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The Watcher

January 27, 2010 Vol. 11, No. 2

In This Issue

Commentary: Deficit Commissions Unlikely to Produce Results

On Jan. 26, the Senate rejected an amendment sponsored by Sens. Kent Conrad (D-ND) and Judd Gregg (R-NH) that would have created a bipartisan deficit commission. Due to the complex nature of the proposal, there is a low probability that such a commission would succeed in its goal to slow the growth of the national debt. Despite the improbability of success, there is much speculation that the president will now create a similar deficit commission through executive order.

There is still debate among economists about short- versus long-term federal deficits and their impact on the federal debt. However, there seems to be a growing consensus within Congress that the projected national debt needs to be addressed. One of the solutions put forward as far back as 2007 was a deficit commission proposed by Conrad and Gregg that covers all spending and tax issues. However, progressives argue there is no need for a commission, that debt reduction strategies can be addressed through the regular order of congressional business. Conservatives have wanted a one-sided debt reduction commission, aimed at spending cuts and excluding revenue increases. Others have wanted their particular concern, such as Social Security, off the table in any commission.

The recently rejected Conrad/Gregg commission called for an 18-member panel comprised of eight congressional Democrats, eight congressional Republicans, and two officials from the Obama administration. The commission would have developed proposals to report to Congress. Fourteen out of 18 members would have had to agree on any given proposal before the commission could present the solution to Congress. No lawmaker could amend any of the proposals once submitted to Congress, and each chamber would have to approve a solution with a two-thirds majority. These mathematical hurdles would likely prevent any bills from making it to the president's desk.

OMB Watch opposes these deficit commissions for several reasons. First, they would have Congress abdicate its most essential functions: authorizing spending and levying taxes. Leaving these decisions to non-legislative bodies raises a second concern. The fast-track, non-amendable procedures to consider these recommendations prevent citizens from affecting the shape of legislation that will have enormous consequences for their lives. Finally, while OMB Watch concurs that long-term deficits are not sustainable, short-term deficits in an economy as fragile as ours are actually a good thing. Any responsible approach to debt reduction must sort out the structural problems and address those head-on through the regular business of Congress. However, as demonstrated by President's Obama proposed three-year freeze on domestic spending (exclusive of Recovery Act funding), there is a tendency among politicians to tackle items with the least potential impact because those tend to be the easiest to address.

Tasking a single commission to look at every possible solution to reducing deficits and bringing back a balanced budget or proposals to reduce the debt is quite a daunting task. Theoretically, the taskforce would have examined everything from reducing mandatory and discretionary spending to raising taxes and reducing tax expenditures. Yet solving the long-term fiscal imbalances of entitlement programs such as Medicare and Social Security could easily necessitate commissions of their own. Committing sitting lawmakers to incorporate those issues into the larger problem of annual budget deficits is a recipe for gridlock.

Requiring 14 out of 18 members of the commission to agree on any one solution further reduced the probability the taskforce would report policy options. In addition, asking two-thirds of both chambers of Congress to agree to any solution without amendment is a sure way to stymie action on difficult policy questions. (See, for example, the health care bills currently stuck in Congress despite large majorities of a single party.)

In the days before the final vote on the amendment, both Republicans – claiming that the commission would be a backdoor approach to raising taxes – and Democrats – arguing the same for cuts to vital entitlement programs like Medicare and Social Security – hammered the proposal. President Obama will face this same environment with the deficit commission he is likely to create. Additionally, an Obama taskforce will not have statutory authority, which means that Congress is not required to take up any of the commission's recommendations. While recommendations from the presidential taskforce will be finalized after the 2010 midterm elections, it would appear that Congress does not have the political courage to make the tough choices that reducing deficits and slowing the growth of the national debt require.

The End of TARP to Be Met with Controversy

The Troubled Asset Relief Program (TARP) began with a single, basic idea: prevent imminent economic collapse. With that premise, then-Treasury Secretary Henry Paulson convinced Congress and President Bush to authorize $700 billion of emergency spending to undertake actions to avert such disaster. Now, with economic catastrophe averted but with the nation's economy still struggling, a new report turns policymakers' focus to the end of TARP.

Over the coming year, as TARP's mandate expires, Obama administration officials will have to make tough choices about whether to prioritize the program's original mandate – maintaining economic stability – or safeguarding taxpayer money. The two goals are supposed to be coequal, but in practice, Treasury has ignored the second priority – maximizing return on taxpayer investments.

The Congressional Oversight Panel (COP), which is charged with oversight of TARP, released its latest quarterly report during the week of Jan. 18, examining Treasury's TARP exit strategy. The report notes that while Treasury's authority to undertake actions using funds allocated under TARP expires on Oct. 3, TARP investments will continue for at least another year. Indeed, on Oct. 3, Treasury is expected to still be holding billions of dollars' worth of TARP assets.

Most of the COP report focuses on the dueling TARP priorities, which are laid out in the authorizing legislation, the Emergency Economic Stabilization Act of 2008 (EESA). The law states that the Treasury Secretary must "hold the [TARP] assets to maturity or for resale for and until such time as the Secretary determines that the market is optimal for selling such assets, in order to maximize the value for taxpayers." This single sentence contains both priorities noted above. The first, maximizing taxpayer return, is plainly stated, but the second, ensuring economic stability, is more subtle. Treasury has chosen to interpret the word "optimal" in the law to mean “when market conditions are optimal.” However, as the COP report states, "'optimal' timing might therefore not be the most profitable, but timing that best forwards Treasury's goals" of overall economic stability. Trying to ensure economic stability could mean that Treasury has to take a loss on an asset to stabilize the financial markets or prevent a too-big-to-fail bank from collapsing.

In practice, Treasury has had difficulty ensuring that the two goals are equal in priority. In particular, Treasury has opted to more frequently err on the side of protecting economic stability. Indeed, COP's report provides several examples of how Treasury is failing its statutory obligation to provide maximum return on investment.

The prime example of this is American International Group (AIG), the investment giant which almost collapsed in 2008. While Treasury has repeatedly stated that "taxpayers will be made whole" in the government's assistance to AIG, Treasury's actions indicate that it is in fact more focused on maintaining economic stability. In testimony leaked to *The New York Times*, the Special Inspector General for TARP (SIGTARP) estimates that taxpayers will lose almost $30 billion on the over $182 billion the government has invested in AIG, in large part because of bad choices the government made when bailing out the company. Instead of forcing AIG creditors to take a loss, Treasury insisted that they be paid in full. The COP report notes that Treasury said that it would rather reduce its AIG assets in an orderly manner, avoiding a premature sell-off, which could disrupt the economy, "than [make] a lot of money on it." This example does not bode well for when Treasury fully divests itself from AIG and the rest of TARP.

In its defense, Treasury has been driving a hard bargain when banks have tried to buy back their warrants, documents the banks gave to the government in exchange for financial support during the recession, which give the holder the right to purchase stock in the company. A recent *Wall Street Journal* article reported that Treasury has received $2.9 billion from warrant repurchases, well above third-party valuations of between $2.2 billion and $2.7 billion, indicating that Treasury has forced banks to pay top dollar for their warrants. However, one could argue that Treasury had no choice but to drive these bargains, since Treasury's warrant acquisitions are one of the most public aspects of the department's bank support, and anything less than a full repayment of the warrants would have stirred public anger toward the government. Regardless, the revenue from warrant repurchases falls far short of compensating for the cost of the other TARP programs.

Perhaps to help fill that gap, the administration has recently proposed the "Financial Crisis Responsibility Fee." The proposal is intended to repay the costs of TARP by making larger banks pay a fee based on the riskiness of their portfolios. The fee would be in place for ten years, although it could be extended if it had not yet covered the costs of the bailout.

The fee would seem to be an optimal solution to the problem of the competing TARP goals. By covering the cost of TARP itself, it would leave the Treasury free to divest itself of TARP assets in such a way as to ensure the greatest economic stability possible. By no longer having to worry about maximizing the return on investment, Treasury would be able to sell off its TARP assets whenever the market was most "optimal." This would save Treasury the excruciating back-and-forth process of asset sales to make sure taxpayers are made whole, or even earn a profit, as TARP would be paid for through the new fee.

The problem is that the fee is based on the state of a financial institution's books, not how much money they received from TARP. The more debt an institution has relative to its assets, the greater the fee it would have to pay. Therefore, organizations which greatly benefited from TARP, such as AIG, would only pay as much as other institutions with similar balance sheets. AIG could receive tens of billions of dollars in aid while paying mere hundreds of millions dollars back to Treasury. If Treasury is not concerned about maximizing taxpayer return when it is divesting its TARP assets, this problem will be exacerbated.

Ideally, the proposed fee would allow Treasury to continue to elide its statutory obligation to ensure maximum return on taxpayer investments. It has already ignored this obligation several times in pursuit of the competing goal of greatest economic stability. The greater-than-expected revenue from the warrants are a positive sign that the administration is willing to put safeguarding taxpayer money before corporate well-being, but considering TARP's past performance (with AIG losses indicating that TARP will still have significant costs), it is clear that TARP's demise will be, like its life, fraught with controversy and questionable outcomes.

Agencies Make Data More Widely Available Through Data.gov

On Jan. 22, executive agencies posted hundreds of datasets onto Data.gov as required under the Open Government Directive (OGD). Many transparency advocates have lauded the administration's efforts while at the same time raising questions about how well this first initiative under the OGD actually worked. The release of the datasets has triggered discussions about the value of the data, how individual privacy rights are protected, whether the datasets being released are new, and the quality of the data that has been released.

Under the OGD, published Dec. 8, 2009, executive branch agencies had 45 days to release at least three "high-value" datasets on their websites and register them with Data.gov. These datasets were to be information "not previously available online or in a downloadable format" and were to be published "online in an open format." All together, about 300 new datasets were uploaded to Data.gov, with 175 labeled "high-value." The topics of datasets released varied widely across the agencies, from population counts of wild horses and burros to hate crime statistics.

Despite the short deadline for this disclosure, several executive agencies released more than the required three datasets. The Departments of Defense, Energy, and Labor led the pack by releasing six high-value datasets each. Numerous independent agencies, such as the National Transportation Safety Board and the Equal Employment Opportunity Commission, also released datasets, despite the fact that the OGD does not appear to apply to them.

A sticking point is the definition of "high-value." According to the OGD, the definition covers information "that can be used to increase agency accountability and responsiveness; improve public knowledge of the agency and its operations; further the core mission of the agency; create economic opportunity; or respond to need and demand as identified through public consultation." A review of the datasets that have been released seem to indicate a limited number of datasets targeting agency accountability. Most agencies did not provide a justification for why the released dataset was considered "high-value."

The datasets that were released are supposed to be just the first installment. By April 7, each federal agency is required to develop an Open Government Plan that includes an inventory of high-value information available for download and identifies high-value information not yet available to the public. For such information, the agency is to provide specific target dates for making the material publicly available.

Some of the new sets that were released on Jan. 22 improve public access while others are simple data that has been released in the past but in raw formats. For example, instead of publishing the data in PDF format, the underlying data is available. Some changes will likely be perceived as very positive. In one case, the Center for Medicare and Medicaid Services, part of the Department of Health and Human Services, chose to publish for free Medicaid information that previously was only available by purchasing a CD-ROM from the agency. Several datasets offer increased insight into inspections and safety ratings, including two on housing inspection scores from the Department of Housing and Urban Development, a tire grading system and child car seat scores from the Department of Transportation, and chemical hazard information from the U.S. Environmental Protection Agency.

However, not all of the data appear to be new data not previously released. Instead, many of the datasets, while already available elsewhere, were being published in new, machine-readable formats that can be more easily manipulated by the public into useful tools. According to the Sunlight Foundation, of the 58 datasets released by the executive agencies, only 16 were previously unavailable in some format online.

The sheer scope of topics made it difficult for any one organization to evaluate the usefulness or value of the new data. Heather West of the Center for Democracy and Technology wrote, “There are some data sets that are clearly high value to the public. Hopefully, this is the start of a process to release all the data sets that are valuable, no matter how valuable or to whom.”

A complication to the release is that some of the datasets that were originally posted by agencies have already been taken down. All three sets posted by the Peace Corps were removed, as well as two from the Nuclear Regulatory Commission. Additionally, a Department of Education set about expenditure data in public schools that was already available through the National Center for Education Statistics was removed from the list of OGD data sets on Data.gov. In fact, the data policy on Data.gov does not mention anything that would guarantee permanent public access, meaning the agencies can take down information just as easily as they can put it up. These actions have reportedly been taken largely due to concerns over individual privacy rights.

In order to improve Data.gov and the range of data included on the site, the administration is welcoming comments on its blog, *Join the Dialogue*. Additionally, Data.gov allows users to rate each dataset for ease of access, usefulness, data utility, and an overall ranking. Several of the new datasets have already received numerous votes, including the Department of Veteran Affairs data on patient satisfaction with hospitals that currently has 47 votes but low scores and the Department of Homeland Security’s data set on the Federal Emergency Management Administration’s disaster declarations that has 10 votes and top marks in each category.

Overall, the effort demonstrated that if the government can push out this much data in 45 days, then what it is able to accomplish is quite promising. It should be noted that most of the datasets are only available in raw formats, and some of the files are quite large, ranging upward to several hundred megabytes. The general public will find them of limited use. The hope is that public interest groups, reporters, academics, and others will review the information, build interfaces, and report on findings. As agencies move forward with this process, it will be important for them to identify the most important and useful datasets and develop their own interfaces to allow broader public review of the information. The administration's ongoing dialogue with partner groups and the public will likely be key in identifying these top datasets.

Bite Taken Out of Chemical Secrecy

The U.S. Environmental Protection Agency (EPA) announced on Jan. 21 a new practice that will prevent chemical manufacturers from hiding the identities of chemicals that have been found to pose a significant risk to environmental or public health. The policy is a small step to increase the transparency of the nation's chemical laws, and it highlights both the problem of excessive secrecy and the power of the executive branch to make government more open – even without action by Congress or the courts.

The new practice, which took effect immediately upon publication, changes how the agency handles information submitted by chemical companies under the Toxic Substances Control Act (TSCA), the primary statute regulating chemicals. Under TSCA Section 8(e), chemical companies must notify EPA of any information indicating a chemical substance or mixture presents a substantial risk of injury to health or the environment. In numerous cases, EPA has allowed companies to hide the identity of the chemical in these reports as a trade secret. Under the new policy, EPA will reject confidentiality claims for a chemical's identity if the name is already publicly disclosed on TSCA's inventory of chemicals in commerce (a list of more than 83,000 chemical substances). The TSCA inventory does not include chemical substances subject to other statutes, such as food additives, pesticides, drugs, and cosmetics.

Businesses submitting information to the agency are allowed to claim all or part of the information as confidential business information (CBI). Information labeled CBI by companies is kept secret from the public by EPA. As reported in the previous *Watcher*, by hiding chemical information from the public, and even from other EPA offices, the agency greatly hinders the research and accountability needed to ensure public safety and protect the environment.

Although the agency's action is a step in chipping away at excessive secrecy, the move should not have been necessary based on a reading of the existing CBI regulations. According to the rules already on the books, a company can legitimately claim information is CBI only "if the information is not, and has not been, reasonably obtainable without the business's consent by other persons ... by use of legitimate means." In other words, the identities of chemicals publicly available in the TSCA inventory should never have been allowed to be hidden in the "substantial risk" reports.

Moreover, health and safety data are prohibited from being hidden as CBI. When evaluating the health and safety of chemicals, the identities of the chemicals are crucial data. EPA has repeatedly confirmed this in its TSCA regulations, stating, "Chemical identity is part of, or underlying data to, a health and safety study," and also stating, "Chemical identity is always part of a health and safety study." Despite these proclamations, EPA has allowed the labeling of chemical identities as CBI for years.

The agency's regulations under TSCA do exempt from disclosure information in the health and safety data category that would "disclose processes used in the manufacturing or processing the chemical substance or mixture" or "disclose the portion of the mixture comprised by any of the chemical substances in the mixture." Despite EPA's previous practices to the contrary, this does not exempt chemical identity.

To address the handling of alleged trade secrets, EPA has the authority to issue a "class determination," which defines certain types of business information as either public or entitled to confidential treatment. Such determinations would reduce the time and resource burden on the agency caused by case-by-case evaluations of CBI claims. The agency's recent action seems to lack the force of a class determination.

It is difficult to quantify the impact of illegitimate CBI claims or the impact this new agency practice will have on reducing those claims. According to *Chemistry World*, "The new policy covers the approximately 63,000 chemicals that are on the public portion of the TSCA inventory. Approximately 17,000 chemicals are on an undisclosed, confidential list." EPA has not disclosed the extent of CBI claims, what types of information are labeled as such, how many times the agency has challenged a CBI claim, or the results of such challenges.

Proponents of greater chemical disclosure have criticized the chemical industry for abusing the trade secrets provisions in TSCA by submitting excessive and illegitimate claims of CBI. A recent report from the nonprofit Environmental Working Group found that in the first eight months of 2009, industry concealed the identity of chemicals in more than half the reports submitted under TSCA Section 8(e). Without enforcement of the rules and without penalties for illegitimately making confidentiality claims, businesses have felt free to label information as secret that should be disclosed. EPA states that its change in handling CBI claims is "part of a broader effort to increase transparency ... by identifying programs where non-CBI may have been claimed and treated as CBI in the past."

The new practice restricting CBI claims is limited to one statute – TSCA – and to only health and safety data submissions under one section of that statute. However, EPA receives information with CBI claims under numerous other statutes as well, such as the Clean Air Act, Clean Water Act, and the Federal Insecticide, Fungicide, and Rodenticide Act (the statute regulating pesticides). It is unclear if EPA will review CBI policies under these statutes as well.

In the announcement of the TSCA CBI changes, the agency stated, "In the coming months, EPA intends to announce additional steps to further increase transparency of chemical information." No further details about the pending actions were released.

Among the other transparency problems afflicting TSCA is the difficulty accessing the data. According to EPA's website, the TSCA inventory changes daily and "EPA does not provide searches of the non-confidential TSCA Inventory." The inventory data must be purchased as a CD-ROM from the National Technical Information Service (NTIS) for $360, with an updated version available every six months.

FDA Shifts Position on BPA but Says Its Hands are Tied

In its long-awaited decision on the dangers of bisphenol-A (BPA) exposure, the Food and Drug Administration (FDA) announced that it believes there is some concern about the effects of BPA on children. This is a shift from the agency's recent position that BPA is safe. The agency says its ability to regulate the chemical, however, is limited by FDA's outdated regulatory authority.

On Jan. 15, FDA announced the results of a year-long review process of scientific studies on low-dose exposure to BPA. The agency expected to announce the results of that review in November 2009 but delayed the announcement until this month. FDA and other federal agencies are still assessing the dangers of exposure to the chemical, which is most commonly found in hard plastics and metal food containers. Products that can contain BPA include baby and water bottles, medical equipment, non-metal dental fillings and sealants, thermal paper used for receipts, and more.

In its announcement of the policy shift, the agency said, "FDA shares the perspective of the National Toxicology Program that recent studies provide reason for some concern about the potential effects of BPA on the brain, behavior, and prostate gland of fetuses, infants and children." As a result, FDA is taking several interim steps:

- Working with industry, FDA is supporting efforts to reduce exposure to BPA by searching for substitutes for its use and minimizing the amount of the chemical in use currently.
- FDA is seeking "a shift to a more robust regulatory framework for oversight of BPA."
- The agency is seeking more scientific information to help address the uncertainties it believes exist. According to the announcement, FDA will open a docket on Regulations.gov to ask for public comment and submissions for agency consideration.

In addition, the Department of Health and Human Services (HHS), the National Institutes of Health, and FDA announced a new website for parents to learn more about BPA and its effects. The message provided on the website is confusing. It states, "While BPA is not proven to harm children or adults ... newer studies have led federal health officials to express some concern about the safety of BPA."

The website encourages parents to take several actions to "minimize your infant's exposure to BPA." Discarding scratched baby bottles and cups and avoiding the overheating of formula or food placed in polycarbonate containers are some of the steps suggested.

Several other government agencies are stepping up research on the effects of BPA. According to the HHS website, FDA and the Centers for Disease Control and Prevention (CDC) are conducting new research on the chemical's health effects. The U.S. Environmental Protection Agency is preparing action plans for a variety of chemicals, including BPA. The action plans will summarize scientific studies on BPA and propose a plan for addressing the risks associated with exposure to the chemical, according to a Dec. 17, 2009, BNA article (subscription required).

The National Institute of Environmental Health Sciences is providing $30 million over two years for private and public research. The agency also held an October 2009 meeting of scientists receiving government funding to launch an integrated research effort on BPA.

The federal research focus constitutes a change from prior years in which FDA argued, as recently as August 2008, that BPA was safe. Other research from multiple sources led other governments and private corporations to change their policies and practices regarding BPA. Bottle manufacturers like Nalgene and retailers such as Wal-Mart began to find alternatives to BPA-laced plastic and pulled products from commerce. Health Canada conducted a risk assessment that concluded there was concern about neurological development problems from exposure of infants and small children to BPA. As a result, Canada banned the use of BPA in baby bottles and infant formula cans.

According to FDA's Jan. 15 announcement, BPA is considered a food additive and is subject to regulations issued more than 40 years ago. Under this framework, "Once a food additive is approved, any manufacturer of food or food packaging may use the food additive in accordance with the regulation. There is no requirement to notify FDA of that use. For example, today there exist hundreds of different formulations for BPA-containing epoxy linings, which have varying characteristics. As currently regulated, manufacturers are not required to disclose to FDA the existence or nature of these formulations," the announcement adds.

If FDA wished to regulate BPA, it would have to initiate a new rulemaking. Any regulatory decision would have to be based on clearer scientific evidence than the agency believes exists currently. Although FDA cannot compel industry to submit data on the chemical, it intends to ask manufacturers to voluntarily submit information about food contact uses. For years, industry has ignored questions from Congress and refused to turn over information to FDA, according to a Jan. 17 *Milwaukee Journal Sentinel* article.

Dr. Joshua Sharfstein, Principle Deputy Commissioner of FDA, told the *Journal Sentinel* that the agency may need to ask Congress to provide it with the necessary authority to collect data on BPA uses and impacts before the agency issues standards. There is frustration within the agency with the antiquated regulatory framework that applies to BPA, especially when the agency has had the ability to regulate new food additives since 2000.

According to the *Journal Sentinel*, the agency's inability to regulate should help convince Congress to pass new legislation. The article quotes John Peterson Myers, Chief Scientist of Environmental Health Sciences, who favors banning BPA, as saying, "Industry always uses the argument that the chemical is regulated ... This shows that it is not. State and federal lawmakers need to consider that. They can't rely on this agency to regulate it if they don't have the tools to do so."

Several bills have been introduced in Congress either to ban BPA in certain uses or to label products containing BPA so that consumers are free to choose which products to buy. The bills remain in committee.

Lead Standards for Children's Products Challenge CPSC

The Consumer Product Safety Commission (CPSC) is struggling to interpret and enforce standards intended to limit children's exposure to lead, the agency's commissioners reported to Congress Jan. 15.

CPSC has been enforcing new general lead standards for the content of children's products for nearly one year, and a standard for lead in paint and coatings for nearly six months. Those standards were mandated by the Consumer Product Safety Improvement Act (CPSIA) – a sweeping bill signed into law Aug. 14, 2008 – which gave CPSC a host of new powers and responsibilities. The law set strict standards to protect children from exposure to lead, a neurotoxin that impairs brain development and leads to IQ loss, and gives the CPSC little leeway to deviate from the letter of the law.

Echoing concerns voiced by manufacturers and retailers, CPSC's Jan. 15 report identifies several problems with the enforcement of the lead standards. CPSC believes the scope of the lead limits, which cover all children's products, is too broad. The report complains that everything from bicycle frames to zipper pulls are subject to the limits. CPSC is asking Congress to give it more flexibility to exempt certain products from the ban.

CPSC already has the authority to exempt products but has not yet exercised it: "[N]o exemption has been granted by the Commission to date because in each instance the manufacturer admitted that an amount of lead was present in the product that could be handled by the child, however infrequently, leading to hand to mouth ingestion of lead," the report says.

Additionally, the report says the retroactive application of the lead limits has put CPSC in a situation where it is regulating thrift store and used bookstore inventories. The report says regulators have focused on education, not punitive enforcement.

CPSC's February 2009 "Statement of Commission Enforcement Policy on Section 101 Lead Limits" carves out certain classes of products, including books printed after 1985, that the commission believes are unlikely to contain lead in excess of federal standards. (Section 101 refers to the section of the CPSIA limiting lead content.) CPSC will forego enforcement of lead standards for these products unless firms or persons "had actual knowledge" that a product violated the standard or unless they continue to sell such products after being notified by CPSC.

The report also relays firms' complaints that the costs of third-party testing and accreditation are too high. Under the CPSIA, children's products must be tested by CPSC-approved laboratories and certified as compliant with the lead standards.

CPSC has taken two actions to limit the number of products currently subject to third-party testing. First, CPSC developed a list of products which, "by their nature, will never exceed the lead content limits" and are therefore exempt. CPSC mentions cotton and wool as examples. Second, CPSC announced that firms would not have to test for the general lead content standard for children's products, except jewelry, until Feb. 10, 2011. Testing for lead paint and testing of children's jewelry is still required. CPSC detailed its third-party testing requirements in a Dec. 28, 2009, *Federal Register* notice.

CPSC staff has been cracking down on children's products contaminated with lead paint, the report says. CPSC identified 117 violations in FY 2009 using X-ray technology. "The vast majority of these violations were found by CPSC staff screening children's products at the ports," according to the report.

The CPSIA lowered the standard for lead in paint to 90 ppm (parts per million), from 600 ppm. The report says most of the 117 violations were detected before the new 90 ppm limit took effect on Aug. 14, 2008.

The CPSIA set for the first time a separate lead standard for the content of children's products. The law set a limit of 600 ppm to take effect in February 2009. The law ratcheted the limit down to 300 ppm beginning Aug. 14, 2009, one year after the CPSIA was signed into law. Although CPSC has delayed the third-party testing requirement, it is still illegal to sell, distribute, or import products in violation of the lead content standard. CPSC will again tighten the standard, down to 100 ppm, in August 2011.

The CPSIA was passed in response to a rash of toy recalls in 2007. The recalls brought to light CPSC's inability to protect children from lead-contaminated toys: the commission enforced no limit on lead content nor could it pull contaminated products from store shelves. Eighty-three senators and 424 House members voted in favor of the bill, and President George W. Bush signed it into law.

Complaints from manufacturers and retailers – and from the CPSC itself – are building momentum behind possible alteration of the law. Rep. Henry Waxman (D-CA), chair of the powerful House Energy and Commerce Committee, is considering a legislative amendment that would give CPSC more flexibility, the *Wall Street Journal* reported in December.

In a statement accompanying the Jan. 15 report, CPSC Commissioner Robert Adler further discussed the challenges of enforcing the CPSIA's lead limits. "I hope that Congress will consider these concerns in any modifications it makes to section 101(b)," Adler said. "Doing so, however, should not take precedence over a demonstrable health risk to children."

***Citizens United*: The Supreme Court Decision and Its Potential Impacts**

The long-awaited decision in *Citizens United v. Federal Election Commission* was issued on Jan. 21. With a 5-4 ruling, the U.S. Supreme Court decided that corporations and unions may now directly and expressly advocate for the election or defeat of candidates for federal office, as long as they do not coordinate their efforts with campaigns or political parties. Many predict the impacts of the decision will be immense and far-reaching, both for nonprofit voter engagement and political discourse as a whole.

The majority opinion authored by Justice Anthony Kennedy argued that limits on so-called "independent expenditures" by corporations violate the First Amendment right to free speech. The Bipartisan Campaign Reform Act (BCRA), which the *Citizens United* decision partially invalidated, prohibited corporations (including nonprofit organizations) and labor unions from airing any "electioneering communications" – broadcast messages that refer to a federal candidate 30 days before a primary election and 60 days before a general election. Older law also barred corporations from using monies from their general treasuries for "express advocacy," to directly urge the election or defeat of a candidate for federal office.

The opinion stems from a controversy caused by a clash between Citizens United, a 501(c)(4) nonprofit organization, and regulations crafted by the Federal Election Commission (FEC). The nonprofit group wanted to release a film on a cable TV video-on-demand service about former Democratic presidential candidate Hillary Clinton during the 2008 presidential primary. The group also wanted to promote the film with several ads. The critical movie was partially funded by corporate contributions, in violation of BCRA and FEC regulations.

Before the Supreme Court ruling, *Hillary: The Movie* and the ads promoting the film were considered a prohibited electioneering communication. Citizens United challenged these campaign finance laws, charging that the provisions enforced by the FEC were an unconstitutional violation of the organization's free speech rights. The group also felt it should not be subject to donor disclosure and disclaimer requirements for its 90-minute film.

The case was first heard by the Court in March 2009. A few months later, the Court decided to not only rehear the case, but to expand the scope of the review to include broader First Amendment concerns. The new briefs had to address whether the 1990 decision in *Austin v. Michigan State Chamber of Commerce*, as well as parts of the 2003 decision in *McConnell v. Federal Election Commission* that dealt with BCRA, should be overturned. Both of those opinions held that restrictions on direct corporate and union spending in campaigns were justified and upheld the government's right to limit corporate expenditures on electoral activity. The Supreme Court met in special session on Sept. 9 for the second hearing of *Citizens United*, and since then, many had fervently anticipated how the Court would rule.

After months of waiting and speculation, the Court overturned long-standing precedent, ruling that banning corporations from using money from their general treasuries for express advocacy was an unconstitutional violation of First Amendment political free speech rights. The majority opinion also struck down the electioneering communications rule as it applies to corporations. As a result, corporations and unions may now spend as much as they want on independent expenditures, in a way that could help the candidate of their choice, right up until Election Day.

This historic decision specifies that the First Amendment protects corporations and unions the same as individuals with regard to the ability to spend money to influence elections. Kennedy wrote that there was "no basis for the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored speakers."

Citizens United argued that its film was not electioneering because it did not advocate for or against any particular candidate, but rather that it was simply a documentary about Clinton. However, the Supreme Court agreed that the film was in fact an electioneering communication and "contained pejorative references to her [Clinton's] candidacy." Kennedy wrote, "The movie, in essence, is a feature-length negative advertisement that urges viewers to vote against Senator Clinton for President."

While the Court did not agree with Citizens United's argument that the film and its messages were not electioneering communications, it ruled that applying such prohibitions to corporations is censorship and a "ban on speech." The Court affirmed that such rules constraining speech are unconstitutional. The Court opinion stated, "The law before us is an outright ban, backed by criminal sanctions."

The Court rejected the argument that corporate money in elections will distort the political debate. It also found that regulations meant to level the playing field are not enough to justify campaign finance laws that restrict certain corporate campaign spending.

Justice John Paul Stevens wrote a scathing 90-page dissent, joined by Justices Stephen Breyer, Ruth Bader Ginsburg, and Sonia Sotomayor. Stevens wrote that the "ruling threatens to undermine the integrity of elected institutions across the Nation. The path [the Court] has taken to reach its outcome will, I fear, do damage to this institution." In a Jan. 26 speech, former Justice Sandra Day O'Connor also cautioned that the ruling may impact state judicial elections, allowing corporations to increasingly influence those who are supposed to be unbiased arbiters of the law.

Importantly, the decision does keep in place disclosure and disclaimer requirements. All of the justices except Clarence Thomas ruled against Citizens United's challenge to disclosure rules. These requirements involve reports that have to be filed with the FEC on electioneering communications, and the ads themselves must carry a disclaimer stating who is responsible for the content. The opinion states that "transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages."

Kennedy said disclosure and disclaimer provisions regarding those funding such ads are constitutional unless there is a specific threat of harassment of donors. This may leave open the possibility for future court challenges and ultimately reverse the disclosure provision if a group can successfully prove that donors did face mistreatment.

Nevertheless, the Court's endorsement of the Internet and meaningful disclosure is something to applaud. According to the opinion, "[With] the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters."

Unfortunately, as the Sunlight Foundation notes, "The disclosure system they describe doesn't yet exist. The current disclosure system is insufficiently 'rapid and informative' and does not make effective use of modern technology."

Additionally, some predict that to protect their image with consumers and to avoid being associated with a particular candidate, corporations may now contribute more to trade associations or 501(c)(4) organizations to fund campaign advertising. This may ultimately weaken the disclosure argument that the Court makes, considering that Internal Revenue Service (IRS) rules and Supreme Court precedent provide for donor confidentiality for such tax-exempt organizations.

Reaction to the decision was swift and often passionate. Shortly after the opinion was released, OMB Watch issued a press release that stated, "The corporate voice will now be more powerful than ever." Lateefah Williams, a nonprofit speech rights analyst at OMB Watch, added, "Our fear is that the voices of large portions of our citizenry and the charities that advocate on their behalf will be drowned out in the process."

President Obama criticized the ruling, calling it "a green light to a new stampede of special interest money in our politics. It is a major victory for big oil, Wall Street banks, health insurance companies and the other powerful interests that marshal their power every day in Washington to drown out the voices of everyday Americans."

The FEC issued a press release announcing that it will be "considering the impact of the opinion on its existing regulations, as well as its ongoing enforcement processes, and will be providing guidance to the public as soon as possible regarding what steps will be taken to comply fully with the opinion."

Many nonprofits are working to respond to the *Citizens United* decision, with various strategies either to shape legislation or craft other reforms to campaign finance regulations. Lawmakers have also reacted with ideas for addressing the impacts of the decision.

The ruling will certainly alter corporate and union spending on future elections, most immediately the 2010 midterm elections and the 2012 presidential election. Just how large of an impact the case will have remains to be seen, but many advocates and election law experts warn that the impending influx of corporate money could go far beyond the exercise of free speech and ultimately allow moneyed interests to wield disproportionate influence on both elections and the lawmakers whose campaigns such corporate spending will supplement.

Citizens United: Nonprofit Calls to Action and the Legislative Response

In response to the *Citizens United v. Federal Election Commission* opinion announced on Jan. 21, many nonprofits and political leaders are mobilizing to address the impact of the decision. Nonprofits, in particular, are taking the lead in ensuring that the voices of ordinary Americans are not diminished by an influx of corporate money into electoral politics.

In the highly anticipated opinion, the U.S. Supreme Court overturned a long-standing precedent, which had stated that corporations can be prohibited from using money from their general treasuries to pay for their own campaign-related advertisements. Justices also struck down parts of the Bipartisan Campaign Reform Act (BCRA), also known as the McCain-Feingold bill, which prohibited unions and corporations from running issue ads before primary and general elections.

The Court determined that current campaign finance regulations on corporate spending violate the First Amendment protection of political speech. The opinion applies only to independent expenditures and leaves in place a prohibition on direct corporate contributions to candidates and national party committees. It also upholds disclosure requirements for organizations that conduct advertising campaigns that promote or oppose candidates. More details about the decision are available in this issue of *The Watcher*.

The following examples illustrate the scope of the nonprofit community's response to the *Citizens United* opinion:

- Following the announcement of the Court's opinion, People for the American Way (PFAW) launched an action alert to diminish the impact of the decision. PFAW's action alert is an electronic petition urging Congress to pass a constitutional amendment granting Congress the authority to limit corporate influence in electoral politics.

- Common Cause also initiated a campaign for a constitutional amendment. The group hosted an online presentation on Jan. 26 that outlined the efforts that it plans to undertake to push for a constitutional fix.

- The Alliance for Justice (AFJ) held a conference call on Jan. 25, where it discussed the impact of the decision, its effect, and its implications. In a fact sheet, AFJ posed questions concerning the case's implications. The organization also stressed why it is important for nonprofits to be involved in political advocacy. "Even if you think the case was wrongly decided, 501(c)(4)s and other nonprofit corporations (except for 501(c)(3)s) should take advantage of it – use it to strengthen democracy by increasing your public communications about the candidates and what's best for the future of our country," said AFJ.

- Organizing for America, the successor organization to Obama for America and a project of the Democratic National Committee, has circulated an electronic letter to members in its database and visitors to its website, asking them to send the electronic letter to their congressional representatives to inform the representatives that the American people support fair elections and limits on corporate spending.

- To further explore nonprofit reactions to the decision, OMB Watch and the Hudson Institute will host a panel discussion on February 16, entitled "Nonprofits Divided About *Citizens United*?" The panel will examine the ruling and the varying approaches used to either counter the effects or capitalize on opportunities it presents.

Nonprofits have also been using the decision as a springboard to address other issues related to nonprofit advocacy. For example, a coalition of nonprofit organizations that engage in public policy advocacy, including OMB Watch, is seeking to ease restrictions on nonprofit lobbyists in the wake of *Citizens United*. The organizations sent a joint letter to President Obama addressing their concerns. "The solution [as it relates to lobbying and ethics reform] should focus on issues like campaign finance reform and the disproportionate influence that large financial interests have over our nation's politics and public policies. The Supreme Court's decision in *Citizens United v. FEC* has increased the urgency of such actions," said the organizations.

On the legislative side, there has also been interest in addressing the influence of money in politics. Even before *Citizens United* was decided, Sen. Dick Durbin (D-IL) and Rep. John Larson (D-CT) introduced the Fair Elections Now Act (S. 752 and H.R. 1826), which attempts to limit the impact of corporate funds on elections by offering a public financing alternative. "The bill would allow federal candidates to choose to run for office without relying on large contributions, big money bundlers, or donations from lobbyists, and would be freed from the constant fundraising in order to focus on what people in their communities want," according to Public Campaign, a campaign finance reform organization.

After the *Citizens United* opinion was announced, Rep. Leonard Boswell (D-IA) introduced a constitutional amendment that would prohibit corporations and labor unions from using general treasury funds in connection with a federal election campaign. Sen. Charles Schumer (D-NY), chairman of the Senate Rules Committee, also said he would "hold hearings to explore ways to limit corporate spending on elections," according to *The Hill*.

In a statement following the Supreme Court's decision, House Speaker Nancy Pelosi (D-CA) said, "We will review the decision, work with the Obama Administration, and explore legislative options available to mitigate the impact of this disappointing decision." Rep. Chris Van Hollen (D-MD), chairman of the Democratic Congressional Campaign Committee, said the House would also take measures similar to the Senate to limit corporate spending, according to *The Hill*.

The House Administration Committee, which has jurisdiction over campaign finance law, will hold a hearing in February in response to the *Citizens United* ruling. House Administration Committee Chairman Robert Brady (D-PA) "indicated he would be working with fellow lawmakers and the Obama administration to shape new legislation in time to affect this year's congressional campaigns, but he provided no details about what such a measure would provide," according to BNA (subscription required).

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