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October Surprise: Looming Recovery Act Data Quality Issues

At the end of October, the first round of recipient reporting for the Recovery Act will be released on Recovery.gov. This reporting is a crucial step in Recovery Act oversight and transparency, but there is no guarantee that the reporting process will proceed smoothly. Come October, the diffusion of responsibility for Recovery Act data quality could result in a great deal of confusion, as a flood of bad data could stymie the administration's efforts at Recovery Act transparency.

The data provided by the reporting process is supposed to let both the government and the public track where Recovery Act funds are going, and, importantly, how many jobs have been created or saved due to Recovery Act programs. Despite this vision, Earl Devaney, chair of the Recovery Accountability and Transparency Board, has been saying publicly that the first round of reporting is likely to be very rough, complete with a great deal of bad data. Unfortunately, no

agency has taken sole responsibility for data quality, creating a last-minute scramble as the reporting deadline approaches.

The Recovery Act reporting requirements are not exceptionally complex, and a majority of recipients should be able to report on time without incident. However, when one is dealing with tens of thousands, potentially hundreds of thousands, of recipients, even a 10 percent error rate would result in an enormous amount of erroneous information, creating an equally large PR headache for the administration.

The problems with reporting will likely attract media attention. Already, critical articles on the poor quality of Recovery Act data have been written, including a recent *New York Times* article highlighting the "fuzzy math" behind some construction projects in New York City. Also, some articles will focus on minor errors that appear as wasteful spending, like the recent "$1 million sliced ham" stories, which reported on a poorly described Recovery Act procurement that made it seem like the government spent $1.19 million on two pounds of sliced ham. (The description of the procurement failed to mention that the order was for 760,000 sliced hams, not just one ham.)

The reaction to Recovery Act spending will be the result of several issues that will arise in October. First, there is the possibility that some recipients might not report, limiting the information available about Recovery Act spending. Theoretically, agencies will know the prime recipients they have given stimulus funding to, but they will not know any subrecipients those primes divide their funding among until data is reported. Therefore, it will be very difficult for agencies to know whether all the subrecipients that are required to report have done so. This is because the prime recipients are not required to disclose if and when they will divide their funding among subrecipients until the information is reported at the end of each quarter. Agencies will then be left with a short 10-day period to ensure all recipients have reported data.

Another cause for concern will be the quality of the data from those recipients who do complete their reports. It will be the first time Recovery Act recipients are using the reporting system, and there are bound to be problems when they report. The data dictionary the Office of Management and Budget (OMB) released is a technical document, which could be confusing for organizations that are not used to federal reporting guidelines.

There are also several data points which require subjective, often narrative entries, which will result in a wide, uneven range of answers. Several of these entries involve job creation and retention estimates, which will be the most scrutinized entries in the entire data set and yet are the most likely to have errors. For example, one report field requires recipients to estimate the number of jobs created, despite the administration giving relatively little guidance on how to differentiate between jobs created versus jobs saved, as well as the lack of a definition of what constitutes a job. The administration has left it up to the individual agencies to disseminate statistical techniques for their recipients to use, and less than half of the federal agencies have done so thus far. The lack of central guidance in job creation estimates that will come from this reporting cycle will provide critics with more ammunition to criticize the Recovery Act.

How have these problems arisen? If the data, which are the foundation of oversight, are of poor quality, then one would be tempted to blame the Recovery Board, since it is specifically charged with Recovery Act oversight. However, Devaney has repeatedly stated the board's mission is data integrity or protection, not data quality. Devaney has said it would be inappropriate for the board, as a collection of Inspectors General, to become involved in the actual collection of data. Instead, Devaney points to OMB and the agencies, arguing that they change and execute the reporting guidelines.

OMB, however, points to the agencies and Recovery Act fund recipients. According to OMB's guidance documents, the agencies must take responsibility and work with their recipients to ensure comprehensive and accurate data reporting.

Recently, however, OMB has begun to take greater responsibility for data quality. At a Senate hearing on Sept. 10, OMB Deputy Director Rob Nabors said OMB is working to make sure the reporting process goes as smoothly as possible. Nabors detailed steps the agency is taking – such as sending OMB personnel to state and local municipalities to facilitate communication between recipients, agencies, and OMB – and holding webinars for Recovery Act recipients.

More importantly, on Sept. 11, OMB released a new memorandum to the federal agencies titled "Improving Recovery Act Recipient Reporting." The memo "identifies essential actions that Federal agencies must take immediately to effectively assist recipients in meeting reporting requirements" and may signal that OMB is concerned the first round of recipient reporting will be difficult. OMB's memo says "current recipient registration is below expected levels, which may lead to underreporting" as the reporting deadline approaches, and that the agencies must start identifying their recipients now. By identifying the recipients well ahead of time, OMB is trying to avoid the missing-recipients problem.

However, it remains to be seen how effective these steps will be and if they are simply too late in the process to be effective. With less than a month remaining until the reporting deadline, agencies still might not have enough time to perform the outreach OMB is recommending.

It appears that both OMB and the Recovery Board understand the October reporting period will be rough. The board had originally planned on releasing the data on Oct. 11, the day after the reporting deadline, but it recently decided to hold onto the information a little longer, consistent with the intent of the Recovery Act, which builds in a 20-day error correction period. According to the Recovery Board, the recipient reports collected by Oct. 10 will be released on Oct. 30. Additionally, information about contracts provided directly from federal agencies will be posted to Recovery.gov on Oct. 15. The agencies will be able to use these additional days to correct simple errors in the data before it is released, ensuring a more accurate representation of Recovery Act spending in a timely manner.

Wartime Contracting Commission Continues Work through Summer

While Congress was away for its August recess, the Commission on Wartime Contracting in Iraq and Afghanistan continued its work, holding a hearing on Aug. 11 to investigate deficiencies in contractors' business systems. The timing of the hearing prevented some significant problems from receiving much public attention.

The hearing explored the challenges that government oversight officials face when contractors' systems for billing, purchasing, labor, compensation, estimates, and other activities are inadequate for providing complete, accurate, and timely information. The commission also looked at the bureaucratic infighting that can occur among government oversight agencies. Altogether, the hearing displayed troubling glimpses of a broken contracting process that wastes billions of taxpayer dollars every year.

Prior to the hearing, the commission examined contractor business systems involved with tracking company information related to some $43 billion in contracts and learned federal auditors found half of the systems for billing and compensation "inadequate." According to the commission's June interim report:

> Significant deficiencies in contractor systems increase the likelihood that contractors will provide proposal estimates that include unallowable costs or that they will request reimbursement of contract costs to which they are not entitled or which they cannot support.

These deficiencies cost taxpayers billions of dollars each year, and, according to former Rep. Christopher Shays (R-CT), co-chair of the commission, some of these "contractors have had inadequate systems in place for years" and have not suffered any serious consequences because of it.

The lack of repercussions for contractors raised two questions for the commission: how could contractors operate with inadequate systems for an extended period, and how could those tasked with oversight allow it to happen?

Brought before the commission to answer the first question were executives of DynCorp International, Fluor Corporation, and KBR, the latter of which was the sole-source contractor for the third iteration of the Army's Logistics Civil Augmentation Program (LOGCAP), and which now competes with the first two contractors for awards in LOGCAP IV. KBR's widely criticized handling of LOGCAP III dogged Senior Vice President William Walter throughout most of the hearing, as the commission focused on KBR and used the company as a symbol for the broken contracting system at large.

Commission members argued during the hearing that because the company is so large and extensively integrated into Department of Defense (DOD) operations, KBR feels it can get away with almost any transgression, including the continuation of inadequate billing and

compensation systems. Walter rejected this characterization and argued that, while the company disagrees with government auditors over the exact quality of its systems about half the time, KBR has always been found to have adequate business systems by the one auditing agency that matters: the Defense Contract Management Agency (DCMA).

This gets to the second question about how contractors continue to operate with seemingly deficient systems, yet repeatedly win and keep contracts with the government without consequences from those tasked with oversight. The answer lies in a tale of bureaucratic turf war between the DCMA – the contracting representative of DOD – and the Defense Contract Audit Agency (DCAA), which as the agency's title suggests, audits and advises on defense contracts for DOD. DCAA's recommendations, however, are not legally binding on DCMA, and the management agency routinely ignores the audit agency's suggestions. This arrangement further undermines sufficient contracting oversight at DOD, as the commission feels DCAA audits are more thorough and trustworthy compared to DCMA's analyses.

This conflict is at the heart of many of the challenges facing sufficient defense contract oversight within the federal government. In fact, as the commission revealed during the hearing, contractors can hide from the harsh eye of DCAA behind DCMA's admittedly soft investigations. This working relationship between the two agencies has affected defense contracting since at least 2002, according to the director of DCAA, April Stephenson.

With wartime activities declining in Iraq and contractors preparing to ramp up services in Afghanistan, the lack of regard shown DCAA by DCMA, which once had a staff of over 100 but now numbers in the teens, portends significant difficulties for oversight of contingency operations. Combine that with the warm reception given those problems by contractors, and taxpayers face the potential for sizeable dollar losses due to hamstrung oversight and contractor negligence.

EPA Pushing Data Out to the Public

The Obama administration has made government transparency a high priority in its early months, and of all the federal agencies, the U.S. Environmental Protection Agency (EPA) appears to be making the quickest progress in turning rhetoric into action. Across a range of issues, the EPA is taking proactive steps to improve transparency, collecting and releasing to the public important environmental data needed to protect the environment and public health.

Much of this information is actively being pushed out to the public, whereas other releases are only made following lawsuits and Freedom of Information Act (FOIA) requests. These actions, combined with instructions from the EPA administrator, Lisa Jackson, to operate more openly, are a distinct change from agency policies during the last several years. However, it is still too early to determine whether these information disclosures comprise an agency-wide commitment to openness and engagement with the public.

TRI Early Release

Among the developments was the early release of Toxics Release Inventory (TRI) data for 2008. Historically, the TRI data, which track the release or transfer of more than 650 toxic chemicals from facilities nationwide, were not available to the public until up to 14 months after the end of a reporting year. The data for 2008 were released Aug. 18 in a "raw" downloadable format and are expected to be finalized or "frozen" before the end of 2009. With the early release, EPA is encouraging data users to study and analyze the data on their own. EPA also is seeking public comments on its early data sharing policy.

This early data release follows action by Congress to restore TRI reporting levels that were scaled back in a controversial rulemaking during the Bush administration. The rulemaking had restricted the amount of toxic release information citizens and communities would receive from TRI and prompted a firestorm of criticism and more than 122,000 comments in opposition to the change in reporting levels.

Pesticides in Drinking Water

Atrazine, one of the most widely used herbicides in the United States, is toxic to humans and animals even at very low levels. It is also one of the most ubiquitous pesticides in streams and groundwater. A recent report by the Natural Resources Defense Council (NRDC) was critical of EPA's monitoring and notification system for atrazine contamination. NRDC acquired sampling data from EPA's atrazine monitoring program, but only after two FOIA requests and a lawsuit.

Shortly after the report was published, EPA announced the public release of the data that NRDC had sued to acquire. According to EPA, "As part of this [EPA's] commitment to transparency and to enhance accessibility, EPA has posted complete atrazine monitoring program drinking water data gathered from 150 community water systems over the six-year period 2003 through 2008."

The agency has released two sets of atrazine data, one for ecological monitoring and one for drinking water monitoring. The accessibility and usability of the data sets online vary. To access the ecological data, one must navigate through the cumbersome *Federal Register* (The data are available in the public docket.). The drinking water raw data are available as Excel spreadsheets, and data are also presented in a summary form. The website also provides a basic explanation of the data and EPA's understanding of the health risks.

Missing are data visualization tools many open government advocates have been calling for from the Obama administration. Both *The New York Times* and NRDC provided maps, charts, and graphs interpreting the raw data for their readers. EPA has only provided links to spreadsheets.

School Air Pollution Monitoring

Earlier in 2009, EPA began a program to monitor the air quality around selected schools to identify areas where air pollutants are at dangerous levels. The program was developed in

response to a *USA Today* report published late in 2008 that used publicly available pollution information to identify schools that might be at risk of dangerously high air pollution levels. Pressure from the public and Congress encouraged Jackson to take action. The results of the air monitoring are made available online as they are collected from monitoring sites.

Coal Ash Dump Sites

In December 2008, the failure of a retaining wall at a Tennessee dump site for wet coal ash – the toxic waste product from combustion of coal at power plants – caused more than one billion gallons of coal ash sludge to wash over hundreds of acres and flow into local waterways. The spill caused alarm over the possibility of additional catastrophic failures of similar dump sites.

In response, Jackson vowed to gather the information needed to issue a rule to bring these dump sites under federal regulation. A survey sent to hundreds of power plants around the country collected information on the location and inspection history of coal ash dump sites. Despite protests from the Department of Homeland Security, which viewed disclosing such information as a security threat, EPA published online a list of the highest-risk dumpsites identified through a survey to electric utilities nationwide.

On Aug. 28, in response to a FOIA request by several environmental groups, the agency released more detailed information about the impoundments. Of 584 impoundment units in 35 states, 194 have been given hazard ratings by the National Inventory of Dams. Several reporting utilities labeled portions of their responses as confidential trade secrets. Data on the inspection histories and size and capacity of impoundments were not disclosed by EPA. The agency stated that it will evaluate the claims of confidential business information and disclose the data that are not deemed to be legitimate trade secrets.

The agency plans to assess by year's end all 109 coal ash dump sites that have been assigned a high or significant hazard rating. With the data now available, public interest groups and individuals are able to evaluate dump sites in their communities and hold their state and federal officials accountable for ensuring the safety of the sites.

Recovery Act and Data.gov

As part of the Recovery Act, EPA distributed more than $7 billion, mostly for assistance with water quality and infrastructure programs. The agency's transparency efforts also extend to these spending data. Expenditures are now presented in an interactive map depicting total Recovery Act obligations and gross outlays by EPA at the national and state levels. EPA claims that in the future, the map will link to project-by-project information.

"Fishbowl" Still Cloudy

In an April 24 memo to agency staff, Jackson pledged that EPA would operate with transparency, as if it were "in a fishbowl." Jackson outlined broad principles for agency

transparency, including instructions to staff to "make information public on the Agency's Web site without waiting for a request from the public to do so."

Whereas the release of data on school air quality and the early release of TRI data are agency initiatives, other data releases have come only following FOIA requests and legal action. The EPA has not explained what steps it will take to conform to the administrator's instruction to push out information without waiting for FOIA requests. Additionally, the agency still lacks a permanent assistant administrator for the Office of Environmental Information (OEI), a key department with many responsibilities covering the agency's public release of data.

Overall, the recent actions are a welcome change in openness from EPA. The information being released includes vital data needed by the public to hold the agency accountable, protect public and environmental health, and prepare for emergencies. However, it is not clear that these disparate actions comprise a coherent, uniform policy for public disclosure of environmental information.

Secrecy Report Card Gives Modest Grades to Bush and Obama

On Sept. 8, OpenTheGovernment.org, a coalition of 70 open government advocates, released its sixth annual *Secrecy Report Card*. Focusing on 2008, the report card serves primarily as a final assessment of the Bush administration but also addresses early actions of the Obama administration. Overall, the report notes a decrease in secrecy at the end of the Bush years but concludes that greater efforts are needed to increase federal transparency.

According to the report, original classification decisions under the Bush administration decreased by 13 percent to the lowest level since 1999. Once information has been designated as classified by an original classifier, many other documents can be derivatively classified. Despite the drop in original classifications, derivative classification decisions increased. Further, the number of pages being reviewed for automatic declassification declined by 14 percent, and the number of pages declassified declined by 16 percent in 2008.

The report also indicated that the federal government spent a little less during the last year of the Bush administration on both classification and declassification. However, the proportion of declassification spending to that of classification remained grossly disproportionate. According to the report, "for every one dollar the government spent declassifying documents in 2008, the government spent almost $200 maintaining the secrets already on the books, a 2 percent increase from last year."

The report included a special section on openness and secrecy trends in the Obama administration, for which the coalition gives a mixed review. The new administration has taken several steps toward its promise of "an unprecedented level of transparency." One of these was the collaborative and participatory online policymaking process for the Open Government Directive. Using social media tools, the government solicited public input on potential open government recommendations. This was the first effort to use the Internet to widely and actively

engage the public in policymaking. However, the report indicates that there is an "undefined connection between the recommendations developed during the process and what will be presented to the President." This raises concerns about the effectiveness of the process, but the Open Government Directive has not yet been released, so it is impossible to know how public input factored into policymaking at this time.

The Obama administration also issued a new Freedom of Information Act (FOIA) memorandum that directs FOIA to be applied with a presumption of openness and agencies to release records in anticipation of public interest. Moreover, the new memo included important language about enforcement and accountability. The memo orders that the chief FOIA officers of each agency recommend adjustments to agency transparency practices, personnel, and funding as necessary. The report cited two lawsuits, *CREW v. EPA* and *CREW v. Council on Environmental Quality*, in which the government released material previously withheld under Exemption 5 of FOIA after reviewing it under the new guidelines.

The *Secrecy Report Card* also noted some actions that cloud the Obama administration's early transparency initiative. The Obama administration has issued seven signing statements, most of which challenge specific provisions of law. However, the report admits Obama's signing statements have "not been as expansive or specific as his predecessors." In addition, the administration has also maintained the Bush administration's claims of state secrets in three court cases and has argued for its constitutionality in an amicus brief to the U.S. Supreme Court in a fourth case. Rooting the privilege in the Constitution, according to the report, "could hinder Congress's legal ability to regulate it."

Additionally, the 2009 report card includes a section highlighting fiscal transparency efforts. In particular, the report is critical of the differing commitments to transparency in the financial bailout and stimulus legislation. According to the report, FinancialStability.gov, the public face of the bailout, lacks reports from Treasury, the Federal Reserve, the Federal Deposit Insurance Corporation, and other executive branch agencies. The public face of the stimulus, Recovery.gov, however, is far more comprehensive, providing "information for accountability from a variety of sources."

Overall, the report presents a mixed record for both the last year of the Bush administration and the first few months of the Obama administration. Patrice McDermott, Director of OpenTheGovernment.org, stated, "Promising trends began to develop in the last year of the Bush Administration, but we have a long way to go to return to the level of government openness and accountability that existed before the September 11 attacks."

Majority of Americans Support Food Safety Reform, Poll Finds

Eighty-nine percent of Americans support more aggressive food safety regulation, according to a poll commissioned by The Pew Charitable Trusts. The findings could place added pressure on Congress as it considers whether to make food safety reform a top legislative priority in 2009.

According to an outline of the poll's key findings, 89 percent of voters support broad reform of the food safety net, "including 61% who strongly support this."

The poll also probed respondents for their views on specific policy ideas. At least 90 percent voiced support for better systems for tracking food through the supply chain, more frequent government inspections of food facilities, and stronger regulation of imported food.

Americans would continue to support increased regulation and inspections even if it meant higher grocery bills, according to the Pew poll. "72% say it would be worth it to pay between 3% and 5% more in grocery costs to have these new safety measures—this is true among lower-income (77% worth it), middle-income (74%), and higher-income voters (69%)."

Hart Research Associates and Public Opinion Strategies conducted the poll. The pollsters surveyed 1,005 registered voters between June 29 and July 3. The results carry a 3.1 percent margin of error.

The poll results lend weight to arguments in favor of increased regulation of the food industry. Advocates have been increasingly calling for more protective food safety standards and more diligent enforcement, citing high-profile recalls and contamination scares that have made headlines over the past few years.

In June, for example, the Food and Drug Administration (FDA) warned consumers about a batch of Nestlé refrigerated cookie dough which had become contaminated with *E. coli* bacteria. Nestlé recalled all packages of the cookie dough, but not before dozens had been sickened.

The cookie dough was manufactured in a Danville, VA, plant. However, FDA investigators found no traces of *E. coli* at the plant, leaving investigators bewildered.

The uncertainty surrounding the cookie dough investigation is not uncommon. In the summer of 2008, the FDA spent months trying to figure out the cause of a salmonella outbreak that sickened more than 1,000 people. Initially, FDA focused on tomatoes but later identified Mexican-grown jalapeño peppers as the culprits.

To help public officials during future investigations, FDA has launched a Reportable Food Registry where industry and local officials can report food safety problems "when there is reasonable probability that an article of food will cause serious adverse health consequences."

Federal, state, and local officials hope the registry will allow investigators to more quickly identify the scope of foodborne illness outbreaks. By linking reports from a variety of sources, the registry could reveal geographic or illness patterns caused by the same or similar foods. "Working with the food industry, we can swiftly remove contaminated products from commerce and keep them out of consumers' hands," said Michael R. Taylor, a senior advisor at the FDA.

Congress mandated the creation of the registry in the Food and Drug Administration Amendments Act of 2007. Congress gave FDA one year to create the registry. FDA missed the deadline, which passed in September 2008.

Congress is considering further legislative reforms to the food safety system. On July 20, the House passed the Food Safety Enhancement Act of 2009 (H.R. 2749) by a vote of 283-142.

The bill would give FDA the authority to pull risky products from store shelves. Currently, FDA cannot mandate a recall. Instead, the agency works with industry to orchestrate voluntary recalls. The bill would also require more frequent inspections of food facilities. To pay for the inspections, the bill would allow FDA to charge food facilities an annual $500 registration fee.

In the Pew poll, 66 percent of respondents said they supported the registration fee program.

In the Senate, reform efforts have lagged. Sen. Richard Durbin (D-IL) introduced a bill in March with bipartisan support, but no hearings have been held. Durbin's bill is similar to the House version, but it does not include the registration fee provision.

Debate over other congressional priorities further clouds the forecast for successful passage of any reform package in 2009. Comprehensive food safety reform is likely to take a back seat to health care and finalizing FY 2010 appropriations.

Sunstein Confirmed as Obama's Regulatory Chief

On Sept. 10, the Senate confirmed Cass Sunstein as the administrator of the White House Office of Information and Regulatory Affairs (OIRA). Sunstein's nomination had been stalled by several senators who were concerned about the nominee's views on such issues as animal rights and citizens' right to bear arms. The Senate confirmed Sunstein by a 57-40 vote.

Sunstein is a distinguished academic and author who served on the University of Chicago Law School faculty with President Barack Obama, where they became friends. Sunstein subsequently moved to Harvard Law School. He worked briefly in the Department of Justice's Office of Legal Counsel before embarking on an academic career. He served as a special adviser to Peter Orszag, director of the White House Office of Management and Budget (OMB), while awaiting confirmation.

Obama nominated Sunstein April 20 to lead OIRA, the small office within OMB that reviews proposed and final regulations and paperwork requirements. The office also has responsibilities over federal statistics, dissemination of information, and general information resources management.

Sunstein's nomination was controversial. Obama's choice to lead this powerful but little-known office drew criticism from the left because of Sunstein's ardent support of the use of cost-benefit analysis, an economic tool that has been used to weaken the stringency of federal regulations

since the Reagan era. He has also argued for greater control by OIRA over aspects of the regulatory process at the expense of agency authority.

In his May 12 confirmation hearing before the Senate Homeland Security and Governmental Affairs Committee, Sunstein portrayed himself as a pragmatist, one who would not use economic analysis as a straitjacket for regulations. In pledging to look to the law first for regulatory guidance, Sunstein tried to distance himself from past regulatory czars who strongly supported economic analysis to judge the adequacy of health, safety, and environmental rules. The committee approved Sunstein's nomination on May 20 with only one dissenting vote.

His confirmation by the full Senate, however, was stalled by a series of objections from conservatives to his views on animal rights and the Second Amendment. Sens. Saxby Chambliss (R-GA) and John Cornyn (R-TX) placed holds in sequential order to delay action on the nomination because of Sunstein's controversial views that animals should enjoy meaningful legal rights, including the right to sue. Although Sunstein worked to assuage the concerns of those who raised objections to his views, these and subsequent holds kept the Senate from debating the nomination before the chamber's August recess.

Facing what looked like a series of rotating holds by Republican senators, Senate Majority Leader Harry Reid (D-NV) scheduled a cloture vote – a Senate procedural motion to end the delaying tactics – upon the Senate's return in September. On Sept. 9, senators invoked cloture in a 63-35 vote, formally ending debate on the nomination. They voted to confirm Sunstein as administrator the following day.

The agenda for the new OIRA administrator is daunting. Obama pledged during the presidential campaign to address both financial and social regulatory issues and to overhaul the way government regulates these sectors. OMB Watch and many others have argued for years that the current regulatory process is badly broken. It is characterized by political interference, substantial delay, biased procedures, too little agency discretion, science superseded by politics, and far too few resources for agencies to meet their legal mandates. (Summaries of OMB Watch's recommendations for reforming the regulatory process are on our website.)

The administration has already begun to address some problems. OIRA conducted a process by which agencies and the public (for the first time) could submit comments about how to reform the executive order that defines much of the current process by which regulations are developed and reviewed. (Read the comments submitted here.)

It has also encouraged the public to participate in improving regulatory decision making by publicly vetting changes to the government's e-rulemaking platform, Regulations.gov.

In addition to regulatory reform, the administration has pledged to make science a centerpiece of its decision making, to make the administration more transparent than any other, and to change the government's approach to preempting state regulatory authority.

In OMB Watch's statement on Sunstein's confirmation, Executive Director Gary D. Bass said, "We expect Cass Sunstein to oversee a regulatory system that puts the public first by allowing federal agencies to write and enforce the regulations that protect us in our everyday lives," and that OMB Watch looks forward to working with the staff at OIRA "to promote a regulatory agenda that actively works to protect the public."

Supreme Court Rehears Citizens United Case; Decision Could Impact Nonprofits

Citizens United, a 501(c)(4) nonprofit organization, developed and sought to run a film about candidate Hillary Clinton during the 2008 presidential primary. The group also wanted to promote the film with several ads. The highly critical movie was partially funded by corporate contributions, which the Federal Election Commission (FEC) said was a violation of the Bipartisan Campaign Reform Act of 2002 (BCRA). In a federal lawsuit recently reheard by the U.S. Supreme Court, Citizens United charges that ads for the film should not be subject to donor disclosure and disclaimer requirements and that the BCRA provisions enforced by the FEC are unconstitutional.

BCRA, sponsored by Sens. John McCain (R-AZ) and Russ Feingold (D-WI), prevents corporations (including nonprofit organizations) and labor unions from using general treasury funds to pay for any "electioneering communications" – broadcast messages that refer to a federal candidate 30 days before a primary election and 60 days before a general election.

The case was first heard by the Supreme Court in March, but in a surprising move a few months later, the Court asked Citizens United and the government to reargue the case in order to give the Court the opportunity to consider a broader set of questions regarding campaign finance law. In June, the Court requested an examination of whether two previous decisions that upheld the government's right to limit corporate expenditures in political campaigns should be overturned, specifically the 1990 decision in *Austin v. Michigan State Chamber of Commerce* and the 2003 decision in *McConnell v. Federal Election Commission* that dealt with BCRA.

The Court met in special session on Sept. 9 for a second hearing of *Citizens United v. Federal Election Commission*, and one outcome may be that the Court allows businesses and unions to spend without restraint in a way that could help their candidates of choice. At issue in the case is whether corporate money can be used to directly advocate for the election or defeat of federal candidates.

Shortly after arguments concluded, the Court released audio to the public. *The New York Times* reported, "The makers of a slashing political documentary about Hillary Rodham Clinton were poised to win. The only open question was how broad that victory would be." The film was called *Hillary: The Movie*.

Elena Kagan, the Solicitor General of the United States, all but said "that a loss for the government would be acceptable, so long as it was on narrow grounds." Suggesting that the

campaign finance restrictions were perhaps not meant to be applied to a corporation like Citizens United, Kagan argued that if the Court overturned *Austin*, companies could use the funds to promote political positions at odds with the interests of some of their shareholders, and therefore, the Court should not go that far, even if it finds in favor of Citizens United.

While Chief Justice John Roberts and Justice Samuel Alito appear to remain skeptical of that argument, corporations are not stripped from political speech entirely during campaigns. Rather, corporations and unions pay for federal election spending through political action committees.

Further, the Court has supported the ban on independent spending by corporations in the past. In *McConnell*, the Court upheld the electioneering communications provision, and *Austin* upheld a state's right to restrict direct corporate spending in political campaigns.

Theodore Olson, representing Citizens United, remained committed in calling for a broad ruling by reversing the two precedents. This prompted Justice Sonia Sotomayor's first question as a justice. "Are you giving up on your earlier arguments that there are statutory interpretations that would avoid the constitutional question?" she asked.

The Court could ultimately avoid constitutional questions by ruling that BCRA does not apply to video-on-demand services, which is where Citizens United's film would have aired in 2008, though Court watchers say such an opinion would have been more likely in March. Another possible outcome is expanding an exemption to the general ban on corporate campaign spending for some nonprofit corporations. This approach would be based on a previous Supreme Court case, *FEC v. Massachusetts Citizens for Life*, which created what is known as the "MCFL exemption." "MCFL groups" are "organization[s] formed for the express purpose of promoting political ideas, have no shareholders, are not established by a business corporation or labor union, and do not accept contributions from those entities," according to the Court. Expanding the scope of *MCFL* to include groups like Citizens United could allow MCFL groups to take some corporate funding.

Observers have speculated on what the outcome of the Citizens United case could mean for nonprofit corporations. Past examples show that many business corporations are reluctant to spend directly on political ads, presumably for fear of alienating customers, shareholders, and employees. Instead, they channel such spending through groups like Citizens United, the U.S. Chamber of Commerce, and trade associations, almost all of which are tax-exempt, nonprofit corporations. If the Court's decision allows a significant increase in such spending, as supporters of the current prohibition strongly believe will occur, it will create pressure in two areas when it comes to tax-exempt (but not charitable) entities.

First, these entities can only maintain a 501(c)(4) tax-exempt status or a 501(c)(6) status if political activity is not their "primary" activity, which is not clearly defined.

Second, it is not clear what constitutes "political activity." The Internal Revenue Service (IRS), for example, applies "a facts and circumstances" test to determine political activity, and that test

is both subjective and ambiguous at best; the IRS is the agency charged with oversight of nonprofit organizations' tax-exempt status. The FEC, responsible for enforcing campaign finance laws, applies equally vague tests.

The Court will now work toward a decision, and a final ruling may not be complete until after the new Court term begins Oct. 5.

Assessing the Impact of the Social Innovation Fund

The Social Innovation Fund (SIF) is the Obama administration's major philanthropic effort, with the White House requesting $50 million for the program earlier in 2009. While it is clear that the administration is interested in innovation within the nonprofit sector, organizations are uncertain about how the program will impact their work.

America Forward, the coalition of nonprofit organizations that made the policy recommendations that led to the Edward M. Kennedy Serve America Act, which authorized the program, says the SIF is "intended to increase the impact of social entrepreneurs and innovative nonprofit organizations by scaling proven programs and investing in promising new ideas. In essence, it enables a new role for government to partner with social entrepreneurs and philanthropy to fundamentally improve our nation's problem-solving capacities." It will achieve this by providing "grants to existing grantmaking institutions that will in turn invest in growing innovative, results-driven nonprofits. Both grantmaking institutions and the nonprofit grantees will match the Fund's investment, generally resulting in a 2:1 match."

The impact that the SIF will have on the nonprofit sector remains to be seen. However, it may not impact the sector in ways initially imagined. For instance, it is widely believed that a $35 million expenditure (the appropriation proposed in the House, a $15 million decrease from the White House's request) toward the nonprofit profit sector will really benefit community organizations. Details of the SIF, however, put that premise into question. "Of the total amount, 5% comes off the top for evaluation and R&D, and only 10% will go as grants awarded directly to 'community organizations,'" according to an article by Rick Cohen, a columnist for *Blue Avocado* and the author of the "The Cohen Report" for *Nonprofit Quarterly*.

Community organizations can receive funds that are regranted from foundations, but they will have to match the dollar amount of the funds received. This will make it difficult for local, community-based groups to receive these funds, because many of these organizations "are neither funded by nor visible to private foundations," according to Cohen. Then, even if they manage to get on the radar of the private foundations, providing matching funds can prove to be a major obstacle.

"Unless they're already in the embrace of well-connected foundations and their initiatives, community nonprofits – at the heart of social innovation – are unlikely to find themselves winners in the foundation-dominated Social Innovation Fund," says Cohen. Furthermore, the statutory requirements for measured effectiveness, evidence-based decision making and so forth

may sound good on paper, but in practice, "this provides an institutional mandate for centralized regulation and extensive paperwork," according to a blog post by Jeff Trexler, a professor at Pace University. This level of regulation and paperwork could be another barrier for small community nonprofits.

"Many entrepreneurial leaders of the nonprofit sector toil for small organizations in out-of-the-mainstream locales. They may not be in line to get much from the Social Innovation Fund unless they are willing to sign up as local affiliates of the designated national innovators," commented Cohen in a May article for *Nonprofit Quarterly*. "It would be important for the administrators of the fund to ensure that they make special effort to find innovation wherever it occurs in the nonprofit sector – and to build the networks and 'infrastructure' that support and sustain nonprofit innovation," he continued.

Foundations, on the other hand, stand to benefit tremendously from the SIF. Of the total amount of the SIF, "85% will go in grants sized between $1 million and $5 million to 'grantmaking institutions'," according to Cohen. The foundations will have to match the grant funds before they regrant anything, but this will likely not be an issue for large foundations. Foundations are interested in the program to gain access to the administration and to receive the administration's endorsement, not to receive the funds, said Cohen.

Vince Stehle, a program director at the Surdna Foundation, wrote in an article for the *Chronicle of Philanthropy* that the SIF can become a distraction if the sector focuses all of its energy on this small fund. "For foundations, the more important point is to challenge the conventional wisdom that philanthropy uncovers great new programs and the federal government will always bring the big money to carry out the great ideas on a larger scale. That's not always the case," wrote Stehle.

Stehle cites several examples where the federal government and not philanthropy led the way in new, innovative ideas. He cites the Internet as an example of a federally supported program that "sparked the most sweeping generation of innovations in the history of information technology. In that case, the government was the sole sponsor of development work for 20 years before most people in philanthropy had even heard of the Internet," wrote Stehle. Thus, with a public-private partnership, innovative ideas can come from either direction. Sometimes it is useful for philanthropy not to lead, but to follow federal money, wrote Stehle.

In remarks given at the White House in June, President Obama spoke about the importance of the nonprofit sector in addressing societal ills and in creating and implementing innovative programs. "Solutions to America's challenges are being developed every day at the grass roots – and government shouldn't be supplanting those efforts, it should be supporting those efforts," Obama said. These remarks appear to show that the administration understands the importance of the innovations that solve our communities' problems and that those solutions originate from grassroots or community-based organizations. It remains to be seen, however, if those same organizations will have the opportunity to secure some of the SIF funding to bring such innovative ideas to a larger audience.