programs the 109th Congress tried to cut will now get additional funding to maintain their current level of services, and some will get funding that boosts services. Programs providing health care, housing and educational assistance are some of the ones that will see increases. Significant changes include:

- $1.7 billion more for HIV/AIDS, tuberculosis, malaria;
- $3.6 billion more for VA healthcare;
- $1.4 billion more for Section 8 housing assistance;
- $600 million more for the National Institutes of Health;
- $600 million more for Pell Grant student loans.

To add this funding and stay under the appropriations cap, the resolution would move funding out of other programs. Defense programs would take the bulk of the cuts, though the upcoming supplemental appropriations bill for ongoing military expenses may include some additional funding to restore those cuts. Funding cuts that would reduce services include:

- $3 billion less for military base-relocation;
- $700 million less for foreign aid;
- $700 million less for Iraq reconstruction.

The majority of the rest of $10 billion in offsets will come from canceling budget authority that had not yet been used in housing and transportation programs — saving $5 billion under the discretionary cap. This change will not affect services.

Making good on a prior pledge, House appropriators stripped the resolution of all new earmark language but not the funds that the language had directed. Agencies have the option of using these funds for the same purpose as earmark language would have directed. The Energy Department, for example, has announced that it intends to use funding to continue projects that had been initiated by earmarks in previous appropriations.

The legislation is now headed for the Senate, where it may encounter more amendments and procedural roadblocks. Some Senators have already announced they intend to amend the resolution, which may delay its passage. If the resolution stalls in the Senate, another short-term CR may be passed. Congress has until February 15th to pass either the resolution or an extension of the CR.

Senate Passes Minimum Wage Increase with Tax Cuts Added

On Feb. 1, the U.S. Senate wrapped up nearly two weeks of debate with a 94-3 vote to approve S. 2, the Fair Minimum Wage Act of 2007. The bill raises the federal minimum wage to $7.25 an hour by 2009 and extends $8.3 billion of existing small business tax breaks. The fate of the bill remains uncertain because House Democrats are reluctant to provide tax breaks for small business in exchange for passing a minimum wage hike.

The House passed a version of the bill on Jan. 10 as one of the first items on Speaker Nancy Pelosi's (D-CA) "First 100 Hours" agenda this year. The bill passed, 315-116, with 82 House Republicans joining all the House Democrats voting in favor. Under the bill, the federal minimum wage is to rise to $5.85 an hour 60 days after enactment, then to $6.55 an hour one year after that, and $7.25 an hour two years later. That was a clean bill without additional riders. Twenty-nine states have a required minimum wage higher than that of the current federal level — with seven of those states already above the proposed $7.25 an hour.

After the minimum wage increase passed the House, Senate Finance Committee chair Max Baucus (D-MT) repeatedly insisted that the House's "clean" minimum wage bill did not have the 60 votes needed for passage in the Senate. Baucus then produced the $8.3 billion tax cut package to help convince some Republicans to support the increase in the minimum wage. House Democratic leaders opposed this move, arguing that businesses

have been the beneficiaries of one tax cut after another over the last several years, but the minimum wage has not been raised a penny since 1997. On Jan. 16, the day before the Committee was due to vote on the tax cuts, Baucus announced $8.3 billion in offsets to pay for the tax cut package. The next day, the Committee unanimously approved the package (see itemized provisions and scoring).

As floor debate on S. 2 started and the number of amendments filed — all by GOP Senators — soared to over 150, frustration mounted in some quarters. Said Senate Health, Education, Labor, and Pensions Committee chair Ted Kennedy (D-MA), "We have now had amendments that have been worth over 200 billion dollars... health-savings amendments that will benefit people with average incomes of $112,000... But we still cannot get two dollars and fifteen cents -- over two years."

In the final vote, only three Senate conservatives opposed the measure: Sens. Tom Coburn (R-OK), Jim DeMint (R-SC), and Jon Kyl (R-AZ).

The $8.3 billion in tax cuts mainly offer depreciation and expensing advantages to small companies, including Main Street retailers that own their own stores, and to S-corporation owners, who are generally self-employed. They also include a tax credit for companies to give an incentive to hire certain populations, such as welfare recipients, veterans and food-stamp recipients.

S. 2's major tax break provisions are:

- **Work opportunity tax credit** — extends the credit for five years, through 2012. The bill would modify the credit to also apply to the hiring of veterans disabled after the Sept. 11 terrorist attacks. *(estimated cost: $3.6 billion over 10 years)*
- **15-year depreciation of improvements on leased property** — extends the reduced period of depreciation for three months, through March 31, 2008. *($2.7 billion)*
- **Small-business expensing** — Section 179 deductions for small-business expenses up to $112,000 (indexed for inflation) annually would be extended through 2010, regardless of tax rules requiring gradual write-offs of capital investments. *($257 million)*

Sticking to the principles of pay-as-you-go, the tax cuts are paid for mostly by closing loopholes on offshore tax shelters, by capping deferred compensation payments to corporate executives and by removing the deductibility of punitive damage payments and fines. There are also increased expensing allowances and depreciation, and accounting rules for small businesses — not necessarily cuts targeted to business owners affected by a minimum wage increase. The exception is restaurateurs, who are frequent employers of low-wage workers and would be beneficiaries of many of the tax cuts.

It's now up to House Ways and Means Chairman Charles Rangel (D-NY) and the House

Democratic leadership to determine the next steps. House Democratic leaders oppose linking the small business tax cuts to the minimum wage and have already indicated that any tax legislation, according to the constitution, must originate in the House. Rangel has allowed the bill to "sit at the desk," which means the House has not accepted it, and therefore, it does not trigger constitutional problems. Even if Rangel were willing to accept the tax cut trade-off, he is reportedly not happy with some of the revenue raisers used to pay for the Baucus package, since they are items Rangel may have wanted to use for other purposes.

Senate Democratic leaders remain publicly hopeful that a resolution with the House can be reached quickly. Stay tuned.

Media, Congress Begin to Examine Bush's Executive Order on Regulatory Process

President George W. Bush's Executive Order amending the regulatory process in significant ways didn't immediately garner the attention one might have expected from the mainstream media and Congress. The order set in motion changes that could further delay or hinder public health, safety, environmental, and civil rights protections. It was issued by the White House, with a press release, Jan. 18, and only OMB Watch and Public Citizen rang the alarm bells, calling attention to changes that give OMB's Office of Information and Regulatory Affairs (OIRA) even broader powers over agency actions.

Although a few independent media outlets and Inside Washington publications picked up the story, it wasn't until the *New York Times* published an article on Jan. 30 that other mainstream outlets began paying attention. The order was published in the *Federal Register* on Jan. 23 and takes effect 180 days later. The *Times* article quoted Henry Waxman (D-CA), chair of the House Oversight and Government Reform Committee, who stressed the danger of ignoring agency experts' opinions about health and safety regulations in favor of special interests.

Why should the regulatory process and Bush's changes to it matter? Over the past 30 years, we have made significant progress through strong public safeguards. Our air and water are cleaner; our food, workplaces, and roads are safer; and civil rights protections have improved. These protections have saved many thousands of lives and improved the quality of life for all Americans — without hobbling industry or the economy. In short, regulations matter.

Yet there is still much to do, especially after six years of putting the needs of the administration's supporters over the needs of the public. Food borne illnesses kill an estimated 5,000 and sicken 76 million. Nearly 6,000 workers die as a result of injury on the job, with an additional 50,000 to 60,000 killed by occupational disease. And asthma — linked to air pollution — is rising dramatically, afflicting 17 million, including six

million children.

Why were major media outlets so slow to give the order some coverage? Much attention at the time was focused on a new Congress getting organized and working on an ambitious agenda, as well as the increasing problems in Iraq. The mainstream media also often overlooks regulatory issues. All this allowed administration officials to make these changes relatively quietly.

Now Congress is paying attention and exercising its oversight responsibilities on this and other matters. The House Science and Technology Committee's Subcommittee on Investigations and Oversight is planning a hearing on the impact of the order on Feb. 13. There may be other hearings to learn the full impacts of

- placing political appointees deeper inside regulatory agencies;
- requiring "market failure" criterion as a basis for formulating health and safety protections;
- requiring agencies to aggregate total costs and benefits of their annual regulations; and
- subjecting agencies' guidance documents — generally interpretive statements used to clarify regulatory obligations to industry or explain technical matters — to the same lengthy review process OMB uses for regulations.

If OIRA so chooses, the impacts of delaying regulations and guidance could affect a broad range of public protections. For example, the Centers for Disease Control and Prevention (CDC) just issued guidance regarding actions businesses, urban governments, and school districts should take if an influenza pandemic occurs before a vaccine becomes available. The CDC planning document's wide-ranging recommendations could easily have a significant economic impact, which would trigger a review by OIRA under the new requirements and cause months of delays.

We welcome the congressional attention to an issue with significant implications for health, safety, environmental and civil rights protections. Congress has the opportunity to reassert itself in the battle with the administration over the proper role of agency implementation of legislation. Further centralizing power in the executive branch when Congress has a constitutional role in agency actions is not good government, despite what supporters of the order have argued. The electorate sent a clear message in November that it was time to stop putting special interest priorities ahead of public needs. We need Congress to show the administration that it is paying attention.

Congress Steps Up Oversight of Executive Branch

Congressional Democrats are stepping up their oversight of the Bush administration. Several of the steps Congress has taken, or is likely to take soon, have implications for the federal government's regulatory policy. One recent oversight hearing reflected

concerns over scientific integrity within the White House. The impetus for two other hearings, and one potential hearing, is concern over the Bush administration's failure to enforce laws passed by Congress.

On Jan. 30, the House Oversight and Government Reform Committee held an oversight hearing regarding political interference in the work of government climate scientists. Committee Chairman Rep. Henry Waxman (D-CA) and ranking minority member Rep. Tom Davis (R-VA) have made several requests for documents from the White House Council on Environmental Quality (CEQ) related to the White House's influence on the work of government climate scientists. The requests date back to the 109th Congress. CEQ did not fulfill the requests.

Waxman argues that the White House has exerted its influence in order to downplay the threat of global climate change. In his opening statement, Waxman said, "We know that the White House possesses documents that contain evidence of an attempt by senior administration officials to mislead the public by injecting doubt into the science of global warming and minimizing the potential dangers." Waxman's claim was backed up by a joint report by the Union of Concerned Scientists and the Government Accountability Project introduced at the hearing. According to the online news source *Environment & Energy Daily* (subscription required), Waxman now expects CEQ to be fully cooperative and does not anticipate the need to use the committee's power of subpoena to gather the information the committee needs.

On Feb. 6, the Senate Environment and Public Works Committee held an oversight hearing on the U.S. Environmental Protection Agency (EPA). The Committee, chaired by Sen. Barbara Boxer (D-CA), prodded EPA on several issues including political influence over air pollution standards, perchlorate contamination, and requirements, eased by EPA in December 2006, for facilities reporting toxic chemical discharges.

In her opening statement, Boxer gave reason as to why the committee had brought together such a variety of issues in one hearing: "These EPA rollbacks have common themes: they benefit polluters' bottom line, and they hurt our communities by allowing more pollution and reducing the information about pollution available to the public."

On Jan. 31, the House Judiciary Committee held an oversight hearing on presidential signing statements. In the hearing, a counselor from the Department of Justice and a Georgetown University law professor defended President Bush's use of signing statements. Former Rep. Mickey Edwards and the president of the American Bar Association criticized signing statements on the grounds they pose a danger to constitutional checks and balances.

Presidents often issue such statements when signing a bill into law. Historically, presidents have used signing statements to express their personal opinion on a bill. However, Bush has received criticism for his practice of using signing statements to

reserve the right to *not* enforce certain aspects of laws passed by Congress.

In his opening statement at the hearing, Rep. John Conyers (D-MI) called signing statements "extra-constitutional conduct by the White House." He added, "That conduct threatens to deprive the American people of one of the basic rights of any democracy — the right to elect representatives who determine what the law is, subject only to the President's veto."

Congress has expressed further interest in investigating the administration's activities in enforcing laws. On Feb. 1, Rep. George Miller (D-CA), Chairman of the House Education and Labor Committee, wrote a letter to Secretary of Labor Elaine Chao criticizing the Department of Labor (DoL) for its slow implementation of the Mine Improvement and New Emergency Response Act (MINER Act), which was passed in response to the mine disasters in West Virginia and Kentucky early in 2006. Bush signed the act into law in June 2006, but critical elements of the law have gone unenforced, according to Miller's letter. Miller promised to take a "thorough look" at federal mine safety policy, and pledged committee oversight in 2007.

The tenor of these investigations indicates congressional Democrats' dissatisfaction with the way the Bush White House manages agency practices. The recent controversy surrounding Bush's amendments to Executive Order 12866 on Regulatory Planning and Review may trigger further congressional oversight. Overall, this spate of investigations is a clear sign that Congress will no longer sit idly by while the Bush administration shifts more and more power to the White House.

Federal Contractors: The Invisible, Unaccountable Agency

The incredible growth in the amount of money spent by the federal government on contractors, with almost no corresponding increase in oversight or management, was highlighted in a recent *New York Times* article, "In Washington, Contractors Take on Biggest Role Ever." According to the article, the amount spent on federal contracts has doubled since 2000, from $207 billion to $400 billion. The lack of sufficient government oversight has led to a virtual free reign for contractors, who are not answerable to the public and have not been called to account by the federal government.

Federal contractors, while legally obligated to provide a particular service or product, are essentially invisible and unaccountable to the public. Agencies must answer questions from the public and provide documentation on actions if requested under laws like the Freedom of Information Act. But companies, even those accepting hundreds of billions of federal money, are not required to be transparent or responsive to the public in any way. There is no requirement that companies accepting federal contract money also accept any responsibility to be open and forthcoming with the public or Congress.

The *New York Times* article is the first in a series. The article highlighted how various

functions that were previously performed by government are now being outsourced. Some would say this outsourcing is a way to give the impression that government is smaller than it really is, since there are no analyses that identify the number of contractors providing agency functions. Others have argued that "inherently governmental" activities should never be contracted out; however, they are increasingly being done so. Finally, some have noted that people who treasure public service are leaving government to work as a contractor, doing the same work they may have done in government, but being paid considerably more money.

The increasing amount spent on contracts and the diminishing amount of accountability contributed to the effort during the last Congress to pass the Federal Funding Accountability and Transparency Act (P.L. 109-282). The bill, now law, was co-sponsored by Sens. Tom Coburn (R-OK) and Barack Obama (D-IL) and mandates that the Office of Management and Budget (OMB) create and maintain a searchable database of all federal spending by 2008. This new tool will be the first step to bring greater attention to how the government spends billions each year.

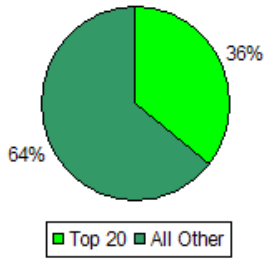
While the government website isn't supposed to available until next year, OMB Watch used currently available data to launch a website called FedSpending.org that allows users to search more than $12 trillion of federal spending over six years. The site includes tutorials on using the site that explore many of the issues raised in the *Times* article, including the growth of federal contracts, the decreasing use of competition, and the intense concentration of federal contract money among a relative few companies.

Using FedSpending.org, OMB Watch found there were 168,317 contractors in 2005, but that just 20 companies accounted for 36 percent of the $382 billion contracted out (see chart below). This concentration of resources in the hands of a few companies raises a number of questions, particularly about accountability.

Top 20 Companies Account for 36% of All Contracts in FY 2005

Total # of Contractors
168,317

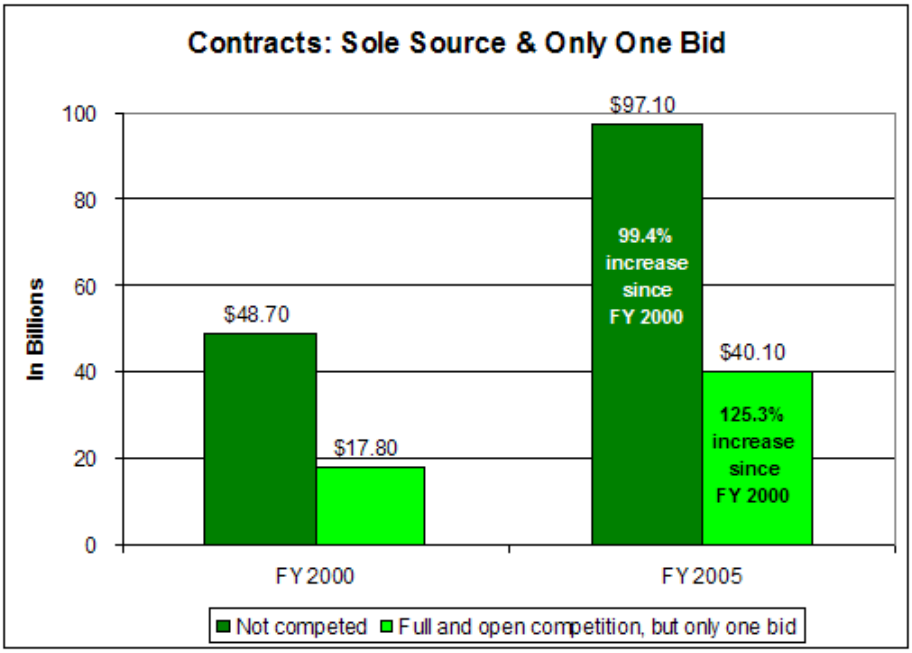
Total Amount of Contracts
$381.93 Billion



Contractor	$ Billions	%
LOCKHEED MARTIN, INC	$24.90	6.52%
THE BOEING COMPANY	$19.56	5.12%
NORTHROP GRUMMAN SYSTEMS CORP	$14.97	3.92%
ADVANCED INFORMATION ENGINEERI	$10.78	2.82%
RAYTHEON AIRCRAFT COMPANY	$9.05	2.37%
HALLIBURTON CO.	$5.91	1.55%
MISCELLANEOUS FOREIGN CONTRACTORS	$5.82	1.52%
UNITED TECHNOLOGIES SERVICES INC	$5.02	1.31%
L 3 COMMUNICATIONS CORPORATION	$4.67	1.22%
CONAGRA, INC.	$4.37	1.14%
UNIVERSITY OF CALIF SYSTEM	$4.37	1.14%
MCKESSON AUTOMATION SYSTEMS IN	$4.33	1.13%
COMPUTER SCIENCES CORP.	$4.12	1.08%
BECHTEL GROUP, INC.	$4.01	1.05%
CARLYLE GROUP	$2.68	0.70%
ITT FLUID TECHNOLOGY CORP	$2.61	0.68%
BAE SYSTEMS/ROCKWELL COLLINS D	$2.57	0.67%
GE CAPITAL INFORMATION TECHNOL	$2.53	0.66%
HONEYWELL, INC.	$2.35	0.62%
HUMANA, INC.	$2.22	0.58%
Total	$136.83	35.8%

OMB Watch also found that between 2000 and 2005, there has been a rapid increase in contracts that have not been competed, but instead awarded as sole-source contracts. During that period, sole-source contracts have doubled in size (see graph below). Additionally, the number of contracts that have had open competition but only one bidder has also risen rapidly since 2000.

This may be part of the reason that the House Oversight and Government Reform Committee will be holding four days of hearings, from Feb. 6-9, on waste, fraud, and abuse of taxpayer dollars. The first two hearings will address contracting issues related to the war in Iraq. The third hearing with address contracting issues related to the Department of Homeland Security. The final hearing will focus on fraudulent, abusive, or wasteful pharmaceutical pricing practices that affect federal health programs.



If the trends of increasingly outsourcing government activities and decreasing the amount of oversight such contractors receive are to be reversed, Congress is going to have to use tools such as FedSpending.org and the Coburn-Obama law as first steps to broader reforms. Changes that might help include placing stricter limits on what activities can and can not be outsourced, stronger requirements for competition, contractor requirements for disclosure of compliance with federal laws, and other information.

TRI Changes are Major Issue at EPA Oversight Hearing

The Environmental Protection Agency's (EPA) changes to the Toxics Release Inventory (TRI) were a prominent issue at the Senate Environment and Public Works Committee's (EPW) Feb. 6 EPA oversight hearing. The three-panel hearing also addressed the closure of EPA libraries, the elimination of perchlorate testing, and the agency's current consideration of revoking the air quality standard for lead.

The EPW hearing is EPA's first under the new Democratically controlled Congress and probably set a tone for future hearings. It included much sharper questioning of EPA decisions and actions than was typical under the Republican controlled hearings of the last few years. EPA Administrator Stephen Johnson, after a brief opening statement claiming significant improvements in protecting the environment, was almost immediately placed on the defensive with tough questions about EPA's library closures and raising thresholds for toxic reporting.

Sen. Frank Lautenberg (D-NJ) was among the most aggressive committee members on the subject of EPA's TRI changes. Lautenberg questioned Johnson on the importance

EPA placed placed on input from its own Science Advisory Board, state agencies and the general public—all of which weighed in heavily against the changes to TRI. Johnson responded that these perspectives were considered by the agency but that EPA had an opportunity to improve environmental performance and create incentives to reduce toxic pollution. When questioned further on how EPA could be sure toxic pollution would drop under the changes, Johnson was unable to provide any specific evidence or analysis.

In the second panel, John Stephenson, Director of the Natural Resources and Environment Department at the Government Accountability Office (GAO), testified about preliminary findings from its investigation of the EPA's proposals to reduce TRI reporting. Stephenson testified, "EPA did not adhere to its own rulemaking guidelines when developing the proposal to change TRI reporting requirements." The GAO investigation found at least three questionable actions by EPA, including the forced consideration of an option that a workgroup rejected earlier in the process, shortcuts in impact analysis and insufficient opportunity for a full agency review by other EPA offices.

Stephenson also made clearer the enormous impact the changes would have to information on local toxic pollution. GAO concludes "that the TRI reporting changes will likely have a significant impact on information available to the public about dozens of toxic chemicals from thousands of facilities in states and communities across the country." Stephenson's testimony also noted that EPA's claims that the impact of the changes were minor because the changes would only effect one or two percent of toxic pollution tracked under TRI "runs contrary to the legislative intent of EPCRA and the principles of the public's right-to-know."

Protecting small businesses came out as a major theme in justifying the EPA's rollback of the TRI program. Thomas Sullivan, General Counsel for the Small Business Administration's Advocacy Office, and Nancy Klienfelter, a small business owner and member of the National Federation of Independent Businesses, both testified that the reduced TRI reporting would be a significant benefit to small business. However, several Senators questioned the benefits available. Sen. Amy Klobuchar (D-MN) confirmed with Johnson that some of the TRI information would still have to be reported under another provision that provides first responders with emergency planning information. Klobuchar found it difficult to understand that significant time savings could be achieved from just reporting the information in one place instead of two.

During his questioning of Johnson, Lautenberg also stated that he would be introducing legislation shortly that would restore the TRI program's previous reporting thresholds. Later, Sen. Barbara Boxer (D-CA), chair of the committee, also stated that since the EPA had finalized the TRI changes, legislative action might be needed.

OMB Watch Critical of Proposed Chemical Security Rule

In response to the Department of Homeland Security's (DHS) proposed interim chemical security rule, OMB Watch will submit comments to DHS that argue for increased transparency and stronger protections at thousands of facilities across the country.

Chemical facilities pose one of the greatest threats to our nation's security. The U.S. Army's Surgeon General states that 2.4 million people are at risk of death or injury as a result of an attack on a chemical plant in the United States, and the U.S. Public Interest Research Group estimates that 41 million Americans live in "within range of a toxic cloud that could result from a chemical accident at a facility located in their home zip codes." In order to prevent an attack that could approximate another 9/11, we need to ensure that the highest security is in place at chemical facilities.

Section 550 of the Department of Homeland Security Appropriations Act of 2007 requires DHS to develop a temporary program for instituting security performance standards for high risk chemical facilities. DHS's proposed regulations will require certain high risk facilities to develop site security plans and submit them to DHS for approval.

While the statutory language in Section 550 passed by Congress contained serious flaws, DHS compounded this poor legislation with even poorer regulations. In comments to DHS, OMB Watch will outline several problems with the proposed regulations. In particular, the regulations contain excessive secrecy provisions that create impediments to effective oversight and information sharing, and the regulations institute a temporary federal program that preempts state regulations.

Excessive Secrecy

Limiting the free flow of information increases the danger faced by a terrorist attack upon a chemical facility. In testimony before the Committee on Homeland Security, Lee Hamilton, former Vice Chair of the 9/11 Commission, stated, "Poor information sharing was the single greatest failure of our government in the lead-up to the 9/11 attacks." Instead of fixing this problem, DHS heads in the opposite direction by proposing the creation of a new category of controlled information called Chemical-terrorism Security and Vulnerability Information (CVI). DHS states that CVI will be strictly limited to those persons with a "need to know." OMB Watch strongly objects to this paradigm for information sharing as it violates the fundamental democratic principle of a "right to know."

In order to prevent a potentially catastrophic event or to recover from such an event, DHS needs to invest time and effort into developing robust information exchange procedures. The proposed regulations should specify how the information which is collected will be combined and shared with other information and ongoing counterterrorism and security programs at other departments and agencies. OMB Watch

encourages DHS to create the infrastructure to increase information sharing, not by limiting information to those who "need to know," but by creating an environment and culture at DHS which understands the need to share information with state, local and private actors and with the public. Information restrictions should be limited to only the most detailed and specific information. DHS should specify in the regulation precisely what reports and information submissions will be withheld from public disclosure, rather then creating an open-ended category.

People who live near chemical facilities have a right to know if they are living in harm's way. Moreover, DHS should provide information to inform the public, Congress, and public interest groups on the status of chemical security and the improvements being made. OMB Watch recommends that the following information be made public:

- The number and identity of chemical facilities covered by the program;
- The number and identity of facilities who have been certified by DHS;
- The number and identity of facilities who have had their site security plans denied by or are waiting for approval from DHS;
- The best practices of site security plans for chemical facilities on a sector-by-sector basis;
- The approval and denial of site security plans for particular facilities but not the details regarding vulnerabilities.

State Preemption

The proposed interim regulation states that no state law or regulation can have any effect if it conflicts with DHS's regulation. If a state regulation is stronger than the federal regulations, DHS argues, it could frustrate Congress's intent. Therefore, according to DHS, the state regulation should be granted no effect. This is an overly expansive interpretation of DHS's authority under Section 550.

Moreover, certain states face unique threats due to the proliferation of chemical facilities in densely populated regions. In New Jersey, there are six industrial facilities that could endanger the lives of one million people and fifteen that could endanger 100,000 or more people. The FBI has called a two-mile stretch of New Jersey the "most dangerous two miles in America." As a result, New Jersey has stronger chemical security measures that require facilities that use the most toxic chemicals to investigate whether they could reduce or replace those chemicals. DHS's chemical security regulations could affect New Jersey's requirements by setting the federal standard as a ceiling.

OMB Watch will raise a number of other concerns in its comments to DHS, including the failure to consider inherently safer technologies and the failure to include a role for worker and community participation in the oversight of site security improvements. Section 550 requires DHS to issue finalized regulations by April 4.

FEC Tells Court that Case-by-Case Regulation of Independent PACs Works

On Feb. 1, the Federal Election Commission (FEC) published new guidance for its 2004 rule defining when independent political committees are subject to federal campaign finance rules and contribution limits. The document responds to a court order seeking stricter regulation of 527 groups. In the guidance, the FEC cites its 2006 enforcement action against six groups as proof that its case-by-case approach — used to determine whether a group's "major purpose" is to influence federal elections — is workable. It remains to be seen whether the court will accept this approach, which moves the FEC toward a vague standard similar to the "facts and circumstances" test used by the Internal Revenue Service (IRS) to define prohibited partisan activity by charities and religious organizations.

In 2004, the FEC rejected arguments by campaign finance reform groups and Reps. Chris Shays (R-CT) and Martin Meehan (D-MA) urging it to subject groups exempt under Section 527 of the tax code to the same regulatory regime as campaigns and political parties. In response, Shays and Meehan took the issue to federal court, and although the court declined to order a new rulemaking proceeding, it ordered the FEC to explain why 527 tax exempt status should not trigger federal campaign finance regulation.

The FEC's new "Explanation and Justification" explains that the IRS tax exempt status criteria are broader and serve a different purpose than the Federal Election Campaign Act (FECA). As a result, the FEC says it will focus on two criteria in FECA that establish whether a group is to be regulated as a federal "political committee": whether the group has received contributions or made expenditures of $1,000 or more that expressly advocate for or against federal candidates *and* whether the group's "major purpose" is to influence federal elections.

After the Supreme Court upheld the McCain-Feingold law, express advocacy is no longer limited to "magic words" like "vote for" or "vote against". Instead, the standard has become vague, counting expenditures for communications that are "unmistakable, unambiguous, and suggestive of only one meaning" as intending to support or oppose federal candidates. In addition, the definition of a group's "major purpose" is not clear, since the FEC says it will make that determination on a case-by-case basis, looking at factors such as the wording of fundraising appeals, spending patterns, and public and internal statements of purpose. The FEC says this "fact-intensive analysis" is necessary, and that "any list of factors developed by the Commission would not likely be exhaustive in any event."

The result is that any organization could become the subject of a FEC investigation into its campaign activities compared to its non-campaign activities, with FEC staff deciding what the group's "major purpose" is. The FEC says uncertainty can be addressed by looking at its past enforcement decisions, since "Any organization can look to the public

files for the Political Committee Status Matters and other closed enforcement matters, as well as advisory opinions and filings in civil enforcement cases, for guidance...."

According to the FEC, nonprofits can ask for Advisory Opinions or make their own best judgment about whether they should register as a regulated political committee. The FEC also says that if a nonprofit disagrees with an FEC Advisory Opinion, the group can appeal, and if a nonprofit is investigated, it can appeal the outcome or settle and pay fines. This will provide little comfort to nonprofits without the resources to hire the legal expertise needed to wade through these complexities.

In December 2006, three 527 organizations were fined a total of $630,000 for failure to register as political committees. They included Swift Boat Veterans and POWs for Truth, the League of Conservation Voters and MoveOn.org. The FEC also cited action against the Leadership Forum, Freedom Inc. and League of Conservation Voters 527 fund as proof that their case-be-case approach to enforcement is adequate.

Courts Defining When Government Funds Cannot Support Faith-Based Programs

The U.S. Supreme Court will soon hear oral arguments about whether taxpayers have the right to challenge the constitutionality of government funding for conferences supported by the White House Office of Faith-Based and Community Initiatives that are alleged to promote religious groups over secular ones. Meanwhile, several recent court decisions involving separation of government-funded and religious programs provide some clarity to vague federal regulations.

Because the Establishment Clause of the U.S. Constitution prohibits government funds from being used to pay for programs that include religious content or require participation in religious activities, federal regulations require religious and government funded programs to be separated in time and place. However, there has been little concrete guidance on how federal grantees implement this standard and little oversight. Since the Bush administration began its push to increase participation of faith-based organizations in federal grant programs, there has been a series of legal challenges to specific programs brought by nonprofits concerned about separation of church and state.

Supreme Court to Hear Case Challenging White House Faith-Based Office

On Feb. 28, the Freedom From Religion Foundation (FFRF) will argue before the Supreme Court that it should be allowed to challenge the constitutionality of the Bush administration's use federal funds for conferences the group says promote grant opportunities for religious organizations over secular ones. In December 2006, the Supreme Court granted review of *Hein v. Freedom From Religion Foundation Inc.* (U.S. No 06-157), after the U.S. Court of Appeals for the Seventh Circuit overturned a lower

court order dismissing FFRF's challenge.

The Bush administration argues that because Congress has not earmarked appropriations directly for the faith-based offices, there is no basis to sue over the discretionary use of federal tax dollars to promote religion. However, according to a recent FFRF news release, its brief "documents the tens of millions of dollars which have gone to the faith-based offices, often with direct Congressional oversight, since many Cabinets have placed the faith-based offices in their budgets, which are reviewed and debated by Congress." If the Supreme Court rules in favor of FFRF, the case will go back to the lower court, which will consider the constitutional issues.

Court Discontinues Funding for Michigan Teen Ranch

On Jan. 17, the Sixth Circuit Court of Appeals in Michigan upheld the decision of a lower federal court against Teen Ranch, a Christian ministry treatment center for abused and delinquent children. The court found the organization routinely used state funds for religious instruction during treatment. In 2003, the state stopped sending funds to the program, and the Michigan Family Independence Agency stopped placing at-risk teens in their program after a routine review showed the program was proselytizing with federal funds. A plan to correct the problem submitted by Teen Ranch failed to address the proselytization issue. Instead, the group issued a statement saying, "Incorporating religious teachings into on-going daily activities of youth and their treatment plans touches at the core of why we were founded, why we are here today, and why we will continue to include such programming for children in our care."

Teen Ranch sued claiming that their religious freedom, freedom of speech, and right to equal protection were denied when the funds were discontinued. They argued that since Michigan pays for the program on a per-child basis, it should be treated as a voucher program, which, under federal regulations on "indirect funding", would allow religious content in the program. However, Judge Damon Keith said that requires "true private choice" of program provider by those receiving treatment, and children at Teen Ranch had no real choice over their program placement. He also pointed out that the other 34 faith-based youth providers in Michigan had not violated rules against proselytizing.

Ruling Allowing Spiritual Screening in VA Chaplain Programs Appealed

FFRF will appeal a Jan. 8 federal district court ruling dismissing its lawsuit against the Department of Veterans Affairs (VA). In *FFRF v. Nicholson*, the group challenged the constitutionality of the VA's hospital chaplaincy program because the program broadly integrates faith while providing medical care. The VA has a required policy that each patient undergoes a spiritual assessment. One of the treatment programs referenced in the lawsuit is from Sheridan, Virginia. "The Sheridan VA Medical Center provides a drug and alcohol treatment program entitled the Spiritual Recovery Support Group (hereinafter SRSG). The purpose of SRSG is to provide intervention and support to

veterans suffering from low self-esteem because of 13 significant spiritual injuries."

The court said the VA program is permissible because it is voluntary. The opinion states, "Voluntariness lies at the heart of each and every aspect of VA's chaplaincy program being challenged by plaintiffs. In terms of its clinical chaplaincy program and integration into patient care, VA chaplains do not incorporate religious content into either their pastoral care or spiritual counseling unless that is the patient's wish." The court concluded that the VA's purpose is to promote the health of patients and that because patients could choose whether or not to work with chaplains, the program is therefore permissible. FFRF's appeal argues that patients do not have a choice in undergoing the spiritual screening, which it says asks intrusive questions about religious beliefs and practices.

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