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The Watcher
September 25, 2012 Vol. 13, No. 18

In This Issue

New Senate Bill Would Advance Spending Transparency

The latest offering from the Senate on federal spending transparency is far less ambitious that its House counterpart, but if enacted, it would be a big win for transparency and accountability. There would still be some areas of spending transparency to be addressed in future legislation, but if the Senate's version of the Digital Accountability and Transparency Act (DATA Act) becomes law, the public will have a clearer picture of federal spending and new tools for accountability.

A Brief History of the DATA Act

Chairman of the House Oversight and Government Reform Committee Darrell Issa (R-CA) introduced the DATA Act in the House in June 2011. At the same time, Sen. Mark Warner (D-VA) introduced an identical bill in the Senate. The House's DATA Act is a wide-ranging bill that would establish a new, independent agency to oversee spending transparency, overhaul federal computer systems, create new data standards, and enhance recipient reporting. A slightly different version was passed by the House in April 2012 by voice vote with strong bipartisan support.

Recognizing the need for improved federal spending transparency, the Senate's Homeland Security and Governmental Affairs Committee held a hearing in July on the state of transparency. (You can read OMB Watch's summary of the hearing here). At the hearing, Warner appeared as a witness and said that his opinion on the DATA Act has "evolved." The result of that evolution and the adoption of feedback from colleagues and advocates in the transparency community have resulted in the version of the DATA Act that Warner introduced on Sept. 21 along with Republican co-sponsor Rob Portman (OH). This new version is slimmer than the House's, but it would still accomplish much for transparency and accountability.

What's in the New DATA Act?

- *Payment data from the Treasury Department*

  Unlike the current data on USAspending.gov, which displays only what federal agencies report they have promised to pay contractors and grant recipients, Treasury payment data would show users information on the money that actually went out the door. Both the House and the new Senate versions of the DATA Act would require the online posting of this information. This is an essential element of federal spending transparency and will provide a critical data quality check between agency obligation information and recipient reports. The DATA Act will put the nation's checkbook online.

- *An expansion of USAspending.gov to include spending data beyond contracts, grants, and loans*

  The DATA Act will expand USAspending.gov so that users will be able to analyze not just the $2 trillion paid to contract and grant awardees (and aggregate amounts paid to Social Security recipients), but the additional $1 trillion spent by federal agencies on facilities, salaries, and other expenses used to carry out the hundreds of programs run by the federal government. The previous version of the DATA Act would replace USAspending.gov with a new website, but the new version will build on the existing site that has been online since 2008. Data on budget authority, outlays, and obligations for every agency, component of an agency, appropriations account, and program will be included on the USAspending.gov website, bringing users closer to a true one-stop shop for federal spending information.

- *A spending transparency and accountability board*

  The centerpiece of the House-passed version of the DATA Act is the creation of an independent board to succeed the Recovery Accountability and Transparency Board that was successful in implementing the transparency provisions of the Recovery Act. That independent board would have its powers extended to all of federal spending while also taking control of USAspending.gov from the Office of Management and Budget (OMB), have subpoena power, be charged with the creation of common data elements and standards, and have a limited ability to promulgate requirements to agencies.

The new Senate version scales this board back quite a bit. Still called the Federal Accountability Spending and Transparency Board (FAST Board), it would be smaller and not independent. Intended to replace President Obama's Government Accountability and Transparency Board (GAT Board), it would "provide strategic direction" for federal spending transparency, monitor the creation of data standards and the publication of spending data, as well as look for ways to reduce waste, fraud, and abuse.

- *The creation of data standards*

  Currently, federal spending data formats and elements vary with each agency, making it difficult to mix and match data for central reporting. The Senate's DATA Act would charge the Treasury with establishing government-wide financial data standards, as well as create common data elements such as award identifiers. The bill calls for the standards to allow systems in different agencies to talk to each other, which will significantly improve the ability of websites like USAspending.gov to display federal spending data in more user-friendly ways.

  This is also a major piece of the House version of the DATA Act. The Senate version contains similar language that would require spending data be created so that it can interact with multiple systems and use non-proprietary, platform-independent formats.

- *Act implementation and data quality reporting*

  Data quality problems have plagued USAspending.gov for years, and with this in mind, the authors of the Senate DATA Act have added provisions that work to ensure that agencies produce high-quality data. It requires the inspector general for each agency to report annually to Congress and the public on the accuracy, timeliness, and completeness of the spending data reported by agencies. The Government Accountability Office (GAO) would be responsible for reviewing these reports and create a ranking of the agencies based on the quality of their reported data.

  This new version of the DATA Act also holds agencies accountable in compliance with the implementation of the act. To do this, it will require the FAST Board to report annually to Congress and the public on the progress agencies are making in implementing the DATA Act. It will also require the director of OMB to report every 90 days on the cost of, progress achieved toward, and status of each milestone required in the implementation of the act.

How the DATA Act Can Be Strengthened

The DATA Act would accomplish a lot, but it would also leave important information on how federal funds are spent in the dark. Congress and the Obama administration would still have to address the problems with the existing corporate identification system, DUNS, which is an expensive and proprietary system. They would also have to extend federal funds recipient reporting to all tiers of sub-recipients; currently, we can see only two links in that chain: prime recipients and the first tier of sub-recipients.

Also not currently available to the public and Congress is the text of the contracts and agreements that the government makes with private entities, which would allow Congress and the public to know exactly what the government is supposed to be getting for what. And lastly, making detailed performance information available to Congress and the public is the first step in tying budget decisions to program improvement. The DATA Act is silent on performance information, but the technical infrastructure that would be built to meet the bill's requirements could facilitate a move toward relating program performance data to spending data.

The current battle over the federal budget and the looming, so-called "fiscal cliff" illustrate the need for the DATA Act. The first round of cuts under the Budget Control Act (BCA), set to go into effect in January 2013, has posed a very important question: "How will the hundreds of federal programs be impacted by $110 billion in across-the-board cuts called for in the BCA?" Progress in spending transparency like the kind envisioned in the DATA Act is aimed at allowing the public to be able to answer questions like these. Congress and the public have the right to examine the nation's checkbook, and having access to standardized, fine-grained spending data will allow us to hold officials accountable for budgetary decisions.

Tax Treatment of Capital Gains and Stock Trades Receives Attention as Congress Considers Tax Reform

On Sept. 20, the two congressional tax-writing committees held a joint hearing on the tax treatment of capital gains – gains on assets such as stocks, real estate, and other forms of wealth. The combined hearing – which brought together members of the Republican-controlled House Ways and Means Committee with members of the Democratically controlled Senate Finance Committee – demonstrated the commitment of both parties to address tax reform issues soon after the elections. Such reforms may come as part of a larger budget package intended to prevent the federal government from going over a "fiscal cliff" on Jan. 2, when a host of Bush era-tax cuts are set to expire and across-the-board spending cuts required by the 2011 Budget Control Act will go into effect.

Media reports suggest that Senate Majority Leader Harry Reid (D-NV) is preparing to ask Senate Minority Leader Mitch McConnell (R-KY) to appoint senators to a bipartisan committee that would negotiate details of such a tax reform package. Sen. Jim DeMint (R-SC), an ardent tax-cutter and Tea Party supporter, signaled the seriousness of the effort in September when he said, "We might as well cut a deal. If Republicans want to maintain the defense, we're going to have to give tax increases to Obama."

Sen. Kent Conrad (D-ND), chairman of the Senate Budget Committee, has said that Congress may act to give tax writers six additional months to work on the package, possibly extending the current Bush-era tax cuts in the meantime. Conrad is reportedly part of a new bipartisan group of eight senators negotiating over a new deficit reduction proposal. In addition to Conrad, other members of the group include Sens. Lamar Alexander (R-TN), Michael Bennet (D-CO), and Tom Coburn (R-OK). Under their proposal, if Congress failed to enact a new package within the six-month window, instead of the across-the-board spending cuts that would be triggered under the current law, the group's alternative deficit plan would be "triggered."

The group's plan is reportedly modeled on recommendations from the commission informally known as the Simpson-Bowles commission, which was chaired by former Republican Sen. Alan Simpson of Wyoming and former President Bill Clinton’s White House chief of staff, Erskine Bowles. The commission’s plan failed to receive the necessary support of 14 out of 18 members to be forwarded to Congress for consideration. Since then, the two co-chairs have been speaking to the media about the need to enact something similar to their plan. They recently helped launch a new group, Fix the Debt, to advocate for their ideas.

The original Simpson-Bowles plan would have achieved 26 percent of its deficit reduction from revenue increases, 57 percent from spending cuts, and 17 percent from interest savings. Discussions of a second version of the plan appear to drifting further to the right, especially on potential cuts to the Medicare program.

Capital Gains Hearing

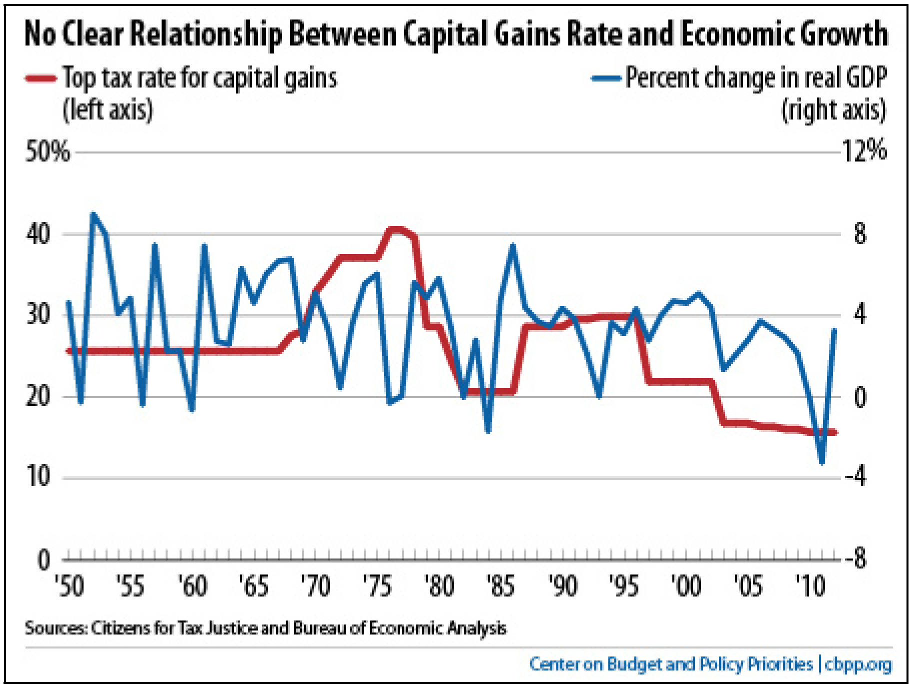
Two important reports on the tax treatment of capital gains were released in advance of the congressional hearing – one from the Center on Budget and Policy Priorities and another from Citizens for Tax Justice. Together, the two reports describe the highly regressive nature of current law governing capital gains taxes and how little benefit is derived from treating this income preferentially.

Highlights from the reports include the following:

- **Capital Gains Are Taxed at Much Lower Rates than Ordinary Income:** The top rate on most capital gains is 15 percent, while the top tax rate on ordinary income is 35 percent. In addition to the lower tax rate, capital gains taxes are not paid unless the asset is sold, which may not happen. About half of all capital gains are never taxed for this reason. Moreover, because capital gains taxes are based on the cost of the asset upon acquisition, the base price is reset when someone dies and passes an asset on to an heir. This prevents taxation on the gain that had accrued through that date. This tax treatment of capital gains upon transfer at death is a major reason why the estate tax is so important.

- **The Wealthy Receive Most of the Benefits of Low Capital Gains Tax Rates:** Low tax rates on capital gains are highly regressive because most capital gains accrue to the very wealthy. According to the Tax Policy Center, a joint project of the Brookings Institution and Urban Institute, the top one percent of taxpayers will receive 71 percent of all capital gains in 2012. The top 0.1 percent of taxpayers will receive 47 percent. The preferential treatment of capital gains is a major reason that the tax code often violates the "Buffett rule," which says that high-income investors should not have lower tax rates than wage earners.

- **Low Tax Rates on Capital Gains Do Not Help the Economy:** There is no evidence that low tax rates for capital gains help spur economic growth. The Tax Policy Center has found no statistically significant correlation between capital gains rates and real GDP growth during the last 50 years. The primary reasons are that productive investment decisions are based not on tax rates, but on risk and rate of return, and because lower taxes on capital gains accrue to the very wealthy, who do not spend the proceeds and instead save them, which does nothing to boost economic demand.



- **Lower Capital Gains Tax Rates Encourage the Use of Tax Shelters:** The preferential treatment of capital gains has helped create a cottage industry of tax experts in the accounting industry whose primary focus is devising ways to convert the earned income of high-earning individuals into capital gains, which are then taxed at the lower rate. One egregious example is the treatment of income of highly paid hedge fund managers, most of whose income is taxed at the lower capital gains rate.

- **Low Capital Gains Taxes Are Costly:** According to the Joint Committee on Taxation, the preferential rates on capital gains and long-term dividends together will cost $457 billion between 2011-2015 when compared to what would be collected if they were taxed at the same rate as ordinary income.

Under current law, the Bush-era tax cuts are scheduled to expire at the end of the year. Unless Congress enacts a new tax package, the tax rate on most capital gains will rise from 15 to 20 percent in 2013. The Obama administration has proposed continuing the current, lower rate for individuals earning less than $200,000 per year and couples earning less than $250,000.

Since most capital gains accrue to the very wealthy, the Obama approach would recapture most of the lost revenue that would occur if the Bush rules were simply extended. The Treasury Department estimates the 10-year savings will be $36 billion, a significant sum. However, this is still less than the hundreds of billions of dollars that would be saved by instead treating capital gains like ordinary income.

Financial Transactions Tax Bill Introduced in the House

Rep. Keith Ellison (D-MN) introduced legislation on Sept. 14 that would level a 0.5 percent tax on all stock trades, 0.1 percent on bond trades, and 0.005 percent on derivatives trades. The bill is the Inclusive Prosperity Act (H.R. 6411).

In introducing the bill, Ellison said it would collect billions of dollars in new tax revenue annually and also help hinder speculative high-speed computer trading. According to a statement from Ellison's office:

> Almost 30 nations have some form of a financial transaction tax and the U.S. had a similar tax from 1914 until 1966. The United Kingdom has had a tax on stock trades for decades – the same rate proposed in HR 6411 – and their volume of trading has grown robustly. Supporters of a form of financial transactions tax include business leaders such as Microsoft founder Bill Gates, Dallas Mavericks' owner Mark Cuban, and Berkshire Hathaway chairman and CEO Warren Buffet.

A similar set of bills (H.R. 3313, S. 1787) were introduced by Rep. Peter DeFazio (D-OR) and Sen. Tom Harkin (D-IA) on Nov. 2, 2011. The identical bills, dubbed the Wall Street Trading and Speculators Tax Act, would impose a 0.03 percent tax (three cents for every $100) on purchases of stocks, bonds, and derivatives. The House bill has 36 co-sponsors, and the Senate bill has three co-sponsors. An analysis of that bill by the bipartisan Joint Committee on Taxation indicated that it would raise $352 billion in new revenues over nine years.

One Year Later, Delivering on the Commitments of the Open Government Partnership

Sept. 20 marked the one-year anniversary of the launch of the global Open Government Partnership (OGP) and the release of the U.S. National Action Plan detailing the Obama administration's commitments to strengthen transparency in the federal government. The partnership and the administration's implementation efforts have both made significant progress toward their goal of more open and responsive governments in the U.S. and worldwide.

Background

President Obama planted the seeds of the partnership in September 2010 when he called on countries around the world to make "specific commitments to promote transparency." The Open Government Partnership initiative was introduced to the world in July 2011 and formally launched in September 2011. It will host an anniversary event on Sept. 26 in New York.

Through OGP, partner countries agree to develop plans to strengthen open government in their nations and endorse a joint Open Government Declaration. OGP's membership now stands at an impressive 57 countries.

Status of U.S. Commitments

The U.S. plan committed to 26 specific open government reforms, ranging from improvements in the Freedom of Information Act (FOIA) and declassification to increased spending transparency and public participation. The administration was expected to release a self-assessment of the plan's implementation after one year, but officials now say it will be released in early 2013. However, OpenTheGovernment.org published an independent progress report. [Disclosure: OMB Watch is a member of the OpenTheGovernment.org coalition and contributed to the report.]

The report shows that the administration has delivered on several key commitments and is in the process of implementing others. However, on some commitments, there has been little visible progress to date.

For instance, following up on the plan's commitment to modernize policies for managing government records, President Obama issued a well received memorandum in November 2011, which was followed by a directive with specific requirements in August.

To implement the commitment to reform government websites, the administration released its Digital Government Strategy in May. Under the strategy, OMB is due to update the seven-year-old memo governing federal websites by November.

The administration also followed through on its promise to encourage public participation by redesigning Regulations.gov to be easier to use. The updated site launched in February.

Progress in other areas is wanting. For example, the plan promised that agencies would provide more information on their regulatory compliance and enforcement activities, as originally called for in a January 2011 memorandum. But few agencies have published their plans for doing so.

Partnership Progress

The new international partnership has also made progress in supporting the development and sustainable implementation of open government reforms around the world. In August, OGP published and sought comment on a draft strategic plan for the partnership, which will outline goals to guide the partnership's future work. In addition, OGP is in the process of standing up an independent review mechanism to supervise the evaluation of country action plans. The partnership has already surveyed governments and civil society on the status of implementation efforts and the effectiveness of the partnership.

Government and civil society participants are engaging with the partnership in new ways – a sign of the initiative's relevance. For instance, European participants have organized a regional meeting in October to share ideas, and meetings in other parts of the world are being planned.

Next Steps

The one-year anniversary of the plan's launch is a good opportunity for the administration to capitalize on the initiative's momentum by releasing a plan to complete implementation of the remaining commitments by the time it publishes its self-assessment early next year.

After implementing their initial plans, countries are expected to develop a new round of plans to ratchet up their open government practices even more. The second round of plans will account for the progress that has been made and incorporate lessons learned from the first round. We hope the next U.S. plan will provide more detail about the government's commitments and how they will be realized. An analysis of country plans conducted by Global Integrity found that the U.S. plan shared a shortcoming common to several other countries: its commitments were not measurable and did not include specific timelines. Some countries are already rewriting their plans to address this criticism: Mexico released an updated plan in August, adding specific compliance dates for each commitment. By following the same approach, the U.S. could strengthen its implementation efforts.

EPA Proposal Missing Improvements to Water Quality Reports

Under the Safe Drinking Water Act, water utilities are required to provide annual drinking water quality reports to consumers. These reports, usually attached to a customer's water bill, contain information on any contaminants in the water, any violations of water quality standards, and sources of public drinking water. But a new proposal being considered by the U.S. Environmental Protection Agency (EPA) could actually reduce public access to these water quality reports.

Water Quality Reports

The water quality reports, known as Consumer Confidence Reports, describe a system's water sources, risks to the water system, contaminants detected in the water supply that violate EPA's health standards, and the potential effects of any violations. The reports also list other violations that occurred in the past year and provide educational information about water contaminants. The purpose of these reports is to raise public awareness about possible risks to the public's drinking water; however, they have been criticized for being overly technical, complex, and difficult for the general public to understand or act upon. For instance, a 2003 report by the Natural Resources Defense Council (NRDC) surveyed 19 cities and found several problems with the reports, including misleading claims and omitted information.

As required by a current EPA rule, community water systems typically mail or otherwise directly deliver one copy of the water quality reports to each customer. However, the requirement for direct delivery may be waived by the governor of a state for water systems serving fewer than 10,000 persons. Most water companies mail paper copies of the reports to paying customers, usually in their water bills. In addition, water companies are required to make good-faith efforts to notify consumers who do not directly receive water bills, such as apartment tenants and workers in an office building. Large water systems are required to post their reports online, as well to provide individual reports to customers.

EPA began reviewing the rule on water quality reports last year as part of the retrospective review of rules ordered by the Obama administration in January 2011. Water utilities have been complaining about the cost of sending out reports to their customers for some time. While there is no prohibition against electronic delivery of the reports, it is unclear how e-delivery meets the requirements of the Safe Drinking Water Act.

EPA's Proposal

On Sept. 11, EPA released a notice of a public meeting and request for public comments on a new proposal that would allow water utilities to electronically deliver water quality reports to the public. The proposal assesses various electronic methods for water companies to meet the Safe Drinking Water Act requirement. For example, one possible method would allow the water company to mail bill-paying customers a notification with a website address where the reports can be viewed; the notification could be a link on the consumer's water bill, an item in a community newsletter, or an insert or postcard in the water bill. Other proposed methods include: e-mailing the reports directly to consumers as an electronic file attachment (e.g., portable document format (PDF)) or e-mailing the reports to consumers with the text and tables of the report inserted into the body of the message.

Although the proposal lays out various options for electronic delivery, it fails to provide clear standards for water companies to follow. Without clear standards in place, the proposed changes could actually weaken public access to the information on local water supplies required by the Safe Drinking Water Act.

The public cannot be compelled to have an e-mail address or to make that address available, so there is no guarantee that a water utility would be able to send out reports to their customers' e-mail addresses. Other potential problems are a lack of software compatibility to open links and e-mail spam filters.

Additionally, just printing website addresses on customer water bills is problematic for several reasons. For one, if the links are buried in the fine print of a routine water bill, very few people are likely to notice the link and visit the site that contains the report. Moreover, almost a third of American households are still without at-home broadband Internet access; those without access are likely to reside in low-income urban neighborhoods and rural areas. In short, those citizens unable to easily track information about the quality of their water supplies are exactly those populations we would expect to be most at risk of having contaminants in their water.

Since EPA's rule requires these water quality reports to be "directly delivered" to all customers, the proposal to deliver the information via the Internet would seem to violate a key provision of the agency's own standard. Though all water companies should be required to post water quality reports online, utilities should not be able to void the requirement to add water quality information to customer bills once a year unless they know each consumer will receive the reports electronically.

The Real Issue: Making the Reports Easier to Understand

While EPA is focused on responding to industry complaints, the agency has missed the key problem with the reports: the lax design standards and resulting difficulty for the public to understand the information contained within them. EPA's review of the rule, intended to improve outdated and underperforming regulations, is the perfect opportunity to improve the readability of the reports.

Staff could design a standard template and test it with the lay public to ensure people understand the information contained in the report. EPA could also develop visual indicators in a kind of simplified dashboard display. EPA already uses straightforward indicators that facilitate a better understanding of complex information, like color-coded air quality warnings, miles-per-gallon ratings for cars, and energy usage labels for appliances. Such indicators should be adapted to measures of water quality.

To achieve these reforms, EPA would need to revise the water quality reports rule and update the templates that water systems use. It should consider ways to ensure water utilities are consistently delivering accurate *and accessible* information to the American people. Finally, EPA should conduct a public education campaign to raise awareness about the reports so consumers understand why this information is important to them.

Take Action: Tell the EPA to Standardize and Simplify Water Quality Reports and Deliver Information to Consumers By Mail and Online.

You can take action. Urge the EPA to create clearer and more stringent standards for electronic delivery of your water quality reports; require all water systems to post the water quality reports online; and redesign the reports so that it is easier for you and your family to understand the risks to your drinking water. The timeline is short, so urgent action is required – the agency is accepting comments until Oct. 11.

House Passes Anti-Environmental Package before Recess

On Sept. 21, the House passed a package of anti-environmental bills in a last-ditch effort to further the majority's regulatory reform agenda before adjourning until after the November elections. The legislation includes many measures already approved by the House that would limit the U.S. Environmental Protection Agency's (EPA) ability to curb pollution and protect our natural resources.

The legislative package, short-titled the "Stop the War on Coal Act of 2012," passed by a vote of 233 to 175 and would place far-reaching limits on EPA's authority to protect the public. The legislation is comprised of five measures, four of which have already passed the House. The fifth, H.R. 3409, would restrict the U.S. Department of the Interior's ability to issue rules affecting certain aspects of coal mining and coal production. Although the GOP has not successfully moved these bills through the Senate, the continued effort to chip away at public protections is a serious threat.

One of the bills included in the package is the Coal Residuals Reuse and Management Act (H.R. 2273), which would require the EPA to defer to states with respect to the regulation of coal combustion residuals, or coal ash, and limit federal oversight. EPA proposed two options for regulating coal ash in 2010, but a final rule has been stalled by EPA and the Office of Information and Regulatory Affairs (OIRA). H.R. 2273 would prevent EPA from regulating coal ash as a hazardous waste, one of the agency's proposed alternatives. Under the bill, EPA would be forced to regulate coal ash as if it were a less toxic waste, like household garbage, even if coal ash was not adequately regulated by the states.

EPA conducted a technical analysis of the legislation at the request of Rep. Henry Waxman (D-CA), ranking member of the Energy and Commerce Committee. As a result of the findings of the completed analysis, Democratic staff have charged that the bill does not establish any legal standard for state programs, authorize meaningful review of state programs, or ensure other appropriate criteria for the disposal of coal ash. The staff object that H.R. 2273 "has not been the subject of any Committee hearing and the final text was made available only moments before it was to be reported out of Committee." These concerns were echoed during the floor debate preceding the bill's passage. Rep. James Moran (D-VA) said that the bill would create "a patchwork of compliance." Nevertheless, the bill passed in the House in 2011, and a companion bill was introduced in the Senate.

Also included in the anti-environment package is the Clean Water Cooperative Federalism Act of 2011 (H.R. 2018), which the House also passed last year. This bill would dismantle the federal-state relationship envisioned under the Clean Water Act (CWA) by stripping EPA of its ability to object to state-approved permits under the National Pollutant Discharge Elimination System (NPDES) program, to revise state water quality standards, and to veto dredge and fill permits issued by the Army Corps of Engineers. In other words, the law would reduce federal authority to ensure high levels of water quality across the country.

OMB Watch blogged about this bill after it was introduced, cautioning that, by restricting or eliminating these important checks on state programs under the CWA, the bill would impair EPA's ability to effectively carry out its statutory duties and ensure that the goals of the act are met. Though the latest version of this legislation is presented as an effort to restore a system of cooperative federalism under the CWA, the most recent version of the bill is yet another attempt to diminish EPA's statutory authority.

The legislation also attacks control of dangerous greenhouse gas pollution. H.R. 910, the Energy Tax Prevention Act of 2011, sponsored by Rep. Fred Upton (R-MI), chair of the Committee on Energy and Commerce, would strip EPA of authority under the Clean Air Act (CAA) to "promulgate any regulation concerning, take action relating to, or take into consideration the emission of a greenhouse gas to address climate change." Ironically, Congress has failed to enact climate change legislation in any form, leaving the EPA no choice but to follow the requirements of the CAA and the U.S. Supreme Court by seeking to control emissions through regulations.

Even more far reaching is the Transparency in Regulatory Analysis of Impacts on the Nation (TRAIN) Act (H.R. 2401), which passed the House in September 2011. TRAIN would require an interagency panel of non-experts to review EPA regulations before they are issued and to submit a report to Congress on the costs of proposed regulations. This requirement is redundant and unhelpful for two reasons: first, the EPA and the Office of Management and Budget (OMB) already conduct extensive cost-benefit analyses on proposed rules, so it is unclear what the opinion of non-experts would add other than delay. Second, under the TRAIN Act, the panel's report would have to consider "cumulative costs" of proposed and final regulations, a highly speculative analysis that would artificially inflate costs and stack the deck against issuing safeguards.

Unfortunately, these assaults on environmental protections are familiar. With this final act before recess, the House demonstrated its commitment to disabling agencies and safeguards that protect the environment and natural resources. Proponents advertise the bill as a way to aid the coal industry and help the economy, but opponents argue that the bill promotes a false choice between health and environmental safeguards and a sound economy. Marty Hayden of Earthjustice commented, “Not only does this bill fail to create jobs but it exposes Americans to dangerous pollutants that cause sickness and cancer. This wrongheaded initiative is a recipe for disaster for public health and our economy.” The Natural Resources Defense Council blogged that “Congressional intervention to protect polluters over people ignores what the majority of Americans want and puts us and our country’s ability to compete at risk.”

New Court Decision Is a Blow to Political Spending Transparency Requirements that Were Already Being Evaded

On Sept. 18, the D.C. Circuit Court of Appeals overturned *Van Hollen v. Federal Election Commission* (*Van Hollen*), a lower court ruling that effectively required more disclosure of political spending. But the Court of Appeals' blow to political spending transparency is mostly a symbolic one: over the last six months, most nonprofit political advocates have found ways to skirt the disclosure requirements and keep their donors anonymous.

A bit of history: the rule at issue in *Van Hollen* was written as a result of the Bipartisan Campaign Reform Act (BCRA), often called "McCain-Feingold." According to BCRA, if an organization spends more than $10,000 per year on "electioneering communications" – that is, broadcast political ads that are aired close to the election and refer to a federal candidate but do not expressly call for the candidate’s election or defeat – then it must disclose the name and address of anyone who gave it $1,000 or more.

The Federal Election Commission (FEC) rewrote this rule and limited its application in 2007, in response to the U.S. Supreme Court's decision in *Wisconsin Right to Life v. FEC*. Three years later, the Supreme Court's decision in *Citizens United v. FEC* unleashed political spending – not only via independent expenditure-only political action committees (commonly called super PACs), but also via nonprofit organizations, which are not required to disclose their donors. As reported by *Mother Jones*:

> For all the headlines and hand-wringing about super-PACs, it is dark-money nonprofits like Karl Rove's Crossroads GPS and Americans for Prosperity that dominate the political money wars. These politically oriented groups, which keep their donors secret, outspent super-PACs 3-to-2 in the 2010 elections. Through the spring of 2012, 91 percent of advertising by independent groups came from nonprofits and big business trade groups. And a growing pile of evidence suggests that it's these nonprofits, *not* super-PACs, hauling in the bulk of corporate political cash.

Yet in *Citizens United* itself, the Supreme Court suggested that it would support robust disclosure rules, like those required by BCRA – and perhaps even regard them as essential checks on abusive political spending. The court stated that "prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters."

The District Court's March 30 decision in *Van Hollen* directed the FEC to reinstate the original BCRA regulations, ruling that the agency, just like other regulatory agencies, is bound to implement the expressed will of Congress. The D.C. Circuit decision on Sept. 18 reversed this, allowing the narrower FEC disclosure rules first issued in 2007 to remain in effect.

It took nearly four months for the FEC to react to *Van Hollen* by announcing that it would enforce its BCRA (or pre-2007) disclosure rules for any electioneering communications made after March 30, 2012. Within that time, a *ThinkProgress* investigation found every group making electioneering communications except one tweaked their ads so that they would be considered "independent expenditure" advertisements – which are similar to electioneering communications but *do* expressly ask viewers to vote for or against someone. What this meant in practice was that these groups were maneuvering to evade the disclosure requirements even before the FEC announced them.

There are, of course, other rules about how nonprofit and for-profit corporations can engage in political spending. One example is the requirement that the majority of a 501(c)(4) organization's work benefit the public, not a single candidate or party. However, the Internal Revenue Service (IRS) definitions are complex and opaque, and it seems that many of the 501(c)(4)s now making independent expenditures have electioneering as their primary purpose. Yet it is virtually certain that the IRS will not take enforcement action until long after the 2012 elections, if ever.

Some advocates, frustrated with the continual deadlocks at the FEC and the slow pace of the IRS, have begun looking to other agencies like the Federal Communications Commission and the Securities and Exchange Commission to try to restrict, or at least learn more about, the cash being dumped into the political system. One commentator has described this disjointed system of political spending regulations as a game of whack-a-mole that ultimately allows huge amounts of money to flow into our political system with little restriction or transparency.

Even now that the FEC's limited disclosure rules are back in place, the agency has not shown any particular desire to enforce them. Freedom Path, a conservative 501(c)(4) organization, which made electioneering communications in support of Sen. Orrin Hatch (R-UT) and Mitt Romney, is the only organization subject to the *Van Hollen* disclosure rules. It has not amended its reports to comply with the rules – yet *ThinkProgress* reports the FEC has not contacted the group about its flawed reports and has taken no public enforcement action.

For that reason, the practical effect of the Court of Appeals' reversal of *Van Hollen* will be small. Given the ongoing deadlocks at the FEC, the agency is unlikely to improve its disclosure rules anytime soon or even enforce the ones that do exist. The symbolic effect, however, should not be underestimated. As Nov. 6 approaches and money pours into the political system, the Court of Appeals has reinforced the idea that big-money donors should be allowed to stay anonymous, keeping voters from knowing who's behind which candidates – an undemocratic position that not even *Citizens United* could justify.

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