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TARP IG Reports Underscore Need for Better Transparency in Financial Bailout

Two recent reports by the Special Inspector General for the Troubled Asset Relief Program (SIGTARP), Neil Barofsky, provide useful information and stand in sharp contrast to the Treasury Department's attempt to provide comparable transparency for the program, also known as TARP. One report clearly presents existing TARP information, while the other supplies new data that Treasury should be providing. In both cases, the reports highlight changes Treasury should make to how it conducts and presents TARP data.

To date, TARP, the most prominent element of the larger initiative colloquially known as "the bailout," has been a relatively secretive program. The Treasury Department, which is

responsible for administrating the program, has kept many details secret, such as how banks are using the funds given to them. During the week of July 20, however, Barofsky released two reports on TARP as part of his efforts to bring more transparency and accountability to the program.

One report, released July 21, is the Quarterly Report to Congress, a massive, 252-page overview of all the programs within TARP, as well as the related programs outside of TARP that are considered part of the bailout effort. The second report, released July 20, titled *SIGTARP Survey Demonstrates that Banks Can Provide Meaningful Information on Their Use of TARP Funds*, contains the results of a survey Barofsky conducted of the 364 recipients of TARP funding. In the survey, he asked these institutions to report on their use of TARP funds.

These two reports work well in tandem. The quarterly report provides the public with the "big picture" view of TARP and shows the relative importance of each of the programs, while the survey shows why the government needs to do a better job of disclosure, especially for information related to the largest of the TARP programs, the Capital Purchase Program (CPP). Prior to these reports, the public knew little about the current status of TARP, and together, the reports help make the argument for comprehensive reporting requirements for TARP recipients.

The Quarterly Report is a useful primer on TARP; everything about TARP is located in one easily accessible place. It provides a general background on TARP and then describes each of the twelve programs under TARP. These descriptions are useful for those who are looking to learn about the various aspects of the program. TARP is complicated, with many different, highly technical parts, and Barofsky's report breaks down these complicated terms and issues.

Much of this information is also available online but in a less cohesive format through FinancialStability.gov, the Treasury's website for TARP. FinancialStability.gov lists and describes the various TARP programs but under a tab labeled "Road to Stability." The descriptions are often cursory as well, without a great deal of context for each program. Indeed, the description for the Systemically Significant Failing Institution (SSFI) Program, a $75 billion program which has only been used by AIG, is only a sentence long on FinancialStability.gov, and it does not mention AIG.

TOTAL POTENTIAL FUNDS SUBJECT TO SIGTARP OVERSIGHT, AS OF 6/30/2009 ($ BILLIONS)

Program	Brief Description or Participant	Total Projected Funding at Risk ($)	Projected TARP Funding ($)
Capital Purchase Program ("CPP")	Investments in 649 banks to date; 8 institutions total $134 billion; received $70.1 billion in capital repayments	$218.0 ($70.1)	$218.0 ($70.1)
Automotive Industry Financing Program ("AIFP")	GM, Chrysler, GMAC, Chrysler Financial; received $130.8 million in loan repayments (Chrysler Financial)	79.3	79.3
Auto Suppliers Support Program ("ASSP")	Government-backed protection for auto parts suppliers	5.0	5.0
Auto Warranty Commitment Program ("AWCP")	Government-backed protection for warranties of cars sold during the GM and Chrysler bankruptcy restructuring periods	0.6	0.6
Unlocking Credit for Small Businesses ("UCSB")	Purchase of securities backed by SBA loans	15.0[a]	15.0
Systemically Significant Failing Institutions ("SSFI")	AIG investment	69.8[b]	69.8[b]
Targeted Investment Program ("TIP")	Citigroup, Bank of America investments	40.0	40.0
Asset Guarantee Program ("AGP")	Citigroup, ring-fence asset guarantee	301.0	5.0
Term Asset-Backed Securities Loan Facility ("TALF")	FRBNY non-recourse loans for purchase of asset-backed securities	1,000.0	80.0
Making Home Affordable ("MHA") Program	Modification of mortgage loans	75.0[c]	50.0
Public-Private Investment Program ("PPIP")	Disposition of legacy assets; Legacy Loans Program, Legacy Securities Program (expansion of TALF)	500.0 – 1,000.0	75.0
Capital Assistance Program ("CAP")	Capital to qualified financial institutions; includes stress test	TBD	TBD
New Programs, or Funds Remaining for Existing Programs	Potential additional funding related to CAP; other programs	131.4	131.4
Total		**$2,365.0 – $2,865.0**	**$699.0**

Notes: Numbers affected by rounding.
[a] Treasury announced that it would purchase up to $15 billion in securities under the Unlocking Credit for Small Businesses program.
[b] Actual TARP expenditures as of 6/30/2009.
[c] $75 billion is for mortgage modification.

Sources: Treasury, Office of Financial Stability, Chief of Compliance and CFO, SIGTARP interview, 3/30/2009; Treasury, Transactions Report, 7/2/2009, http://www.financialstability.gov/docs/transaction-reports/transactions-report_070209.pdf, accessed 7/6/2009; Treasury, "Auto Supplier Support Program: Stabilizing the Auto Industry in a Time of Crisis," 3/19/2009, http://www.treas.gov/press/releases/docs/supplier_support_program_3_18.pdf, accessed 3/19/2009; Treasury, "Unlocking Credit for Small Businesses Fact Sheet," 3/17/2009, http://www.financialstability.gov/roadtostability/unlockingCreditforSmallBusinesses.html, accessed 6/10/2009; Treasury, "Treasury, Federal Reserve, and FDIC Provide Assistance to Bank of America," 1/16/2009, http://www.treas.gov/press/releases/hp1356.htm, accessed 1/16/2009; Treasury Press Release, "U.S. Government Finalizes Terms of Citi Guarantee Announced in November," 1/16/2009, http://www.financialstability.gov/latest/hp1358.html, accessed 6/8/2009; Treasury, "Financial Stability Plan Fact Sheet," 2/10/2009, http://www.financialstability.gov/docs/fact-sheet.pdf, accessed 6/8/2009; Treasury, "Making Home Affordable: Updated Detailed Program Description," 3/4/2009, http://www.treas.gov/press/releases/reports/housing_fact_sheet.pdf, accessed 6/10/2009; Treasury, "Public-Private Investment Program," 4/6/2009, http://www.financialstability.gov/roadtostability/publicprivatefund.html, accessed 6/9/2009.

Source: SIGTARP Quarterly Report to Congress, July 21, 2009

Additionally, FinancialStability.gov does not provide dollar totals for each program. Instead, in the description of each program, the site gives only the maximum amount each program could use. Barofsky's report, however, shows the amount each program has actually expended to date. For instance, the report states that thus far, only $441 billion of the $700 billion has been spent, not including the $70 billion that certain banks have paid back to the government. The Capital Purchase Program, which seeks to encourage lending by increasing the capital base of participating banks, accounts for 46 percent of spent funds. Such information is not readily available on FinancialStability.gov.

While the Quarterly Report shows how Treasury should be presenting information, Barofsky's other report, the bank survey, demonstrates how Treasury should be collecting more data. Since starting as SIGTARP in December, Barofsky has been pushing the Treasury for increased TARP transparency and accountability, and Treasury has been resistant to enacting some of his proposed changes. In particular, Barofsky recommended that institutions should be required to report regularly on their use of TARP funds. Treasury, however, has said that such a requirement would be impossible to comply with, since all funds are fungible, and even if such accounting were possible, it would not be useful. Instead, Treasury only requires banks to report on their lending activities, which does not provide as full of a picture of the effect of TARP.

Faced with Treasury's inaction to obtain useful information, Barofsky sent out a letter asking banks to detail their usage of TARP funds. The survey was voluntary and applied only to CPP funds. It asked for responses in an open-ended format, which means that while Barofsky

received a 100-percent response rate, numerical analysis of the information is impossible. However, the survey results do provide insight on how banking institutions are using CPP funds, which, according to the Quarterly Report, account for almost half of all TARP funds.

Barofsky found that 83 percent of institutions used their TARP funds to support lending activities, which is the primary intended use of CPP. Additionally, 43 percent of banks used their funds for capital reserves, 31 percent for investments (such as purchasing mortgage-backed securities), 14 percent for debt repayments, and four percent used their TARP funds to acquire other institutions. The banks also reported significant influence from regulators, such as the FDIC and the Federal Reserve, with some institutions saying that regulators have encouraged them to use their funds for capital reserves or acquisitions.

Contrary to Treasury's protests, it is clear that the survey yielded useful information, which could be used in future oversight hearings in Congress. With this information, Congress might decide that it did not intend for TARP funds be used for acquisitions and make changes to the program. Regardless, without this survey, Congress would have even less understanding of how TARP funds are being used by banks.

Barofsky has promised to publish the survey responses online within 30 days of the report's publication. The institutions surveyed have requested anonymity, so the responses may be published in a redacted format. Despite this, it would be immensely useful to read the full results of the surveys for more detailed information on how each institution is using its TARP funding.

Barofsky's survey demonstrates that not only is such reporting possible, but it is also valuable. It provides a strong argument for mandatory reporting requirements, which Barofsky again recommends the government institute. Treasury should heed this recommendation and begin instituting a monthly reporting requirement based on Barofsky's survey. Additionally, Treasury should restructure the entire FinancialStability.gov site, such that TARP information is more readily accessible and clearly presents relevant financial data. Without such reforms, Congress, the news media, government watchdogs, and the general public will lack basic tools for understanding how the Treasury Department is using the $700 billion Congress mandated it to deploy to "restore liquidity and stability to the financial system of the United States; protects home values, college funds, retirement accounts, and life savings; and preserves homeownership and promotes jobs and economic growth."

OMB Watch Submits Contracting Reform Comments

OMB Watch recently submitted comments and recommendations on needed reforms to the federal contracting process in response to a presidential memorandum issued earlier in 2009. The Presidential Memorandum on Government Contracting directs the Office of Management and Budget (OMB) to both collaborate with federal agencies to review existing contracts and to develop new guidance to help reform future government contracting.

The first part of the president's March 4 memo calls on OMB and agencies to review existing contracts to look for savings. On July 29, OMB Director Peter Orszag released a memo to agencies that provides "guidance on reviewing existing contracting and acquisition practices." Originally required by July 1, the memo requires agencies to review their current contracting and acquisition processes with the goal of developing a plan to save seven percent of baseline contract spending by the end of FY 2011. The memo also requires agencies to "reduce by 10 percent the share of dollars in FY 2010 that are awarded with high-risk contracting vehicles. High-risk contracting vehicles include non-competitive contracts or contract competitions that receive only one bid, cost-reimbursement contracts, and time-and-materials contracts. Agencies are required to develop these plans and submit them to OMB by Nov. 2.

OMB is still working on the second part of the president's memo, which requires new guidance to reform the contracting process going forward. The president identified four areas of reform the new guidance should address, including maximizing the use of competition; improving practices for selecting contract types; strengthening the acquisition workforce; and clarifying those functions that federal employees – as opposed to contractors – must perform. The March 4 memo also directed OMB to hold a public meeting to begin soliciting public testimony and to foster further discussion of the matter. The meeting, which took place on June 18, was well attended by contractors and contracting trade groups, along with a small cadre of public interest groups, including OMB Watch.

OMB also solicited public written comments through July 17. The comments submitted by OMB Watch focus on the need for transparency and openness in the government contracting process:

> OMB Watch strongly supports the Obama administration's drive to strengthen the federal acquisition system and recommends several courses of action to further that objective. Overall, these recommendations are guided by OMB Watch's belief in the power of transparency and access to government information to transform government processes and produce better outcomes for the public. Without greater transparency, issues of waste, fraud, and abuse; conflicts of interest; and poor performance will continue to plague the federal procurement process.

It remains to be seen what effect these comments and similar submissions from other public interest groups will have on OMB's reform guidance. The president's contracting reform memo states that Orszag must develop guidance by Sept. 30.

House Passes Statutory PAYGO Bill

The House passed legislation (H.R. 2920) on July 22 that would reinstate statutory "pay-as-you-go" (PAYGO) budgeting rules, which were allowed to expire in 2002.

The bill was championed by Majority Leader Steny Hoyer (D-MD) and was largely based on language developed by President Obama. Despite criticism from key Republican leaders, the bill

attracted 24 Republican votes and passed by a large margin (265-166). The bill now moves to the Senate, where it may face obstacles, particularly the lack of support from Senate Budget Committee Chairman Kent Conrad (D-ND).

Since Congress allowed statutory PAYGO rules to lapse, a number of expensive fiscal policies, such as the 2001 and 2003 Bush tax cuts and the Medicare prescription benefit, were approved in Congress, substantially adding to the national debt. These policies, combined with the economic instability of the past two years and massive spending initiated to help jumpstart the economy, have pushed the federal government deeply into the red. The result has been an increase in public demand to restore fiscal responsibility in government budget and tax policies.

PAYGO rules were first created as part of the Budget Enforcement Act of 1990 to help control deficit spending by requiring any proposed new mandatory spending or tax cuts to be "paid for" with reduced spending or tax increases elsewhere in the federal budget.

Under the House-passed bill, the Office of Management and Budget (OMB) would tally at the end of the calendar year the sum total of legislation enacted into law and whether it equaled a surplus or a deficit over five- and ten-year budget windows. This is called the PAYGO scorecard. If the PAYGO scorecard was out of balance at the end of the year in either the five- or ten-year budget window, OMB would institute automatic across-the-board reductions to program spending, known as sequestration.

Imposing sequestration is a key difference between a statutory PAYGO requirement and chamber-specific PAYGO rules put in place when Democrats took back control of the House and Senate in 2006. This difference is crucial to forcing Congress to actually follow the rules. For example, the entire time statutory PAYGO was in effect from 1990 through 2002, sequestration was never triggered because Congress passed legislation that complied with the rules. The current chamber-specific rules, on the other hand, lack an automatic enforcement mechanism. This allows Congress to ignore PAYGO whenever it becomes too difficult to pass deficit-neutral legislation, something that has happened quite frequently since 2006.

While the passage of H.R. 2920 is a step toward forcing Congress to develop more responsible and sustainable fiscal policies, the bill has significant exceptions and loopholes that will weaken its overall effectiveness. Under the bill's current language, discretionary programs, such as Head Start, WIC (the Women, Infants, and Children nutrition program), and other economic recovery programs are not subject to spending caps. In addition, the bill includes a long list of mandatory spending programs primarily benefitting low-income populations that are also exempt, including Social Security. A fix to payment rates for doctors under the Medicare program – an expensive legislative agenda item for Congress – is also exempt.

On the tax side, three major tax policies – the annual fix to the Alternative Minimum Tax (AMT), extension of 2009 rates for the estate tax, and a substantial portion of the 2001 and 2003 Bush tax cuts that primarily benefit middle-class families – also received a special exemption. Finally, there is also a loophole that allows Congress to designate spending as "emergency" in order to bypass PAYGO requirements. This last exemption is a carryover from

previous versions of statutory PAYGO, but overuse of the "emergency" designation during the George W. Bush administration has shown this provision can be abused.

The sum total of these exemptions is massive and is at the heart of Conrad's opposition to the bill. He has stated multiple times that he is concerned about the exemptions in the bill, particularly the three major tax exemptions and the Medicare doctor payment fix. At a recent House Budget Committee hearing on PAYGO in June, OMB Director Peter Orszag explained that the exemption of those four policies was done, in fact, to prevent waivers.

Conrad is also hesitant to abdicate control of the budget to the executive branch by giving OMB the sole power to determine sequestrations.

Conrad is not alone in his criticism of the House legislation. Rep. Paul Ryan (R-WI), the ranking member of the House Budget Committee, has criticized the bill because it does not subject discretionary spending to PAYGO. Ryan is also disappointed that the bill does not place caps on discretionary spending. Also, some critics felt the five- and ten-year budget windows used to create the PAYGO scorecard would not do enough to curb spending from year-to-year because legislators would try to work around the system by instituting awkward sunset dates for different policies.

Conrad's opposition to this bill in the Senate and a general willingness among senators to waive PAYGO at any time, particularly for tax cuts, makes it unlikely that this legislation will progress further during this legislative session. Despite the attempt by the House to institute more responsible controls on the federal budget process, the president and congressional leaders will need to return to this issue repeatedly and with a sincere desire to pass sustainable fiscal policies in order to avoid making annual deficits even worse than already projected.

White House Refuses to Release Visitor Logs

On July 22, Citizens for Responsibility and Ethics in Washington (CREW) filed a lawsuit against the Department of Homeland Security (DHS) for withholding White House visitor logs. The logs pertain to individuals who visited the White House to discuss health care policy. Some see the administration's refusal to disclose the logs as a continuation of Bush administration secrecy.

CREW filed the lawsuit after being denied the records in response to a Freedom of Information Act (FOIA) request. In response to the lawsuit, White House legal counsel Gregory Craig sent a letter to CREW with a list of White House visitors "reflected in the relevant visitor records," but he makes no claim that the list is complete. Further, the letter maintained the administration's position that the logs are only subject to "discretionary release." CREW rejected the letter and said it did not satisfy the FOIA request.

The Obama administration had refused to make such logs public previously. In June, CREW sued for the release of logs related to meetings with coal executives after the records were denied

as part of an earlier FOIA request. In both the coal and the healthcare cases, the administration argues that the visitor logs are presidential records not subject to FOIA.

During his presidential campaign, then-Senator Obama made White House communications a central component of his transparency platform, regardless to whether the records held presidential or agency provenance. As part of his "plan to change Washington," Obama criticized the Bush administration for crafting policy based on secret meetings. The campaign website remarked that "Vice President Dick Cheney's Energy Task Force of oil and gas lobbyists met secretly to develop national energy policy." Further, the site stated that the Obama administration "will nullify the Bush attempts to make the timely release of presidential records more difficult."

The Bush administration repeatedly withheld White House visitor logs and fought in court against disclosure, claiming that they were presidential records, not records of an agency subject to FOIA. That administration attempted to withhold visitor logs concerning lobbyists such as Jack Abramoff, Stephen Payne, and religious conservative leaders. White House visitor logs are maintained by the Secret Service, a component of DHS, which is subject to FOIA. U.S. District Court Chief Judge Royce Lamberth twice ruled against the Bush administration on the issue, once in December 2007 and again on appeal in January 2009. Lamberth stated, "Shielding such general information as the identities of visitors would considerably undermine the purposes of FOIA to foster openness and accountability in government."

The Obama administration appealed the January decision again, rather than changing course. In the Bush-era case, the Obama administration argues that the logs would disclose information properly protected as presidential communications, an argument originally advanced by the Bush administration.

Although the Bush administration lost twice in court, official White House policy was changed to try and protect visitor logs. The Bush White House issued a Memorandum of Understanding with the Secret Service in 2007 that establishes mutual agreement that visitor logs are not agency records because "once the visit ends, the information ... has no continuing usefulness to the Secret Service." The Obama administration has stated that it is reviewing its current policies, but it is unknown whether it will alter this agreement.

Court Rules that CIA Committed Fraud in State Secrets Case

On July 20, a federal district court judge ruled that the Central Intelligence Agency (CIA) committed fraud while attempting to get a fifteen-year-old case dismissed on state secrets grounds.

In 1994, Richard Horn, a former agent of the Drug Enforcement Agency, sued Arthur Brown, then CIA station chief, and Franklin Huddle, Jr., the chief of mission at the U.S. embassy in Burma. Horn claimed the CIA unlawfully wiretapped him while he was stationed in Burma because they allegedly opposed his work to restrict that nation's drug trade.

Three administrations have pushed to get the case dismissed. In 2000, then-Director of Central Intelligence George Tenet requested the case against Brown be dismissed since Brown was a covert agent and his identity constituted a state secret. In response to this line of argument, the district court eventually dismissed the case in its entirety in 2004.

In 2007, the Court of Appeals for the DC Circuit overruled the dismissal of the case against Huddle. The court ruled that since Huddle was not a covert agent, a case could go forward against him, using unclassified information. However, the court upheld the removal of Brown from the suit because of his apparent continued status as a covert agent.

In 2008, however, the district court learned from the Department of Justice that Brown's cover had been lifted in 2002. Despite this change in status, the CIA continued to claim that Brown was still covert. The discovery of this lie led to the district court's most recent decision. Judge Royce Lamberth wrote that it soon became "clear ... that many of the issues [of the case] are unclassified."

The ruling referred one of the CIA attorneys for disciplinary action for perpetrating fraud against the court. Five others involved in the case – three CIA attorneys, as well as Brown and Tenet – were given one month to defend themselves prior to charges of contempt or other sanctions being levied upon them. Over two hundred documents related to the case were also unsealed.

This ruling comes at an inopportune time for the CIA. The extent of the agency's disclosure to Congress about torture and other activities during the "war on terror" has come under a great deal of scrutiny in recent months. Some, such as Rep. Rush Holt (D-NJ), have begun to suggest that Congress undertake a comprehensive investigation of intelligence operations, comparable to that undertaken by the Church Committee in the 1970s. "Sure, there are some people who are happy to let intelligence agencies go about their business unexamined," explained Holt. "But I think most people when they think about it will say that you will get better intelligence if the intelligence agencies don't operate in an unexamined fashion."

The state secrets privilege, an evidentiary privilege formalized in 1953 in *United States v. Reynolds*, permits the executive branch to withhold specific evidence at civil trial if there is a reasonable risk that disclosure would harm national security. This privilege has received a great deal of attention of late, especially given the contention of many that it was overused during the George W. Bush administration. President Obama promised a review of the use of state secrets, but in the meantime, his administration has maintained claims of privilege in all of the cases it inherited from the Bush administration. Two bills (H.R. 984, S. 417) currently before Congress would provide for greater scrutiny of state secrets claims in order to balance security concerns with proper oversight.

Reproductive Health Declines as Chemical Exposure Increases

Troubling national trends show increases in reproductive health problems as the widespread use of certain chemicals has increased dramatically. A new analysis of available data makes several recommendations for U.S. chemicals policy to address the growing health concerns and potential links to toxic chemicals. Among the recommendations is a call for greater public disclosure of chemical safety information, increased federal research on safer chemical substitutes, and removing political influence from assessments of chemical safety.

The analysis, *Reproductive Roulette*, produced by the Center for American Progress (CAP), draws on numerous scientific studies that show a clear degradation over the last several decades in both male and female adult reproductive health nationwide, as well as more developmental problems among young children.

At the same time that the nation's reproductive health has deteriorated, the number and amount of potentially harmful chemicals has exploded, as has Americans' exposure to such chemicals. The report cites scientific studies identifying linkages between exposure to chemicals and the reproductive disorders that are on the rise. Despite these studies, more information is needed about the amounts of chemicals people are exposed to and how combinations of chemicals impact a person's health, especially developing fetuses and children, according to the report.

Fertility problems are growing, including decreasing sperm counts, decreased fertility among women of all childbearing ages, and significantly higher reports of miscarriages and stillbirths since the 1970s and 1980s. Since the mid-1990s, premature births and infants born with low birth weight have increased significantly. Several factors, including discrepancies in health care and changes in reporting methodology, may contribute to these health trends, but the report cites studies that link certain chemicals to these ailments even after considering these other factors.

In addition to fertility problems among adults, the report describes data that show increasing rates of birth defects and disabilities over the last few decades. Reported cases of autism have increased 10-fold since the early 1990s. Exposure to chemicals has been linked to many birth defects and developmental problems. The ubiquity of chemicals such as phthalates and bisphenol A (BPA) in household products makes avoiding exposure almost impossible.

Chemical production in the U.S. has greatly increased since World War II, with 80,000 chemicals now in commercial use, a 30 percent increase since 1979. Studies from the Centers for Disease Control and Prevention (CDC) have documented the widespread presence of toxic chemicals in a random sample of Americans. A study by the Environmental Working Group, a nonprofit public interest organization, found 287 industrial chemicals in newborns' umbilical cords. According to the U.S. Environmental Protection Agency's (EPA) Toxics Release Inventory (TRI), in 2007, more than 4.1 billion pounds of toxics were reported disposed of or released into the environment.

The CAP report notes that exposure to these chemicals frequently occurs through the use of everyday products, from cosmetics to baby bottles and even medical equipment like blood bags and IV tubes. Data on human exposure to chemicals through products is harder to acquire because there are few rules requiring manufacturers to report the amount or type of toxics included in products. Public disclosure advocates are pushing to expand TRI to include reporting the amount of toxics in products. Such data would help government agencies track harmful chemicals as they move through the environment and identify sources of human exposure.

The CDC's biomonitoring program is the most extensive exposure monitoring program in the nation, yet it still only tracks 148 chemicals. Biomonitoring measures the amount of chemicals in a person's blood or urine. Blood and urine levels reflect the amounts of chemicals that actually get into the body from the environment and thus are crucial to evaluating the public health risks of toxic chemicals.

In the report, CAP recommends several measures to help fill the information gaps that hinder policy responses and protection of public health. Specifically, CAP calls for requiring chemical companies to test the safety of their products and disclose the results prior to commercial release, including consumer goods and cosmetics. Also, the EPA must speed up its assessments of new chemicals using its Integrated Risk Information System (IRIS). Additionally, public disclosure of chemical safety data should be expanded, to build on previous successes like those of the TRI program, which has driven a 60 percent reduction in releases of its "core" chemicals. Finally, greater research and resources are needed for agencies to study health impacts of chemicals and develop safer chemical substitutes.

The report relies heavily on publicly available information that tracks chemicals and public health trends, such as the CDC's biomonitoring data and TRI. Without this information, linkages between the rapidly expanding use of potentially dangerous chemicals and related public health problems would be even more difficult to document. As the CAP report shows, the data currently available already strongly suggest that greater protections are needed. However, there remains a dearth of relevant information and limited public disclosure. The recommendations to expand the scope, quality, and quantity of such information would improve the ability of policymakers to effectively defend against emerging public health threats and enable the general public to hold officials accountable for doing so.

While Sunstein Nomination Is Delayed, Regulatory Reform Waits

Sen. John Cornyn (R-TX) has placed a hold on the nomination of Cass Sunstein, President Obama's pick to head the Office of Information and Regulatory Affairs (OIRA). News of Cornyn's hold emerged July 22 – one week after Sen. Saxby Chambliss (R-GA) lifted his hold on the nomination.

Cornyn's hold all but eliminates the likelihood that Sunstein's nomination will come up for a vote before the Senate breaks on Aug. 7 for summer recess. The Senate plans to return Sept. 8.

A spokesman for Cornyn told Fox News that the senator is concerned about Sunstein's views on animal rights. Sunstein has written that animals should enjoy meaningful legal rights, including the right to sue.

OIRA is a small but powerful White House office responsible for overseeing federal agencies' regulatory activity. The office reviews and sometimes edits the text of regulations, and it approves government forms and surveys that require the public to divulge information.

Obama nominated Sunstein April 20. Sunstein is a distinguished academic who served on the University of Chicago Law School faculty with Obama and then moved to Harvard Law School. He is currently serving as a special adviser to Peter Orszag, director of the White House Office of Management and Budget (OMB).

During his career as a legal scholar, Sunstein authored several provocative articles and books on a variety of subjects, including animal rights. In his most recent book, *On Rumors: How Falsehoods Spread, Why We Believe Them, What Can Be Done*, scheduled for release in September, Sunstein examines the impact of salacious rumors in the Internet age and suggests that current libel standards may not be strict enough, according to advance copies. The book has stirred controversy among free speech advocates. This is but one example of the controversial subjects Sunstein has addressed in his academic career.

Republican senators beyond Cornyn and Chambliss, including Sens. Susan Collins (R-ME) and Pat Roberts (R-KS), expressed concern about Sunstein's views on animal rights. Both Roberts and Collins said their concerns were allayed after hearing directly from Sunstein. Chambliss lifted his hold after an in-person meeting with Sunstein to discuss the nominee's views on animal rights and the Second Amendment. At Chambliss' request, Sunstein has also met with various stakeholders concerned about his views on animal rights.

The animal rights flap has delayed not only Sunstein's nomination, but also progress on meaningful efforts to reform the federal regulatory process. If confirmed, Sunstein will likely shape the way the Obama administration writes and enforces new rules.

President Obama pledged to issue a new executive order to govern the process. On Jan. 30, Obama issued a memo asking federal agency personnel to recommend improvements. Orszag was charged with leading the effort, and Obama set a deadline of 100 days.

On Feb. 26, Orszag commenced a public comment period, a highly unusual but welcomed approach to the development of an executive order. In response, 183 individuals and organizations commented on the current state of the regulatory process and suggested reforms. (Click here for coverage of the comments.)

Since then, the administration has not provided many updates on the nature of the recommendations or the development of the new executive order. The 100-day deadline passed in May. "The director has submitted a set of recommendations to the president, in compliance with the president's memorandum and within the 100-day timeframe," an OMB official told *The Hill*. "As decisions based on those recommendations are approved, they will be made public."

Two major aspects of the regulatory process likely to be covered by the executive order are regulatory review as managed by OIRA and cost-benefit analysis. Currently, agencies must submit to OIRA any rule that is deemed significant. OIRA then comments or edits the rule and circulates it among other federal agencies. Critics, including OMB Watch, say this process increases the potential for political interference in regulatory decisions and delays the completion of new standards needed to protect the public.

Cost-benefit analysis is an equally controversial issue. Proponents say it is a logical way for regulators to determine whether a new policy is worth pursuing. However, critics point out that the benefits of regulation, such as lives saved or injuries avoided, are difficult to estimate and impossible to put a price on, thus making cost-benefit analysis biased against regulation.

Sunstein has written both on OIRA's role in the regulatory process and on cost-benefit analysis. He believes that OIRA can play a positive role and supports the use of cost-benefit analysis.

Those views have not endeared him to some public interest groups, including the Center for Progressive Reform, a think tank of law professors advocating for a regulatory process that better protects the public. Meanwhile, *The Wall Street Journal* editorial board and some conservative groups are satisfied with Sunstein.

It remains unclear whether Sunstein would attempt to further advance his academic writings as OIRA administrator. He pledged during his confirmation hearing before the Senate Homeland Security and Governmental Affairs Committee to make statutory intent the preeminent criterion for regulatory decision making at OIRA. He also said that cost-benefit analysis should not be used as an "arithmetic straitjacket" to constrain regulation.

Sunstein avoided opportunities to provide more specificity on his plans during the hearing. For example, when asked, "Do you believe that OIRA should be an activist office, steering regulation in particular directions?" Sunstein sidestepped the question, writing, "I believe that OIRA has a role to play in promoting compliance with the law and with the President's commitments and priorities – and that it can do so in a manner fully consistent with its mission." Sunstein was approved by the panel with only one dissenting vote.

EPA to Emphasize Environmental Justice Issues

The U.S. Environmental Protection Agency (EPA) publicly committed to emphasizing environmental justice issues at a recent meeting of the agency's National Environmental Justice Advisory Council (NEJAC). EPA officials, including Administrator Lisa Jackson, described to

the council ways in which the agency intends to reflect environmental justice concerns in the future as EPA formulates rules and emphasizes enforcement.

NEJAC consists of community, academic, industry, environmental, state, local, and indigenous peoples groups and advises the agency on environmental justice concerns across policy areas. The council was created by EPA in 1993 in response to evidence showing that minority and poor communities bore a disproportionate burden of exposure to pollution from industrial and municipal operations compared to the general public. NEJAC held its most recent public meeting July 21-23 in Arlington, VA.

According to its website, EPA defines environmental justice as "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, culture, education, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. Fair Treatment [*sic*] means that no group of people, including racial, ethnic, or socioeconomic groups, should bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal, and commercial operations or the execution of federal, state, local, and tribal environmental programs and policies."

On July 21, in her speech before NEJAC, Jackson promised that environmental justice issues would be a focus for the agency in all its activities. She said:

> In the years ahead, I want to see a full-scale revitalization of what we do and how we think about environmental justice. This is not an issue we can afford to relegate to the margins. It has to be part of our thinking in every decision we make. And not just at EPA. We need the nonprofit sector. We need the academic sector. And we need the private sector. It's absolutely essential that we have a wide range of voices raising these issues.

In a July 22 BNA article (subscription), other EPA officials explained to NEJAC how the agency would shift the focus toward greater consideration of environmental justice issues. For example, Charles Lee, the head of EPA's Office of Environmental Justice, said that his office would spend the next five years developing agency-wide outcomes and means of achieving them as part of defining what success means at EPA.

In a July 23 article, BNA reported that other officials explained how the agency is already moving to incorporate environmental justice considerations into its programs. Acting deputy director of the Environmental Assistance Division within the Office of Prevention, Pesticides, and Toxic Substances, Mike Burns, noted that the agency is reviewing its internal rulemaking process to bring environmental justice considerations into the process at every stage, not just at the end or ignoring them. Burns noted the review should be complete by the summer of 2010.

Cynthia Giles, the assistant administrator for enforcement, told NEJAC that her office was taking steps to increase the transparency of its actions and more actively disseminate

information to local communities so that the public has important information for its advocacy efforts, according to BNA.

Most federal agencies responsible for public health, safety, and environmental issues are expected to comply with Executive Order 12898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*. This Clinton-era order requires agencies to develop environmental justice strategies and to collect and disseminate information on the health effects on various subpopulations.

As the EPA officials indicated, environmental justice issues have not been an important part of agency actions in recent years. Nor have environmental justice concerns been prominently considered in other agencies, according to an April 20 Government Accountability Office (GAO) report on federal rulemaking. GAO concluded that among the 139 major rules it evaluated between January 2006 and May 2008 for the report, fewer than five percent of the rules triggered environmental justice reviews. (Not all of the rules GAO addressed were public health or environmental rules.)

Perhaps the clearest indication that EPA will emphasize environmental justice is the decision by the agency to reconsider a rule redefining hazardous wastes so that the wastes would be exempt from regulation under federal law. According to BNA, Mathy Stanislaus, EPA's assistant administrator for solid waste, told NEJAC that the agency would accept comments on revisions to the rule finalized in October 2008. EPA had not properly considered the risks to poor and minority populations when it issued the final rule. The rule is open for public comment until Aug. 13.

EPA agreed to reconsider the rule after Earthjustice petitioned the agency to amend the rule that "stripped federal oversight of recyclers who handle 1.5 million tons of hazardous waste generated by steel, chemical and pharmaceutical companies each year," according to an Earthjustice press statement. Part of the petition for reconsideration was based on EPA's inadequate consideration of environmental justice issues. Earthjustice has mapped hazardous waste recycling facilities identified by EPA to be sources of contamination; many are located in poor and minority communities.

The decision to reconsider the rule has exposed some divisions among industry, while environmental groups have supported the decision and are pushing for revisions, according to a July 1 BNA article. Many manufacturers supported the 2008 rule and argued that the uncertainty EPA's reconsideration causes can hurt the chances of states adopting the rule. The states have implementation responsibility under the Resource Conservation and Recovery Act. The association representing the hazardous waste industry, however, cited flaws in the 2008 rule that could lead to unequal implementation and supported EPA's decision at a June 30 public hearing, according to BNA.

Senate Set to Lift Legal Services Corporation Restrictions

On June 25, the Senate Appropriations Committee approved a bill that increases funding for the Legal Services Corporation (LSC) in FY 2010 and drops some speech restrictions on legal aid grant recipients that have been in place since 1996. The Senate version of the bill increases legal aid services by $10 million over FY 2009 levels, but it contains $35 million less than the Obama administration's request. The House version of the bill has $40 million more than the Senate version, but it continues a number of speech restrictions dropped by the Senate bill.

Since 1996, Congress has imposed a series of restrictions on LSC grantees that not only cover the federal funds they receive, but also any non-federal funds they raise. Except in a few circumstances, LSC grantees are restricted from engaging in lobbying, participating in agency rulemakings, bringing or participating in class-action lawsuits, representing those who are not U.S. citizens, soliciting clients in person, most activities involving welfare reform, influencing the census, and litigating on cases involving abortions, redistricting, prisoners, or people being evicted from public housing if they face criminal charges for illegal drugs. Most striking, these restrictions apply regardless of whether the activities are paid for with privately raised money. Additionally, LSC programs cannot claim, collect, and retain attorneys' fees, regardless of the funding source or other statutory provisions.

A number of groups supportive of legal services programs have tried for a number of years to get some or all of these restrictions removed. Many of these groups have also argued for additional funding for LSC. In 2009, largely due to the economic downturn and the increased need for legal services, Congress appears more amenable to increased funding and possibly addressing the restrictions.

The Senate version of the Commerce, Justice and Science FY 2010 appropriations bill provides $400 million for LSC. Of that amount, $374.6 million is for legal services, $3.4 million for technology innovation grants, $1 million for student loan repayment assistance to attract attorneys, $4 million for the LSC Inspector General, and $17 million for management and grants oversight. The bill also lifts all the restrictions on non-federal funds except for litigation on abortions and cases involving prisoners. The bill keeps in place all the restrictions with regard to federal funds.

As the Brennan Center for Justice, a leader in trying to get the LSC restrictions removed, details in *A Call to End Federal Restrictions on Legal Aid for the Poor*, "A set of federal funding restrictions is severely undercutting this important work, and doing so in the midst of an unprecedented national financial crisis. The time has come to eliminate the most severe of the LSC funding restrictions."

Sen. Barbara Mikulski (D-MD), who drafted the LSC provision, has been praised for removing the restrictions on non-federal funds. A *Baltimore Sun* editorial noted, "For the first time since 1996, it looks as if the LSC finally may be able to get back to providing the kind of essential legal services its founders envisioned and that poor people desperately need in order to secure their rights under the law."

The House approved its version of the appropriations bill on June 19 on a 259-157 vote. The bill provides $440 million for LSC. Most of the funding – $414.4 million – is for legal aid assistance, and the bill also provides funds for technology innovation grants and for loan repayment assistance to help programs recruit and retain talented attorneys. The House version of the bill continues existing limitations on the use of LSC funds but would lift the restriction on the ability of LSC-funded programs to collect attorneys' fees.

As the House bill was moving to floor action, the Obama administration released a Statement of Policy on June 16 indicating disappointment that the restrictions on use of non-LSC funds remained in the bill. According to the document, the administration "urges the Congress to also remove the riders which restrict the use of non-LSC funds by LSC grant recipients and which prevent LSC lawyers from participating in class action law suits that typically seek injunctive relief for the benefit of all members of a class by stopping illegal activity."

In May, President Obama released details of his FY 2010 budget request, which included a total of $435 million for the LSC and requested the elimination of the current restrictions on non-LSC funds, including the restrictions on attorney's fees and participation in class-action suits.

Nonetheless, the House did not change the bill to respond to the administration's concerns.

The Washington Post has repeatedly called for reforming the LSC restrictions, and on July 13 applauded Mikulski for leading an effort to pass the appropriations bill without the LSC restrictions in the Senate. "The Senate effort is preferable to the House version because it goes further in freeing up legal aid lawyers, but it is not perfect," said the *Post* editorial. "Legal aid lawyers may not seek fees in cases funded with federal dollars – a nonsensical restriction that prevents legal aid clinics from generating more of their own revenue."

On July 8, the Center for American Progress released a report that calls on Congress to increase appropriations for the LSC and lift current restrictions "because the restrictions waste resources and hinder the pursuit of justice."

The Senate version of the bill next faces a vote of the full Senate, which is expected to occur before the August recess. After floor action, it will proceed to a conference with the House to be reconciled.

Advocates Say New Recovery Act Lobbying Guidance Doesn't Go Far Enough

On July 24, Peter Orszag, the director of the Office of Management and Budget (OMB), released further guidance that amends restrictions on lobbying for Recovery Act funds. The document states that it is meant "to supersede all prior written OMB and other agency guidance on the subject." Despite the adjustments within the guidance, which advocates note is a significant step in the right direction, many say the changes do not go far enough to prompt disclosure of all lobbying and other contacts associated with Recovery Act spending.

In a blog post on May 29, Norm Eisen, Counsel to the President for Ethics and Government Reform, announced changes to President Obama's March 20 memorandum that placed restrictions on communications between federally registered lobbyists and executive branch employees regarding the use of Recovery Act funds. The announced changes modified the oral communications ban to include everyone who contacts government officials, but it only applied to competitive grant applications submitted for review. Since then, formal guidance was expected but was not issued until late on July 24.

The guidance confirms that after competitive grant applications have been submitted, and before a decision has been made, communications about the grant applications are prohibited for everyone, not just federally registered lobbyists. The new guidance states the restriction on oral communications "applies in the context and at the stage where concerns about merit-based decision-making are greatest – the period beginning after the submission of formal applications for, and up through awards of, competitive grants or other competitive forms of Federal financial assistance under the Recovery Act. The restriction also has been expanded to cover, generally, all persons outside the Federal Government (not just federally registered lobbyists) who initiate oral communications concerning pending competitive applications under the Recovery Act."

There are exceptions to the rule, but mostly they are in the context of when the federal agency has follow-up questions to discuss. The restrictions only apply to competitively awarded grants, not to other types of grants such as formula or discretionary grants.

As with the initial OMB guidance on Recovery Act lobbying, this version still draws a distinction between federally registered lobbyists and others. Disclosure is required for oral and written communications with "federally registered lobbyists, including lobbyists for governmental or non-profit entities, and who are communicating on behalf of a client for whom they are registered." However, this does not include those who are no longer federally registered, state lobbyists, or "federally registered lobbyists who are not communicating on behalf of a client (or, in the case of an in-house registered lobbyist, on behalf of an employer) for whom they are registered." Moreover, disclosure is only required for federal financial assistance – grants, loans, and insurance – but not for contracts.

Thus, the same effort on behalf of an entity to obtain Recovery Act *financial assistance* might or might not be disclosed depending on who is conducting the communication. If a federally registered lobbyist is communicating, the public will know about the attempt to influence how the Recovery Act funds are used. However, if the communication is initiated by a person within the organization or a representative of the entity who is not a federally registered lobbyist, then the effort will not be disclosed. No communications regarding influence on awards of Recovery Act *contracts* will be disclosed, even if initiated by federally registered lobbyists.

As in the previous OMB guidance, no disclosure is required regarding discussions about logistical Recovery Act issues. Federal agency officials can also listen to lobbyists at "widely attended gatherings," and disclosure of such communications is not required. However, if the

lobbyist tries to have a private conversation with an official at a public event, the communication must be disclosed.

Citizens for Responsibility and Ethics in Washington (CREW) issued a press release July 24 stating that the changes are "a more common sense approach. It is just good policy that once an application for a competitive loan or grant has been filed, no one – registered lobbyist or not – can lobby the government official responsible for handing out the taxpayer funds."

However, concerns still remain because of the specificity of competitive grants, which are a small share of Recovery Act funds. Influence can occur prior to the submission of a competitive grant application, and the largest share of Recovery Act funds are distributed through formula grants, contracts, loans, and tax expenditures, which are excluded. Moreover, some groups, such as OMB Watch, argue that all communications attempting to influence the awarding of money under the Recovery Act – regardless of who is involved – should be disclosed.

The OMB guidance also announces that a new template for the Registered Lobbyist Contact Disclosure Form will be available shortly, but it doesn't address what advocates flag as an underlying problem: agencies are currently doing an inadequate job of disclosing lobbyist contacts, and reporting is inconsistent across agencies. For example, the Department of Energy only has nine listings of meetings with lobbyists, and the Department of Labor has five; the Federal Communications Commission has 22 meetings listed. Compounding the problem, Recovery.gov has no information on lobbyists.

Ideally, a new "web tool," if adopted and consistently used, will make the disclosure of lobbyist contacts easier. Details on the tool are currently unavailable, as it is still in its early development stages.