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Congress Burdened By Must-Pass Legislation

With fewer than 30 working days left before Congress adjourns for its August recess, the legislative branch is once again faced with a pile of must-pass legislation and a ticking clock. Before the end of 2010, Congress must pass a spate of bills to renew a set of expiring tax provisions, prevent stiff pay cuts for Medicare doctors, fund the wars in Iraq and Afghanistan, and prevent the expiration of the Bush tax cuts for the middle class. Congress is likely to truncate its legislative calendar so that members can return to their districts to campaign for this year's elections, lowering the odds of passing other "big-ticket" legislation like climate change policy and immigration reform.

The most prominent bill giving Congress difficulties is the so-called tax extenders bill, which is a collection of miscellaneous tax provisions like biodiesel and R&D tax credits that must be renewed every year. While the extension of these core tax provisions would cost about $32 billion, other provisions, such as an extension of unemployment insurance and continued

increased Medicaid funding to states, pushed the total cost of the Senate version to $109 billion. Many Democrats strongly back the unemployment insurance and Medicaid spending to continue fighting the effects of the recession, but fiscal conservatives in the Senate continue to balk at the bill's cost.

Also proving contentious are provisions in the bill added to offset its ultimate cost. Most controversial is a loophole-closer that changes treatment of investment fund managers' income from being taxed at the capital gains rate of 15 percent to the regular income tax rate (up to 35 percent for high-earners). Bowing to the demands of Wall Street, real estate, and venture capital lobbyists, the Senate bill would only partially close this "carried interest" loophole by taxing only a little more than half of fund managers' income at the regular income tax rate.

As of June 25, Senate Democrats tried to pass the bill three times, each time with a more trimmed-down cost, and each time Democrats failed to reach 60 votes to end debate on the bill. The last version of the Senate bill cost $109 billion, adding $33 billion to the deficit through extended unemployment insurance.

The House passed its version of the extenders bill in May, and it included a 19-month fix to the Medicare reimbursement formula, the so-called "doc fix." Without it, doctors would see steep cuts to their Medicare reimbursements, as much as twenty-one percent. But Senate leaders were forced to scale the 19-month solution down to six, despite the fact that the House version was already pared down from a more expensive five-year fix. Ultimately, the Senate passed the short, six-month fix as a separate measure so that wrangling over the larger package would not prolong the pay cut for doctors serving Medicare patients.

While the House reluctantly passed the Senate's compromise, it only serves to delay the inevitable. Congress will have to pass a long-term extension of the Medicare reimbursement formula at some point, and it will be no easier, and no cheaper, during December's lame-duck session.

The problems facing Congress are not all the Senate's fault, however. The House has been having problems of its own. In particular, the House has not been able to pass a supplemental spending bill that would fund the wars in Iraq and Afghanistan. Surprisingly, the Senate passed its version of the war supplemental bill before the Memorial Day break, but anti-war Democrats in the House are holding up the House bill, demanding a timetable for withdrawal from Afghanistan before they will vote on any new funding for the war. At the same time, Defense Secretary Robert Gates has warned House Speaker Nancy Pelosi (D-CA) that delaying passage of the bill beyond July 4 would have dire consequences for military operations.

The situation is further complicated by the fact that House leadership planned on attaching a deeming resolution to the war supplemental that provides a budget blueprint for the fiscal year that starts Oct. 1. Since the House will not be passing a budget resolution in 2010 (the first time this has happened since Congress passed the Budget Act in 1974; see our previous *Watcher* article on this matter), the deeming resolution would put in place FY 2011 spending caps for

appropriations committees that are usually set by the budget resolution. The deeming resolution also allows Democrats to avoid providing estimates for the deficit.

Because the war supplemental is considered "must-pass" legislation, thanks to Gates' insistence, House leadership believed it would be easier to attach the deeming resolution to the war supplemental than to pass a stand-alone bill. Like other must-pass legislation, the war supplemental will likely serve as a vehicle to move other provisions, such as a $23 billion proposal offered by House Appropriations Chair David Obey (D-WI) to prevent the layoff of thousands of teachers due to state budget shortfalls.

With the current problems the supplemental is facing, however, congressional appropriators may have to wait even longer for FY 2011 budget levels before they start their work, greatly increasing the chances that the 12 spending bills required to fund the federal government's operations will not be passed by the Oct. 1 deadline.

Finally, there is the thorny issue of the Bush tax cuts, which expire at the end of 2010. President Obama has pledged, with Democratic congressional leadership concurring, to not let these tax cuts expire for families earning less than $250,000. However, with the prospect of a tax increase for high-income taxpayers on the horizon, members of Congress are getting an earful from lobbyists representing individuals in the highest tax bracket. Nervous about the prospects of being tarred with such labels as "job-killing tax-hiker" during an election-year, many members of Congress may hesitate at passing a limited extension.

Income tax rates are not the only Bush tax cuts that are set to end on Dec. 31. Since Jan. 1, the nation has been without an estate tax, thanks to another Bush tax cut, which steadily phased the tax out over nine years and completely eliminated it for 2010. The tax will return in 2011 and will revert to rates found in the law prior to the Bush tax cuts, which approximate 2002 levels. 2010 marks the first time the nation has been without an estate tax since its inception in 1916 and the first year that a billionaire has been able to pass on his entire estate to his heirs tax free.

At the end of 2009, the House passed what would have been a permanent extension of the exemption levels and tax rates in place that year, but the Senate has been unable to follow through with a similar bill. With only 41 votes needed to block passage of an estate tax fix, the fate of such a bill remains unclear.

Lack of Transparency in Oil and Gas Oversight Still a Major Problem

The Department of the Interior's management of oil and natural gas resources suffers from a lack of public access to information, according to government investigators and numerous public interest groups. This lack of openness takes a significant toll on the public's ability to challenge Interior's decisions and impedes accountability. Reforms to the Interior Department's oil and gas management policies announced in recent months have not made transparency a key element, casting doubt on their potential to bring about stronger oversight.

In recent testimony before a House subcommittee, an official from the Government Accountability Office (GAO) criticized the Department of the Interior's (DOI) oversight of oil and gas production for weaknesses in the disclosure of information. GAO investigators "found that stakeholders, including industry groups and nongovernmental organizations representing environmental, recreational, and hunting interests, expressed frustration with the transparency and timeliness" of certain types of information on oil and gas management. In addition to the transparency problems, GAO identified weaknesses in four other key areas: technical expertise; ability to conduct inspections; enforcement authority; and independence.

Over the course of several investigations into the management and oversight of oil and natural gas resources, combined with its work to strengthen oversight of nuclear safety, the GAO has identified several key elements it considers valuable to sound independent oversight. One such element, public access, states that the agency "should provide public access to its reports so that those most affected by operations can get information."

DOI's oil and gas oversight is conducted primarily by the Bureau of Land Management (BLM) and the former Minerals Management Service (MMS). On June 18, the MMS was renamed the Bureau of Ocean Energy Management, Regulation, and Enforcement (BOEMRE) as part of a set of reforms announced in the aftermath of the BP Deepwater Horizon catastrophe. The Interior secretary's decision to change the name of the troubled MMS may evoke the name changes of other disgraced organizations such as AIG and Blackwater, but it does little to improve transparency.

BOEMRE (Née MMS)

Reforms of offshore oil and gas oversight announced by Interior Department Secretary Ken Salazar in May fail to highlight the role of the public or the need to increase transparency at MMS. In a report recommending new safety measures for offshore drilling, the Interior secretary does, however, scatter a few mentions of transparency. For example, the document committed the agency to develop "new means of improving transparency and providing public access to the results of inspections and routine reporting" regarding oil rig safety equipment, including the misleadingly named blowout preventers. Additionally, MMS recently conducted inspections of all deepwater drilling rigs in federal waters of the Gulf of Mexico. The inspection results were made available to the public.

Still, public interest watchdogs have called for much greater transparency at MMS/BOEMRE, including narrower application of trade secrets protections and greater disclosure of key data, such as detailed production figures, royalty and tax payments, and environmental and safety inspection reports. According to one industry watchdog, "The way to clean up the mess in Interior and in our waters is to shine enough light to make dealings between industry and government transparent to all of us." Yet, DOI's reforms of the former MMS do not prioritize improving the transparency of the agency or greater public access to information. This neglect could threaten the efficacy of the reforms. Danielle Brian of the Project on Government Oversight (POGO) recently testified before the House Subcommittee on Energy and Mineral

Resources, stating, "No matter what reforms are put in place, they can only be effective with increased transparency about MMS's operations.

BLM: The Other Troubled Bureau

The BLM oversees federal onshore oil and natural gas projects and is supposed to ensure projects adhere to all applicable environmental laws and regulations, including the National Environmental Policy Act (NEPA). NEPA requires certain projects to undergo environmental reviews that also consider alternative actions. Such reviews are waived if the project qualifies for what is known as a categorical exclusion. The GAO has found that "Interior has been providing inconsistent and limited information with respect to its use of categorical exclusions in approving onshore oil and gas activities."

Under the Energy Policy Act of 2005, section 390 authorized DOI to grant categorical exclusion status and skip environmental reviews for certain oil and gas drilling projects. Many projects excluded from the environmental review process under section 390 are frequently not publicly disclosed. The GAO found that "BLM field offices had different degrees and methods of disclosing information related to decisions on section 390 categorical exclusions." The ease of access to information depends on which regional office the public seeks information from.

In September 2009, the GAO found that "BLM's use of section 390 categorical exclusions has frequently been out of compliance with both the law and BLM's guidance." The agency's abysmal implementation of the Energy Policy Act and of NEPA "may have thwarted NEPA's twin aims of ensuring that BLM and the public are fully informed of the environmental consequences of BLM's actions."

In addition to BLM, MMS also was criticized for poor implementation of NEPA. In a report released in March, the GAO found that MMS's failure to share information "has hindered [regional staff's] ability to complete sound environmental analyses under NEPA," and that the agency has failed to provide a required guidance handbook for implementing NEPA. NEPA's environmental reviews allow the public to review and comment on proposed oil and gas activities. Without sound, transparent reviews, the public is effectively shut out of a key part of government decision making.

Little Transparency in Lease Sales

According to GAO's recent testimony before the House subcommittee, the preliminary results of an ongoing GAO investigation show that "BLM state offices provide limited and varying amounts of information to the public on their leasing decisions." Despite the criticisms by the GAO regarding DOI's transparency and involvement of the public, the BLM has not made improving the transparency of the oil and gas leasing process a priority. Proposed reforms of BLM's lease sales make few references to transparency. There is only sporadic mention of public access, such as one assertion that "field offices will ensure greater public involvement." Such sparse and vague mentions of "greater public involvement" provide little substantive direction to staff and little hope for progress.

Websites Missing Key Documents

According to the GAO, another recent reform requires state BLM offices to post online their responses to protests against decisions to offer specific parcels for oil and gas drilling. At least one state office, Wyoming, posted the protest letters for leases sold in February and May 2010, but no response letters were posted. The websites for the Colorado office and the New Mexico office had neither protest letters nor agency responses posted online for sales going back to 2005. The Montana office does provide a webpage with the protest letters and responses for leases sold in 2009 and 2010 only.

Notably, the BLM's website provides substantial information on how to lease federal land for oil and gas drilling. A review of the website failed to identify any instructions for protesting leasing decisions.

DOI's Open Government Plan

Unfortunately for open government advocates, DOI's Open Government Plan, released in April, does little to address the problems of transparency and public engagement in oil and gas management.

As part of an evaluation of all agency Open Government Plans by a coalition of public interest groups, a reviewer noted that DOI's plan "suffers from a lack of specific details for implementation of those [transparency] projects and dearth of 'game-changing' ideas that would put the President's open government ideals into meaningful action."

In her House testimony, POGO's Brian criticized DOI's implementation of the Obama administration's transparency initiatives. "It is important to note that Interior has not released information about oil and gas leases, despite being given several opportunities to do so by measures outlined in the Open Government Directive. Interior's willingness to increase its openness in the wake of the Gulf disaster should be considered a real acid test as to how committed the Administration is to the kind of transparency measures that will help citizens hold the federal government and industry accountable."

Kagan's Impact on Transparency Difficult to Predict

Elena Kagan, President Obama's nominee for the U.S. Supreme Court, is currently undergoing her confirmation hearing before the Senate Judiciary Committee. During the hearing, she will be questioned about a wide range of legal and political issues, which may include government transparency. Kagan's arguments in several transparency-related cases as Obama's Solicitor General may offer some insight into her approach to open government. However, because she has argued those cases from the administration's perspective, her personal legal views on transparency are difficult to assess. It is, therefore, hard to predict how she may rule in transparency-related cases if confirmed as a justice.

Kagan was nominated by President Obama on May 10 to replace retiring Justice John Paul Stevens. Kagan attended both Princeton and Oxford University before obtaining her law degree from Harvard Law School. She first worked in a political capacity in 1993 when she was special counsel to then-Sen. Joe Biden, but she spent most of her early career in academia. In 1995, she joined the Clinton administration and held a variety of positions until 1999, when she returned to teaching. In 2009, she was nominated by President Obama to be Solicitor General, the position she currently holds.

Although she has never been a judge, Kagan, as Solicitor General, has been the primary federal government attorney arguing cases at the Supreme Court. It is her role to decide which cases the government takes to the Court and how they are argued. Kagan had reportedly been considered for the seat vacated by Justice David Souter, but Sonia Sotomayor was ultimately named.

Kagan Has Sided with Secrecy

During her time as Solicitor General, Kagan has pursued five cases before the Supreme Court concerning application of the Freedom of Information Act (FOIA), the country's most fundamental open government law. In four of the five cases, she has argued in favor of government secrecy. Each time, the Court sided in favor of the government. The Court has not yet taken up the fifth FOIA case.

The most notable of the cases was *Department of Defense v. American Civil Liberties Union*, in which Kagan fought the release of photographs depicting the abuse of detainees while in U.S. custody. In her argument to the Supreme Court, Kagan stated, "In the judgment of the president and the nation's highest-ranking military officers, disclosure of the photographs at issue here would pose a substantial risk to the lives and physical safety of United States and allied military and civilian personnel in Iraq and Afghanistan." Kagan made this assertion despite the fact that the administration had already released Justice Department memoranda that detailed the policy and actions of U.S. personnel in torturing detainees because "the existence of that approach to interrogation was already widely known." In that case, the Supreme Court overturned a lower court decision to release the photographs.

In a different case, Kagan argued that it would violate physicians' privacy to release Medicare data on claims paid. Kagan's argument in *Consumers' Checkbook v. Dept. of Health and Human Services* was that the information could be combined with other publicly available Medicare fee information to figure out how much a physician earned each year. Consumers' Checkbook had argued that physicians' privacy did not outweigh the public interest in using the data to measure physician experience, quality, and efficiency. The Supreme Court refused to overturn a ruling from the Court of Appeals for the DC Circuit, which sided with the government and allowed the records to be withheld. The Court of Appeals decision had reversed the original ruling of the U.S. District Court for the District of Columbia, which found in favor of Consumers' Checkbook and ordered the agency to release the records.

In two other FOIA cases, Kagan argued against disclosure of records sought by the public. *Loving v. Department of Defense* concerned a request for documents relating to the president's

review of a military death sentence, and *Berger v. Internal Revenue Service* involved a request for an IRS officer's time sheets. In both of these cases, the Supreme Court chose not to review the cases, essentially siding with Kagan by default and letting the lower courts' rulings to withhold the information stand.

Kagan Has Limited the Use of Privacy Claims to Hide Corporate Information

In another case, Kagan has argued against the idea that corporate information held by the government qualified for privacy protections. Government agencies are prohibited from disclosing records, even under FOIA, if the information would constitute an invasion of personal privacy. Corporations have attempted to extend this exemption for individual privacy to their corporate records.

In a fifth FOIA case, *Federal Communications Commission v. AT&T Inc.*, which the Supreme Court has not yet taken up, Kagan argued that corporate data in the possession of the U.S. government was not subject to the privacy exemption of FOIA requests. She put forth that the public has a right to information concerning corporate malfeasance in government programs. The lower court, the Third Circuit Court of Appeals, rejected this argument and sided with AT&T. The government appealed the Third Circuit ruling to the Supreme Court. If confirmed and the Court takes up the case, Kagan will have to recuse herself because of her past involvement.

Much of Kagan's existing arguments in favor of secrecy may be more the opinion of the administration than her own. On the issue of the torture photographs, for example, Attorney General Eric Holder testified before Congress in June 2009 that the administration would appeal to the Supreme Court any lower court decision to release the photographs. This may indicate a larger administration policy of withholding such records rather than the position of any one person, including Kagan. Thus, while her arguments in important transparency-related cases may offer us some insight, how Kagan would ultimately rule in future transparency cases as a Supreme Court justice is difficult to predict.

MSHA Limited Number of Mines on Violations List

Officials at the Mine Safety and Health Administration (MSHA) purposefully prevented a number of mines with serious safety violations from being placed on the list of mines with patterns of violations. Budget constraints, not safety concerns, led to some dangerous mines not being listed, according to the Department of Labor's Office of Inspector General (OIG).

On June 23, the OIG sent an alert memorandum to MSHA administrator Joseph Main in the midst of an ongoing OIG investigation of MSHA's enforcement procedures. The memo states that in March 2009, when the administrator of MSHA's Coal Mine Safety and Health division discussed the list of mining companies that had been identified as candidates for the agency's pattern of violation (POV) program, he directed the district managers to **"select no more**

than one mine on the initial screening list per field office and a maximum of 3 mines per district." (Emphasis in the original)

According to the memo, investigators were told that the limitations were a result of budgetary constraints. This guidance "set a limit that was inappropriate for this enforcement program." As a result of the guidance, program administrators were permitted to remove some mines from the POV list.

The POV program identifies the mining companies with the worst safety and health violations and invokes enhanced MSHA enforcement efforts for those mines. Several problems with the program allow mines to avoid penalties and the enhanced enforcement regime. For example, companies can escape this status by contesting citations to the independent Federal Mine Safety and Health Review Commission (FMSHRC), which has a backlog of approximately 16,000 cases.

The POV program drew public attention in April after 29 miners were killed in an explosion at the Upper Big Branch mine in West Virginia. The owner of the mine, Massey Energy, has a history of safety violations that placed it on the program's screening list. Massey avoided being placed in the POV program by contesting violations as a regular practice.

Another Massey-owned mine, the Tiller No.1 mine in Virginia, avoided being placed in the POV program on June 8 when a FMSHRC judge dismissed 10 of the 29 citations the company contested. The judge ruled that only 19 of the violations were "significant and substantial." Mines can be placed on the list if 25 violations are proved.

The OIG memo cited MSHA's review of the POV program between 2007 and 2009, which identified 89 mines for potential listing in the program. Although some mines were removed for appropriate reasons, the memo states that at least 10 mines were removed from the list in February and September 2009.

According to the memo, "MSHA is not subjecting these mines to the enhanced oversight that accompanies potential POV status, yet it does not have evidence that they had reduced their rate of significant and substantial violations. As a result, miners may be subjected to increased safety risks."

The OIG recommended that MSHA reevaluate the 10 mines while it undergoes its review of the existing POV program, an effort MSHA began following the West Virginia explosion. The memo further recommended that MSHA ensure that future decisions about the removal and inclusion of mines be based only on the health and safety conditions at the mines.

Problems with the agency's enforcement program led members of the House Committee on Education and Labor to request the OIG investigation after the Upper Big Branch mine disaster. In a June 23 press release, committee chair George Miller (D-CA) said, “The Inspector General’s alert raises very serious concerns that go to the heart of health and safety of mine workers. Prior

to Assistant Secretary Main's confirmation, MSHA obstructed a key safety enforcement tool that could have endangered the lives of mine workers."

In response to the OIG memo, the Labor Department issued a press release promising to reform the POV program. Secretary Hilda Solis and Main acknowledged that the program was "badly broken" and that the screening of mines will be different in 2010 than in the past. The agency is making administrative and rulemaking fixes, as well as working with Congress on legislation, according to the press release.

The OIG asked Main to formally respond to the action memo in 10 days.

Simplify Choices, Disclose More to Alter Public Behavior, White House Says

The White House's Office of Management and Budget (OMB) will push government to look at regulation in a new light and reassess how the choices regulators make affect the choices the public makes, according to a new memorandum sent to federal agencies.

The June 18 memo from Cass Sunstein, administrator of the White House Office of Information and Regulatory Affairs (OIRA), discusses the concepts of disclosure and simplification in a regulatory context and instructs agencies to consider whether those concepts can improve regulatory outcomes. OIRA is an office within OMB.

The memo is Sunstein's first major, formal directive to agencies describing his vision for federal regulatory policy. Since taking office in September 2009 after a protracted confirmation process, Sunstein's comments on rulemaking have mainly come in speeches and through more narrowly focused memos.

The first portion of the memo details principles for rules requiring the disclosure of information. Disclosure can help the public make choices that serve people better, the memo says.

The memo distinguishes between summary disclosure and full disclosure. "With summary disclosure, often required at the point of purchase, agencies highlight the most relevant information in order to increase the likelihood that people will see it, understand it, and act in accordance with what they have learned," the memo says, such as nutrition labeling or tobacco warnings. Full disclosure involves data or other detailed information, the memo says.

Principles for summary disclosure include simplicity, accuracy, timeliness, and proper placement. For full disclosure, the memo emphasizes the use of the Internet to make information available and usable. "The central goals of full disclosure are to allow individuals and organizations to view the data and to analyze, use, and repackage it in multiple ways," the memo says.

The second part of the memo describes Sunstein's desire to advance the concept of simplification as a means to achieve regulatory goals. Agencies should consider using "default rules" to simplify public choices, the memo says.

"In the domain of savings for retirement, for example, private and public employers might create an 'opt in' system, in which employees do not reserve any of their salary for savings unless they affirmatively elect to do so," the memo says. "Alternatively, employers might create an 'opt out' system, in which a certain amount of salary is placed in a retirement plan unless employees affirmatively elect not to participate in the plan." The latter would lead to greater enrollment and therefore greater savings, the memo implies.

When default rules are inappropriate, the memo advocates for the use of "active choosing" where the government does not set a default but does require consumers or other end users to make an explicit choice or state a preference among options.

The memo is consistent with Sunstein's past writings, including his book *Nudge: Improving Decisions About Health, Wealth, and Happiness*, which he co-authored with economist Richard Thaler before Sunstein entered government. Drawing on theories in behavioral sciences and behavioral economics, *Nudge* undercuts the traditional rational actor theory of economics, arguing instead that human foibles sometimes cause people to make poor economic or social decisions. To solve the dilemma, the authors say, people can be incentivized, or nudged, into making better choices if they are provided with better and more relevant information and circumstances. That nudge can often come from government – a philosophy Sunstein has brought with him to his White House post.

Sunstein's memo may signal the death of more official efforts to overhaul the regulatory process. Many expected the principles outlined in the memo to be included in an overdue executive order on regulatory review.

Advocates for improved regulation, including OMB Watch, as well as industry representatives, had been anticipating a broader and more formal declaration of policy from President Obama. In a Jan. 30, 2009, memo, Obama asked OMB to recommend within 100 days changes to the regulatory process. Obama said he would use the recommendations to develop a new executive order. The current process is governed by E.O. 12866, signed by President Clinton in 1993.

OMB then solicited public comment on changes to the process in February 2009, a highly unusual but welcomed approach. Since closing the comment period in April 2009, the White House has not given the public any indication as to the status of the order or its plans to reform the process.

Obama's 2009 memo specifically mentioned "the role of the behavioral sciences in formulating regulatory policy," a nod to Sunstein's theories. It is unclear why the administration may have chosen to address these issues through the Sunstein memo, rather than through executive order.

Sunstein's memo lacks specificity in certain areas, raising questions about its intent and scope. For example, the memo's instructions would seem to be most appropriate for consumer regulation. The examples used throughout the memo refer to consumer issues, such as nutrition labels and retirement accounts. However, the memo is written broadly enough that agencies could potentially apply it to any type of regulation.

It is also unclear how, or whether, the memo will be strictly enforced. Throughout the memo, Sunstein tells agencies what they "should" do but refrains from using words like "must" or "shall."

OIRA's review of agency regulations will likely serve as the mechanism for enforcement. Under E.O. 12866, agencies must submit to OIRA drafts of significant proposed and final rules before releasing those rules to the public. OIRA then reviews the drafts and circulates them to other federal agencies. Agencies often alter rules in response to the comments from OIRA and other agencies. The changes – and more importantly, the origin of the comments that prompted the changes – are not typically disclosed to the public.

When planning to impose disclosure or simplification requirements, the memo instructs agencies to analyze the impacts of several alternatives. "To the extent feasible, and when existing knowledge is inadequate, agencies should consider several alternative methods of disclosure and test them before imposing a disclosure requirement" and "should adopt disclosure requirements only after considering both qualitative and quantitative benefits and costs." The memo includes companion language for default rules. E.O. 12866 imposes similar requirements for regulations generally.

OMB Watch will continue to analyze the memo and monitor its effects. Readers are encouraged to leave their own impressions of the memo in the comment section below this article.

Supreme Court Says States May Disclose Petition Signatories

On June 24, the U.S. Supreme Court ruled 8-1 that states may publicly disclose referendum petition signatures. The case, *Doe v. Reed*, centers on the public's right to know who signed petitions related to Referendum 71, a 2009 attempt to overturn Washington State's expanded domestic partner law, which gives gay and lesbian couples the same rights as married couples.

Summary of *Doe v. Reed*

The State of Washington argued that the names of petition signatories should be disclosed upon request, as required by the state's Public Records Act. It further argued that such disclosure helps to sort out whether fraudulent signatures were included on petitions to reach the required number of signatories to qualify an initiative or referendum for the ballot.

The plaintiffs, who included several individual citizens and an anti-gay political action committee, argued that a constitutional right to anonymity for petition signatories always exists.

They also argued that even if the Court does not recognize a broad constitutional right, it should recognize that a right exists in this particular case due to the harassment and abuse to which the petition signatories could possibly be exposed. Consequently, they argued, if anonymity is not recognized, the public will be discouraged from signing petitions in support of placing referenda and initiatives on the ballot, and this will have an adverse effect on citizens' free speech.

The Court did not find that a constitutional right to anonymity for petition signatories always exists. Rather, it held that the law permits disclosure of petition signatories. "Such disclosure does not, as a general matter, violate the First Amendment," wrote Chief Justice John Roberts in the Court's majority opinion.

While the *Doe v. Reed* decision permits states to publicly disclose referendum petition signatures, the Court also held that courts may require anonymity in certain instances. In the particular matter concerning Referendum 71, the Court remanded the case to a lower court to decide if the referendum petition signatures should be publicly disclosed or if anonymity should be granted in this specific case. Plaintiffs' "chances of prevailing appear very slim, as five members of the Court either expressed significant doubts about their claim or expressly rejected it," according to *SCOTUSblog*.

The Court reasoned that signing a petition is an "expression of a political view – that implicates the First Amendment," noted *SCOTUSblog*. The Court relied on its precedents to illustrate that most campaign finance disclosure laws are constitutional, but it did allow for requiring anonymity in certain instances.

"The Court held that disclosure of referendum petitions generally survives constitutional scrutiny because it helps to combat fraud and eliminate mistakes (because the public is able to review the signatures) and because it promotes governmental transparency and accountability," noted *SCOTUSblog*.

Implications of the Decision

The Court noted the important role that disclosure plays in combating fraud and promoting government transparency. "Voters care about such issues, some quite deeply," said the Chief Justice. He also noted that the petitioners did not rebut arguments that most referendum petitions present "only modest burdens."

Sam Reed, Washington's Secretary of State, told NPR that the Court's decision "really is a victory for the people in terms of open government, transparency in government and the people's right to know."

Even though the Court decided the case by an 8-1 majority, the justices were split on important aspects of the case. "While the court was almost unanimous in the decision to favor transparency over privacy, the justices disagreed widely about who should get a privacy exception," according to NPR. This is evidenced by the seven separate opinions issued in the

case. Justices Ruth Bader Ginsberg and Anthony Kennedy were the only justices who did not write a separate opinion. Still, advocates for public disclosure view this case as a major victory.

J. Gerald Hebert, Executive Director of the Campaign Legal Center, released a statement praising the decision and using it to encourage Congress to move forward on the DISLOSE Act, the bill developed by Democrats to respond to the Court's decision in *Citizens United v. Federal Election Commission*. "Members of Congress considering the DISCLOSE Act should be encouraged by today's ruling from the Court, which highlights once again the public's right to know," Hebert said.

Tom Goldstein echoed similar sentiments on *SCOTUSblog*. "The decision is perhaps most significant for what it means for disclosure provisions under consideration in the pending campaign finance legislation that would respond to the Court's Citizens United decision," Goldstein said. The DISCLOSE Act passed the House on June 24 by a vote of 219-206 and now heads to the Senate, where it awaits further action.

Daniel Schuman of the Sunlight Foundation also noted that some passages in *Doe v. Reed* could indicate wider implications for campaign finance-related disclosure. In a blog piece posted on June 25, he speculates that there may be a "ticking time bomb" to be found within the multiple concurring opinions and Justice Clarence Thomas' dissenting opinion that could force the Court to eventually determine just what level of disclosure is permissible under the First Amendment.

In the short-term, *Doe v. Reed* impacts referendum and initiative petition campaigns nationwide, affecting the 23 states that allow citizens and special interest groups to petition to place measures on the ballot.

House Passes DISCLOSE Act, Senate Struggle Begins

On June 24, the House passed the DISCLOSE Act by a close, largely party-line vote of 219-206. Supporters praise the bill as a success for transparency, while critics argue that it is an attack on the First Amendment and creates unfair exemptions for groups such as the National Rifle Association. The companion bill in the Senate, S. 3295, must now overcome many obstacles.

The DISCLOSE Act (the Democracy Is Strengthened by Casting Light On Spending in Elections Act) was introduced in April by Rep. Chris Van Hollen (D-MD) and Sen. Chuck Schumer (D-NY) to mitigate the effects of the January U.S. Supreme Court decision in *Citizens United v. Federal Election Commission*. In that case, the Court ruled that all corporations, including 501(c)(4), 501(c)(5) (unions), 501(c)(6) (trade associations), and 527 organizations, can spend an unlimited amount of money from their general treasuries to expressly advocate for the election or defeat of candidates for federal office as long as those actions are "independent" of campaigns. Overall, the DISCLOSE Act is meant to increase disclosure requirements for election-related spending and restrict such activity by government contractors and foreign-controlled companies.

On June 14, several publications, including *CQ Politics*, reported that changes were made to the House bill to address opposition to the legislation's disclosure rules. The change came to be known as the NRA (National Rifle Association) carve-out, because the NRA would have been the primary beneficiary of the exemption. The agreement would have exempted 501(c)(4) organizations that have been in existence for more than 10 years, have members in all 50 states, raise 15 percent or less of their funds from corporations, and have more than 1 million members. Many advocacy groups denounced the change for setting up an unfair system that favors large, well established membership groups.

After outspoken criticism of the change, the membership threshold was lowered to 500,000. The manager's amendment, which contained the NRA carve-out, also included a provision raising the threshold for restrictions on campaign spending by government contractors. Under the amendment, companies with more than $10 million in annual contracts would be prohibited from spending general treasury funds to independently influence elections. Originally, the threshold was $500,000, then $7 million, in earlier versions of the bill.

Another change concerned those who have argued that the bill favors unions. According to the final language, the bill now stipulates that organizations are not required to report payments when the "funds attributable to dues, fees or assessments which are paid by individuals on a regular, periodic basis in accordance with a per-individual calculation which is made on a regular basis." Unions would clearly be affected by this language.

A lot of doubt regarding the bill's chances for passage stemmed from the announced exemption for large 501(c)(4) organizations – the NRA carve-out – and some House Democrats expressed uneasiness about making a politically difficult vote if the Senate was unlikely to act. In an attempt to allay these concerns, Senate Majority Leader Harry Reid (D-NV) and Schumer promised that the Senate will take up the measure. In a letter to House leaders, Reid and Schumer said, "We commit to working tirelessly for Senate consideration of the House-passed bill so it can be signed by the president in time to take effect for the 2010 elections."

The White House released a Statement of Administration Policy a few days before action on the floor, which stated, "This bill is not perfect. The Administration would have preferred no exemptions. But by providing for unprecedented transparency, this bill takes great strides to hold corporations who participate in the Nation's elections accountable to the American people."

After weeks of negotiations, floor debate began on June 24. Five amendments were considered, and all but one passed. The failed amendment, offered by Rep. Steve King (R-IA) sought to eliminate all campaign contribution limits in federal elections. Rep. Dan Lungren (R-CA) also offered a "motion to recommit" that would have sent the bill back to committee. That motion failed by a vote of 208-217.

The agreed-upon amendments include:

- Covered organizations must report their campaign spending to shareholders, members or donors in a "clear and conspicuous manner"

- Corporations with leases on the Outer Continental Shelf are banned from making campaign-related expenditures
- Disclaimers must include the city and state of the ad funder's residence or main office
- Political expenditures by corporations with significant foreign government ownership and corporations that have a majority of shares owned by foreign nationals are prohibited

Most of the provisions of the DISCLOSE Act remained intact upon final House passage. For example, under the bill, the CEO or highest-ranking official of any corporation that makes independent election expenditures is required to appear on camera to say that he or she "approves this message." The top funder of the ad also has to record a "stand-by-your-ad" disclaimer, and the top five donors to the group that purchases campaign-related broadcasts would be listed on the screen at the end of the message (this would not apply to groups exempt under the NRA carve-out). Corporations will also have to report certain information to the Federal Election Commission (FEC), including information about donors.

For more information on other provisions in the House bill, see a summary from the Congressional Research Service.

The bill faces an uncertain future in the Senate. Sens. Dianne Feinstein (D-CA) and Frank Lautenberg (D-NJ) have both expressed disapproval of the NRA carve-out. According to *Roll Call* (subscription required), Lautenberg said, "It is the height of irony that Congress is considering special treatment for the NRA in a bill designed to limit the role of special interests in Washington."

The Senate bill currently has 49 co-sponsors, none of whom are Republicans. Even if the bill is brought up in the Senate as promised, it may still have to overcome a possible Republican filibuster, meaning it will need 60 votes to move forward.

Timing is also an issue. The likelihood of the bill impacting the November elections remains in question, considering that the legislation's requirements won't take effect until 30 days after the president signs the bill. Congress' fast-approaching Independence Day and August recesses are additional roadblocks.