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OPEN Government Act Signed into Law

On Dec. 31, 2007, President Bush signed the OPEN Government Act (S. 2488), which includes long-sought reforms of the Freedom of Information Act (FOIA). Though some important provisions were dropped in order to reach bipartisan agreement in Congress, the bill creates incentives to reduce agency backlogs of FOIA requests, increases reporting requirements, and increases the scope of who can make requests and what entities are covered by FOIA.

The mounting problems regarding FOIA are well documented. The Coalition of Journalists for Open Government's report *Waiting Game: FOIA Performance Hits New Lows* found that even though the number of FOIA requests dropped in 2005, the backlog of unanswered requests rose from 20 percent of total requests made in 2004 to 31 percent in 2005. In addition to the increase in unanswered requests, requesters had to wait longer for replies.

In an effort to reduce agency backlogs and improve FOIA procedures, President George W. Bush issued Executive Order 13392 on Dec. 14, 2005. The order, though, did little to relieve agency backlogs. The Government Accountability Office (GAO) recently reported, "Despite increasing the numbers of requests processed, many agencies did not keep pace with the

volume of requests that they received." The OPEN Government Act, sponsored by Sens. Patrick Leahy (D-VT) and John Cornyn (R-TX) in the Senate and Rep. Henry Waxman☼ (D-CA) in the House, seeks to resolve some of these problems.

Incentives for Improving Response Time

A long-standing and notorious problem with FOIA is the large backlog of requests and slow response times. The National Security Archive conducted a 2006 audit of FOIA that found agencies failing to make significant improvements to eliminate or reduce backlogs and reported on the ten oldest unanswered FOIA requests, several dating back to 1989. To help alleviate this problem, the OPEN Government Act penalizes agencies that fail to respond to FOIA requests within the required 20 days by barring them from collecting search or duplication fees from the requester. Moreover, the bill requires agencies to create a FOIA tracking system that would allow requestors to monitor the progress of requests on the Internet or by telephone. The OPEN Government Act also requires agencies to clearly state the amount of information deleted in its redactions and the exemption invoked for making each individual redaction. This may help to limit the number and scope of agency redactions.

Attorney Fees

Previously, attorney fees were only awarded to those complainants that succeeded with a FOIA case in court. A common criticism was that agencies would refuse to release information to requestors until a lawsuit was filed, but the agencies would comply with the request just before trial and thereby avoid paying attorneys fees. The OPEN Government Act expands awards of attorney fees to include cases where the agency makes a "voluntary or unilateral change in position" in the face of a lawsuit. Hence, agencies will no longer be able to avoid the cost of paying attorney fees if they force complainants to prepare cases against them.

Expanded Scope

Under FOIA, the news media does not pay collection or duplication fees, and the OPEN Government Act expands the definition of news media to possibly include bloggers. The bill defines members of the news media as "any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience." This provision may greatly expand the audience using FOIA to collect information and research governmental issues, and through the exploding number of online political blogs, expand the number of people learning about their government.

Another provision expands the scope of who must respond to FOIA requests. In response to the fact that the government contracts out so many of its activities, the OPEN Government Act extends FOIA to include any information that "would be an agency record" that is maintained by "an entity under Government contract, for the purposes of record management." While the breadth of this provision is untested, it will surely serve to provide new access to information

held by contractors that store and manage government records and data.

Reporting Requirements

The OPEN Government Act also adds several important reporting requirements. The new provisions require agencies to report on the average, range, and median number of days for responding to requests. The number of responses made within the 20-day requirement, and in 20-day increments up to 200 days, also must be reported. Additionally, agencies are required to disclose the ten oldest active FOIA requests. Importantly, agencies are required to disclose the raw data regarding FOIA response times upon public request. In addition to the existing reporting requirements, this data will vastly improve oversight of agency practices regarding implementation of FOIA.

Missed Opportunity: Ashcroft Memo

The House passed the OPEN Government Act in March of 2007, but the Senate was held up due to various objections made by Republican senators and the White House. To address these concerns, a number of compromises and revisions were made. Unfortunately, one of these compromises was the removal of a provision which would have reversed the so-called "Ashcroft memo." On Oct. 12, 2001, Attorney General John Ashcroft issued a memo urging federal agencies to exercise greater caution in disclosing information, placing the presumption in favor of not disclosing information under FOIA. Many access advocates believe this policy shift has led to a significant reduction of information being released by agencies in response to FOIA requests.

In the coming months, agencies will translate the new FOIA law into reality, and much will depend on how the implementation of these improvements occurs. It is a practical certainty that many access advocate groups will be monitoring the agencies and testing compliance with the new law.

Big Farms to Get Free Pass in Reporting Air Pollution from Animal Waste

The U.S. Environmental Protection Agency (EPA) issued a Dec. 28, 2007, proposal in a second attempt to exempt farms from reporting air pollution caused by animal waste and to reduce information available about toxins at the local level.

In response to entreaties by the National Chicken Council, National Turkey Federation, and U.S. Poultry and Egg Association in 2005, EPA initially attempted to exempt only ammonia emissions from poultry farms. The new rule proposal extends the reporting loophole to all farms with *any* hazardous substance resulting from *any* animal waste released into the air. Farms must still report other water and land waste.

Congress enacted the Emergency Planning and Community Right-to-Know Act (EPCRA) in

1986 in response to concerns about human and environmental health from toxic spills and pollution. National, state, and local emergency response teams were organized to ensure the immediate and well-planned reaction to any chemically dangerous situation. EPCRA details public notification as crucial for those emergency plans. In addition to requiring companies to report spills and pollution levels to the federal government, the law also also tasks companies with divulging specifics to emergency response teams, the Local Emergency Planning Committee (LEPC), and the State Emergency Response Commission (SERC). These entities are responsible for participating in response planning and providing information to the public to allow citizens to make their own risk evaluations.

The EPA explained that in developing this exemption proposal, it had reasoned that since the air releases are unlikely to trigger an EPA emergency response — having never done so before — mandatory reporting is an unnecessary administrative burden on both industry and government. However, EPA failed to consider the importance of publicly available information about local pollutants and exceedances of reportable quantities (RQs) — above which EPA considers there to be the "possibility" of harm. Currently, farms only have to report when pollution levels rise above a chemical's RQ, and farms routinely release hazardous substances above their RQs. The lack of consistent compliance suggests that no longer requiring information disclosure is an effort to sweep a messy problem under the rug. The intent of EPCRA was to act as preventative legislation, ensuring that sufficient information is disclosed and well-formed plans are created to prevent and properly respond to emergencies.

Government research has shown that animal waste causes significant environmental problems. The role of such waste in climate change and water pollution has also been well documented. The public health impacts from air pollution are also significant: multiple studies in North Carolina and Iowa have found respiratory and mental health problems in residents close to animal factories.

EPA has also recognized that current air monitoring practices, which limit investigations about the correlation between animal waste air pollution and human health, are inadequate. In attempts to determine farms' compliance with regulations, EPA initiated a two-year air emissions monitoring study in large animal farms in June 2007. Although some environmentalists believed the study to be little more than a stalling tactic, acknowledgement of the lack of basic air pollution data actually bolsters the argument that more information is needed rather than less. Instead, the proposed rule would weaken regulatory oversight and public accountability and ignores the central principal of EPCRA — that potential health concerns should be known publicly so that people can participate in protecting themselves.

EPA Denies State Efforts to Curb Global Warming

The Bush administration rejected an attempt by California and several other states to combat global warming by placing a cap on greenhouse gas emissions from vehicles. Stephen Johnson, head of the U.S. Environmental Protection Agency (EPA), announced the decision Dec. 19, 2007. Environmental advocates and members of Congress have sharply criticized the decision,

and several states have already filed suit in federal court hoping to overturn it.

In 2002, California Gov. Gray Davis (D) signed the California Clean Cars law. The legislation called for state regulators to impose strict emissions standards for new vehicles beginning with model year 2009.

In December 2005, California petitioned EPA to let the state enforce the Clean Cars law through regulation. Under the Clean Air Act, the federal government holds the express right to regulate emissions but may grant waivers to California. If EPA grants a waiver to California, other states may adopt California's regulations. "A total of 18 states, representing 45 percent of the nation's auto market, have either adopted" or pledged to adopt California's program, according to *The Washington Post*. EPA has never before denied a waiver request under the Clean Air Act.

In defending his decision, Johnson said a recently passed energy bill supplants the need for the states' programs. Bush signed into law Dec. 19, 2007, the Energy Independence and Security Act of 2007 (H.R. 6). Among other things, the law will raise the national fuel economy standard to 35 miles per gallon by 2020.

California's Clean Cars law does not mandate a change in fuel economy. Instead, the program caps vehicle emissions and provides automakers with latitude in choosing a strategy to meet the emissions limit, including improved fuel economy. Since both the newly passed law and the states' programs would effect a reduction in greenhouse gas emissions, Johnson contends the states' standards would be unnecessary.

However, a study by the California Air Resources Board finds the states' emission reduction programs would be significantly more beneficial than the federal fuel economy standard. The study finds the states' programs would reduce greenhouse gas emissions by 74 percent more than the federal fuel economy mandate for cars in California and be similarly beneficial for other states adopting the program.

Johnson also claims a single national standard is preferable to a "confusing patchwork of state rules." Johnson's rhetoric parrots that of auto industry spokespersons who have consistently called for a "50-state" or "nationwide" standard.

However, Frank O'Donnell, head of the nonprofit clean air advocacy group Clean Air Watch, believes this argument is misleading: "Under the Clean Air Act, there are only two possible standards for motor vehicles: federal standards, and potentially tougher California standards, which by law other states are permitted to adopt." O'Donnell adds, "That's hardly the makings of a quilt."

California and 15 of the states that intend to adopt California's standards filed suit on Jan. 2 against EPA. The states, joined by several environmental groups, filed the suit in San Francisco in the U.S. Court of Appeals for the Ninth Circuit. Governors and attorneys general from some of the states have been vocal in criticizing Johnson for denying California's request without a

scientific basis for doing so. *The Washington Post* reported the claims of anonymous sources inside EPA who said scientific, technical, and legal advisors at the agency recommended Johnson grant California's request, arguing that EPA would lose a lawsuit, if filed.

A report by the Congressional Research Service (CRS) supports the notion that EPA is on shaky legal footing in denying California's request for a waiver. CRS analyzed the four criteria California must meet in order to receive a Clean Air Act waiver ("whether the state has determined that its standards will be, in the aggregate, at least as protective of public health and welfare as applicable federal standards; whether this determination was arbitrary and capricious; whether the state needs such standards to meet compelling and extraordinary conditions; and whether the standards and accompanying enforcement procedures are consistent with Section 202(a) of the Clean Air Act.") California's proposed regulations meet all four criteria, CRS found.

Two congressional committees are investigating EPA's decision. The House Oversight and Government Reform Committee and the Senate Environment and Public Works Committee — headed by Rep. Henry Waxman (D-CA) and Sen. Barbara Boxer☼ (D-CA), respectively — have requested all documents associated with the decision. Boxer's committee has scheduled a field briefing for Jan. 10, to be held in Los Angeles while Congress remains out of Washington. Johnson declined an invitation to attend the briefing.

EPA's general counsel has instructed staff to turn over all relevant documents and communications, including those to or from White House officials, according to the Associated Press. A recent investigation by the House Oversight and Government Reform Committee found senior officials from the White House as well as the Secretary of Transportation were involved in a campaign to lobby governors and federal lawmakers to oppose California's request for a waiver. Administration officials coordinated that campaign with auto industry lobbyists, the report also found.

Despite congressional oversight and the prospect of a court battle EPA will likely lose, the administration may still wind up achieving its intended goal of delaying government regulation of greenhouse gas emissions. Legislation granting the states the authority to regulate would likely be vetoed by Bush and have difficulty garnering the necessary two-thirds majority in both chambers. As for the court case, the CRS report states, "It is unlikely that EPA could be forced to grant a waiver through judicial means before the swearing in of a new Administration in 2009."

Congress Limps Toward Product Safety Reform

Despite a record number of consumer product recalls in 2007, Congress adjourned in December without agreeing on legislation to restore the federal government's safety system. The House passed new legislation that would vastly improve the Consumer Product Safety Commission's (CPSC) ability to regulate unsafe products. Weaker Senate legislation was

blocked by a lack of bipartisan agreement.

The House bill, H.R. 4040, passed Dec. 19, 2007, and includes numerous provisions that would enhance CPSC's authority to regulate the more than 15,000 products under its jurisdiction and ban industry-funded travel. In addition, the bill would:

- lower the levels of lead permitted in consumer products generally and especially lower lead levels in children's products;
- require independent third party testing of children's products;
- modify CPSC's procedures for issuing safety regulations;
- modify CPSC's public disclosure procedures as well as manufacturers' procedures for notifying the public about defective products; and
- authorize increased appropriations for both CPSC activities and for capital improvements to its research and testing facility.

The companion bill in the Senate, S. 2045, is not as extensive as the House bill. It excludes the travel ban and appropriates less money in the short term for CPSC activities. According to a Dec. 12, 2007, *Washington Post* article, there was not a single Republican sponsor for the legislation in the Senate, although there are negotiations to find a compromise. The article quotes the sponsor of the bill, Sen. Mark Pryor☼ (D-AR), as saying he is close to having a bipartisan compromise that would allow the Senate to take up the bill early in 2008. Both the Bush White House and the toy industry oppose some of the provisions in the Senate bill, so it is unclear if Pryor will be able to move the bill quickly.

Both consumer advocates and the toy industry were disappointed in Congress's inability to pass legislation. According to the *Post* story, the toy industry needs to have clarity about regulatory requirements by March or April because that is when toy manufacturers begin to finalize orders for the 2008 holiday season. The president of the Toy Industry Association, Carter Keithley, is quoted as saying, "Having legislation would provide [manufacturers] clarity as to what's required and give the public confidence."

Even if legislation passes both houses of Congress and President Bush signs a bill, there is no guarantee that consumers will be safer from the products they buy. Increased civil penalties, better notice and disclosure of product recalls, and an expanded CPSC will not achieve better consumer protections unless the agency wants to improve its performance. In a strongly worded op-ed published in the *Post* Dec. 23, 2007, a former CPSC statistician, Robin Ingle, argued that the agency "has lost the will to perform the function it was created for in 1972."

Appropriate public protections can only be built upon research, but over the last decade, the author writes, the agency has reduced vital research. For example, when she collected statistics on injuries and fatalities from all-terrain vehicle (ATV) accidents, the results indicated that in 2004, deaths and injuries were at a 20-year high. The general counsel at the agency tried to insert language into the executive summary of her report indicating the risk of riding these vehicles was decreasing. The general counsel at the time had been a lawyer for the ATV

industry.

The author provides two other examples of either products CPSC chose not to regulate or research indicating product dangers it chose not to release because the costs of buying those products would have increased slightly. She concludes the op-ed with this suggestion for improving the CPSC:

> It's easy to be outraged because the agency has allowed dangerous products to be imported from China, or because its chairman has taken trips paid for by the industries she regulates. But it's important to look more closely at CPSC and ask what really drives it and what currency it deals in. The agency was formed for one reason: to save lives. People of all ages die every day in incidents associated with some of the 15,000 products that it's meant to oversee. The agency should listen to its own scientists and stop silencing the life-saving research happening in its buildings.

Temporary and Targeted: The Basics of an Economic Stimulus Package

The release of dismal national jobs data on Jan. 4 has prompted rumblings from politicians in Washington about the need for an "economic stimulus package." On Jan. 7, President Bush and Treasury Secretary Henry Paulson delivered separate speeches on the state of the economy, in which they addressed the basic outlines of a fiscal policy designed to mitigate the effects of a possible recession. Bush announced he is taking a stay-the-course approach while economists from across the political spectrum are calling for some type of stimulus package. The president could still offer a plan in his State of the Union speech at the end of January.

During his speech at the Union League Club of Chicago on Jan. 7, Bush reiterated the importance of continuing his current policies to address what he calls recent economic "challenges." However, he emphasized that new initiatives are unnecessary to address the damage from the housing and financial crises. Bush called for extending his first-term tax cuts, few of which, if any, would have any impact on current economic signals.

Meanwhile, Paulson, in his speech before the New York Society of Security Analysts, Inc., said the administration would consider an economic stimulus package but would not provide any details. This is why some speculated that Bush might announce something during the State of Union address.

In order for an economic stimulus to be successful in its goal of shortening — or even preventing — a recession, it must quickly put money into the hands of individuals most likely to spend it. According to the Bureau of Economic Analysis, the U.S. economy is primarily driven by consumer spending, which accounts for approximately two-thirds of the economy. Thus, if there was a stimulus that incorporated tax cuts, it should be targeted to low- and middle-income families, who not only would benefit most from an increase in their take-home pay in the face of rising health care and energy costs, but would also be most likely to spend the

money immediately. Extending the Bush tax cuts, which largely benefit the wealthiest in the country, would have little stimulative impact, even if they could be felt immediately.

While individual saving and investing are desirable goals of fiscal policy, they would do little to provide short-term and immediate economic stimulus. Writing in the *Financial Times*, Harvard University professor and former Clinton Treasury Secretary Larry Summers stated, "[P]oorly provided fiscal stimulus can have worse side effects than the disease that is to be cured." He believes policymakers should design a stimulus package with the following characteristics:

- Timeliness: The package should be enacted by the middle of 2008, and its benefits should be felt immediately.
- Targeted: Tax spending should be directed at low- and middle-income families whose incomes have recently fallen and who would benefit the most from a tax cut.
- Temporary: A tax cut that increases the deficit for more than one year will be counterproductive, as the resulting upward pressure on long-term interest rates will attenuate the Federal Reserve Bank's ability to stimulate the economy through monetary policy.

While tax cutting can nominally fall under the rubric of "fiscal stimulus," not all cuts are the same: A $100 billion deficit hike can be more or less effective depending on how the tax cuts are designed. In his Jan. 7 column in the *New York Times*, Princeton economics professor Paul Krugman notes the contradiction in rhetoric the Bush administration has deployed in defense of its fiscal policies.

> [U]ntil just the other day Bush administration officials were in denial about the economy's problems. They were still insisting that the economy was strong, and touting the "Bush boom" — the improvement in the job situation that took place between the summer of 2003 and the end of 2006 — as proof of the efficacy of tax cuts.

As a series of charts on Krugman's blog illustrates, the Bush tax regime has not been a stellar jobs creation program.

Congressional Budget Office Director Peter Orszag underscored the importance of the duration of budget deficits when, as co-director of the Brookings-Urban Tax Policy Center, he said, "I want to emphasize at the beginning that temporary budget deficits can be beneficial in providing a jump start to a weak economy. Ongoing, sustained budget deficits are a different story.... The bottom line is that a larger budget deficit and lower national saving today reduce income in the future."

It is important that policy makers ignore calls for a repetition of the failed 2001-2003 Bush tax cuts and adhere to sound economic principles as described by Summers and Orszag. Even worse would be calls for extension of those same tax cuts as a short-term solution for current fiscal problems. Permanent tax cuts for the wealthy and corporations would do little to immediately stimulate the economy or direct economic aid to those most affected by an

economic slump while ultimately putting a drag on the economy in the long term through sustained budget deficits.

At this point, Democratic leaders in Congress have not put forward a stimulus plan. However, there has been discussion that such a plan might incorporate targeted, short-term tax cuts combined with targeted, short-term spending increases. With Congress returning prior to the State of the Union speech, it is expected that Democrats will begin advocating for a stimulus plan of some type.

Parts of Patriot Act Definition of Support for Terrorism Held Unconstitutional

On Dec. 10, 2007, the U.S. Court of Appeals for the Ninth Circuit ruled several provisions of the Patriot Act unconstitutional. The portions of the 2001 law in question criminalized any support for nonviolent activities of groups deemed by the Bush administration to be "terrorist organizations."

In the ruling — *Humanitarian Law Project v. Mukasey* — Judge Harry Pregerson held the language of the law is too vague because a person of ordinary intelligence would not be able to distinguish which types of activities or behaviors are illegal. In his opinion, Pregerson wrote, "Vague statutes are invalidated for three reasons: 1) to avoid punishing people for behavior that they could not have known was illegal; 2) to avoid arbitrary and discriminatory enforcement by government officers, and 3) to avoid any chilling effect on the exercise of First Amendment freedoms."

The provisions of the Patriot Act of concern in this case are amendments to the Antiterrorism and Effective Death Penalty Act (AEDPA), which enabled the U.S. Secretary of State to identify any group as a "foreign terrorist organization." Additionally, the law made it a crime — punishable by up to ten years in prison — for anyone to support even the nonviolent activities of such designated groups. The recent judgment upholds a 2005 ruling in which a U.S. District Court judge in Los Angeles, CA, found the parts of the law defining provision of training, expert advice or assistance, personnel, and service to be unconstitutional because there is "no apparent limit" to presidential authority to label groups as terrorist organizations. The 2005 judgment stopped the federal government from putting these provisions into effect against the groups named in the plaintiffs' complaint.

In their original complaint, the Humanitarian Law Project (HLP) asserted that the law compels an unfair guilt by association standard under which innocent individuals could be punished for supporting the good works of an organization that also engages in illicit activities. HLP contended it had been forced to stop its human rights and conflict resolution training for the Kurdistan Workers Party in Turkey and the Liberation Tigers of Tamil Eelam in Sri Lanka out of fear of legal sanctions because the groups have been designated as terrorist organizations. Both engage in wide range of nonviolent, humanitarian activities as well as violent ones. The plaintiffs argued that, as such, the enforcement of the law violated their First and Fifth

Amendment rights.

IRS Issues Final Version of New Form 990

On Dec. 20, 2007, the Internal Revenue Service (IRS) released the final version of its updated Form 990, the informational return for public charities and other tax-exempt organizations. The new form marked the first revision since 1979 and will be used for the 2008 tax year (returns filed in 2009). The IRS expects to release draft instructions for the 2008 Form 990 later in January. Although the new Form 990 incorporated many suggestions made in public comments on the draft version, the IRS did not make key changes to clarify and simplify reporting of advocacy-related activities.

During the 90-day comment period following the June 2007 IRS release of the Form 990 Discussion Draft, the agency received approximately 700 e-mails and letters totaling approximately 3,000 pages of comments. The final version of the form retains the Discussion Draft's structure of a core form and a series of schedules. Small nonprofits will have a grace period to transition to the new form, when they will be allowed to file Form 990-EZ instead of Form 990. Beginning in the 2010 tax year, all charities with gross receipts of $200,000 or $500,000 in total assets will be required to file Form 990-EZ. Nonprofits with less than $25,000 in gross receipts that are currently required to complete an e-Postcard (Form 990-N) will be required to continue doing so. By 2010, the threshold for those filing postcards will be adjusted to $50,000.

In OMB Watch's comments on the Form 990 Discussion Draft, we recommended several changes. In a recent analysis of the new 990, OMB Watch determined the IRS incorporated only one of the changes we suggested: using a separate box to report "doing business as" names for organizations so such information will be searchable on the web. The IRS retained the combined Schedule C for reporting lobbying and election activities despite concerns that mixing lobbying and political campaign activities in one form is likely to cause substantial confusion. All nonprofits — 501(c)(3), 501(c)(4), 527 organizations, for example — will be required to file Schedule C if engaged in either lobbying or political activity. Charities (501(c)(3) organizations) are not permitted to engage in partisan political activity but are permitted to engage in nonpartisan voter activities; the new form could cause confusion for those organizations.

However, Part IV (listing Required Schedules) of the new Schedule C does define the term "political" so that nonpartisan voter engagement work clearly is not included. Another problematic area is the definition of lobbying in the instructions for filling out Schedule C. The draft instructions used a definition that is inconsistent with the tax code. However, the IRS has not yet provided its version of the final instructions, leaving it uncertain what charities will be told to do in completing the form.

Independent Sector, which represents larger national nonprofits and various foundations, expressed satisfaction with the new form in a statement posted on its website, asserting,

"Independent Sector is pleased that the revised Form allows organizations to describe their exempt purpose and accomplishments on the first two pages of the Form, and that the IRS has made many of the improvements we requested in financial, compensation, and governance information, as well as in other specific schedules."

According to the IRS's overview of their Form 990 redesign, the major changes to the Discussion Draft include:

- A revised summary page that eliminates the ratios, percentages, and other metrics included in the draft, and incorporates a two-year summary of financial information comparing the current and prior years;
- A reordered core form that moves the organization's description of its program service accomplishments to page 2, immediately after the summary;
- A new checklist of schedules that shows which schedules the filing organization must complete;
- More opportunity throughout the form to provide supplemental information;
- Retention of group returns for affiliated groups with a joint exemption;
- Revised governance and compensation sections;
- Modified schedules for hospitals, tax-exempt bonds, non-cash contributions, and supplemental financial statements; and
- Reduced burden throughout the form and schedules, including increased or new reporting thresholds for several of the schedules.

It is surprising the speed with which the IRS proceeded to make changes to the annual tax form. Many organizations wrote to IRS that it should proceed slowly, testing proposed changes. The IRS took comments on its draft until Sept. 14, 2007, but had announced that it intended to publish a final version by the end of the year. Given the complexity of Form 990, some hoped that the IRS would provide a second round of comments. But it was rumored that the IRS staff needed to make quick decisions if they hoped to move the form into electronic formats. The information technology staff within the IRS had a limited opening to work on the Form, forcing the agency to finalize action by the end of 2007 or wait several years before staff could digitize the form.

The next step will be to review instructions on how to fill out the form. IRS has said the instructions will be coming shortly, possibly in installments.

Court Says Evidence Must Tie Charities to Terrorist Attack, Overturns $156 Million Judgment

On Dec. 28, 2007, the U.S. Court of Appeals for the Seventh Circuit overturned a $156 million judgment against several U.S.-based charities accused of supporting terrorism. The court ruled that the 2004 award against several charities that required payment of damages to the family of David Boim, who was shot to death in the West Bank in 1996 in an attack attributed to Hamas, must be based on evidence that the charities were directly connected to the murder.

The case was sent back to the lower court where there may be a new trial. The case could have a significant impact on the long-term fate of charitable funds seized by the government as part of its financial war on terror.

The Boim family was living in Jerusalem in 1996 when their 17-year-old son David was shot by two men identified as members of the militant Palestinian group Hamas, which the U.S. government has designated as a terrorist organization. In 2000, the Boims filed suit against Muhammad Salah, a former Hamas military director then living outside Chicago, and three U.S.-based Islamic charities suspected of funneling money to terrorist groups. The Boims wanted to make sure that that no money raised in the U.S. by Islamic charities was actually used to support terrorists in the Middle East. In 2004, a jury found the defendants responsible for providing financial support to Hamas, granting $52 million in damages, which was later tripled to $156 million as required under U.S. anti-terrorism law.

The appellate court decision said the trial court did not require the Boims to present credible evidence proving a causal connection between Hamas and the activities of the Holy Land Foundation for Relief and Development (HLF), the American Muslim Society, the Quranic Literacy Institute, and fundraiser Muhammad Salah. Furthermore, the trial court improperly allowed the Boims to rely on hearsay evidence and out-of-court statements, including websites attributed to Hamas.

The ruling also said the lower court should not have held that the links between HLF and Hamas were "incontrovertible" based on classified government evidence used by the Department of Treasury to designate HLF as a supporter of terrorism because HLF never had the opportunity to see or contest the evidence. The court drew a distinction between a civil dispute between private litigants and one involving national security with the government as a party, which are for different purposes and use different standards. In the Boim case, Judge Ilana Diamond Rovner wrote, "Belief, assumption, and speculation are no substitutes for evidence in a court of law."

The opinion went on to state, "The district court mistakenly believed that an organization or individual that contributed money or other support to Hamas with the intent to support its terrorist activities could be liable to the Boims even in the absence of proof that the money or support given to Hamas was a cause in fact of David's death, so long as the murder of David was foreseeable to the donor individual or organization."

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