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In This Issue

Obama's Agenda Faces Challenges in Congress

President Barack Obama proposed an ambitious agenda when he unveiled his budget outline at the end of February. In addition to significant funding increases for many key public investments including housing, education, and job training, the president also put on the table landmark legislation that would provide universal health care and begin addressing global climate change. There are, however, a number of obstacles that may hinder the implementation of the president's agenda. During the week of March 16, the Congressional Budget Office (CBO) revised its deficit projection upward, and fiscally conservative senators and representatives noted their intent to hamper the president's efforts through parliamentary procedure. As Congress begins drafting its budget plans, it remains uncertain whether it will include all of the president's spending proposals.

Although his proposals to provide universal health care and curb greenhouse gas emissions have garnered much attention in the media and Congress, the rest of Obama's budget would

provide a funding increase to many human needs programs that have seen real (inflation-adjusted) cuts since 2005. The 7.3 percent increase in discretionary funding proposed in the president's budget, while seemingly large, would not represent expansions in these priorities but would largely fill in gaps in funding that have grown since 2005. An analysis by the Coalition on Human Needs of the funding levels for some 100 programs since 2005 shows that only 22 saw real funding increases over that time period. And while these programs greatly mitigate the hardships of many families facing difficulties in the crumbling economy, the din of outcries over the rising budget deficit will hamper Congress's ability to fully fund these investments.

Attention to the scale of the rising federal budget deficit came into sharp focus on Friday, March 20, when CBO released its analysis of the president's budget. Not only did CBO revise its estimate of FY 2009's deficit upward by $481 billion to $1.76 trillion (and that of FY 2010 from $703 billion to $1.14 trillion), but the nonpartisan office's estimates are higher than those enumerated in Obama's budget. While Obama projects a cumulative deficit over 10 years of $6.97 trillion, CBO predicts that number would be $9.27 trillion – a $2.3 trillion discrepancy – should Congress adopt all of the president's proposals. CBO notes that these differences "stem from underlying baseline differences rather than from varying assessments of the effect of the President's policy proposals" and that "[e]conomic and technical factors affecting revenue projections account for the largest part of those baseline differences." Regardless of the causes of the differences, CBO's figures have shifted the national priority-setting debate to potential post-war record-setting deficits.

Senate Budget Committee Chair Kent Conrad (D-ND) began setting expectations for that chamber's Budget Resolution on March 20 by saying, "The reality is we are going to have to make adjustments to the president's budget if we want to keep the deficit on a downward trajectory." Ranking member Judd Gregg's (R-NH) tone was somewhat less moderate as he predicted that the "shocking" levels of debt caused by the president's plan would "devastate future economic opportunities for our children and grandchildren." Although emphatic opposition from Republicans is to be expected, Obama cannot rely on full Democratic congressional support. The 51-member, fiscally conservative House Blue Dog Coalition released a set of budget principles on Thursday, March 19 that would hold domestic discretionary spending growth at the rate of inflation, setting the stage for an uphill battle in Congress for Obama's budget priorities. Yet, Federal Reserve Chairman Ben Bernanke sees the federal budget deficit as the lesser of two evils. Speaking before the Senate Budget Committee on March 3, Bernanke testified that:

> ...our economy and financial markets face extraordinary challenges, and a failure by policymakers to address these challenges in a timely way would likely be more costly in the end. We are better off moving aggressively today to solve our economic problems; the alternative could be a prolonged episode of economic stagnation that would not only contribute to further deterioration in the fiscal situation, but would also imply lower output, employment, and incomes for an extended period.

The president, however, has an ally in grassroots support for his plan. Working together as the Campaign for Rebuild and Renew America Now, over 100 progressive organizations, including OMB Watch, are reaching out to their constituents to "support and build upon the President's budget priorities" and "strongly urge Congress to follow the priorities set forth in the President's blueprint." And in an unprecedented bid to marshal the full support of congressional Democrats, Obama has reconstituted his network of campaign volunteers as Organizing for America. Obama is hoping that this "next phase" of the network created for his campaign will provide a similar level of support for his policies, starting with his budget. A crucial test of these groups' effectiveness will come in the weeks ahead, as Congress begins work on its spending blueprint – the Congressional Budget Resolution.

On March 25, both House and Senate Budget Committees will begin marking up their respective resolutions. Floor action on these resolutions could come as early as the week of March 30. While the president's agenda may be scaled back somewhat, much debate will revolve around a procedural mechanism by which the Senate can pass spending and tax legislation without needing to overcome the usual 60-vote hurdle. The mechanism, called the "Budget Reconciliation Process" or just "reconciliation," would allow Congress to pass contentious budget-related programs like a greenhouse gas-reducing "cap-and-trade" scheme or a universal health care program. The president's budget director, Peter Orszag; House Speaker Nancy Pelosi (D-CA); and Senate Majority Leader Harry Reid (D-NV) refuse to rule out reconciliation as an option, but eight Democratic senators have informed the Senate Budget Committee that they oppose such a move as a vehicle for a cap-and-trade program. While Congress's failure to use the reconciliation process to advance Obama's agenda is by no means a defeat for those programs, it does signal that Congress is not in lock-step with the president and that moving his agenda will take effort, time, and pressure from an engaged citizenry.

The Toxics Release Inventory is Back

On March 11, President Barack Obama signed into law a restoration of the Toxics Release Inventory (TRI), reversing changes made by the Bush administration that had weakened the program. The measure was included deep within the Omnibus Appropriations Act of 2009 and restored the rules that existed before the U.S. Environmental Protection Agency (EPA) weakened them in December 2006.

The change lowers the thresholds for reporting releases of more than 650 toxic chemicals and requires that releases of persistent bioaccumulative toxins (PBTs) always be reported in detail. The EPA is now implementing the new thresholds for reports being submitted for calendar year 2008 and will soon issue a rule revising the regulatory text to reflect the changes.

The restoration of TRI is the culmination of years of efforts by hundreds of organizations and thousands of individuals nationwide. When the Bush administration first proposed raising the amount of pollution companies could release before they had to disclose it, the public's reaction was overwhelmingly in opposition. Of the 122,420 comments received by EPA, 99.97

percent were opposed to the proposed rule. Only 34 commenters expressed some level of support for the proposals. However, the EPA ignored the public's will and finalized the rule change. Soon after, 13 states sued the EPA to eliminate the new rules and return to the previous thresholds.

Sen. Frank Lautenberg (D-NJ) and Rep. Frank Pallone (D-NJ) have previously introduced legislation to overturn the EPA's action, but their stand-alone legislation was never able to reach a full vote. It is likely the Bush administration would have vetoed such legislation even if it had passed. Pallone and Lautenberg included language in the omnibus spending bill to improve the chances of success.

OMB Watch worked in coalition with a host of other organizations to stop the TRI rollback and then to restore the reporting rules following the Bush EPA's decision. Most recently, OMB Watch teamed with U.S. PIRG to send a letter to EPA Administrator Lisa Jackson, urging her to settle the lawsuit and restore the reporting thresholds. The letter was signed by 237 national, state, and local organizations and more than 1,300 individuals.

2007 Data Released to Public

On March 19, one week after the passage of the measure restoring the TRI reporting thresholds, the EPA released the data from 2007 TRI reports.

Jackson announced, "This information underscores the need for fundamental transparency and provides a powerful tool for protecting public health and the environment." Jackson also commented on the TRI reporting rules, saying she is "pleased that Congress under the leadership of Senator Lautenberg took action to restore the rigorous reporting standards of this vital program."

The public release of data from 2006 occurred on Feb. 21, 2008, almost one month earlier than this year's release of 2007 data. EPA officials said they had hoped to release the 2007 data as early as January but wanted to allow the Obama administration and the new EPA administrator time to review the process beforehand. Facilities had until July 2008 to submit their reports of 2007 releases. Many environmental right-to-know advocates have been pushing EPA to release the data to the public sooner.

According to the EPA's analysis, almost 4.1 billion pounds of toxic chemicals were released into the environment or otherwise disposed of in 2007, a decrease of five percent since 2006. Releases to air decreased seven percent, and releases to water decreased five percent.

For 2007, 21,996 facilities reported to TRI. This is the seventh year in a row that the number of facilities reporting their toxic releases declined. It is not clear whether all facilities that should be reporting to TRI have been doing so. TRI program staff have indicated that the EPA will try to identify the driving forces behind this downward trend.

Metal mining and electric utilities account for the majority of releases (53 percent), and since 2006, the two industries have experienced decreases of eight percent and one percent, respectively.

Releases of PBTs increased one percent, driven largely by an increase in releases of lead and by releases from a "handful of facilities." Three metal mines were responsible for the bulk of a 38 percent increase in releases of mercury, a PBT.

On-site releases of toxic chemicals to land accounted for 44 percent of total disposals and other releases in 2007, and releases to air accounted for 32 percent.

The TRI program, instituted in 1987, collects information on disposal and releases of more than 650 toxic chemicals. The program does not require any reductions in releases or use of toxic chemicals but has been credited with reducing releases through pressure from the public disclosure of pollution.

The 2007 TRI data are now available on OMB Watch's Right-to-Know Network.

New FOIA Memo, Hot Off the Press

On March 19, the Obama administration issued a new set of guidelines to federal agencies on implementation of the Freedom of Information Act (FOIA), replacing Bush-era rules that many thought promoted a culture of secrecy in government. Written by Attorney General Eric Holder, the Department of Justice (DOJ) memorandum outlines a spirit of transparency that reflects President Obama's Jan. 21 assertion, "In the face of doubt, openness prevails."

The new memo reflects but builds upon an October 1993 memorandum from Clinton administration Attorney General Janet Reno. Among other things, Holder's memo promises to defend agency decisions to withhold information only if the agency demonstrates a reasonably foreseeable risk of harm to an interest protected by FOIA exemptions or statutory law. Further, the memo focuses on timeliness, declaring that "long delays should not be viewed as an inevitable and insurmountable consequence of high demand."

FOIA guidance is traditionally issued by the attorney general at the beginning of a new administration. For example, guidance was provided in May 1977 by Attorney General Griffin B. Bell, in May 1981 by Attorney General William French Smith, and in October 1993 by Reno. The most recent prior FOIA guidance was issued by former Attorney General John Ashcroft in October 2001.

Ashcroft's memo instructed agencies that in the face of doubt, secrecy was to prevail. Ashcroft guaranteed that the DOJ would defend agency decisions to withhold information so long as they were made on a sound legal basis. Most agencies perceived the language of the Ashcroft memo to support and encourage the application of FOIA exemptions to withhold information.

The Reno memo that Ashcroft replaced called for "presumption of disclosure." The objective Reno wanted to achieve was "a maximum responsible disclosure of government information – while preserving essential confidentiality." Reno also warned the agencies that the DOJ would only defend the withholding of information where "the agency reasonably foresees that disclosure would be harmful to an interest protected by that exemption." In other words, the Reno policy was to disclose information if there was no foreseeable harm, even if there might be an argument to be made that it could legally withhold disclosure under one of the FOIA exemptions. Reno's DOJ further encouraged agencies to make “discretionary disclosures” in order to relieve agency burden in processing FOIA requests.

The Ashcroft memo flipped the Reno standards. Ashcroft noted that compliance with FOIA is only one "value" of importance to DOJ. Other values include "safeguarding our national security, enhancing the effectiveness of our law enforcement agencies, protecting sensitive business information and, not least, preserving personal privacy." Ashcroft described the importance of allowing the federal government to operate outside of public scrutiny and emphasized the importance of FOIA exemptions to withhold such information.

The Ashcroft memo replaced the Reno "foreseeable harm" approach to withholding information with a "sound legal basis" standard for disclosure. The Ashcroft memo was a major blow to transparency. The increased secrecy caused FOIA requests to back up and be processed less efficiently, cost taxpayers millions in review expenses, and hid government waste and other abuses of the public trust.

How are the Obama administration FOIA guidelines different?

The Holder document is a return to the Reno memo in significant ways. Holder has brought back the foreseeable harm clause and also encourages discretionary disclosure. However, Holder is clearly also attempting to do something new to change the culture of secrecy that plagues the federal bureaucracy.

In the Holder memo, the language on enforcement is striking. In response to poor performance reviews on FOIA compliance, Holder mandates that agencies "must address the key roles played by a broad spectrum of agency personnel" in order to reduce "competing agency priorities and insufficient technological support." Moreover, he orders that the chief FOIA officers of each agency recommend adjustments to agency practices, personnel, and funding as necessary. Thus, it appears the administration has recognized that the responsibility for public dissemination of information goes beyond the FOIA offices of each agency and that the chief FOIA officers have the responsibility to respond to inadequate resources. Holder also declares that "unnecessary bureaucratic hurdles have no place in the 'new era of open government' that the President has proclaimed."

The Holder memo also expands on the earlier discretionary disclosure language. Holder encourages agencies to not just make discretionary disclosures, but to do in so in anticipation of the public interest. This language aims to prevent agencies from being able to allege

compliance with the guidance but to do so by releasing irrelevant material. He also encourages the use of technology and publication on the Internet in making this type of disclosure.

The level of transparency secured or diminished by a FOIA memo is cyclical in nature. The instructions of any given memo vary by administration. The Ashcroft memo was not without precedent and reflected the earlier 1981 memo written by Smith. Some advocates believe that legislation is needed to further define and make consistent how agencies are to implement FOIA. However, this could backfire by codifying an interpretation of FOIA that agrees more with the Ashcroft presumption of secrecy than with Holder's presumption of transparency.

Efforts to Reform FDA Begin

President Barack Obama and Congress recently began efforts aimed at shoring up the Food and Drug Administration (FDA), an agency battered by recent consumer safety problems and declining resources. In a March 14 address, Obama named two officials he wants to lead the agency and announced the creation of a working group to propose food safety reforms. Congress is once again trying to craft legislation aimed at providing greater consumer protections and restoring resources to the agency.

Obama named Dr. Margaret Hamburg as his choice to lead FDA and Baltimore Health Commissioner Dr. Joshua Sharfstein as Hamburg's deputy. Hamburg is a former New York City health commissioner and served in President Clinton's Department of Health and Human Services. Industry, public interest groups, and congressional representatives praised Hamburg both for her qualifications and for her status as an outsider, according to a March 15 *Washington Post* article.

A March 14 White House press release states that the Food Safety Working Group "will be chaired by the Secretaries of Health and Human Services and the Department of Agriculture and it will coordinate with other agencies and senior officials to advise the President on improving coordination throughout the government, examining and upgrading food safety laws, and enforcing laws that will keep the American people safe." The need for the group stems from the increased incidents of illness from contaminated food and FDA's inability to inspect the 150,000 food plants and warehouses under its purview. Agriculture Secretary Tom Vilsack has been confirmed and is in place. Obama nominated Kansas Governor Kathleen Sibelius to head Health and Human Services (HHS), the department that houses FDA.

In his address, Obama indicated the agency has been underfunded and understaffed, which hinders FDA's food inspection capabilities. He pledged to "significantly increas[e] the number of food inspectors" at FDA.

FDA has faced the wrath of Congress and the public over problems with food and drug safety. Currently, the agency faces the salmonella contamination of peanut products made by the Peanut Corporation of America (PCA), which has left nine people dead and nearly 700

sickened since September 2008. The peanut product incident follows the salmonella contamination of peppers from Mexico in 2008.

The House Energy and Commerce Committee's Subcommittee on Oversight and Investigations conducted two hearings on the salmonella contamination incident. The first hearing was Feb. 11 and focused on the broad failures by government and private-sector inspectors, individual companies purchasing products from PCA failing to take active measures to ensure the safety of their suppliers, and PCA's failure to report contamination and stop selling its products after learning of the contamination.

The subcommittee held its second hearing March 19 on the role industry plays in regulating food safety in the context of the peanut products contamination. The three witnesses at the hearing represented companies using PCA's products, and all had assurances from PCA that its manufacturing plants passed safety inspections. PCA received superior ratings from the firm it hired to inspect its facilities at announced inspection times and passed the results of the inspections to its customers. All the companies had in place their own safety and quality assurance procedures that met or exceeded industry practices.

However, this system of inspections and quality control programs did not prevent the companies from withdrawing their products from circulation once they learned from government safety inspectors that their products were targets of investigations in the salmonella outbreak. PCA is now under investigation for "knowingly selling" contaminated peanut products, which has resulted in the largest food recall in U.S. history, according to a March 20 *Washington Post* article on the hearing. (A list of the recalled products is available on FDA's website at http://www.fda.gov/oc/opacom/hottopics/salmonellatyph.html.)

One of the witnesses, David Mackay, president and chief operating officer of Kellogg Company, proposed the most far-reaching recommendations during the hearing. The recall of Kellogg's products cost the company between $65 and $70 million, and Mackay argued that cost is a direct result of not being able to manage for the presence of unscrupulous companies that can circumvent quality assurance mechanisms and government oversight. His testimony called for a single food safety agency with broad research and oversight responsibilities complimented by a permanent advisory council of government and industry experts to enhance "science-based food safety policies and standards." He argued that all food manufacturers, in an effort to prevent outbreaks, should be required to conduct risk analyses and develop food safety plans that FDA would review. Also, Mackay said FDA should inspect annually all high-risk food manufacturers and should be given mandatory recall authority so that delays in getting contaminated products off store shelves can be minimized.

Although the other witnesses did not provide specific lists of recommendations, under questioning from subcommittee members, they supported more rigorous regulatory approaches than currently exist. For example, all of the witnesses supported having unannounced inspections and requirements to supply the results of those inspections to FDA. They also supported accreditation of third-party testing companies and mandatory testing of high-risk products and reporting of negative test results. One witness thought FDA had

sufficient resources to carry out its responsibilities, but the other two witnesses did not think the agency had the necessary resources to provide adequate safety.

Many of these recommendations, and many others, are contained in numerous food safety bills that have been introduced in Congress this session. The bills address such issues as creating a single food safety agency, a food tracking system to trace the origins of products, enhanced risk-based inspection systems with mandatory testing and reporting, and enhanced authority and enforcement powers for federal agencies with food safety responsibilities. Congress, the administration, many businesses, and the public are aligned in favor of an enhanced regulatory system to help ensure the safety of the food supply. The costs of inaction are great to both business and the public. It remains to be seen if a set of meaningful reforms will follow from the broad support that currently exists.

OSHA Agenda Will Include Diacetyl, Secretary Says

Secretary of Labor Hilda Solis announced that the Occupational Safety and Health Administration (OSHA) intends to limit workers' exposure to the food flavoring chemical diacetyl. Diacetyl regulation was one of the many worker protection issues left unresolved by the Bush administration.

Diacetyl is a chemical compound used to give foods like microwave popcorn a buttery flavor. Exposure to diacetyl can cause the onset of *bronchiolitis obliterans,* a degenerative and potentially fatal lung disease. In July 2006, labor unions petitioned OSHA to issue an emergency standard to protect exposed workers, but OSHA denied the request.

Pledging faster action on regulation, Solis said March 16, "It is imperative that the Labor Department move quickly to address exposure to food flavorings containing diacetyl." She called deaths stemming from diacetyl exposure "preventable."

Solis also announced that OSHA has withdrawn the Bush administration's early plans for regulating diacetyl. In January, OSHA published an Advanced Notice of Proposed Rulemaking (ANPRM) that merely describes the issue of diacetyl exposure and asks for insight from commenters. The notice does not propose policy solutions for limiting exposure.

Solis said withdrawing the Bush-era document is critical to moving forward on a more aggressive path. By cutting the ANPRM step from the process, OSHA can begin to navigate through other requirements it must satisfy before issuing a formal regulatory proposal.

Workers may witness a renewed and more aggressive OSHA under President Obama. Obama's budget outline, released in February, would increase OSHA funding, "enabling it to vigorously enforce workplace safety laws and whistleblower protections, and ensure the safety and health of American workers."

Obama has yet to announce his nominee to lead OSHA. Solis was formally sworn in as Labor Secretary March 13.

Under President Bush, OSHA made little progress in writing new occupational safety and health regulations. The agency's Unified Agenda of Federal Regulatory and Deregulatory Actions – a semiannual publication federal agencies prepare to announce upcoming and recently completed rules – shows dozens of rules stuck in the regulatory pipeline. (See graphic below.) Some potentially life-saving regulations, like one to protect construction workers in confined spaces or another to limit exposure to silica dust, have languished at the agency for more than a decade.

Meanwhile, new and pressing occupational health and safety issues, such as diacetyl, have lengthened OSHA's queue of regulatory obligations. For example, OSHA in 2008 announced its intent to set new safety requirements for tree care and maintenance workers. Falls and machinery accidents cause dozens of deaths in the industry each year, according to OSHA. Like diacetyl, OSHA issued an ANPRM for tree care safety but has not projected when it will take action.

The slow pace of OSHA rulemaking can at least partially be attributed to the many requirements imposed by overarching laws and executive policies intended to govern federal rulemaking. Like other agencies, OSHA must solicit public comments on rules (under the Administrative Procedure Act), submit rules to the White House for review (under Executive Order 12866), and analyze a rule's impact on a variety of subpopulations, public sectors, and private industries. Unlike other agencies, OSHA has its own hybrid rulemaking process than can add another layer of complexity.

In addition, OSHA (and the U.S. Environmental Protection Agency) is required by the Small Business Regulatory Enforcement Fairness Act (SBREFA) to convene panels of small business representatives to assess a regulation's potential impact on the regulated community. These panels get a sneak peak at regulations under development, and their comments and suggestions are often incorporated before the proposals ever reach the public. The SBREFA panel process can take years.

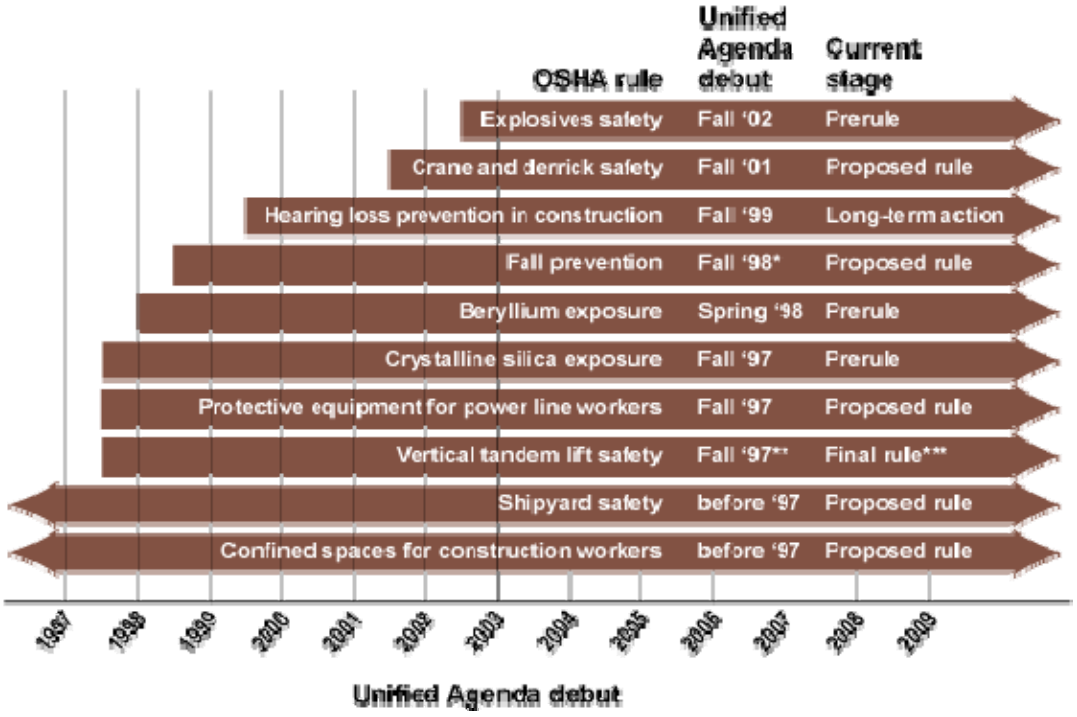
OSHA will conduct the SBREFA panel for diacetyl differently than previous administrations have by making the process more transparent. OSHA will place the advanced copy of the regulatory proposal, usually reserved for the panels, in the public docket. OSHA will also make SBREFA panel meetings open to the general public.

Stuck in the pipeline: OSHA rulemakings six years and older

Twice per year, in the fall and spring, federal agencies publish their Unified Agenda of Federal Regulatory and Deregulatory Actions, which announces regulations in any stage of development and those recently completed. Agencies generally place upcoming rules into one of four categories: pre-rule, proposed rule, final rule, or long-term action.

OSHA has consistently failed to make progress on regulations identified in its Unified Agenda. As a result, OSHA regulations needed to ensure worker health and safety have gone unfinished, as this graphic shows.

All information in this graphic is based on OSHA Unified Agendas from 1995-2008. (Older Unified Agendas are not available online.) The most recent version, which was published Nov. 24, 2008, is available here.



Notes:

- *OSHA first proposed a fall prevention rule in 1990 but allowed the rulemaking to remain dormant. In 1998, the issue again began to appear as an entry in OSHA's Unified Agenda.
- **OSHA addressed vertical tandem lifts by reopening another rulemaking related to longshoring. OSHA's intent to reopen first appeared in the Fall 1997 Unified Agenda.
- ***OSHA published the final rule Dec. 10, 2008.

Court Decision Will Have Impacts on Voting Districts

On March 9, the U.S. Supreme Court issued a decision in *Bartlett v. Strickland* that will impact voting districts nationwide. In *Bartlett*, the Court held in a 5-4 plurality decision that Section 2 of the Voting Rights Act of 1965 does not require state officials to draw election lines to create a crossover district when racial minorities comprise less than 50 percent of the district's voting-age population.

A crossover district is a district in which racial minorities are a significant percentage of the population, although less than 50 percent, and can elect their candidate of choice when some members of the majority population cross over and support their preferred candidate. A plurality decision is one in which some of the justices in the majority agreed with the outcome, but not with the reasoning. In *Bartlett*, three justices formed the plurality, and two additional justices concurred with the outcome but not the reasoning.

In *Bartlett*, the North Carolina legislature created a geographically compact district in which African Americans made up 39 percent of the district's voting age population. The legislature stated that its purpose was to comply with Section 2 of the Voting Rights Act. The district that the legislature drew crossed over county lines, which violated the "Whole County Provision" of the North Carolina Constitution. A federal statute such as the Voting Rights Act, however, takes precedence over the state constitution. The crossover district did, in fact, result in an African American being elected to represent the area in the state legislature. The U.S. Supreme Court affirmed the North Carolina Supreme Court's decision that "a minority group must constitute a numerical majority of the voting-age population in an area before Section 2 requires the creation of a legislative district to prevent dilution of that group's vote."

This narrow view of Section 2 may impact voting districts nationwide. While the "Whole County Provision" is unique to North Carolina, any state that has created a district in which a minority group is less than 50 percent of the population may see that district challenged.

In New Jersey, the state Republican Party is considering filing suit to have New Jersey legislative boundaries declared unconstitutional. Every 10 years, New Jersey redraws its legislative districts to make them equal in population based on the latest Census. The boundaries were last redrawn in 2001. The process was very contentious, as large, urban, heavily minority areas in Newark and Jersey City were combined with suburban areas, which resulted in more Democrats being elected. The state Republican Party filed suit, claiming that the "Democratic map violated the U.S. Constitution and the 1965 Voting Rights Act by 'diluting' the black vote," according to the *Star Ledger*. The state supreme court ruled against them. Mark Sheridan, general counsel to the New Jersey Legislature's Republicans, told the *Star Ledger* that the state map is unconstitutional. Donald Scarinci, Democratic counsel to the last redistricting commission, told the *Star Ledger* that additional court action has little chance of succeeding. He also said the map increased the number of minority legislators.

The biggest impact from the U.S. Supreme Court decision may occur after the 2010 Census, when legislatures across the county will use the Census results to redraw district boundaries. This is when districts that are geographically compact and in which minorities are a significant population, but not the majority, may be redrawn to diminish the possibility of electing a minority representative. Some states may have drawn heavily minority legislative districts solely because they were under the impression that Section 2 required it. However, *Bartlett* makes it clear that states are not required to consider race in drawing legislative districts where racial minorities are not the numerical majority. While they are still permitted to do so (unless it is prohibited for another reason, such as North Carolina's "Whole County

Provision"), it remains to be seen how many states will choose to ensure that minorities are adequately represented without a federal requirement.

Redistricting battles have already begun to heat up in some states, such as Ohio. The board that currently decides Ohio legislative boundaries has five members – the governor, state auditor, secretary of state, a member appointed by the majority party's leaders, and a member appointed by the minority party's leaders – according to the *Cincinnati Enquirer*. This composition currently gives Democrats the majority on the board. Two Republican state senators have introduced a bill that would add more Republicans to the board. This is the type of Census-related redistricting battle that is starting to heat up, even without adding the newly restrictive version of Section 2 into the mix.

As a result of the *Bartlett* decision, it is more important than ever for nonprofits to ensure that underrepresented communities are adequately counted in the 2010 Census. The Nonprofit Voter Engagement Network (NVEN) recently announced the national kickoff of their *Nonprofits Count! 2010 Campaign* initiative. NVEN will soon be launching a website for the campaign, www.nonprofitscount.org, and will be hosting a webinar on April 1 on the role that 501(c)(3) organizations can play in the 2010 census.

Nonprofits and Obama's Lobbying Rules

On Jan. 21, President Barack Obama issued an executive order to stop the influence special interests have had in government and to close the revolving door between government service and financial rewards in the private sector. One aspect of the Obama order puts limits on lobbyists serving in government. These limits appear to be having unintended consequences for employees of nonprofit organizations, specifically those registered as lobbyists and working in the public interest.

For those who register to lobby under the Lobbying Disclosure Act (LDA) within two years of working for the administration, the order prohibits the individual from participating in any matter on which the person lobbied within the previous two years or from working for an agency that the person lobbied within the last two years. The order also includes a provision to allow waivers from these requirements if, for example, the lobbying was in the public interest or if there has been minimal executive branch lobbying.

There are at least three problems that nonprofit organizations have identified. First, there has been no guidance on the definition of executive branch lobbying. Accordingly, it has been rumored that senior nonprofit leadership interested in possibly working for the Obama administration have avoided policy meetings with Obama officials for fear that such meetings might be construed as executive branch lobbying and trigger the two-year waiting period. This deprives the Obama administration of important insight.

Second, many employees within nonprofit organizations have been registered under the LDA even if they are below the required reporting thresholds. Since the LDA is simply a disclosure

law, most nonprofit organizations felt it wise to err on the side of full disclosure, especially since they disclose lobbying information on annual tax forms.

A consequence of the order is that many groups, including nonprofits, are either deregistering or restricting their lobbying activities so that they are eligible to serve in the Obama administration. According to *The Washington Post*, "More than 700 lobbyists or lobbying groups have filed 'de-registration' papers with the House and Senate since Obama took office, including scores of charities and other nonprofits. [. . .] Many of the groups and their representatives feel particularly stung because they registered as lobbyists even when it was not required, either as a demonstration of their influence or to err on the side of caution in complying with transparency rules." Stephen Rickard, Washington director of the Open Society Institute, said, "They were not trying to say that if you were lobbying to stop the genocide in Darfur, you're not going to be able to work for us. . . . If you're in nonprofit advocacy, there is a very good chance you want to work for Barack Obama."

The third problem with the rules is that the Obama administration seems to be using the waiver authority sparingly. In fact, the widespread perception is that the Obama administration does not want to grant waivers in the aftermath of former Sen. Tom Daschle's nomination and withdrawal to run the Department of Health and Human Services.

The Washington Post reported that the administration said three waivers have been issued so far: William Lynn, deputy Defense secretary; Jocelyn Frye, Michelle Obama's director of policy and projects; and Cecilia Muñoz, White House director of intergovernmental affairs. Upon announcing two waivers, Norm Eisen, the president's chief ethics counsel, said in a White House blog posting on March 10 that waivers will be granted because "it is important to have reasonable exceptions in case of exigency or when the public interest so demands."

Even as the administration has identified only three waivers, the *National Journal* (subscription required) found that of 267 Obama nominees and appointees, at least 30 have been registered lobbyists at some point during the past five years.

The focus on registered lobbyists has caused controversy for the Obama administration. For example, consider the numerous registered lobbyists that, according to disclosure reports, do very little direct lobbying. The Center for Responsive Politics (CRP) recently issued a report on such "stealth" lobbying. CRP found "nearly 19,000 reports totaling at least $565 million in payments to firms for their lobbying activities that was almost entirely unaccounted for. Last year, more than one in 10 filings were the equivalent of a single page – no issues listed, no lobbyists named, no government agencies contacted."

This raises an additional problem: a lack of disclosure about the waivers or executive branch lobbying. If waivers were used more and disclosed, the public would know whether the objective of the Obama order – stopping the influence of special interests – is being achieved. Disclosure can also play an important role in addressing executive branch lobbying. A small step to such a requirement came the week of March 16 when Obama announced, "Any lobbyist who wants to talk with a member of my administration about a particular Recovery Act project

will have to submit their thoughts in writing, and we will post it on the Internet for all to see. If any member of my administration does meet with a lobbyist about a Recovery Act project, every American will be able to go online and see what that meeting was about."

It is disappointing that nonprofits may be scaling back their lobbying activities in hopes of working with the administration. The voice of public interest advocates is invaluable in the public policy arena in contrast to the boisterous, well-heeled corporate lobbyists. Possibly, with such disclosure by all parties, guidance on what executive branch lobbying includes, and clarity on when waivers can be employed, the government and the public would be able to tell the difference between public interest lobbyists and those of large corporations.