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Congress Passes FY 2010 Budget Resolution

On April 29, exactly 100 days into the Obama administration, the House and Senate each passed a final version of the Fiscal Year 2010 budget resolution. The final resolution outlines $3.56 trillion in spending and tracks closely with President Obama's major proposals, including key investments in health care, education, and energy.

The final resolution includes a total of $1.086 trillion in discretionary spending for the House and Senate Appropriations Committees to divide up within 12 appropriations bills. This is $10 billion less than President Obama had originally requested, which Congress plans to cut from non-defense discretionary programs. The president's request for $556.1 billion for defense programs was included in the resolution.

The resolution includes $529.8 billion for discretionary programs outside of defense. Although Congress cut $10 billion from Obama's request for these programs, the level in the budget resolution represents a $29.8 billion increase (six percent) over the FY 2009 funding level after adjusting for inflation, according to the Center on Budget and Policy Priorities.

On the tax side, the final budget assumes the extension of a large portion of the Bush tax cuts that benefit the middle class, including extending the patch to protect certain taxpayers from the Alternative Minimum Tax (AMT). In all, the resolution assumes tax revenues will be $764 billion below levels under current law. These tax cuts primarily impact those making less than $250,000.

Congressional leaders also decided against including language from a Senate amendment that would make further cuts to the estate tax. Offered by Sens. Blanche Lincoln (D-AR) and Jon Kyl (R-AZ) during debate on the Senate version of the resolution, the amendment would have cut the estate tax for America's wealthiest heirs by increasing the size of estates that can be passed on tax-free to $10 million for a couple and $5 million for an individual (from $7 million for a couple and $3.5 million for an individual) and reducing the estate tax rate to 35 percent (from 45 percent).

The House and Senate also agreed to include the option of using the reconciliation process later in 2009 to move health care reform legislation through Congress. Budget reconciliation is a fast-track procedure that limits the time for debate and amendment process for future legislation and also protects bills from filibuster in the Senate.

The House passed the resolution by a 233-193 margin. No Republicans supported the resolution, and 17 Democrats voted against it, all but four of whom represent districts that supported Sen. John McCain (R-AZ) in the 2008 presidential election, according to an analysis by Congressional Quarterly. The Senate passed the measure 53-43. As in the House, no Senate Republicans voted for the budget, while Democrats Evan Bayh (IN), Ben Nelson (NE), and Robert Byrd (WV) voted against the budget. Arlen Specter (D-PA), who recently switched his party affiliation, also voted against the budget.

The budget resolution is not signed by the president; it simply serves as a blueprint for Congress. However, the Obama administration is preparing to release more details about its FY 2010 budget request, which are expected May 7.

The aforementioned appropriations bills, which implement the budget resolution, will need to be signed by the president. According to *The Hill*, legislators are optimistic that all appropriations bills can be completed by Oct. 1, the start of the next fiscal year. If this occurs, it will mark the first instance since 1996 that all appropriations bills have been completed on time.

Recovery Act Transparency in 51 Flavors: A Sample of State Recovery Act Websites

An informal OMB Watch survey of eight state-level Recovery Act websites reveals that the access to and quality of information on Recovery Act expenditures varies widely from state to state.

Federal agencies have committed and are distributing Recovery Act funds at a rapid pace, through either formula allocations or a bidding process. Since the enactment of the act on Feb. 17, some $72 billion has been committed by federal agencies to fund myriad Recovery Act projects. The vast majority of these funds, of which $15.4 billion has already gone out the door, are disbursed to state governments that then distribute the money to individuals, private organizations, and local governments.

Like Recovery.gov, state Recovery Act websites should clearly answer four basic questions:

- What Recovery Act funds are available to the state?
- How can individuals or organizations apply for Recovery Act funds?
- Which organizations received Recovery Act funds?
- What did those organizations do with those funds?

Unfortunately, there is not a single state website that can provide the answer to these basic questions of spending transparency. OMB Watch conducted an informal review of eight state-level Recovery Act websites (Connecticut, Louisiana, Maine, Maryland, Nebraska, Texas, Virginia, and Washington State). While all of the surveyed sites provide a breakdown of Recovery Act funds by category (e.g., health care, infrastructure, education, etc.), most are limited in more detailed data.

For example, the Maryland and Washington State Recovery Act websites have user-friendly, interactive maps showing county-by-county breakdowns of Recovery Act funding by category. Yet neither allows users to perform a simple search such as typing in a ZIP code to find a list of all Recovery Act projects within a given neighborhood. Louisiana's site is a particularly striking example of limited information, listing program names with allocated funding amounts with no further information, such as descriptions of the programs. The Frequently Asked Questions section of the Maine website reveals an unsettling aspect of that state's allocation information availability.

> Until the funding is distributed by the Federal government to states and local governments, and eventually to your community, we won't be able to determine exactly where all of the funding will go. Over the next few weeks and months, there's going to be a lot of data coming in, as we coordinate with different agencies. As soon as the first dollars start to go out, you'll be able to track where the money is going.

Although data on the distribution of Recovery Act funds in Maine is needed and welcome, distributing that information after the money has been spent will significantly diminish the

usefulness of those data to groups seeking to apply for Recovery Act grants and contracts. It will also limit the ability of organizations and citizens to use the information on the sites to hold those responsible for implementation and funding accountable.

In addition to creating visibility of who received the money, another key aspect of Recovery Act transparency is visibility in the process of how groups or individuals get the money. State and local service providers not familiar with their state's grant or contract processes may be locked out of receiving Recovery Act funds. Texas's site is notable for its list of Recovery Act grant and loan opportunities. The available awards are grouped by category and include links to the administering agencies (state and federal). But like other state sites, information on how to apply for or bid on grants and contracts is not immediately apparent. Washington State's website also has a useful list of programs that are providing funding for state projects, but it is also thin on details about how to apply for funds. Nebraska provides similar information on its website, but it is grouped by category. Connecticut's site provides a link to federally administered grants available in the state but gives no information on grants or contracts that will be available directly from the state government. Louisiana's site, which was, by far, the least informative of any state site reviewed, contains no information on Recovery Act grants or contracts that are available in the state.

Unsurprisingly, no state website surveyed contains Recovery Act data reported by recipients. No state site details who has received the funds for grants or contracts that have already been awarded. However, recent OMB guidance to federal agencies on Recovery Act implementation indicates that the first recipient reports are to be available by Oct. 10, making this information gap expected. It is notable, however, that not a single state has been more aggressive than the federal government with respect to collecting recipient spending reports.

As recipients begin expending funds, it is doubtless that some waste, fraud, and abuse will occur. Unfortunately, whistleblowers seeking to expose malfeasance may be at a loss on how to report it. While there are established hotlines for waste, fraud, and abuse at the federal level, the same is not immediately apparent for most of the surveyed states. Maine's and Texas's websites are the exceptions. Prominently displayed on the Maine Recovery Act homepage is information on how to report fraud. Texas's site has this information as a sub-menu item, making it less obvious but otherwise easy to find. The other six sites had no information readily available about reporting waste, fraud, and abuse. Although an exhaustive search of the other state sites might reveal such contact information, this information should be prominently displayed to potential whistleblowers to facilitate waste, fraud, and abuse reporting.

This survey of eight states' Recovery Act websites reveals an uneven landscape in a critical component to track the use of Recovery Act funds. And while it is too early to judge the ultimate quality of spending data that may be available on these sites, this sample indicates that it will likely vary as much as the quality of information today. This unevenness should not be surprising in that the federal government has not provided resources for or guidance on developing websites. In many respects, the states, where the initial batch of Recovery Act funds is flowing, are in the center of the mix. This indicates that the federal government should take the lead in offering not only funds to assist states in enabling Recovery Act transparency, but in

providing technical assistance and advice. Without national leadership and widely promulgated standards, Recovery Act transparency will be severely hindered, as data within some states are incomplete, and data among states are incomparable.

EPA Back in the "Fishbowl"

In a recent memorandum to employees, the head of the U.S. Environmental Protection Agency (EPA) outlined broad principles of transparency that will govern the agency's interactions with the public. By promising to operate EPA as if it were "in a fishbowl," Administrator Lisa Jackson reinstated a principle many considered ignored by the previous administration. Jackson also announced measures to promote transparency in EPA's economic stimulus activities.

Jackson's April 23 transparency memo explains that to gain the public's trust, the EPA "must conduct business with the public openly and fairly." Jackson pledges that all agency programs "will provide for the fullest possible public participation in decision-making," including groups that have been historically underrepresented, such as minorities and those affected disproportionately by pollution. The memo also details an EPA commitment not to favor any particular special interest and to review outside recommendations critically and independently.

Presumption of Openness

In accordance with President Obama's recently announced policy regarding Freedom of Information Act (FOIA) compliance, the memo directs EPA staff to presume that information should be disclosed whenever possible. Only where a protected interest would be harmed or where the law prohibits disclosure should staff refuse to make information available. The memo does not detail what steps will be taken to conform to the administrator's instruction to "make information public on the Agency's Web site without waiting for a request from the public to do so." However, government transparency advocates have long sought such an approach to pushing information out to the public.

Rulemakings

In the memo, the administrator calls on EPA employees involved in rulemakings to ensure that all public correspondence is submitted to the public docket, including summaries of oral communications. The instruction falls short of guaranteeing that all meetings with non-EPA staff are disclosed, but rather, it requires only those that contain "significant new factual information regarding a proposed rulemaking" to be posted. The memo also instructs rulemaking staff "to provide all interested persons with equal access to EPA." Greater transparency in the rulemaking process is sought by open government and regulatory reform advocates.

The administrator does not provide detailed guidance on how to ensure all relevant communications with the public are disclosed in the rulemaking docket. The memo does, however, encourage the use of a variety of media and technologies for communicating with the

public. Internet-based dialogues are highlighted as one useful form of public participation, in addition to the more traditional public hearings and the *Federal Register* public comment process. The memo encourages EPA staff "to be creative and innovative in the tools we use to engage the public in our decision-making."

Schedules

The memo includes a commitment from the administrator to post her daily schedule online, allowing the public to see what groups and individuals are meeting with her. Other senior officials are also directed to post their appointment calendars on the EPA website. The administrator's and acting deputy administrator's calendars currently appear online, but only the current day's appointments are available. Schedules from previous days or upcoming days are not accessible.

Restoring a Tradition

In 1983, following the resignation of EPA Administrator Anne Gorsuch Burford amidst scandal, President Reagan brought back the first EPA administrator, William Ruckelshaus. To restore confidence in the agency, Ruckelshaus vowed to a Senate committee to operate the agency as if it were in a fishbowl, where agency actions were transparent and included open public participation. His subsequent memo set forth principles of transparency for agency employees.

Rep. John Dingell (D-MI) and Bart Stupak (D-MI) of the House Committee on Energy and Commerce sought such a memo from Bush administration EPA Administrator Stephen Johnson, noting in a December 2007 letter that every administrator from 1983 to 2001 had issued a memo detailing the openness principles. Johnson never produced a fishbowl memo during his time as EPA administrator.

The EPA administrator's office is now in the process of creating guidance and policies for implementing the principles set forth in Jackson's memo. The agency has stated that additional guidance governing public communications will be available to the public once it is formulated.

Other transparency issues the agency will be working on include the review of information alleged to be confidential business information and guidance on how program staff should coordinate with the agency's public affairs office when communicating with the public. The previous administration was criticized because expert staff were infrequently available to answer questions from the public.

Recovery Act Transparency

In testimony before a House committee on April 29, Jackson announced measures being developed to provide transparency and accountability in the disbursement of billions of Recovery Act dollars provided to EPA. Jackson stated, "Transparency will be achieved through regular reporting to the Agency's Recovery Web site, as well as the government-wide Recovery

site." To date, transparency on Recovery Act activities has been spotty, according to numerous watchdog groups.

The Recovery Act provides $7.22 billion for EPA-administered programs, including the Clean Water State Revolving Fund, the Drinking Water State Revolving Fund, Superfund, Brownfields, Underground Storage Tanks, and Clean Diesel programs. The EPA has already distributed $1.5 billion to 49 states, plus the District of Columbia and American Samoa, mostly for the clean water programs.

According to Jackson, EPA is working to make all Recovery Act activities "transparent to the public, the public benefits of these funds are reported clearly, accurately, and in a timely manner." The agency has appointed a "Senior Accountable Official" who will lead and coordinate all EPA actions under the Recovery Act. Jackson also announced a "Stimulus Steering Committee comprised of senior managers from across the Agency" that monitors stimulus activities weekly. So far, no public information is available about this committee's composition or findings.

The Recovery Act also provides EPA's Office of Inspector General (OIG) with $20 million to oversee stimulus activities. The OIG's activities and findings to date are available online.

Justice Department Clarifies FOIA Policy

On April 17, the Office of Information Policy (OIP) at the Department of Justice (DOJ) issued new guidance on agency implementation of the March 19 Freedom of Information Act (FOIA) memo written by Attorney General Eric Holder. Despite the clarifications, public interest groups continue to notice a wide difference between the new policy and agency actions on FOIA.

The memo describes the impact of Holder's guidelines as "a sea change in the way transparency is viewed across government." The new guidance gives agencies specific frameworks within which to interpret FOIA exemptions. The OIP also placed new emphasis on agency requirements recognizing that transparency and accountability are inherently linked.

Discretionary Disclosure

One of the biggest changes Holder's memo brought to the executive branch interpretation of FOIA was urging greater use of discretionary disclosure. The OIP explains that just because material could be legally withheld under a particular exemption does not mean that agencies should automatically withhold it. The guidance instructs personnel that upon finding a record technically exempt under FOIA, staff must make a separate determination on whether a record is suitable for discretionary disclosure because of possible importance to the public interest.

This approach has significant implications for implementation of several exemptions. For instance, under Exemption 2, which deals with agency personnel rules and practices, there are two categories. The "Low 2" exemption refers to records that contain control markings that

agencies contend are of little or no interest to the public and used solely for internal purposes. The OIP virtually removed "Low 2" as a proper exemption under the FOIA, stating that "there would be no reasonably foreseeable harm from release, and discretionary release should be the general rule."

The discretionary release standard will also affect Exemption 5, records considered to be pre-decisional or interagency communication, in a major way. The OIP establishes specific criteria to consider when evaluating the discretionary release potential of records under this exemption: age of the record, sensitivity of its content, nature of the decision at issue, status of the decision, and the personnel involved. In the past, the government often argued that disclosing such records could discourage open and frank discussions on policy. The OIP, however, appears to change the official position and asserts that release would "make available to the public records which reflect the operations and activities of the government."

Some exemptions, however, remain protected from the new push for discretionary disclosure. In particular, with regard to Exemption 1, national security information, the OIP argues, "no discretionary disclosure is appropriate." Thus, all information concerning the foreign relations of the United States can still be withheld as long as it is properly classified, regardless of the public interest in the material.

Foreseeable Harm

The OIP guidance also elaborated on Holder's call to apply a standard of "foreseeable harm" for withholding decisions. The principle would require agencies to reasonably foresee harm to interests protected under an exemption before withholding information from requestors. This requirement is identical to that established in the October 1993 FOIA memo by Attorney General Janet Reno. This determination, however, is to be made based on the age, content, and character of the record rather than "speculative or abstract fears."

Oversight

The OIP places strong emphasis on Chief FOIA Officers being held accountable for agency progress. They are responsible for recommending adjustments to "agency practices, personnel, and funding." All Chief FOIA Officers are mandated to report annually to the DOJ on the steps that they have taken to improve transparency in their agencies. DOJ also requires that the Chief FOIA Officer at each agency conduct a comprehensive review of FOIA practices for timeliness and to identify other problems, such as backlog issues and resource requirements.

Criticism

The new openness policies of the administration have been met by critics who particularly focus on the slow pace of actual implementation by agencies. The Electronic Frontier Foundation noted recently that the Federal Bureau of Investigation is still using the "Low 2" exemption to withhold records. Additionally, a summary of recent court decisions posted to the OIP website shows that other agencies are also withholding information under the Low 2 exemption and

successfully defending themselves in court. The same is true for the use of Exemption 5. Agencies are still applying it widely, and the courts are taking a black-and-white approach ruling along the letter of the law.

Courts, which often favor agencies in FOIA cases rather than aggressively applying the spirit of FOIA, are unlikely to challenge continued broad use of exemptions, even if they differ with the newly stated policies. The U.S. Supreme Court has even turned down its opportunity to review the threshold of Exemption 5. Therefore, strong efforts from the White House, OIP, and each agency's Chief FOIA Officer will be key in changing the federal culture of secrecy.

Under Obama, Sun Setting on Bush Midnight Rules

The Obama administration continues to reverse policies left by the Bush administration, including many controversial regulations finalized near the end of President Bush's term. Administration officials are employing different strategies with the goal of overturning or significantly altering some of the Bush administration's so-called midnight regulations.

The Interior Department has pushed back against three Bush midnight regulations without undertaking new rulemakings, relying instead on openings Congress and the courts have given it.

Interior Secretary Ken Salazar announced April 28 that the administration would withdraw a December 2008 regulation limiting the role of science in Endangered Species Act decisions. Critics say the rule was designed to make species protection more difficult.

The rule, issued jointly by the departments of Interior and Commerce, allows federal land-use managers to approve projects like infrastructure creation, minerals extraction, or logging without consulting federal habitat managers and biological health experts. Previously, consultation had been required. The rule also forbids global warming from being considered as a factor in species decisions.

Congress gave the Obama administration the authority to withdraw the rule in a FY 2009 spending bill (H.R. 1105). Without the bill, the administration would have had to undertake a lengthier process, including a public comment period.

In a March 3 memo, President Obama instructed Interior and Commerce to review the Bush rule and "determine whether to undertake new rulemaking procedures." In the interim, Obama instructed land-use managers to exercise their discretion in favor of continuing scientific review. As a result, it is unlikely the rule ever had any practical effect.

On April 27, Salazar announced his intent to back away from a Bush midnight rule allowing mountaintop mining operations to dump waste into streams. Calling the rule "legally defective," Salazar said, "I have asked the Department of the Justice to file a pleading in the U.S. District

Court requesting that the rule be vacated due to this deficiency and remanded to the Department of the Interior for further action."

Environmentalists applauded the move but emphasized that, without more aggressive enforcement, mountaintop mining waste will continue to degrade waterways and threaten communities. Joan Mulhern, senior legislative counsel for the environmental group Earthjustice, called for "a firm commitment to enforce the law as it applies to mountaintop removal and valley fills," noting that Interior had historically failed to enforce the old regulations.

Interior now awaits the court's decision. The rule was challenged in federal court by two different coalitions of environmental groups.

The third Interior Department rule turned back by the Obama administration had sought to permit the carrying of loaded weapons in national parks. Interior has said that it will accept a judge's decision that sent the rule back to the agency for an assessment of the rule's impact on wildlife. The ban on loaded weapons, first set in 1983, remains in effect.

Other regulatory agencies are reversing Bush midnight regulations more methodically, using traditional notice-and-comment rulemaking.

The Department of Labor published a notice April 21 proposing to withdraw a rule that would have increased reporting requirements for unions. The rule, finished under the Bush administration but not published until Jan. 21, the day after President Obama was sworn in as president, had yet to take effect.

The administration has also proposed withdrawing a November 2008 rule changing services covered by Medicaid. The rule limits the kinds of outpatient services, like vision or dental, Medicaid recipients can access. The Department of Health and Human Services (HHS) is taking comment on the proposed withdrawal from May 6 to June 1. Meanwhile, the Bush rule remains in effect.

Other midnight regulations may be addressed soon:

- The U.S. Environmental Protection Agency (EPA) has asked a federal court to delay a lawsuit over a December 2008 rule that deregulates tons of hazardous waste, allowing it to be burned as fuel instead of disposing of it properly. EPA said it is reconsidering the rule and expects to propose a withdrawal notice in November.
- EPA is also reconsidering a change to the definition of solid waste that critics charge exempts tons of hazardous waste from regulation under the Resource Conservation and Recovery Act, instead allowing the waste to be recycled. EPA will hold a public meeting on the regulation sometime in May.
- HHS proposed March 10 a withdrawal of a regulation giving health care providers the right to refuse services that they believe do not comport with their personal beliefs. Critics say the rule is aimed at limiting access to reproductive health services and

information. HHS accepted comment on the withdrawal notice until April 9. A final withdrawal notice is expected soon.

The Bush administration's midnight regulations campaign was more methodical and effective than that of any previous administration. Bush officials pushed to have many rules finalized well before Jan. 20 in order to give those rules time to take effect. By law, agencies must wait at least 30 or 60 days before allowing rules to take effect.

As a result, the Obama administration was unable to quickly or easily undo most Bush-era regulations. Without congressional or judicial intervention, the Obama administration has been left to undertake entirely new rulemakings, an often time-consuming process.

Meanwhile, many Bush rules remain in effect and have yet to be addressed, including rules that ease environmental regulations on factory farms and a rule that allows trucking companies to force drivers to work more hours and longer shifts. For a list of controversial midnight regulations and updates on efforts to overturn them, visit www.ombwatch.org/node/9739.

Senators Stall Obama's Agency Nominees

As President Barack Obama continues the process of nominating officials to fill agency positions in his administration, some senators have stalled the nominations over policy differences. The senators have targeted nominees to regulatory agencies that have responsibility for a range of environmental policies.

Sen. John Barrasso (R-WY) has placed a hold on the nomination of Gina McCarthy as the U.S. Environmental Protection Agency's (EPA) Assistant Administrator for Air and Radiation. (A hold is an informal action intended to keep a measure or nomination from reaching the floor for a vote.) The air and radiation office would have some responsibility for regulating greenhouse gases under the Clean Air Act, if Congress does not pass legislation addressing climate change. McCarthy was nominated March 16; she is a former commissioner of the Connecticut Department of Environmental Protection.

According to an April 30 press release, Barrasso is concerned about EPA's potential to use the act to regulate and the impacts of the regulations on businesses and consumers. “The nominee has failed to address serious concerns regarding the implementation of the Clean Air Act with regards EPA’s recent endangerment finding,” Barrasso said. The EPA issued an endangerment finding that will require the agency to act on climate issues if Congress does not supplant that responsibility with new legislation. The press release also indicates that Sen. James Inhofe (R-OK), the ranking member of the Senate Environment and Public Works Committee, supported Barrasso's hold.

Department of Interior nominees are also targets of Senate holds. Sens. Robert F. Bennett (R-UT) and Lisa Murkowski (R-AK) have placed holds on David Hayes, Obama's choice for deputy secretary at Interior. Bennett has delayed Hayes's nomination pending a departmental review of

77 oil and gas leases that Interior Secretary Ken Salazar cancelled Feb. 4. Salazar agreed to review the decision at Bennett's request and asked Hayes to lead the review team. Hayes indicated in a letter to Bennett that he thought the reviews would be completed May 1 and he and his staff would have a final report for Salazar by May 29.

Murkowski added her name to the hold on Hayes because of her objection to the administration's decision to overturn President George W. Bush's midnight regulation changing the way the Endangered Species Act is implemented. The rule allowed federal land-use managers to approve projects like infrastructure creation or minerals extraction without consulting federal habitat managers and biological health experts responsible for species protection. Consultation was required under the previous version of the rule.

According to an April 30 press release, Murkowski disagreed with "Interior's decision to unilaterally overturn an existing rule" without going through the normal rulemaking process. The release also noted her disappointment in Obama's decisions on other environmental and energy-related matters, but none of these objections are specifically related to Hayes.

However, under Section 429 of the Omnibus Appropriations Act of 2009, Congress authorized the secretaries of Interior and Commerce to withdraw or reissue the rule "without regard to any provision of law that establishes a requirement for such withdrawal." In addition, Obama issued a memo to the two agencies urging them to review and determine the appropriate approach to revising the rule.

Bennett also has a hold on Interior's solicitor nominee, Hilary Tompkins, over concern that Tompkins avoided clearly answering questions about the department's position on the Utah Wilderness Settlement Agreement. According to an April 30 *Salt Lake Tribune* article, the 2003 settlement agreement freezes the state's designated wilderness study areas at 3.2 million acres, thus restricting Interior's ability to designate additional areas of Utah as wilderness. Bennett is seeking assurances from Salazar and Tompkins that the settlement will remain in place because removing the freeze could hurt Utah's energy industry, the article noted.

The Senate was able to confirm Tom Strickland as Interior's Assistant Secretary for Fish and Wildlife and Parks April 30. Strickland, like Salazar, is from Colorado and will retain his position as Salazar's chief of staff while serving as assistant secretary.

Obama named two people to another critical regulatory agency May 5. In a press release, Obama announced that he will nominate as commissioners to the Consumer Product Safety Commission (CPSC) Inez Moore Tenenbaum and Robert S. Adler. Tenenbaum will be nominated to chair CPSC and Adler to one of two new commissioner positions. Tenenbaum is a former superintendent of education in South Carolina and an advocate for families and children. Adler is a law professor in North Carolina, a former advisor to CPSC staff, and has consumer protection experience, according to the press release. In addition, the statement indicated Obama's intent to expand the commission from three to five members, so one position remains to be filled.

Another Obama nominee, Cass Sunstein, will sit for his Senate confirmation hearing on May 12. Sunstein has been nominated to run the White House Office of Information and Regulatory Affairs, an office that has been deeply involved in regulatory review and other regulatory process issues since the Reagan administration.

Oral Arguments Indicate Court May Strike Down Key Voting Rights Provision

On April 29, the U.S. Supreme Court heard oral arguments in *Northwest Austin Municipal Utility District No. 1 (NAMUDNO) v. Holder*, a case in which a small utility district in Texas is challenging Section 5 of the Voting Rights Act of 1965. Section 5 was reauthorized in 2006 and applies to all or part of 16 states, including nine states in their entirety. It requires those states to seek federal approval before changing election rules or procedures due to past laws and practices that discriminated against and disenfranchised racial minorities.

NAMUDNO argued that under Section 5, it can "bail out" of the approval provision, known as "preclearance." NAMUDNO further argued that even if it could not get out from under the provision, Congress' extension of preclearance was unconstitutional because Congress did not have adequate evidence that an extension was necessary.

The high court spent considerable time on the evidence and constitutionality Congress used to support its decision to reauthorize Section 5 in 2006. Justice Stephen Breyer elaborated on the evidence, noting that the act has served as a deterrent to voting discrimination and that thousands of discriminatory election changes have been prevented as a result of Section 5.

Justices Samuel Alito, Antonin Scalia, and Anthony Kennedy seemed to be bothered that some states are subjected to preclearance when others are not. Their questions focused on the supposed inequality of requiring preclearance for some states and not for others.

Kennedy stated that Congress has found that the sovereignty of one state is less than another. "The sovereignty of Alabama, is less than the sovereign dignity of Michigan. And the governments in one are to be trusted less than the governments in another," he said. Kennedy later added that due to Section 5 preclearance, "a minority opportunity district is protected in covered jurisdictions and not in non-covered jurisdictions."

The arguments and the evidence from the *Congressional Record* supporting preclearance were not enough to sway the course of the justices' questions. Alito, Scalia, and Kennedy, in particular, questioned why Congress did not compare the states that are covered by the preclearance provision to the states that are not covered by the provision to show that the covered states are more likely to discriminate.

"Whether Congress could have written a different or even better Voting Rights Act in 2006—making pre-clearance voluntary for the entire nation (as suggested by Justice Scalia) or extending pre-clearance requirements to jurisdictions not previously covered (as Justices Alito

and Kennedy seemed to find intriguing)—is thus the wrong inquiry," said Elizabeth Wydra, Chief Counsel of the Constitutional Accountability Center, in a blog post. "Here, Congress held 21 hearings, interviewed more than 90 witnesses, amassed a 15,000 page record, and found that jurisdictions required to pre-clear had engaged in thousands of discriminatory electoral practices between 1982 and 2006," Wydra said.

While a decision in this case is not expected until June, oral arguments indicate that Section 5 is receiving considerable attention. Prior to oral arguments, it appeared that Justice Kennedy would be the swing vote. It is assumed that the high court's conservative block of Alito, Roberts, Scalia, and Thomas will vote to strike down Section 5. Justices Souter, Ginsburg, and Breyer seem poised to uphold it. Stevens did not say much during oral arguments, making it difficult to anticipate even a cursory view of his potential vote.

Recent FEC Rulings May Indicate Growing Leniency in Enforcement

The Federal Election Commission (FEC) recently issued a series of rulings that may represent a move toward a more lenient interpretation of election laws. The commissioners have repeatedly split along party lines over whether to pursue possible campaign finance violations involving organizations charged with acting as political committees.

A "political committee" is defined in the Code of Federal Regulations as "any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year." In *Buckley v. Valeo*, the U.S. Supreme Court said political committees are "organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." The FEC has the responsibility of determining whether groups in question engaged in behavior intended to support the election of a candidate.

In 2007, Public Citizen filed complaints against Americans for Job Security (AJS), charging that AJS violated its 501(c)(6) tax-exempt status by airing messages intended to influence an election. The complaints argued that AJS should be considered a political committee and therefore have to disclose funding and limit contributions to $5,000 annually per contributor. After a split 3-3 decision, the FEC decided against moving forward with an investigation into the group's activities.

According to the organization's website, AJS has spent more than 95 percent of the $40 million it receives in membership dues on "direct issue advocacy," which includes television commercials, radio ads, direct mail, and telephone calls. A sampling of its recent television and radio ads is also available on its site.

According to The Campaign Finance Institute report on the 2008 election, AJS spent over $8 million in electioneering communications. 501(c)(6) organizations may engage in some partisan

activity and help to influence an election, but influencing the outcome of elections cannot be the organization's primary purpose.

Public Citizen decided to file a lawsuit on April 24 to overturn the FEC's dismissal of the AJS case. Since then, FEC commissioners have released statements of reasons regarding the dismissal. The Democratic commissioners concluded that "there is reason to believe" that some of the AJS messages appeared to contain express advocacy and therefore may be subject to campaign finance laws. They supported the factual and legal analysis prepared by the Office of General Counsel (OGC). The Republican commissioners rejected the OGC conclusions and decided that AJS did not engage in any express advocacy.

A 527 organization, the American Leadership Project (ALP), was charged with failing to file as a political committee. The group released ads during the 2008 Democratic primary disapproving of then-candidate Barack Obama. At issue was whether the group expressly supported candidate Hillary Clinton and opposed Obama. The FEC once again had an insufficient number of votes to move forward with the case.

OMB Watch submitted comments to the FEC in January 2009 regarding the harm that occurs with the vague definition of express advocacy and the difficulty in determining when an organization is acting as a political committee. OMB Watch's comments note that as a result of the lack of definition, "the FEC cannot fairly or adequately enforce the rule defining express advocacy. As a practical matter, this makes it impossible for citizen groups that want to communicate with the general public to judge whether their form of communication is allowable or not, which threatens a risk of sanctions."

Effective enforcement is not possible when the FEC rules are so vague, and with recent votes to drop numerous cases, the question remains: What will it mean for upcoming campaigns?

The OMB Watch comments added, "The FEC must clarify the line between express advocacy and issue advocacy. For the sake of future enforcement cases and for continued citizen engagement in genuine issue advocacy, FEC regulations should outline in distinct language what is electoral and non-electoral activity."

Lobbying Restrictions Generate More Criticism

It appears that the Obama administration's restrictions on lobbying are drawing criticism even as the administration defends the policies. The controversy surrounds two policy documents: one addresses restrictions on hiring lobbyists and others as political appointees, and the other focuses on communications by lobbyists about use of Recovery Act funds.

On May 5, the White House counsel for ethics and government reform, Norm Eisen, spoke at a half-day conference hosted by George Washington University's Graduate School of Political Management. He strongly supported President Obama's executive order on ethics (E.O. 13490), noting that the order is a tool to help ensure the American people "will not be subjected to the

influences ... that have waylaid good policy, but really will attempt to be guided by that point on the horizon that represents the best thing for the country."

The January 21 executive order on ethics prohibits, for two years, an individual registered under the Lobbying Disclosure Act from working in an agency that he or she lobbied. Additionally, the political appointee may not participate in "any particular matter" that the person lobbied on within the past two years and may not participate in the specific issue area in which the particular matter falls. There is also a restriction on all potential employees – regardless of whether they are lobbyists or not – from working on "any particular matter" that is "directly and substantially related" to former employers or former clients, again for two years. Finally, when an appointee leaves government service, there is a ban on lobbying high-level executive branch officials for the remainder of the administration. The director of OMB, in consultation with the White House counsel, may grant a waiver of these restrictions if the "application of the restriction is inconsistent with the purposes of the restriction" or it is in the "public interest" to grant a waiver.

At this time, only three waivers have been granted for lobbyists to work within the administration. A fourth waiver was granted on May 1 for White House advisor Valerie Jarrett. Jarrett was given permission to work on Chicago's bid for the 2016 Olympics, even though she was previously the vice chair of a nonprofit organization working to bring the Olympics to Chicago.

Eisen also argued that there is no "flat ban" on lobbyist communications on Recovery Act spending. "There is a requirement that lobbyist communications about particular applications, applicants, or projects be put in writing. The rationale is that we wanted every American ... to be able to evaluate those proposals on their merits." He was referring to a requirement that the written communications must be posted to the agency's website.

The controversy is over a March 20 presidential memo that restrictions communications by federally registered lobbyists with executive branch employees on use of Recovery Act funds. The memo, and subsequent guidance from OMB, allows federally registered lobbyists to communicate on general issues about the Recovery Act as well as to ask specific questions in public forums. However, the moment the conversation switches to specific comments about how money should be spent, the communication must be put in writing. The guidance calls on agencies to post all written communications with lobbyists to the agency website within three days of the communication.

This can create unusual situations. For example, a state registered lobbyist or someone who is not a lobbyist can speak orally to an executive branch official about how Recovery Act money should be spent, but a federally registered lobbyist cannot. In response to questions from the audience about this situation and the administration's desire for more transparency, Eisen suggested he was reviewing various options for modifications to the rules, including requiring disclosure of all communications from lobbyists and non-lobbyists who are seeking to influence how money is spent under the Recovery Act.

Other panelists at the event thought the administration had gone too far in targeting and restricting lobbyists. Several pointed out that the real problem isn't lobbyists but the corrupting influence of money. For example, Bob Edgar, the president of Common Cause, said, "Most lobbyists are good people who perform a valuable service sharing their expertise on issues with Members of Congress. The problem is our corrosive system of funding political campaigns that makes lobbyists a conduit between Members of Congress and money. We need to change that."

Eisen has been hosting a series of listening sessions, including one on May 6 that included a range of nonprofit organizations, to identify possible modifications and improvements to these policies.