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The Watcher
January 13, 2009 Vol. 10, No. 1

In This Issue

Bush's Midnight Rule Campaign Comes to a Close

President George W. Bush and senior administration officials appear to have concluded their midnight regulations campaign, leaving the incoming Obama administration with a host of new rules it may not agree with. In the past two months, the Bush administration has finalized at least 20 controversial midnight regulations affecting everything from the environment to health care and worker rights.

The regulations are scheduled to take effect before President-elect Barack Obama takes office. Some will take effect on Jan. 20 — the day of Obama's swearing in. Regulations are considered final upon publication in the *Federal Register*, but generally, federal law requires agencies wait at least 30 or 60 days before making the rules effective.

The Bush administration's shrewd timing handcuffs the Obama administration from repealing any Bush-era regulations in effect. Had Bush waited until January to finalize those controversial regulations — thereby missing the opportunity to close the 30- or 60-day

effective date window during his term — the Obama administration would have had an opportunity to delay the rules' effective dates and/or reevaluate the content of the regulations. (The Bush administration employed such a strategy upon taking office, delaying dozens of controversial Clinton-era regulations.)

Obama transition officials have shown interest in tackling Bush's midnight regulations. Incoming White House counsel Gregory B. Craig told *The New York Times* the Obama administration "will take appropriate steps to address any concerns in a timely manner."

But because Bush has limited the incoming administration's options, congressional action will likely be necessary to spur the reconsideration or reversal of the Bush regulations. Congress could disapprove regulations on a case-by-case basis using the Congressional Review Act. Congress could also use legislation to explicitly authorize the Obama administration to act on Bush-era regulations without having to reenter the often cumbersome rulemaking process.

Rep. Jerrod Nadler (D-NY) introduced Jan. 6 the Midnight Rule Act (H.R. 34), which would require incoming cabinet officials to approve Bush-era regulations before they are allowed to take effect. Other congressional members are mulling their options for addressing individual regulations.

The Democratic leadership has pledged to take its cues from the incoming Obama administration. Spokespersons for the offices of Senate Majority Leader Harry Reid (D-NV) and Speaker of the House Nancy Pelosi (D-CA) have said they are "waiting for guidance from the administration before adopting a specific strategy," according to *The New York Times*.

Reid and 16 co-sponsors, all Democrats, have introduced a "Sense of Congress" bill (S. 8), that, if adopted, would express Congress's displeasure with Bush's midnight regulation campaign.

Public interest groups are challenging the administration on a number of midnight regulations. A group of park conservation advocates are suing the Department of the Interior over its Dec. 10, 2008, rule, which lifts the 25-year-old ban on carrying loaded guns in national parks. According to a statement, "The groups are arguing that the rule is unlawful because the Department of the Interior did not conduct an analysis of the rule's environmental effects."

Environmental groups are suing Interior over another rule that puts endangered species at greater risk. The rule changes the implementation of the Endangered Species Act, which requires scientific consultation for decisions that could impact species. "The Bush rule allows federal agencies involved with projects such as new highways, bridges, dams and airports to ignore the views of wildlife experts and instead internally determine the threat level posed to imperiled wildlife," the groups said in a statement. "These agencies not only lack the expertise to make wildlife decisions, but often they have a built-in conflict of interest."

Highway safety advocates have filed a "petition for reconsideration" with the Department of Transportation over a rule that allows truck drivers to spend up to 11 consecutive hours on the road. The rule also shortens mandatory rest times between work weeks. The groups are asking

that an older 10-hour limit be reinstated, citing studies that show the risk of a crash increases during long runs like those allowed under the new rule.

One of the most controversial midnight regulations gives health care providers the right to refuse to provide women with access to or information about reproductive health services, if a provider objects on moral or religious grounds. The rule requires providers receiving federal funding to certify in writing that they are complying with laws intended to preserve an individual's right of conscience. On its face, it seems to target abortion and sterilization services, but critics say the Department of Health and Human Services (HHS) wrote the rule so broadly that it could also reduce access to information about and the dispensing of contraception.

The HHS provider conscience regulation and the endangered species rule were among at least six midnight regulations finalized the week of Dec. 15, 2008 — the final week for agencies to make certain their rules would take effect by the close of the Bush administration.

In addition:

- The U.S. Environmental Protection Agency (EPA) published two rules: one exempting farms from reporting to the government the air emissions generated by animal waste, and another reclassifying thousands of tons of hazardous waste, allowing it to be burned as fuel.

- The Department of Labor announced revisions to its guestworker program that weaken already modest protections for farmworkers.

- The Department of Transportation finalized a regulation that could lead to an increase in the privatization of public toll roads by forcing states to accept bids from private companies.

The provider conscience rule and both EPA rules are scheduled to take effect Jan. 20.

HHS published another controversial regulation on Dec. 24, 2008. The administration says the regulation, which requires government grantees to pledge opposition to prostitution and sex trafficking, will take effect Jan. 20, just 27 days after being finalized. HHS gave no defense for its decision to shorten the effective date window, ignoring the requirements of the Administrative Procedure Act (APA) that call for a minimum 30-day waiting period before a rule becomes effective.

Under the APA, agencies may only dispense with the 30-day requirement if they can show "good cause" for doing so. Similarly, the Obama administration could suspend any of Bush's midnight regulations if it cites good cause. However, both the executive branch and courts generally apply the good cause exemption conservatively, so a broad application of the provision is unlikely.

Transition at OIRA: What Kind of Change?

Change is coming to the leadership position at the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB). Two news reports during the week of Jan. 5 highlighted the outgoing and (potentially) incoming administrators of the office that reviews federal agencies' proposals for providing public health, safety, consumer, and environmental protections.

On Jan. 6, President Bush named Susan Dudley to the position of Acting Administrator of OIRA. The appointment was necessary to extend Dudley's tenure in the position she has held since April 2007. Dudley was one of a handful of recess appointments whose tenures expired when the 110th Congress officially ended — and a new recess appointment could not be made. In order to continue the work of the Bush administration through Jan. 20, it was necessary that someone be appointed to fill the position in an acting capacity, and Dudley was Bush's logical choice. According to a Jan. 8 BNA article (subscription), Dudley has submitted her resignation from the post effective Jan. 20.

Dudley's initial nomination was widely opposed by those who support an active role for government in providing regulatory protections, including OMB Watch, and was widely supported by business groups and those who view regulations only as unnecessary infringements on free markets. The controversy surrounding her nomination may have prevented the Senate from confirming her when the 109th Congress reconvened following the November 2006 elections, even though Republicans controlled the Senate at that time. Although new confirmation hearings were being scheduled in 2007 under Democratic leadership, Bush decided to use his recess appointment powers to install Dudley at OIRA. She is the only OIRA administrator not confirmed by the Senate since the office was created in 1980.

President-elect Obama's choice to head OIRA is Cass R. Sunstein, a prolific legal scholar, according to a Jan. 8 article in the *Chicago Tribune*. Sunstein is a friend of Obama's from Chicago and a member of the presidential transition team. He is currently a law professor at Harvard University and remains a visiting professor at the University of Chicago, where he and Obama taught. Sunstein is the author of numerous books and articles and has written on constitutional, administrative, financial, and environmental issues.

According to the *Tribune* article, Obama's decision to name Sunstein to OIRA signals Obama's commitment to overhaul regulatory processes that determine both financial sector regulations and health, safety, and environmental regulations. Obama has not formally nominated Sunstein and has not made any statement about the nomination.

Sunstein's writings may make his nomination for OIRA as controversial as Dudley's nomination. He is widely published and regarded as an intellectual heavyweight. Some of his writings raise concern over his appropriateness to lead an office that can ultimately control the outcome of health, safety, and environmental regulations. For example, the title of an October 2008 law review article he wrote asks, "Is OSHA Unconstitutional?" Sunstein uses the article

to advance the theory that the Occupational Safety and Health Act gives the Labor Department undue authority to promulgate health and safety regulations.

He has also written articles critical of traditional environmental regulatory approaches and has advocated for the use of market mechanisms and cost-benefit analysis, even when statutes explicitly exclude the consideration of costs in determining regulatory standards. In early January, *E&E News PM* quoted Frank O'Donnell, president of Clean Air Watch, as saying, "[Sunstein] appears to be embracing the very positions of the Bush EPA [Environmental Protection Agency] and other business interests who for years have tried to use this business of cost-benefit analysis as a device to attack the Clean Air Act."

The president of the Center for Progressive Reform, law professor Rena Steinzor, likewise criticized Sunstein's views on cost-benefit analysis in a blog post Jan. 9. She argues that Sunstein should not be "given a free pass" to be OIRA administrator and that "progressives concerned about regulatory policy and Sunstein's ample writings on the subject will want to hear assurances that under his leadership OIRA will stop serving as a roadblock to much needed protections."

Gary Bass, executive director of OMB Watch, said, "I have enormous respect for Sunstein's intellect, but there is a good deal of concern in the public interest community about his support of cost-benefit analysis and what that means for regulatory policy in an Obama administration. He has an immensely difficult task in front of him if the administration wants to change the regulatory process to provide greater public protections."

Justice Nominee May Bring Sunlight to Office of Legal Counsel

On Jan. 5, President-elect Obama nominated Dawn Johnsen as Assistant Attorney General for the Office of Legal Counsel (OLC). Johnsen has written articles advocating for restrained executive power and increased government transparency, in particular at OLC. The office issued several secret and controversial opinions during the Bush administration.

The OLC provides legal advice to the president, Cabinet departments, and other executive branch agencies regarding the constitutionality or legality of particular policies. OLC memoranda are regarded as binding on the executive branch, and as their legal opinions are most often kept secret, they frequently go unreviewed by Congress or the judiciary. The office has provided a legal justification for some of the Bush administration's most controversial counterterrorism activities, including John Yoo's secret 2002 torture memorandum, the National Security Agency's secret warrantless wiretapping program, and secret Central Intelligence Agency prisons.

Johnsen, most recently a professor at Indiana University Law School, spent several years at OLC during the Clinton administration, including two years as acting head. Along with eighteen other former attorneys from OLC, Johnsen authored a white paper — "Principles to Guide the Office of Legal Counsel" — outlining the manner in which OLC should operate.

Johnsen and the other authors concluded that greater transparency at OLC would have trickle-down effects across the federal government, strengthening the rule of law and the system of checks and balances while enriching the quality of American democracy.

The white paper recommends OLC make its opinions public "in a timely manner, absent strong reasons for delay or nondisclosure." The former OLC attorneys believe doing so promotes accountability, "ensur[ing] executive branch adherence to the rule of law and guard[ing] against excessive claims of executive authority," and as a corollary, "transparency also promotes confidence in the lawfulness of governmental action." The paper also proposes that the public disclosure of legal advice helps agencies understand and apply such advice. Finally, disclosure allows the legislative and judicial branches to better evaluate and check executive actions.

In an article published in the *UCLA Law Review*, entitled "Faithfully Executing the Laws: Internal Legal Constraints on Executive Power," Johnsen sees OLC as an essential contributor to the checks and balances on the president's power. Complementing the external checks of the legislative and judicial branches, Johnsen believes OLC can serve as a check internal to the executive branch. "OLC must be prepared to say no to the President. For OLC instead to distort its legal analysis to support preferred policy outcomes would undermine the rule of law and our democratic system of government."

Johnsen believes that the "torture opinion" was constructed on a flimsy legal basis, explicitly to achieve the goals of the executive. She theorizes that had OLC been concerned with not merely justifying action regardless of its constitutionality, but with providing a neutral legal analysis, such an opinion would never have been issued.

President-elect Obama made repeated campaign promises about having the most transparent administration in our country's history. Based on Johnsen's previous writings, her nomination appears to not only signal a strong intent to break with Bush administration policies, such as the use of torture, but also a significant step to ensure and improve transparency across the executive branch.

Transparency Concerns Raised about EPA Nominee

President-elect Barack Obama's nominee to lead the U.S. Environmental Protection Agency (EPA), Lisa Jackson, has drawn both praise and criticism from environmental advocates. Some have accused Jackson of limiting public participation, denying the release of information to the public, and weakening scientific integrity in her time as a state environmental commissioner in New Jersey. Other environmentalists have hailed the nomination and believe the events should not be attributed to Jackson.

Jackson served as commissioner of the New Jersey Department of Environmental Protection (DEP) from February 2006 to November 2008. Much of the criticism of Jackson's tenure concerns charges of weak enforcement and poor administration, especially related to the

cleanup of the state's numerous toxic waste sites — New Jersey is home to more Superfund sites than any other state in the nation.

However, Jackson's environmental supporters place the blame for DEP's shortcomings on miserable state budget conditions and obstacles generated by Governor Jon S. Corzine (D). Moreover, many of the DEP problems identified predate Jackson's tenure, by more than 20 years in the case of some Superfund sites.

Several criticisms directed against Jackson may have implications for government transparency and scientific integrity at a Jackson-led EPA. Public Employees for Environmental Responsibility (PEER), a national watchdog group that has a chapter active in New Jersey, has identified alleged cases of secrecy and reprisals against scientists in Jackson's DEP.

According to reports posted on PEER's website, a whistleblower in the DEP was reassigned after criticizing the objectivity of a panel investigating the relicensing of a nuclear power plant. In another case, a 20-year DEP veteran scientist, Zoe Kelman, resigned in protest when she allegedly was removed from a chromium study after criticizing DEP standards for chromium pollution. PEER has also accused Jackson's DEP of issuing a "gag order" against its employees following criticisms of the agency's performance regarding the cleanup of toxic sites.

Concerns have also been raised about excessive withholding of information. In July 2007, PEER petitioned the DEP to change rules to allow public release of officials' calendars and meeting information. The petition was denied. The group also criticized a task force created to review DEP's permitting programs and offer suggestions for streamlining the processes. The task force was dominated by industry representatives, lacked public involvement, and failed to make substantial recommendations, according to PEER.

The New Jersey chapter of the Sierra Club strongly supports Jackson's nomination and refutes many of the criticisms from PEER and others, calling them "false and derogatory statements ... based on half truths and faulty information." The Sierra Club chapter blames previous DEP commissioners and several governors, including Corzine, for many of the problems facing the state and DEP. The Sierra Club chapter disagrees with DEP's policy of preventing disclosure of meeting sign-in logs, but it blames a previous commissioner for instilling the secrecy. The chapter also denies that there was a lack of transparency in the proceedings of the permit efficiency task force and defends the task force's final report.

John Pajak, President of the New Jersey Work Environment Council, also noted his dissatisfaction with the governor in the organization's endorsement of Jackson. "While we have differences with some of Governor Corzine's environmental policies," stated Pajak, "Lisa Jackson has proven an able DEP Commissioner and has helped make New Jersey safer and more secure." In a press release following Obama's announcement, Environment New Jersey, a state conservation organization, also hailed the choice of Jackson. The group claimed, "As head of New Jersey's Department of Environmental Protection, Lisa Jackson championed

legislation to put New Jersey on the forefront of global warming solutions."

The EPA under outgoing administrator Stephen Johnson has drawn extensive criticism for the erosion of transparency at the agency. Given that Obama has made repeated statements about intending to have the most transparent administration in our country's history, many environmental advocates are looking forward to a change in direction at EPA that restores transparency, accountability, and scientific integrity. New Jersey Sen. Robert Menendez (D) said of Jackson, "I am confident she will bring the change we need from what has been simply disastrous environmental policy under the Bush administration." The Senate will hold a confirmation hearing for Jackson on Jan. 14.

Jackson joined the New Jersey DEP in March 2002 as Assistant Commissioner of Compliance and Enforcement after 16 years with EPA, initially at its headquarters in Washington and more recently at its regional office in New York City. In 2005, before being nominated Commissioner, Jackson also served as the DEP's Assistant Commissioner for Land Use Management.

Department of Energy Proposes Eliminating 20-Year-Old Disclosure Test

On Dec. 9, 2008, the Department of Energy (DOE) published a proposed rule that would revise its official Freedom of Information Act (FOIA) regulations to remove a 20-year-old requirement for weighing the public interest in records disclosure decisions. In the same rulemaking, DOE also proposed to raise FOIA copying fees from five cents to 20 cents a page.

The rule would remove one sentence from the agency's FOIA regulations. The sentence requires the use of a public interest "balancing test" and states, "To the extent permitted by other laws, the DOE will make records available which it is authorized to withhold under [FOIA] whenever it determines that such disclosure is in the public interest." OMB Watch and other groups, including the National Security Archive and the Federation of American Scientists, submitted comments opposing the rule change.

Balancing Test and FOIA Requirements

In the proposed rule change, DOE argued that the balancing test goes "beyond the requirements of FOIA." However, OMB Watch contends that it represents a process to ensure agency compliance with the law, additional statues, and court rulings related to FOIA. In fact, the sentence embodied the decisions of a U.S. Supreme Court opinion in 1976 that held, "Disclosure, not secrecy, is the dominant objective of the [FOIA]." The opinion was upheld in 1991 when the Court stated that FOIA established a "strong presumption in favor of disclosure." While neither the original law nor any amendments specifically require an agency to implement a balancing test, both the statutory history and court decisions make it clear that under FOIA, agencies are expected to use reasonable mechanisms to identify information for

public disclosure.

Agency Burden

The primary charge DOE levels against the public interest balancing test is that implementing the test places an undue burden on the agency. However, DOE fails to provide any details concerning financial, personnel, or time costs borne by the department because of the test. OMB Watch insisted that DOE must "provide sufficient information and supporting documentation" for a proper public comment process. The National Security Archive argued, in its comments, that proactive release of information in the public interest actually reduces burden on the DOE's FOIA program. The Archive stated, "DOE will receive fewer requests for the same information if it releases records to journalists and others who will publish it or posts frequently requested records as required by E-FOIA."

The department also claimed in the proposed rule that the test forces the agency "to reconsider a determination." Despite this claim, the simple balancing test language merely requires the agency to consider public interest along with other components when making disclosure decisions.

Impact of Balancing Test on Disclosure

The department stated in the proposed rule that "the extra balancing test does not alter the outcome of the decision to withhold information," explaining that instead, the DOE follows Department of Justice guidance, without elaborating on precisely which guidance DOE uses. It is somewhat perplexing that DOE claims an undue burden from the balancing test, while also stating the test does not alter any decisions. This lack of information and apparent paradox makes it impossible for commenters to appropriately respond. The 2001 FOIA memorandum from then-Attorney General John Ashcroft, restricts discretionary disclosures and promotes withholding information when there is a "sound legal basis" to do so. However, other FOIA guidance indicates an agency has flexibility on discretionary releases and would seem to argue for just such a balancing test to help determine which records should be disclosed.

Copying Costs

The DOE described an increase in copying fees from five cents to 20 cents a page as "modest and reasonable" and "more reflective of current costs and would bring DOE into conformity with the rest of the government." However, several aspects of this characterization appear difficult to defend. While 20 cents per page could be considered a modest amount of money, it would be difficult to describe a 400 percent increase as "modest." The proposed fee also does not match other major agencies. According to *Federal Register* records, the departments of State, Justice, Interior, and Homeland Security all have copying fees less than 20 cents per page. DOE has also not provided any information about current copying costs incurred by the department and how the proposed fee increase better reflects those costs.

Timing of the Proposed Rule

OMB Watch recommended that DOE withdraw the proposed rule until after the incoming Obama administration has established its FOIA guidance to agencies. If a rule change were still necessary, OMB Watch argued that additional information would be needed on the following issues:

- Burden imposed on the agency by the public interest balancing test
- Process by which the balancing test is administered
- Department of Justice guidance being referenced
- Copying charges assessed under FOIA by other agencies
- DOE's costs associated with copying records

Comments were accepted for only 30 days, and the comment period was conducted during the holiday season. Comments were due by Jan. 8.

The incoming administration will almost certainly bring with it new guidance on FOIA. There will likely be a new Attorney General memorandum on FOIA, along with other new policies and guidance from the Department of Justice. Given that an incoming administration means changes to the guidance are likely in the near term, OMB Watch argued that hurried rules "can be burdensome to the taxpayer as they are often challenged in court. They also prevent the completion of a thorough and proper democratic process by minimizing public scrutiny and participation."

Oversight Report Highlights Lack of Transparency in TARP

When Congress passed the legislation that created the $700 billion Troubled Asset Relief Program (TARP), it authorized the creation of the Congressional Oversight Panel (COP) to monitor the execution of the program by the Treasury Department. The panel is required to issue reports on a regular basis, and its latest report, released Jan. 9, indicates that the Treasury Department either cannot or will not answer the questions posed to it in the COP's previous report, released on Dec. 10, 2008.

The Dec. 10 report was issued within days of the panel's formation; the COP therefore had little time to produce substantive information on TARP. Instead, the panel posed to Treasury 44 questions falling under ten broader topics. One month later, the COP reported on Treasury's responses to those questions. Of the 44 questions originally asked, the Treasury Department failed to respond to 25 and provided non-answer responses to five others. The answers to the questions the Treasury Department *did* address provide a murky picture of the effectiveness of TARP and the processes by which Treasury is implementing the program.

In responding to the very basic question, "What is Treasury's strategy?" the department enumerated a series of goals without indicating a plan by which those goals could be achieved. Treasury also failed to respond to the question of what it sees as the fundamental problem in

the financial markets that TARP is supposed to fix. As the COP report's authors reason, without an understanding of the underlying problem, it is impossible to devise a strategy to tackle the problem itself rather than merely treat the attendant symptoms. What's more, the report indicates that Treasury is not collecting sufficient data to provide support to its claim that the program is in fact attenuating those symptoms.

Although Treasury provides several broad-based data points that it believes are sufficient to measure the effectiveness of TARP, the COP would prefer that Treasury collect and provide a more robust set of data. The COP believes that "metrics that gauge the markets more broadly, as well as other economic measures [are necessary], in order to form any firm view of the effectiveness of Treasury's strategy."

In addition to these broad metrics, the panel was also interested in assessing changes in the level of lending by banks that have participated in TARP. The COP believes that analyzing data on each bank receiving TARP funds would provide insight into whether banks are lending at higher levels than they otherwise would. And while Treasury has told the COP that it is working with banking regulators to obtain information on tracking TARP dollars, it has yet to inform the COP which, if any, metrics are being used to measure the impact of TARP funds on bank lending levels. Treasury also remains circumspect on answering the more general question, "What have financial institutions done with the taxpayers' money received so far?" The Treasury Department's response suggests that it gave little forethought into gathering information that would indicate if banks receiving TARP money were using the funds as intended.

On the specific question, "Have the companies used the funds in the way Treasury intended when it disbursed them?" Treasury provided no response to the COP. And with respect to whether banks are increasing their levels of lending, the COP insists that Treasury provide "some evidence" to support its assertion that lending levels are increasing. However, Treasury's response to this question is emblematic of its attitude toward transparency with respect to its approach to administering TARP.

The COP asked reasonable questions that Treasury can certainly answer, such as what authority the department assumes it has in executing specific TARP programs or how it determines the value of a given bank's assets. Yet the Treasury Department has refused to directly answer these questions. For other inquiries, such as those about the financial markets and the banking system, Treasury is resistant to obtaining data the COP considers useful in providing insight into the effectiveness of TARP. The resistance from the Treasury Department to disclose information about its activities and also to collect the necessary data to evaluate their actions has important implications for the very financial system that TARP was intended stabilize.

As the COP report argues, "The confidence [in the nation's financial markets] that Treasury seeks can be restored only when information is completely transparent and reliable." Without knowledge of Treasury's method of assessment of the health of the banks that receive TARP funds, potential creditors to those banks will have little basis on which to judge market risk.

The report also states that the "recent refusal of certain private financial institutions to provide any accounting of how they are using taxpayer money undermines public confidence in [the health and the sound management of all financial institutions]."

Many in Congress share these concerns and are developing legislation to increase the amount of information required to be disclosed about TARP. On the same day the COP released its second oversight report, Chairman of the House Financial Services Committee Barney Frank (D-MA) introduced legislation designed to, among other things, improve TARP oversight. The TARP Reform and Accountability Act of 2009 (H.R. 384) would :

- Require insured depository institutions that receive funding under TARP to report quarterly on the amount of any increased lending (or reduction in lending) and related activity attributable to such financial assistance.

- For recipients that are not insured depository institutions or that do not have a federal regulator, require any reporting and impose other terms no less stringent than those applicable to insured depository institutions, and require Treasury to examine the institution or delegate such functions to the Federal Reserve.

- Require Treasury to reach agreement with the institution and its primary federal regulator on how the funds are to be used and benchmarks the institution is required to meet so as to advance the purposes of the act to strengthen the soundness of the financial system and the availability of credit to the economy.

President-elect Obama, through Director-designate of the National Economic Council Larry Summers, has expressed a desire to improve transparency and oversight of TARP. Writing to congressional leadership on Jan. 12, Summers requested the release of the final $350 billion of TARP funds and promised that the incoming administration would "impose tough and transparent conditions on firms receiving taxpayer assistance." Summers also stated that Obama is "committed to ensuring a full and accurate accounting of how the Treasury Department has allocated the funds spent to date and going forward." While the letter was short on what specific remedies Obama intents to implement, it indicated that the Obama administration will likely pursue transparency and accountability policies that mark a departure from the current administration.

Regardless of the impact of transparency on the financial markets, there still exists the essential right of the public to know how the federal government is deploying hundreds of billions of dollars to repair a sector of the economy that, as has been argued relentlessly by economists and policymakers, has a large impact on all American families. The COP's activities and investigations and Frank's legislation are important first steps in clearing initial obstacles to transparency of the TARP, but they also indicate the myriad aspects of the program that remain behind closed doors and deserve increased public scrutiny.

House Adopts Changes in New Rules Package

The 111th Congress began work on Jan. 5 when the House approved a new rules package, including further earmark reforms and a modification of pay-as-you-go (PAYGO) rules.

According to a fact sheet released by Majority Leader Steny Hoyer's (D-MD) office, the new rules package would further "strengthen the integrity of the institution," and help to "restore accountability to the House." Among the many changes covered in the rules package are:

- Extension of the disclosure requirement for members negotiating post-House employment from the date a successor is elected to the date the member completes his or her service
- Elimination of term limits for committee chairs
- Modification to the motion to recommit rule often used by the minority to amend legislation being debated or send bills back to committee for major overhauls
- Including a prohibition on inserting earmarks in conference committee deliberations that have not first appeared in either the House or Senate version of the bill
- Enhancing PAYGO rules to bring them in line with the Senate rule to facilitate use of the same Congressional Budget Office (CBO) baseline

There are three distinct changes to the House PAYGO rules enacted during the previous Congress. The first is a technical change in how PAYGO rules operate in the House. Because the House and Senate did not institute identical PAYGO rules during the 110th Congress, each chamber had to reference a different baseline used by the CBO to calculate compliance with their PAYGO rules. The House has now modified its PAYGO rule to bring it into alignment with the Senate rule. This is a straightforward change intended to expedite negotiations between the House and Senate during conference committees.

The next change is the addition of an emergency exception to the House PAYGO rule. PAYGO has long had an exception for legislation developed to respond to an "emergency," and this change allows for such an exception in the case of "an act of war, an act of terrorism, a natural disaster, or a period of sustained low economic growth." The rule uses a widely accepted definition of "emergency" developed by the Office of Management and Budget in 1991 that states the spending or tax change must be (1) necessary, essential or vital; (2) sudden; (3) urgent or pressing; (4) unforeseen; and (5) temporary in nature.

The final change to the House PAYGO rule allows for additional flexibility in complying with the deficit-neutral nature of PAYGO. During the 110th Congress, each individual bill passed by the House was required to be deficit-neutral over both a one-year and five-year window. The change made in the rules for the 111th Congress allow for one House-passed bill to offset the cost of a separate House-passed bill if the two are linked together during the engrossment stage — or when legislation has been voted on and approved by the House and is being prepared to be sent to the Senate. Supporters of the change asserted that it will not weaken PAYGO rules to allow for legislation that increases the deficit, but it should make it easier

overall to pass legislation that is also deficit-neutral.

The addition of an emergency designation and the added flexibility of being able to link bills after passage to comply with PAYGO rules angered certain members on both sides of the aisle, who feel these changes open the door to pass any legislation without worrying about long-term budget impacts.

In addition to PAYGO, the new rules package makes a small change to earmark reforms that were also instituted at the start of the previous Congress. The change would allow a point of order to be raised against an "airlifted" earmark, which occurs when an earmark is added to a conference report being negotiated between the House and Senate, even though that specific provision is not included in either the House-passed or Senate-passed bill. This one change, however, falls short of instituting more aggressive earmark transparency rules.

There are other efforts underway, however, that will strengthen the disclosure requirements for earmarks in the 111th Congress. First, House Appropriations Committee Chairman David Obey (D-WI) and new Senate Appropriations Chairman Daniel Inouye (D-HI) announced new rules on earmark disclosure on Jan. 6. The two major reforms come close to embracing a proposal that Sen. Jim DeMint (R-SC) introduced during the 110th Congress that would require the posting of information on earmarks online *before* votes on legislation, not after as has happened in the past. Specifically, Obey and Inouye are calling for:

- Posting Requests Online: To offer more opportunity for public scrutiny of member requests, members will be required to post information on their earmark requests on their websites at the time the request is made, explaining the purpose of the earmark and why it is a valuable use of taxpayer funds.

- Early Public Disclosure: To increase public scrutiny of committee decisions, earmark disclosure tables will be made publically available the same day as the House or Senate Subcommittee (rather than Full Committee) reports its bill or 24 hours before Full Committee consideration of appropriations legislation that has not been marked up by a Senate Subcommittee.

The proposal from Obey and Inouye does not make clear exactly how these new online disclosure rules will work or how much good they will do. By requiring that each member of the House post earmark requests on his or her own website, the rule spreads information across 435 different websites. Obey and Inouye also do not standardize the type of information to be posted or where or how it should appear on each member's website. Bill Allison posted a succinct explanation on the Sunlight Foundation's blog about why this system of disclosure is problematic, at best. It would be better for public access and easier for lawmakers if earmark requests were posted in a central online database that was fully searchable and open to the public.

In addition to the Obey/Inouye rule, a bipartisan group of senators introduced legislation on Jan. 7 to improve earmark transparency and make it easier to block individual earmarks in

legislation. Sens. John McCain (R-AZ), Russ Feingold (D-WI), Claire McCaskill (D-MO), Tom Coburn (R-OK), and Lindsay Graham (R-SC) are cosponsoring a bill that would let senators raise points of order against unauthorized earmarks in appropriations bills. Sixty votes would be required to waive the point of order and retain the unauthorized earmark.

The Senate bill also requires appropriations and authorizing conference reports to be available online in a searchable form at least 48 hours before the Senate considers the legislation and requires that recipients of federal funds disclose payments to registered lobbyists.

Associations Release Recommendations for Obama, Congress, to Strengthen Nonprofit Sector

Two major nonprofit associations, Independent Sector and the National Council of Nonprofits, have released detailed recommendations on how the federal government can strengthen and serve communities through nonprofit organizations, including some proposals that can be included in the upcoming economic stimulus package.

Nonprofits hope the next administration will not only realize the value of the sector, but also embrace it with policies that promote long-term sustainable social change. For example, President-elect Barack Obama can encourage Americans to give more or volunteer more, to ultimately give back to one another. The new Congress and administration are being called upon to promote national service, ease lobbying restrictions on charities, and much more.

The National Council of Nonprofits has submitted its recommendations to Obama's transition team, specifically addressing the Corporation for National and Community Service, the GIVE Act, and the Serve America Act. Their document states, "The nonprofit sector serves as America's social safety net to provide for people needing basic human services like food, shelter, and health care. Yet that community safety net is unraveling rapidly, straining to endure the additional weight dropping on it from the economy."

On Jan. 6, Independent Sector, a nonpartisan coalition of over 600 charities and foundations, issued a seven-page document, *Policy Proposals to Strengthen the Nonprofit Community's Ability to Serve our Society*.

Independent Sector (IS) offers six broad policy proposals including:

- Ensure adequate resources and fair and responsible fiscal policies to support vital programs that sustain, protect, and strengthen communities
- Preserve and expand policies that help Americans give back to their communities
- Ensure that nonprofits have the capacity and capital to serve the needs of their communities
- Protect the rights of Americans to speak out through nonprofit organizations
- Ensure that Americans are able to continue vital charitable work throughout the world without unduly jeopardizing their safety or their civil rights

- Support funding and policies that provide for transparency and accountability to ensure integrity and public trust in charitable institutions

Encourage Americans to Join Service Programs

IS supports improving national service programs. For example, the Serve America Act, introduced in the previous Congress, would expand opportunities to engage in community service through stipend programs, voluntary paid leave, and subsidies from employers. In addition, it would allow older people to donate money from their individual retirement accounts to charity without paying taxes on the charitable disbursements. It also includes the creation of the Commission on Cross-Sector Solutions to America's Problems. Similarly, the National Council of Nonprofits supports the creation of the Commission, intended to transform "relationships among the three sectors: public, private, and nonprofit (including volunteers). The Commission can provide a vision of 'interdependent' sectors and the new infrastructure to support it."

The National Council of Nonprofits recommends that the Nonprofit Capacity Building Initiative (NCBI) be included in the Serve America Act as an amendment. "To ensure the continued viability of the social safety net, the federal government should purposefully work to strengthen nonprofits by including the NCBI program in the Serve America Act. Targeted grants in a pilot program can inform the Commission on Cross-Sector Solutions of replicable solutions through field experiences of innovative, proven capacity building."

Improve Nonprofits' Resources to Serve Our Communities

IS promotes establishing an office within the executive branch to coordinate education and oversight efforts that are directed toward improving the capacity of nonprofit organizations in all federal agencies. Similarly, the National Council of Nonprofits supports the GIVE Act to reauthorize the Corporation for National and Community Service (CNCS) and suggests elevating its CEO to a Cabinet-level position within a Social Entrepreneurship Agency for Nonprofits.

As Obama outlines on Change.gov, a Social Entrepreneurship Agency for Nonprofits would be placed within the Corporation for National and Community Service and would be dedicated to building the capacity and effectiveness of the nonprofit sector. Obama has already started to call on Americans to serve their communities. The Presidential Inaugural Committee released a public service announcement for television and radio, in which the President-elect asks Americans to get involved through USAservice.org.

U.S. Nonprofits Working Abroad

Noting criticisms of the Department of the Treasury's Anti-Terrorist Financing Guidelines, which are meant to prevent the diversion of charitable money to terrorism, IS calls for the adoption of the Principles of International Charity, which were developed by a working group

of nonprofit organizations as a proposed alternative to the guidelines.

Referencing the Partner Vetting System, which requires U.S Agency for International Development (USAID) grantees to collect and hand over to the U.S. government information about its employees, IS cautions against any such action. "Congress should prevent federal agencies administering foreign assistance programs from imposing requirements on international charitable organizations that would cause them to violate the civil rights of those with whom they work, to unduly jeopardize the safety of their employees and partners working outside the United States, or their own charitable missions."

Advocacy and Speech Rights

The National Council of Nonprofits' document recognizes that Obama "can help restore the American people's ability to participate meaningfully in their government by amplifying their voices through nonprofits." Nonprofit organizations allow Americans to have a collective voice to influence and change policies. To uphold and respect this tradition, both groups recommend that Congress protect the rights of nonprofit federal grantees to lobby with non-federal funds. In addition, IS specifically suggests raising "the $1 million ceiling on lobbying expenses set in 1976 to at least $3 million to account for inflation and eliminate confusing distinctions between 'grassroots' and 'direct' lobbying. Congress should amend the tax code to permit private foundations to support nonpartisan lobbying activities conducted by other 501(c)(3) organizations under the same rules that apply to those organizations."

At a time when every dollar counts, adequate funding and support for lobbying and advocacy is essential for change. This assertion is supported by recent research from New Mexico. A report from the National Committee for Responsive Philanthropy (NCRP), *Strengthening Democracy, Increasing Opportunities*, found that "for every dollar invested in the 14 advocacy and organizing groups studied, New Mexico's residents reaped more than $157 in benefits." The report's executive summary states that "communities with more engaged residents are stronger economically, politically and socially than communities in which residents are disconnected from each other and from civic institutions."

Some of these recommendations for the sector could be acted upon immediately, as groups are requesting their inclusion in the economic stimulus package. Promoting community and national service has started as a short-term request as groups are urging the inclusion of a "nonprofit stimulus" as part of the economic recovery plan. The proposals were drafted by the coalitions America Forward, ServiceNation, and Voices for National Service. The groups are circulating a letter that will be sent to Obama and Congress. The letter urges that the stimulus package include money to expand national service programs and support nonprofits that are providing social services. The letter references the Serve America Act, S. 3487.

The letter states, "A nonprofit stimulus fund, patterned after the network of social innovation funds that President-elect Obama called for during the campaign, could help stabilize and grow effective nonprofit organizations that provide vital services in the areas of education,

youth development, poverty alleviation, the environment and more."

Public Comments Ask FEC to Clarify, Simplify Campaign Finance Rules

After seeking public comments on ways to improve campaign finance regulation, enforcement, and compliance, the Federal Election Commission (FEC) heard a common theme: its rules and procedures can hinder nonprofits and small organizations from effectively participating in the political process. Nonprofits, including OMB Watch, recommended improvements that the FEC can make to ensure that all groups can fully participate in our democracy. A public hearing on the rules will be held on Jan. 14.

OMB Watch's comments asked the FEC to address problems that vagueness in several key regulations and case-by-case enforcement creates for nonprofit organizations. These problems arise in the electioneering communications rule, definition of "express advocacy," and definition of "major purpose."

The electioneering communications rule, which was established in the implementation of the Bipartisan Campaign Reform Act (BCRA) of 2002, prohibits corporations, including nonprofits, from airing broadcasts that refer to a federal candidate 30 days before a primary election and 60 days before a general election. In *Wisconsin Right to Life v. FEC*, the U.S. Supreme Court limited the electioneering communications prohibition to broadcasts that are "susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate." OMB Watch expressed concern with the FEC's ability to fairly and adequately enforce the restrictions due to the lack of clarity in the FEC's rule interpreting the Supreme Court's ruling.

OMB Watch also noted the uncertainty that arises under the FEC's case-by-case approach to deciding whether a communication is permissible. This method provides little guidance as to what is and is not prohibited activity and may ultimately have a chilling effect on groups that want to engage in issue advocacy through broadcast communications.

The FEC rule provides a safe harbor and gives some examples of communications that fall within it. However, this approach has the same kinds of problems charities and religious organizations are experiencing with the vagueness of the Internal Revenue Service's (IRS) "facts-and-circumstances" standard for enforcing the tax code's ban on partisan intervention in elections by 501(c)(3) organizations. The comments asked the FEC to consider moving away from the safe harbor and toward a more explicit rule that is less ambiguous.

The OMB Watch comments also noted that the definition of express advocacy, which plays an important role in triggering FEC contribution limits and reporting requirements, is very similar to the standard set in the Supreme Court's opinion in *WRTL* and leaves too much room for interpretation. As a practical matter, this vagueness makes it impossible for citizens' organizations that want to communicate with the general public to judge whether their

broadcast is allowable or not, which causes them to assume a risk of sanctions.

The major purpose test, established in *Massachusetts Citizens for Life (MCFL)*, is used to determine which organizations should be considered political committees. The *MCFL* decision notes that if the "major purpose" of an organization is to influence federal elections, it should be considered a political committee subject to FEC rules. However, the definition of the term "major purpose" is unclear, making it difficult to determine when an organization is considered a political committee and subject to FEC rules. OMB Watch urged the FEC to provide better guidance.

OMB Watch also asked the FEC to consider working with the IRS to harmonize the definitions of "major purpose" and "primary purpose." Organizations exempt under 501(c)(4) of the Internal Revenue Code, known generally as "social welfare" organizations, are allowed to engage in partisan political activity as long as it is not their "primary purpose." However, similar to the FEC's "major purpose" test, there is no IRS definition that clearly defines what constitutes "primary purpose." Harmonizing the definitions will help alleviate confusion that is sometimes caused due to the similarity of the terms, the lack of clarity surrounding both terms, and the FEC and the IRS using different standards.

Additional Comments Urge Simplification, Improved Disclosure

Other groups that commented to the FEC focused on procedural issues. Virginia Red State wrote that the record keeping burden discourages small political action committees from engaging in the grassroots political process. The group wants the FEC to allow small PACs to submit financial statements instead of the FEC form. Diane Valentino, who wrote on behalf of a local Democratic club, shared a similar sentiment. She wrote that the "rules, regulations, paperwork, [and] filings are so complex" that it is impossible for small groups to operate without expensive professional assistance.

The Sunlight Foundation's comments focused on technical and electronic issues. It wants the FEC to provide new web services, make the information available in a timelier, more user-friendly manner, improve electronic filing procedures, and provide online disclosure of significant agency contacts. The organization believes that transparency will improve "the public's confidence in government."

Craig Donsanto, Director of the Election Crimes Branch in the Department of Justice's Public Integrity Section, submitted a comment stating the DOJ should have a larger role in enforcement matters. Donsanto argues that since BCRA increased the penalties and seriousness of campaign finance violations, DOJ should be involved. He says that when FECA crimes are involved, enforcement efforts should be "coordinated with a federal prosecutor."

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Combined Federal Campaign #10201