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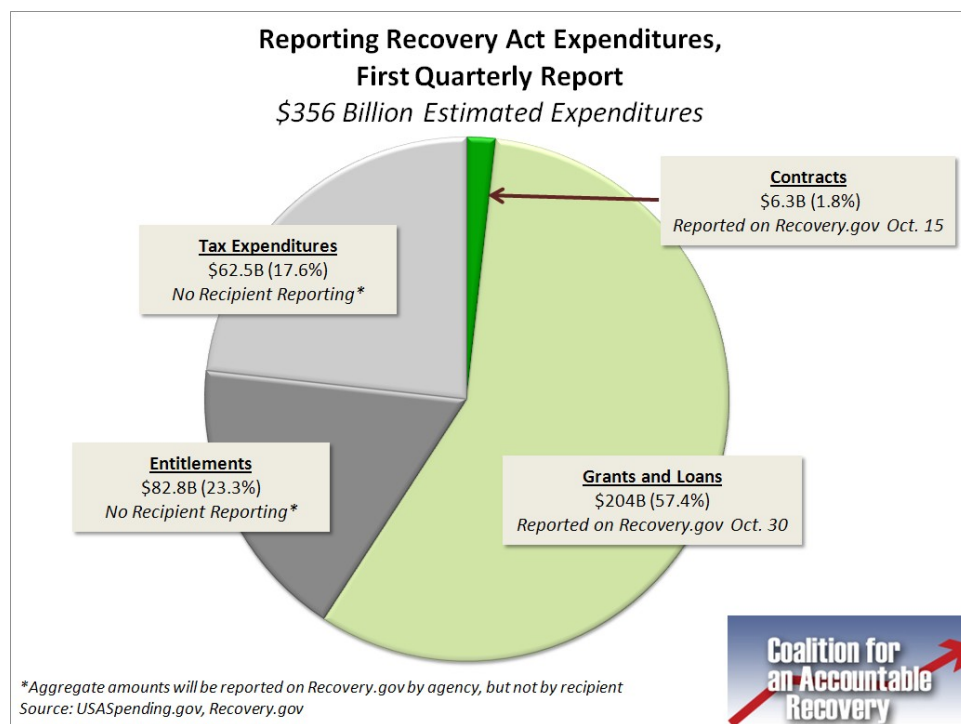
First Round of Recovery Act Data Expected Oct. 15

On Oct. 15, the Recovery Accountability and Transparency Board (Recovery Board) will begin releasing on Recovery.gov the first round of Recovery Act recipient reporting to the public.

The reporting of this information, including spending data and jobs numbers, is the culmination of a complex process that started in February. Never before have recipients of federal spending reported on their use of the funds in such a timely or transparent manner, so the release of the data alone will mark a historic moment in bringing greater accountability to federal spending. At the same time, the data published on Recovery.gov will likely leave many transparency advocates pushing for more information accompanied by higher data quality.

The recipient reports, filed between Oct. 1 and Oct. 10 (with a ten-day grace period announced Oct. 10), will be released by the Recovery Board in two tranches: The first will cover recipient reports about federal contracts that have been received and will be released through Recovery.gov on Oct. 15; the second will cover recipient reports on federal grants and loans that have been received and will be released through Recovery.gov on Oct. 30. Between \$6 billion and \$12 billion, or about one to two percent of the \$787 billion Recovery Act, will be reported by recipients on Oct. 15. On Oct. 30, some \$204 billion in grants and loans will be reported.

The Coalition for an Accountable Recovery, which OMB Watch co-chairs with Good Jobs First, has compiled [a set of charts and tables](#) that describe the dimensions of the expected data. These figures are estimates drawn from federal spending data sources [USAspending.gov](#) and [FPDS-NG](#), but data on how many recipients will report and the dollar amounts of awards they report will remain a mystery to the public until the data are released in the latter half of October.



(click to enlarge)

According to the reporting provisions in the law, a great deal of Recovery Act information does not have to be reported by recipients to the federal government. Most prominently, the \$288 billion in personal and corporate tax cuts, such as the Making Work Pay tax cut, does not have to be reported. Similarly, recipients of the \$224 billion in entitlement spending, such as the increase in Social Security spending and the unemployment insurance expansion, also do not have to report on their Recovery Act funds. Ultimately, some \$512 billion of the stimulus, representing almost two-thirds of all Recovery Act spending, will not be reported by recipients at any point.

Of the remaining \$275 billion, which will be distributed through contracts, grants, and loans, details will be reported by recipients. However, of that amount, only a small fraction has been

distributed thus far. While agencies have allocated funding and awarded grants, contracts, and loans, states and other recipients have yet to draw down federal funding. In fact, contract spending, which is what will be reported Oct. 15, represents less than four percent of estimated Recovery Act spending to date, constituting but a sliver of all released Recovery Act funds.

Additionally, the data that will be reported Oct. 15 is not representative of the Recovery Act as a whole. Most of the contracts that are on Recovery.gov and USAspending.gov now are Energy Department (DOE) contracts, accounting for almost half of current Recovery Act contract spending to date. Most of the DOE contracts will go to facilities, such as the Hanford nuclear facility in Washington. Hanford, which received the largest set of contracts, has estimated these contracts have generated approximately 3,000 jobs related to Recovery Act cleanup along the Columbia River, accelerating demolition of the plutonium finishing plant, retrieving solid radioactive waste, and other tasks.

Because the total dollar amounts of contracts is a small fraction of the entire Recovery Act, it is expected that job counts in the reports will also represent a small fraction of the ultimate number of jobs that will be created by the stimulus.

However, there are also two other reasons why recipient report job numbers will be small in comparison to the millions of new and sustained jobs touted by the framers of the Recovery Act. First, these data will not have direct information from the ultimate recipient of Recovery Act funds. That is, only direct, or "prime," recipients will report job counts, estimating the number of jobs created by the multiple tiers of subrecipients below them. Second, these data will only cover direct jobs and omit employment created by the newly enhanced buying power of recipient employees, the so-called "multiplier effect." A parallel effort of job count estimation is being conducted by the Council of Economic Advisers, which reported in September that "slightly more than 1 million jobs" had been created directly and indirectly at the time it released its [first quarterly report on the Recovery Act](#).

In September, OMB Watch highlighted [potential data quality issues in Recovery Act reporting](#) and how bad data could affect the usefulness of the information. With tens of thousands of recipients reporting through a new, unfamiliar system, even a small amount of user error could result in thousands of flawed reports. Indeed, recent evidence seems to indicate that some recipients are having trouble with the first reporting deadline, as on Oct. 10, the last day for filing reports, the Recovery Board pushed the reporting deadline back by ten days to give recipients more time to collect and report their data.

Data quality will also be affected by the small window of opportunity for prime recipients and federal agencies to review and correct omissions and errors. With potentially tens of thousands of reports, it remains unlikely that federal agencies will have time to thoroughly inspect every recipient report within the 20 days allotted to them for data review. Additionally, there will be no reconciliation between recipient reports, federal agency reports, and Treasury account records, leaving what will likely be large discrepancies in different sources of spending information.

Despite these data quality issues, there remains the significant problem of the data trail disappearing after money changes hands twice. The Office of Management and Budget (OMB) requires only prime recipients and their first tier of subrecipients to report on the use of Recovery Act funds. For example, the federal Department of Transportation might grant funds to the Texas Department of Transportation. The Texas DOT could then give money to Dallas for a bridge repair project. Dallas would likely hire contractors to execute the work, but because the contractor hired by Dallas is a second-tier subrecipient, citizens and the federal government will have no information on who the contractor is or the value of the contract.

Because so little Recovery Act funding is available for reporting, the Oct. 15 publication date will likely shed little light on the how well Recovery Act funds are being spent. The public will, however, be given a window on how the recipient reports can be analyzed and obtained through the new Recovery.gov website. Even if the reporting system itself works perfectly, the dearth of data and potential quality issues may limit the significance of this first round of recipient report publishing. However, as successive reporting cycles add more and more information, and as the Recovery Board and OMB iron out difficulties with the reporting system, Recovery.gov has the potential to be a powerful instrument of federal spending transparency and accountability.

Latest TARP Program Poses Significant Conflict of Interest Issues

The Obama administration [rolled out](#) a revamped [Public-Private Investment Program](#) (PPIP) the week of Oct. 5. The program is designed to accomplish the original goals of the [Troubled Asset Relief Program](#) (TARP). According to observers, the program still contains too little disclosure of conflicts of interest among those charged with implementing it.

Despite being created over a year ago, TARP still has not been used to actually alleviate the strain of troubled assets at the heart of the near-collapse of the financial sector. When former Treasury Secretary Henry Paulson came to congressional leaders in 2008 with dire warnings of the collapse of the nation's economy, he [argued](#) that resources were needed to purchase toxic assets from many of the nation's leading financial institutions.

After Congress passed a program Paulson advocated, however, the Bush administration shifted course. Instead of purchasing toxic assets, the Treasury Department has used almost half of the committed TARP funding to infuse banks with additional capital, which could be seen as providing relief from the troubled asset symptoms but not providing a cure. The rest of the funding is split between auto industry bailouts, AIG support, small business loans, mortgage modification programs, and Citigroup and Bank of America investments. The fact that jars the most with Paulson's earlier dire warnings is that, to this day, Treasury has yet to even commit about a third of the \$700 billion it requested from Congress.

[Starting the week of Oct. 5](#), however, Treasury began to focus more of its attention on TARP and toxic assets by announcing that by the end of the month, PPIP should be operating at full strength. Created in March, the Obama administration designed PPIP as a way to purchase

some of the toxic assets still on the balance sheets of many banks. The PPIP was originally planned as a massive \$1 trillion program, with the Federal Deposit Insurance Corporation (FDIC) and the Federal Reserve joining Treasury in helping to finance the effort, though it has since been scaled back. The program would use federal dollars, matched dollar-for-dollar with private money through Public-Private Investment Funds (PPIFs), to purchase the toxic assets. With the toxic assets off their books, financial institutions should be better positioned to loosen up financing in capital markets.

Although the financing system is fairly straightforward, there are still complicated problems within the program related to how to value the assets in question. Previously, financial institutions had to value the assets using the "mark-to-market" rule, by which assets are valued at current market price. In the current economic situation, current market price for these toxic assets is startlingly low, forcing banks to declare losses on the assets. This is the very reason why there is a need for PPIP.

In April, however, thanks to a [change in regulations](#), these institutions were allowed to be a little more creative in how to value toxic assets. Instead of going by current market rates, institutions can value assets at "fair value," which theoretically will be higher than the current, recession-era value. While the rule change has taken some pressure off of financial institutions in the short term, it has an unfortunate effect on PPIP. Now, the administration is left with what many see as a bad choice to make: either purchase the toxic assets at an artificially inflated price (giving the financial sector a nice subsidy in the process) or offer a mark-to-market price and have the financial institutions refuse to let go of their toxic assets, since they do not want to be forced to take a loss.

Considering the administration's desire to deal with toxic assets, it will probably choose the first option. According to experts, such a choice would not only be bad for the PPIF investors (i.e., taxpayers), it would also create a conflict of interest situation. The PPIFs are run by prominent private fund managers, such as Invesco Ltd, BlackRock, and the Wellington Management Company, which are charged with determining the fair value for the toxic assets the PPIFs will be purchasing. However, these companies could also be managing toxic assets for their private clients. If so, there is a clear incentive for the fund managers to overvalue toxic assets in order to receive a larger subsidy from the government. By arranging potentially bad deals for the government, fund managers would be relieving themselves of toxic assets while at the same time reaping a profit for their private clients and themselves.

The conflict of interest problem is not new, and the Special Inspector General for the Troubled Asset Relief Program (SIGTARP) has been questioning Treasury's safeguards since its [April report](#). More recently, SIGTARP went as far as writing in its [July report](#) that there exist "numerous potential opportunities for fraud, waste, and abuse in PPIP." While Treasury has adopted many of SIGTARP's recommendations for PPIP, it has resisted several of the core conflict of interest recommendations, including the imposition of information "walls" between the PPIFs and their parent fund managers and increased disclosure requirements for PPIF fund managers.

By not adopting the SIGTARP recommendations, the PPIP program remains riddled with potential conflicts. While the program may succeed in taking toxic assets off the books of prominent financial institutions, it could do so at the risk of hurting the bottom line for taxpayers.

OMB Releases Plan to Elevate Performance Evaluation

The Office of Management and Budget (OMB) released a memo to federal agencies on Oct. 7 that outlines a new initiative to bring a renewed emphasis and additional resources for program evaluation within agencies. Although this initiative is not a comprehensive plan to reinvigorate performance measurement in the federal government, it will help correct many problems that kept previous performance systems from creating real improvement in government performance.

The memo is entitled "Increased Emphasis on Program Evaluations" and details a three-part plan to help agencies develop better systems to conduct "rigorous, independent program evaluations." The plan includes giving better access to agency program evaluations on the Internet that are both in progress and planned for the future, re-launching an interagency working group on evaluations, and a voluntary pilot program to provide additional resources to fund rigorous program evaluations or strengthen evaluation capacity within agencies. Each of these three policy changes will help to improve performance evaluations within agencies and encourage better use of performance information.

Posting more information about federal evaluations online: OMB will begin working this fall with federal agencies to expand access to information about program evaluations. The goal will be to "make researchers, policymakers, and the general public aware of studies planned or underway" that examine if a program is making the grade or evaluate the effectiveness of other approaches and strategies that achieve the desired outcomes.

This plan mirrors the Obama administration's general commitment to a more transparent government but also helps to decrease a tendency to protect agency prerogatives in performance evaluations. During the Bush administration's use of the Program Assessment Rating Tool (PART), there was reluctance among some agency staff to share all of their internal performance evaluation materials and results with OMB. In addition, OMB often dismissed evidence and evaluations that were shared as unsatisfactory. The requirement in this memo to simply make program evaluations public should help to create a more positive dialogue about performance evaluations and results.

What's more, this requirement has the potential to become as useful a repository as one that allows the public to search all government-funded clinical trials provided by the National Institutes of Health (see ClinicalTrials.gov). While the memo does not explicitly state that OMB will develop a central repository for all government program evaluations, allowing for the capacity to search evaluations across agencies and departments that focus on a central goal or

issue (alleviating homelessness, for instance) would allow for better coordination and communication between agencies that run programs with similar objections.

Interagency Evaluations Working Group: The second part of the memo states that OMB is going to re-constitute an interagency working group of program evaluation experts from the Domestic Policy Council, the National Economic Council, and the Council of Economic Advisers. This working group will help build agency evaluation capacity by developing a network of experts inside and out of the federal government, share best evaluation practices from across the federal government, develop techniques for using evaluation and performance data to continually drive improvement, and potentially develop government-wide guidance for program evaluation practices.

There are three key points made within the language of this section of the memo that are improvements over previous performance efforts. First, it is clear the Obama administration understands a one-size-fits-all approach will not succeed. The memo references that different evaluation methods and structures are necessary for different types of programs and objectives the government is trying to achieve and that agencies need flexibility within government-wide evaluation guidance to "adopt practices suited to their specific needs."

Second, there is an acknowledgment, albeit subtle, that many agencies do not have the resources or in-house expertise to develop "strong, independent evaluation offices." This acknowledgment is bolstered by the fact that OMB intends to make additional resources available to a limited number of programs to develop their own evaluation systems.

Finally, in both the first section of the memo and the second, OMB opens the door to potential collaboration between government and outside experts to design and implement robust program evaluation studies. This could potentially allow those outside the government who are responsible for implementing government programs, as well as experts from academia or other sectors, to work more closely in designing evaluations that are targeted and useful for those implementing federal programs.

Voluntary FY 2011 Evaluation Initiative: The third and final aspect of the memo is a voluntary program that invites interested agencies to submit additional information along with their FY 2011 budget materials to win more funding for high-priority evaluation activities. OMB plans to award funding to 20 "rigorous program evaluations across the Federal government or [to agencies] to strengthen agency evaluation capacity."

Agencies must submit additional information to OMB that includes an assessment of evidentiary support for budget priorities, new proposals for rigorous evaluations, an assessment of agency capacity to conduct rigorous independent evaluations, and the identification of statutory requirements that may have the unintended effect of keeping agencies from conducting rigorous evaluations and assembling evidence about what is working within agencies.

This third part could almost be called a pilot program since it is initially being implemented in a limited way. Only 20 awards will be made to agencies, and the scope of performance measurement activities this will support is restricted to "social, educational, economic, and similar programs" that support life outcomes of Americans. The memo specifically mentions that four very large areas – procurement, construction, taxation, and national defense – will not be considered except on a case-by-case basis. OMB Director Peter Orszag further describes this section as a pilot in a blog post released on Oct. 7, stating:

The agencies participating in this initial effort will serve as demonstration projects through which we can test approaches to improve program effectiveness and efficiency, share best practices, and further improve performance. After assessing this initiative in FY2011, the Administration will be better positioned to implement government-wide evaluation metrics.

The limited scope and voluntary nature of this part of the initiative may help alleviate some problems encountered in the past by getting the Obama administration's performance measurement effort off on the right foot. Overall, this memo gives agencies more of a central role in developing their own evaluation systems and has a more collaborative tone than previous performance improvement efforts. Yet this is not a comprehensive plan to replace the PART, as both Orszag and Chief Performance Officer Jeffrey Zients have hinted that more is coming at some point in the future. There are currently no details regarding when additional aspects of the Obama administration's overhaul of performance systems will be released.

Controversial Patriot Act Reauthorization Ready for Senate Floor

On Oct. 7, the Senate Judiciary Committee approved a bill, the USA Patriot Act Sunset Extension Act of 2009 ([S. 1692](#)), to reauthorize the Patriot Act. The bill, introduced by Sen. Patrick Leahy (D-VT), chair of the committee, passed with bipartisan support but has been denounced by civil liberties groups and privacy advocates. A week earlier, the committee voted down another reauthorization bill, the JUSTICE Act ([S. 1686](#)), introduced by Sens. Russ Feingold (D-WI) and Richard Durbin (D-IL), that would have greatly reduced surveillance powers and strengthened civil liberties protections.

Critics of the Leahy bill assert that the legislation does little to address the well known civil liberties concerns and extends sweeping law enforcement surveillance powers with little to no safeguards. For instance, as passed out of committee, the bill renews the roving "John Doe" wiretap authority that allows the federal government to obtain a wiretap order without the requirement to name the target or specify the phone lines and e-mail accounts to be monitored. Further, it offers little or no reform of other controversial Patriot Act provisions

Reform of National Security Letters (NSLs) was also limited in the legislation. NSLs are used by the Justice Department like subpoenas to seek information from companies, such as Internet service providers and phone companies, about their subscribers. The Feingold-Durbin bill had

included increased standards for NSL issuance, limitations on the types of information that can be obtained by NSLs, limitations on non-disclosure orders for NSLs, and limits on emergency use of NSLs. The Leahy bill only requires that the government draft an internal statement showing that the information sought is somehow relevant to an investigation. Conversely, the Feingold-Durbin standard would require discussion of specific facts, a much more rigorous standard. However, the committee noted that the Obama administration supports a relevance standard like that found in the Leahy bill.

The Obama administration has been criticized as being an agent against reforming the broad powers granted to the executive branch by the act. According to [reports](#), five of the seven amendments introduced to limit privacy and civil liberties protections were recommended by the Justice Department. Feingold [accused](#) the administration of taking positions behind closed doors that it is not taking publicly. In the committee's public hearing, the Justice Department had stated that it took no position on any of the civil liberties and privacy issues. However, it was reported that they announced their disapproval of some of the bill provisions to the committee during classified meetings.

Some of the provisions to protect civil liberties that the administration opposed, such as the restrictions on NSLs, were proposals that Obama had supported as a senator. In particular, Obama had supported the SAFE Act ([S. 737](#)) in 2005 that attempted to reform Section 215 orders that require anyone to produce tangible records relevant to an investigation to protect against international terrorism, including business records. The SAFE Act had been unanimously reported by a Republican-controlled committee and included the requirement of a link between records sought and a terrorist or other agent of a foreign power. Durbin proposed an amendment to the Leahy bill that would have added this standard, but it was voted down due to the administration's opposition.

Some committee members reacted negatively to the committee vote to accept the Leahy bill for Senate debate. Feingold expressed his disappointment in the final version of the bill. Feingold likened the Senate Judiciary Committee to a "Prosecutor's Committee" and stated that the bill "falls well short of what the Congress must do to correct the problems with the Patriot Act." This position was echoed by some advocates, including Leslie Harris, president of the Center for Democracy and Technology, who [proclaimed](#) that "the opportunity for real reform will not come again anytime soon. Congress needs to do the right thing, even if Obama will not."

Some minor reforms were included the final Leahy bill. The bill included reforms for "sneak and peek" searches and requires the executive branch to issue procedures to minimize the use of NSLs. However, these changes were not enough to garner the support of Feingold or many of the civil liberties groups following the legislation.

Metal Mining Proposal Marks Online Forum Trend at EPA

The U.S. Environmental Protection Agency (EPA) launched [an online forum](#) on the agency's blog to collect comments on a potential change to the way metal mining companies report their

pollution. Controversial court decisions in recent years have reduced the amount of information on the industry's pollution. This online forum marks at least the third time the Obama administration's EPA has used a "Web 2.0" tool to engage the public on matters of proposed agency policies.

According to the Toxics Release Inventory (TRI), the metal mining sector consistently places among the most polluting industries. In 1997, the metal mining industry and several others were added to TRI, which is an EPA program requiring thousands of facilities to report how much toxic pollution they release. From 1998 to 2007, more than 19 billion pounds of toxic releases were [reported](#) by the industry. Yet even with such large quantities being reported, many environmental groups are concerned that a significant amount of releases is not being disclosed, largely due to the agency's response to the [court decisions](#).

In 2003, the mining industry won a partial victory in a [lawsuit](#) against the EPA over how to report its pollution to TRI. The court's decision led the agency to exempt small concentrations of toxics in waste rock from being reported. The EPA established a *de minimis* provision exempting concentrations of most toxics under one percent from having to report. Although concentrations of naturally occurring toxics such as selenium are typically low in metal mines' waste rock, the prodigious amounts of waste rock mean that the total amount of toxics quickly adds up.

The EPA is now considering a possible [metal mining rulemaking](#). The [online forum](#) is a preliminary step in the agency's preparation for a formal rulemaking process. The agency has not specified what issues it expects to address in the rulemaking, nor why such a process is even needed. Rather, the agency is requesting comments on several issues previously raised by stakeholders during telephone interviews conducted by EPA in November 2008.

The public is encouraged to submit comments on five broad issue areas raised by the industry and environmental groups:

- Ways that TRI can drive environmental improvements
- Accurate measurement of releases
- Expanding what releases must be reported
- Clarifying definitions of terms
- Any additional TRI metal mining issues

This online process for metal mining and TRI mimics the process used by two other EPA offices to gather comments in a more informal manner than through the use of the *Federal Register*. The Office of Enforcement and Compliance Assurance (OECA), working with the Office of Water, solicited opinions from the public to help design its upcoming [Clean Water Enforcement Action Plan](#). The action plan – ordered by the EPA administrator – is intended to improve information transparency, strengthen enforcement of water pollution laws, and expand the use of technology to increase efficiency and provide information to the public. OECA also designed an [online forum](#) to collect ideas on areas to focus its enforcement and compliance activities in the future. In this case, the online forum aids an ongoing process at EPA – the revision of its

enforcement priorities every three years. A future [fourth online forum](#) is planned by the head of EPA's solid waste office, but it has not been announced yet.

What impact on agency policy these forums will have remains to be seen. In each instance, the agency has not exploited fully the capabilities of the forums. For example, the enforcement forum, as its name suggests, allows for multilateral conversations, with commenters responding to one another. The agency has not responded to any comments, creating a one-way flow of information and failing to engage the public in dialogue.

The clean water forum was intended to inform the creation of a document for the EPA administrator. The action plan was due at the end of September. It has not yet been disclosed whether the plan is completed or available to the public. There is no way to judge the extent the public's forum comments were incorporated into policy recommendations until the report is released.

The metal mining discussion forum will be open until Oct. 30. According to EPA, comments received before that time will be included in a public docket, and a link to the docket will be posted. A proposed rule may be published by early 2011.

Read the Bill Act Stalled in Congress

Recently introduced House and Senate resolutions seek to illuminate the legislative process, giving Congress, as well as the American people, the opportunity to read legislation and formulate an informed opinion prior to any debate or votes.

In the House, Rep. Brian Baird (D-WA) introduced [H.Res. 554](#) on June 17, along with 180 cosponsors from both parties. The resolutions would amend House rules to require that non-emergency bills and conference reports be posted online for at least 72 hours prior to consideration by the full chamber.

In the Senate, Sen. Jim Bunning (R-KY) introduced [S.Res. 307](#) on Oct. 7, which has gained the support of 28 Republican cosponsors. The proposal would amend the Senate rules but would establish an even more exacting standard, requiring that legislation, accompanied by an evaluation from the Congressional Budget Office, be posted online 72 hours before subcommittee and committee consideration, as well a similar time standard for floor debate and votes.

[ReadtheBill.org](#), a project of the Sunlight Foundation, has been supporting the legislation. According to its website, there are several important benefits to such a legislative approach: "When Congress rushes to pass complex legislation, the bills are not properly vetted. With more time to examine the legislation, the public can help ferret out wasteful spending, sneaky provisions that were inserted by well-connected special interests and other problematic provisions."

The House Rules Committee has had that chamber's resolution since late June with no action. On Sept. 23, Rep. Greg Walden (R-OR) filed a motion to discharge the resolution from the committee. A discharge motion recalls a bill from committee for consideration by the full House and is a procedural move used to circumvent a committee that has no intention on acting upon legislation. Such a petition may be circulated if a bill has sat in committee for 30 days without being reported out and requires a simple majority (218 representatives) to be successful. The discharge petition for H.Res. 554 currently has 182 signatures. The resolution appears stuck in the Rules Committee until additional support is found for the discharge petition.

The Senate resolution has garnered attention mostly from Republicans, as noted by the cosponsor list. Moreover, the effort appears sidelined by health care and energy legislation, two wars, spending bills, and countless other matters perceived as higher legislative priorities.

Those promoting congressional transparency consider passage of the “Read the Bill” legislation a key element in bringing sunshine to Congress. It remains to be seen if legislators have the same interest.

Fractured Nomination Process Leaves Regulatory Posts Vacant

Senate Republicans are blocking several of President Obama's nominees – often for reasons unrelated to the position – resulting in vacancies at the Department of Labor, U.S. Environmental Protection Agency, Department of Justice, and elsewhere. In addition, the Democratic leadership has not often combated Republican tactics, as nominations have slipped down the list of Senate priorities.

At the Labor Department, several vacancies have hampered the administration's ability to advance its agenda, especially in the areas of occupational safety and health and worker rights.

On Aug. 5, President Obama nominated David Michaels to lead the Occupational Safety and Health Administration (OSHA). Michaels is an epidemiologist and professor at George Washington University, where he also runs the Project on Scientific Knowledge and Public Policy. A Republican-controlled Senate confirmed him in 1998 to serve as the Assistant Secretary for Environment, Safety and Health at the Department of Energy under President Clinton.

Michaels' nomination to OSHA is attracting scrutiny. Industry lobbyists fear Michaels would move aggressively to finalize new workplace health and safety standards. The [Occupational Safety and Health Act](#), which OSHA enforces, directs the agency to write regulations "reasonably necessary or appropriate to provide safe or healthful employment and places of employment." The agency is a major focus for opponents of strong regulatory action on worker safety.

Industry lobbyists and conservative bloggers have also criticized Michaels' 2008 book, *Doubt Is Their Product: How Industry's Assault on Science Threatens Your Health*. In the book, Michaels details numerous examples – including tobacco, asbestos, and lead – where industry

groups have commissioned scientific studies and reports intended to undermine evidence that would prove their products harmful or strengthen the case for regulation.

Several industry groups including the National Association of Manufacturers and the U.S. Chamber of Commerce have [written](#) to members of the Senate Health, Education, Labor, and Pensions (HELP) Committee highlighting their objections to Michaels' nomination and asking for a confirmation hearing in the committee. If the groups' concerns remain after the hearing, it is likely that senators will place holds on the nomination, a procedure by which one senator can single-handedly delay a bill or nomination.

A delay in Michaels' nomination will translate into additional delays in new OSHA standards and in revitalizing an agency that has been largely nonresponsive to worker safety issues. Critics of the Bush administration faulted OSHA for finalizing too few worker protection standards. As a result, there is a backlog of hazards in need of attention. OSHA Deputy Assistant Secretary and acting OSHA chief Jordan Barab has been making progress in trying to reduce the backlog: OSHA is developing a proposed rule to limit workers' exposure to diacetyl, a chemical used to give foods a buttery flavor, and the agency recently finalized a rule that would standardize the way employers communicate occupational hazards. However, OSHA is unlikely to shift into high gear without a full-time, Senate-confirmed head.

Republicans have also objected to M. Patricia Smith, President Obama's pick to be the Labor Department's solicitor general, the top enforcement official at the agency. After the Senate HELP committee approved Smith and reported her nomination to the full Senate, Sen. Mike Enzi (R-WY) announced a hold on the nomination.

Smith drew the ire of committee Republicans after she made an inaccurate statement during her confirmation hearing. Smith said she had not discussed expanding Wage Watch – a state-level program intended to crack down on wage and hour violations, which she ran while serving as the New York State labor commissioner – but later acknowledged that she had discussed expanding Wage Watch to the federal level.

The committee's Democratic staff called the error inadvertent. Committee chair Sen. Tom Harkin (D-IA) said Enzi's hold was "clearly an effort to try to delay the confirmation of the government's top advocate for our nation's workers," [according to *The New York Times*](#).

Meanwhile, Lorelei Boylan has withdrawn her nomination to lead the Labor Department's Wage and Hour division amid conservative objections, [according to *The Washington Post*](#). Boylan is also involved in New York's Wage Watch program. The Wage and Hour Division enforces minimum wage standards, child labor laws, and other worker rights issues. The *Post* reported that Boylan withdrew her nomination because of family issues, not because of Republican opposition.

Another Labor Department agency critical to worker protection, the Mine Safety and Health Administration, is also without a permanent leader. Joe Main, a safety official at the United

Mine Workers of America, was nominated July 6. He has been approved by the Senate HELP committee and awaits a full Senate vote.

Key posts at the U.S. Environmental Protection Agency (EPA) also remain unfilled. In May, Obama nominated Paul Anastas, a green chemistry and green engineering expert, to lead EPA's main research office. The nomination has been [delayed](#) by Sen. David Vitter (R-LA), who is seeking a review of EPA's risk assessment for formaldehyde. EPA currently considers formaldehyde a "probable carcinogen" and is expected to update its scientific studies soon. The International Agency for Research on Cancer calls formaldehyde a "known carcinogen."

Sen. George Voinovich (R-OH) has [placed a hold](#) on the nomination of Robert Perciasepe to serve as EPA Deputy Administrator because Voinovich believes EPA has underestimated the potential costs of cap-and-trade legislation currently under consideration in Congress. The senator is requesting that EPA redo its economic analysis. He is using Perciasepe as a bargaining chip while acknowledging that, "This hold does not to serve [*sic*] as a reflection on Mr. Perciasepe's ability to perform in the role of the Deputy Administrator."

Voinovich's and Vitter's holds are part of a broader trend in which senators are holding nominees hostage not because of their qualifications but because of the lawmakers' objections to the views or policies of the administration. The holds are a simpler but more damaging alternative to traditional oversight mechanisms, such as hearings or letters of inquiry, as qualified candidates are kept out of their positions.

While Republicans have lodged complaints against nominees, Democrats have been slow to counter Republican arguments and unwilling to push back by scheduling votes. Instead, the nomination process appears to have fallen down the Senate agenda, behind other priorities like health care and FY 2010 spending legislation.

The pace at which the Senate is confirming nominees for the Obama administration is slowing. Between the spring and summer recess, the Senate confirmed an average of 18 nominees per week while in session. Since returning from the August recess, the average has dropped to less than nine per week, according to Senate and White House records.

Although Democrats hold a filibuster-proof majority, leadership has appeared unwilling to move to confirm nominees. Majority Leader Harry Reid (D-NV) has forced only two confirmation votes. One was on [Cass Sunstein](#), the head of the White House Office of Information and Regulatory Affairs. The other was Thomas Perez, the Department of Justice's (DOJ) top civil rights lawyer. Republicans held up Perez's nomination after the Justice Department dismissed voter intimidation claims filed against the Black Panthers. The Senate confirmed Perez Oct. 6.

Perez was the first DOJ nominee to be considered by the Senate since April. Meanwhile, other Justice Department nominees accumulated: four critical assistant attorney general nominees await confirmation, including Ignacia Moreno, nominee for the environment and natural resources division; Mary Smith, nominee for the tax division; Dawn Johnsen, nominee for the

Office of Legal Counsel (OLC); and Chris Schroeder, nominee for the Office of Legal Policy (OLP).

Johnsen's nomination has drawn criticism largely because of her past work with an abortion rights organization. Obama nominated Johnsen to head the OLC, a powerful office that provides the Attorney General and other administration officials with legal advice on almost any issue, on Feb. 11, making hers one of the longest outstanding nominations.

Obama nominated Schroeder on June 4. OLP provides high-level policy recommendations to the Attorney General and handles special projects and judicial nominations for the department. Schroeder is a law professor at Duke University and has written extensively on administrative and environmental law. He formerly served as a scholar at the Center for Progressive Reform, a collection of academics advocating for a regulatory system that better protects the public.

Parochial interests have slowed the nomination of Martha Johnson to serve as administrator of the General Services Administration (GSA) – the government agency responsible for procuring and managing real estate, equipment, and other assets. Currently, Missouri Sen. Kit Bond (R) [has a hold](#) on Johnson's nomination. Bond blames GSA for delays in the construction of a federal building in Kansas City, MO. Previously, Reid had [slowed](#) Johnson's nomination in an attempt to move a GSA-sponsored conference to Las Vegas in his home state of Nevada. Johnson was nominated May 4.

NCRP Report Confirms Return on Investment in Advocacy

New research from the National Committee for Responsive Philanthropy (NCRP), a national foundation watchdog organization, concludes that public policy work is an effective strategy to address societal issues. A majority of grantmakers have traditionally steered away from funding public policy, grassroots advocacy, and other civic engagement activities. However, studies continue to show that advocacy work is vital to advancing a nonprofit organization's mission. The NCRP finding that there is such a great return on investment in advocacy could resonate with funders.

NCRP's [Grantmaking for Community Impact Project](#) seeks to increase philanthropic resources for advocacy, organizing, and civic engagement to particularly benefit communities most in need. An objective of the project is to appease funders' concerns by featuring the positive impact communities have experienced because of support for nonprofit advocacy. The project's reports use both quantitative and qualitative methods to gauge the positive returns from civic engagement.

NCRP began the *Strengthening Democracy, Increasing Opportunities* series with a report on New Mexico nonprofits in December 2008. This [latest report](#), the third in the series, looks to nonprofits in Minnesota. NCRP details the impact of 15 state nonprofit organizations' advocacy from 2004 to 2008; during this time, the groups received \$16.5 million from foundations.

According to the report, "Minnesota foundations that made grants to nonprofit organizations in the state had a \$2.28 billion impact from 2004 to 2008."

NCRP studied local nonprofits that worked with underrepresented communities on a range of issues and recorded the groups' activities and achievements. The organizations used a variety of advocacy strategies, including working in coalitions, mobilizing communities, working with policymakers, conducting research, and utilizing the media.

Most notably, and probably the most useful for those trying to gain foundation support for advocacy activities, is the cost-benefit breakdown presented in the report, as grantmakers want to know their money is being put to good use. According to NCRP, the economic and social benefit impacts of advocacy outweighed the cost of organizing campaigns.

NCRP tracked advocacy and organizing impacts, funding, civic engagement indicators, and the groups' progress. A return-on-investment calculation was made by dividing the aggregate dollar amount of successes, or desired outcomes, by the aggregate dollars invested in advocacy and organizing. The report found that every grant dollar spent on advocacy produced a \$138 return on investment. This data led to the report's conclusion that it is highly beneficial for nonprofits and foundations to work together, and it is especially effective for these groups to become involved in public policy advocacy.

The report lays forth recommendations for foundations, particularly those facing tough economic situations. Foremost among the recommendations is that funding for advocacy, community organizing, and civic engagement should be increased. Board members and donors should also be conscious of how advocacy can help an organization achieve its goals, according to the report.

EMILY's List Decision May Impact Contribution Limits, Other Campaign Finance Cases

A three-judge panel of the U.S. Court of Appeals for the D.C. Circuit [issued an opinion](#) in *EMILY's List v. Federal Election Commission* in September, striking down regulations that limited donations to nonprofit political action committees that are used for campaign activity. The regulations were intended to limit how certain nonprofit organizations raise and spend money for political campaigns.

[EMILY's List](#), a non-connected political action committee (PAC) that seeks to elect pro-choice, Democratic women to office, challenged Federal Election Commission (FEC) regulations, which went into effect in 2005, as an unconstitutional violation of the group's First Amendment free speech rights. EMILY's List, which maintains both federal and nonfederal accounts, filed a complaint on Jan. 12, 2005, challenging the regulations regarding the treatment of funds received in response to certain solicitations and amended rules regarding federal/nonfederal fund allocation ratios for PACs.

The regulations required tax-exempt organizations to use "hard money" for election and campaign activities. "Hard money" is limited to a \$5,000 annual cap per contributor. The regulations enacted by the FEC were intended to limit "soft money," which is "unlimited donations by individuals, corporations, political action committees and unions, to nonprofit groups," according to [The Washington Post](#).

The decision in the *EMILY's List* case could greatly impact contribution limits for tax-exempt groups in the future. It may enable individuals to circumvent campaign finance regulations limiting the amount of money that they can give to a federal candidate by allowing them to give unlimited money to a nonprofit organization. The organization would then be able to spend the money to directly support or oppose a candidate's campaign.

Rick Hasen, a law professor at Loyola Law School—Los Angeles and the moderator of the [Election Law Blog](#), said that this decision "essentially will allow individuals (and, I predict, eventually corporations and unions) to make unlimited contributions to political committees to fund independent expenditure campaigns." Hasen further stated, "Even if the court restrains itself in *Citizens United* [a campaign finance case currently before the U.S. Supreme Court], the writing is on the wall: if the court's members remain the same, the corporate limits eventually will fall. After that, the court could strike down contribution limits to PACs and the ban on party soft money."

Judge Janice Rogers Brown also seemed to worry about going down this path in her concurring opinion in the *EMILY's List* case. She said that the majority ruling would allow political action committees to say, "Just like you, we want [*federal candidate*] to win. You have already donated all the law allows to [*federal candidate*], but there is no limit on how much you can give to us to support [*federal candidate*]." She also noted that the majority opinion means that multicandidate political committees can "spend unlimited amounts of soft money to run ads attacking or supporting federal candidates and political parties" or "on get-out-the-vote activities that support federal candidates and political parties," and Congress cannot do anything to stop it.

Brown said the majority opinion overreached by deciding the constitutional question, instead of only deciding the statutory issue. Quoting language from a previous D.C. Circuit case, Brown said, "Federal courts should not decide constitutional questions unless it is necessary to do so. Before reaching a constitutional question, a federal court should therefore consider whether there is a non-constitutional ground for deciding the case, and if there is, dispose of the case on that ground."

The *EMILY's List* case has also answered the constitutional question posed in the *SpeechNow.org v. FEC* case that the D.C. Circuit is scheduled to hear soon. In that case, "The plaintiff is challenging the contribution limits that apply to a group which makes only independent expenditures," according to [Democracy 21](#). "The majority opinion in *EMILY's List* attempts to resolve that question, even though it wasn't presented in the case. The opinion says contribution limits cannot apply to such a group, thus serving to preempt the full Court of

Appeals' decision in the *SpeechNow* case before it even has reached the Court of Appeals, much less before it has been briefed and argued," said Democracy 21.

The FEC is still deciding if it will appeal the decision. If it moves forward, the commission can appeal to an *en banc* panel of the D.C. Circuit Court of Appeals, or it can appeal directly to the U.S. Supreme Court. According to [Roll Call](#), "The Justice Department could choose to pursue the case on its own should the FEC take a pass or simply let the deadlines lapse."

The *EMILY's List* case has already affected FEC enforcement proceedings. The FEC did not take a position on whether Black Rock Group, a political consulting group, could coordinate independent expenditure campaigns. The *EMILY's List* decision "has left the FEC uncertain over how to proceed with some questions of campaign finance law," according to [The Hill](#).

"We are moving toward a deregulated federal campaign finance system, where money flows freely and perhaps only disclosure laws remain. It is a world in which those with more money use their considerable funds to elect candidates of their choice and to have disproportionate influence over public policy. The unlevel playing field awaits," according to Hasen.

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