



Promoting Government Accountability and Citizen Participation

[ACTION CENTER](#) | [BLOGS](#) | [DONATE](#)

## The Watcher

January 28, 2009

Vol. 10, No. 2

### In This Issue

#### Regulatory Matters

[What is the Obama Agenda for Bush-Era Regulations?](#)  
[GAO Report Highlights High-Risk Areas](#)

#### Information & Access

[White House Promises a New Era of Sunlight](#)  
[Obama Transparency Rhetoric Trickles Down to EPA](#)  
[New Potential and Challenges for White House Website](#)

#### Nonprofit Issues

[Obama Withdraws Family Planning Policy, Restores Some Nonprofit Speech Rights](#)  
[Lobbying and Ethics Reform Takes Center Stage at the White House](#)

#### Federal Budget

[House Makes Transparency a Priority for Stimulus](#)  
[Groups Launch Bailout Watch to Oversee Government Bailout Actions](#)

---

## What is the Obama Agenda for Bush-Era Regulations?

Just hours after President Barack Obama took the oath of office on Jan. 20, new White House Chief of Staff Rahm Emanuel issued a memo setting out the Obama administration's policy for dealing with some regulations left by the administration of President George W. Bush. The Emanuel memo puts a freeze on all regulations still in the pipeline and gives agencies leeway to deal with those Bush-era regulations already finalized but not yet being implemented. However, the memo does not address most of the controversial regulations finalized by the Bush administration in its last days; these rules are already in effect and impacting the nation.

### Regulations in the pipeline

Under the [Emanuel memo](#), agencies are to put a hold on any proposed or final regulations that had been under development during the Bush administration. The Emanuel memo states, "No proposed or final regulation should be [published] unless and until it has been reviewed and approved by a department or agency head appointed or designated by the President after noon

on January 20, 2009." The memo makes exceptions for regulations that address "urgent circumstances relating to health, safety, environmental, financial, or national security matters," as well as regulations needed to meet statutory or judicial deadlines.

The moratorium covers all regulations in any stage of the rulemaking process but not yet finalized — a figure that likely numbers in the hundreds. For example:

- In August 2008, the Department of Labor [proposed a rule](#) that would change the way federal regulators calculate estimates for on-the-job risks. The rule would also add an extra comment period to new worker health standards, creating unnecessary delay. However, the Bush administration's Labor Department did not finish its work on the rule.
- In July 2008, the Justice Department [proposed a rule](#) that would expand the power of state and local law enforcement agencies to investigate potential criminal activities and report the information to federal agencies. The rule would broaden the scope of activities authorities could monitor to include organizations as well as individuals, along with non-criminal activities that are deemed "suspicious." The Justice Department did not finish developing the rule.

The memo is addressed to the heads of all executive branch agencies, including Cabinet-level agencies and, presumably, independent regulatory agencies such as the Securities and Exchange Commission and the Consumer Product Safety Commission.

### **Final regulations not yet in effect**

The Emanuel memo allows agencies to reevaluate those Bush-era regulations that were published in the *Federal Register* as final rules but which have not yet taken effect. The memo asks agencies to "consider extending for 60 days the effective date" of those regulations and instructs agencies to open a 30-day public comment period on any decision to extend a regulation's effective date.

Publication in the *Federal Register* marks the official finalization of a regulation. After publication, according to federal law, agencies must wait 30 or 60 days (depending on the significance of the regulation) before making a new regulation effective — that is, before implementing its requirements or provisions. Agencies may also choose to wait longer than 30 or 60 days before making a new regulation effective.

A separate [memo](#) from Office of Management and Budget (OMB) Director Peter Orszag identifies eight criteria agencies may use to reconsider regulations that have not taken effect. For example, agencies may extend the effective dates of the regulations if they find regulations that do not meet legal muster or were not developed in an open and transparent manner, according to Orszag.

Among those Bush administration final regulations that are not yet in effect:

- A U.S. Environmental Protection Agency (EPA) regulation that [alters](#) the way industrial facilities count their emissions under the New Source Review program. Under the regulation, industrial facilities are not required to combine all their emissions when determining whether they meet federal emissions thresholds, if the emissions are for two or more different purposes. EPA published the regulation Jan. 15, and it is scheduled to go into effect Feb. 17.
- A Department of Agriculture (USDA) regulation that [sets requirements](#) for country-of-origin labeling on meat and other perishable food items. Although consumers support country-of-origin labeling, critics say the regulation has loopholes. USDA used an overly broad definition of "processed" foods that can be exempt from labeling requirements. USDA published the regulation Jan. 15, and it is scheduled to go into effect March 16.

### **Regulations not covered by the memo**

What the Emanuel memo does not do may be more important than what it does do. Because the Bush administration was able to finalize many regulations in time to make them effective before Bush left office, the Obama administration will be unable to freeze them or delay their effective dates. The memo also may not apply to other types of agency actions like guidelines or policy statements that have effect of regulations.

The administration finalized dozens of regulations that drew fire from environmental, consumer, worker, and healthcare advocates. A new report by the Center for American Progress and OMB Watch, [After Midnight](#), recaps the Bush administration's midnight regulations campaign and identifies strategies for reversing them. The report includes a list of more than two dozen controversial midnight regulations, including:

- An Interior Department regulation that went into effect Jan. 12 allows mining companies to dump the waste (i.e. excess rock and dirt) generated during mountaintop mining into rivers and streams.
- An EPA regulation that went into effect Jan. 20 exempts farms from reporting to the government potentially harmful air emissions that come from animal waste.
- A Department of Health and Human Services (HHS) regulation that went into effect Jan. 20 could limit women's access to reproductive health services by requiring health care providers to certify they will allow their employees to withhold services on the basis of religious or moral grounds or risk losing federal funding.
- A Department of Labor regulation that went into effect Jan. 17 weakens already modest wage protections and housing standards for agricultural workers.

These and other regulations will continue to carry the force of law until they are changed or reversed by the Obama administration, invalidated by the courts, or until Congress intercedes.

## **Midnight regulations in the courts**

The Orszag memo opens the door for expedited court settlements on both final regulations not yet in effect and final regulations in effect if suits have been filed challenging the rules before the effective date. A court ruling invalidating one of Bush's midnight regulations would give agencies two options: do nothing, thereby reverting to the pre-Bush status, or write (or revise) a new regulation substantially different from the Bush rule.

For final regulations not in effect, the Orszag memo points agency officials to the [Administrative Procedure Act](#), which allows agencies to postpone effective dates for regulations under judicial review "when an agency finds that justice so requires."

Orszag also reminds agencies that they may choose not to defend Bush-era regulations — both effective and not effective — in court. The memo states, "In special cases ... you may consider the appropriateness of not defending a legally doubtful rule in the face of a judicial challenge."

Lawsuits have already been filed on a number of Bush's midnight regulations. In separate suits, a group of state attorneys general and reproductive health rights advocates have sued HHS over the "provider conscience" rule mentioned above. Environmentalists have filed suit on several controversial regulations, including the mountaintop mining rule and a regulation which changes the way the Interior Department implements the Endangered Species Act.

## **GAO Report Highlights High-Risk Areas**

The Government Accountability Office (GAO) released its latest report to Congress Jan. 22 highlighting the wide range of high-risk areas in government that it urges the new Congress and administration to address. The report updates the areas already on GAO's list and adds three new high-risk areas: the outdated financial regulatory system, medical product oversight and regulation, and toxic chemical assessment.

Since 1990, GAO has regularly issued reports in its high-risk series, usually at the beginning of each new Congress. [The new report](#), issued as the 111th Congress was still organizing itself, includes 30 areas that GAO has identified as either being susceptible to high levels of waste, fraud, and abuse or in need of transformational change to achieve greater efficiency, effectiveness, and accountability. Some of the areas on the current list were designated high-risk as early as 1990, while three new areas were added to this version of the report.

The three new areas added to the list are modernizing the outdated U.S. financial regulatory system, protecting public health through enhanced oversight of medical products, and transforming the U.S. Environmental Protection Agency's (EPA) processes for assessing and controlling toxic chemicals. Each of these critical regulatory issues has been addressed in earlier GAO reports. (Reports are available on [GAO's website](#).)

### *Modernizing the Outdated U.S. Regulatory System.*

The U.S. is currently facing the worst economic crisis since the Great Depression, with

widespread failures of important financial institutions, home foreclosures nationwide, and massive job losses. GAO writes that several factors "have revealed limitations in the existing financial regulatory system." Among them:

- The current structure is limited in its ability to oversee large conglomerates and especially their risk management activities.
- Financial problems have originated from large, important market institutions that are under-regulated or are not regulated at all. For example, part of the subprime mortgage crisis was caused by nonbank mortgage lenders not subject to direct oversight.
- As new and more complex investment products were developed and marketed by financial institutions, the regulatory system has been unable to keep up with the rapid changes.
- The various boards and agencies responsible for setting the accounting standards regulators rely on have not always been able to keep up with the pace of change in the investment products.
- As financial markets have become increasingly global, "the current fragmented" U.S. regulatory structure has made it more difficult to coordinate with international regulators.

In the high-risk report, GAO urges Congress to consider [a report](#) the office issued Jan. 8 that suggests a framework for evaluating new proposals to revamp the existing regulatory system. It contains "key elements that any new regulatory system should include regardless of the structure it takes, such as ensuring systemwide risks are identified and mitigated and that consumers are protected."

*Protecting Public Health through Enhanced Oversight of Medical Products.*

The Food and Drug Administration (FDA), part of the Department of Health and Human Services, is responsible for ensuring that medical products used in the U.S are safe and effective. FDA oversees drugs, medical devices used in over 100 million surgical procedures each year, and biologics, a class of biologically-produced medicines. Many of these products are manufactured in other countries and fall under FDA's approval and inspection programs.

GAO's report supports numerous other analyses of FDA's "significant challenges that compromise its ability to protect Americans from unsafe and ineffective products." Demands on the agency to oversee an increasing number of complex products, increased globalization, new statutory responsibilities, and significant declines in its resources have all factored into FDA's inability to respond effectively. (See, for example, an [OMB Watch article](#) on new statutory responsibilities and FDA's [Science Board report](#) entitled *FDA Science and Mission at Risk*.)

Among GAO's recommendations is the need to improve FDA's data management for its foreign drug inspection program and to conduct more foreign inspections, improve its monitoring of post-market product safety, better manage its oversight of promotional materials developed by drug companies and others aimed at both the medical profession and consumers, and vastly improve its oversight of clinical trials of new drugs. Taken together, these problems create a

significant need for FDA to "enhance its oversight of medical products to better protect public health."

*Transforming EPA's Processes for Assessing and Controlling Toxic Chemicals.*

According to GAO, EPA "lacks adequate scientific information on the toxicity of many chemicals that may be found in the environment — as well as on tens of thousands of chemicals used commercially" in the U.S. This information is critical to sound regulatory decisions EPA needs to make under several environmental statutes.

EPA's Integrated Risk Information System (IRIS) is a database of information on the health effects of exposure to many chemicals. EPA has only assessed nine chemicals in the last three fiscal years and has a substantial backlog of assessments. The program "is at serious risk of becoming obsolete," according to GAO. IRIS assessments have been halted or delayed due to several factors GAO outlines, including 1) new review processes by the Office of Management and Budget (OMB) and other federal agencies; 2) EPA's decisions to delay many assessments pending collection of new scientific information; and 3) the compounding impact of delaying assessments. "Thus EPA's decisions to wait for new research on key chemicals rather than relying on the best available scientific data at the time of [*sic*] the assessment is conducted — as had been EPA's general approach in the 1990s — can have a significant impact on assessment completion dates."

OMB's effort to allow federal agencies to review the [IRIS assessment process](#) has undercut EPA's ability to manage the process and allows agencies potentially affected by the chemical assessments to have a virtual veto over assessments.

GAO notes that in its several reports on EPA's handling of scientific information regarding the toxicity of chemicals, "Neither Congress nor EPA has implemented the most important recommendations aimed at providing EPA with the information needed to support its assessment of industrial chemicals. Without greater attention ... the nation lacks assurance that human health and the environment are adequately protected."

## **White House Promises a New Era of Sunlight**

In his first full day in office, President Barack Obama acknowledged the importance of transparency by signing an executive order on the Presidential Records Act (PRA) and issuing memoranda on the Freedom of Information Act (FOIA) and open government standards in general. He further [pledged](#) that he would "hold [himself], as president, to a new standard of openness."

Obama issued an [order](#) to the Attorney General to draft new FOIA guidelines for agency heads that contain a presumption of openness in making decisions concerning disclosure of information. These guidelines will replace the existing October 2001 [memorandum](#) issued by then-Attorney General John Ashcroft that encouraged agencies to withhold information whenever there was a "sound legal basis" to do so. Obama's instructions mandate that "the



presumption of disclosure should be applied to all decisions involving FOIA."

It remains to be seen what the new Attorney General memorandum will say. It may return government to the standard established by then-Attorney General Janet Reno's October 1993 memorandum, or it may set new and possibly more progressive standards for FOIA openness. Reno required that "the principle of openness in government [be] applied in each and every disclosure and nondisclosure decision that is required under the Act." Her memo [instructed agencies](#) to use FOIA exemptions only where "the agency reasonably foresees that disclosure would be harmful to an interest protected by that exemption." In other words, the policy was to disclose information if there was no foreseeable harm, even if there might be an argument to be made that an agency could legally withhold the information. The Ashcroft memo flipped this, telling agencies that they should obstruct disclosure if they could make a sound legal argument; thus, the "foreseeable harm" standard set by Reno was replaced with a "sound legal basis" standard by Ashcroft. Ashcroft told agencies that the Justice Department "will defend your decisions" to withhold records, in whole or in part, under FOIA.

Obama remarked in his FOIA memo that "the presumption of disclosure also means that agencies should take affirmative steps to make information public." In the past, FOIA memos have focused on providing guidance to agencies on responding to requests. If the new guidance under Obama includes requirements to proactively post information online, prior to receiving a request, it would be a significant change in FOIA policy.

Obama also issued an [executive order](#) limiting an incumbent president's ability to restrict public access to presidential records. The measure repealed President George W. Bush's Executive Order 13233, which created an unlimited delay in releasing records of former presidents beyond the previously held 12-year mandatory disclosure period. Before an incumbent president can withhold material under the PRA, he or she must now consult with the Attorney General, the Archivist of the United States, and White House counsel.

Most importantly, Obama also set forth his broad vision for government openness, going beyond mere compliance with existing disclosure laws. The president [mandated](#) that the Chief Technology Officer, along with the Director of the Office of Management and Budget (OMB) and the Administrator of General Services, develop an Open Government Directive in the next 120 days. This directive will be designed to establish actions to be taken by agencies in an effort to move toward a government that is transparent, participatory, and collaborative. Not only did Obama promise to increase disclosure of information, but he pledged to do so in a timely manner and in forms that the public can easily find and use. This includes the increased use of new media and Internet technologies, as well as greater efforts to solicit public input. The order did not specify what actions should be included to achieve these goals or how they should be implemented.

The declarations made by the president reflect key recommendations made in a report published by OMB Watch in November 2008, [Moving Toward a 21st Century Right to Know](#). Several groups involved in the creation of that report have lauded the president's first steps toward greater government transparency. Rick Blum of the [Sunshine in Government Initiative](#)

stated that these declarations "will help keep the public informed in our technology-driven, connected society. On open government, the dawn is breaking."

However, the report also detailed actions that should be taken by the president and Congress in order to create a "culture of openness" within agencies. While presidential orders can establish new requirements, overcoming entrenched attitudes of secrecy will require new incentive and enforcement mechanisms and ongoing emphasis on transparency as a performance issue. Also, any actions taken by the administration are vulnerable to being overturned by future administrations if not protected by legislation. This makes congressional action on transparency vital to ensuring that new mechanisms for openness are available to future generations.

## **Obama Transparency Rhetoric Trickles Down to EPA**

The new administrator of the U.S. Environmental Protection Agency (EPA), Lisa Jackson, pledged in a memo to staff to "uphold the values of scientific integrity, rule of law, and transparency every day." In the memo, Jackson also highlighted five priorities for the EPA, including reducing greenhouse gases and strengthening EPA's chemicals management and risk assessment programs.

Jackson, former head of New Jersey's Department of Environmental Protection, took control of the embattled agency on Jan. 26. In a [memo](#) to EPA employees, Jackson laid out the philosophy, as articulated by President Obama, that she plans to apply to her tenure as administrator. Transparency and respect for the scientific analyses of EPA staff were included as key values. Jackson cited former EPA administrator William Ruckelshaus' commitment to run the agency as if it were "in a fishbowl," with its actions and motives available for all to observe.

"I pledge that we will carry out the work of the Agency in public view so that the door is open to all interested parties and that there is no doubt why we are acting and how we arrived at our decisions," said Jackson in the memo. She also embraced Ruckelshaus' promise "to communicate with everyone from the environmentalists to those we regulate, and we will do so as openly as possible."

Jackson promised EPA employees that science will be the "backbone" of EPA programs. Citing the damage that can be done to scientific integrity, Jackson promised not to "disguise" policy decisions as scientific findings, an accusation frequently leveled at the Bush EPA. Jackson stated, "I pledge that I will not compromise the integrity of EPA's experts in order to advance a preference for a particular regulatory outcome." According to the memo, "When scientific judgments are suppressed, misrepresented or distorted by political agendas, Americans can lose faith in their government to provide strong public health and environmental protection."

The EPA during the Bush administration came under frequent attack for [allowing politics to distort](#) and override the findings of agency scientists. The pledges of transparency and



scientific integrity represent a clear move by the new administrator to break from the policies of the previous EPA administration.

The principles laid out in the memo echo Jackson's testimony during her Senate confirmation hearing. In her [opening remarks](#), Jackson stated that "President-elect Obama has affirmed two core values that he expects EPA to uphold during his Administration: scientific integrity and the rule of law. He has also made it clear we will operate with unparalleled transparency and openness. I pledge to uphold those values."

In addition to outlining the core values that will guide her tenure, Jackson highlighted several priorities that will receive her "personal attention." The five issues are reducing greenhouse gases, improving air quality, managing chemical risks, cleaning up hazardous waste sites, and protecting waters. Jackson specifically referred to the Toxic Substances Control Act (TSCA) when highlighting the need for strengthened chemicals risk management.

The Government Accountability Office (GAO) recently added EPA's [TSCA-related programs](#) to its [list of federal high-risk programs](#), which are programs in need of broad-based management transformation to improve their effectiveness.

The values espoused in the new administrator's memo may help to ease [concerns](#) over Jackson's commitment to transparency raised prior to her confirmation hearing. On the day of Jackson's swearing in, Public Employees for Environmental Responsibility (PEER), one of Jackson's more vocal critics, sent a [letter](#) urging Jackson to translate the promises of openness and scientific integrity into concrete and enforceable policies. PEER listed several specific recommended policy changes, including protections for government whistleblowers and eliminating "gag orders" on agency scientists. Despite the promising rhetoric of Jackson's initial memo, no specific actions were proposed or committed to on the administrator's first day.

Jackson pledged "to follow the rule of law." While acknowledging the discretion granted the EPA to implement environmental laws, she also recognized the authority of Congress and the courts. "When a court has determined EPA's responsibilities under our governing statutes, EPA cannot turn a blind eye to the court's decision or procrastinate in complying." The EPA had been heavily criticized during the Bush administration for failing to regulate greenhouse gases with its authority under the Clean Air Act, especially following the 2007 U.S. Supreme Court decision explicitly stating the agency's authority and obligation to do so.

During her confirmation hearing, Jackson was asked what process would be best to review previous EPA decisions to identify instances where science had been compromised. Jackson responded that a strong inspector general (IG) offers the best mechanism for such an evaluation. The EPA inspector general position is currently vacant, with the IG's duties being performed by the deputy IG, who was himself [investigated](#) by Congress for his plan to cut the number of inspectors working under him.

Jackson directed her employees to hold her accountable for her promises. "If ever you feel I am

not meeting this commitment, I expect you to let me know," she said.

## **New Potential and Challenges for White House Website**

President Barack Obama replaced the Bush administration's White House website at noon on Inauguration Day. The new website has been met with both applause and criticism in its first week of operation, but it offers indications of how the new president may utilize Internet technology to better inform the public.

In one of its first posts, the first presidential blog announced that the touchstones of the new website would be communication, transparency, and participation.

### **Communication**

The new White House website features RSS feeds, similar to the old version, allowing people to be updated on site changes through an RSS reader, without having to continuously check the site. The site also allows the public to [sign up for](#) e-mail updates.

Currently, however, users are unable to access information that had been posted on the former administration's White House site. Some of those pages still show up in Google searches, but the links redirect users to the relevant Obama administration pages rather than archived versions of the old pages.

To address a similar website transition, the State Department created an [archived version](#) of the department's Bush-era website, which is available to the public. The State Department's effort provides easy public access to government information, much of which is still relevant, and could serve as an example for other agencies as well as the White House. Past presidential websites, such as that of the [Clinton administration](#) and [Bush administration's](#) White House website, have been preserved by the National Archive and Records Administration, but links from the new White House site would probably be most helpful for people looking for older information.

### **Transparency**

The new White House website models much of its design and layout from the transition team's former website, [change.gov](#). In a previous *Watcher* [article](#), we commented that [change.gov](#) demonstrated a commitment to transparency during that hectic planning phase, which boded well for the importance of transparency during Obama's time in office.

This also seems to be the case for the new [whitehouse.gov](#). The White House website now has a blog, which is often updated multiple times a day and contains all of President Obama's executive orders and memoranda to date. It also links back to the *Federal Register* for previous presidential orders.

## **Participation**

Of note on the White House site is the inclusion of YouTube videos as the standard format for the president's weekly address. Despite [initial controversy](#) over tracking cookies installed by YouTube, the White House quickly managed to resolve issues when they were raised by the public. The president has promised to post all non-emergency legislation to the White House website and open it up to public review and commentary.

While the new website boasts greater participation, it has been [criticized](#) for not meeting expectations for greater interactivity. Neither the YouTube nor blog posts currently allow for comments from the public. The website has a contact page that allows users to send messages to the webmaster, but it does not provide the same opportunities for public discourse as change.gov did. The blog might take on the same comment features as the State Department's blog, which has a [moderated comments policy](#).

## **The Government Shift to Information Age 2.0**

The administration is still hurrying to apply its openness standards to its information infrastructure. Media coverage indicates that the new White House has been burdened by software difficulties — operating on software platforms that have not been upgraded in six years. The website also does not include transcripts of press conferences at this time.

The primary question may not be whether the administration will apply its change.gov innovations to federal Internet technology, but rather whether or not the Washington bureaucracy will be slow and resistant to such change. Forging the White House website into an example for transparency, participation, and openness for other agencies may require considerable cultural change within the government, as well as several rule changes.

Macon Phillips, director of New Media at the White House, has asked for suggestions concerning improvements or ideas to the website. You can provide your feedback using the White House's [contact form](#).

## **Obama Withdraws Family Planning Policy, Restores Some Nonprofit Speech Rights**

On Jan. 23, President Barack Obama issued a [memorandum](#) withdrawing the Mexico City Policy. The Mexico City Policy prohibited organizations funded by the U.S. Agency for International Development (USAID) from using private, non-USAID funds to engage in activities including "providing advice, counseling, or information regarding abortion, or lobbying a foreign government to legalize or make abortion available." Foreign nonprofits, referred to as nongovernmental organizations (NGOs), were already barred from using U.S. funds to pay for abortions as a method of family planning. However, the Mexico City Policy went further and ultimately restricted the free speech rights of government grantees.

President Clinton overturned the Mexico City Policy, also known as the Global Gag Rule, following its imposition by the first President Bush. President George W. Bush reinstated the policy in 2001, further distorting the distinction between the government-funded and privately funded work of nonprofits. Bush implemented the policy through conditions in USAID grant awards and extended the policy to "voluntary population planning" assistance provided by the State Department.

The Obama memo states, "These excessively broad conditions on grants and assistance awards are unwarranted. Moreover, they have undermined efforts to promote safe and effective voluntary family planning programs in foreign nations." With regard to conditions in voluntary population planning assistance and USAID grants, under Obama's memo, the Secretary of State and the administrator of USAID must waive conditions in any current grants and advise grantees that they have been waived.

In a [statement released](#) after the memorandum was issued, Obama said; "For too long, international family planning assistance has been used as a political wedge issue, the subject of a back and forth debate that has served only to divide us. [ . . . ] It is time that we end the politicization of this issue." The statement also noted the president will work with Congress to restore U.S. funding for the United Nations Population Fund "to reduce poverty, improve the health of women and children, prevent HIV/AIDS and provide family planning assistance to women in 154 countries." Notably, Obama's action on the global gag rule does not mean that U.S. funds can be used for abortions.

In 2003, OMB Watch highlighted a report, *Access Denied: U.S. Restrictions on International Family Planning*, which found that the global gag rule "led to closed clinics, cuts in healthcare staff and dwindling medical supplies, leaving women, children and families without access to vital healthcare services." In October 2004, OMB Watch released [Continuing Attacks on Nonprofit Speech: Death By a Thousand Cuts II](#), which documented attempts to limit the policy voice of nonprofits, including the global gag rule.

The very controversial issues of abortion and family planning services notwithstanding, the danger in the global gag rule lies in the restrictions on organizations' private funds. Nonprofits have criticized the program because if they received U.S. funds, they could not use private funds (including money from other countries) to provide counseling about or perform abortions, even in countries where abortion is legal. The federal government was able to control speech, conditioned on receipt of government money, and impact the mission of many organizations through these restrictions.

In [the past](#), courts have ruled that restrictions on the privately funded speech of nonprofit government grantees are a violation of the First Amendment.

The chairman of the House Foreign Affairs Committee, Howard Berman (D-CA), issued a [statement](#) along similar lines. He said, "This policy — which would violate the constitutional right to freedom of speech if placed on U.S.-based non-governmental organizations — applied even if abortion-related services were funded only with non-U.S. funds, and even if abortion

was legal in the country in which services were provided."

Opposition to the policy has existed because of the implications for family planning and abortion, but the fundamental free speech issues and implications for the mission of nonprofit organizations are also of vital importance. Federal restrictions on private funds, conditioned on receipt of government grants, amount to an unconstitutional coercion of speech and appropriately should be curtailed.

## **Lobbying and Ethics Reform Takes Center Stage at the White House**

On Jan. 21, President Barack Obama signed an executive order on [Ethics Commitments by Executive Branch Personnel](#). The order details new restrictions for political appointees that work in the Obama administration. It limits the role lobbyists can play in the executive branch and attempts to reduce the influence of powerful special interests by addressing the revolving door — when government officials move to and from private sector jobs.

The Obama order says that a person cannot be hired by an agency if he or she lobbied that agency within the last two years. There is also a two-year ban on appointees — even those who are not lobbyists — from working on any issue they used to cover when in the private sector. Additionally, there is a ban, which runs for the entirety of the administration's time in office, on lobbying any other executive branch official or senior appointee should an appointee leave government service. The order requires appointees to sign a pledge stating they will abide by the new rules.

Executive branch employees are also barred from accepting gifts from lobbyists, and hiring at all agencies must be based upon qualifications and experience, not political connections.

In making lobbying and ethics reform one of his first items of business, Obama was acting on campaign and transition promises of significant change in the way the federal government does business. Obama's [campaign website](#) stated the intention to close the revolving door on former and future employers. The campaign site also pledged to "create a centralized Internet database of lobbying reports, ethics records, and campaign finance filings." The order does not address the searchable website. In addition, Obama planned to create an independent watchdog agency to oversee congressional investigations into ethics violations.

The executive order provides for a waiver from the new ethics rules. The director of the Office of Management and Budget (OMB), in consultation with the president's Counsel, can grant the waiver for one of two reasons: "(i) that the literal application of the restriction is inconsistent with the purposes of the restriction, or (ii) that it is in the public interest to grant the waiver."

The order represents an attempt to deal with industry representatives coming into government and regulating the very industry the person used to represent, or being in a position to dole out federal funding to a particular company or industry.

Obama's order is an attempt to reverse this trend by requiring all appointees seeking employment in the administration to pledge not to "participate in any particular matter involving specific parties that is directly and substantially related to my former employer or former clients, including regulations and contracts."

Despite the best intentions toward a more open and honest government, these rules have already faced some tough realities. Two exceptions to the rules have already been made for administration nominees. William Lynn was appointed Deputy Secretary of Defense but had been a registered lobbyist for defense contractor Raytheon until July 2008; Raytheon received \$11.7 billion in federal funding in Fiscal Year 2007, not including money through partnerships with other companies. And William Corr was nominated as Deputy Secretary at the Department of Health and Human Services; in the past, he has lobbied on behalf of the Campaign for Tobacco-Free Kids.

The White House issued a waiver to Lynn because of his unique qualifications. In response, the Project On Government Oversight (POGO) issued a [statement](#) of disapproval and called on Obama to remove Lynn's name from consideration. "The Obama Administration should not allow its ethics standards to begin with a series of waivers and loopholes which immediately undermine its good intentions."

According to [Congressional Quarterly](#), Senate Armed Services Committee Chairman Carl Levin (D-MI) endorsed the waiver, "which the panel had sought before voting on the nomination. But Levin said that under congressional ethics rules, Lynn would still have to recuse himself for one year from matters related to Raytheon."

On Jan. 23, POGO, Citizens for Responsibility and Ethics in Washington (CREW), the Government Accountability Project (GAP), and Public Citizen signed a [letter](#) to Levin and Ranking Member John McCain (R-AZ). The letter states that the groups do not doubt that Lynn is qualified for the position, and that before the new rules, "there would have been little ground for questioning the proposed nomination of Mr. Lynn." But the letter notes that Lynn's background clearly violates Obama's executive order and that the nomination does not "meet the spirit of these standards for a waiver."

[The Hill](#) recently reported that the same groups opposed to Lynn's nomination do not find Corr's nomination problematic. "I don't think they're the same. I think there's this problem of tarring all lobbyists with the same brush," said Melanie Sloan, the executive director of CREW.

"For these groups, their chief objection to Lynn moving from Raytheon, a major defense contractor, to the Pentagon is the potential for financial conflicts of interest," noted *The Hill*. "Because the Campaign for Tobacco-Free Kids does not earn money from HHS programs, Corr would not be in the same position, the watchdogs argued. 'His former group is not going to profit from him being at HHS,' said Mandy Smithberger, a national security investigator at the Project on Government Oversight."

Overall, the standards for issuing a waiver are unclear. More so, the problem is not the



lobbying industry itself but the role money plays in politics. Some argue that without an overhaul of the campaign finance system, specifically the public financing system, other attempts to improve government ethics will continue to be undermined.

The definitions outlined in the order may also allow some ways around these new rules. For example, those who leave the administration are free to lobby Congress or engage in lobbying activities that do not [meet the threshold](#) for someone to be required to register as a lobbyist.

Obama bolstered existing limits on gifts from lobbyists or lobbying organizations. However, many are concerned that an exception that allows for speaking engagements or attending "widely attended events" is not included in the new executive order. According to [BNA Money and Politics](#) (subscription required), "Without this exception, the strictly applied gift ban would appear to bar officials from accepting an invitation offered by a company or other entity that employs lobbyists to have a meal or other hospitality at any Washington event. [. . .] The order also retains a provision allowing an administration official to accept the cost of travel to and participation in an event outside of Washington, as long as the trip is related to the official's duties." This may mean that appointees can attend events across the country, but not accept an invitation in Washington, D.C.

Because some unplanned consequences of the order have clearly already appeared, it may have to be modified in the future. Importantly, the order leaves open the possibility for improvement and the consideration for further disclosure requirements. For example, the director of the Office of Government Ethics has been charged with reporting on "steps the executive branch can take to expand to the fullest extent practicable disclosure of such executive branch procurement lobbying."

## **House Makes Transparency a Priority for Stimulus**

The House is poised to vote on an [\\$825 billion](#) economic stimulus package. The legislation represents a historic effort to stabilize the economy through fiscal policy by approving \$275 billion in tax cuts and \$550 billion in direct spending, including funding for health care, education and job training, community development and housing, and energy and transportation infrastructure projects.

In addition to a massive infusion of resources, the bill has unprecedented disclosure and accountability requirements that represent a singular attempt to bring transparency and accountability to the implementation of the legislation. While the bill makes significant strides in the right direction, Congress would do well to strengthen the legislation's disclosure provisions to ensure that spending is as transparent and accountable as intended.

A section entitled "Accountability in Recovery Act Spending" in the American Recovery and Reinvestment Act of 2009 ([H.R. 1](#)) details a set of provisions intended to allow the general public to see where, how, and why the appropriated funds are spent. The bill calls for the establishment of a new website, "Recovery.gov", dedicated to promulgating information on

stimulus spending. The new website would be "a portal or gateway to key information ... and provide a window to other Government websites with related information." This website would contain:

- A database of findings from audits, inspectors general, and the Government Accountability Office
- Data on relevant economic, financial, grant, and contract information in user-friendly visual presentations
- Detailed data on contracts awarded by the government for purposes of carrying out the law, including information about the competitiveness of the contracting process
- A means for the public to give feedback on the performance of contracts awarded

Information on contracts that are not fixed-price and not awarded using competitive procedures must also be posted in a special section of the website.

The House economic recovery bill is significantly more sophisticated in its approach to transparency and oversight than legislation Congress approved that created the Troubled Asset Relief Program (TARP). The TARP law simply mandated that the Treasury Department post online "a description, amounts, and pricing of assets" purchased under the program.

Transparency and oversight in the American Recovery and Reinvestment Act of 2009 extend beyond posting spending data on the Internet. The economic recovery bill establishes an "Accountability and Transparency Board." The oversight body would be headed by the new Chief Performance Officer, Nancy Killefer, and composed of six inspectors general and/or deputy secretaries from various federal agencies. It would be charged with coordinating and conducting oversight of federal spending under the law to prevent waste, fraud, and abuse by submitting monthly reports to Congress on contract and grant awards, contractor performance, and the adequacy of contractor and acquisition oversight within the federal government.

In addition to the Board, the bill would also create an "Independent Advisory Panel" and require regular oversight by the Government Accountability Office (GAO), Congress's investigative arm. Composed of experts in the fields of economics, public finance, and other related disciplines, the Independent Advisory Panel would be charged with advising the Accountability and Transparency Board with an aim to prevent and otherwise identify waste, fraud, and abuse related to spending under the law. The bill also appropriates \$25 million to GAO for the ongoing oversight of and reporting on the stimulus bill.

OMB Watch has [analyzed](#) the bill's transparency and accountability section and has found areas in which Congress could expand or improve the legislation as drafted. Our analysis expounds on these areas in some detail, but in short we suggest the bill stipulate that:

- Recovery.gov be open to indexing by commercial search engines
- All contract and grant transactions should be posted on USASpending.gov, with a special notation that such contracts and grants are created through the stimulus

legislation

- All reports, findings, minutes and agendas of meetings, official letters and correspondence of the Board, and any data or information gathered during investigations by the Board be made publicly available and posted on Recovery.gov within five business days of the release of information

The existing transparency and accountability measures are substantial and will likely provide unprecedented access to data about stimulus spending enacted through this legislation. However, with minor changes, Congress could significantly increase the depth of transparency and accountability of the funds spent under this bill.

## **Groups Launch Bailout Watch to Oversee Government Bailout Actions**

OMB Watch and five other nonprofit organizations have collaborated to form a project called Bailout Watch. The project will research, investigate, and analyze the federal government's bailout activities and publish resources and data for policymakers, the media, and interested citizens.

The project will be conducted as a partnership with a number of groups, which will provide leadership on different aspects as dictated by their expertise. Coordinated by OMB Watch, the project also includes the Center for Economic and Policy Research, the Economic Policy Institute, OpenTheGovernment.org, the Project on Government Oversight, and Taxpayers for Common Sense.

The goal of the Bailout Watch project is to identify specific data that should be disclosed (and made available in an online, indexed, searchable format), research and investigate government decision making processes related to the bailout, and provide analysis and commentary about the effectiveness of different bailout programs. The groups also hope to work closely with oversight bodies including the Special Inspector General for the Troubled Asset Relief Program (TARP), the Congressional Oversight Panel, and the Government Accountability Office. The initial focus of the project will be on TARP and its use of the \$700 billion authorized by Congress, but it will also reach beyond TARP to include related financial bailouts.

Specifically, Bailout Watch will draw upon the expertise and resources of the partner organizations to fulfill three primary goals:

**Identify specific data that should be disclosed:** There has been much discussion about the way in which Treasury provides information about various bailouts. While dollar amounts have been disclosed, albeit late, the related data concerning items such as warrants, value and type of stock obtained, and transaction terms need to be disclosed. When necessary, the project will seek the advice of financial market experts to help identify the specific types of data that are needed for more useful analysis of the TARP program. The project will urge the Obama administration and congressional oversight bodies make such data available in

useable, searchable formats. When the data is not available in such formats from the government, Bailout Watch partners will step in to make sure it is accessible.

Bailout Watch has started this process by drafting an initial [list of government data](#) and information that should be disclosed to the public about the TARP program. The data memo was originally drafted by the Economic Policy Institute and was further developed by the Bailout Watch partner organizations. OMB Watch has shared this data memo with the Obama transition team, OMB officials, congressional leaders and oversight bodies, and other organizations working on bailout issues. A second memo is also being drafted, detailing other information that should be disclosed by institutions receiving TARP funding, including data on loans, executive compensation, dividend payments, and mortgage-related concerns.

**Conduct research and investigations:** Even if the Obama administration increases transparency and provides all the data being requested, there will be a need for further research and investigation to ensure against real and perceived conflicts of interest in the TARP program and to highlight any sweetheart deals involved in implementing TARP. This includes further research on institutions that receive money and on the contractors involved in the transactions. It also entails monitoring the implementation and oversight of bailout activities, including working closely with the government oversight bodies.

Taxpayers for Common Sense has begun part of this work by researching details about the institutions receiving TARP funds and publishing these details in bank/institution profiles available on its [website](#).

**Produce analysis and commentary:** Ultimately, if Bailout Watch is successful in creating a more robust clearinghouse of information about the TARP program, including more information made public from the Obama administration and additional research and investigation by the Bailout Watch partner groups, it will be possible to provide public interest analysis and commentary on the government's actions. Questions this analysis and commentary would seek to answer include: Are these the right types of stock to purchase? Will there be a real chance that taxpayers will get their money back? How do the bailout activities impact federal deficits and debt? What purchases and investments by the government are the most beneficial to broad economic growth?

While the TARP program will be the first focus of Bailout Watch because of the poor state of transparency and disclosure of information about resources that have already been spent, there are many more areas of the government involved in bailout activities. By some estimates, the government has already allocated somewhere between \$3 trillion and \$7 trillion to bailout activities beyond the TARP program, including actions by the Federal Reserve, the Federal Deposit Insurance Corporation (FDIC) and other agencies and entities. Accordingly, as the project progresses, and to the extent possible, the scope of work will be expanded beyond TARP to include actions by the Federal Reserve (which is notorious for its lack of disclosure and not controlled by the incoming Obama administration), the FDIC, Fannie Mae and Freddie Mac, and other institutions involved in bailouts that may yet occur.

[Privacy Statement](#) | [Press Room](#) | [Site Map](#) | [Contact OMB Watch](#)

© **2009 OMB Watch**

1742 Connecticut Avenue, N.W., Washington, D.C. 20009

202-234-8494 (phone)

202-234-8584 (fax)

Combined Federal Campaign #10201

Please credit OMB Watch when redistributing this material.