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USAspending.gov Adds Recovery Act Spending Data Months before Recovery.gov

In late May, USAspending.gov started posting data that identified grants and contracts given out under the Recovery Act. This is in addition to the regular data on government spending on the site. Up until now, there has been a disappointing lack of specific data made available about Recovery Act spending, particularly on the Recovery.gov website – the main vehicle created for information on implementation of the act.

The Recovery.gov website has plenty of general information, such as the recently released agency program plans, which provide descriptions of the programs each federal agency will be implementing as part of their Recovery Act efforts. But it does not yet have any recipient data, such as details about which contractors or subcontractors receive funds. What's more, officials

at the Recovery Accountability and Transparency Board have said such information will not be available on the site until October, which is the first time recipients of Recovery Act funds are required to report on use of the funds. This type of information is equally as important as the program information itself, since it helps ensure taxpayer money is being well spent.

Strikingly, some of this data is already on USAspending.gov, a website on government spending created at the end of 2007 in response to a law sponsored by Sens. Barack Obama (D-IL) and Tom Coburn (R-OK). The data on USASpending.gov is limited to only those grants and contracts given out directly by the federal government; it does not include sub-awards. Moreover, there is not very much of it yet (only a handful of departments have submitted data so far: Recovery contracts by departments; Financial assistance (e.g., grants) by departments).

While the standard data fields used on the USAspending.gov website are included in the Recovery Act data, almost none of it can be used to match those contracts and grants up with their corresponding program plans on Recovery.gov. Instead, we are left with simple identification details, such as the date the grant or contract was awarded, how much has been spent, to whom the funds were awarded, what congressional district recipients are in, and an esoteric description of the project. The contract description field is particularly useless as the quality of the information within that field is very poor.

OMB Watch did manage to link up one Department of Energy contract to its corresponding program plan, but that only happened because the contract and its plan were the only ones that mentioned work at the Hanford nuclear plant. If you do not have time to read all 270 program plans or browse through the literally tens of thousands of contracts and grants, matching up the contracts is simply impossible.

That said, the Recovery Act contract data on USAspending.gov is not entirely useless. As mentioned before, the site does identify contractors receiving Recovery Act funds. Using resources like the Project On Government Oversight's (POGO) Contractor Misconduct Database and the Center for Responsive Politics' Open Secrets database, one can start to take a closer look at the contractors who are receiving Recovery Act funds, their past performance records, and their campaign contributions and lobbying expenditures.

Indeed, a quick search of the contractors turns up some interesting data. Of the top five Recovery Act contractors on USAspending.gov, which collectively account for 98 percent of the contracts awarded thus far, three are listed in POGO's Contractor Misconduct Database for recent violations. Two of them, CH2M Hill Companies, Ltd and Ut-Battelle, have entries from the past year *for the very same work at the very same place* where they were just awarded new Recovery Act contracts. (The third company was URS Corporation.)

Ut-Battelle, in particular, was cited by the Department of Energy's Inspector General for incurring "unreasonable" costs at the Oak Ridge National Laboratory in 2008, and yet it received a $73 million contract under the Recovery Act for continued operations at Oak Ridge. The three companies, despite their track records, received $1.3 billion of the $1.8 billion in

Recovery Act contracts, or about 75 percent of *all* the Recovery Act contracts which have been awarded to date.

Additionally, according to OpenSecrets.org, these same companies have given millions of dollars in campaign contributions to federal candidates and spent even more on lobbying activities. URS Corporation, which received a $203 million contract, spent well over $1 million during the 2008 election season, in addition to $2 million on lobbying expenses (one of the firms URS hired to lobby for it was PMA Group, a lobbying firm which is currently embroiled in a pay-to-play investigation).

Ut-Battelle, on the other hand, contributed to only one legislator during the 2008 cycle: Congressman Zack Wamp, a Republican who represents the Third District of Tennessee. Over the past ten years, Ut-Battelle has given Wamp over $100,000 in campaign contributions. Coincidentally, the one contract Ut-Battelle received under the Recovery Act will be performed in Oak Ridge, TN, in the heart of the Third District.

Despite this, none of what these companies did is illegal. Companies can legally lobby and contribute to campaigns, and the companies' misconduct was not flagrant enough to get any of them put on the federal debarment register. But it is disappointing that so much of the first round of Recovery Act money is going to what ProPublica aptly calls "scofflaw companies," or companies that have histories of violations of federal law and poor performance. This problem is most likely a result of the speed and urgency many placed on getting the Recovery Act funds out the door, and hopefully there will be improvements in the next round.

These limited examples reinforce why transparency and access to good spending information is so crucial. While it is wonderful that USAspending.gov has added a feature to allow subdividing Recovery Act spending, there is no reason this information should not also be available on Recovery.gov right now. There is also no reason federal spending and performance data should not inform future contract and grant decisions.

With its mission to help make implementation of the Recovery Act as transparent as possible, Recovery.gov should be providing the same information – both raw spending data and performance information – in a timely fashion. More directly, each agency and Recovery.gov should be providing machine-readable feeds on detailed spending so the public has access to the underlying data.

Administration Seeks Public Input on Open Government

Starting May 21, the Obama administration began to make good on the president's goal of "work[ing] together to ensure the public trust and establish a system of transparency, public participation, and collaboration," as expressed in his Jan. 21 memorandum on transparency and open government.

The memo called for recommendations to the president for an Open Government Directive that will instruct federal agencies how to implement the administration's transparency principles. The memo established a May 21 deadline for the recommendations, but delay occurred due to vacancies among the key appointees responsible for the recommendations' development, most notably the Chief Technology Officer, Aneesh Chopra. On the deadline, the administration instead formally outlined the process by which those recommendations will be crafted.

Spearheaded by the Office of Science and Technology Policy (OSTP), the administration initiated a project called the "Open Government Initiative." In announcing the initiative, the administration stated, "Consistent with the President's mandate, we want to be fully transparent in our work, participatory in soliciting your ideas and expertise, and collaborative in how we experiment together to use new tools and techniques for developing open government policy."

Phase One began on May 21 and was scheduled to run for one week. This first phase consisted of a brainstorming session in which individuals could post ideas and vote on one another's suggestions on a website hosted by the National Academy of Public Administration. So far, more than 1,400 ideas for improvement have been posted across several categories, including transparency, participation, collaboration, capacity building, and legal and policy challenges.

Phase Two, an online discussion of "the most compelling ideas from the brainstorming," is scheduled to begin June 3. According to the administration, the discussion is "designed to dig in on harder topics that require greater exploration or refinement." The discussion will also include ideas generated in an online dialogue with federal agency employees. Comments from federal employees are available to the public on the OSTP website.

June 15 will see the beginning of the third phase: the collaborative drafting of recommendations through a wiki. Once this process is complete, OSTP will craft formal recommendations, followed by a traditional *Federal Register* notice and comment period.

A major criticism of the process as a whole has been that with such a compressed schedule, reasonable ideas may not be raised, especially considering the first stage lasted only one week and included the long Memorial Day weekend. The administration addressed these concerns on May 28 – the original date for the last day of the brainstorming – by deciding to keep the brainstorm website open until June 19, after the start of the drafting phase. However, it is already selecting the ideas for the next discussion phase and has made clear that ideas submitted after May 28 might not be included.

The administration explained that the rapid process "is designed to ensure that your ideas inform the development of open government recommendations ... as soon as possible" and reassured the open government community that "the process of crafting open government policy ... is an ongoing effort, and your participation has been and will continue to be essential to its success."

The short time frame for the Open Government Initiative is not the only criticism of the administration's process. There has been an overall lack of clarity about the process as the

administration determines how it will work as it goes along. It is unknown at this point whether this is the first iteration of what could be a new model for rulemaking or if this process merely will be tacked on to existing procedures.

Initially, participants in the open government dialogue were not informed of what the effect of voting was going to be. Because registration was not required for voting and people could vote multiple times for their ideas, participants were concerned about the process being used to select the topics for further discussion. The administration later clarified that the voting would be "instructive, [but] it will not determine which topics are discussed in the second phase." This response raised questions of its own: is this a good way to make policy, or is there a better model to reconcile an impetus for greater democratic involvement with expert opinions?

Moreover, the open government dialogue website itself is lackluster. Its search capability is extremely limited, making it difficult to compare similar ideas. If this were improved, it would be easier to build off of the ideas of others, rather than repeating something that had already been posted. Also, little guidance is provided concerning the content of the suggestions, leading to numerous ideas that are complete *non sequiturs* and others that, while worthwhile ideas for improving transparency and accountability, are not substantively related to executive branch policy.

As of the close of May 28, the top items had little to do with what the executive branch could do to strengthen transparency, participation, or collaboration. The top-rated item was that Congress should have a 72-hour waiting period with public disclosure before considering spending bills. The second-rated item related to making state and local governments more open. The third- and sixth-rated items related to legalizing marijuana. And the fourth-rated item was listed as “End Imperial Presidency.” These results raised the question of whether the brainstorming phase should have been moderated.

While criticism within the openness community was widespread and consistent, the same community also praised the administration for experimenting with a participatory process. This new experimental process may result in more people becoming engaged, eliciting new ideas, and creating strong momentum in developing government-wide policies for transparency, participation, and collaboration.

New Transparency Websites

In addition to the open government dialogue site, two new federal websites have been created. The OSTP Open Government Initiative website allows the submission of longer reports and policy papers. The White House has its own website dedicated to open government, including a blog with updates on the Open Government Initiative, as well as an Innovations Gallery, which highlights some of the independent efforts taken by executive branch agencies toward transparency, participation, and collaboration.

Among the featured sites in the Innovations Gallery is Data.gov. Launched May 21, this website consists of a collection of government datasets and tools for analyzing them. Numerous federal

datasets have been difficult to find and access, but through this site, open government boosters hope an increasing number of datasets will be more easily accessible to the American people.

Much remains to be seen regarding what concrete policies will emerge from the Open Government Initiative. However, transparency as an issue is now front and center, and through this flexible and innovative process of soliciting public opinion, new ideas and new voices can be brought to the debate and the policymaking process.

EPA Plans to Listen to Scientists Again

The U.S. Environmental Protection Agency (EPA) recently announced it will increase the influence of scientists and the level of transparency in setting standards for common air pollutants, a reversal of a Bush administration policy that politicized scientific analyses. Clean air advocates are welcoming the policy reversal as a restoration of the role of science in crafting policies that impact environmental and public health.

In a letter to an independent science advisory group, EPA Administrator Lisa Jackson described the new process for reviewing the National Ambient Air Quality Standards (NAAQS) and stated her belief that the process "will ensure the timeliness, scientific integrity, and transparency of the NAAQS review process." The new process restores the use of a key document that assessed the scientific foundation for air quality policy options.

Every five years, the EPA is required to review the standards for emissions of six common pollutants, including those that contribute to acid precipitation and smog, as well as the science undergirding the standards. The agency most often fails to meet this deadline. Advising the EPA is a panel of non-EPA scientists know as the Clean Air Scientific Advisory Committee (CASAC).

In prior years, EPA scientists produced a "staff paper" during the NAAQS reviews that analyzed the scientific basis for policy options that considered whether to raise or lower a standard or leave it unchanged. In a purported effort to streamline the review process, in 2006, the Bush EPA made several changes, including replacing the staff paper with a policy assessment that reflected the views of EPA senior management and was published as an Advance Notice of Proposed Rulemaking (ANPR). An ANPR usually announces the beginning of a rulemaking process. However, the 2006 change placed it at the end of a comprehensive public review process, creating more delay and possibly undermining the work of the scientists.

Many clean air advocates criticized the change and sought to restore the influence of staff scientists and undo the added bureaucracy of the ANPR. Significantly, the CASAC strongly objected to the change, decrying the marginalization of scientists in the review process and the increased influence of political appointees. The CASAC claimed that in practice, the document that replaced the staff paper was "*both unsuitable and inadequate as a basis for rulemaking*" and served to "*undermine* the scientific foundation of the NAAQS reviews" (emphasis in the original).

The newly announced review process for air quality standards will once again include the staff paper. The use of the ANPR policy assessment will cease. The staff paper (also referred to as the "policy assessment") will serve to "bridge the gap" between the science and the policy options available to the administrator. The draft document will be available for public comment.

The EPA administrator will not jettison all of the Bush-era changes to the NAAQS review process. The process as described by Jackson will retain parts of the prior administration's changes and will add new features. Every phase of the review process prior to the interagency review will include public comment and participation by the CASAC.

The NAAQS review process for each pollutant will kick off with a public workshop to create a strategic plan for the review that will identify the purpose and approach the agency will use. The draft review plan will be open for public comment.

When creating an assessment of the relevant science, and during the assessment of human health risks, Jackson has instructed EPA scientists to reach out to other federal scientists, such as at the Centers for Disease Control and Prevention (CDC), for their input. It is not clear whether comments from federal scientists will be disclosed to the public during the review process. Allowing the public to evaluate disagreements and discussions among federal scientists is a crucial aspect of government transparency.

Concerns also remain over the role of the Office of Management and Budget (OMB) during the interagency review process. OMB has previously been criticized for interfering with science-based policy decisions, including during the review of standards for ozone.

Additionally, Jackson will continue to pursue the development of an electronic database to identify and prioritize scientific studies, known as Health and Environmental Research Online (HERO). It is not clear to what degree such a database would be accessible to the public.

Overall, Jackson's air quality review process provides a respectable level of public participation and transparency at important stages of the process – that is, before policy decisions have already been made. If the review process is implemented in accordance with the Obama administration's recent rhetoric upholding the value of scientific integrity, then the EPA will once again be assessing the best available science in a transparent manner when setting standards for air quality.

Administration Orders Interagency Review of Classification and CUI

On May 27, the Obama administration released a memorandum requiring reviews of overclassification and the current Controlled Unclassified Information (CUI)/Sensitive but Unclassified (SBU) process. The memorandum establishes separate 90-day interagency review processes to advise the administration on actions it should take to advance previous efforts to reform problems associated with these issues.

Whether or not the interagency processes will be transparent and include public participation is unknown. The memo does not dictate any new procedures on how agencies must handle such designated material.

Overclassification

On overclassification, the administration ordered a review of Executive Order 12958, originally authored by President Clinton in 1995 and amended in 2003 by President Bush. The review, to be completed by the Assistant to the President for National Security Affairs, will issue recommendations concerning:

- Establishment of a national declassification center
- Measures such as restoring a presumption against classification
- Changes necessary to facilitate greater classified information sharing among appropriate parties
- Prohibition of reclassification once documents have been declassified.

The right-to-know community has been calling for a national declassification center for a long time; open government advocates say such a center is needed to improve the efficiency of records processing. Most importantly, creation of a declassification center was a key recommendation made by the Public Interest Declassification Board in 2007.

Further, the Obama administration also seems to seek a clear prohibition of reclassification in response to the Bush administration's systematic review and restriction of access to documents once available to the public in the National Archives and the presidential library system. Some have criticized the Obama memorandum for not adequately recognizing important classification problems such as the role of "need to know" restrictions and antiquated classification criteria. Without more substantive changes to classification policy, it is uncertain if a centralized declassification center will just produce the same results as before.

CUI/SBU

To address the CUI problem, the administration has ordered the creation of a task force composed of senior representatives from a broad range of agencies both inside and outside the information-sharing environment. The group will address issues including whether the scope of CUI should remain limited to terrorism-related information or expand standardization to all SBU categories and identify measures to track and enhance agency implementation of a CUI framework. Whatever the recommendations are, the administration gave clear orders that it will balance a presumption of openness with an understanding of the value of standardizing SBU designation procedures and the need to prevent public disclosure where it would compromise privacy.

Some groups have expressed concern that the administration's memorandum does not adequately recognize all the negative issues related to CUI. Meredith Fuchs of the National

Security Archive stated, "On CUI, it seems like there is very little focus. It does not commit to scope or reduction in labeling or protection of access. These are serious problems."

The memorandum does not offer actual change or even the promise of it, nor does it ask the task force to address all the relevant problems that right-to-know advocates have been highlighting for years. As early as April 1993, President Clinton issued his own directive for classification reform. The Clinton memo illuminated problems that the Obama administration memo does not acknowledge, even though they remain unaddressed.

EPA Regains Control of Toxic Chemical Studies

The U.S. Environmental Protection Agency (EPA) is changing the way it studies the health effects of industrial chemicals in an attempt to quicken the pace at which new assessments are completed and to limit political interference in the scientific process.

Every year, hundreds of new chemicals are introduced into commerce, but chemical manufacturers and users rarely provide detailed health information. EPA's Integrated Risk Information System (IRIS) studies those chemicals and posts final risk assessments on the EPA website at cfpub.epa.gov/ncea/iris/index.cfm.

EPA announced May 21 that it is removing procedural steps to shorten the time frame for completing assessments. A memo from EPA Administrator Lisa Jackson says, "While still robust, the assessment development process will be shortened to 23 months, speeding the availability of IRIS assessments to the risk assessor community and the public."

Delay has plagued the IRIS program in recent years. EPA expects to complete five assessments later in 2009 (one was completed in February). All five have been in development for several years, with timeframes ranging from four years to over ten years, according the IRIS website.

In part because of the length of the process, EPA has made little progress in finishing new assessments. From 2004 through 2008, the agency completed assessments for only 16 substances.

To shorten the process, EPA is removing several steps added during the Bush administration. In 2004, the White House Office of Management and Budget (OMB) began reviewing draft assessments both before and after the studies underwent an external peer review. EPA calls the phases "interagency review" since OMB shares the draft assessments with other agencies inside the federal government.

The review gave the White House and other agencies an opportunity to block new assessments. According to a Government Accountability Office (GAO) report released in March 2008, OMB forced EPA to halt work on five IRIS assessments because it disagreed with the agency's decision to study the health effects of short-term exposure to those chemicals.

The interagency review also delayed the IRIS process. Recent interagency reviews have typically taken six months to one year.

In 2008, the Bush administration again revised the process to empower other agencies. If EPA assessed a chemical deemed critical to the mission of another agency, that agency could demand further review of the substance. Critics feared agencies like the Department of Defense, a major user of industrial chemicals, would have an incentive to delay or suppress conclusions showing a substance's risks.

EPA will no longer allow other agencies to receive special treatment if they believe a chemical is mission critical.

However, EPA is preserving a role for the White House in the revised process, giving it two opportunities to review IRIS assessments before they are officially finalized.

EPA did not indicate why it believes White House review is necessary. It is unclear what value, if any, a White House review adds to the process, particularly after the assessment has been peer reviewed. It is also unclear who will lead the review for the White House. OMB may continue to review drafts, or other offices, such as the Office of Science and Technology Policy, may play a bigger role.

In the past, employees inside the IRIS program have expressed concern with OMB's involvement. Comments on the 2008 GAO report complained that the OMB review delayed the completion of assessments and said OMB's comments "can be very extensive and troubling to address."

To mitigate concern, EPA insists it will maintain control over the process, including the White House review, at all times. The revised process also sets a time limit of 45 days for each review phase. EPA also says that comments on draft assessments should focus solely on science.

EPA is also making the process more transparent: Written comments submitted to EPA during the White House review will be made public. The disclosure requirement may help fend off any potential political manipulation.

Rep. Brad Miller (D-NC), Chairman of the House Science and Technology Committee's Subcommittee on Investigations, applauded the revisions, but added, "The assessment of the health effects of environmental exposures should be entirely scientific, not at all political. Scientific peer review is useful, political review is not." Miller plans to hold a hearing on the revisions to the IRIS process June 11.

In addition to the process changes, Jackson said she hoped to infuse more resources into the agency. Jackson noted that President Obama's FY 2010 budget request calls for an additional $5 million and 10 new employees to help the program reduce the backlog of substances awaiting study.

MSHA Provides Test of Obama's FOIA Policies

Despite the Obama administration's consistent theme of creating a new, more open government, the Mine Safety and Health Administration (MSHA) has yet to prove it will comply with the administration's Freedom of Information Act (FOIA) policies. In its response to a 2008 FOIA request, MSHA refused to release information that has been consistently released in the past. An appeal of that response provides a test of the administration's approach to implementing its openness policies.

On his first full day in office, President Barack Obama issued a memorandum about the use of FOIA, writing that the presumption regarding government disclosure should be: "In the face of doubt, openness prevails." Subsequently, Attorney General Eric Holder issued a memo to executive branch department and agency heads implementing Obama's directive. The Holder memo states, "The Department of Justice will defend a denial of a FOIA request only if (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) disclosure is prohibited by law."

The memo further states, "[A]n agency should not withhold information simply because it may do so legally. I strongly encourage agencies to make discretionary disclosures of information. An agency should not withhold records merely because it can demonstrate, as a technical matter, that the record falls within the scope of a FOIA exemption."

According to an article in *Mine Safety and Health News* (subscription), a mine safety attorney, Tony Oppegard, filed a FOIA request Oct. 28, 2008, to MSHA for a client's investigation file, including witness statements. He had filed 135 such requests in similar cases, and MSHA had supplied witness statements. In its Nov. 24, 2008, reply, however, MSHA withheld every witness statement under the FOIA exemption related to law enforcement purposes and cited fear of disclosing confidential sources.

MSHA withheld the witness statements under Exemption 7 (information compiled for law enforcement purposes), and specifically under section 7(C) (an unwarranted invasion of personal privacy) and section 7(D) (disclosure of the identity of a confidential source).

The Department of Justice's Office of Information Policy (OIP) issued guidance to the agencies about implementing the new administration's presumption of openness. The guidance offers specific examples to agencies of how they should apply their discretion in releasing information. It states that discretionary releases are reasonable under Exemption 7. "Documents protected by the remaining Exemptions, Exemptions 2, 5, 7, 8, and 9, can all be subjects of discretionary release," the guidance notes. In addition, the guidance addresses sections C and D of Exemption 7 specifically and notes that discretionary releases are possible under both.

In Oppegard's April 16 appeal letter to Mark Malecki, MSHA's counsel for trial litigation, Oppegard called MSHA's position on withholding the witness statements "the most disappointing response to a FOIA request regarding a safety discrimination case that I have ever

received." He called MSHA's decision to withhold the information under the two reasons cited in MSHA's letter "utter rubbish."

”Miners can only hope – and trust – that when the new Assistant Secretary takes office, he will put a quick end to the agency’s blatant attempts to protect operators who have been charged with discrimination by miners," Oppegard wrote. He asked Malecki to review, under the Obama administration’s new FOIA policies, MSHA's decision to withhold the information that the agency had routinely provided for the past 25 years.

Mine Safety and Health News (MSHN) reports that it, too, has had difficulty extracting information from MSHA through FOIA requests and largely placed the blame on the Bush administration's approach to FOIA. An editorial in the same issue of its newsletter notes, "MSHA is offering ridiculous redactions and refusing to divulge information which, previous to 2002, was openly shared with the public."

In one instance, MSHN requested the tape of a one-day training seminar MSHA held on the use of FOIA. The request was made four years ago and has never been answered. In another instance, MSHN asked for information regarding how MSHA made a legal determination of what constituted a haul road. MSHA supplied a response heavily redacted based on a FOIA exemption regarding trade secrets.

Lastly, MSHN has appealed another FOIA response from MSHA because of heavy redactions. In the appeal for a full report issued by the agency's inspector general, MSHN received another heavily redacted version, but this time, some of the redactions were made based on different FOIA exemptions. In its editorial, MSHN writes, "Regarding FOIA, MSHA is spewing red tape and accomplishing nothing, except alienating the American people – miners, their families, industry and the press."

According to the Department of Labor's (DOL) website, initial FOIA requests to MSHA are handled by the agency's district offices, and appeals are centralized in DOL's Office of the Solicitor in Washington, DC.

As OMB Watch noted in a May 5 article, agencies have been slow to implement the administration's openness policies. The change in the mindset of agencies will have to come from the president, OIP, and agency FOIA officers who have the responsibility for changing the kind of secrecy-first approach that MSHA and other agencies display.

Tax-exempt Organizations’ Involvement in Hot-Button Issues Spurs IRS Complaints

The recent involvement of tax-exempt organizations in hot-button political issues has caused watchdog groups to question if the organizations are engaging in prohibited campaign intervention. The tax code prohibits certain organizations, including charities and churches, from intervening in any political campaign on behalf of, or in opposition to, any candidate for

public office. The involvement of these organizations in political causes reflects the nonprofit sector's valuable interest in social issues and public affairs. However, that interest is hampered by the uncertainty of what is allowed in many election-related activities.

Liberty University (LU), a private, tax-exempt university founded by the late Rev. Jerry Falwell, dropped official recognition of the university's College Democrats club due to the National Democratic Party's platform on abortion and marriage equality, according to LU's Chancellor Rev. Jerry Falwell, Jr. Without official recognition, the club cannot receive funding from the university or use the university's name on anything affiliated with the club.

Mark Vine, LU's Vice President for Student Affairs, sent the LU College Democrats an e-mail on May 15 revoking recognition for the club. The e-mail says that the "Democratic Party Platform is contrary to the mission of LU and to Christian doctrine (supports abortion, federal funding of abortion, advocates repeal of the federal Defense of Marriage Act, promotes the 'LGBT' agenda, Hate Crimes, which include sexual orientation and gender identity, socialism, etc)."

Americans United for Separation of Church and State (AU) sent a letter to the Internal Revenue Service (IRS) asking the agency to review Liberty University's tax-exempt status. AU's letter highlights that the university provides the College Republicans club with official recognition and funding. In an AU press release, Executive Director Rev. Barry W. Lynn said, "Liberty University is a tax-exempt institution and isn't allowed to support one party over another. If the school insists on pushing policies that favor Republicans over Democrats, it should have to surrender its tax exemption." There is a gubernatorial primary in Virginia on June 9, which raises the question about whether LU's action could be intended to affect the outcome of an election.

Liberty University announced in a press release on May 28 that it had plans to file a complaint on June 1 against AU, alleging that AU is politically biased and files "these letters to silence churches and other conservative organizations by intimidating them."

There are also complaints that the Maine Diocese of the Catholic Church is violating tax law by helping push a referendum that would repeal same-sex marriage in the state. According to *SFGate.com*, an online affiliate of the *San Francisco Chronicle*, the Empowering Spirits Foundation filed an IRS complaint against the Diocese, alleging that it is "engaging in political activity by collecting signatures for the referendum [and, thus,] violating IRS rules applying to nonprofits." The referendum is designed to overturn Maine's recently enacted marriage equality law, which expands civil marriage to same-sex couples.

By participating in the referendum, the Maine Diocese is engaging in direct lobbying, according to IRS regulations. Support or opposition to a referendum is considered lobbying because the general public is considered the legislative body in this case. The Diocese, a 501(c)(3) organization, can legally engage in direct lobbying as long as it is not a "substantial part" of its activities. Thus, the Diocese is not prohibited from participating in the referendum process as long as it is not supporting or opposing a candidate. However, Leonard Cole, an attorney who specializes in tax and nonprofit issues, told the Associated Press, "It's hard for me to imagine how you seek someone's signature on a petition without it arguably at least being an attempt to

influence their vote once the measure was on the ballot." Presumably, Cole is challenging the legitimacy of IRS regulations that make actions on referenda a lobbying activity, not a political intervention.

Leaders of tax-exempt organizations have also been extremely vocal about the Washington, DC, City Council's passage of legislation on May 5 to recognize valid same-sex marriages from other jurisdictions. Some religious leaders have vowed to target city council members who supported the legislation, according to the *Washington Post*.

AU warned that DC pastors who target politicians for supporting the marriage equality legislation risk their institutions' tax-exempt status. "Religious leaders have the right to speak out for or against same-sex marriage, but they cannot use the resources of their churches to elect or defeat candidates," said Lynn in another press release.

A pastor can make an endorsement as an individual but not as a representative of a church. IRS Rev. Rul. 2007-41 states, "Leaders cannot make partisan comments in official organization publications or at official functions of the organization." AU says it will monitor the DC situation and will report any tax-exempt organization to the IRS that violates the prohibition against campaign intervention.

Many complaints might never be filed if the IRS guidance for tax-exempt organizations was less ambiguous. Clarifying ambiguous IRS voter engagement rules would not only prevent organizations from unknowingly participating in prohibited activities, but it would also enable organizations to engage in issue advocacy without the fear of unintentionally violating rules that are too vague for many organizations to understand.

Report, Comments Reveal Need for Regulatory Clarity at IRS

Every year, the Department of the Treasury and the Internal Revenue Service (IRS) request public comments on recommendations for their Guidance Priority List to identify tax issues that should be addressed through regulations, revenue rulings, revenue procedures, notices, and other guidance for the year. OMB Watch recently submitted comments that urge the IRS to prioritize the creation of a bright-line definition of prohibited political activity for tax-exempt charities and religious organizations. Such clarity is particularly important given recent findings that IRS agents have not properly differentiated between permissible advocacy and activities that are considered partisan election intervention.

501(c)(3) tax-exempt organizations – charities, educational institutions, and religious organizations, including churches – are prohibited from participating or intervening in any political campaign on behalf of, or in opposition to, any candidate for public office. However, IRS regulations do not clearly define political intervention. The IRS relies on a "facts and circumstances" test to determine, on a case-by-case basis, what is and is not permissible. Consequently, groups are left with little precedent to guide their decision making. In 2004, the

IRS began the Political Activities Compliance Initiative (PACI) program, targeting alleged illegal political activity by 501(c)(3) organizations.

In its recent comments to the IRS, OMB Watch recommends the creation of a rule that unambiguously defines prohibited political intervention activities to protect basic constitutional rights of free speech and association. OMB Watch's submission notes the downside to the current uncertainty: "groups feel more comfortable vacating their issue advocacy prior to an election rather than inadvertently violating the law. It is necessary to remove the chilling effect of the current vague facts and circumstances test so that 501(c)(3) organizations can become fully engaged in activities that support election reform and the goals of the Help America Vote Act." The comments continue, "If IRS employees do not understand the difference between permissible and impermissible activities, nonprofit organizations certainly can not be expected to understand the overly vague standard of when partisan activity has occurred."

The OMB Watch comments also suggest that the IRS take into account the U.S. Supreme Court's 2007 decision in *Federal Election Commission v. Wisconsin Right to Life* (*WRTL*) in providing clarity on permissible election activities. In *WRTL*, the Court exempted genuine issue advocacy from the "electioneering communications" ban on corporate-funded broadcasts that refer to federal candidates within 60 days of a general election or 30 days of a primary.

The IRS could use the Federal Election Commission (FEC)-approved regulation for permissible issue advocacy as a starting point for guidelines. According to the FEC rules, if the focus of a broadcast or other advertisement is on a legislative issue, and an officeholder is urged to support that legislation or the public is called upon to support a position and contact an officeholder, that ad is not an electioneering communication. However, the FEC regulation is also problematic in that it does not draw a specific standard and, as a result, deciding whether a communication is permissible is subjective.

Further evidence supporting the need for regulatory clarity is provided in a new Treasury Inspector General for Tax Administration (TIGTA) audit report on the IRS PACI program for the 2004 election season. TIGTA found that the IRS overstated the number of cases with confirmed prohibited political activity. Specifically, TIGTA notes the confusion that the IRS places on nonprofits when the agency does not communicate whether political intervention occurred. Fifteen of the closing letters TIGTA reviewed "did not specifically state whether the IRS determined that the prohibition against political intervention had been violated, which can be confusing for tax exempt organizations that spend resources on a lengthy examination." Furthermore, TIGTA reviewed 99 cases and found that 14 of them were incorrectly classified as a violation of the prohibition.

TIGTA recognized the difficulty organizations face while going through the arduous examination process. Its report said, "When organizations have not violated the prohibition on political activity, clear feedback is needed to notify the tax exempt organization that it may continue to operate consistent with its tax exempt status and to provide assurance that the alleged political actions did not violate prohibited political activity guidelines. Similarly, when tax exempt organizations have violated the prohibition on political activity, clear feedback is needed to

ensure that prohibited activities are stopped and that corrective actions are taken to prevent these types of activities in the future."

Other interesting points from the review of the 2004 cases include:

- Most organizations were investigated for a violation of a single prohibition
- The investigations included questionable activities in the form of printed and electronic material and verbal statements
- Three cases from the 2004 election remain open
- Most of the examinations involved local organizations
- Approximately half of the cases involved churches

The report made two recommendations: 1) closing letters should clearly state whether a violation was confirmed, and 2) IRS examiners should have guidance on the use of the correct disposal code when political intervention is not substantiated.

Currently, the facts and circumstances test does not bode well for any effective enforcement of the law. The majority of cases where the IRS determined political campaign intervention had occurred were resolved by issuing a written advisory with a warning and no penalty. In only six cases did the IRS revoke an organization's tax-exempt status, and in no case did the IRS impose the excise tax penalty provided in the law.

The IRS is responsible for releasing a PACI report on cases from the 2008 election season. However, it is unclear when that report will be complete.

White House Announces Changes to Recovery Act Lobbying Memo

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. After completing a 60-day review, the administration modified the oral communications ban to include not just federally registered lobbyists, but everyone who contacts government officials. However, that ban appears to only apply to competitive grant applications that have been submitted for review.

Through the changes, the administration has essentially removed the ban on federal lobbyists communicating orally with agency officials on specific projects related to the Recovery Act. Now oral communications are only prohibited once a competitive grant application has been filed, and the ban lasts until the grant is awarded. However, the restrictions apply to everyone, not just federally registered lobbyists. Further, everyone can communicate with agency officials in writing, and those communications will be posted on the Internet. Eisen wrote, "For the first time, we will reach contacts not only by registered lobbyists but also by unregistered ones, as well as anyone else exerting influence on the process."

Eisen describes the competitive grant applications for Recovery Act funds as "the scenario where concerns about merit-based decision-making are greatest. Once such applications are on file, the competition should be strictly on the merits. To that end, comments (unless initiated by an agency official) must be in writing and will be posted on the Internet for every American to see."

The change in the lobbying restrictions hones in on one particular step in the process of acquiring funding under the Recovery Act and significantly recognizes that not only registered lobbyists can gain influence. However, the changes seem to ignore the influence that can be generated prior to submitting a competitive grant application. More to the point, most of the Recovery Act funds are not distributed through competitive grants but through formula grants, contracts, loans, and tax expenditures. The policy change is silent about disclosure regarding influence-peddling where more money is at stake.

The announcement also made clear that disclosure of contacts with federally registered lobbyists and agency officials will continue to be posted online. "Third, we will continue to require immediate internet disclosure of all other communications with registered lobbyists. If registered lobbyists have conversations or meetings before an application is filed, a form must be completed and posted to each agency's website documenting the contact." This provision seems unclear. It appears to be referencing the earlier sample guidance from the Office of Management and Budget (OMB) that instructed agencies to disclose any contacts with federally registered lobbyists, even when those communications were about procedural issues.

Criticism of the restrictions rested on their reliance on the Lobbying Disclosure Act (LDA) and how they set a double standard on speech. Those registered under the LDA were the only ones who had their oral communications restricted. Critics charged that to avoid the ban on oral communications, organizations and corporations could use a non-registered lobbyist to communicate with agencies on Recovery Act funding.

Now, many of those who decried the March 20 memo are praising the changes. For example, Citizens for Responsibility and Ethics in Washington (CREW) Executive Director Melanie Sloan stated, "By requiring everyone – not just lobbyists – to communicate in writing after grant applications have been filed, the WH is ensuring real merits-based decision-making. For the first time, not just lobbyist communications but also communications by the ubiquitous class of deliberately vaguely titled 'consultants' will be reported."

Public Citizen issued a press release stating that the new rule "levels the playing field between wealthy corporations and non-profit organizations as well as those who can afford hiring an insider lobbying firm and those who cannot. Everyone who requests an earmark must request it in the same way."

Some groups remain opposed to the speech limitations still found in the memo. None of the “good government groups,” save OMB Watch, have expressed concern that the focus is on the smallest share of Recovery Act funds – competitive grant awards – and often the least contentious. The Associated Press quoted an anonymous White House official who said, "The

new prohibition against conversations would apply to about $60 billion worth of spending." The Recovery Act provides $787 billion.

Questions still remain about the administration's policy. The updated regulations were announced rather informally via the White House blog. The blog stated that detailed guidance will be issued on the changes. Hopefully, such guidance will provide more clarity and definition to the scant six-paragraph announcement. Perhaps further changes can be made in the future to tweak the rules. The simplest solution is for all communications that attempt to influence federal spending under the Recovery Act to be disclosed.