FINANCIAL SERVICES AND GENERAL GOVERNMENT APPROPRIATIONS FOR 2009

HEARINGS

BEFORE A

SUBCOMMITTEE OF THE

COMMITTEE ON APPROPRIATIONS

HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

SECOND SESSION

SUBCOMMITTEE ON FINANCIAL SERVICES AND GENERAL GOVERNMENT APPROPRIATIONS

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U.S. GOVERNMENT PRINTING OFFICE

42–322 WASHINGTON : 2008

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FINANCIAL SERVICES AND GENERAL GOVERNMENT APPROPRIATIONS FOR 2009

WEDNESDAY, FEBRUARY 27, 2008.

ELECTION ADMINISTRATION

WITNESSES

PANEL 1

HON. ROSEMARY RODRIGUEZ, CHAIR, ELECTION ASSISTANCE COMMISSION
HON. CAROLINE HUNTER, VICE CHAIR, ELECTION ASSISTANCE COMMISSION
HON. GRACIA HILLMAN, COMMISSIONER, ELECTION ASSISTANCE COMMISSION
HON. DONETTA D. DAVIDSON, COMMISSIONER, ELECTION ASSISTANCE COMMISSION

PANEL 2

WENDY, WEISER, DEPUTY DIRECTOR OF THE DEMOCRACY PROGRAM, BRENNAN CENTER
SUSAN K. URAHN, PH.D., MANAGING DIRECTOR, STATE POLICY INITIATIVES, PEW CHARITABLE TRUSTS
ARTURO VARGAS, EXECUTIVE DIRECTOR, NATIONAL ASSOCIATION OF LATINO ELECTED AND APPOINTED OFFICIALS EDUCATIONAL FUND
JEFF MATTHEWS, DIRECTOR, STARK COUNTY, OHIO, BOARD OF ELECTIONS

CHAIRMAN SERRANO'S OPENING STATEMENT

Mr. SERRANO. The Subcommittee will come to order.

I welcome you to this hearing of the Financial Services and General Government Subcommittee. Today's hearing is on election administration and will focus on the work we need to do to ensure that elections are secure, reliable, and accessible to all voters.

This hearing is particularly timely, since we are well into the 2008 primary season, and a little more than eight months away from the November general election. We are anxious to hear what our witnesses will say about how the primary elections have proceeded and what issues or concerns have arisen. Will these primary elections be indicators of election administration successes or failures in the general election? What are the potential problems that we may face in the general election?

We also want to use this hearing to learn more about the issues facing the Election Assistance Commission, including the funding requirements that will help the EAC meet its mission.

This is a small agency with a very big responsibility. The EAC has an important role in giving guidance and information, pro-

viding regulatory authority over the National Voter Registration Act, and directing federal resources to support the conduct of elections at the state and local levels.

More than $3 billion have been appropriated over the past six years to improve election administration and voting systems. Even with this commitment of federal resources, states continue to have critical unmet needs relating to ensuring that their elections run smoothly. The need is not more apparent than in the case of providing states with secure, reliable, and accessible voting systems.

Touch screen, direct recording, electronic voting machines were purchased by many states using money they received through Help America Vote Act programs. These machines were touted as the answer to election officials' prayers. Indeed, they offer the important benefits of accessibility and ease of use. But, unfortunately, concerns have been raised about the reliability and security of these machines.

Many states and their voters have lost confidence in them. Some states are reviewing their voting system requirements and are scrambling to modify or replace their systems to increase public confidence. It may be fair to say that no voting system is going to be 100 percent perfect, especially considering human factors that go into operating our polling places.

However, we should continue to strive for an election process that has a minimum of confusion and error and a maximum of accurate results. Finally, I strongly believe that the often intense debate over election issues is due to the passion we share when it comes to protecting our democratic process and guaranteeing the right of every individual to cast a ballot in a fair, open, and honest election.

Our goal should be to ensure that we count every vote and make every vote count. I hope this hearing will help us to understand better how we can be more helpful to election officials in meeting that goal.

Today, we welcome several witnesses who come before us to share their knowledge on election matters. On our first panel we have, from the Election Assistance Commission, Rosemary Rodriguez, the Chair of the Commission, as well as Commissioners Caroline Hunter, Gracia Hillman, and Donetta Davidson.

On our second panel we will have Wendy Weiser of the Democracy Program at NYU School of Law's Brennan Center for Justice; Susan K. Urahn, Managing Director for State Policy Initiatives at the Pew Charitable Trusts; Arturo Vargas, Executive Director of the National Association of Latino Elected and Appointed Officials Educational Fund; and Jeff Matthews, Director of the Stark County, Ohio, Elections Board. And we welcome all of our guests.

We have a lot of material to cover and many people to hear from during this hearing, so I ask that each witness strictly—strictly—did I say that enough? Strictly observe a five-minute maximum for their opening statements. Your complete written statements will be submitted for the record.

Also, I just want to remind members of the procedures we established last year for questioning witnesses. We will observe the five-minute rule, except for Mr. Regula—anything he wants. I will recognize those members who are in the room at the time the hearing

begins by seniority. Those members who enter the room after the hearing begins will be recognized in the order in which they arrived. I also intend to alternate between Democratic and Republican sides.

We have two new members of the Committee, and I will have Mr. Regula mention their names. And with that, I turn to my trusted colleague. And I do not know how my party is going to feel about this, but on the list of people I wanted to retire from your side, you were not on my list. [Laughter.]

You were not on my list.

Mr. REGULA. I appreciate that.

Mr. SERRANO. You are one of the nicest people I know, and it is a pleasure working with you.

MR. REGULA'S OPENING STATEMENT

Mr. REGULA. Nice way to start the day. Thank you, Mr. Chairman. I think you have done a great job of summarizing the challenge that confronts us in this bill, and so I do not have much to add. I do want to welcome Mr. Bonner, who is a new member of this Committee. And I think you will find it very interesting and some rather challenging policy decisions that we have to make, starting with the one today.

I would like to welcome also our witnesses from the Election Assistance Commission. You know, elections are such a great part of the American way that it is so important that people have confidence in the election process. And certainly voting is the method by which the American people select their representatives in government. And if democracy is going to thrive, we have to—believe in the integrity of the voting system, and that every vote counts.

We have had a couple of elections back home where maybe it was decided by one or two votes, and people say to me, "By golly, my vote did make a difference." You know, it is easy to think, when there are millions of people voting, that your vote does not matter, but once in a while you see an election where it hinges on one or two votes. And, therefore, it is important that people believe in the integrity of the system, and also that they participate. So that is what we are trying to do here is to create an environment where people will participate.

It is amazing, there are over 100,000 polling places in our election system. And that is the challenge, to ensure that there is integrity in each of these 100,000, because for the people that use them that is their way to participate in our democracy. I look forward to your testimony and learning how you can, have been, and prospectively want to help maintain the integrity of the election process, and how we might improve it.

And, Mr. Chairman, it is always a privilege to work with you. We have worked well together on issues last year, and I know that we will again this year. And it is kind of interesting—it is a sharp contrast. He is a big city boy from New York City, and I am a farm boy from Ohio. So you cannot get much difference in the way of background contrast, but we are here as a team. And we have done what everybody says should happen, and that is that we get along with each other and work together. So I look forward to the testimony.

Mr. SERRANO. Thank you. It has been an experience for me. I came to Congress thinking all food came from a supermarket. [Laughter.]

And it was wrapped there, you know, in cellophane, and so on.

I want to welcome Mr. Ruppersberger and Ms. Kilpatrick. Just to remind you, initially I said that we would recognize people in the order that they came into the room for questioning.

And, you know, when I look at this group before us, this panel, I am always tempted to ask the question I have been asking for 34 years in public office in New York. But I do not know if you do ballot placement. You know, New York has—the U.S. Senate runs up at the top of the ballot. Then, you have all of the local judges who cover the whole county of the Bronx come next. Then comes the member of Congress.

And I have always said, "Why does the member of Congress not follow—the member of Congress follows the Senate in your state?" And in New York, if you have 15 judges running, who are usually supported by all three parties, or four parties, they appear because they cover the county. These are statewide—Hillary or Chuck, right? These are county-wide, and then this is district-wide.

So I am always 30 percent less of the vote by the time they get down to me. I do not know. It is a conflict of interest if I ask for anything special.

Anyway, we——

Mr. RUPPERSBERGER. Excuse me, Mr. Chairman, but it works for you. You are still here. [Laughter.]

Mr. SERRANO. We should all be nice to Ms. Kilpatrick. The champions this year are probably going to be the Detroit Tigers and not the Orioles or the Yankees. But anyway.

Our first panel is Ms. Rodriguez, Chair of the Commission. Then, we will recognize the Vice Chair, Ms. Hunter, followed by Ms. Hillman, and finally Ms. Davidson.

Ms. RODRIGUEZ, welcome, welcome to all of you, and please.

ROSEMARY RODRIGUEZ'S TESTIMONY

Ms. RODRIGUEZ. Good morning, Chairman Serrano, Ranking Member Regula, and all of the Subcommittee members. Thank you for asking us to be here today.

This year we will elect a new President. Millions and millions of voters will go to the polls in November, and millions of poll workers will be there to help them. Election officials are working hard to get ready, and let me say this: we must be ready for a huge turnout. If primaries are any indicator, the turnout will be enormous. There must be enough ballots, voting machines, and poll workers to serve the rush that will surely show up in November. A contingency plan is also a must, because in elections things do not always go as planned.

At the EAC, we are providing tools and information to assist election officials. Poll workers guides, information about how to design a ballot, and a series of management guides to help them effectively manage the entire process from voting system security all the way through ballot tabulation.

While election officials have a lot on their plates, the EAC faces challenges of its own. Congress provided $115 million in new funds

to the states. Thank you for that. Can states use that to replace touch screen equipment? The Help America Vote Act, or HAVA, says that voting systems purchased with funds appropriated after 2007 must be fully accessible. What systems are considered accessible to individuals with disabilities?

Mr. Chairman, as you know, the EAC does not mandate, endorse, or recommend one voting system over another. It is the spirit and intent of HAVA that the states make voting system decisions based upon what will best serve the individual state. That is why I have proposed a reversal of EAC guidance. My proposal asserts that it is reasonable, pursuant to the Office of Management and Budget Circulars, for state governing jurisdictions to use HAVA funds to replace voting systems purchased with HAVA funds, as long as such funds comply with HAVA.

Our Inspector General recently released a review of EAC's operations and financial controls. Clearly, there are changes that must be made at the EAC, and the IG's report provides us with a roadmap to make those changes. We have already gotten started, but we have much to do. These challenges have not stopped the EAC from fulfilling some of its most important mandates, including launching the Federal Government's first voting system certification program, and issuing voluntary voting system guidelines.

I am the Chair of this Commission, and I take this responsibility very seriously. I am very aware that what happens in 2008 will be on my watch. I assure you that the EAC will focus on its responsibilities under the law, and make sure that Congress and the public are fully informed about our activities.

Thank you again for having us here today, for your support of the EAC, and for your support of the voters of America. We look forward to your questions.

Mr. SERRANO. Thank you.

Ms. Hunter.

CAROLINE HUNTER'S TESTIMONY

Ms. HUNTER. Thank you. Good morning, Chair Serrano, Ranking Member Regula, and the other Subcommittee members. Thank you for asking us to be with you today.

As Chairwoman Rodriguez mentioned, one of EAC's mandates under the Help America Vote Act is the adoption of the voluntary voting system guidelines. The guidelines provide a set of specifications and requirements against which voting systems can be tested to determine if they provide all of the basic functionality, accessibility, and security capabilities required of voting systems.

HAVA transferred this responsibility from the FEC to the EAC. The EAC adopted its first version in 2005, and we are in the beginning of the process to adopt the next iteration of the VVSG. HAVA clearly defines the process for adopting these guidelines. Our Technical Guidelines Development Committee and the National Institute of Standards and Technology, or NIST, provide EAC with an initial draft.

Then, the EAC adopts the final version. However, the road to adopting a final version will include widespread input, public meetings, and public comments. As a matter of fact, we have already

scheduled a series of roundtable discussions with a wide variety of stakeholders. All of these discussions are open to the public.

The EAC has implemented a very thorough, inclusive, and transparent public comment process. We have already begun the first comment period for the initial version and provided the public with a very user-friendly online comment tool. At the end of the comment period, the EAC will consider every comment and issue our own draft version. At that point, there will be another 120-day comment period.

Again, the public will be able to submit comments as well as view every comment that has been submitted, and the EAC will continue to work with NIST throughout this process.

The draft guidelines are a complete rewrite of the 2005 guidelines, intended to address the next generation of voting systems. They contain new and expanded material in the areas of reliability, quality, usability and accessibility, security, and testing. According to the Help America Vote Act, adoption of the guidelines at the state level is voluntary. However, states may formally adopt a VVSG, which would of course make these guidelines mandatory in those jurisdictions that choose to adopt them.

We often get asked, "What value do voluntary guidelines provide?" The answer is simple: They provide a base level of conformity testing that election officials can rely on. States have the flexibility to apply the parts of the guidelines that make sense in their jurisdiction, or to not use them at all.

The EAC is also operating the Federal Government's first Voting System Certification Program. And let me address two issues that come up frequently. One issue is vendors paying labs directly. That is the way the process is working at this moment. The vendors can choose their own labs and pay the labs for the cost of testing.

The EAC is not authorized to pay the labs. Some have argued that the EAC should do so, and the EAC should choose the lab to make them a little bit more a distance between the vendor and the lab. But the EAC is not authorized to do so. Any funds that we collect must be turned over to the Treasury, unless we have a specific authorization, such as an authorization to redistribute Section 102 funds. To allow EAC to take this responsibility, it would require Congress to take action. As we have stated in the past, if Congress wishes to take this action, we stand ready to assist.

The second issue I would like to bring up is that the Help America Vote Act did not give the EAC any authority over voting systems we have not certified. And at this point, as you know, the EAC has not certified any voting systems. So it is very likely that there will not be any systems in use during the 2008 election cycle that were certified by the EAC. And so, therefore, we have no authority to regulate those machines.

Thank you very much.

Mr. SERRANO. Thank you.

Ms. Hillman.

GRACIA HILLMAN'S TESTIMONY

Ms. HILLMAN. Good morning, Chairman Serrano, Ranking Member Regula, and members of the Committee. Let me begin by saying that I have the distinction of having served on the Commission

since it was established in 2003. Mr. Chairman, most local election officials are resource-challenged to plan and run their election day activities. As you know, EAC must provide a range of assistance to states. There are thousands of election officials who work the front lines in our quest for accurate, fair, and accessible elections.

I will briefly describe some of our programs that provide assistance to their work. An urgent need is adequate numbers of highly trained poll workers. EAC has helped election officials tackle this challenge in two ways. We produced documents that provide effective and affordable practices for the recruitment, training, and retention of poll workers. These resource manuals are now in the hands of election officials.

Secondly, Mr. Chairman, you and this Committee have recognized the value of preparing the next generation for community service at the polls. Since 2004, EAC has run two college poll worker programs and produced a guide for recruiting students. As a result, more than 3,000 college students and three dozen communities have joined the ranks of America's champions of democracy.

EAC also looks forward to the opportunity to directly operate the mock election program. This program will provide opportunities for high school students to have first-hand experiences with a mock election process.

Equally challenging for election officials is the effective design of voting materials. You mentioned a design on a ballot. Ballot design flaws made front page news in 2000, 2006, and even this year during the California primary. Last year, EAC produced and distributed sample materials and best practices for effective designs.

More details about these materials are provided on pages 11 and 12 of our written testimony, but let me just quickly mention that the materials we produced are camera-ready images. I mentioned earlier that election officials are resource-challenged, and when EAC produces materials we try to do it in a way that is very affordable and practical for the election officials. The information is available in different languages, and we are hoping that it will serve as a useful resource to election officials.

Once the election is over, Mr. Chairman, we need to know more than who was elected. EAC uses election day statistics to measure progress and improvement. We conduct a biennial election day survey, and the resulting reports include information about uniformed and overseas citizens voting, and registration under the National Voter Registration Act.

As we work to fine tune our data collection efforts, we acknowledge the value of the $10 million in grant funding that was appropriated in this fiscal year. The grants will be awarded this spring for pilot projects in five states. Through this program, EAC and election officials will be able to explore the requirements, challenges, and solutions for collecting data at the precinct level. These results will be reported to Congress in June of 2009.

Information about all of EAC's programs, including our 2008 grant programs, can be found on our website at www.eac.gov. The Help America Vote Act calls for significant improvements. Some simply take more time than others. EAC recognizes that challenges remain.

Mr. Chairman, I appreciate the Committee's continued interest in accomplishments under HAVA and your continued support of EAC. I also look forward to continuing this dialogue and answering your questions.

Thank you.

Mr. SERRANO. Thank you.

Ms. Davidson.

DONETTA DAVIDSON'S TESTIMONY

Ms. DAVIDSON. Good morning, Mr. Chairman Serrano, and Ranking Member Regula, and Subcommittee. I thank you for this opportunity this morning. I am a former Secretary of State, and my priority is providing election officials with real-world tools and solutions to effectively manage their elections.

Secure, accurate, accessible elections are a complex process comprised of many moving parts and many moving people. And they only work one time a year in some instances. We hear a lot about certain voting systems, if they are trusted. In fact, any voting system—a ballot box, a direct record, or a scan machine—can be compromised if you have two things, if you have access to that system and if you have knowledge of that system.

I have spent my entire career in elections, and some things never change. Whether it is a voter using a paper ballot, a touch screen, details matter. It is just as important to make sure that voting equipment is working properly as it is to have procedures and well-trained people to control access to and maintain the equipment properly.

That is why the EAC has established the Election Management Guidelines Program, which provides material to election officials to help them manage the entire process. So far, we have issued information on the following topics: polling places and vote centers, managing change in an election office, media and public relations, absentee voting and voting by mail, acceptance testing of the equipment, voting system certification, voting system security, poll workers, ballot preparation, printing and pre-election testing, new voting systems, and contingency and disaster planning.

Let me speak briefly about the importance of the contingency planning this year. The turnout has been high, as we know. And in November, we expect a very high turnout. That is the great problem to have. But in the meantime, we must make sure that our election officials are prepared, that they have enough ballots, they have enough poll workers, they also have the voting equipment that they need to make sure that the record number of voters can move through the polling locations.

Management material—as we call them, Quick Starts—have been distributed to more than 6,000 election officials throughout the nation. We continue to receive requests asking for more when they are conducting their training sessions. In the near future, we will have material about serving the elderly and the disabled in long-term facilities, military voting, and how to audit the entire election process.

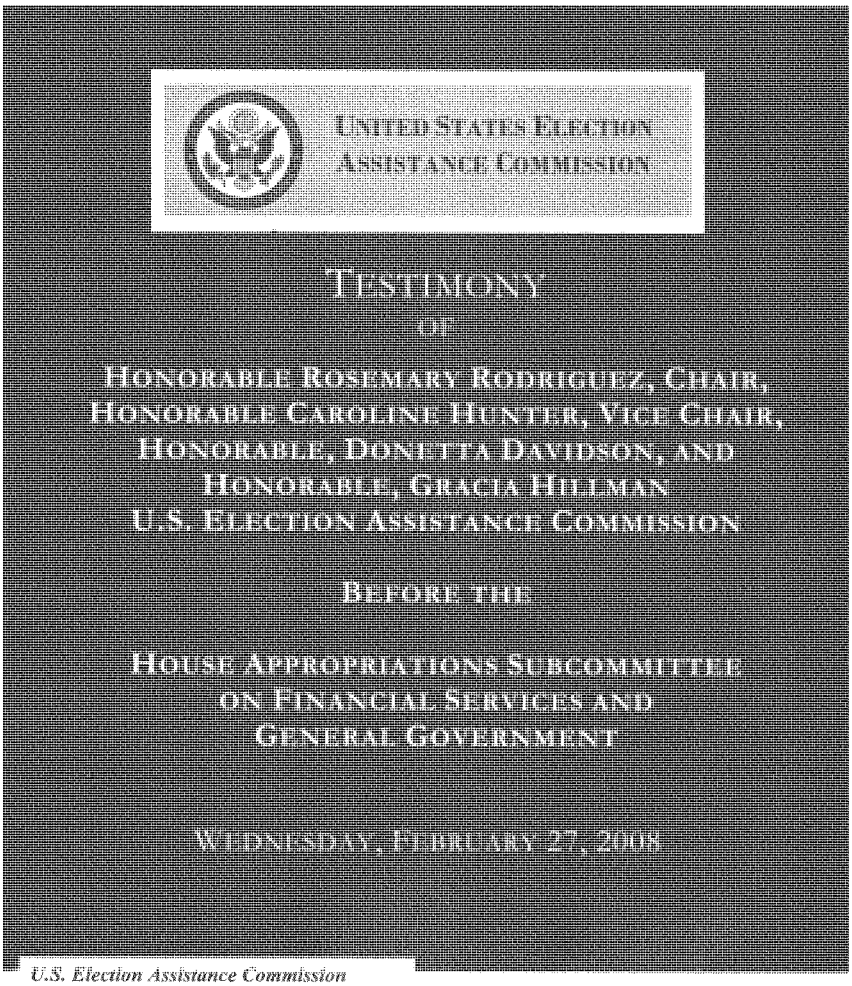
The EAC also has helped election officials assist with the language accessibility needs. Our language accessibility program is a very large portion of our new website, and we have translated it

into Spanish, as well as our voter registration is translated into Spanish. In May, the EAC will offer a glossary, just like the Spanish one, in five Asian languages, as well as provide website information in those languages, and the national form.

All of this material from the EAC to help election officials manage their elections is free, at no cost, and we provide it to everyone. As a former election official who has watched the formation and the involvement and the evolution of HAVA very closely, the EAC is providing exactly the kind of assistance and support the law envisioned.

Thank you. I look forward to your questions.

[CLERK'S NOTE.—A single written statement was submitted for all four Election Assistance Commission witnesses. The statement follows:]



U.S. Election Assistance Commission
1225 New York Ave., NW – Suite 1100
Washington, DC 20005

Good morning Chairman Serrano, Ranking Member Regula, and Members of the Subcommittee. We are pleased to be here this morning on behalf of the U.S. Election Assistance Commission (EAC) to discuss election administration, the challenges that our election process faces to prepare for the upcoming Presidential election, and the role that EAC plays in supporting State and local governments in conducting Federal elections.

INTRODUCTION

EAC is a bipartisan commission consisting of four members: Rosemary Rodriguez, Chair; Caroline Hunter, Vice Chair; Donetta Davidson, and Gracia Hillman. EAC is an independent Federal agency that guides and assists States in the effective administration of Federal elections. In doing so, EAC has focused on fulfilling its obligations under the Help America Vote Act of 2002 (HAVA) and the National Voter Registration Act of 1993 (NVRA). EAC works to identify potential election administration issues and to provide States with tools that they can use to avoid problems and serve their citizens by holding accurate and reliable elections.

Our country is in the middle of the important process of choosing our next President. The primary season has been marked by true challenges to obtain the party nominations, record turn out of voters who are not only engaged in the process but also excited about making their voices heard. During the primary season, a few problems – some old and some new – have arisen. We continue to see challenges in designing ballots that voters can easily understand. We also see that if election jurisdictions underestimate the interest of the voters, the result is a failure to have sufficient numbers of ballots on hand and enough poll workers to assist voters. Provisional balloting will likely also be an issue if election officials are not prepared for the volume of provisional voters.[1] Human error continues to be the source of most of the problems that emerge during the election process, including everything from providing voters with accurate information to the few problems that have occurred with the equipment that is used to tabulate our votes.

EAC has worked to fulfill Congress' mandate to assist States with the administration of election for Federal office. EAC has distributed funding made available under HAVA. EAC has also developed and delivered a number of tools to assist States in the design of effective ballots, in managing effective elections, and in selecting voting equipment that fits the needs of each State and its electorate. Below we will discuss these products in detail and discuss current projects of the EAC that will continue to assist States with their election administration.

[1] In 2004, 1.9 million people cast a provisional ballot and 1.2 million were counted. Similarly, in the mid-term elections of 2006, nearly 800,000 provisional ballots were cast and approximately 630,000 were counted. The number of provisional ballots cast in the upcoming Presidential election is likely to be similar to the numbers in the 2004 Presidential election.

FUNDING IMPROVEMENTS IN ELECTIONS

There are three major funding programs under which the EAC or its predecessor, the General Services Administration (GSA), distributed money to the States to implement the provisions of HAVA. Those sources are Section 101, Section 102 and Section 251 funds. Those funds could be used to purchase voting equipment; establish provisional voting; provide information to voters; develop and maintain a single list of registered voters for the State; to verify the identity of voter registration applicants; and to improve the administration of elections for Federal office.

In addition, HAVA provided funding through grant programs to States to improve the accessibility of polling places and to educational institutions and organizations to recruit and train college-aged poll workers. The former grant program was distributed and administered by the Department of Health and Human Services. The latter was administered by EAC. In 2007 EAC developed a handbook for student groups and universities to develop their own programs to recruit and train college students as poll workers. Most recently, Congress appropriated $750,000 for EAC to continue the college poll worker grant program, $200,000 for grants to conduct student mock elections to engage our young people in the election process, and $10,000,000 to assist States in developing technologies and processes to collect and report data on our elections. EAC is developing Requests for Applications for each of these grant programs which will be posted shortly to solicit applications by educational institutions, non-profit associations, and States, respectively, for these grant funds.

The following chart details the funds that have been distributed to the various States (under Sections 101, 102, and 251) and the total amount that have been spent by the States as of the last reporting deadlines.

State	Total HAVA Funds Received	Expended[a]	Percentage of Funds Expended	Balance[b]
Alabama	$40,907,194	$12,947,460	31.65	$29,651,133
Alaska	16,596,803	8,006,393	48.24	10,367,582
American Samoa	3,319,361	3,371,840	101.58	0
Arizona	47,600,072	13,740,471	28.87	37,432,722
Arkansas	27,761,472	16,423,388	59.16	14,365,587
California	348,900,661	280,638,373	80.44	78,030,487
Colorado	41,582,761	22,849,704	54.95	22,157,712
Connecticut	32,719,501	3,096,045	9.46	34,936,789
Delaware	16,596,803	7,735,905	46.61	9,374,974
District of Columbia	16,596,803	4,918,303	29.63	12,909,938
Florida	158,531,048	73,304,281	46.24	94,244,933
Georgia	77,304,946	73,140,615	94.61	5,324,478
Guam	3,319,361	1,866,693	56.24	1,452,668
Hawaii	16,596,803	6,191,808	37.31	10,674,907

State	Total HAVA Funds Received	Expended[a]	Percentage of Funds Expended	Balance[b]
Idaho	16,596,803	8,741,234	52.67	8,755,567
Illinois	143,529,899	94,511,610	65.85	55,379,615
Indiana	64,297,862	56,297,878	87.56	8,078,612
Iowa	28,739,383	24,232,850	84.32	4,662,077
Kansas	26,409,789	19,275,443	72.99	9,140,051
Kentucky	38,067,744	19,355,672	50.85	20,726,784
Louisiana	47,330,777	34,859,102	73.65	15,287,651
Maine	16,596,803	3,321,221	20.01	13,275,584
Maryland	49,752,770	35,713,473	71.78	17,297,799
Massachusetts	60,332,104	5,276,401	8.75	58,995,914
Michigan	94,699,081	67,003,920	70.75	32,459,061
Minnesota	44,492,574	37,688,821	84.71	6,690,119
Mississippi	27,869,654	20,139,498	72.26	9,171,324
Missouri	62,262,661	45,773,331	73.52	20,105,989
Montana	16,596,803	13,264,106	79.92	3,595,165
Nebraska	18,749,549	14,690,310	78.35	5,046,964
Nevada	21,166,810	12,497,029	59.04	9,359,448
New Hampshire	16,596,803	335,689	2.02	16,596,803
New Jersey	84,904,403	55,933,253	65.88	28,519,543
New Mexico	19,279,790	14,123,471	73.26	9,014,194
New York	219,512,672	3,144,170	1.43	224,694,515
North Carolina	74,259,370	49,200,344	66.25	33,102,811
North Dakota	16,596,803	8,367,713	50.42	8,838,732
Ohio	132,045,112	131,682,814	99.73	8,613,372
Oklahoma	32,659,638	2,619,668	8.02	30,039,970
Oregon	33,863,940	13,993,020	41.32	20,230,033
Pennsylvania	134,818,949	124,793,466	92.56	26,155,774
Puerto Rico	5,470,505	922,763	16.87	5,023,981
Rhode Island	16,596,803	14,117,981	85.06	2,478,822
South Carolina[c]	39,241,210	40,362,239	102.86	3,684,755
South Dakota	16,596,803	5,635,898	33.96	11,702,173
Tennessee	54,714,608	21,048,399	38.47	37,009,309
Texas	184,168,065	128,504,360	69.78	64,292,305
Utah	25,284,969	22,708,000	89.81	4,115,977
Vermont	$16,596,803	$2,692,784	16.22	$15,030,010
Virgin Islands	3,319,361	1,286,780	38.77	2,444,869
Virginia	69,121,820	35,308,415	51.08	37,064,507
Washington	60,093,850	26,081,858	43.40	37,116,984
West Virginia	20,630,100	12,934,539	62.70	8,768,045
Wisconsin	50,066,781	17,948,603	35.85	35,293,708
Wyoming	16,596,803	7,323,706	44.13	10,606,567
Total	2,968,860,616	1,781,943,111	60.02	1,339,389,395

[a] Expenditures include cash disbursements and unliquidated obligations. For Sections 101 and 102, the expenditures are as of December 31, 2006. For Section 251, the expenditures are as of September 31, 2006.
[b] The balance is greater than the difference between funds received and expenditures in most cases

State	Total HAVA Funds Received	Expended[a]	Percentage of Funds Expended	Balance[b]

because it includes interest earned on funds deposited in State election fund accounts.
[c]South Carolina reported that it overspent its Section 251 funds which resulted in total expenditures exceeding funds received. The balance shown in this table consists of remaining Section 101 and 102 funds.

In FY 2008, Congress appropriated an additional $115,000,000 in requirements payments (Section 251 funds). The condition of receipt of these funds was not altered, and the funds are therefore available to the States under the original conditions specified in HAVA. The only difference according to HAVA is that funding made available after January 1, 2007 that is used to purchase voting equipment must be used to purchase accessible voting systems.

How States Have Used HAVA Funds

As of September 30, 2006, States had spent 60 percent ($1,781,943,111) of HAVA funds received ($2,968,860,616). Also, 60 percent of States had expended more than 50 percent of their HAVA funds. In contrast, five States had spent less than 10 percent of their HAVA funds. These five States, however, account for approximately 27 percent ($365,263,991) of the unexpended funds ($1,339,389,395).

Seventy-six percent of the total reported expenditures were used for voting systems and statewide voter registration lists that comply with the requirements of HAVA Sections 301 and 303. Sixteen percent of reported expenditures were used to improve the administration of Federal elections, including expenses related to educating voters; creating a HAVA State plan, training election officials and poll workers; establishing voter hotlines; administering HAVA programs; improving polling place accessibility; establishing administrative complaint procedures; and other improvements. Voter education programs, used primarily to educate voters about new voting systems in the States, accounted for more than 26 percent of expenditures to improve the administration of Federal elections. Eight percent of reported expenditures were classified as uncategorized. Less than one-tenth of one percent of all reported expenditures were used for meeting the Section 302 requirements regarding provisional voting and voter information postings at the polls.

At the time of their last reports, only eight States had filed certifications with EAC that they had met all of the requirements of Title III of HAVA. However, EAC has begun receiving numerous requests from various States to reprogram HAVA funds to replace the voting equipment that these States purchased or upgraded using HAVA funds to meet the requirements of HAVA. Some States have demonstrated that the equipment that they certified as meeting HAVA requirements can no longer be repaired or maintained and thus has exceeded its useful life. Others have made the request to reprogram funds based

upon a change in approach by the state legislature or state election board, certifying that the equipment in place is not only HAVA compliant, but also fully functioning, supported and maintainable.

The EAC staff responsible for overseeing and administering the distribution of HAVA funds acted in accordance with applicable cost principles to apply a test to determine if the requested reprogramming of funds is reasonable. In the case of the former scenario, EAC staff granted a reprogramming of funds, and in the case of the latter request, it denied the request. However, despite the denial, the State was able to use HAVA funds to fund its replacement. The State had failed to obtain reimbursement for certain eligible expenses. The reimbursement amount covered the expense of replacing the voting equipment.

EAC is aware of criticism by members of this subcommittee regarding the Commission's application of the reasonableness test. Chair Rodriguez will offer a policy statement at EAC's upcoming meeting that would revise the staff's previous guidance.

Management and Auditing HAVA Funds

EAC requires that States, territories and the District of Columbia report their uses of HAVA funds. In the second quarter of each year, States report on their use of both Title I and Title II funds. The Title II report includes: (a) a list of expenditures for each category of activities described in Title III; (b) the number and types of voting equipment obtained with the funds; and (c) an analysis and description of the activities funded to meet HAVA requirements and how such activities conform to the state plan. The Title I report requires States to (1) disclose, in separate reports for Section 101 and 102 funds, the financial activity for the previous calendar year on a Standard Form 269; and (2) provide the same detail on the expenditures that is required for the reports on Title II requirements payments. EAC conducts a detailed review of each report to validate that the expenditure of funds met the requirements of HAVA and was in accordance with plans filed by the State or Territory. The States' Title I and Title II reports are available to the public upon request.

Section 902 of HAVA gives EAC and other HAVA granting agencies the authority to conduct regular audits of HAVA funds. EAC's audit activity is conducted through EAC's Office of the Inspector General (OIG), which has previously consisted of two types of reviews to determine if the States are exercising sufficient controls and using the funds distributed under HAVA for appropriate purposes. The first was an assessment of procedures each State uses to administer and monitor HAVA funds, as well as a review of certain critical elements such as whether the State has maintained sufficient matching funds. Second, OIG has commissioned audits of approximately 10 States each year to fully review the State's internal controls, processes, procedures, and transactions to ensure compliance with Government Auditing Standards.

In addition to EAC's regular audits, HAVA also provides for two other means of extraordinary audit authority – (a) funds are subject at least once during the term of the program to an audit by the Comptroller General; and (b) Section 902(b)(6) of HAVA allows EAC to conduct a "special audit" or "special examination" of the funds that are subject to regular audit under Section 902(b)(1). This special audit authority covers every HAVA program, including funds distributed under Title I, Title II, and programs administered by the Department of Health and Human Services. If EAC determines that a special audit is warranted, by vote of the Commission, EAC will refer the matter to the OIG for review.

Following the issuance of an audit report by the OIG, EAC management is required to resolve any audit findings, including recommendations for changes to policies and procedures and any findings that HAVA funds were misspent. This process requires EAC management to review the audit findings, develop monitoring programs for changes to policy or procedure, and quantify amounts of funding that are to be returned to the State's election fund or to the U.S. Treasury. Once an initial decision is made by the Executive Director, the determination is sent to the audited State. The State then has the option of appealing the decision to the Commission. Appeal can entail a paper review of the record of the audit or a combination of paper review and a hearing on the record. The decision of the Commission is final and binding on the State.

The OIG has issued 14 final reports on States that reported some of the largest expenditures of HAVA funds. There are six additional State audits that are in progress.

VOTING SYSTEMS

HAVA requires that all voting systems used in Federal elections meet minimum standards including functions and features that: (1) allow the voter to review his or her selections privately and independently prior to casting a ballot; (2) allow the voter to change his or her selections privately and independently prior to casting a ballot; (3) notify the voter when he or she has made more selections in a single race than are permitted (overvote); (4) provide for the production of a permanent paper record suitable to be used in a manual recount; (5) provide voters with disabilities, including visual disabilities, the same opportunity for access and participation (including privacy and independence) as for other voters; (6) provide accessibility in minority languages for voters with limited English proficiency as required by the Voting Rights Act of 1965 (42 U.S.C. 1973 et seq.); and (7) provide for an error rate in operating the voting system that is no greater than the error rate set forth in Section 3.2.1 of the 2002 Voting System Standards (VSS) adopted by the FEC. However, Congress did not dictate to the States what type, make or model of voting system that they must chose. That selection was left to each State in consideration of their unique needs and circumstances.

HAVA also required that EAC establish a set of voluntary standards against which voting systems could be tested to determine whether the systems operate accurately and reliably. EAC has worked to develop a program of testing and certification that States can rely upon in selecting their voting equipment. The program is rigorous, thorough, and transparent and is based upon three components: the Voluntary Voting System Guidelines (VVSG), an accreditation program for laboratories that are authorized to test voting systems, and a testing and certification program through which registered vendors can submit systems for testing to the VVSG by accredited laboratories.

Voluntary Voting System Guidelines (VVSG)

One of EAC's most important mandates is the testing, certification, decertification and recertification of voting system hardware and software – a program that does not require participation by the States. Fundamental to implementing this key function is the development of updated voting system guidelines, which prescribe the technical requirements for voting system performance and identify testing protocols to determine how well systems meet these requirements. HAVA dictates that EAC along with its Federal advisory committee, the Technical Guidelines Development Committee (TGDC), and the National Institute of Standards and Technology (NIST), work together to develop voluntary testing standards.

The first set of national voting system standards was created in 1990 by the Federal Election Commission (FEC). In 2002, FEC updated the standards, and HAVA mandated that the EAC develop a new iteration of the standards—which would be known as the Voluntary Voting System Guidelines (*VVSG*)—to address advancements in information and computer technologies. On December 13, 2005, EAC adopted the first iteration of the Voluntary Voting System Standards (VVSG). Before the adoption of the VVSG, the EAC conducted a thorough and transparent public comment process. After conducting an initial review of the draft *VVSG*, EAC released the two-volume proposed guidelines for a 90-day public comment period; during this period, the EAC received more than 6,000 comments. Each comment was reviewed and considered before final adoption. The agency also held public hearings about the *VVSG* in New York City, NY, Pasadena, CA, and Denver, CO.

The *VVSG* was an initial update to the 2002 Voting System Standards focusing on improving the standards for accessibility, usability and security. Since the adoption of the 2005 VVSG, TGDC and NIST have been working to revise that version and to completely review and update the 2002 Voting System Standards that were developed by the FEC. EAC received TGDC's recommendations for the next iteration of the VVSG in September 2007. EAC posted the recommendations for a 120-day comment period. During this time, EAC has also hosted meetings of its Board of Advisors and Standards Board so that they could be briefed on, thoroughly review, and comment on the recommendations from TGDC. Following the comment period, EAC will consider every

comment and the recommendations made by TGDC and adopt a draft of the next iteration of the VVSG, which will then be posted for a second 120-day comment period prior to the adoption of the final document.

In addition to the work that has been done on the VVSG, NIST is working to develop a uniform set of test methods that can be applied to the testing of voting equipment. Currently, accredited laboratories develop their own test methods to test voting equipment. After the completion of these uniform test methods, every accredited lab will use the same test to determine if a voting system conforms to the *VVSG*. This is a long and arduous process as test methods must be developed for each type and make of voting system. Work began in 2007 on these methods, but will likely take several years to complete.

Testing and Certification and Laboratory Accreditation Programs

Accreditation of Voting System Testing Laboratories

HAVA Section 231 requires EAC and NIST to develop a national program for accrediting voting system testing laboratories. The National Voluntary Laboratory Accreditation Program (NVLAP) of NIST screens and evaluates testing laboratories and performs periodic re-evaluation to verify that the labs continue to meet the accreditation criteria. When NIST has determined that a lab is competent to test systems, the NIST director recommends to EAC that a lab be accredited. EAC then makes the determination to accredit the lab. EAC issues an accreditation certificate to approved labs, maintains a register of accredited labs, distributes the information to the public, and posts this information on its website.

EAC has accredited the following four laboratories under the EAC Testing and Certification Program. The accredited labs are:

- iBeta Quality Assurance
- SysTest Labs, L.L.C.
- InfoGard Laboratories, Inc.
- Wyle Laboratories

Three other labs have applied for accreditation and are currently being reviewed by NVLAP:

- Aspect Labs
- CIBER Labs
- Atsec Information Security Corporation

Voting System Certification

On December 7, 2006, EAC adopted its Voting System Certification Program. The program became effective on January 1, 2007. Since that time, EAC has registered 12 manufacturers to participate in its testing and certification program:

- Unisyn Voting Solutions
- Premier Election Solutions, Inc.
- Dominion Voting Systems Corp.
- Hart InterCivic, Inc.
- Advanced Voting Solutions, Inc.
- MicroVote General Corp.
- Avante International Technology, Inc.
- Election Systems & Software, Inc.
- Sequoia Voting Systems, Inc.
- TruVote International
- Precise Voting LLC
- AutoMark Technical Systems LLC

Manufacturer registration is required prior to a manufacturer submitting a system for testing. Once the manufacturer is registered, it may submit systems for testing to an EAC-accredited testing laboratory along with a test plan for the testing of that system. EAC has received four draft test plans for the testing of voting systems and has approved one of those plans:

- MicroVote General Corporation, EMS Voting System v.4.0.0. **(APPROVED)**
- Dominion Voting Systems, Democracy Suite v.1.0.0.
- Election System & Software, Unity Voting System v.3.2.0.0
- Hart InterCivic, Voting Suite v.6.4.

Once systems are tested, reports from the laboratory's assessment are provided to EAC for review and action. The reports are reviewed by EAC technical reviewers. If the report is in order and the system is in conformance with the applicable voting system standards or guidelines, the technical reviewers will recommend that EAC grant the system certification. EAC's Executive Director will make the final decision regarding certification.

Once certified, a system may bear an EAC certification sticker and may be marketed as having obtained EAC certification. The EAC process also allows for assessment of quality control, field monitoring, decertification of voting systems, and enhanced public access to certification information. For more information concerning EAC's Voting System Testing and Certification Program, see the program manual for this program, which is available on the EAC Web site. Also available on the Web site is a list of registered manufacturers, test plans, systems undergoing testing, and related correspondence.

ELECTION ADMINISTRATION SUPPORT

HAVA requires EAC to assist States with the administration of Federal elections and establishes EAC as a national clearinghouse of election information. To fulfill this

mandate, EAC makes research available on a range of issues including best practices in election administration, hours and places for voting, and election data. This information is presented to the election community and to the public through the EAC's website (www.eac.gov) as well as through formal reports on studies and data collections.

Management Guidelines

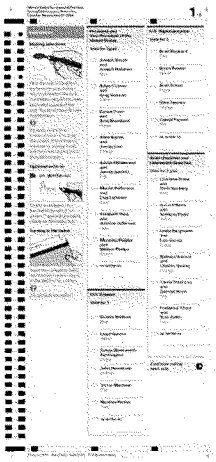
EAC assists States and local election jurisdictions by providing information about successfully managing all of details surrounding the administration of elections. In 2005, EAC began work on a comprehensive set of management guidelines, collaborating with a group of experienced State and local election officials to provide subject matter expertise and to help develop the guidelines. The project focuses on developing procedures related to the use of voting equipment and procedures for all other aspects of the election administration process. These publications are a companion to the *VVSG* and assist States and local election jurisdictions with the appropriate implementation and management of their voting systems.

Eleven *Quick Start Guides* have been distributed to election officials throughout the nation. These guides covered topics such as introducing a new voting system; ballot preparation; voting system security; poll worker training; voting system certification; acceptance testing; absentee voting and vote by mail; contingency and disaster planning; media and public relations; managing change in an election office; and polling places and vote centers. These guides are available at www.eac.gov.

Effective Ballot and Polling Place Sign Design

One challenge that continues to confront election officials throughout the country is designing ballots that are understandable, intuitive, user-friendly and affordable. EAC received requests from of its Board of Advisors and election officials throughout the country to provide sample ballots and polling place signs that could be adapted and used by election jurisdictions throughout the country.

EAC engaged Design for Democracy, a non-profit organization affiliated with the American Institute of Graphic Arts (AIGA), to assist with the development of best practices and guidelines for the design of ballots and polling place signs. At its June 14, 2007 public meeting, EAC adopted "Best Practices for Effective Designs in Election Administration." This report includes instructions, guides and suggestions for effective design, as well as sample signs and ballots that can be adapted and used by election administrators. Some examples of those designs follow.



EAC has distributed this report to election officials and published it on the EAC Web site. Ballot and polling place design templates that can be customized have been distributed to election officials are available upon request.

Poll Worker Recruitment

A large, trained pool of election workers is critical to the effective and efficient administration of elections. The average age of poll workers continues to rise and the number of returning workers falls each year, so one of the EAC's top priorities is to help election officials recruit, train, and retain poll workers. This effort is part of two projects: one focused on traditional poll workers and one specifically aimed at targeting college students as poll workers.

At its July 19, 2007 public meeting, EAC adopted two manuals or guidebooks that can be used by election administrators to recruit, train and retain poll workers: "Successful Practices for Poll Worker Recruitment, Training and Retention" and "A Guidebook for Recruiting College Poll Workers." These guidebooks were created to directly assist local election officials with maintaining their poll worker pool, but also provide educational tools for State and local governments about the types of resources necessary to find and keep skilled poll workers. Similarly, it can serve as a reminder to the public at large of the need for volunteers to serve this very important function.

Language Accessibility Program for Voters

EAC's Language Accessibility Program was developed in accordance with HAVA's instruction to study and promote methods of ensuring the accessibility of voting, registration, polling places, and voting equipment to all voters, including Native American and Alaska Native citizens and voters with limited proficiency in the English language. These provisions also charge EAC with examining the technical feasibility of providing voting materials in eight or more languages for voters who speak those languages and who have limited English proficiency.

The EAC Language Accessibility Program staff has already produced a Spanish Glossary of Key Election Terminology, which translates more than 1,800 terms from Spanish to English and from English to Spanish. This glossary was distributed to election officials throughout the nation, and it continues to be one of the most requested resources produced by the EAC. Also, the EAC is already working on a similar glossary in Chinese, Japanese, Korean, Tagalog, and Vietnamese, which we anticipate will be completed by May 2008.

EAC's two guidebooks about recruiting, training, and retaining poll workers also include information about serving voters with alternative language needs. In addition, the Effective Designs in Elections report provides information about how to design ballots and polling place materials, and it includes polling place signage and sample ballots in several languages.

To ensure the program best meets language accessibility requirements, it consists of working groups comprised of local election officials, advocacy groups, and research and public policy organizations to advise EAC. Future activities the formation of working groups to address the election needs of American Indians and Alaskan natives.

Another initiative to assist election officials in serving voters with alternative language needs is an Election Management Guidelines chapter about language accessibility that will provide strategies to assist these voters through the election process.

The EAC Web site also contains a comprehensive *En Español* section that includes information about registering to vote, contacting local election officials, and resources for military and overseas voters. The National Voter Registration Form is also available in Spanish on the EAC Web site.

Our efforts were recognized in the General Accountability Office report called *Bilingual Voting Assistance: Selection Jurisdictions' Strategies for Identifying Needs and Providing Assistance*. GAO described the activities of the EAC's Language Accessibility Program, and this report will be a valuable resource to election officials as we work together to serve all voters.

Future Support for Election Officials and Voters

EAC has several projects that are due for completion prior to the 2008 Presidential election, and two of these research efforts are focused on getting information to voters. The first is a study of Web sites or on-line portals that voters can use to check to see if they are registered to vote and if so where they vote. As a part of its 2005 guidance on statewide databases EAC encouraged States to develop Web-based tools to allow voters to verify their registration. This research effort will follow up by analyzing those sites that are now available and providing successful practices for making those sites user-friendly and secure. The second project focuses on telephone hotlines that are used by local election officials to further assist voters.

In addition to these projects, EAC is conducting a study regarding the benefits and drawbacks involved with the concept of free absentee ballot return. Currently, many voters must place postage on an absentee ballot to return it to the appropriate local election official. The first part of this study has been completed and focused on surveying voters to determine whether they would be more likely to vote absentee if they had the benefit of returning the ballot free of charge. These surveys demonstrated that while people said that they would be more likely to vote if they could return their ballots free of charge, the same people said that they would vote anyway even if the return postage was not free.

EAC has several long term projects that will help election officials with their use of the HAVA-mandated statewide voter registration lists. EAC is working on a study on the use of social security numbers in voter registration. This is one of the required HAVA studies to answer questions related to the use of the last four digits of a person's social security number to verify his or her identity. In addition, EAC is working with the National Academy of Sciences (NAS) to build on EAC's previous guidance on statewide voter registration lists. NAS is conducting a study for EAC on the interoperability of statewide voter registration lists. This study will focus on:

- Technical approaches, processes and safeguards associated with identifying and removing duplicate registrations;
- Technical approaches and procedures for sharing voter registration data across state systems; and
- Security issues that arise when sharing data among states, and technical and procedural approaches for addressing them.

The study is slated to be completed in December 2009. Last, EAC is working with NIST to adopt guidelines for electronic voting to support voting by military and overseas voters. These guidelines are being developed to assist the Department of Defense (DoD) in developing a voting system to serve these voters. EAC has entered into Memoranda of Understanding with both NIST and DoD, Federal Voting Assistance Program, to facilitate this work.

EAC uses the expertise and resources of its Board of Advisors and Standards Board to provide comment on the various research and study efforts conducted by EAC, whether they are voluntary voting system guidelines or research on areas of election administration. The public can view the boards' comments on the EAC Web site in the Virtual Meeting Room. In addition, interested persons can email the board members concerning the various projects and their comments. In addition, minutes of meetings, resolutions, charters, and rosters of membership for each of the boards can be found on EAC's Web site, www.eac.gov.

CONCLUSION

Conducting accurate and reliable elections is key to ensuring public confidence in our electoral system. EAC is here to help States by providing research, tools, and solutions that State and local government resources to help them best serve their voters, and in some cases that election officials cannot afford to develop. The information collected by EAC about how, when, and where we vote will also provide valuable insight to election officials as they work to make improvements at the local level. With Congress' continued support, we will work to assure that election officials have the tools that they need to anticipate problems, find solutions, and improve the Federal election process.

EAC appreciates the opportunity to provide this testimony regarding election integrity. If you have any questions, I will be happy to address them.

Mr. SERRANO. Thank you. I thank all of you for wonderful testimony, notwithstanding the fact that none of you spoke about my ballot placement problem in New York. We are going to take that up locally.

IMPROVING ELECTION OPERATIONS

I just asked Mr. Regula how long he has been in public office, and he told us 49 years. And I have been in public office 34. I do not think that during my lifetime I have seen turnouts the way I have seen already this year. And I do not speak for Mr. Regula, but I venture to say he probably does not remember in recent times having this kind of turnout. And it does not look like it is going to stop.

On the Republican side, there is obvious excitement. No national poll indicates that anybody is going to trounce the other person. On the Democratic side, there is the excitement of possibly the first woman or the first African-American President. Immigrants who have joined the ranks as American citizens, have found out that it is important, once they get the citizenship, to start voting. Students have not been excited—this excited—in my opinion, since the anti-war protests that brought me into politics.

This is all wonderful, but this is scary. Are we ready? Or are we going to spend two weeks after an election trying to find out who the next President will be? So with that in mind—and I know you touched on some of these things, Ms. Davidson—what are the top priorities that need to be accomplished before November? And how are you working with the states, what role are you playing with the states, to make sure that these things are in place?

On one hand, we have this excitement, which is good for the democracy. We cannot run the risk of having people upset at how the results came about or in doubt as to what the result has been. That would, I think, just do a complete turnaround of the excitement and hurt the democracy in a way that it cannot hurt.

So what needs to be done before '08, in your opinions? And what are you doing working with the states, and how far along are we in making sure that we get a good election operation, if you will, in November?

Ms. RODRIGUEZ. I will start, if it is okay.

Mr. SERRANO. Sure.

Ms. RODRIGUEZ. The EAC is going everywhere. We are scattered all over the country, meeting with election officials, and promoting the contingency planning aspects of our programs. Commissioner Hunter was in Casper, Wyoming. Commissioner Davidson was in Kentucky last week. We will go anywhere in the country to train election officials on the importance of contingency planning. I think that is our big message this year—to expect record turnout and to prepare for it substantively, with enough ballots, machines, and poll workers.

Mr. SERRANO. Now, I know that part of your role is to, as you deal with these issues, tell us, you know, we are going to do it right and everything is going to get done right. But if you were an advocate for better elections, what would you be fearful of right now looking at November? What do you think may not be in place that makes you nervous?

Ms. RODRIGUEZ. Well, again, I am from Colorado. I would—as an advocate, I would want my State to have the election plan in place. And there are several states who do not have a plan in place yet, because of uncertainty about the voting systems that their legislatures want them to use.

Mr. SERRANO. Are there many states like that?

Ms. RODRIGUEZ. I think there is—there is definitely a handful.

Ms. HILLMAN. Mr. Chairman, if I might——

Mr. SERRANO. Sure.

Ms. HILLMAN [continuing]. If I might just say that if I were an advocate, I guess there would be a couple of specific things. One would be how the state is implementing the statewide voter registration database, the voter registration lists, so that when people show up at the polls, or even before Election Day, they know that they are on the roll properly and they know which precinct they are to report to.

I always encourage election officials to meet with the advocate groups early and often, so that each knows what the other is doing, so that election officials know the level of activity for voter registration and what kind of increase in voter registration to expect. And we certainly would hope, given some of the experiences in the recent primaries, that election officials would understand it is better to send more ballots, more materials to polling places, than to budget on last year's turnout, because that is just not working right now.

And, therefore, provisional ballots are being used in ways that they were not envisioned, which is, if you run out of a ballot, then you must use the provisional ballot. Unfortunately, some states and locals are not budgeted to have more machines, but certainly I would think that putting more machines in a polling place than previous would be one way to cut down on lines.

Mr. SERRANO. Okay. Yes?

BALLOT CONCERNS

Ms. DAVIDSON. I think there is one other issue that we all need to be prepared for, maybe a couple, is—one is the printing of the ballots. There is a lot of ballots being printed now, and we must make sure that there is enough printers, and that they can get the ballots to the election officials timely.

That is one of the concerns—and make sure that there is a process put into place to make sure that the ballots' timing bar has not slipped, so the ballots will read on election night, not holding up the process—as we have seen in some states—of getting results.

And I will say that the more——

Mr. SERRANO. Now, you said there are ballots being printed now?

Ms. DAVIDSON. No, no.

Mr. SERRANO. Oh, okay.

Ms. DAVIDSON. But, you know, that is the problem——

Mr. SERRANO. Because we do not know who is running yet.

Ms. DAVIDSON. Yes, I was going to say, that is the problem.

Mr. SERRANO. Certainly, on this side we do not know.

Ms. DAVIDSON. If we had that magical ball, we would know the ballot, and we could print them now and would not have the prob-

lem. As you are aware, the list of candidates and issues for a ballot come very late. So there is a very short timeframe to print ballots.

That is our concern—is enough ballots could be printed immediately so that the election officials have them, and there is a process put into place to make sure they are printed correctly. And also, that the states really look at it and make sure that the design is properly done, so that voters will not miss an office, or whatever the case might be.

Mr. SERRANO. Thank you.

Ms. HUNTER. I think what we can do, to the extent we are able to, is help voters to determine in advance—and I think Commissioner Hillman mentioned this—where they are supposed to go on election day. And when they wait until the last minute to find that information out, they probably will get a busy signal, or they will have a bit of a hard time finding out that information.

So I think we should help voters with a lot of great resources that are out there today, that were not maybe even four years ago, to determine where they are supposed to go on election day.

Mr. SERRANO. Okay. I would hope that as we move forward here you keep the Committee informed of what new issues come up, so that we can all be part of this informational process. Your point is well taken. One of the biggest issues, I know, during all of the campaigns I have been involved in—the largest amount of questions is calling campaign headquarters, whatever, "Where do I vote?" You know, people—and things get changed, and they are not told that it was changed from the last place they went to.

TRANSPARENCY OF EAC RESEARCH

Let me move on to—very quickly to another issue. In 2007, the EAC substantially edited a Commission research report on voter fraud and intimidation, changing an analysis that concluded that voter fraud is rare. After much criticism from Congress and others about the lack of transparency at the agency, the EAC released the original draft report to the Committee and directed its Inspector General to review its procedures. The IG's report is expected in the near future.

What changes to internal policies and procedures have been implemented or are being considered to ensure that EAC's work, including work done by researchers on contract, is open and transparent? Will all research funded with tax dollars be available to the public?

Anyone, or all.

Ms. HILLMAN. Well, two things that we have done is we have changed the language we use. We will either accept or adopt a report, and they mean very different things. If a consultant is doing preliminary study for us and presents us with a report, we accept it. We post it on our website. It is available as presented to us for anybody in the public to see.

Additionally, we are re-looking at how we, as a small agency, can incorporate the multitude of responsibilities for overseeing contracts. I mean, the Federal Government is replete, as you know, with requirements, and small agencies are often challenged to be able to follow all of those things through, so that we do not inadvertently take a misstep.

And the other thing is that we will use our Standards Board and our Board of Advisors frequently as sounding boards to help us as we work our way through how we approach research projects.

Mr. SERRANO. Okay.

Ms. HILLMAN. Anyone else?

Ms. RODRIGUEZ. Just, Mr. Chairman, as the Chair, I do not ever want to be accused of burying anything again. And I think we can commit to you that we will not be subject to those accusations.

Mr. SERRANO. Well, that is important. That was a pretty embarrassing situation for a lot of folks, and it was a very difficult situation. And it came on early in the work that you do, and it created a feeling that maybe we could not get the information we needed. And so that is something that we have to deal with, and I appreciate your comments.

I will now recognize Mr. Regula, and after that we will make the Committee members angry by sticking to the five-minute rule. Mr. Regula? After Mr. Regula.

Mr. REGULA. Thank you, Mr. Chairman.

2006 ELECTION REVIEW

What was your impression of the 2006 elections? Did the process work? And did the advice that is available in these various publications prove useful in ensuring that the election process was done accurately and in a way that the public could understand it?

Ms. DAVIDSON. Being a new agency, the 2006—really, at that time we were trying to get out and educate our public, as we know we should again this time. And, as you say, education is great, whether we educate you so you can help educate the public is wonderful. And we appreciate all of the help, because definitely getting the word out to the public is very important.

But, in 2006, we did not have a lot of our work done. You know, there was some, but it was very small. We have done a lot since 2006, and in 2006 it was started, in 2007 a lot of it was complete, and, as you have heard, by spring this year we will have a lot more of it even up.

Our website is full of information that we hope—and we try to educate the election people, because many of our election officials come from small jurisdictions. Getting that information down to them, to that level, is very important. That is why we see such a need of education, whether it is the press—and last year we tried to educate the press. There is a lot of work that needs to be done, and having the agency being as new as it was in 2006 and trying to get out information, we feel we have made great strides of improving on what we had started in 2006 to make it better for 2008.

POLL WORKERS

We saw problems that—we are never going to have a perfect election. We have over a million poll workers throughout the nation. And when we put it into a million people's hands, human error is what we find is our biggest problem. So that is why we were so glad that we had the study, which took us over a year to do, on the poll workers, on educating of the poll workers. So that—we are always hurting to get poll workers, number one.

Mr. REGULA. Your studies show how we can get more.

Ms. DAVIDSON. They gave us great ideas, yes. We pulled in election officials that have been very successful in getting poll workers to recruit them from—whether it is from the corporate world, whether it is from the parties, whether it is from any organization, even a non-profit organization, how they can be of help and really serve as a poll worker.

So we are trying very hard. Is it still a problem in our nation? Absolutely. We have it throughout the nation of trying to find poll workers, and we have election officials at the very last minute still scrambling to have enough.

Mr. REGULA. Is it your experience that employers will help? It is kind of like jury duty. That they will encourage their employees to participate?

Ms. DAVIDSON. In some jurisdictions, they are very willing to help. But in others, they have not been—the election official has not been as successful of getting the polling workers from the business world.

ABSENTEE BALLOTS

Mr. REGULA. Absentee ballots—it is my impression at least that more people are voting absentee. Is that accurate? And maybe this contributes to the volume of voting, because it is easier to do it.

Ms. DAVIDSON. If you are looking at me, I would be more than happy—yes, in a lot of states there is more absentee. There is more of a volume. But so far, absentee has not shown that it has turned out more of an increase in voters, but we do have more people voting absentee. A lot of the western states—California has gone to permanent absentee now. So in moving that direction in a lot of states, we see that the turnout of an absentee will be higher.

Mr. REGULA. Do your guidelines help to preclude any voter fraud? Because there are always allegations that there is voter fraud in some jurisdictions. Do you think following the guidelines that you provide will help to preclude that happening? Any one of you that would like to——

Ms. RODRIGUEZ. I can attempt that.

Mr. REGULA. All right. Madam Chairman.

Ms. RODRIGUEZ. HAVA requires that at the point of registration identification is demonstrated by—at the registration point. And states have a variety of ways to match the voter with that voter's record and polling place. Some states require identification. Some states require government-issued picture identification. Some states require, if the voter does not have that, something else.

So it is a hodgepodge, again, like everything else in elections. It is a state-by-state requirement. The EAC has not issued "one size fits all" policy or guidance on identification.

Mr. REGULA. Well, since obviously elections are local control, or state control, do you think we should have a greater amount of mandatory requirements coming out of the federal process?

Ms. RODRIGUEZ. That would be your decision, Congress's decision.

Mr. REGULA. What would you recommend?

Ms. RODRIGUEZ. I do not have a consensus position from the EAC at this point.

Mr. REGULA. Thank you, Mr. Chairman.

Mr. SERRANO. Thank you.

What is "permanent absentee"?

Ms. DAVIDSON. Permanent absentee is your name—once you require a ballot by absentee, your name stays on a list. And unless you fail to vote, they automatically send an absentee ballot to your home at that address, or until it comes back undeliverable, and then they take your name off of that permanent list.

Mr. SERRANO. Thank you.

Ms. Kilpatrick.

Ms. KILPATRICK. Thank you, Mr. Chairman, and good morning. I like the female board I see in front of me. [Laughter.]

We do not get that often here, so it is a pleasure to have you all here again this morning. Thank you very much for coming.

STATE AND LOCAL ELECTION PREPARATION

This is perhaps—and your responsibility this year, since you were started in '02, I believe, and then late—took a year or so before you got set up, we did not appropriate you properly, you did the best you can do, and I want to commend you for the job that you have done over these now five years.

This election—what is this, the second—nine months away will really determine whether all that we have done since we have, you know, instituted the EAC and all is going to be what we hoped it would be. So I want to ask you that you ask us for absolutely everything that you need.

I think, Ms. Hillman, your points were well taken, as one of my colleagues asked the question, you know, how do we get an accurate election—all voters can vote, and all votes be counted? How do you get the education started now in our local communities? And I think the Chair mentioned that some places do not even have plans yet.

We have to be your partners in this, and we do not expect you to do it by yourself. But the voter registration lists—I mean, those are just absolutely necessary. Meeting with the advocacy groups often and soon, necessary. People need to know now where they vote, not in July, not in September, certainly not in November.

What kinds of one, two, threes can we do, and as your partners, as members of Congress? We all represent 650-, 700,000 people apiece, and we need to be joined so that we might be able to help you get this done, because in a minute we are going to point at you guys when we in fact could have been much more helpful.

The ballots themselves, the number of machines, we know now it is going to be more than ever, because of what we are seeing already this year, and as we go through the rest of the year I am sure. What kinds of things can we do now? Madam Secretary of State, you mentioned—and it is unfortunate, and I am a former state legislator as well, you cannot print the ballot until you know who the candidates are.

So, okay, Presidential is one thing, but it also happens locally and statewide. Maybe we ought to have a cutoff period or something in the states. We have got to get real creative this year, and I hope for the rest of our lives, as more and more people come into the process and vote more and have our processes sped up.

What can we do together? Ask for it. I do not care what OMB said. I mean, you know, you have got to ask for it. [Laughter.]

And we have got to help you get it. The appropriation is important. Getting it out to the states is more important. And seeing that every voter who wants to vote votes, and is counted, we will not blame you. They can blame me, not even the Chairman, I will take the rap for you.

But we have got to make sure that there is enough machines and ballots, and even the structure of the ballots. Sometimes they are too difficult, you know. I am needing something. I am asking for something. And I do not know, I just want your opinion in general or anything that I can work on particularly, or we can work on as a caucus or the House and Senate.

Ms. HUNTER. Madam Vice Chair, I think you bring up some excellent points, and I think we all agree with everything you just said. As you know, the Help America Vote Act is structured in such a way that the Federal Government has a role, of course, per the Help America Vote Act.

But essentially many of the decisions that you discussed are made at the state and local level, because, of course, not every state thinks that there should be a uniform process, and different states have different requirements, different issues. For rural communities, there are completely different issues than for the Chairman's jurisdiction in Brooklyn. So I think that is important to keep in mind.

You know, the way that the Help America Vote Act has been working is that the Congress appropriated $3 billion, as you know, and now an additional $115 million for the states to spend essentially as they see fit. There are not very strict requirements on how they spend that money.

And so what we are doing, as some of us have discussed this morning, is providing some voluntary guidelines for them to say, you know, with the money that Congress has appropriated to you, you might want to be creative on getting poll workers. You know, go to the local universities, do things differently, because we all anticipate high turnout, and you have to be prepared to have all of these things in place.

So I think what we are trying to do is to provide that guidance that states may not have the resources to do the research themselves, to use that guidance to make sure their election runs as smoothly as they can. And all of us participated in some meetings here a few weeks ago in Washington with state and local election officials, and they stand ready. They understand that the participation levels will be greatly increased. They know the pressures on their jobs. Many of them, you know, live under a microscope that they never imagined in the past.

So they are—I believe most of them are prepared, they are ready, and they are willing to do whatever it takes.

Ms. RODRIGUEZ. I would like to add a couple of points. Election officials need help recruiting poll workers, and members of Congress have the identification with the voters and could be real leaders in that effort.

The election officials need help with their appropriating authorities. County Commissioners sometimes cannot get the attention of

the legislature, and so a letter from a member of Congress with an appropriation request might tip the balance in favor of an election——

Ms. KILPATRICK. Give an example of that.

Ms. RODRIGUEZ. Well, for example, in order to better serve the voters in a county, they might need some additional funds. And so if that local official had a member of Congress in their corner, I bet they would get the attention of the legislature better—better get their attention.

Ms. KILPATRICK. So perhaps now members of Congress need to be working closely with their states and elected officials to vet out some of this and see where we might work and partner together.

Ms. RODRIGUEZ. You stated my point exactly.

Ms. KILPATRICK. Thank you. Thank you very much.

Mr. REGULA. You might give us a guideline of how we can be helpful. Maybe that is one of the publications you ought to put out.

Ms. HILLMAN. Well, and I would just add one thing, is to make sure that state legislators are more engaged in HAVA requirements, because often state legislators do not understand. And when the Secretary of State goes for an appropriation, like the 5 percent match that is required for the $115 million to be disbursed, and if state legislatures drag their feet and do not get it done, that means the state is delayed in receiving its funds.

DEVELOPING NEW VOTING SYSTEMS

I would like to put one thing on the table in response to your question, and let me say, Congresswoman, thank you very much for recognizing those struggles EAC has and the work that we have been doing. But for the long term, but it—long term, all things are relative. Let us say if we look down the road to 2012, two things could very nicely come together. The Election Assistance Commission is working on, as was mentioned earlier, our guidelines for voting systems, the next generation.

I think Congress can do a lot to end the concern and debate about what is a good voting system. The manufacturers need some incentive, some encouragement, to come to the table. And I think it would be appropriate for Congress to consider some funding for some innovations, so that the manufacturers will step up to the plate. My guess is in 2002 Congress thought we would be a lot further along with respect to what is an accessible machine and what is available in the market.

And election officials can only purchase what is in the market, and they get scared when a manufacturer says, "If you want that, we can do it, but it is going to cost several thousand more." So as Congress did, like with the orphan drug issue, the people who purchase voting systems, that is a relatively small constituency.

But if Congress gave—put out some money for innovation, for research and testing, so that we can have the kind of voting systems that will well serve America, so that we will not have calibration issues, so that we will not have confusion over software, so that we will not have the kind of systems that cause people concern.

Mr. SERRANO. Thank you. We have less than five minutes on a vote, so we are going to take a break—it is one vote—and come back and resume our questioning of this panel.

Thank you.

[Recess.]

Mr. SERRANO. Had we finished all of the comments on that last question? Yes, we had.

Ms. RODRIGUEZ. I believe so.

Mr. SERRANO. Yes.

PAPERWORK REDUCTION ACT

Ms. HILLMAN. Well, there would have been one other thing, and it sounds mundane, but it is very important to us. The Election Assistance Commission is subject to the Paperwork Reduction Act, which means for any project we do where we have to collect information from the states, we have to go through that process, which adds 90 to 120 days to whatever project we do.

So if this Committee today asks us to collect data available to them by April 1st, we probably could not do it unless we got total exemption. So we do request consideration that EAC, like the FEC, can be exempt from the Paperwork Reduction Act. It would allow us to meet the every two-year deadline cycles that we have to prepare for elections.

Mr. SERRANO. That is a good point, and the Committee will certainly take that up. I think that's only a fair request. I hope voting machines are not held under that provision, Paper Reduction.

The Committee will now recognize the newest member of our Committee, the gentleman from Brooklyn, New York, right?

Mr. GOODE. Right.

Mr. SERRANO. That accent is from Brooklyn, New York, I assure you. Mr. Goode from the great state of Virginia.

I'm sorry, Mr. Goode. With all due respect, Mr. Bonner was next, and I had promised him if he hurried back he would be next, the gentleman from Alabama. He also has a Brooklyn accent.

Mr. BONNER. Thank you.

I am sorry. I am a little winded. This is my first day on the Committee and my first day on the Subcommittee, and I am honored to join both.

MILITARY AND OVERSEAS VOTERS

In many ways it is very appropriate that the question I might ask of this distinguished panel has to do with the brave men and women around the world who allow us to meet today in freedom. Many states face challenges to ensure that our service men and women overseas are able to effectively participate in the election process.

My home State of Alabama alone has some 19,000 men and women in uniform who claim Alabama as their residence, and all 50 states can make similar claims. These are men and women defending our freedoms and helping to spread the right to vote many times to oppressed people around the world, and they are practically prevented from having their votes counted in our own elections.

GAO has suggested that the Department of Defense create a plan for future electronic voting. Our own Secretary of State in Alabama, Beth Chapman, would like to see Alabama participate in a pilot program with DoD to provide secure voting over the Internet

for members of our military and other Americans who reside overseas.

I have been told that we are waiting on the Election Assistance Commission to help develop guidelines so such a program could work. Can you give us some thoughts about what we can do to ensure, especially, this year if we are looking at record votes being cast and counted here in our own country? How can we make sure that the people who allow us to stay free have their votes counted as well?

Ms. RODRIGUEZ. Thank you.

Commissioner Davidson.

Ms. DAVIDSON. I will start with it, and I hope maybe others will add because I am sure I am going to leave something out that is very important.

But we have dedicated a portion of our Web site to the military and overseas voters that we give links to whether it is the military branches, all of the military branches, to the Overseas Vote Foundation, which is a nonprofit, as well as NASS, and to other organizations that we can give information out about so that the overseas people know what their state laws are and how they can meet the needs.

The other thing that we are doing, we are working with NIST in developing guidelines. We did a study that took a year and a half in doing the study about what works best throughout the nation, and I believe it was four or six states—I am not sure—that we did this study with.

In doing that study, it is getting ready to come out, you know, best practices for the military and the overseas voting, and the other thing that we did is we did a study of the actual overseas and military, what did they like and how did they like to go about voting. In that, we have 5,000 individuals reply to that survey, and that survey, we are just getting ready to put that out. We have just received that in from the contractor. So it is being reviewed right now and we will get comments from our locals, as we always do, try to put it out to our states and get comments.

So we are on the move in having NIST really develop those studies. They are moving forward to actually, first of all, make sure that they transmit the ballot over safely and be able to get it back safely. So electronic transmission, and then move into Internet itself because there are more issues in Internet voting than there is transmitting it and having them mail it back.

But at least if we can eliminate the travel time of a ballot over and for them to be able to mail it back like most states are doing, then that is great. But we also are having states move forward and are actually transmitting it back electronically.

So we have two states. I believe it is Arizona and Washington States that are registering people online if they have a driver's license. That also helps them in the overseas voting because if they are registering them, they have moved forward where they are also looking into receiving the ballot back electronically.

The security of that ballot is what we are most concerned about and making sure that individual has their right to the ballot and nobody else. So obviously we want to work as fast as we can, but make sure that we actually address all of the issues that we can,

and so we are moving forward, and we are working with the Federal Voter Assistance, Polli Brunelli, in doing this, and we are moving forward with her as well as with NIST.

We have done an intergovernmental agreement with the two agencies. So all three of us are working together.

Mr. BONNER. So is it safe to say that this Commission can give assurance to the military men and women that we are doing everything we can to ensure that their votes will count?

Ms. RODRIGUEZ. Mr. Bonner, yes, it is a very high priority of this Commission to enable that.

Ms. HUNTER. But I think I would like to just add that states are doing some of their own great ideas, and Florida is one of them. One of the counties there took it upon themselves to create a pilot program to allow voters to be able to vote actually overseas in certain locations, and I know the Secretary from Alabama is hosting a conference on this issue in the next two weeks.

So I think while it is true that NIST is working on standards to be able to vote via the Internet. I hope States do not wait for that because it may take some time, and I think when you really look at the issue, as Commissioner Davidson said, the issue is the transmission of the ballots, and because the ballots are printed somewhat late in the process, you know, the election officials are unable to mail them until the ballots are ready, of course.

And it is a very small window of time. When you just think it is only about mailing things, it seems so obvious that one of the best ways to fix it is through some kind of electronic transmission, and I think that we should be able to come up with guidelines for states that they can use to transmit these ballots securely.

Ms. HILLMAN. Mr. Bonner, if I just might add that while the EAC has been asked to study the issue and come up with guidelines, I think we do have to acknowledge that the Federal Voting Assistance Program at the Department of Defense has enormous responsibility for helping states find the military personnel who have moved and what their addresses are, and so that is a big piece of this as well.

Ms. DAVIDSON. Could I add one more thing?

There is one problem that we have with it, is the federal law says that absentee ballots to the overseas and military is left on at that address unless they are notified, and as we know, our military move around a lot. We are getting a lot of those ballots back at the state and local level that is not addressed properly because the military has moved. So that is one of our problems of having correct information, and we are working with them trying to get that.

Once we have better information, we may come back to you and say we definitely need some help in some law changes.

Mr. BONNER. Thank you, Mr. Chairman.

Mr. SERRANO. Thank you.

Ms. Wasserman Shultz from the State of Florida, which you say is way ahead the rest of the nation.

VOTER FRAUD AND INTIMIDATION REPORT

Ms. WASSERMAN SCHULTZ. Yes, we are, but that is after eight years of struggling to get to this point, and I might add that the

Election Assistance Commission was created as a result of the Help America Vote act, which resulted directly from the travesty that occurred in the presidential election of 2000.

Madam Chair, my question is for you. My series of questions will be for you, and I would be happy to have any others chime in while you are out it.

But, Mr. Chairman, I would like to ask unanimous consent to enter into the record a first person account by Tova Andrea Wang that was published in the Washington Post on August 30th of 2007.

Mr. SERRANO. Without objection.

[The information follows:]

The Washington Post
A Rigged Report on U.S. Voting?

By Tova Andrea Wang
Thursday, August 30, 2007; A21

After the 2000 Florida election debacle, Congress established a body called the Election Assistance Commission to improve voting and democracy in this country. Two years ago, the commission approached me about doing a project that would take a preliminary look at voter fraud and intimidation and make recommendations for further research on the issues.

Because my approach to election issues tends to be more closely aligned with Democrats, I was paired with a Republican co-author. To further remove any taint of partisanship, my co-author and I convened a bipartisan working group to help us. We spent a year doing research and consulting with leaders in the field to produce a draft report. What happened next seems inexplicable. After submitting the draft in July 2006, we were barred by the commission's staff from having anything more to do with it.

What was the problem? In all the time we were doing our research and drafting the report, neither the staff nor the commissioners, who were continually advised of our activities and the substance of our work, raised any concerns about the direction we were going or the research findings.

Yet, after sitting on the draft for six months, the EAC publicly released a report -- citing it as based on work by me and my co-author -- that completely stood our own work on its head.

Consider the title. Whereas the commission is mandated by law to study voter fraud *and intimidation*, this new report was titled simply "Election Crimes" and excluded a wide range of serious offenses that harm the system and suppress voting but are not currently crimes under the U.S. criminal code.

We said that our preliminary research found widespread agreement among administrators, academics and election experts from all points on the political spectrum that allegations of fraud through voter impersonation at polling places were greatly exaggerated. We noted that this position was supported by existing research and an analysis of several years of news articles. The commission chose instead to state that the issue was a matter of considerable debate. And while we found that problems of voter intimidation were still prevalent in a variety of forms, the commission excluded much of the discussion of voter intimidation.

We also raised questions about the way the Justice Department was handling complaints of fraud and intimidation. The commission excised all references to the department that might be construed as critical -- or that Justice officials later took issue with. And all of

the suggestions we received from political scientists and other scholars regarding methodologies for a more scientifically rigorous look at these problems were omitted.

Once these "revisions" to the report were revealed this spring, there was an uproar among voting rights advocates. I was eager to set the record straight, but the commission would not allow me to speak about the report because of a broad "confidentiality provision" in my contract. The EAC finally released me from the gag order this summer, and, under pressure from Congress, it has publicly released 40,000 pages of revealing documents and e-mail.

What was behind the strange handling of our report? It's still unclear, but it is worth noting that during the time the commission was holding our draft, claims about voter fraud and efforts to advance the cause of strict voter identification laws were at a fever pitch in Congress and the states. And it has been reported that some U.S. attorneys were being fired because they failed to pursue weakly supported voter fraud cases with sufficient zeal.

We have learned that several Republican officials, including a state official, a former political appointee at the Justice Department and current Federal Election Commission member (Hans Von Spakovsky), and a Capitol Hill staffer complained about our project, particularly about my role in it. Officials at Justice were actively involved in the report throughout the process and even exerted some degree of editorial control over the new report. And it is evident from the commission's "document dump" that its Republican general counsel assumed primary control over the rewriting of the report.

Even without a smoking gun showing political motives in the handling of the draft, the results are disappointing. This is not the way an institution created to promote democracy should function. A government entity that seeks democratic progress should be transparent. It should not be in the business of suppressing information or ideas. Such an institution must be thoroughly insulated from political interference from outside operatives or other parts of the executive branch.

We need an institution like the Election Assistance Commission to provide guidance and research information to the states, election officials, elected leaders and voters. But this agency's structure and procedures need to be seriously reexamined in light of this episode. I support a strong, well-funded EAC that can help our country find reforms to the election system that will make voting more accessible, fair and accurate. But only after it finds some reforms for itself.

The writer is Democracy Fellow at the Century Foundation.

Ms. WASSERMAN SCHULTZ. Thank you.

Tova Wang and Job Serebrov were commissioned by the EAC to conduct a study about voter fraud and intimidation; is that correct?

And my question is directed to you, Madam Chair.

Ms. HUNTER. Okay. I am the Vice Chair, but I will be happy to answer your question.

Ms. WASSERMAN SCHULTZ. No, I would like my question directed to the Chair.

Ms. RODRIGUEZ. Yes. Yes, ma'am, that is correct.

Ms. WASSERMAN SCHULTZ. Thank you.

And they wrote this in partnership together to provide partisan balance; is that correct?

Ms. RODRIGUEZ. Yes.

Ms. WASSERMAN SCHULTZ. Their research found widespread agreement among administrators, academics, and election experts from all points on the political spectrum, that allegations of fraud through voter impersonation at polling places was greatly exaggerated, and that was in the draft that was submitted to your commission initially, correct?

Ms. RODRIGUEZ. Yes.

Ms. WASSERMAN SCHULTZ. After submitting the draft in July 2006, Ms. Wang and her co-author were barred by the commission staff from having anything more to do with the project; is that correct?

Ms. RODRIGUEZ. That is correct.

Ms. WASSERMAN SCHULTZ. Okay. Why was that?

Ms. RODRIGUEZ. I'm sorry. Why was?

Ms. WASSERMAN SCHULTZ. Why were they barred from having anything more to do with the project after they submitted their draft?

Ms. RODRIGUEZ. The EAC accepted the draft, and they at the time were classified as contract employees, and the EA——

Ms. WASSERMAN SCHULTZ. But why wouldn't you want the expertise of the authors when you were going forward, moving forward with the production of the final report?

Ms. RODRIGUEZ. As I was not there, I cannot accurately answer that question, but I can speculate, and——

Ms. WASSERMAN SCHULTZ. Is there someone who was on the commission who can answer that question as to why the authors of the report were barred from further participation after they submitted their draft?

Ms. HILLMAN. I was on the commission. I would not agree with the terminology that they were barred. Unfortunately, several weeks went by after their report was submitted due to a staff person not prioritizing it and moving it along fast enough, and then their contract time had expired.

Ms. WASSERMAN SCHULTZ. Okay. Ms. Wang's account is that they were prohibited from any further participation in the report after they initially submitted the draft. Do you dispute that account?

Ms. HILLMAN. I am not aware of anything in which they would have been prohibited or barred from participating.

Ms. WASSERMAN SCHULTZ. Okay. If you could verify that and get that information to the Committee for the record, I would appreciate it.

Ms. HILLMAN. I do not know if there is information I can get you. I am just simply saying as a member of the commission I was not aware of anything that would have barred or prohibited them except for the fact that their contract had expired.

Ms. WASSERMAN SCHULTZ. Okay. Well, according to them, they were specifically prohibited, and the chair of the commission acknowledges that.

Who is Hans von Spakovsky, Madam Chair?

Ms. RODRIGUEZ. Mr. von Spakovsky is, I believe—well, I do not know what his status is—a member of the Federal Election Commission.

Ms. WASSERMAN SCHULTZ. Okay. Did he direct that Tova Wang be taken off the assignment at the time? Did he have any involvement in her removal or participation in the assignment?

Ms. RODRIGUEZ. At the time he was on the EAC's Board of Advisors, and I have seen E-mail from him expressing concern about her working on the project.

Ms. WASSERMAN SCHULTZ. Thank you.

Ms. RODRIGUEZ. But he certainly did not direct the operations.

Ms. WASSERMAN SCHULTZ. But he did express vocal concern, and as a member of the EAC's Advisory Board, about her participation.

Ms. RODRIGUEZ. In the E-mail that I read, yes.

Ms. WASSERMAN SCHULTZ. Okay. And six months after they submitted their preliminary findings, the EAC released a report, and it concluded that voter fraud was a matter of considerable debate, directly in contradiction to the draft report's findings; is that correct?

Ms. RODRIGUEZ. Well, I am going to ask Commissioner Hillman if she would.

Ms. WASSERMAN SCHULTZ. Is that correct? Yes or no? The final report said there was a matter of considerable debate. The draft said the opposite, correct?

Ms. RODRIGUEZ. That's correct.

Ms. WASSERMAN SCHULTZ. Okay. Thank you.

And the commission still attached Ms. Wang's name to the report, as well as Mr. Serebrov, correct?

They were considered the authors, and it was reported as such. The report also——

Ms. HILLMAN. Excuse me. If I might, Congresswoman.

Ms. WASSERMAN SCHULTZ. Yes.

Ms. HILLMAN. No, the report came out as an EAC report. We acknowledged that the research work had been conducted by Ms. Wang, but they were not written as the authors.

Ms. WASSERMAN SCHULTZ. Okay, but the findings were in direct contradiction to the authors, to the researchers, as you characterized them, to the researchers' findings, and you still attached their names to the report.

The report also excluded much of the discussion of voter intimidation that was in the draft, correct?

If that is the case, then why?

Ms. RODRIGUEZ. I am sorry. Will you repeat that question?

Ms. WASSERMAN SCHULTZ. The report also excluded much of the discussion of voter intimidation that was in the researchers' findings. Why did that happen?

Ms. RODRIGUEZ. I cannot really do justice with that, my response to that question. That is something I would like to supplement after learning about——

Ms. WASSERMAN SCHULTZ. Were you on the commission at the time that the report was released?

Ms. RODRIGUEZ. No.

Ms. WASSERMAN SCHULTZ. Okay.

Ms. RODRIGUEZ. Oh, at the time it was released?

Ms. WASSERMAN SCHULTZ. Yes.

Ms. RODRIGUEZ. Yes.

Ms. WASSERMAN SCHULTZ. Okay. Well, then you had a draft. You voted in favor of the release of the final report. You saw the draft which included the voter intimidation information and that was not included in the final report. Why?

Ms. RODRIGUEZ. I was on the commission at the time that the draft was released at the suggestion of this Committee, but I was not on the commission at the time the revised or the EAC—

Ms. WASSERMAN SCHULTZ. Is there anyone on the commission that can tell me why the information about voter intimidation was not in the final report?

Ms. HILLMAN. I was on the commission, but, Congresswoman, I would have to go back because I am not sure which information you are referring to, and so my memory does not serve me to answer your question directly because I do not recall it that way.

Ms. WASSERMAN SCHULTZ. That is convenient. If you could please get me the information for the record and make sure that we have it.

Ms. HILLMAN. It is not a matter of convenience, ma'am. It is a matter of human being.

Ms. WASSERMAN SCHULTZ. Okay.

Ms. HILLMAN. I do not remember what happened two years ago verbatim.

Ms. WASSERMAN SCHULTZ. There are a lot of human beings that come before congressional committees and have lapses in memory.

What was Mr. von Spakovsky's role during this time? Anyone who was actually on the commission.

You have to forgive me for taking this a little bit personally. I am a member of Congress that represents the State of Florida. The HAVA Act is the direct result of the debacle that took place in 2000. Your commission was created specifically to make sure that we protect the right to vote, that we enhance the right to vote, and that we make sure that every vote is registered and counted. And you produce a suspect report that was dramatically rewritten, that you acknowledge was dramatically rewritten compared to the authors' draft that was submitted, and you are asking for a significant amount, millions of dollars, and the confidence of the American people, which is the purpose of your institution, and I am really not sure how you expect the American people and this Committee to give you those millions of dollars when you decided to make a report that should not have been politicized a totally political document.

Ms. DAVIDSON. Maybe I can add a little bit.

Ms. WASSERMAN SCHULTZ. Please. That would be illuminating.

Ms. DAVIDSON. When we asked for the report to be done, when we asked for it, we asked for a definition of what vote fraud and vote intimidation was.

We also asked in the contract that as we went through it, you know, what we asked for in the contract was not what we got. How should we move forward in the study is what we asked for. We did not ask for a conclusion.

There were 24 people who were interviewed in that report, if I remember correctly, 24 or 27.

Ms. WASSERMAN SCHULTZ. Since you're making that accusation or that suggestion, let me quote Job Serebrov, the Republican elections lawyer who was commissioned to co-author the report. He said, "Tova and I worked hard to produce a correct, accurate, and truthful report."

Mr. Serebrov wrote, referring to Tova Wang, a voting expert with liberal leanings from the Century Foundation and co-author of the report—he is a Republican elections lawyer from Arkansas—"I could care less that the results were not what the more conservative members of my party wanted." He added, "Neither one of us was willing to conform results for political expediency."

So you have your bipartisan authors who differ with the commission's characterization of their work.

Ms. DAVIDSON. You know, that is the reason why we put over 40,000 pieces of documents up on the Web site. Everything that took place in that study——

Ms. WASSERMAN SCHULTZ. Unfortunately only after Congress forced you.

Ms. DAVIDSON [continuing]. And the contract, and we would be more than happy to provide you a copy with a contract showing what they had actually signed to.

Ms. WASSERMAN SCHULTZ. That would be great.

Mr. Chairman, I know that my time is expiring because I hear you banging, but the discomfort that I have is that the EAC was formed to help determine what problems in our nation's voting system existed, and that we can have a more accessible, fair, and accurate voting system. But I do not know how the commission can do that unless it finds some reforms for itself.

I yield back.

Mr. SERRANO. And the Committee understands that concern and has voiced that concern strongly last year because I do not think the Committee would be tolerant of that kind of behavior again.

Mr. BONNER. Could I inquire of the Chairman?

Mr. SERRANO. Yes.

Mr. BONNER. Given that you raised this issue in your opening statement as a concern and the gentle lady from Florida has raised this question as well, would it be fair to ask—I know my time has expired—but would it be fair to ask if there is concern that the report was delayed for a reason, was there political pressure put on the commission by the White House or by members of Congress or by other people that might have influenced this?

I know I am the newest kid on the block, but is that not an appropriate question?

Mr. SERRANO. Well, that is a fair question that has been asked in the past. People have denied that kind of situation, but it was not a pleasant thing that we had to deal with last year, and I can assure you that this Committee, both the Chairman and the Ranking Member, would not be happy with that kind of behavior again, and one answers as to what happened then. Still we keep asking those questions.

But we are where we are now.

Mr. Goode the newest member of the Committee from the great State of Virginia.

Mr. GOODE. Thank you I appreciate it.

Mr. SERRANO. With your Brooklyn accent.

Mr. GOODE. I thank each Commissioner for being here today.

STATE FUNDING UNDER HAVA AND STATE SPENDING

Let me ask a little bit about what you all have been spending. Since the inception of the EAC, how much federal money has been spent under HAVA? Six billion, seven billion, eight billion, nine billion? Just kind of ball park.

Ms. HILLMAN. No, sir, I would say less than four billion. About 3.2 billion went to the states directly as requirements payments, and it has been way less than four billion because the EAC has received less than 60 million in the four years, in the first four budgets.

Mr. GOODE. So you spent 3.2 billion the first year in grants to the states to change or upgrade their voting equipment, correct?

Ms. HILLMAN. There were three separate payments. One was early money for them to get their HAVA state plans together and then to be able to replace the punch card and the lever machines, and then the second largest set of requirements payments was sent out in 2004 and 2005.

Mr. GOODE. How much do you say the states had to spend of their own monies and local governments to match or do upgrades?

Ms. HILLMAN. I am not sure that we have that information, sir. They were required to do a five percent match. Some states had reported what they had spent beyond that five percent, but that information is not required for states to report to us. So we do not get that.

Mr. GOODE. What was the number one company in selling voting equipment to the states in terms of dollars would you guess?

Ms. HILLMAN. I honestly do not know, sir.

Mr. GOODE. Anyone?

Ms. RODRIGUEZ. I do not know either.

Ms. HILLMAN. The states purchase their own equipment, and I cannot tell you which company would have sold the most equipment to the states.

Mr. GOODE. All right. So it would be depending on how much the states did spend, counting state money, federal money, and local money to make all of the voting machine changes and everything. It was more than four billion, ballpark, in less than six counting state money and local?

Ms. HILLMAN. State money? Wow, if I am ballparking, I would say it was probably—just on what the state spent, not our operating budget——

Mr. GOODE. Right.

Ms. HILLMAN [continuing]. I would say maybe, maybe four billion, maybe.

Mr. GOODE. Okay. Thank you, Mr. Chairman.

Mr. SERRANO. Thank you.

IG INVESTIGATION INTO VOTER FRAUD AND INTIMIDATION REPORT

Let me just remind folks that in my opening statement, I did mention the fact that the IG is due to come out with a report on this particular issue that you had brought up, and about the procedures that were in place that might have led to this situation.

So there is a pending IG report coming out, we understand, soon.

Mr. Cramer.

Mr. CRAMER. Thank you, Mr. Chairman, and I apologize for having to be late to the hearing. I always like to be on time.

But I wanted to be here as much to welcome my colleague and friend from Alabama, Jo Bonner, who happens to be from lower Alabama. I am from north Alabama, and we are part of the Alabama team, and I want to associate myself with the remarks of the Ranking Member and the Chair in welcoming Mr. Bonner to this particular Subcommittee and to the full Committee as well.

Mr. SERRANO. Mr. Hinchey and I are from New York, just to let you know.

Mr. CRAMER. I think I knew that, but thanks for reminding.

Mr. SERRANO. We did welcome him.

Mr. CRAMER. I know you did. I know you did, but unfortunately I was not here at the time, and I apologize for making you endure that.

I want to give you the opportunity. I am a little late in jumping into your issues here, but I want to give you the chance to respond to the issues that Ms. Wasserman Schultz and my colleague, Jo Bonner from Alabama, were proposing.

Was there pressure put on you in any way whatsoever?

Ms. RODRIGUEZ. On behalf of the commission, I will thank the Chair for mentioning the Inspector General's report. We voted unanimously to investigate that matter. We await. Nobody wants to see that report more than we do. I personally do not believe that there was external pressure. I do believe that the research was mishandled.

Mr. CRAMER. How?

Ms. RODRIGUEZ. Well, I have read all of the E-mails. I mean, she clearly wanted to continue to participate and contribute to the project, and it looked like there was not a lot of response. We may not have been clear in our Statement of Work in the parameters that we set down for a relationship. I know that we have learned a lot from it as an agency.

I told the Chair that I do not want to ever be accused of burying things or mishandling things, and I speak for the commission. It was not where we wanted to be perceived by this body at the time.

Mr. CRAMER. I would like the rest of you, please, to give a reaction to that.

Ms. HUNTER. Sir, I was not on the commission at the time that this report was being dealt with, but I will say that I agree with the comments of the chairwoman. We anxiously await that report,

and from everything I can tell from the E-mails that I have read, there was no outside political pressure, and I believe Ms. Wang even acknowledged as such in the article that the Congresswoman refers to.

I do not believe that there was any kind of political pressure in this regard, and I read the report several months ago, and from what I can tell, the conclusions that she calls research were based on interviews of approximately 26 people, and I do not know how you can draw sweeping national conclusions based on interviewing 26 people.

Thank you.

Mr. CRAMER. And particularly the allegation that officials at the Justice Department were actively involved in the report throughout the process and even exerted some degree of editorial control over the new report.

Ms. HUNTER. There were two members, I believe it was, of the Department of Justice who were on the Board of Advisors of the Election Assistance Commission, and they are required to be on the board pursuant to the Help America Vote Act. So in their capacity as board members, they did weigh in on a couple of matters, yes.

Mr. CRAMER. Well, weighing in is one thing, but controlling, dictating, exerting pressure, you were not on the commission so you would not know that. I would like the rest of you to respond to that.

Ms. HILLMAN. Certainly, sir. Let me say that we did have a member, a person from the Department of Justice who worked on the working group, the project under which Ms. Wang and Mr. Serebrov did the work, had the working group, and we did have someone from the Department of Justice who was on there.

And our principal staff person on this project did consult with him periodically. What I would say as a member of this commission, two things. I personally never received any pressure from either side of the aisle with respect to the contents of the report, particularly not from the Justice Department.

I was aware that expressions of concern had been raised; partisan expressions of concern had been raised with respect to Ms. Wang's participation, but I was not aware and I did not receive any pressure.

I do not believe our staff received any pressure. Irrespective of the participation of a representative from the Department of Justice on the working group, I do not believe the Justice Department put pressure on our staff to change.

However, I do look forward to the results of the Inspector General's report to tell me whether or not what I believed at the time I voted to release the information was correct or not.

Mr. CRAMER. Well, it will be important for all of us to know what was spinning around.

Yes, Ms. Davidson. Did you want to offer information?

Ms. DAVIDSON. I agree with everything that has been said. I was chair during that time, and I asked because I brought it up, that I felt that we needed to go to the IG and ask for a report to be done. And my colleagues voted unanimously to back that.

And so we all look forward to that. We expect it at any time. We really thought it would be here before now.

So as it moves forward, I took a pledge myself of saying if there was anything in that report we needed to change in our office, and we have already started changing how we work through our process of contracting. GovWorks does our contracting. We do not do it ourselves individually now so that it is actually out of our hands at the EAC.

There is more of a protection there for the contractors as well as, you know, the Office of the EAC. So as we move forward, we are improving.

We learned a great deal, as we said, and we moved forward to do a lot better job, but I never received any contact from the Justice Department, the White House, from any colleague on any side, a pressure of how I should vote. I never have.

The only time I ever heard from the White House is that my name was going to be submitted to the Senate for a confirmation. That is the last time I heard from them. So I really feel in my review of the E-mails, I do not think the staff had any pressure put on them either, but we are anxiously awaiting for that report to find out if there was anything.

Mr. CRAMER. Specifically, if I have any time left, the Department of Justice involvement, would you react to that?

Ms. DAVIDSON. The Department of Justice, I was contacted twice with the Department of Justice. When I first came on I went with Ray Martinez to a luncheon, just a hello greeting.

The second time after the report was done I got an E-mail from Hans von Spakovsky, which I know is up on the Internet, but I never responded to it, and that was after the report was done.

Mr. CRAMER. Thank you, Mr. Chairman.

Mr. SERRANO. Mr. Alexander.

Mr. KIRK.

Mr. KIRK. Thank you.

VOTER VERIFICATION

I would like to sort of look at the past and look at the future. I remember when my predecessor was retiring, a nice, old gentleman came up to me and said, "I want to apologize."

And I said, "Why?"

And he said, "I was the guy that stuffed the ballot in 1978 to make sure that your predecessor lost his first chance for election."

And later on he turned out to be a good Congressman, and so I just want to apologize because I think John Porter was a good guy.

You know, I come from Chicago. We know these things, but it was a sort of disheartening moment to go through.

With all of the money that you have, what about just assuring the American people also of the integrity of the process?

And I want to take a moment to look forward. Is there an EAC policy on, you know, people convicted of federal felonies and to get that out to the states? Is there a policy on dead people, foreign citizens voting, people who we actually know were under the age of 18, double jurisdiction voters, something we see a lot of, you know, voting in the city and then coming out and voting in another place?

Anything on that to upgrade our standards and make sure in the work of the commission?

Ms. HUNTER. As Chairwoman Rodriguez mentioned earlier, the Help America Vote Act does have a verification requirement at the front end, when voters submit their voter registration form. So that hopefully will help in some respect to the concerns that you raise.

Another thing is that the Election Assistance Commission has commissioned a study with the National Academy of Sciences, and we are hoping that that study assists states in doing proper matching procedures so that they are able to use their voter registration list and match it up against the records of persons who are deceased, for example, and to ensure that they are matching the proper people before that person is removed.

But, of course, federal law does require that states have a list maintenance program, and unfortunately many states have not done that list maintenance, and so several states have come to us and said, "We need help in this regard. We would like some national standards."

And that is why EAC entered into the contract with the National Academy of Sciences. So we are hoping that what comes out of that contract will assist in some of the areas you have mentioned.

Mr. KIRK. I would just think though we have a list of federal felons, the federal government. Has that ever been provided to the states?

Ms. HUNTER. Not to my knowledge.

Ms. RODRIGUEZ. The states have a variety of laws about felon voting and the rights of felons that we have no control over.

Mr. KIRK. But no data assistance on that point?

Ms. HUNTER. No.

Mr. KIRK. The Social Security Administration obviously knows who is dead because you have got to stop the checks.

Ms. DAVIDSON. Yes. HAVA requires the states now with their new voter registration systems to check with the Vital Statistics to make sure that they have the deceased off of their list. It also requires that they go through Justice to make sure they could meet their state laws, whether it is a felon or what the case might be.

So HAVA has put in some requirements for the states with their voter registration systems to improve upon the areas that you are talking about.

Mr. KIRK. I just say that because in my district, for example, two dead guys resurrected themselves. One dead guy voted or signed election petitions twice before the Super Tuesday elections. So the process of resurrection is very active in my area, and I was just wondering if there was any way you could help.

Ms. DAVIDSON. Hopefully as the states move forward in developing of their statewide voter registration list and doing their process, we are hoping that that will definitely correct everything, and as we said, we are also doing the study and how they actually take names off the list. If there are duplicates within the state, as you mentioned, they could be registered in one location.

So we are moving forward in trying to assist the states in the best practices.

Mr. KIRK. This has more of a federal bent. What about a double jurisdiction voter? Happens to vote in the city, get on the train, and then vote somewhere else the same day.

Ms. DAVIDSON. Well, obviously that is one of the things that really is looked at after the election. If something like that has occurred, then any election, and it depends on their state and the state law whether it is sent to the District Attorney or whether it is sent to the judge at the county level, but election through the process of their state laws, those types of things are handled after the election and prosecuted instead of before.

Mr. KIRK. But for the commission, no significant work on any of these five areas?

Ms. DAVIDSON. As we said, it is being studied currently at the National Academy of Science. So those are all things that we are studying and making sure how the states are doing their statewide voter registration systems.

Mr. KIRK. Have any of the studies been published since? Any action?

Ms. DAVIDSON. Any action on the——

Mr. KIRK. I am looking for anything substantive that you have done on the subject where actual action has been taken besides just study?

Ms. DAVIDSON. Well, the states are working on developing and some of them are already developed, the statewide voter registration.

Mr. KIRK. No, no. I am thinking for the 37 million we gave you guys.

Ms. DAVIDSON. Of what we have done? Well, we have——

Ms. RODRIGUEZ. A preliminary draft of the National Academy of Science's study that Commissioner Hunter referred to will be available in April.

Mr. KIRK. In April, and that is the first action.

Ms. RODRIGUEZ. Yes, if you would call it an action.

Mr. KIRK. Nothing else?

Ms. RODRIGUEZ. I think if you looked at our authorizing statute, you probably wouldn't find much for us in there.

Mr. KIRK. Thank you, Mr. Chairman.

Mr. SERRANO. Thank you.

Mr. Hinchey.

Mr. HINCHEY. Thank you very much, Mr. Chairman.

RELIABILITY OF ELECTRONIC VOTING SYSTEMS

First of all, I want to thank you for your proposal to make it clear that states could use HAVA funds to purchase additional equipment if they have no confidence or less confidence in what they have already purchased. I think that is a very important step, and I hope that you will endorse it and make sure that those kinds of things are allowed to happen.

The problem with the Help America Vote Act is it should have been the Help America Vote Accurately Act, because it is, in my opinion, undermining the accuracy of voting across the country. At the very least it has the very serious potential to do so, and I think there are many places where that is actually taking place, and we need to be very, very focused on this issue.

We need to make sure that the elections in this country are reliable. If they are not reliable, then the people of this country begin

to become unhappy and uncertain with that reliability. We are going to see a major disruption in the whole political process here.

So this is a very critical issue, and that Help America Vote Act, I think, has been a big mistake, particularly in the way that it is open to potential corruption of the election process. I am deeply concerned about that.

Over the last period of time since the Act has come into effect, there have been several districts across the country that have reported specifically numerous problems with electronic voting equipment. These problems occurred in primaries in New Jersey, Georgia, South Carolina, and a few other places.

There have also been several reports that have been issued, including a report by the Government Accounting Service. One of these reports states that state elections officials in California, Colorado, Ohio, Florida, Alaska, Kentucky, and a number of other places have been raising concerns about the security and the reliability of electronic voting machines.

I want to ask why is it that the EAC is not taking a more aggressive, a more proactive stance in dealing with this issue, at least being a receptor or a sounding board for these actions. What are you doing? How are you responding to this?

Ms. HUNTER. Congressman, two things that we have done, and I mentioned this in my opening comments. We are working on the next iteration of the voluntary voting system guidelines, and those guidelines will be for the future of voting. So that doesn't answer your question. I understand that.

Mr. HINCHEY. Yes, I know. That is right. That is fine. You can do that, but the point is we have got to deal with the situation now.

Ms. HUNTER. Right.

Mr. HINCHEY. And you have the evidence of problems and you have the states stipulating those problems telling you about their concerns. It is your job. It is your responsibility to deal with these issues and make sure that if there are problems in the voting system that they are corrected immediately.

Ms. HUNTER. It is our responsibility to ensure that systems that have been certified by the Election Assistance Commission, you know, are properly maintained, that they work, that there are no problems.

However, at this point there are no systems that have been certified by the Election Assistance Commission. So, of course, there is some lag time in between——

Mr. HINCHEY. Well, no, but there are systems that have been promoted, that have been pushed, in effect.

Ms. HUNTER. Not——

Mr. HINCHEY. Oh, yes, they have. I am not saying that you did it specifically, but there has been a lot of pushing on these electronic voting machines, and a lot of people bought into them, and now they understand that there are serious problems associated with them.

They are responding to these serious problems, and they are calling upon the responsible federal agency to try to do something about it. You are the responsible federal agency.

What are you doing about it?

Ms. HUNTER. We have a policy that states that either a state or local election official can send to us their experience with voting systems and we post that on our Web site so that states can share information amongst one another to learn what problems they have had in other jurisdictions.

So we are doing that as part of our clearinghouse role.

Mr. HINCHEY. Very, very passive. Very, very relaxed, not with any intention to bring about corrections.

Let me just ask you another question. I mean I see the answer to that question. The answer is no, you are not doing anything, and that is, I think, potentially tragic, and we are going to have to address that, and hopefully we will be able to address it to some extent within the context of the appropriations process.

But let me ask you another. Are there currently any voting systems in the field that have been certified by the EAC?

Ms. HUNTER. No.

Mr. HINCHEY. No, none. Do you have any oversight? Are you examining them? Do you have any intention of issuing certifications? Do you have any intention of issuing concerns about the accuracy, the reliability of these systems?

Ms. HUNTER. No.

Mr. HINCHEY. No.

Ms. HUNTER. I mean, we do not have the authority to do so, sir, and the only authority that we have is when a machine has been brought to the EAC for certification. There are eight systems right now that have been brought to the EAC for certification under our program.

Mr. HINCHEY. Well, I would disagree with you on the first sentence that you just said there, that you do not have any authority. I think you do have authority. I am sure you have authority. When you see that there are problems, when people are bringing problems to your attention, when states are stepping forward and saying, "We have problems with these primaries," when other states are stepping forward, when you have inspection agencies which are stepping forward, bringing all of this matter to public attention, I do not think there is anything that you can do to just relax and be passive about it.

You have got to be more aggressive. You have got to step forward. You are the agency that was set up by HAVA to deal with these issues.

Ms. HILLMAN. Mr. Hinchey, if I might add, on the issue of the machines, HAVA set the EAC up to be relatively small. I mean, heck, we were kicked to the curb the first year we were in existence——

Mr. HINCHEY. Right.

Ms. HILLMAN [continuing]. Not being able to operate.

People have very high expectations of what EAC can do, and earlier we were asked by Ms. Kilpatrick as to what do we need. If Congress wants EAC to be ready to go into the field to investigate problems with machines and to be able to come up with recommendations, then we need the staff and resources to do that.

We have 30 people on staff, and quite frankly, with the many responsibilities and mandates we have, I would agree with you it would be great. I would also say to you, sir, I do not think the

states would agree that we have that authority because the states have been told, "You purchase the HAVA compliant equipment. You choose to purchase. You choose the certification process you want to go through, whether you are going to go through the national or your own state certification process.

It is all voluntary, sir. So we can be aggressive, but my fear is aggressiveness on words without the authority to follow up is not going to produce the results that I hear you suggesting we need to see.

Mr. HINCHEY. I am not suggesting that you be aggressive, and I know you were kicked.

Ms. HILLMAN. No.

Mr. HINCHEY. I know you were kicked to the curb, and I know who kicked you to the curb, and I know the effects that that has had.

Ms. HILLMAN. No, I mean aggressive about following up, being able to follow up immediately.

Mr. HINCHEY. You need to follow up.

Ms. HILLMAN. Right, and we do not have the capacity.

Mr. HINCHEY. If you want to put that follow-up in the form of aggressiveness, then please be my guest.

Ms. HILLMAN. Well, we do not have the capacity. That is what I am trying to say.

Mr. HINCHEY. Well, then you had better make that clear, that you do not have the capacity. You do not have the ability to do it, and you had better make it clear what the problems are because they need to be dealt with, and if you cannot do it, somebody else is going to have to.

Mr. SERRANO. Thank you.

We are running somewhat behind, and we have yet another panel to come. Let me finish up in two ways, by thanking all of the members for a fine line of questioning, thanking you for your presentations.

But I am going to very loudly disagree with you. You do have a hammer. It is called a bully pulpit. If the New York Times and the Washington Post or the local Des Moines Gazette, if there is such a thing, publishes that you folks said something that is not right with the way to run the next elections, you have power beyond the power you think you have.

If you would say to this country, especially now with the excitement surrounding this election season, that something does not look right, I do not think you realize how powerful that is and how people will start jumping through hoops to make it right.

Secondly, you say you do not have resources, but we did treat the commission fairly, and this Chairman, along with the support of Mr. Regula, made sure that you were a priority.

Ms. HILLMAN. Absolutely.

Mr. SERRANO. And we fought some folks who wanted to cut you down to the bare bones. This Ranking Member and this Chairman did not. We gave you $16 million for the commission. We gave you $125 million to carry out some of your work with the states. We intend to try to be as helpful as we can. Again, you are a top priority for us.

So it breaks my heart when I have you as a top priority for protection and then you tell me you have no power. Use—I do not want a response on this. This is my farewell to you. [Laughter.]

Mr. SERRANO. Use it. You have it. It is called the bully pulpit. Members of Congress use it all the time. What Mr. Hinchey just did in his questioning, what Ms. Wasserman Schultz did in her questioning did not necessarily change anything right now, but it will be reported on. It will be mentioned.

I told you. You have the bully pulpit. Use it, but you have to have the intention and the desire to use it because what you have at hand, and I have always said this, you are a small agency probably that is going to become one of the most important agencies in our government because you have in your hands the ability to tell the country how to conduct fairer and more accurate elections.

And if what we hear every day on TV from right wingers and left wingers is true, there is nothing more important to us in our democratic process and our electoral process. So go out there and raise hell. We will support you on behalf of a fair and accurate count.

Thank you.

Mr. REGULA. Mr. Chairman.

Mr. SERRANO. Mr. Regula.

Mr. REGULA. Is it your experience generally that the states are receptive? Because they do have the primary responsibility. Are they generally receptive to working with you to improve the process?

Ms. RODRIGUEZ. May I? That varies from year to year. One of the organizations we worked with passed a resolution to do away with the commission a year ago. So when we do not have a heavy hand, they are very receptive. When we exert too much force, I think they are less receptive.

Mr. SERRANO. Do not feel too bad about that. If you took a vote on whether to have a Congress or not, you might be surprised with the vote. But we are not going to ask that question.

Ms. RODRIGUEZ. Thank you very much.

Mr. SERRANO. Thank you so much.

Ms. HILLMAN. Mr. Chairman, might I say thank you. I heard you say that you have got our back, and I want to thank you for that.

Mr. SERRANO. Yes, we do. Of course, as Mr. Rangel would say, I am with you for as long as I can stay with you. [Laughter.]

Mr. SERRANO. No, no. I am only kidding. We have your back.

PANEL 2

Ms. HILLMAN. Thank you.

Mr. SERRANO. Thank you so much.

I want to thank the first panel for their testimony. We will now turn to our second panel witnesses, and we will try to at least get through opening statements before the next series of votes.

This panel has Wendy Weiser from the Brennan Center for Justice. She will lead off. Then, Susan Urahn from the Pew Charitable Trusts, followed by Arturo Vargas from the National Association of Latino Elected and Appointed Officials Educational Fund, and Jeff Matthews from the Board of Elections in Stark County, Ohio.

Mr. REGULA. There you go.

Mr. SERRANO. Your district?

Mr. REGULA. Every bit.

Mr. SERRANO. So since you are accepting the fact that he is from your district, let me say that I am a member of the NALEAO. You do not join. You are kind of born into it once you get elected, and we welcome everyone to this panel.

We will hear from you first, Ms. Weiser.

WENDY WEISER'S TESTIMONY

Ms. WEISER. Thank you, Mr. Chairman, Ranking Member, and members of this Committee for holding this important hearing.

My testimony will address the oversight that is needed to insure that the EAC lives up to its charge and helps insure effective election administration this year. I have submitted detailed written testimony, and so today I will focus principally on the urgent need to reform the way in which the agency operates. I will hopefully briefly address also things we believe the commission can and should do this year to improve election administration.

Mr. SERRANO. I should remind this panel also in case you were not in the room that your full testimony will go into the record, and we hope you stay within the five-minute rule.

Ms. WEISER. Okay.

Mr. SERRANO. Thank you.

Ms. WEISER. The EAC is in charge of some of the most critical election administration tasks, from distributing much needed HAVA funds to the states, developing standards for voting systems, overseeing the certification and testing of voting systems, collecting data and conducting election reform research, and administering the federal mail-in voter registration form.

And for our elections to run smoothly, it is essential that these tasks be executed well, and unfortunately there are now two major barriers to this happening. The first is the lack of adequate resources in the agency and the second is a lack of transparent operating procedures for virtually all of the agency's operations.

And as Commissioner Rodriguez mentioned, two days ago after I submitted my written testimony, the EAC's independent Inspector General released an audit of the agency's program and financial operations, and it bears quoting some of what the audit found.

It found that the agency lacks policies and procedures in all program areas to document governance and accountability structure and practices in place. It lacks appropriate and effective internal controls, a clear organizational structure, and strategic plans.

The audit documents in detail the fact that the EAC does not have any standard policies or procedures for virtually any of its functions, and this confirms our longstanding concern that the agency appears to function at times in an ad hoc manner without the transparency, consistency and accountability expected of a public agency. And these are serious failings and ones with significant consequences. They make the agency's work less effective, and they undermine the public's confidence in the agency.

There are two incidents from last election cycle that illustrate the problem. The first is the one that was discussed at length in the questions and answers for the last panel concerning the EAC's mishandling of the voter ID and voter fraud report, and for the reasons that this subcommittee has already elucidated, this incident

shook the public confidence in the agency because there was simply no good reason to withhold research on matters of public concern, commission from established experts with taxpayer dollars under statutory mandate to make available to the public studies on election administration issues.

And worse, this was withheld at a time when at virtually all levels of government these issues of voter ID and voter fraud were being discussed, including in this House.

The public mistrust was magnified not only by the conduct and what happened with the report, but also by the fact that the EAC had absolutely no policies or procedures in place for making the decisions that it made or managing its research, and its action, therefore, seemed ad hoc and arbitrary or to some even worse, designed to suppress information.

And this controversy really could have been avoided if the EAC had in place fair and transparent, standardized procedures that everyone agreed on in advance that were subject to fair research protocols, but it did not.

And another incident that similarly undermined public concern and I addressed at length in my testimony was the agency's handling of its assessment of CIBER, one of the laboratories that accredited voting machines. This was another report that was withheld despite the fact that the agency had decided to not to accredit this agency and despite the fact that at least the State of New York was using that laboratory to test its voting machines.

Now, while the EAC has taken some steps recently to address some of these issues, these deficiencies still infect virtually all aspects of the agency's operations, and so we, therefore, urge this subcommittee to continue to provide oversight to make sure that the agency implements appropriate reforms, including those recommended by the Inspector General and in our testimony.

But at the same time, we urge Congress to provide the EAC with sufficient resources to undertake this important task and to get its house in order and to fulfill its many essential statutory functions. The fact remains that the EAC's work is critical to our elections, and it needs the resources to do that work effectively.

Thank you.

[The information follows:]

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Testimony of

WENDY R. WEISER

Deputy Director, Democracy Program
Brennan Center for Justice at NYU School of Law

Before the
Subcommittee on Financial Services and General Government of the
House Appropriations Committee

February 27, 2008

On behalf of the Brennan Center for Justice at NYU School of Law, I thank the Subcommittee on Financial Services and General Government for holding this hearing and for providing me the opportunity to discuss the U.S. Election Assistance Commission (the "EAC") and election administration issues.

My name is Wendy Weiser, and I direct the Brennan Center's work on voting rights and elections. The Brennan Center is a nonpartisan think tank and legal advocacy organization that focuses on issues of democracy and justice. Among other things, we seek to ensure fair and accurate voting procedures and systems and to promote policies that maximize citizen enfranchisement and participation in elections. We have done extensive work on a range of issues relating to election administration, including work to remove unnecessary barriers to voter registration; to make voting machines more secure, reliable, usable, and accessible; and to expand access to the franchise. Our work on these topics has included the publication of studies and reports; assistance to federal and state administrative and legislative bodies with responsibility over elections; and, when necessary, participation in litigation to compel states to comply with their obligations under federal law and the Constitution. We have also monitored the work of the EAC on a variety of election administration topics.

My testimony today will address how Congress can help ensure that the EAC is effective this year in assisting the states to administer smooth and fair elections. I will focus in particular on the areas in which we believe this Subcommittee can provide helpful oversight of the EAC. Although we believe that such oversight is needed, we also recommend that this Committee support the EAC because its work is critical to our country's election administration.

I. Congressional Oversight is Needed to Ensure that the EAC Operates in a Transparent Manner and Follows Regular Procedures

First and foremost, oversight is needed to ensure that the EAC functions pursuant to regular procedures in a transparent manner that facilitates public accountability. Over the past few years, the EAC has come under criticism for its failure to adopt and follow regular procedures and for the lack of transparency of its operations and decision-making processes. These failures have, unfortunately, undermined public confidence in the agency. Although the EAC has taken steps to increase the transparency of its operations this year—especially by publicizing more information about the agency's operations on a regular basis—more can and should be done to foster public accountability and to regularize and standardize the agency's operations.

Perhaps the most vivid illustration[1] of this problem is the way in which the EAC handled two research projects it commissioned: a report on voter identification and a report on voting fraud and voter intimidation, both of which were completed by mid-2006. Both reports were commissioned pursuant to the agency's responsibility to conduct and make available to the public studies regarding election administration issues.[2] Nonetheless, the EAC refused to release those reports until mid-2007, after it came under intensive scrutiny and pressure from members of this Subcommittee and others.

The Brennan Center consistently denounced the EAC's decision to suppress or delay the release of those reports.[3] There is simply no legitimate reason for a public agency to withhold research on matters of public concern, particularly when the research was commissioned with taxpayer dollars from established experts in the field pursuant to a statutory mandate that the agency make studies on election administration issues available to public. The duty to disclose is especially strong because the EAC's primary purpose is to serve as "a national clearinghouse and resource" on election administration information and procedures.[4] Worse, the EAC withheld these reports at a critical time when the issues addressed in the reports were the subjects of debate and decisions at all levels of federal and state government. These debates and decisions took place without the benefit of the reports' findings on the significant impact of voter ID laws in reducing voter turnout and the low prevalence of the kind of voter fraud targeted by ID laws.

The decisions to withhold these reports from the public, as well as the subsequent decisions to release these reports, were not made in a public vote by the Commissioners, nor were they publicly justified or explained in any way. There were no agency policies or procedures in place to guide the Commission's actions with respect to the research. Indeed, the Commission did not even have published procedures for handling requests for public

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[1] Another illustration, discussed in Part III, *infra*, is the EAC's failure to timely publish a report criticizing CIBER, Inc., a voting system testing laboratory.
[2] *See* 42 U.S.C. § 15381.
[3] The Brennan Center requested both reports in October 2006 under the Freedom of Information Act (FOIA), but the EAC denied our request and our subsequent appeal, arguing that the reports were privileged. *See* http://brennan.3cdn.net/83207ea295b4a3c852_w4m6idxs1.pdf (appeal letter). All documents relating to this dispute are available at http://www.brennancenter.org/content/resources/legislation_testimony/category/eac_oversight.
[4] 42 U.S.C. § 15322.

information, as required by the Freedom of Information Act. To the best of our knowledge, no systematic and regular procedures have been put in place since that time.

In April 2007, the Brennan Center urged the EAC to adopt a number of recommendations designed to increase the transparency of the agency's research operations, to bring the EAC's practices in line with generally accepted research protocols and methods, to promote greater confidence in the EAC's processes, and to enhance its public legitimacy. I attach a copy of those recommendations as an exhibit to my testimony.[5] To the best of our knowledge, these recommendations have not yet been adopted by the Commission. We respectfully request that this Committee consider these recommendations in its oversight of the EAC.

Also in April 2007, the EAC asked its Inspector General to review its internal procedures, including its procedures for awarding and managing research contracts. We welcome any recommendations by the Inspector General designed to achieve the above-referenced goals. Given how critical the work of the Election Assistance Commission is to the effective administration of elections, it is essential that its procedures and processes be reformed and regularized as soon as possible.

II. Congressional Oversight is Needed to Ensure That the EAC Does Not Make Recommendations That Could Risk Disenfranchising Eligible Voters This Year

The Help America Vote Act of 2002 ("HAVA") grants the EAC limited authority over voter registration in three significant respects. First, HAVA charges the EAC with adopting voluntary guidance to assist states in meeting the requirements of the statute's provisions regarding statewide voter registration databases, among other things.[6] The EAC exercised this authority in July 2005, providing the states with some useful non-binding guidance in implementing the new computerized voter registration databases mandated by HAVA.[7] Second, HAVA confers upon the EAC the authority previously held by the Federal Election Commission under the National Voter Registration Act of 1993 (the "NVRA" or the "Motor Voter" Act), including limited rule-making authority over the federal mail-in voter registration form.[8] The EAC has acted under this authority on two occasions,[9] but it has not revised or undertaken any

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[5] The Brennan Center's recommendations are also available here: http://www.brennancenter.org/content/resource/brennan_center_calls_for_greater_transparency_and_accountability_of_us_elec/.

[6] 42 U.S.C. § 15501(a).

[7] *See* http://www.eac.gov/election/docs/statewide_registration_guidelines_072605.pdf/attachment_download/file. The Brennan Center provided extensive commentary on this guidance. *See* Testimony of Wendy R. Weiser before the U.S. Election Assistance Commission Concerning Statewide Voter Registration Databases, April 26, 2005, *available at* http://www.brennancenter.org/page/-/d/download_file_9238.pdf; Comments by Voting Rights, Civil Rights, and Civic Organizations on the EAC's Draft Voluntary Guidance on the Implementation of Voter Registration Lists, May 25, 2005, *available at* http://www.brennancenter.org/page/-/d/download_file_9233.pdf. The Brennan Center's chief criticism of the guidance the EAC issued is that it did not go far enough to ensure that states protect voters' rights as they use their computerized voter lists. Specifically, the guidance does not address the problem, discussed *infra*, of certain states refusing to register new voters, contrary to HAVA, solely because election officials cannot find a computerized match for their voter registration information.

[8] *See* 42 U.S.C. § 1973gg-7(a).

[9] On both occasions, the EAC refused requests—by Florida in July 2005 and Arizona in March 2006—to add to the conditions set by Congress for accepting the federal mail-in voter registration form. *See* Ray Martinez III, Position

rule-making actions concerning the federal mail-in voter registration form since 2006. And third, HAVA charges the EAC with conducting and making available to the public studies regarding election administration issues, including the issue of voter registration databases and maintaining a secure and accurate voter list.[10] Pursuant to this authority and possibly also its guidance authority, the EAC has recently sponsored a three-year study, beginning in 2007, on voter registration databases, with two principal goals: (i) to advise the states on how to better implement their statewide voter registration databases, and (ii) to study and make recommendations concerning interoperability among different states' voter registration databases.[11] An interim report focusing on the second goal is expected on April 1, 2008.[12]

For the reasons stated below, we believe that the EAC should not exercise its authority to make or recommend any further changes to the voter registration process this year. Instead, the EAC should focus on assisting the states in improving their voter registration databases.

A. The EAC Should Not Recommend Changes to the Way in Which States Use Voter Registration Databases in 2008

Although the EAC can and should play an important role in assisting the states to improve their statewide voter registration databases, we believe that the EAC should not recommend any changes that could affect how voters are registered and who is added to or removed from the voter rolls in 2008. In particular, the EAC should not adopt any recommendations concerning cross-state data matching this year. We are concerned that the EAC may be preparing to issue recommendations concerning the use of voter registration databases this year, and we hope that this Committee will urge it to refrain from doing so.

The nation's experience to date shows that changes in the way statewide voter registration databases are used often have unintended consequences or glitches that could disenfranchise eligible voters. There is simply not enough time in 2008 to properly vet such changes, to identify and correct any problems, and to make sure that there are adequate voter protections in place. In particular, there is insufficient time in 2008 to undertake any new program of cross-state data matching that could result in changes to voters' registration status without risking widespread problems that would affect the November elections.

The risk of unwarranted disenfranchisement is especially high in connection with efforts to electronically match records in a voter registration database against records in other government databases. This risk arises primarily in two contexts: (1) when matching is used as a barrier to getting on the voter rolls, and (2) when matching is used to create lists with which to purge the voter rolls of persons who have become ineligible to vote or of duplicate entries. In

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Statement, July 10, 2006, available at http://www.eac.gov/News/docs/arizona-martinezpositionstatementaz.pdf/attachment_download/file (discussing both actions).

[10] 42 U.S.C. § 15381(a) & (b)(3).

[11] *See* Testimony of Dr. Herbert Lin, Chief Scientist, Computer Science and Telecommunications Board, National Research Council, before the Election Assistance Commission, November 13, 2007, *available at* http://www.eac.gov/News/docs/2007-meetings-and-hearings-11-13-07-meeting-herb-lin.pdf/attachment_download/file (testimony by study director).

[12] *Id.*

both contexts, database matching efforts have yielded significant errors that threatened to disenfranchise eligible voters.

First, database matching has created problems when states have attempted to match the information provided by applicants for voter registration against information maintained in other government databases, including databases maintained by motor vehicle authorities and the Social Security Administration. Although such match attempts can be useful tools when used for the purposes intended by Congress in HAVA,[13] they are unreliable when used to determine whether applicants are ineligible to vote. Nonetheless, over the past few years, a small but significant minority of states have inappropriately used database matching as a barrier to getting on the voter rolls.[14] These states have refused to place eligible citizens on the rolls unless election officials could find a match between the voter's registration information and information in other government databases. Although HAVA does provide for such database matching efforts,[15] the statute does not permit states to condition access to the voter rolls on successful matches. The only two federal courts to have considered the issue to date have held that "no match, no vote" procedures violate HAVA and the Voting Rights Act.[16]

Regardless of whether "no match, no vote" procedures are lawful, they risk blocking large numbers of eligible voters from the voter rolls for no good reason. As the Brennan Center has catalogued,[17] the failure to find a computer match between a voter registration record and another government record usually does not indicate any problem with an applicant's eligibility or her voter registration information. Rather, match failures are far more frequently the result of typos, the switch from maiden names to married names, and a variety of other common database inconsistencies. When New York City conducted an audit of its 2005 effort to match the records in its voter database against those in its department of motor vehicles database, it found that almost all of the match failures resulted from typos. When states use matching as a condition to

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[13] Under HAVA, states must attempt to match the information supplied by applicants for voter registration against information in the databases maintained by motor vehicle departments and the Social Security Administration. 42 U.S.C. § 15483(a)(5)(B). The purpose of this matching procedure is to enable states to associate a unique identifying number—a driver's license number, a partial Social Security number, or a newly assigned number—with each eligible voter, to keep better track of voters moving within the state, and to ensure that a John Smith in one county would not be confused with a John Smith elsewhere. Thanks to an amendment offered by Senator Wyden, this matching procedure serves a second purpose as well—to exempt first-time voters who register by mail from HAVA's identification requirements if state officials are able to "match" the information on their registration records with other state records. 42 U.S.C. § 15483(b)(3).

[14] *See* Justin Levitt, Wendy Weiser & Ana Munoz, *Making the List: Database Matching and Verification Processes for Voter Registration*, March 24, 2006, *available at* http://www.brennancenter.org/content/resource/making_the_list_database_matching_and_verification_processes_for_voter_regi/ (cataloguing state database practices based on research in late 2005 and early 2006). Currently, we are aware of only three states that still refuse to register voters based on the results of unsuccessful database matching efforts, though it is difficult to be sure since states rarely codify such practices.

[15] *See supra*, note 8.

[16] *See Washington Ass'n of Churches v. Reed*, 492 F. Supp. 2d 1264 (W.D. Wa. 2006); *Florida State Conference of the NAACP Braches v. Browning*, No. 07-CV-402-SPM/WCS (N.D. Fla. Dec. 18, 2007) (order granting motion for preliminary injunction), *available at* http://www.brennancenter.org/page/-/Democracy/FloridaNAACPvBrowning%20-%2012-18-07%20Order%20Granting%20PI.pdf. While the Washington decision has been made final, the Florida decision is currently on appeal.

[17] *See, e.g., Making the List, supra*, note 14.

getting on the voter rolls, a substantial number of eligible voters are kept off the rolls because of computer and human errors.

The number of eligible voters who could be affected by "no match, no vote" policies is alarming. In several jurisdictions, match failure rates have been as high as 20-30%. According to a February 2007 report by the Social Security Administration, 46.2%—almost half—of all voter registration records submitted to the Administration for verification failed to match its records. Moreover, match failures are more common for members of minority groups, whose names may be less familiar to election officials, as well as for women, who are more likely to have changed their surnames. The Brennan Center found significant racial disparities in match failure rates in connection with lawsuits challenging a "no match, no vote" rules in Florida and Washington State.[18]

Second, database matching has also created problems in the purge context. Although new statewide voter registration databases, when fully developed, can facilitate better maintenance of the rolls, without adequate protections for voters, purge practices raise significant concerns. Computerized voter rolls enable states to purge voters with the push of a button. Most states are now able to develop lists of voters to be purged from the rolls by electronically matching names on voter rolls against government databases of persons ineligible to vote. Unfortunately, the matching processes used are inaccurate and may result in many eligible voters being purged from the voter rolls. Since states rarely provide effective notice of a purge, voters whose names have been removed from the rolls usually do not learn of the problem until they show up at the polls on Election Day and are denied a regular ballot. The secrecy of the process makes it easier for election officials to manipulate purges to target certain groups of citizens.

The most notorious examples of flawed purges occurred in Florida in 2000 and 2004. In 2000, thousands of legal voters were purged from Florida's voter rolls simply because their names shared 80% of the characters of the names on a list of people with felony convictions. In 2004, the Brennan Center uncovered evidence of another erroneous purge list in Florida, containing 47,000 "suspected felons." The flawed process used to generate the list identified only 61 voters with Hispanic surnames, notwithstanding Florida's sizable Hispanic population.[19] To compound the problem, the purge list over-represented African Americans[20] and mistakenly included thousands who had had their voting rights restored under Florida law. Although the Florida flawed purge lists were widely publicized, similar errors across the country typically

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[18] In Florida, we found that Hispanic Americans, who comprised 15% of the voter applicant population, constituted 34% of those on the failed match list; similarly, African-Americans, who comprised 13% of the voter applicant pool, constituted 22% of those on the failed match list. In contrast, whites, who comprised 66% of the applicant pool, accounted for only 29% of the un-matched applications. *See* Plaintiffs' Supplemental Evidentiary Submission in Support of Motion for Preliminary Injunction, *Florida State Conference of NAACP Branches v. Browning*, No. 07 CV 402 (N.D. Fla. Nov. 14, 2007). In Washington State, we found that Asian Americans were vastly over-represented in the un-matched population.

[19] Specifically, 0.1% of the people on the list were Hispanic, even though in Florida, 12% of the disenfranchised population, or one in eight citizens, is Hispanic. The contractor that compiled that list did so by matching names on the voter list against records maintained by the state department of corrections. For a match to be found, the contractor required matches in a variety of fields, including a field for race. The problem was that one database had a category for Hispanics and the other did not. The result was a list that systematically excluded Hispanics.

[20] African-Americans comprised 46% of the purge list but only 30% of the disenfranchised population.

escape public scrutiny. Other purges that have come to public light have been found to ensnare many eligible voters.[21]

Because the database matching techniques used by many states in the voter registration context have been inaccurate; because there are insufficient safeguards in place to guard against unwarranted disenfranchisement due to database and matching errors; and because there is insufficient time to improve these processes and provide the necessary protections for voters this year, the EAC should not recommend that states engage in additional forms of database matching this year to maintain their voter rolls.

B. The EAC Should Not Make Recommendations For Inter-State Database Matching in 2008

In particular, the EAC should not recommend that states undertake new efforts to match voter registration data across state lines to identify voters who have allegedly moved or who are otherwise ineligible to vote in a jurisdiction.[22] The problems associated with database matching voters are compounded as states attempt to increase the interoperability of their systems for the purposes of pruning their voter rolls based on information gleaned from other states. In several instances in which purges based on cross-state data matching have come to public light,[23] the purge attempts were found to have been based on erroneous assumptions, such as the assumption that two records showing the same name and date of birth refer to the same person. (To the contrary, in a sufficiently large group such as a state, two different individuals will share the same name and date of birth surprisingly often.[24])

Given the novelty of the practice, the current technological limitations of state voter registration databases, and the lack of sufficient voter protections in place, any effort to promote purges based on cross-state database matching presents too great a risk of voter disenfranchisement this year. Indeed, the EAC should not make any recommendations on database matching without ample opportunity for study and public comment and a demonstration that the recommendations include adequate protections to prevent eligible voters from being

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[21] For example, the Brennan Center worked with political science professor Michael McDonald to analyze a New Jersey purge list prepared by a political party using "matching" techniques. We found that the list was compiled using a number of faulty assumptions and thus that it would have harmed eligible voters if used as the basis for a purge. *See* http://brennan.3cdn.net/9d1efbddb2c45834e0_pom6bx3bk.pdf.

[22] It bears noting that nothing in HAVA or any other federal statute requires states to attempt to compare their voter registration database records with those of other states.

[23] For example, in 2006, the Secretary of State of Kentucky attempted to purge the state's rolls based on a flawed attempt to identify voters who had moved from Kentucky to neighboring South Carolina and Tennessee. The state Attorney General learned of the purge and brought a successful lawsuit to reverse it on the grounds that the Secretary of State did not follow the voter protection procedures outlined in the state law analog to the NVRA. The lawsuit uncovered the fact that eligible voters who had not, in fact, moved out of the state of Kentucky were caught up in the purge. (Neither South Carolina nor Tennessee relied on the results of the flawed match exercise.)

[24] Statistics teaches that in a group of 23 people, it is more likely than not that two will share the same birthday; in a group of 180, two will probably share the same birth date, including day, month, and year. Particularly for voters with common names in a pool as large as a state, there will be several different individuals who share the same basic information. *See* Michael P. McDonald & Justin Levitt, *Seeing Double Voting: An Extension of the Birthday Problem*, 11 (July 1, 2007) (unpublished manuscript, submitted to the 2007 Conference on Empirical Legal Studies), *available at* http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID997888_code698321.pdf?abstractid=997888&mirid=1.

inappropriately disenfranchised. (At the very least, HAVA requires the agency to provide notice of any such recommendations and to allow ninety days for public comment.[25])

C. The EAC Should Assist the States to Improve Their Voter Registration Databases

The risk of voter disenfranchisement as a result of purges based on database matching programs is unlikely to be abated until the states improve the quality of their voter registration databases. Accordingly, the Brennan Center recommends that EAC focus its efforts this year on helping states improve their voter registration databases, many of which do not function adequately, instead of on making recommendations concerning database interoperability.

D. The EAC Should Not Recommend Changes to the Federal Mail-In Voter Registration Form in 2008 Other Than Technical Corrections

Congress provided for a federal mail-in voter registration form in the NVRA to guard against a range of state barriers to voter registration and to ensure that all eligible Americans can register to vote using a single form. Most changes to this federal form require a formal vote by the EAC Commissioners after a formal rule-making process. At this point, there is insufficient time in 2008 to implement any changes to the federal mail-in voter registration form, other than technical corrections like address updates, without risking confusion and error that could prevent eligible voters from being registered. The EAC should, however, immediately update the addresses of the state election offices on the instructions to the federal form to ensure that eligible registrants are not disenfranchised due to lost voter registration forms sent to old addresses.

III. Congressional Oversight Is Needed to Ensure That the EAC Adequately Fulfills Its Necessary Functions, Especially Relating to Testing and Certification of Voting Machines

HAVA has placed the EAC in charge of many crucial federal election administration tasks. Among its many responsibilities, it is charged with acting as the lead federal agency for accrediting voting system testing laboratories and certifying voting systems, and allocating election-related federal funding to the states.[26] Both of these functions are essential. The EAC's performance with respect to the latter can and should be improved.

For the last several years, the testing and certification process conducted by the EAC for voting machines has been flawed in at least three ways: (1) vendors choose and pay the laboratories that evaluate their systems, (2) the process lacks transparency, and (3) the formal reporting process is too limited.

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[25] 42 U.S.C. § 15501.
[26] 42 U.S.C. § 15322 (2003).

Vendors Choose and Pay the Laboratories that Revaluate their Systems. Under the current process, vendors choose and pay for the laboratories that evaluate their systems.[27] This process creates an appearance of conflict of interest for the testing labs. Worse still, it creates perverse incentives for the testing laboratories to certify machines to ensure that vendors choose them in the future. The testing laboratories themselves have done little to build public confidence in their independence from voting machine vendors. In a fairly well-publicized written submission to the EAC, a testing laboratory recently stated that it "view[ed] the relationship between an independent testing laboratory and it's [sic] clients as similar to that between lawyer and client or between doctor and client."[28]

Accordingly, the Brennan Center recommends taking action to ensure that voting system testing laboratories are and appear to be independent of vendors. First, we should end the process whereby the voting system testing laboratories are chosen and directly paid by the vendors whose machines they evaluate. Second, the periodic evaluations of testing laboratories conducted by the National Voluntary Laboratory Accreditation Program should be made public promptly, regardless of whether the laboratory's accreditation is granted, denied or revoked.

Process Lacks Transparency. The EAC's failure to timely publish a damning Assessment Report of CIBER, Inc. after it was completed in July 2006 provides a textbook case of how a lack of transparency can severely shake public confidence. The report concluded, among other things, that CIBER had not shown the resources to provide a reliable product.[29] As a result of the Assessment Report, the EAC determined it could not accredit CIBER under the interim accreditation process.[30] However, it did not publicize this decision, release the Assessment Report, or notify the State of New York, which was using CIBER to test its voting systems at the time. Only after the New York Times reported that CIBER had been barred from certifying election equipment and weeks of public pressure following that news article, did the EAC finally release the Assessment Report and other documents related to its decision.[31]

New York's experience with CIBER is also an excellent illustration of the importance of transparency in the voting machine certification process, and in particular the need to ensure that

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[27] *See* ACCURATE, *Public Comment on the Manual for Voting System Testing & Certification Program Submitted to the United States Election Assistance Commission* (Oct. 31, 2006), joined by the Brennan Center, *available at* http://accurate-voting.org/wp-content/uploads/2006/11/ACCURATE_VSTCP_comment.pdf (hereinafter "ACCURATE Comment on VSTCP"); U.S. Election Assistance Commission Public Meeting and Hearing, Pasadena, CA (July 28, 2005) (Testimony of David L. Dill, Professor of Computer Science, Stanford University and Founder of Verified Voting Foundation and VerifiedVoting.org) available at http://www.eac.gov/docs/Dill.pdf (hereinafter "Testimony of David Dill").; *Voting Machines: Will the New Standards and Guidelines Help Prevent Future Problems?: Joint Hearing Before the H. Comm. on H. Admin. and the Comm. on Science*, 109th Cong. 66-71 (2006) (Written Statement of David Wagner, Professor of Computer Science, University of California-Berkeley), *available at* http://www.votetrustusa.org/index.php?option=com_content&task=view&id=1554&Itemid=26 (hereinafter "Testimony of David Wagner").

[28] U.S. Election Assistance Commission Public Meeting, Washington, D.C. (Oct. 26, 2006) (Written Statement of Frank Padilla, Test Supervisor, Wyle Laboratories, Inc.) *available at* http://www.eac.gov/docs/Voting%20Systems%20Briefing%20-%20Frank%20Padilla%2010-18-06%20Final.pdf.

[29] U.S. Election Assistance Commission, Assessment Report: CIBER & Wyle (conducted July 17-22, 2006) *available at* http://www.eac.gov/docs/Ciber%20&%20Wyle%20Assessment%20(July%202006).pdf.

[30] Christopher Drew, *Citing Problems, U.S. Bars Lab From Testing Electronic Voting*, N.Y. TIMES (Jan. 4, 2007) available at http://select.nytimes.com/search/restricted/article?res=F50811F63C540C778CDDA80894DF404482.

[31] These documents are available at: http://www.eac.gov/eac_vsc3_updates.htm.

all test plans, Technical Data Packages and test reports are made public. Concurrent with its hiring of CIBER to conduct its certification testing, New York also hired NYSTEC, a private, not-for-profit engineering company to conduct an independent review of CIBER's test plan. NYSTEC's review showed that the test plan lacked several security and functional testing requirements under state law and the federal Voluntary Voting System Guidelines of 2005 (to which CIBER had agreed to test). Among the items missing from the test plan were: a requirement that voting systems did not include any device potentially capable of externally transmitting or receiving data via the internet, radio waves or other wireless means; a requirement that voting system software not contain any viruses or other devices that could cause the system to cease functioning properly at a future time; a requirement for voting systems to provide a means by which the ballot definition code could be positively verified to ensure that it corresponded to the format of the ballot face and election configuration; and test methods or procedures for the majority of the state's voting system requirements.[32] These problems were only discovered because CIBER's test plans were subject to independent scrutiny.

Short of mandating that jurisdictions hire independent reviewers for all certifications of voting machines, it is imperative that the EAC publish documents necessary for the public to ascertain the value of a testing laboratory's certification. This means not only publishing all testing laboratory test plans for a particular machine, but also the technical data packages submitted by the vendor to the testing laboratory, and the laboratory's reports that assess the machines. The EAC's Voting System Testing and Certification Program Manual now requires the publication of testing laboratory reports and test plans. It does not, however require the publication of all Technical Data Packages provided by the vendors for the reports; this omission will make it more difficult for the public and independent experts to judge the conclusions made in the laboratory reports.[33] This is a glaring gap in the EAC's reporting requirements and should be changed.

Accordingly, the Brennan Center recommends that the EAC make the voting machine certification process more transparent. If the public is to regain its trust in this process, it is critical that the EAC publish: (1) all test plans submitted by the testing laboratories; (2) the vendor's Technical Data Packages, which the vendor submits to the EAC to provide the specifics of a voting system; as well as (3) the test report that a testing laboratory submits to the EAC after it has tested that voting system.[34]

Formal Reporting Process is Too Limited. Under the new Voting System Testing and Certification Program Manual, the EAC will accept reports from "[s]tate or local election officials who have experienced voting system anomalies in their jurisdiction."[35] This is an important step. Unfortunately, individual voters and technical experts performing usability,

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[32] Howard Stanislevic, *Voting System Certification: Who's Minding the Store?*, VoteTrustUSA (Jan. 9, 2007) *available at* http://votetrustusa.org/index.php?option=com_content&task=view&id=2173&Itemid=113.

[33] Aaron Burstein & Joseph Lorenzo Hall, *Unlike Ballots, EAC Shouldn't Be Secretive*, Roll Call (Jan. 22, 2007) *available at* http://www.rollcall.com/issues/52_66/guest/16640-1.html.

[34] ACCURATE Comment on VSTCP, supra note 27.

[35] U.S. Election Assistance Commission, Testing and Certification Program Manual section 8.7.2 (draft, Sept. 28, 2006) *available at* http://www.eac.gov/docs/Voting%20System%20Testing%20and%20Certification%20Program%20Manual%20FR%20DRAFT%20(Sept%2028).pdf.

accessibility and security tests on voting machines appear to be excluded from filing such reports with the EAC.[36] This is problematic for two reasons. First, the EAC has no method in place to protect the anonymity of election officials filing reports. Many election integrity and security experts have argued that an election official "might be reluctant to report an irregularity in a system he was responsible for administering," both because he may have also been responsible for purchasing that system and because he would probably need to continue to rely on technical assistance from the vendor.[37] Second, voters and technical experts using these machines would be an excellent source of information about problems with these machines; in many instances, they will be in a far better position than election officials to know how the machines actually perform when used.

Accordingly, the Brennan Center recommends that the reporting process be opened to include reporting information from voters and technical experts who have used the voting machines to amend voting system standards, where necessary.[38]

IV. The EAC Should Provide Assistance to State and Local Election Officials to Avoid Basic Ballot Design Mistakes

The EAC can make a significant difference this year if it provides assistance to state and local election officials to prevent basic ballot design mistakes. The EAC recently produced a 266-page report on effective ballot design. It has been repeatedly demonstrated that ballot design is very important to smooth election administration. A poorly designed ballot in Sarasota County is thought to be responsible for 13% of voters failing to cast their vote for the House of Representatives, even though they voted for the Senate.[39] The "butterfly ballot" in Palm Beach was blamed for many of the 19,000 over-votes in that county which had to be discarded.[40] Even more recently, in the 2008 California Presidential Primary, as many as 49,500 votes may have been lost in Los Angeles County because voters mis-marked their ballots as a result of a confusing ballot design.[41]

Notwithstanding the importance of the information in the report, the dense report on ballot design produced by the EAC may not, standing alone, be sufficient to communicate the information in the report to relevant decision-makers and actors. The EAC has experience using multiple and complimentary methods of public education. For example, in July of 2007, the EAC hosted a series of briefings with respect to improving the quality and recruitment of poll workers and also published a manual on poll worker recruitment, training, and retention. By way of another example, the EAC published a glossary of common election terms in Spanish and provided a mechanism for translating its website.

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[36] ACCURATE Comment on VSTCP, *supra* note 27, at 8
[37] *Id.* at 9.
[38] *Id.* at 8.
[39] *See* Editorial, *Fixes for Accurate Vote Counts*, CHRISTIAN SCIENCE MONITOR, Feb. 27, 2007, at 8.
[40] *See* Jeff Kunerth, Scott Maxwell, & Maya Bell, *Vote Never Had Chance; Ballots and Laws Were Confusing, Poll Workers Weren't Well-Trained and Voters Were Careless*, ORLANDO SENTINEL, Dec. 17, 2000, at A1.
[41] Richard C. Paddock, *Some Independent Votes Won't Count in L.A. County*, L.A. TIMES, Feb. 12, 2008, at A1.

The EAC should similarly undertake further efforts to ensure that ballot design mistakes are avoided—such as providing trainings and workshops to those officials responsible for designing ballots, providing an easy to use "checklist" for ballot design, and publishing best practices. There is still enough time to disseminate this information this year to ensure that it helps avoid ballot design errors this November.

At this time, however, the EAC's operating budget and staffing levels are insufficient for its many tasks. Accordingly, we urge Congress to provide the EAC with adequate resources to undertake this important public education effort.

V. Congress Should Provide Adequate Resources to the EAC and Fully Fund HAVA

As noted above, HAVA has placed the EAC in charge of many of the most important federal election administration tasks. In addition to its responsibilities over the accreditation of the Voting System Testing Laboratories and certification of voting systems, the EAC is also charged with distributing HAVA funding to the states, acting as a clearinghouse of information on the experiences of State and local governments in implementing the guidelines and in operating voting systems in general, conducting studies and carrying out other activities to promote the effective election administration of Federal elections, and carrying out administrative duties under the NVRA, including developing and maintaining a mail voter registration application form for elections for federal office.

In contrast to its significant responsibilities, the EAC receives very little support. In 2006, it had an operating budget of just $15 million and employed less than 30 people. Even the best operating procedures and practices will have little effect if the EAC does not have the resources and staff to carry them out. Accordingly, the Brennan Center recommends that Congress provide the EAC with sufficient resources to carry out its responsibilities effectively.

In addition, the Brennan Center recommends that Congress fully fund HAVA. The scope and speed with which the nation has transformed the way it registers, votes, and counts votes is unprecedented. Such a transformation requires adequate funding to be successful. The funding thus far has proven insufficient, and the challenges facing election administrators are not abating. Full funding is necessary to ensure that states properly implement statewide voter registration databases, keep up with the spiraling costs of purchasing and maintaining voting equipment, and ensure proper poll worker training and voter education during a period of significant change. Sufficient resources are needed to fulfill HAVA's promise.

Thank you very much.

Attachment to Testimony of Wendy R. Weiser

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Brennan Center Calls for Greater Transparency and Accountability of U.S. Election Assistance Commission

Last week, the U.S. Election Assistance Commission (EAC) announced that it will review its internal processes for releasing research and reports to the public and for awarding research contracts, and yesterday it asked its inspector general to review its procedures. We hope that these announcements signal the agency's willingness to embrace greater transparency and public accountability—qualities that have been lacking from many of its operations to date.

The EAC's announcements come on the heels of intense pressure from the Brennan Center and other advocates, members of Congress, and the media for the EAC to release two reports on important voting issues that the agency had commissioned from expert consultants with taxpayer dollars: a report on voter identification, and a report on voting fraud and voter intimidation. Despite the fact that both reports were completed by the summer of 2006, the EAC did not release the voter identification report until March 30, 2007, and it has never released the voting fraud and voter intimidation report (the latter report, however, was leaked to the *New York Times* last week).[1] The Brennan Center had requested both reports in October 2006 under the Freedom of Information Act (FOIA), but the EAC denied our request and our subsequent appeal.

The Brennan Center has consistently denounced the EAC's decision to suppress or delay the release of these expert reports. There is simply no legitimate reason for a public agency to withhold research on matters of public concern, particularly in this instance, when the research was commissioned with taxpayer dollars from established experts in the field pursuant to a statutory mandate that the agency make studies on election administration issues available to public. The duty to disclose is especially strong with respect to a public agency whose primary purpose is to serve as "a national clearinghouse and resource" on election administration information and procedures.

Worse yet, the EAC withheld these reports at a critical time when the issues addressed in the reports were the subjects of debate and decisions at all levels of government. During the period in which the reports were suppressed, the legislatures of more than half of the states considered and voted on bills to impose more restrictive voter ID requirements on citizens; a number of federal and state courts – including the United States Supreme Court – heard and decided lawsuits challenging restrictive voter ID laws; and the U.S. House of Representatives debated and passed a bill that would have imposed requirements on all voters. All of these debates and decisions took place without the benefit of the reports' findings on the significant impact of voter ID laws in reducing voter turnout and the low prevalence of the kind of voter fraud targeted by ID laws.

[1] The EAC did, however, produce its own report on election crimes based in part on the consultants' research.

As the EAC reconsiders its internal processes, we urge it to adopt the following recommendations designed to increase the transparency of the agency's research operations, to bring the EAC's practices in line with generally accepted research protocols and methods, to promote greater confidence in the EAC's processes, and to enhance its public legitimacy.

- The EAC should solicit and publish public input on its research agenda and priorities.
- The EAC should develop and publish uniform policies and procedures for selecting research contractors, entering into research contracts, and managing research projects. The policies and procedures should be designed to foster research on election administration issues; to ensure that such research is timely and useful for voters, election administrators, and the public; to promote research that uses sound methodology; and to ensure the greatest possible transparency, predictability, and accountability of the EAC's decision-making processes.
- The EAC should make all the research it commissions available to the public. It should do so without unreasonable delay.
- The EAC should not censor or modify outside research in any way, even if it is dissatisfied with the methodology or the findings. The EAC is free to adopt or decline to adopt, in whole or in part, the findings and conclusions of outside researchers. It should not alter those findings or conclusions when it releases the research.
- If the EAC decides to adopt or to reject the findings or conclusions of outside research, it should do so by a public vote, with advance public notice. The EAC need not specifically adopt or reject the research; it can release the research without comment or attribution to the agency.
- The EAC should not use any political litmus test for selecting the researchers with whom it contracts. The researchers should be judged on the quality of their proposals and their research, not on their actual or perceived political leanings.
- The EAC's research contracts should not in any way prohibit researchers from discussing their research or findings within a reasonable time after they complete their research.
- The EAC should oversee its outside research contracts so as to foster independent and peer-reviewed research rather than to design, plan, and manage the studies or research projects. Nor should the EAC place unreasonable restrictions on researchers or prevent them from drawing conclusions based on their research.
- The EAC should not refuse to sponsor or withdraw its support from any research project because of the potential political consequences of the research findings or conclusions. The goal of research should be increased knowledge and information about election administration issues.
- The EAC should encourage peer review of the research it commissions after the research is released. It can also seek independent review prior to initiating research.

The Brennan Center looks forward to working with the EAC to reform its practices to better realize its statutory mandate of fostering research on election administration issues and serving as an election information clearinghouse. For more information, please contact Wendy Weiser at wendy.weiser@nyu.edu or Myrna Perez at myrna.perez@nyu.edu.

Mr. SERRANO. Thank you.

SUSAN URAHN'S TESTIMONY

Ms. URAHN. Thank you, Chairman Serrano, Ranking Member Regula, and other members of the Committee for holding this important hearing and inviting me to address some of the challenges facing U.S. elections.

As Managing Director of the Pew Center on the States, part of the Pew Charitable Trusts, I oversee an initiative called Making Voting Work, which seeks to significantly improve the accuracy, convenience, efficiency, and security of U.S. elections. The challenge for state and local election officials, for those who control their budgets, and for policy makers in state legislatures and in Congress is to insure that elections reflect the way that American now lead their lives and take advantage of some of the advances that have transformed modern society, and that the answers to fundamental questions about the performance of elections can be answered with clarity.

Elections today fail to reflect the convenience and efficiency that characterize other interactions that define our lives. If you move, your registration does not follow you. If you want to register on line, you cannot unless you live in Arizona or Washington State.

If you want to vote at a polling place near your office rather than one near your home, in all but a handful of states you cannot. If you are one of six million military and overseas citizens, you are faced with a complex and conflicting set of state rules and regulations when it comes to requesting, receiving and returning ballots.

And if you want information about any of this, how to register, where to vote, what is no the ballot, or if your vote is counted, it either is not available on line or, if it is, it is not very easy to find.

Unfortunately, the field of election administration has too often been unable to muster the resources and the expertise needed to meet these challenges. Now, changing this dynamic will require testing improvements in how we run elections, building a body of evidence and sharing those results broadly to inform state and local policies.

Make Voting Work with support from the JEHT Foundation is proud to be working in partnership with election officials, the private sector, academics, and others to test some of the most promising innovations in several states. Pew has invested $20 million in this arena to date, and this is only part of a multi-year, multimillion dollar commitment on the part of the board to really build the evidence base we so desperately need in this area.

Now, given our limited time, I will highlight just one of our projects, and if the Committee will allow, we will put the full announcement of our first awards into the record.

In Ohio, Kentucky, and Indiana, the Secretaries of State have joined together to test the use of change of address forms to improve the registration process, offer voters a convenient way to update their registration, and hopefully reduce costs to state and local governments. Recognizing that 40 million Americans move every year, the National Association of Secretaries of State has adopted a resolution at their national conference this month calling for an expansion of this approach.

Creating projects like this should encourage us to take an entirely new look at conventional practices and think about where we can transform the outdated elements of our election system. Field test experiments that point the way to a more portable registration system are an important step forward.

But rather than applying Bandaids, it may be time to create a voter registration system where states would have a comprehensive list of all the voters. Registration would seamlessly follow those who move. Ineligible names could not be added to the list, and information would be managed reliably.

And then we have the issue of data. Sound policymaking and effective management practices for elections are built on data, data that allow us to assess the performance of our election systems. Gaps in the EAC election day survey currently are so severe that it is nearly impossible to consistently monitor state compliance with key provisions of the NVRA and UOCAVA. We do not have a good handle on how many Americans are registered to vote, how many have been moved to inactive lists, or how many show up at polling places for each federal election.

The EAC must assure that the election day survey meets the highest standards of quality data collection, and they need to take a leadership role in setting standards for the kinds of data we will need to collect over the next decade. With good data that reaches down to the precinct level, because that is the unit of analysis necessary for meaningful comparison, one could determine the impact of a new voting system on accuracy, whether any new early voting policy reduces election day stress, how the number, age, and training of poll workers relates to election performance, which voters take advantage of new registration methods such as online registration applications or change of address forms, how a new voter identification law affects an election.

This kind of data would allow your committee to better evaluate the impact of the Help America Vote Act and the over $3 billion in federal funding.

The Committee has taken a positive first step by funding $10 million in new state data collection efforts to be administered through the EAC, and thank you, Chairman Serrano, for your leadership in securing this funding. Collecting information on the state of our elections is a critical element of EAC's mandate to serve as a clearinghouse of information about elections in the states.

We firmly believe that the five states that receive funding under this new program will set the gold standard for how to assess election performance, and we hope that requests for proposals receive the attention that they deserve from Secretaries of State and state election directors.

However, the success of this pilot is also dependent on the EAC. The data collection program should receive the highest priority. They should insure that states receive the support they need to submit competitive applications and that participating states set aggressive data collection goals, including collecting high quality precinct level data.

I urge the Committee to hold an oversight hearing this summer on the data collection program. At that point after the grants for the data collection program are awarded and the 2008 election day

survey is released, the Committee will be able to hear from the selected states about their plans and from the EAC on how they have refined the survey to insure that it collects the information needed to assess the performance of state election systems.

Thank you again for the opportunity to testify today, and I look forward to future opportunities to talk about Make Voting Work, and welcome any questions you may have.

[The information follows:]

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Testimony of Susan Urahn
Managing Director, The Pew Charitable Trusts

House Appropriations Subcommittee on
Financial Services and General Government
February 27, 2008

Thank you Chairman Serrano, Ranking Member Regula and other members of the committee for holding this important hearing and inviting me to address the many challenges facing U.S. elections.

As managing director of the Pew Center on the States, a project of The Pew Charitable Trusts, I oversee an initiative called Make Voting Work which seeks to significantly improve the accuracy, convenience, efficiency and security of U.S. elections.

Make Voting Work was launched last year and builds on Pew's long-standing support for *electionline.org*. Started in 2001, *electionline* is the nation's premier source for news and analysis on issues of election administration.

Make no mistake—the field of election administration has changed dramatically in the last eight years.

Still, the fundamental questions asked by voters—How do I register to vote? Where is my polling place?—have not changed.

Even the current debate about the accuracy of voting technologies rings familiar. The machines being examined may look different, but voters are rightly asking, as they have in other times, "Is my vote being counted?" And, "Are election outcomes trustworthy?"

The challenge for state and local election officials—not to mention for the councils, boards and administrators that control their budgets as well as for policy makers in state legislatures and in Congress, is to ensure that:

(1) the policies and practices that govern elections reflect our modern times, and
(2) the answers to fundamental questions about the performance of elections can be answered with clarity.

No one before your committee today can credibly argue that *any* system of elections in *any* state fully meets either of these requirements.

Elections today exhibit a troubling failure to reflect the convenience and efficiency that characterize other interactions that define our lives.

If you move, your registration doesn't follow you.

If you want to register online, unless you live in Arizona or Washington, you cannot.

If you want to vote early, in over a third of the states you still need an excuse.

If you want to vote at a polling place near your office rather than one near your home, in all but a handful of states you can't.

If you are one of the approximately six million military and overseas citizens, you are faced with a labyrinth of complex and conflicting state rules and regulations when it comes to requesting, receiving and returning ballots.

If you want to find out information about any of this—how to register, where to vote, what's on the ballot or if your vote was counted—it either isn't available online or if it is, it's not very easy to find.

There is no reason that these simple improvements can't be made, so long as the challenges to the operations and integrity of elections they present can be overcome.

Unfortunately, the field of election administration has too often been unable to muster both the resources and expertise necessary to meet these challenges.

State and local election officials certainly show a willingness to experiment and desire to improve, but without research and evidence about how to make these changes and rest assured of their success, improvements are waylaid by the status quo.

Changing this dynamic requires producing a body of evidence that tests desired improvements in how we run elections and shares the results broadly to inform state and local policies.

Make Voting Work, with support from the JEHT Foundation, is proud to be working in partnership with election officials, major private-sector partners, academics and others, to test current practices and some of the most promising innovations. Through our initial investment of $3 million, we are supporting a range of pilot projects in four key areas:

(1) Voter registration
(2) Election Day vote centers (large, centralized polling places that replace neighborhood-based precincts)
(3) Post-election audits of the election process
(4) Online poll worker training

This is only the initial stage of a multi-year, multi-million dollar commitment that Pew's board has made to Make Voting Work to build the evidence-base so desperately needed and to tap multi-disciplinary expertise from outside the elections arena.

Given our limited time, I'll highlight just one example for the committee, and if the committee will allow, we'll put the full announcement of our first $2.5 million in awards into the record.

The project I'd like to highlight involves voter registration, which seems appropriate since voter registration rolls are the primary building blocks of a reliable election system. Successful voter registration systems enable eligible citizens to vote without undue burden, secure our elections from those ineligible to participate and facilitate communication with voters. Yet, registration rolls are created from piecemeal data collected by local election officials, state motor vehicle agencies and other nonpartisan and partisan get-out-the-vote campaigns. As a result, rolls fail to keep pace with a mobile society and are often inaccurate and costly to maintain.

In Ohio, a project being led by Secretary of State Jennifer Brunner, in partnership with the U.S. Postal Service, the Secretary of State in Indiana, Todd Rokita, and the Secretary of State in Kentucky, Trey Grayson, is testing the use of the change of address form to improve the registration process, offering voters a convenient way to update their registration, promoting the integrity of voter rolls, and hopefully, reducing costs to state and local governments. Recognizing that 40 million Americans move every year, the National Association of Secretaries of State adopted a resolution at their national conference this month calling for an expansion of this approach.

Make Voting Work offers those running our elections an opportunity to field-test innovations and learn what works and what doesn't. The creativity exhibited by leading election officials and lessons from the private sector and other established democracies also provide an opening to take an entirely new look at conventional practices. Rather than applying band-aids, it may be time to create a registration system where states would have a comprehensive list of all their voters, registration would seamlessly follow those who move, ineligible names could not be added to the list and information would be managed reliably. With insights from pilot programs and case studies, Pew plans to host forums that would allow us to break through current constraints and modernize the most out-dated facets of U.S. elections.

Whatever new policies and practices are adopted, we must collect authenticated information from those running our elections in order to analyze their impact. We don't expect election officials to be omniscient but we also should not be reliant on their guesses. Sound policymaking and effective management practices for elections is built on data—data that provides the foundation to assess the performance of our election systems.

Unfortunately, we are far from this goal. Consistent data collection is essentially non-existent. Instead this field is driven by anecdotes that can be too easily manipulated for impassioned arguments and partisan self-interest.

Federal surveys cataloging voters registered, errant ballots, poll workers used, and other data go unanswered entirely or are left incomplete. The quality of the data that is reported is also suspect.

The act of collecting data beyond vote totals may seem a pointless exercise until you consider the possibilities.

With good data—that reaches down to the precinct-level, the unit of analysis necessary for meaningful comparison—one could determine:

- The impact of a new voting system on accuracy.
- Whether a new early voting policy reduces Election Day stress.
- How the number, age and training of poll workers relates to election performance.
- What voters take advantage of new registration methods such as online registration applications or change of address forms.
- How a new voter identification law affects an election.

Imagine for a moment if such systems had been in place after passage of the Help America Vote Act (HAVA). Today, Congress would know to what degree the over $3 billion in federal dollars appropriated to modernize and improve elections actually worked. And Congress would know which states used these resources most effectively and what policies and practices resulted in the greatest improvements. Instead, little is known about the impact of HAVA.

This committee has taken a positive first step by funding $10 million in new state data collection efforts to be administered through the Election Assistance Commission (EAC). Thank you Chairman Serrano for your bold leadership in securing this funding. Collecting information on the state of our elections is a critical element of the EAC's mandate to serve as "clearinghouse" of information about elections in the states (HAVA Section 202).

We firmly believe that the five states who will receive funding under this new program will set the gold-standard for how to assess election performance and we hope the request for proposals receives the attention it deserves from Secretaries of State and State Election Directors.

It is certainly time for all state and local officials to step up—to undertake greater analysis of how well they conduct elections and take steps to improve the transparency and quality of their election data.

The success of this pilot program is not only dependent on states however—it is also dependent on the EAC.

The data collection program should receive their highest priority, with a focus on ensuring that states receive the support needed to submit competitive applications and that participating states set aggressive data collection goals, including the goal of collecting high-quality precinct-level data.

In addition, the EAC should require that each state undertake an independent evaluation of their work, to be supported by a national evaluation that pools and examines the results of all the states' work.

The EAC can send a strong signal to the field about the importance of this program with the pending release of the questions that will comprise the 2008 Election Day survey—a voluntary data collection survey that has been sent to states during each federal election cycle since 2004.

Currently, gaps in the data collection effort are so severe that it is nearly impossible to monitor state compliance with key provisions of the NVRA and UOCAVA. We don't even have a good handle on how many Americans are registered to vote, how many have been moved to inactive lists, or how many show up at the polling place in each Federal election. The EAC must not only assure that the Election Day survey meets the highest standards of high quality data collection, but they need to take a leadership role in setting standards for the kinds of data we'll need to collect over the next decade.

Finally, I urge the committee to hold an oversight hearing this summer on the data collection program following the awarding of grants for the data collection program and the release of the 2008 Election Day survey. At that point, the committee will be able to hear from the selected states about their plans and from the EAC on how they have refined the survey to ensure it collects the information critical for any assessment of the performance of state election systems.

Thank you again for the opportunity to testify today. I look forward to future opportunities to talk about Make Voting Work and I welcome any questions you may have.

Mr. SERRANO. Thank you. Thank you so much.

Mr. Vargas.

ARTURO VARGAS'S TESTIMONY

Mr. VARGAS. Thank you, Mr. Chairman, Ranking Member Regula. Thank you for the opportunity to testify before you.

The NALEAO Educational Fund has been at the forefront of efforts to insure that federal election reform enhances opportunities for full participation by all of our citizens. We believe that there must be a comprehensive effort involving federal, state, local, community based organizations and the private sector to eliminate barriers to voting and to promote voter engagement.

Voters with a limited English proficiency continue to face barriers in obtaining information about voting and elections. We urge the Department of Justice to continue to vigorously enforce the Voting Rights Act language assistance provisions. We commend the EAC for publishing its glossary of key election terminology, and we recommend that the EAC conduct an assessment of how this glossary is being used.

This will be important as the release of the Census Bureau's American Community Survey, ACS, data approaches in 2010. The Voting Rights Act requires that the ACS data be used every five years to determine which jurisdictions are required to provide language assistance during elections, and that next determination will occur in 2010.

It is likely that several jurisdictions will be subject to the VRA's language assistance requirements for the first time, and the EAC will need to help them meet this challenge.

When the Congress enacted HAVA, the legislation included provisions which required certain first hand voters to provide ID. Recently there has been an increase in state efforts to impose proof of citizenship and voter ID requirements that go far beyond the federal mandates. We believe that these measures make it more difficult for citizens to register to vote and greatly increase the risk that eligible voters will be denied the right to vote.

We believe that EAC should take stronger action to discourage states from imposing proof of citizenship or voter ID requirements that go beyond the scope of HAVA. We are aware that Arizona has asked the EAC to amend the federal mail voter registration form to incorporate state specific instructions reflecting Arizona's group of citizenship requirement. We urge the EAC to reject the request.

We are also aware of the controversy over two reports commissioned by the EAC related to voter ID issues and voter fraud, the voter fraud one which was extensively discussed by the earlier panel and the members of the Committee. We are deeply concerned about the possibility that the election fraud reports' conclusions were altered. We are also disappointed that the EAC did not adopt the report on voter identification, which found that Latino voters were ten percent less likely to vote in states that required nonphoto ID.

We hope that the more comprehensive review that the agency has initiated will assess the impact of the more restrictive photo ID requirements imposed by some states, and we look forward to

the results of the review that will be conducted by the Inspector General.

With regard to direct electronic voting systems, we believe that these hold advantages over older paper-based systems to insure that votes are accurately counted. DREs can be programmed to provide ballot screens in multiple languages where required, which is more cost effective and efficient than paper voting materials. DREs are also particularly useful for voters with disabilities because they provide them with the right to cast a vote privately and independently.

We understand the concerns that voter verified paper capabilities are necessary to maintain public confidence, and we are pleased that manufacturers are developing new technology that will provide these capabilities for DRE systems.

However, manufacturers should insure that the voter verified paper train technology meets HAVA's accessibility requirements for persons with disabilities and for language minorities.

Now, Latino voters face special challenges when they participate in the electoral process. They often do not have access to information about the basic mechanics of registering and casting the ballot. When jurisdictions do not have well administered election procedures, they often fail to maintain correct data about Latinos and their voter roles, and they fail to provide Latinos with election materials in a timely manner.

Among callers to our national hotline during the past two general elections, we found that less than half of Latino registered voters reported having received any information from their election officials. We also found that voters who were not yet fully proficient in English were more likely to experience problems with obtaining information from their jurisdictions.

Jurisdictions need to scrutinize every aspect of the registration and voting process to insure that there are quality control measures for effective election administration. States need to carefully examine their procedures for maintaining voter databases and processing DMV registrations to insure that all eligible registrants are added to the voter rolls in a timely manner.

There should be an assessment of best practices providing voters with basic registration and voting information. We understand the EAC has undertaken a study of voter hotlines operated by election offices, and we urge the agency to conduct a more expansive study of overall voter education efforts.

With regard to poll workers, we believe jurisdictions should provide more comprehensive training and specifically with regard to the needs and rights of language minority voters and those with disabilities and the nondiscriminatory application of voter ID requirements. The training should also cover HAVA's requirement that voters be provided with the opportunity to cast the provisional ballot.

Many callers to our hotline report not having been offered a provisional ballot or found that poll workers were not familiar with them, and in some cases our callers were not able to cast any ballot because of these problems.

Finally, election officials should establish partnerships with CBOs that serve population groups who are under represented in

the electoral process. CBOs can provide invaluable assistance in nearly every aspect of election administration. States and localities can establish CBO partnerships by creating advisory panels or committees which include CBO representatives.

Some jurisdictions, such as the County of Los Angeles, have ongoing committees that meet regularly with election officials, and this allows for troubleshooting of problems. We urge the EAC to conduct an assessment of best practices in developing and maintaining CBO and election official partnerships.

Lastly, there is a need for a nonpartisan CBO voter engagement and education efforts in under representative communities. The traditional mobilization approaches of parties and candidates produce short-term increases in turnout among certain select groups of voters. They do not aim to create the long-term fundamental changes in voter attitudes and behaviors that are needed to insure that under representative groups become full participants in the electoral process.

Only a few states offer HAVA funding to non-governmental groups for nonpartisan voter education. Most states tend to use HAVA funding for already established activities conducted by government agencies. Thus, the private sector, including corporations and foundations, should explore ways to generate more resources for nonpartisan CBO voter information and engagement work that targets under representative communities.

As jurisdictions move forward with implementing HAVA, we urge the EAC to provide them with the guidance that enables them to embrace the opportunity to make significant improvements in the accessibility of election systems for Latinos in the nation as a whole. We stand ready to work with this Committee and the EAC in insuring that all of our citizens have access to the voting process.

Thank you, Mr. Chairman.

[The information follows:]

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Executive Director
Mr. Arturo Vargas

Testimony

by

Arturo Vargas, Executive Director
National Association of Latino Elected and Appointed Officials (NALEO) Educational Fund

before

the United States House of Representatives
Committee on Appropriations
Subcommittee on Financial Services
and General Government
on Election Administration

Washington, DC
February 27, 2008

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Chairman Serrano, Ranking Member U.S. Representative Regula, other distinguished members of the Subcommittee, fellow panelists and guests. Thank you for the invitation to testify before you today on election administration issues and the Federal government's responsibility to promote and support fair, accurate, and inclusive elections. I am Arturo Vargas, the Executive Director of the National Association of Latino Elected and Appointed Officials (NALEO) Educational Fund, the leading national organization that empowers Latinos to participate fully in the American political process, from citizenship to public service. We fulfill our mission through programs that promote the civic integration of Latino immigrants into American society, provide technical assistance and skills development to the nation's Latino elected and appointed officials, and conduct research on issues relating to Latino political engagement and impact. The NALEO Educational Fund is a 501(c)(3) non-profit, non-partisan organization, and our constituency includes the more than 6,000 Latino elected and appointed officials nationwide.

The NALEO Educational Fund has been at the forefront of efforts to ensure that federal election reform is accomplished in a manner that enhances opportunities for full participation by all of our citizens, including the Latino community, which is the fastest growing group of the nation's electorate. Between 1988 and 2004, the number of Latino voters in Presidential elections more than doubled, growing from 3.7 million voters to 7.6 million, and we believe that more than 9.2 million Latinos will cast ballots in the 2008 Presidential contest. Because it is so critical that Latinos have an active presence in our democratic process, our organization's election work incorporates a broad range of policy development and voter engagement efforts.
Nationally, we were involved in the efforts to shape the Help America Vote Act of 2002 (HAVA), and we continue to educate state and local policymakers about HAVA's impact on the Latino community. We have testified before Congress and the United States Civil Rights Commission on Latino access to the electoral process. Both before and after the enactment of HAVA, we were also invited to testify before prominent private commissions that examined election reform issues, including the Ford-Carter and Carter-Baker National Commissions on Federal Election Reform.

In 2006, we worked together with a national coalition of civil rights and civic associations in a successful effort to secure the reauthorization of key provisions of the Voting Rights Act of 1965

("VRA"). We published two reports, which were both submitted to Congress to help document the continued need for the VRA's protection. One report, "The ESL Logjam: Waiting Times for Adult ESL Classes and the Impact on English Learners," examined the unmet demand for English-as-a-Second-Language classes, and the challenges confronting newcomers in obtaining ESL instruction. The other report, "I Was Asked If I Was A Citizen": Latino Elected Officials Speak Out on the Voting Rights Act, documented the continued existence of discrimination against Latino elected officials and voters in the electoral process. Our VRA activities also included an initiative to educate Latino elected officials and civic leaders about the importance of the reauthorization of the VRA's provisions.

We are also at the forefront of efforts to shape the implementation of HAVA on the state level and in jurisdictions with large populations of Latino voters. We were a member of the California Secretary of State's (SOS) HAVA Plan Advisory Committee, and we have also served on SOS Advisory Committees on pollworker training and recruitment, election system accessibility, and voter registration database procurement. In Los Angeles County, which is home to more than 1 million Latino registered voters, we are active members of the Community Voter Outreach Committee, where we work with the Registrar Recorder-County Clerk's office on election issues.

Finally, we have extensive experience in educating Latino voters about the importance of electoral participation through our *Voces del Pueblo* non-partisan voter engagement program. Since the inception of the program in 2001, the NALEO Educational Fund has worked closely with elections officials, the media, and other community-based organizations to mobilize Latino voters across the country who do not yet fully participate in the electoral process. This mobilization effort has two important components. First, we listen to Latino voters by conducting voter forums, where we learn about the issues of concern to the voters and their perspectives on the voting and elections. We have conducted these forums in cities with significant Latino populations, including Albuquerque, Chicago, Denver, Houston, Los Angeles, Miami, New York, and Phoenix. Additionally, we engage the voters in the community by sending them positive motivational and informational messages through phone, mail and the media. Over the years, we have reached more than 500,000 Latino voters across the country, in states including Arizona, California, Colorado, New Mexico, New York and Texas.

This year, we plan to expand the *Voces del Pueblo* program to even more jurisdictions across the nation as part of the *ya es hora* ("the time is now") campaign, in partnership with the National Council of La Raza and *Mi Familia Vota.* The *ya es hora* campaign, which encouraged and assisted hundreds of thousands of eligible legal permanent residents to apply for U.S. citizenship in 2007, benefits from partnership with leaders in the Spanish-language media – Univision Communications, ImpreMedia, and Entravision Communications.

Our *Voces del Pueblo* program also includes our national bilingual voter information and protection hotline, *1-888-VE-Y-VOTA,* which has provided assistance to nearly 20,000 callers since September 2004. Through the *VE-Y-VOTA* hotline, we have been able to ensure that thousands of Latino voters across the country have access to information regarding voter registration, where to vote, and how to cast a ballot. Additionally, our hotline has helped us document the challenges facing Latinos and other voters who are not yet fully proficient in English when they attempt to participate in the electoral process.

Both our policy development work on election reform and our voter engagement efforts in the Latino community have led us to the same conclusion – there needs to be a comprehensive effort involving the federal, state, and local governments, together with community-based organizations (CBOs) and the private sector, to eliminate barriers to Latino participation in the electoral process and to promote voter engagement within the Latino community. Improving the administration of elections is a critical component of this effort. In my testimony, I will highlight the following issues:

1) the strict enforcement of the newly-reauthorized language assistance requirements of the Voting Rights Act of 1965;
2) the immediate cessation of state legislative efforts to impose proof of citizenship and voter identification requirements that are more restrictive than those contained in HAVA;
3) careful implementation of any "voter verified paper trail" requirements for voting systems;
4) vigorous efforts by local jurisdictions to improve their basic administration of elections, including the procedures for registering voters and providing them with election

information in a timely manner;

5) better programs for pollworker training and recruitment, particularly for pollworkers who can provide language assistance to Latino voters;
6) stronger partnerships between election officials and CBOs to work together on the translation of election materials, voter outreach, and other election administration enhancements; and
7) increased support for non-partisan voter engagement efforts by the philanthropic and private sector that affect election administration and key components of this effort:

I. Enforcement and Reauthorization of Key Provisions of the Voting Rights Act

In 1975, Congress extended the protections of the Voting Rights Act of 1965 (VRA) to "language minorities," such as Latinos, Asian Americans and Native Americans. For the last three decades, the VRA has served as a powerful tool to combat discriminatory election practices, including arbitrary literacy/English language requirements, capricious voting rules, and poll taxes. Additionally, the VRA provisions that require certain jurisdictions to provide language assistance to Latinos and other population groups have made the electoral process accessible to voters who are not yet fully proficient in English. From our work with *Voces del Pueblo* and our *VE-Y-VOTA* hotline, we have learned that these voters face particularly challenging barriers in obtaining information about voting and elections, and the language assistance provided by jurisdictions enhances their opportunity to cast their ballots on Election Day.

In 2006, Congress renewed the VRA's language assistance requirements through 2032 by enacting the "Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006." HAVA also includes provisions which reinforce these requirements.

We urge the U.S. Department of Justice (DOJ) to continue to vigorously enforce the VRA's language assistance requirements. Since 2002, the DOJ has entered into consent decrees with several jurisdictions throughout the nation to compel them to improve language assistance for

Latino voters. These jurisdictions include counties, cities and school boards in Arizona, California, Florida, Illinois, Massachusetts, New York, Pennsylvania, Texas, and Washington. The DOJ, together with community and civic organizations, has also conducted outreach to jurisdictions to emphasize the importance of strict compliance with the VRA.

In this connection, we commend the Election Assistance Commission (EAC) for publishing its *Glossary of Key Election Terminology,* which provides a translation of election terms from English to Spanish and from Spanish to English. This glossary will help jurisdictions meet their language assistance requirements, and it will be particularly useful for jurisdictions that do not have the personnel or the technical capacity to conduct translations with their own staff. Many of these jurisdictions contract with translation vendors to prepare their bilingual materials, and the glossary can help them review and check the quality of those materials.

We recommend that the EAC conduct an assessment of how many jurisdictions use the glossary, and whether or not they find it helpful. This assessment will assist the EAC in evaluating whether it needs to make revisions to the glossary in the future. This effort is particularly important as the release of the Census Bureau's American Community Survey (ACS) data in 2010 approaches. Under the newly-reauthorized provisions of the VRA, data from the ACS are used to determine which jurisdictions are required to provide language assistance during elections, and the next determination will be made after 2010 ACS data are available. In light of the growth of the Latino population, it is likely that there will be several new jurisdictions that will be subject to the VRA's language assistance requirements based on 2010 ACS data.. These jurisdictions will face the challenge of implementing a language assistance program for the first time, and the EAC can help them meet that challenge by ensuring that its glossary is an effective and useful tool.

II. Cessation of State Efforts to Impose Restrictive Voter ID Requirements

When Congress enacted HAVA, the legislation included new provisions which required certain first-time voters to provide identification (ID) when casting their ballots. We opposed these requirements because we were concerned that they would create new obstacles for Latino participation in the electoral process. However, HAVA's requirements are somewhat

narrowly-drawn – they apply to only one segment of the voting population (generally, first-time voters who register by mail), and when jurisdictions have implemented HAVA-compliant statewide databases, most voters will undergo a verification that will eliminate any need for them to show identification at their polling places.

Since HAVA's enactment, there has been an alarming proliferation of state efforts to impose proof of citizenship and voter ID requirements that go far beyond its federal mandates. According to the Pew Center on the State's report, "HAVA at 5," in 2000, only 11 states required voters to show some kind of identification to vote. According to the Pew Center, as of September 2007, 27 states have verification or identification requirements that go beyond the mandates of HAVA. These requirements vary greatly by state – for example, in Arizona, voters must provide proof of citizenship when registering to vote; other states have no proof of citizenship requirements for registration, but do require all voters to present photo ID before casting a ballot, and some states impose fairly limited identification requirements at the polling place. However, we believe that all of these measures will make it more difficult for citizens to register to vote and greatly increase the risk that eligible voters will be denied the right to vote.

Arizona's proof of citizenship measure generally requires citizens who do not have an Arizona driver's license issued after October 1996 to provide documentary evidence of citizenship when registering to vote, such as a birth certificate, U.S. passport or certificate of naturalization. Registration applicants who lack these documents may have to incur substantial costs to obtain them. Additionally, under the National Voting Registration Act of 1993 (NVRA), citizens must be able to register to vote by mail, and Arizona's proof of citizenship measures have resulted in a cumbersome mail-in registration procedure where some citizens must submit photocopies of the documents that prove their citizenship.

Restrictive voter ID requirements also impose significant burdens on voters, particularly the elderly, the poor or people living in rural areas who may not have such forms of identification as driver's licenses, utility bills or bank statements. Many of the voter identification laws require that the addresses on the identification exactly match the address on the voter rolls. However, it is difficult for citizens who are particularly mobile to ensure that their identification documents

consistently reflect their most current address – for example, in some states, when citizens send their driver's license agency their new address, the notification may trigger their address being updated in the voter rolls, but they may not receive a new driver's license. Thus, pollworkers may refuse to allow them to vote because of the "mismatch" of the address on their identification and the voter rolls. This would create serious obstacles for population groups that are particularly mobile, such as Latinos.

Both proof of citizenship and voter identification requirements are difficult to administer, and impose new and costly burdens on election officials and pollworkers, who must comply with complicated documentation requirements, or make hundreds of judgment calls as to whether certain forms of identification are acceptable. There is also a significant risk that pollworkers or election officials will arbitrarily use these types of requirements to prevent Latino voter participation. Through our *VE-Y-VOTA* hotline, we have received reports from Latino voters of rude or unhelpful treatment by pollworkers, particularly from voters who need language assistance at the polling place.

Polling place ID requirements give election workers enormous discretion in determining whether the identification presented by voters meet the requirements, and these workers often make these decisions quickly at busy polling places. It is likely that pollworkers will subject Latino voters to more rigorous and unfair scrutiny in determining whether they are qualified to vote, particularly those whom they view as "problem voters" because of their need for language assistance.

The proponents of proof of citizenship and voter id requirements justify their measures by raising the specter of widespread voter fraud – but documented occurrences of voter fraud are rare and isolated. We can prevent these occurrences through improvements in current election laws and procedures, including improved voter database management and enforcement of existing federal and state laws.

Ultimately, we believe that proof of citizenship and voter ID provisions that go beyond the scope of those included in HAVA are unnecessary and will create new barriers for the participation of

Latinos and other population groups in the electoral process. These requirements will also impose costly and time-consuming burdens on election officials and pollworkers.

We believe that the EAC should take stronger action to discourage states from imposing proof of citizenship or voter identification requirements that go beyond the scope of HAVA. We are aware that Arizona has asked the EAC to amend the Federal Mail Voter Registration Form to incorporate state specific instructions reflecting Arizona's proof of citizenship requirement, and we urge the EAC to reject this request. We do not believe Arizona's unfair and burdensome requirement should become a national standard through its inclusion on the Federal Form.

We are also aware of the controversy over two reports commissioned by the EAC related to voter identification issues. In April 2007, members of this Subcommittee learned that a draft report prepared for the EAC included an analysis that contradicted the notion that voter fraud is common (rampant voter fraud is one of the primary justifications for voter ID requirements). However, alterations were made to the draft, and the report ultimately issued by the EAC was far more equivocal about the existence of voter fraud.

Similarly, in June 2006, the Eagleton Institute of Politics at Rutgers and the Moritz College of Law at Ohio State University prepared a report which revealed that for the November 2004 election, more stringent voter identification requirements were correlated with lower voter turnout. This report generally examined the effect of the most stringent non-photo identification requirements; the restrictive photo identification requirements that have been enacted by Georgia and Indiana were not in effect in Election 2004, so the study was not able to assess their impact. When the study examined the impact of identification requirements on different ethnic groups, the report found that Latino voters were 10 percent less likely to vote in states that required non-photo identification compared to states where voters only had to give their names to vote. Ultimately, the EAC decided not to adopt this report, and chose instead to release it in a draft format. The EAC justified this action by claiming that because the report focused on only one election cycle, its research was not sufficient to draw any conclusions. The EAC also announced that it would conduct a more comprehensive research effort to examine voter identification requirements.

We are deeply concerned about the possibility that the election fraud report's conclusions were altered in a manner that would buttress support for voter identification laws. We are also disappointed that the EAC did not adopt the report on voter identification, and we hope that the more comprehensive review that the agency has initiated will attempt to assess the impact of the more restrictive photo-identification requirements imposed by Indiana and Georgia. These requirements have been challenged in court, and a Supreme Court decision on the Indiana requirement is currently pending. We believe that if these requirements survive court challenges, they will have a particularly detrimental impact on Latino access to the electoral process in their states, and that other states will be encouraged to adopt similar requirements.

We also are pleased that the EAC asked its Inspector General to review its internal processes for releasing research and reports to the public and for awarding research contracts. We look forward to the results of this review, and we hope that the review will promote greater transparency and accountability in the EAC's research and contracting activities.

III. Careful Implementation of VVPT Requirements

The heated public policy debate about the accessibility and security of direct record electronic (DRE) voting systems has led some jurisdictions to require the addition of a voter verified paper trail (VVPT) capability to those systems, a paper record of voters' choices that they can review before finally casting their ballots. We believe that DRE voting systems hold several advantages over older, paper-based systems and will help to ensure that more votes are accurately counted. For jurisdictions covered by the VRA's language assistance requirements, DREs can be programmed to provide ballot screens in multiple languages, which is more cost-effective and efficient than printing numerous sets of paper voting materials.

The audio capability features of DREs are particularly useful for voters who are visually impaired because they provide them with the right to cast a vote privately and independently. DREs also have other features that make them far more accessible to voters with motor or neurological impairments than paper-based systems. HAVA required all jurisdictions to have at least one accessible voting system at each polling place by January 1, 2006, and we know that several

states have been struggling to find voting systems that meet these requirements.

However, we understand the concerns of policymakers who believe that VVPT capabilities are necessary to maintain public confidence in the accuracy and security of votes cast on DREs, and we are pleased to see that voting system manufacturers are developing new technology that will provide VVPT capabilities for DRE systems. We also believe that manufacturers and entities should ensure that the VVPT technology meets HAVA accessibility requirements, which not only include accessibility for persons with disabilities, but also accessibility for language minorities. For jurisdictions that have already adopted VVPT mandates, we recommend that the state certification requirements include testing to ensure that the VVPT is fully accessible to language minorities. We urge states to work with organizations that are familiar with language minority voters during the testing process to obtain their input regarding accessibility issues.

In addition, we urge states that decide to impose VVPT requirements to implement realistic deadlines for those requirements. There are several steps that must occur before jurisdictions can deploy new voting technology or add VVPT capabilities to existing voting systems. First, jurisdictions may need to wait until the manufacturers of a system they have chosen have obtained federal and any applicable state certification of the new technology. Then, the jurisdiction must become familiar with the VVPT technology, train its election officials and pollworkers on its proper use, and conduct voter education about the new system. We urge states that have or are considering imposing VVPT requirements to ensure that their deadlines leave jurisdictions sufficient time to obtain properly-certified equipment, and to implement effective pollworker training and voter education programs for the new systems.

IV. Enhanced Election Administration Practices and Procedures

Both demographic research on Latino voters and our own experiences through our *Voces del Pueblo* program indicate that Latino voters face special challenges when they participate in the electoral process. Latinos tend to be a younger population than non-Latinos, and a significant portion are naturalized citizens who do not have extensive experience with voting. Additionally, Latinos are a relatively mobile population, and voters who frequently change addresses experience difficulties with ensuring that voter rolls consistently reflect their most recent

residence. In general, we have learned that Latino voters often lack basic information about the importance of voting and the basic mechanics of registering and casting a ballot. Additionally, when jurisdictions do not have well-administered election procedures, they may fail to maintain correct data about Latinos on their voter rolls, or they may fail to provide Latinos with election materials in a timely manner. Thus, before each election, Latinos often have several basic questions about voting, including where to find their proper polling site and how to address situations where their names do not appear on the voter rolls.

Our experiences with our *VE-Y-VOTA* hotline underscore the need for improved election administration and information dissemination to Latino voters. After the last Presidential election, we conducted a comprehensive analysis of the calls received on the hotline. Callers from 42 states and 371 counties contacted us, and 99% of the calls were inquiries about registering to vote, or about where and how to vote. With respect to voter registration, many callers could not obtain basic information from their own jurisdictions about whether or not they were registered to vote. In some cases, voters tried to use phone lines established by jurisdictions to confirm their registration, and encountered either long waiting times, or problems with finding bilingual operators who could assist them. Latino callers experienced similar problems when contacting jurisdictions to obtain the location of their polling place.

The problems experienced by Latino voters were exacerbated by inconsistent jurisdiction practices with respect to the mailing of election materials, such as sample ballots. While not all states mail this information to registrants, a large share of Latino voters are registered in states that do mail this information (such as Arizona, California, Florida, New York and Texas). However, among our callers during the last Presidential election, we found that less than half of Latino registered voters in these states reported having received any information about voting from their election officials. We also found that voters who are not yet fully proficient in English were more likely to experience problems with obtaining information from their jurisdictions – 61% of these voters reported that they had received no election information from their jurisdictions compared to 55% of voters who were more proficient in English.

Thus, we believe that jurisdictions need to scrutinize every aspect of the registration and voting

process, and ensure that there are quality control procedures for effective election administration. From our *VE-Y-VOTA* hotline calls, we learned that every misstep in proper election procedures could potentially prevent an eligible voter from being able to cast a ballot. For example, we found many Latino callers who had been registered to vote and voted in the past found that they had disappeared from voter rolls on or before Election Day. New registrants and re-registrants reported having registered through their state's motor vehicles license agency (hereinafter referred to as the state's "DMV") only to later realize that their registration had not been processed. We believe that states need to carefully examine their procedures for maintaining voter databases and processing DMV registrations to ensure that all eligible registrants are added to and appear on the voter rolls in a timely manner. The proper maintenance of voter rolls also affects the extent to which voters will receive the information they need to cast their ballots in time for Election Day.

Other basic election administration improvements that have a particular impact on Latino voters include:

- For jurisdictions that are required to comply with the language assistance requirements of the VRA, the timely mailing of alternate language voting materials – we have consistently received reports of voters who request these materials receiving them far later than the English-language materials; and
- The implementation of effective systems for voters to 1) verify their registration status; and 2) determine the location of their polling place. We have found that jurisdictions vary widely with respect to the quality and accessibility of these systems. Some jurisdictions have on-line computer-based systems or telephone hotlines that work effectively for these purposes, while others have little or no capability to assist voters with these matters.

We operated our *Ve-Y-Vota* hotline during Election 2006, and most recently, we received about 1,600 calls during the 2008 "Super Tuesday" primary season. We have found that the questions from Latino callers and the challenges they confront in voting are very similar to those encountered in the last Presidential election. Thus, we believe that there is a great need for an assessment of the "best practices" among jurisdictions to highlight the most effective and accessible systems for providing voters with basic registration and voting information. We

understand the EAC is undertaking a study of voter hotlines operated by election offices, and we urge the agency to conduct a more expansive study of overall voter education efforts conducted by those offices.

V. Improved Pollworker Training and Recruitment Efforts

Pollworkers serve on the "frontlines" of election administration, and they are often the first point of contact for voters. In the Latino community, where many citizens are not fully familiar with the voting process, it is critical that there be well-trained pollworkers who can effectively serve voters at each polling place. Jurisdictions must institute effective pollworker recruitment programs, particularly for pollworkers who have appropriate language assistance skills. Jurisdictions must also ensure that they provide comprehensive training to these workers which covers the proper operation of voting equipment (particularly when new equipment is being deployed), the specific needs and rights of language minority voters and those with disabilities, and the non-discriminatory application of voter ID requirements. The training should also cover HAVA's requirement that voters be provided the opportunity to cast a provisional ballot. Many of our *VE-Y-VOTA* callers were not offered provisional ballots, or found that pollworkers were not familiar with them; in some cases, our callers were not able to cast any ballot because of these problems. Finally, pollworker training should cover basic "customer service" and cultural sensitivity techniques for pollworkers. As noted earlier, from our experience with *VE-Y-VOTA*, we learned that some Latino voters experience rude or unhelpful treatment from pollworkers, particularly those voters who are not yet fully proficient in English. While these instances were relatively rare, they should not be occurring at all.

We believe that state and local jurisdictions should work closely together on pollworker training and recruitment. States can provide overall guidance to local jurisdictions by creating basic standards for pollworker training, and states should also consider providing local jurisdictions with a general training curriculum. The standards and curriculum should be broad enough to provide local jurisdictions with the flexibility they need to tailor pollworker training to the specific needs of their voters; however, there should be some sense that there is a uniform set of guidelines for pollworker training that will ensure all voters in the state receive quality service at the polling place.

States can also serve as a clearinghouse for best practices in pollworker recruitment. Many states and local jurisdictions have innovative programs to recruit pollworkers, which include programs which encourage the participation of certain government workers, youth, or persons employed in private businesses. In this connection, we commend the EAC for issuing its "Successful Practices for Poll Worker Recruitment, Training and Retention," and we are pleased to see that this manual emphasizes the need for jurisdictions to recruit bilingual pollworkers. However, we believe that the manual does not contain strong enough language regarding training all pollworkers about the VRA's language assistance requirements and the need to treat language minority voters fairly and courteously. The manual contains a good section on sensitivity training on the needs of voters with disabilities, and we believe the manual should have comparable information about language minority voters. We urge the EAC to consider revising the manual to address these topics. We also urge the EAC to actively disseminate the revised manual to all jurisdictions covered by the VRA's language assistance requirements, with a special dissemination effort being made to jurisdictions that first become subject to the requirements after the 2010 Census determinations are made.

VI. Stronger Partnerships between Election Officials and CBOs

In order for election officials to improve the administration of elections in a manner that ensures full participation by all eligible citizens, they must establish strong partnerships with CBOs that serve population groups such as Latinos who are underrepresented in the electoral process. These CBOs have expertise in the challenges facing underrepresented voters, and can provide invaluable assistance in nearly every aspect of election administration. For jurisdictions that are covered by the language assistance requirements of the VRA, CBOs can assist election officials with the implementation of language assistance programs, including the translation of materials and the recruitment and training of pollworkers. CBOs can also provide guidance to localities on the effectiveness of their voter outreach and education efforts. As noted earlier, state officials should seek CBO input into the language accessibility of new voting systems during the state certification process. States should also involve CBO representatives in the review of the curriculum and standards they develop for pollworker training.

States and localities can establish CBO partnerships by creating advisory panels or committees which include CBO representatives. We note that some jurisdictions, such as Los Angeles County, have on-going committees that meet with election officials on a regular basis. These committees enable CBOs to have "face-to-face" discussions on issues such as the implementation of language assistance programs, and "troubleshooting" on election administration problems. We recommend that all states and localities establish on-going advisory committees that include representatives of CBOs familiar with the needs of voters in underrepresented communities. We also urge the EAC to conduct an assessment of the "best practices" in developing and maintaining CBO and election official partnerships.

VII. Public and Private Resources for Non-Partisan Voter Engagement Efforts

Through our extensive work with Latino voters, we have learned that there is a critical need for non-partisan CBO voter engagement and education efforts in underrepresented communities. Traditional voter engagement campaigns conducted by political parties and candidates target voters who are already likely to vote - citizens referred to as "high-propensity voters." Since Latinos are less likely to be "high-propensity voters" than non-Latinos, traditional voter engagement campaigns tend not to target Latinos. Low Latino participation rates are partly attributable to demographic factors such as youth, high mobility, and lack of access to education and economic opportunities. However, the traditional voter engagement approaches of political parties and candidates also contribute to a cycle that reinforces the low Latino participation rates. Because traditional mobilization efforts fail to promote participation among Latinos and other low-propensity voters, they vote infrequently, which means that the mobilization efforts continue to ignore them in the future.

Additionally, strategic political considerations in each election cycle have a significant impact on how parties and candidates target their outreach efforts. For example, in the November 2004 Presidential election, the parties adopted a "battleground state" strategy where they concentrated their voter engagement resources in states they believed would be the most significant for an Electoral College vote victory. As a result, the parties conducted minimal voter engagement activity in the 32 states which were not considered "battlegrounds" – states with about 63% of

the nation's registered voters. The battleground strategy had a particularly pronounced impact in shifting voter engagement resources away from states with large numbers of Latino voters. About 73% - or nearly three-quarters – of Latino registered voters lived outside of the battleground states.

The traditional mobilization approaches of parties and many candidates generally try to produce short-term increases in turnout among certain select groups of voters. They do not aim to create the long-term, fundamental changes in voter attitudes and behavior that are needed to ensure that underrepresented groups become full participants in the electoral process.

Many non-profit organizations that conduct non-partisan voter education and engagement activities target those voters who are ignored by traditional mobilization campaigns. Efforts by CBOs and civic groups can complement the voter education work of state and local election officials. In some cases, Latinos or members of other ethnic population groups feel more comfortable contacting CBOs than government agencies to obtain information. CBOs also have relationships with ethnic media that can prove invaluable in disseminating election information within their communities.

However, CBOs and civic groups often lack the resources they need for their election information activities. A few states offered HAVA funding to non-governmental groups for non-partisan voter education, but most states tended to use HAVA funding for already-established activities conducted by government agencies. Thus, the private sector, including corporations and foundations, should explore ways to generate more resources for the non-partisan CBO voter information and engagement work. A vital and responsive democracy that is truly representative of our nation's diverse voices is a laudable goal, and the private sector can play an important leadership role in helping us to achieve it.

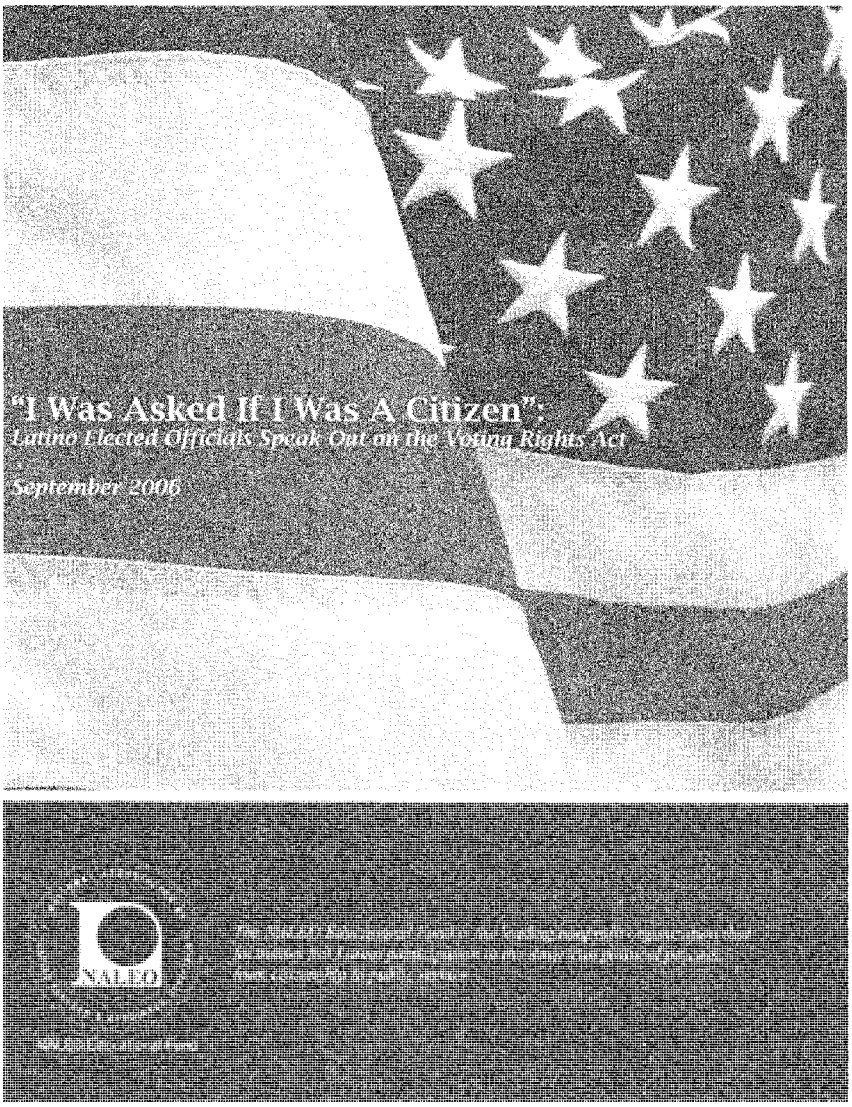
VIII. Conclusion

Chairman Serrano, the enactment of HAVA resulted from a spirited public discussion about the integrity and reliability of our federal election system. However, this discussion also provided us with an opportunity to re-examine the fundamental challenge of ensuring that all of our citizens

become full participants in our electoral process. HAVA helped lay the foundation for governmental efforts that will result in a more inclusive and participatory democracy, and it has provided significant resources for these efforts. We hope that HAVA's requirements for the accessibility and integrity of voting systems will encourage jurisdictions to make significant improvements in all aspects of election administration. Many of HAVA's provisions have highlighted the need for enhanced programs of pollworker training and recruitment and voter education.

Our nation now has the opportunity to build upon the foundation established by HAVA to ensure that Latinos and other population groups become full participants in our democracy. This will require a partnership between the federal, state and local jurisdictions, together with CBOs, civic organizations, and the philanthropic and private sector. But the effort is critical for our nation. Between 1960 and 1996, we saw a general decline in voter turnout for Presidential elections. While this trend started to reverse itself in the 2000 and 2004 Presidential elections, U.S. Census data suggest that there were still more than 71 million voting-age U.S. citizens (36%) who did not cast ballots in November 2004. Latinos and other underrepresented groups are eager to participate in the electoral process and become active and informed citizens, as evidenced by their strong turnout in the recent primaries. Additionally, last year's surge of 1.4 million naturalization applications received by the U.S. Citizenship and Immigration Services was the highest annual number in new applications filed for citizenship in a decade, and the third highest in our nation's history. The legal permanent residents who applied for U.S. citizenship last year, as well as those who are applying this year, are eager to demonstrate their commitment to this nation. Jurisdictions across the country should be prepared to ensure these new voters are welcomed into the voting process once the USCIS completes the adjudication of these applications and these new citizens become part of the U.S. electorate. As jurisdictions move forward with implementing HAVA, we urge the EAC to provide them with guidance that enables them to embrace the opportunity to make significant improvements in the accessibility of election systems for Latinos and the nation as a whole. We stand ready to work with the EAC and election officials throughout the nation to help ensure that our democracy remains vital and responsive to the voices of all of its citizens.

I thank the Chairman, the Ranking Member, and the Subcommittee once again for providing us with the opportunity to share our views today on election administration.


"I Was Asked If I Was A Citizen":
Latino Elected Officials Speak Out on the Voting Rights Act
September 2006
NALEO

"I WAS ASKED IF I WAS A CITIZEN":

Latino Elected Officials Speak Out on the Voting Rights Act

By Dr. James Thomas Tucker

September 2006

The National Association of Latino Elected and Appointed Officials (NALEO) Educational Fund is the leading national organization that empowers Latinos to participate fully in the American political process, from citizenship to public service. The NALEO Educational Fund carries out its mission through programs that promote the civic engagement of Latinos, provide technical assistance and professional development to the nation's Latino elected officials, and disseminate research on issues important to the Latino population. The NALEO Educational Fund is a non-partisan 501(c)(3) organization whose constituency includes the more than 6,000 Latino elected and appointed officials nationwide. For further information contact:

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Acknowledgments

The NALEO Educational Fund and its staff are grateful to the 190 Latino elected and appointed officials and civic leaders who provided extensive information about their experiences with voting discrimination and the impact of the Voting Rights Act on their communities.

Our deepest appreciation for former NALEO Educational Fund staff members Susie Valenzuela and Jennifer Gill; Ms. Valenzuela placed hundreds of calls to members of NALEO's elected official constituency, encouraging them to respond to the survey; Ms. Gill also assisted with contacting survey respondents. We are also grateful for the work of Evan Bacalao, NALEO Educational Fund Research Associate, for his tireless efforts in helping to prepare the survey instrument, coding data, and providing invaluable insight into conducting this study; Marco Alarcon, NALEO Educational Fund Communications Associate, for his work on the report's cover design; Jon Greenbaum, Director of the Voting Rights Project at the Lawyers' Committee for Civil Rights Under Law, for providing many helpful suggestions on survey questions and for his work on the early survey instrument; Rosalind Gold, Senior Director of Policy, Research and Advocacy for the NALEO Educational Fund, for her incalculable assistance on every facet of this study and her direct work with members of NALEO's constituency in regional strategy sessions and leadership conferences to encourage their responses; and Arturo Vargas, Executive Director of the NALEO Educational Fund, for his unyielding support for this project and the NALEO Educational Fund's work on assessing the impact of the Voting Rights Act.

We also extend a special thanks to Grace Felschündneff for her design and layout of this report; and to Daniel McNeill, of Spectrum Editorial, for his editorial assistance.

Finally, the NALEO Educational Fund would like to acknowledge Wal-Mart for its generous support in making this report possible. The development of this report was also supported in part by a grant from The James Irvine Foundation.

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Dr. Tucker clerked for Chief United States District Judge Maurice Paul in the Northern District of Florida from 1994-97. An Air Force veteran and commissioned officer, Dr. Tucker served on AWACs during Desert Storm operations in the Persian Gulf and in the active reserves as an assistant staff judge advocate (JAG). Dr. Tucker has also been a Shareholder at Ogletree Deakins, the third largest labor and employment firm in the United States.

Dr. Tucker is co-director and co-author (with Dr. Rodolfo Espino, Assistant Professor of Political Science at Arizona State University) of *Minority Language Assistance Practices in Public Elections* (2006). The study updated the cost data collected by the two prior GAO studies and determined the practices of public elections officials in providing oral and written language assistance.

Dr. Tucker holds a Doctor of the Science of Laws and Master of Laws degrees from the University of Pennsylvania, a Juris Doctor degree with high honors from the University of Florida and a Master of Public Administration degree from the University of Oklahoma.

I. Executive Summary

The Voting Rights Act is one of the most significant pieces of legislation of the 20th century. It has served as a powerful tool to combat discrimination against racial and ethnic minorities in the electoral process. What impact has it had on the Latino community's progress toward full political participation and representation? The answer is complex, but to assess their perspectives on this issue, the NALEO Educational Fund conducted a survey of its elected and appointed official constituents and civic leader stakeholders. This report presents the results.

Ever since the Voting Rights Act became law in August, 1965, Latino voters have received legal protection under its permanent provisions. For instance, the Act forbids voting discrimination against Latino vorers and allows federal courts to authorize observer coverage in jurisdictions where violations have occurred. It also allows Spanish-speaking voters educated in Puerto Rico to receive election materials and assistance in Spanish.

In addition to the Voring Rights Act's permanent provisions, the Act contains "temporary" provisions that are targeted to remedy discriminatory practices. In 1975, Alaska Native, American Indian, Asian, and Spanish-language minority voters became protected under the Act's temporary provisions. Under these provisions, certain jurisdictions must provide language materials and oral language assistance in elections. Moreover, many jurisdictions with large populations of Latino voters — including the entire states of Arizona and Texas and certain counties in California, Florida, and New York — became subject to the "preclearance" process and must submit all voting changes to the U.S. Attorney General for approval before implementing them, to prevent discrimination. The federal observer provisions of the Act have facilitated compliance and enforcement of these protections. Each of these temporary provisions was renewed for twenty-five years when President Bush signed the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 into law on July 27, 2006.

The Latino elected and appointed officials and civic leaders in the survey provided substantial evidence of the continued existence of the types of electoral discrimination the Voting Rights Act was intended to prevent. Among the findings:

- Over half of the respondents (52.6 percent) reported that they have personally experienced or observed discrimination in an activity related to running for or holding a public office.
- More than 30 percent of all respondents reported experiencing or observing discrimination in campaigning, appointments, racial or ethnic appeals, racially polarized voting, and redistricting.
- Our survey also asked Latino elected officials and civic leaders about their experiences with discrimination against Latino or minority voters. Over half (52.0 percent) of the respondents to this question indicated that they had personally experienced or observed some form of discrimination during elections.
- Approximately one-quarter of all respondents reported experiencing or observing discrimination in voter assistance, voter challenges, checking in at the polling place, polling place locations and changes, and poll worker recruitment.
- The great majority (86.2 percent) reported a need for Spanish-language assistance in public elections activities where they reside.
- Although most respondents indicated election materials are offered in Spanish, some indicated that some or all materials are not and less than half indicated that language assistance is available in Spanish at all stages of the elections process.
- Only 12.9 percent of surveyed Latino elected officials and civic leaders reported having experience with preclearance submissions.

- Only 18.3 percent reported that federal observers or monitors had been present for elections in their jurisdictions.

- Most Latino elected officials and civic leaders who had experience with federal observer coverage had favorable reports about its impact on minority voter participation.

In summary, while Latino voters have been able to make much progress under the temporary provisions of the Voting Rights Act, much work remains to be done. Examples of continuing discrimination and the exclusion of Latino voters provide compelling evidence of the need for the vigorous enforcement of the Act's protections.

II. Survey Participants and Methodology

This survey assesses the perspectives of Latino elected and appointed officials and civic leaders about the impact of the Voting Rights Act of 1965 on the Latino community, particulary three temporary provisions: Section 5 of the Act, which requires that certain jurisdictions with a history of voting discrimination submit any voting changes to the Attorney General of the United States for approval before they are implemented or enforced; Sections 6 through 9 of the Act, which authorize the Attorney General to deploy federal observers to certain jurisdictions to prevent voting discrimination, enforce compliance with the Act, and assess progress in jurisdictions under federal court orders; and Section 203 of the Act, which requires that certain jurisdictions provide language assistance to voters in their native languages, including Spanish.

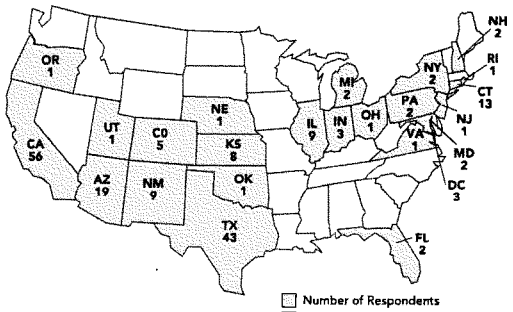
The respondents are members of the constituency of the National Association of Latino Elected and Appointed Officials (NALEO). They include Latino elected and appointed officials from virtually every level of federal, state, and local government, as well as Latino civic leaders. The NALEO Educational Fund initially solicited its Latino elected and appointed official constituency and civic leaders stakeholders to participate in the survey. We then conducted targeted outreach to secure responses from a group of approximately 500 elected officials and stakeholders who had attended policy technical assistance sessions or expressed an interest in the Voting Rights Act. A total of 190 of individuals responded between February and late May 2006.

Figure 1 depicts the number of NALEO respondents, by state. The percentages generally are proportionate to the number of Latino elected officials in the identified states, with the greatest number of responses (over half) coming from California and Texas, where over half of all Latino elected and appointed officials serve in public office.

With the exception of approximately twenty-five responses, all of the surveys were completed through an online questionnaire available through an Internet link. A copy of the survey instrument is included as Appendix A to this report.

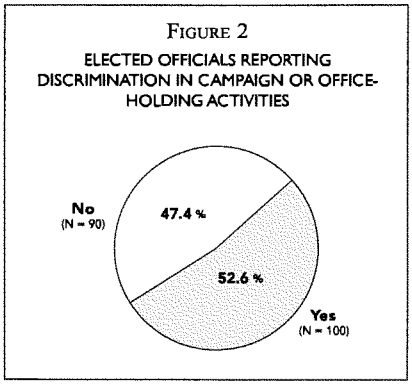
Figure 1

NUMBER OF LATINO ELECTED OR APPOINTED OFFICIALS RESPONDING TO SURVEY, BY STATE



III. Discrimination in Campaigning and in Elected Office

Our survey asked respondents about their experiences with discrimination as candidates or as office holders. As Figure 2 indicates, a majority of the 190 respondents, 52.6 percent (N = 100), indicated that they had personally experienced or observed discrimination in an activity related to running for or holding a public office.



There are several activities in which respondents indicated they had experienced discrimination. In many cases, respondents reported that they have both experienced and observed discrimination.

> **"[Latino] voters were told that they had to put a sign in their lawn for a non-Latino candidate because it had a police insignia on it."**

Campaigning was the most common activity for which discrimination was reported, with more than one-third (37.9 percent) reporting they had personally observed or experienced it. Some of this discrimination was by election officials, including a "double standard in how election laws and campaign laws are enforced."[1] For example, a respondent reported that a limited-English proficient Latino circulator of a petition was told by Anglos that "her signatures were invalid (though they weren't)" and they told her that she needed "to sign a withdrawal affidavit."[2] In another jurisdiction, "dirty campaign tactics [are] utilized against Latinos and African-Americans."[3] One respondent observed that discriminatory campaign activities are commonplace at "political forums, public events, dinners, etc."[4] In other instances, a respondent noted discrimination occurred in a 2005 school board election,[5] while another reported they occurred "in countless city and school board elections during the past thirty years."[6]

Some discriminatory campaigning activities include direct threats or intimidation. One respondent reported that public officials engaged in that conduct, including "overly aggressive police and fire involvement in political campaigns which leads to harassment of campaign workers and voters, especially those of different ethnicity and language ability."[7] The respondent further reported:

> Campaign workers for a Latino candidate were stopped and detained and asked for "papers." Campaign workers were told that they could not get out the vote before 8 a.m. [Latino] voters were told that they had to put a sign in their lawn for a non-Latino candidate because it had a police insignia on it.[8]

Still another Latino official reported, "A school administrator approached a neighbor who had put up one of my signs in front of their house."[9] In another instance, a respondent noted, "Individuals were threatened if they publicly came out in support of a candidate that was not of their particular group. Members of the community received threatening phone calls and [were told] that they were going to

lose their jobs, etc."[10] One respondent noted that after local police harassed election workers, it "was reported to DOJ" (the United States Department of Justice).[11]

Disparate appointment opportunities were the second most common discriminatory activity reported, including 33.7 percent of all respondents.[12] Many Latino elected officials reported that Latinos were completely shut out of official appointments, which were limited to non-Latinos.[13] In other cases, it is simply a "lack of effort ... to appoint a minority on the Board."[14] For instance:

> The people asked to apply for an appointment were mainly Anglo, until I started to convince some Hispanics to apply. The Board appointed a non-minority to keep the Board all Anglo.[15]

" Individuals were threatened if they publicly came out in support of a candidate that was not of their particular [ethnic] group. [They] received threatening phone calls and [were told] that they were going to lose their jobs . . . "

FIGURE 3

TYPES OF ACTIVITIES FOR WHICH ELECTED OFFICIALS REPORTED THEY HAVE PERSONALLY EXPERIENCED OR OBSERVED DISCRIMINATION

Election Activity	Number Who Have Experienced	Number Who Have Observed	Number Who Have Both Experienced and Observed	Total	Percent of All Respondents
Campaigning	27	24	21	72	37.9%
Appointments	19	27	18	64	33.7%
Racial or ethnic appeals	22	22	17	61	32.1%
Racially polarized voting	20	19	19	58	30.5%
Redistricting/district boundaries	17	27	13	57	30.0%
Changes in power after election	15	21	17	53	27.9%
Candidate nomination process	11	28	11	50	26.3%
Candidate slating	9	25	11	45	23.7%
Candidate qualifying process	10	23	10	43	22.6%
Election rules or procedures	12	18	11	41	21.6%
Changes in procedure after election	9	18	11	38	20.0%
Method of election	5	21	10	36	18.9%
Other	9	9	7	25	13.2%

This discrimination continues even after Latinos are elected. As one official stated, "I have served in the city council for [several] years and have yet to be selected as mayor. [Another Latino] served ten years and yet was never vice mayor. The other ... [Anglo] members continue to pass the baton for mayor back and forth!"[16]

The nomination process, like appointments, also has been used to discriminate against Latinos. Over one-quarter of respondents, 26.3 percent, reported experiencing or observing discriminatory nominations.[17] Sometimes this discrimination is overt, such as a direct effort "10-15 years ago ... to keep a Latino from being nominated ... because of ethnicity."[18] Often, it is less direct, with officials simply failing to consider Latino applicants.[19]

One respondent noted that discrimination occurred "in countless city and school board elections during the past thirty years."

Candidate-slating also has caused many Latinos to be excluded from any meaningful opportunity to run for office, even if they can be nominated. Candidate-slating allows private individuals or groups to informally prepare a slate of preferred candidates before the election, rendering the election itself nothing more than a formality. Almost one-quarter of respondents, 23.7 percent, reported discriminatory candidate-slating practices in their jurisdiction.[20] As one respondent explained:

> Another form of discrimination against minority candidates is the practice of slating by majority incumbents. During my first attempt at ... office, the incumbents' slate did not allow me a fair and open chance at one of [the] available positions. In a more current example, the slate has chosen a neophyte, majority male candidate to fill an open position prior to a primary, closing the doors on a highly qualified Latina who has held public office and been a well-recognized state party official.[21]

Latino candidates often cannot get any endorsements from non-Latino organizations and have to rely exclusively on groups from their own ethnic communities.[22] Frequently, majority groups will unify "with the only reason being racial."[23]

Nearly a third of respondents reported racial appeals during elections.[24] Local media made many of these appeals. One respondent decried "disrespectful and discriminatory" statements by a newspaper about the Latino mayor and city council, referring to them as the "tortilla republic."[25] Several elected officials reported that local press and editorials contained "clearly racially prejudicial overtones,"[26] "very racial comments in print,"[27] "subtle racial appeals,"[28] "making the language and the background of the candidate an agenda item during campaigns,"[29] or simply refusing to provide any "positive information" on Latino candidates.[30]

In many jurisdictions, private citizens were no better than the local media in making racial appeals based upon Spanish heritage, surnames, or accents. One Latino elected official reported being told that "because of my last name I couldn't win my election" and "having been born in Mexico, I was questioned about my loyalty" to the United States.[31]

In another jurisdiction, "an Anglo candidate targeted only Anglo residents" and campaign workers stated "to voters, 'don't you want someone like you to represent you' in reference to an Anglo candidate."[32] Elsewhere, discriminatory campaign mailers were used.[33] In addition, "there were several instances of candidates who spoke English with an accent and were belittled because of it."[34]

Often, Anglo voters and Anglo elected officials acknowledged they were apprehensive about supporting a Latino candidate purely based upon their ethnicity or surname. Some of this disparate treatment included "the way someone is addressed or ... looked at when walking into meetings or forums."[35] One Latino elected official observed, "My surname is not obviously Latino. [There was] some constituent discomfort when my ethnicity [was] revealed."[36] Another respondent reported:

> The power brokers in my community were surprised that I was so articulate because I have

> a Spanish name. People who didn't know me assumed my qualifications were less than my rivals. I was constantly questioned about my qualifications when my rivals were not.[37]

Similarly, a Latina elected official stated, "Some community citizens were apprehensive on having a female Hispanic as board president."[38]

"The power brokers in my community were surprised that I was so articulate because I have a Spanish name. People who didn't know me assumed my qualifications were less than my rivals."

These racial appeals clearly had an impact on elections: 30.5 percent of all respondents reported racially polarized voting in their communities, with the overwhelming majority of these respondents also reporting the presence of racial appeals during election activities.[39] Sometimes, dilution of the Latino vote was facilitated by Anglos placing a second Latino candidate on the ballot.[40] As one elected official indicated, "Within the Democratic Party, all Latinos are given a primary election and hardly ever make it past the primary" because of racially polarized voting.[41] Another candidly noted, "The Board had always had a majority "White" board and wanted to keep it that way."[42]

Thirty percent of respondents reported redistricting or gerrymandering practices that discriminated against Latinos.[43] In some cases, these practices combined with racial bloc voting to defeat Latino candidates of choice:

> [We] tried to change a white dominated county... The population breakdown in the 1970s and 1980s was slightly a Hispanic majority over white. The results of the election were overwhelmingly in favor of the white candidate. It was rumored that bloc voting was taking place as well as redistricting.[44]

In many jurisdictions, redistricting reportedly trailed demographic changes. As one respondent noted, "Even though there was a huge increase in Latino population in [the] County, after 2000 Census/redistricting, there was no correlative increase in opportunity seats for Latinos at all jurisdictional levels."[45] Instead, "past redistricting has shored up incumbent territories by pushing Latinos into other districts."[46]

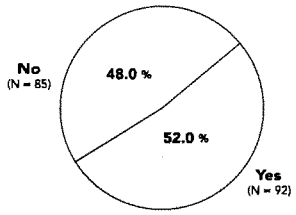
Finally, one in five respondents reported that when Latino candidates were successful in being elected, they were often faced with new rules or procedures that limited their voice on the elected body.[47] One respondent explained, "Once elected, the majority changes the rules to limit the powers of minority members. Also, minority elected officials receive higher scrutiny than non-minorities."[48]

IV. Discrimination in Voting

Our survey also asked Latino elected officials and civic leaders about their experiences with discrimination against Latino and minority voters. Figure 4 shows that over half of the 177 respondents to this question (52.0 percent) indicated that they had personally experienced or observed this type of discrimination in a public election-related activity. Figure 5 depicts the types of activities in which respondents indicated they had experienced discrimination.

Figure 4

ELECTED OFFICIALS REPORTING THAT THEY HAVE PERSONALLY EXPERIENCED OR OBSERVED VOTING DISCRIMINATION AGAINST LATINO OR MINORITY VOTERS



Voter assistance practices were the most frequently reported form of election-related discrimination, with nearly a third of respondents experiencing or observing it.[49] One respondent reported, "Poll watchers are mostly white older folks who will not take the time to help elderly Latinos."[50] Another indicated, "Spanish-speaking voters [were] not given assistance when voting for the first time and [were] not ... allowed a friend to assist or translate."[51] One respondent even said, "I was ordered to not use Hispanic information at the polling place in a community that is 75% Latino."[52]

Much of the discriminatory voter assistance comes in the form of inadequate language assistance for limited-English proficient Latino voters who need to receive information in Spanish to cast a meaningful ballot. Many respondents indicated that local election officials failed to recruit, hire, and train enough bilingual poll workers.[53] Even where some language assistance is offered to Spanish-speakers, it often is insufficient. One respondent stated:

> The county does not always have Spanish-speakers at early voting locations. There is a lot done to have Spanish-speakers at the polls, but they are hard to recruit and not every location has one. There is room for improvement.[54]

In a few cases, inadequate language assistance is a thing of the recent past, such as one instance in which the respondent observed "a Hispanic citizen being turned away from the polling place" approximately four to six years ago, before proper assistance was available.[55]

> **"Spanish-speaking voters [were] not given assistance when voting for the first time and [were] not ... allowed a friend to assist or translate."**

Approximately twenty-seven percent of all respondents reported personally experiencing or observing discriminatory use of voter identification requirements or challenges to suppress the Latino vote.[56] According to one respondent, "I have seen challenges and other things based on race."[57] For example, another respondent indicated, "I was asked if I was a citizen. Also, when I tried to drop my absentee ballot off, I was asked to show ID."[58] Even where voter identification requirements are facially neutral, they can still have a disparare effect on Latinos. One respondent reported, "Indiana now requires a picture ID from voters at the polls, and at the same time the state is closing Motor Vehicle offices in poor areas."[59]

According to roughly one-quarter of all respondents, polling place locations and changes likewise have a disparate impact on Latino voters.[60] In some instances, this involved last-minute polling place changes that were not adequately communicated to Latino voters:

> Polling places were moved right before the primary election in 2004, due to supposed [Americans with Disabilities Act] code compliances, which so happened to be in minority ethnic districts. [Election officials] sent out a "white" postcard stating the change, in small type. Our turnout was so bad that year.[61]

"People would go to the advertised place to vote and would find that their site was closed and directed to go to another polling place," with "the majority of polls closed ... in Latino populated areas of the city."

FIGURE 5

TYPES OF ACTIVITIES FOR WHICH ELECTED OFFICIALS REPORTED THEY HAVE PERSONALLY EXPERIENCED OR OBSERVED DISCRIMINATION AGAINST LATINO OR MINORITY VOTERS

Election Activity	Number Who Have Experienced	Number Who Have Observed	Number Who Have Both Experienced and Observed	Total	Percent of All Respondents
Voter assistance	6	36	13	55	31.1%
Voter challenges (citizenship, ID, etc.)	8	33	7	48	27.2%
Checking in at the polling place	8	24	15	47	26.6%
Polling place locations and changes	9	21	15	45	25.4%
Poll worker recruitment	9	24	11	44	24.9%
Voter registration	11	20	9	40	22.6%
Absentee voting	10	21	8	39	22.0%
Early or mail-in voting	10	20	8	38	21.5%
Casting a ballot at the polls	5	19	9	33	18.6%
Casting a provisional ballot	8	16	8	32	18.1%
Voter purges	6	15	6	27	15.3%
Counting of ballot	4	12	7	22	12.4%
Other	4	0	0	4	2.3%

Likewise, a respondent noted, "People would go to the advertised place to vote and would find that their site was closed and directed to go to another polling place," with "[t]he majority of polls closed ... in Latino populated areas of the city."[62] In some cases, early voting locations have been changed at the last minute, having a negative impact on Latino voter participation.[63]

> **"Election officials purposely turn[ed] voters away by using delay tactics and rude behavior ... using derogatory language to intimidate and chase away voters."**

Untimely polling place changes can combine with discriminatory provisional voting procedures to disenfranchise Latino voters. Under the Help America Vote Act (HAVA), all states are required to adopt non-discriminatory procedures for ensuring that a voter whose name does not appear on a voter registration list is offered a "provisional ballot" that will be counted if the voter's eligibility is later confirmed.

One respondent reported that when the names of Latino voters did not appear on the voter registration list, they "were not told of [the] ability to vote with a provisional ballot."[64] This can be a particular problem for Latino voters who have recently moved and are eligible to vote.[65] Another respondent reported, "Folks were not allowed to vote once they were inside the building and 8 p.m. approached. They were not provided with provisional ballots when [they] requested one."[66] In a separate instance, Latino voters were "told that they already voted when they hadn't" and were "told that they no longer vote in the district when they do," turning them away without a provisional ballot.[67]

Many respondents reported that election officials directly discriminated against Latino voters in their treatment at the polls. For example, "election officials purposely turn[ed] voters away by using delay tactics and rude behavior ... using derogatory language to intimidate and chase away voters."[68] Frequently, "Latinos were questioned more thoroughly by poll workers."[69] In addition, another respondent observed "minority voters having to wait longer than non-Latino voters to cast their ballots."[70] Such discriminatory treatment at the polls severely impairs Latino voter participation.

One respondent reported that when the names of Latino voters did not appear on the voter registration list, they "were not told of [the] ability to vote with a provisional ballot."

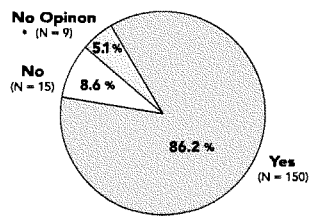
V. The Need for Spanish-Language Assistance, its Availability, and Quality

Under Section 203 of the Voting Rights Act, certain jurisdictions are required to provide language materials and oral language assistance to Latino and other "language minority" voters. Our survey asked respondents to assess the need for this kind of assistance and its availability in their area.

As depicted in Figure 6, an overwhelming majority of all respondents reported a need for Spanish-language assistance in public elections in their communities. Among the 174 respondents, 86.2 percent (N = 150) indicated language assistance is needed, with only 8.6 percent (N =15) saying there is no need; the remaining 5.2 percent (N = 9) expressed no opinion.

Figure 6

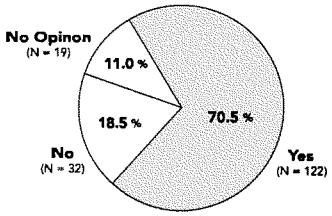
ELECTED OFFICIALS REPORTING A NEED FOR SPANISH-LANGUAGE ASSISTANCE



Many of these respondents indicated that the need for language assistance is unmet. As depicted in Figure 7, nearly one in five (N = 32) reported that their jurisdictions do not make all written public election-related materials available in Spanish. These materials include ballots,[71] sample ballots and voter information guides,[72] voting instructions,[73] voter registration materials,[74] signs,[75] and "most documents, if not all."[76]

Figure 7

ELECTED OFFICIALS REPORTING ALL WRITTEN PUBLIC ELECTION-RELATED MATERIALS ARE AVAILABLE IN SPANISH WHERE THEY LIVE



In several instances, only some elections materials are available in Spanish, often those provided by the Secretary of State. For example, one respondent observed, "only voter registration [forms] and I believe absentee ballots are in Spanish, everything else is not."[77] Another respondent opined, "I don't think we have enough written information in Spanish for the

> **"Until bilingual ballots were federally mandated for my voting district with a high multilingual, multicultural immigrant population, no voting information was available to new voters in their own language."**

voters."[78] In some cases, Spanish-language materials are "poorly written" and "confusing."[79] In other cases, respondents reported, "we do not have material in Spanish that fully explains the issue at hand, therefore making it difficult for a Spanish-dominant voter to make an informed decision."[80]

Federal language assistance requirements play a vital role in ensuring that Spanish materials and assistance are available to voters who need them. As one respondent explained:

> Until bilingual ballots were federally mandated for my voting district with a high multilingual, multicultural immigrant population, no voting information was available to new voters in their own language, from voter registration forms and completion instructions, to the actual voting process. There were no bilingual judges or assistants to help first-time voters.[81]

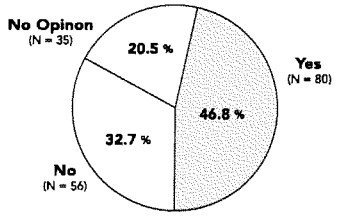
Absent the language assistance provisions of the Voting Rights Act, many jurisdictions will not provide assistance to voters in Spanish.

Lack of oral language assistance presents an even greater obstacle to Spanish-language voters. As depicted in Figure 8, fewer than half (N= 80) of the 171 respondents to this question indicated that oral language assistance is available at some stage of the public elections process. It is likely that a much smaller percentage of jurisdictions provide oral language assistance in Spanish at all stages of the public elections process.

Numerous respondents indicated that although their respective jurisdictions had some bilingual election workers, they were not available "in all cases."[82] Many respondents reported that there is "not enough oral language assistance throughout the public election process,"[83] including "at the city and county offices,"[84] "when they call the registrar of voters with a question,"[85] or "at the registration office in the clerk and recorder's office."[86] As a result, language assistance is unavailable for many election activities other than voting, including "registration, candidate information ... mail in voting and early voting."[87]

FIGURE 8

ELECTED OFFICIALS REPORTING THAT ORAL LANGUAGE ASSISTANCE IS AVAILABLE IN SPANISH AT SOME STAGES OF THE PUBLIC ELECTIONS PROCESS WHERE THEY LIVE



Many respondents indicated that their jurisdiction does not have enough bilingual poll workers available to provide oral language assistance. One respondent explained, "It is available at certain locations. It is not available as a matter of doing business."[88] Another respondent indicated, "Not all polling places have bilingual personnel to assist with voting, especially in the suburbs where many Latinos are moving into what used to be an all Anglo community."[89] As one respondent observed, "It's a hit and miss situation ... it just depends if the election clerks are bilingual, but there is no requirement for that."[90] Another noted that the Latino community has to request bilingual poll workers "for each election," and if not, "they don't provide for one."[91] Student translators[92] and Spanish-language media[93] can fill in some of these gaps. However, absent the availability of enough bilingual poll workers, some Spanish-speaking voters are turned away without being able to vote.[94]

One respondent noted that the Latino community has to request bilingual poll workers "for each election," and if not, "they don't provide for one."

Even where bilingual poll workers are available, they often are not proficient in Spanish. One respondent described the Spanish-language skills of "those offering assistance" as "very often very low."[95] Another observed, "If the person registering does not bring a translator, the individuals at the poll location speak barely broken Spanish," and thereby can prevent the voter from casting a meaningful ballot.[96]

> **"Many individuals prefer directions in Spanish, but are not allowed to ask, and if they do they are told to just do their best."**

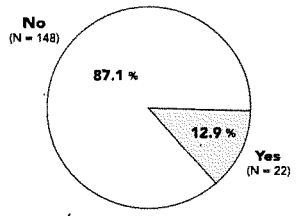
Elsewhere, Anglo election officials or voters prevent language assistance from being offered to voters in Spanish. One respondent stated, "Many individuals prefer directions in Spanish, but are not allowed to ask, and if they do they are told to just do their best."[97] In another case, a respondent wrote, "People need assistance and when a ...site president or volunteer [from one political party] tries to help, the...Anglo... site president or volunteer [from the other political party] cries foul."[98] These comments demonstrate that while much progress has been made under the language assistance provisions of the Voting Rights Act, jurisdictions and their election officials still have far to go to achieve full compliance with those provisions.

VI. The Submission of Voting Changes Under the Preclearance Provisions of the Voting Rights Act

Under Section 5 of the Voting Rights Act, certain states and local jurisdictions must submit all voting changes to the U.S. Department of Justice for approval or "preclearance" before implementing them, to prevent discrimination. Few of the respondents reported that they have experience with the submission of voting changes under the preclearance provisions. As depicted in Figure 9, only 12.9 percent (N = 22) reported such experience. It is unclear why such a small percentage of Latino elected officials have experience with the Section 5 submission process, particularly because over half of all Latino elected officials reside in Section 5-covered jurisdictions. More study is needed on this issue.

FIGURE 9

ELECTED OFFICIALS REPORTING THEY HAVE EXPERIENCE WITH THE SUBMISSION OF VOTING CHANGES UNDER THE PRECLEARANCE PROVISIONS OF THE VOTING RIGHTS ACT



All of the narrative comments received from respondents on the Section 5 process pertained to the Texas redistricting plan that was struck down by the United States Supreme Court in *LULAC v. Perry*.[99] One respondent echoed the findings of the Supreme Court (before the decision was issued), noting, "The changes in congressional voting districts in Texas were discriminatory to Latinos and divided communities that historically had voted together."[100]

Largely as a result of the Texas redistricting case, many respondents specifically urged that the Section 5 submission process be de-politicized. One recommended, "Have a bi-partisan panel to remove the authority of political appointees overruling staff recommendations" at the Department of Justice.[101] Others agreed.[102] Another suggested "there should be a weighting system in place to put emphasis on career staff recommendations versus appointed staff overrides."[103] As one respondent concluded, "Keep politics out of it and force the DOJ attorneys to adhere to laws, rules, policies, and procedures" regarding Section 5 submissions.[104]

VII. Federal Observer Coverage under the Voting Rights Act

Sections 6 through 9 of the Voting Rights Act give the United States Attorney General the power to send federal observers to monitor elections, and to document and deter discriminatory conduct. Many survey respondents who have experience with federal observers or federal attorneys indicated that they have made a difference in providing Latino voters with equal access to the election process. One respondent indicated "their presence made a difference because of respect for authority."[105] Another respondent observed, "Monitors were placed in high minority voter polling sites. [They] assured people that minority families were welcome at the polls."[106]

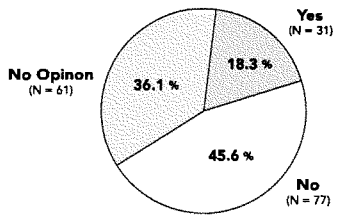
Respondents who have experience with federal observers or federal attorneys indicated that they have made a difference in providing Latino voters with equal access to the election process.

Some respondents indicated that they were unaware of the federal observer program and wanted more information about it.[107] These responses demonstrate that the United States Department of Justice needs to engage in more outreach to Latino and other racial, ethnic, and language minority communities about the program.

Several respondents requested that federal observer coverage be more accessible to Latino voters and that there be a reduction in "red tape and layers of bureaucracy" that inhibits their use.[108]

Figure 10

ELECTED OFFICIALS REPORTING THAT FEDERAL OBSERVERS OR FEDERAL ATTORNEYS HAVE MONITORED ELECTIONS IN THEIR LOCAL AREA



Some respondents suggested how jurisdictions be selected for observer coverage. One asked that coverage be directed at areas with high numbers of limited-English proficient Latino voters.[109] Others suggested that observer coverage be done randomly or unannounced to more accurately reflect what happens at the polls in their absence.[110] One respondent indicated, "Districts that have been mandated to reduce potential voting rights and access violations should be routinely monitored over three subsequent elections."[111] Another respondent explained, with some exasperation, that elections were so bad in their jurisdiction, "Bring Jimmy Carter to observe. Really, we need a multinational observer team."[112]

In some cases, respondents suggested that federal observers need to be used in the least intrusive way possible. As one respondent indicated, "Make sure the federal monitoring of public elections does not interfere [with] or intimidate Latino voters."[113] Another stated, "If federal monitors are to be placed in traditional minority precincts, they should be sensitive to the community, [be] courteous, professional and not overzealous in conducting their duties as monitors."[114] Most suggested that this could be achieved by hiring "the monitors from the local area," "make sure they are minorities," and "that they speak Spanish."[115]

Others asked that federal observers and monitors include other activities in their observer coverage. As one explained:

> Federal monitoring of public elections only observes if voters are being discouraged or intimidated from voting but they do not take into consideration the uneven distribution of voting machines in low-minority versus high-minority precincts. I've observed lines out the door and around the block in many minority dominant districts for lack of enough voting machines, while across town in suburban precincts no lines are observed. Federal monitors should also consider this distribution when determining if elections violations are occurring.[116]

Another suggested that federal observers "review the voting records in high Latino populated areas," presumably to see if Latino and other minority voters were experiencing disproportionately low turnout.[117] Yet another respondent asked that federal observers and monitors "review the polling locations and the notices that are posted regarding polling locations. It is very difficult to find many voting sites on Election Day."[118] One respondent also asked that federal observers be "more visible prior to the election" and share information on "rights and abuses" occurring at the polls.[119]

VIII. Conclusion

The Voting Rights Act has helped make the promise of our democracy a reality for millions of Latino citizens. This nation has made great strides towards providing all citizens equal access to the political process, regardless of their race, color, ethnicity, or language ability. Nevertheless, as Congress recently found in renewing the expiring provisions of the Act for another twenty-five years, many barriers to participation remain for Latino voters. This survey of Latino elected and appointed officials and civic leaders corroborates the substantial record developed during the reauthorization process. It shows the direct impact the Voting Rights Act has on individual citizens who strive to exercise their fundamental right to vote. It also demonstrates that continuing need for strict enforcement of the Voting Rights Act's protections. Our nation still has a long way to go before our democracy offers a full and fair opportunity for all of our citizens' voices to be heard.

ENDNOTES

1 Respondent 153.
2 Respondent 355.
3 Respondent 269.
4 Respondent 301.
5 Respondent 353.
6 Respondent 17.
7 Respondent 139.
8 Respondent 139.
9 Respondent 304.
10 Respondent 141.
11 Respondent 316.
12 See Figure 3.
13 Respondents 347, 349, 354.
14 Respondent 204.
15 Respondent 291.
16 Respondent 201.
17 See Figure 3.
18 Respondent 351.
19 Respondents 342, 347.
20 See Figure 3.
21 Respondent 359.
22 Respondents 56, 139, 335, 359.
23 Respondent 160.
24 See Figure 3.
25 Respondent 146.
26 Respondent 121.
27 Respondent 146.
28 Respondent 337.
29 Respondent 99.
30 Respondent 349.
31 Respondent 265.
32 Respondent 262.
33 Respondent 207.
34 Respondent 150.
35 Respondent 301.
36 Respondent 124.
37 Respondent 25.
38 Respondent 48.
39 See Figure 3.
40 Respondent 172.
41 Respondent 5.
42 Respondent 56.
43 See Figure 3.
44 Respondent 89.
45 Respondent 340; see also Respondent 337.
46 Respondent 124.
47 See Figure 3.
48 Respondent 360.
49 See Figure 5.
50 Respondent 162.
51 Respondent 139.
52 Respondent 372.
53 Respondents 5, 13, 27, 56, 83, 84, 316, 329, 354, 355; see also Figure 8.
54 Respondent 371.
55 Respondent 338.
56 See Figure 5.
57 Respondent 98.
58 Respondent 305.
59 Respondent 50.
60 See Figure 5.
61 Respondent 215.
62 Respondent 36.
63 Respondent 306.
64 Respondent 139.
65 Respondent 268.
66 Respondent 280.
67 Respondent 134.
68 Respondent 189.
69 Respondent 25.
70 Respondent 342.
71 Respondents 127, 190, 329.
72 Respondents 50, 96, 127, 271, 281, 305, 329, 372.
73 Respondent 26.
74 Respondent 96.
75 Respondent 141.
76 Respondent 255.
77 Respondent 233.
78 Respondent 334.
79 Respondent 254.
80 Respondent 189.
81 Respondent 359.
82 Respondent 344; see also Respondents 17, 48, 69, 162, 304, 316, 340, 342, 355, 371.
83 Respondent 288.
84 Respondent 127.
85 Respondent 305.
86 Respondent 5.
87 Respondent 307.
88 Respondent 301.
89 Respondent 339.
90 Respondent 306.
91 Respondent 280.
92 Respondent 139.
93 Respondent 335.
94 Respondent 201.
95 Respondent 254.
96 Respondent 141.
97 Respondent 26.
98 Respondent 80.
99 126 S. Ct. 2594 (June 28, 2006).
100 Respondent 360.
101 Respondent 311.
102 Respondent 16.
103 Respondent 360.
104 Respondent 340.
105 Respondent 17.
106 Respondent 265.
107 Respondents 141, 146, 294.
108 Respondent 89.
109 Respondents 123, 372.
110 Respondents 52, 83, 99, 305.
111 Respondent 359.
112 Respondent 254.
113 Respondent 281.
114 Respondent 311.
115 Respondents 17, 41, 360.
116 Respondent 33.
117 Respondent 271.
118 Respondent 11.
119 Respondent 207.

Appendix: Survey Instrument

NALEO Educational Fund Voting Rights Act Questionnaire

This questionnaire will take approximately five minutes to complete. The status bar at the top of the screen will inform you of how much of the questionnaire you have completed as you answer the questions.

We are seeking to document instances in which Latino and/or Spanish-speaking voters continue to experience discrimination in voting. In addition, we are seeking to document experiences where the Voting Rights Act has enhanced the electoral opportunities for Latino and/or Spanish-speaking voters. We would appreciate your assistance in our efforts. **Please take a few moments to complete this questionnaire.**

All responses to this questionnaire will be kept strictly confidential. We are asking for your contact information to allow us to keep you informed about our progress on reauthorization and, if necessary, to follow up with you about your responses.

Please complete each entry.

Preferred Salutation

First Name *

Last Name *

Name of Elected or Appointed Office (e.g., State Representative, Mayor, Councilmember, School Board Member, School Board Trustee, etc.) *

Name of Jurisdiction you Represent (e.g., Smallville, Middleton School District, etc.) *

Business or Mailing Address

City

State *

Postal Code

E-mail Address *

Would you like to receive e-mail alerts from the NALEO Educational Fund? *

☐ Yes ☐ No

As a Latino elected or appointed official or a candidate for office, have you **personally experienced** or **observed** discrimination in any activity related to running for or holding a public office? *

☐ Yes ☐ No

In which of the following activities related to running for or holding a public office have you **personally experienced or observed** discrimination against other Latino or minority candidates? (check all that apply)

	Experienced	Observed	Both	Neither
Candidate nomination process	☐	☐	☐	☐
Candidate qualifying process	☐	☐	☐	☐
Appointments	☐	☐	☐	☐
Campaigning	☐	☐	☐	☐
Election rules or procedures	☐	☐	☐	☐

Redistricting/district boundaries	☐	☐	☐	☐
Method of election	☐	☐	☐	☐
Candidate-slating	☐	☐	☐	☐
Racial or ethnic appeals	☐	☐	☐	☐
Changes in power after election	☐	☐	☐	☐
Changes in procedure after election	☐	☐	☐	☐
Racially polarized voting	☐	☐	☐	☐
Other	☐	☐	☐	☐

For "other" discrimination, please specify.

Please describe the circumstances of the discrimination you identified above.

Have you **personally experienced or observed** discrimination in any public election-related activities?

☐ Yes ☐ No

In which of the following public election-related activities have you **personally experienced or observed** discrimination against Latino or minority voters? (check all that apply)

	Experienced	Observed	Both	Neither
Poll worker recruitment	☐	☐	☐	☐
Voter registration	☐	☐	☐	☐
Early or mail-in voting	☐	☐	☐	☐
Absentee voting	☐	☐	☐	☐
Voter purges	☐	☐	☐	☐
Polling place locations and changes	☐	☐	☐	☐
Checking in at the polling place	☐	☐	☐	☐
Casting a provisional ballot	☐	☐	☐	☐
Voter assistance	☐	☐	☐	☐
Voter challenges (citizenship. ID, etc.)	☐	☐	☐	☐
Casting a ballot at the polls	☐	☐	☐	☐
Counting of ballot	☐	☐	☐	☐
Other (please specify)	☐	☐	☐	☐

For "other" discrimination, please specify.

Please describe the circumstances of the discrimination you identified above.

Is there a need for Spanish-language assistance in public-election activities where you live?
*

☐ Yes ☐ No ☐ Do not know

Are all **written public election-related materials** (voter registration materials, sample ballots, absentee ballots, publicity, signs, forms, ballots, etc.) available in Spanish where you live?
*

☐ Yes ☐ No ☐ Do not know

Please describe the **written public election-related materials** that are not available in Spanish where you live:

Is **oral language assistance** available to voters who need assistance in Spanish at any stage of the public elections process (registration, at election office, at polling place, etc.) where you live?
*

☐ Yes ☐ No ☐ Do not know

Please describe any stages of the public elections process for which **oral language assistance** is not available to voters who need assistance in Spanish:

Do you have any experiences with the submission of voting changes to the United States Department of Justice under Section 5 of the Voting Rights Act?
*

☐ Yes ☐ No

Do you believe that any of these voting changes discriminated against Latinos or other minority voters?
*

☐ Yes ☐ No ☐ Do not know

Did the United States Department of Justice object to any of the voting changes that you believe were discriminatory?

☐ Yes ☐ No ☐ Do not know

Please describe the circumstances of the discrimination you identified above.

Did the United States Department of Justice approve/preclear any of the voting changes that you believe were discriminatory?
*

☐ Yes ☐ No ☐ Do not know

Please describe the circumstances of the precleared change(s) identified above:

Please provide any suggestions on how to improve the Section 5 preclearance process:

Have federal observers or federal attorneys monitored elections in your local area?
*

☐ Yes ☐ No ☐ Do not know

Please describe the circumstances of federal observer or federal attorney coverage identified above, including what difference, if any, the coverage made:

Have you ever requested to have federal observers or federal attorneys monitor an election?
*

☐ Yes ☐ No

Were federal observers or federal attorneys sent to monitor the election?
*

☐ Yes ☐ No ☐ Do not know

Please provide any suggestions on how to improve federal monitoring of public elections:

Mr. SERRANO. Thank you, Mr. Vargas.
Mr. MATTHEWS.

JEFF MATTHEWS' TESTIMONY

Mr. MATTHEWS. Good afternoon, Chairman Serrano, Ranking Member Regula, and members of the Committee. I am pleased to be here today to discuss a few election administration issues from the local perspective.

Election officials in Ohio and elsewhere are a diverse community of individuals with one thing in common: a desire to serve the voter. Because of our diversity, I am not attempting to speak for the entire elections community, but to merely provide my own opinions based upon my experiences.

The consensus after the 2000 election was that something needed to be done to improve elections in the United States. The Help America Vote Act was the result. Although it was crafted over a period of two years and provided much needed funds to upgrade equipment, the time frame for implementation was perhaps rushed as evidenced by recent appeals for another overhaul or new equipment.

In Ohio, there was much debate about implementation and deployment, was delayed until November of 2005 due to the Ohio general assembly's requirement of a voter verified paper audit trail on all direct recording voting equipment.

In addition, Ohio requires the voter verified paper audit trail to be the official ballot of record for recount purposes. There have been some widely reported instances of problems with the printing of the voter verified paper audit trail due to paper jams or the paper being loaded backwards. This has raised questions about whether some voters could be disenfranchised because Ohio law does not specifically address this issue.

However, all DRE equipment has a capability to recreate either a ballot image or another VVPAT. In Stark County, we have conducted nine recounts since deployment in 2005. These recounts have included candidates and issues. In every single instance the recount has verified the results from the official certification.

Because the VVPAT was an afterthought and not part of the original design of the units currently deployed, any federally mandated voter verified paper audit trail requirements should go into effect only after the Election Assistance Commission has developed standards for the function and operation of this technology.

Also widely reported was Ohio's second round of testing of its voting equipment, which was federally and state certified prior to purchase. Ohio's Secretary of State Jennifer Brunner commissioned a study, the evaluation and evaluation of election related equipment, standards, and testing report, known as EVEREST. It is a comprehensive review of all voting equipment currently deployed throughout the state.

The Ohio study tested the systems for risks to vote security, system performance, including load capacity, configuration to currently certified systems specifications, and operations and internal controls that could mitigate risk.

The $1.9 million study paid for using federal funds was structured to allow two teams of scientists, corporate and academic, to

conduct parallel assessment of the security of the state's voting systems. The researchers in the Ohio study did not address the issue of probability of attack, leaving that to the determination of state and local officials. The researchers commented that with the lack of technical measures and voting system design, its integrity is provided purely by the integrity and honesty of election officials.

Although I do not embrace all of the recommendations as the result of the EVEREST Project, I do commend the Secretary for a concern with election integrity. I have been asked for my reaction to the various studies conducted for the EVEREST Project. My thought are best reflected in the executive summary of the SysTest Lab's risk assessment study of Ohio voting systems.

Beginning with the fourth full paragraph on page 3, the solutions to election administration issues, voter confidence, and the security and integrity of elections are not to be found solely in technology. Regardless of the thoughtfulness and thoroughness of a design, the complexities and the costs associated with creating systems that are 100 percent secure solely on their own is unrealistic.

True security is a combination of technology related security techniques and security measures found in thoughtful, well documented policies, procedures and processes for internal controls that are reflective of both a specific locality and a specific voting system.

Ohio, like many other states, has a voter ID law which has been and is currently being litigated. For election data voting purposes, Ohio requirements are as follows: a current and valid photo identification that has an Ohio driver's license, state ID, government ID. Photo identification must show name and address, although the address does not need to be current for the driver's license. A military identification that would show a name and address, or a copy of a current utility bill, including a cell phone bill, a bank statement, a government check or paycheck, or other government document that shows the voter's name and current address, including if it is from a public college or university.

Voters who do not provide one of these documents are still able to vote by provisional ballot and then are given ten days to provide that information.

Obviously, this debate is shaped by two contrary ideological positions: facilitating the ease of voting compared to the need to secure the election process. What is needed in all of these laws is to strike a balance between the right to vote with the state's interest in securing free and fair elections.

In conclusion, the EAC provides a valuable resource to state and local election officials. Real problems versus politically manipulated and reported problems demand and deserve our attention. The EAC is the best entity for the compilation of this data.

If documented problems rise to a sufficient level of concern, then the EAC should inform Congress of these facts and help facilitate a remedy. These remedies if needed should be broad in scope, outlining goals and objectives and then implemented at the state and local level.

It is my opinion that the role of Congress should be to outline goals and objectives in election matters and not specifics because with the diversity of the election jurisdictions, it is very difficult to craft a one size fits all solution to very complex election issues.

Thank you for your invitation to speak to you today.

[The information follows:]

Testimony of Jeff Matthews, Director of the Board of Elections, Stark County, Ohio before the U.S. House Committee on Appropriations. Subcommittee on Financial Services and General Government February 27, 2008

Good morning Chairman Serrano, Ranking Member Regula, and Members of the Subcommittee. I am pleased to be here this morning to discuss election administration issues from the local perspective.

Election officials in Ohio and elsewhere are a diverse community of individuals with one thing in common, a desire to serve the voter. Because of our diversity, I am not attempting to speak for the entire elections community, but to merely provide my own opinions based upon my experiences.

The consensus after the 2000 election was that something needed to be done to improve elections in the United States. The Help America Vote Act was the result. Although it was crafted over a period of two years and provided much needed funds to upgrade equipment, the timeframe for implementation was perhaps rushed as evidenced by recent appeals for another overhaul or new equipment.

Election Systems

In Ohio, there was much debate about implementation and deployment was delayed until November of 2005 due to the Ohio General Assembly's requirement of a voter verified paper audit trail (VVPAT) on all direct recording electronic (DRE) voting equipment. In addition, Ohio requires the VVPAT to be the official ballot of record for recount purposes.

There have been some widely reported instances of problems with the printing of the VVPAT due to paper jams or the paper being loaded backwards. This has raised questions about whether some voters could be disenfranchised because Ohio law doesn't specifically address this issue. However, all DRE equipment has a capability to recreate either a ballot image or another VVPAT. In Stark County, we have conducted nine recounts since deployment in 2005. These recounts have included candidates and issues. In every single instance, the recount has verified the results from the official certification.

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Also widely reported was Ohio's second round of testing of its voting equipment which was federally and state certified prior to purchase. Ohio Secretary of State Jennifer Brunner commissioned a study, the Evaluation & Validation of Election-Related Equipment, Standards & Testing report, known as EVEREST, is a comprehensive review of all voting equipment currently deployed throughout the state. The Ohio study tested

the systems for:
- risks to vote security,
- system performance, including load capacity,
- configuration to currently certified systems specifications, and
- operations and internal controls that could mitigate risk.

The $1.9 million study, paid for using federal funds, was structured to allow two teams of scientists, corporate and academic, to conduct parallel assessment of the security of the state's voting systems. The researchers in the Ohio study didn't address the issue of probability of attack, leaving that to the determination of state and local officials. The researchers commented that with the lack of technical measures in voting system design, its integrity "is provided purely by the integrity and honesty of election officials."

Although I do not embrace all of the recommendations as the result of the EVEREST project, I do commend the Secretary for her concern with election integrity. I have been asked for my reaction to the various studies conducted for the EVEREST project. My thoughts are best reflected in the Executive Summary of SysTest Labs, RISK ASSESSMENT STUDY OF OHIO VOTING SYSTEMS and available here:
http://www.sos.state.oh.us/sos/info/EVEREST/16-sysTestFinalExecSummReport.pdf
Beginning with the fourth full paragraph on page 3:
The solutions to election administration issues, voter confidence and the security and integrity of elections are not to be found solely in the technology. Regardless of the thoughtfulness and thoroughness of a design, the complexities and cost associated with creating systems that are 100% secure solely on their own is unrealistic. True security is a combination of technology related security techniques and security measures found in thoughtful, well documented policies, procedures and processes for internal controls that are reflective of both a specific locality and a specific voting system.

Voter Identification requirements
Ohio, like many other states has a voter ID law which has been and is currently being litigated. For Election Day voting purposes, Ohio requirements are as follows:

- A current and valid photo identification (i.e. Ohio driver's license, state ID, government ID). Photo identification must show name and address (does not need to be current address for driver's license); or
- A military identification that shows the voter's name and current address; or
- A copy of a current utility bill (including cell phone bill), bank statement, government check, paycheck, or other government document that shows the voter's name and current address (including from a public college or university).

Voters who do not provide one of these documents are still able to vote by provisional ballot.

Obviously, this debate is shaped by two contrary ideological positions; facilitating the ease of voting compared to the need to secure the election process. What is needed in all of these laws is to strike a balance between the right to vote with the state's interest in ensuring free and fair elections.

Conclusion

In conclusion, the EAC provides a valuable resource to state and local election officials. Real problems versus politically manipulated and reported problems demand and deserve our attention. The EAC is the best entity for the compilation of this data. If documented problems rise to a sufficient level of concern, then the EAC should inform Congress of these facts and help facilitate a remedy. These remedies, if needed, should be broad in scope, outlining goals and objectives and then implemented at the state and local level. It is my opinion that the role of Congress should be to outline goals and objectives in election matters and not specifics, because with the diversity of election jurisdictions, it is very difficult to craft a one size fits all solution to very complex election issues.

Thank you for your invitation to speak to you today.

Mr. SERRANO. Thank you all for fine presentations.

We have five minutes left on a series, the first of three votes. The second vote is a five-minute vote, and the third vote is a five-minute vote. So we will get back here as quickly as we can. We ask the panel to please stay so that we can join in the questioning.

Thank you.

[Recess.]

Mr. SERRANO. While we were gone, we lowered all of your taxes and left Iraq, all in one.

DISCRIMINATION AGAINST MINORITY VOTERS

We thank you for your patience, and we will begin our questioning now. Mr. Vargas, this nation has an unfortunate history of discrimination against minority voters. Long after enactment of the Voting Rights Act, forms of discrimination still exist. A survey of Latino elected officials and civic leaders by your organization found that over half of the respondents have either experienced voting discrimination or have witnessed it.

What are now the most prevalent forms of discrimination against minority voters? Are sufficient election resources being directed in your opinion to jurisdictions that have these problems or that have low income communities?

Is it a matter of not enough voting machines, well trained poll workers?

What should state and local election officials do to prevent discrimination? And I know that a lot of folks, I think, in this country at times do not understand this, you know. I look at everything when I look at the Latino community based on my experience as someone who was born in Puerto Rico, and I find that that is different from folks who are born in other countries outside the U.S. and its territories because they in so many cases come from situations where voting was something that they had to fight the military to get or fight somebody else to get, and they come here and they know they have all of the rights in the world, but it does not take much.

I remember in New York one year we had a situation with asbestos in the schools, and someone suggested—I cannot believe they suggested this—that we should have elections that year outside the school buildings because we use schools in New York City, as you know, in the school yard in a tent, and have the National Guard guarding the machines.

I said, "No. Don't you see they come from systems where the military stands around so that they do not vote? The last thing you want is the National Guard hanging around an election poll."

So what forms does this discrimination take, when it takes place takes these days?

Mr. VARGAS. Thank you, Mr. Chairman, for that question, and if you like, I actually brought a copy of that study we conducted on discrimination. I could submit it along with my testimony for the record.

Mr. SERRANO. That would be great. That would be great.

[*CLERK'S NOTE:* The material is included following the opening statement of Mr. Vargas]

Mr. VARGAS. Certainly the implementation of voter ID and citizenship requirements has been uneven and in some cases poll workers without adequate training have been requiring certain proof of citizenship.

Mr. SERRANO. Proof of citizenship. I want to make clear no one picks us up on that.

Mr. VARGAS. Right, and individuals like yourself, sir. You know, whether you were born in Puerto Rico or on the mainland, you are a U.S. citizen by birth, and you do not walk around with passports necessarily.

And so what we have seen though from calls to our hotline have been reports of people being asked to prove their citizenship when that is not being required in certain jurisdictions.

POLL WORKER TRAINING

What we see as the most pervasive issue is the lack of appropriate training of poll workers who are not familiar with exactly what the requirements are of the law and see themselves as the last line of defense between democracy and voter fraud when, in fact, it is just people who are trying to exercise their right to vote.

Many times folks are not aware that if their names do not appear on the voter rolls, they have a right to a provisional ballot, and poll workers do not advise them of that right. So many voters are, in fact, disenfranchised because they are sent away if they do not find their names on the voting rolls.

So what we believe is most needed is adequate training of poll workers, that poll workers be fully advised of what the rights are of language minorities, that if a U.S. citizen comes into the polling place and they are not yet fully proficient in English, they do have the right to vote even though they may not yet speak English, and that is especially true for senior citizens who are naturalized U.S. citizens who do not need to show knowledge of English to become a U.S. citizen. They are over 65 years of age.

In all of these instances many times people who are voting for the first time may be discouraged if they are not being given full assistance in the voting process.

Mr. SERRANO. It is interesting what you are telling us because when people hear the word "discrimination," they usually think of an aggressive desire to do some harm to you, and you are saying that most see this as not necessarily people not wanting these folks to vote, but not being prepared to really deal with them and know, for instance, that you do not have to ask for this or you do not have to ask for that. And you are right. They see themselves as the last wave.

So training of poll workers, but that continues to be a problem, right? I mean, I find even in our area where people used to line up to work at the poll, now you have to go and find them. Is it in your opinion just a matter of lack of interest on the part of the citizenry? Is it that we do not pay them enough?

Why are we not getting enough poll workers?

Mr. VARGAS. Well, certainly there is a great disincentive to give up a full work day to work for only a nominal amount and to do a civic duty working as a poll worker. But one of the programs that we implemented a few years ago, which I think is something that

bears replication, is that we partnered at the NALEAO Educational Fund with the Secretary of State of California, who was at the time Bill Jones, and State Farm Insurance Company, where State Farm Insurance Company gave their agents the day off with pay to work as poll workers, and that was an incentive especially for those State Farm employees who could speak languages other than English so that they could go work. So they did not lose a day of pay. In fact, the company paid them still their daily salary.

We had over I think it was a couple of hundred State Farm employees to work the polls. So I think there are some creative, innovative ways when we can have public, private, nonprofit partnerships to try to fulfill the need that we have for poll workers.

Mr. SERRANO. That is interesting. Of course, you did not tell us that half of the voters switched to State Farm, right, right after the election? [Laughter.]

VOTER FRAUD

Mr. SERRANO. The Brennan Center has always done a lot of work in this area, and I commend the work that you all do. I am very familiar with the work of the Brennan Center. How significant is the issue of voter fraud, in your opinion?

What are some examples of voter fraud, but interestingly enough, what are some examples of things that some people perceive to be voter fraud and, in fact, are not?

Ms. WEISER. Thank you.

We have actually recently completed an extensive study on this topic called the Truth about Voter Fraud, which I have brought copies of, and we would be happy also to submit that to the record.

Mr. SERRANO. Without objection.

[The information follows:]

BRENNAN
CENTER
FOR JUSTICE

THE TRUTH ABOUT VOTER FRAUD

Justin Levitt

Brennan Center for Justice *at New York University School of Law*

ABOUT THE BRENNAN CENTER FOR JUSTICE

The Brennan Center for Justice at New York University School of Law is a non-partisan public policy and law institute that focuses on fundamental issues of democracy and justice. Our work ranges from voting rights to redistricting reform, from access to the courts to presidential power in the fight against terrorism. A singular institution—part think tank, part public interest law firm, part advocacy group—the Brennan Center combines scholarship, legislative and legal advocacy, and communications to win meaningful, measurable change in the public sector.

ABOUT THE BRENNAN CENTER'S VOTING RIGHTS AND ELECTIONS PROJECT

The Voting Rights and Elections Project works to expand the franchise, to make it as simple as possible for every eligible American to vote, and to ensure that every vote cast is accurately recorded and counted. The Center's staff provides top-flight legal and policy assistance on a broad range of election administration issues, including voter registration systems, voting technology, voter identification, statewide voter registration list maintenance, and provisional ballots.

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ACKNOWLEDGMENTS

The author would like to thank his Brennan Center colleagues for their contributions to this paper—particularly Deborah Goldberg and Wendy Weiser of the Brennan Center for their helpful comments and Margaret Chen for her extraordinary research assistance. The Center thanks the Carnegie Corporation of New York, Educational Foundation of America, Ford Foundation, JEHT Foundation, Open Society Institute, Rockefeller Family Fund, and an anonymous donor for the generous support that made this paper possible. The statements made and views expressed in this paper are solely the responsibility of the Brennan Center.

THE TRUTH ABOUT VOTER FRAUD

I. INTRODUCTION

Allegations of election-related fraud make for enticing press. Many Americans remember vivid stories of voting improprieties in Chicagoland, or the suspiciously sudden appearance of LBJ's alphabetized ballot box in Texas, or Governor Earl Long's quip: "When I die, I want to be buried in Louisiana, so I can stay active in politics." Voter fraud, in particular, has the feel of a bank heist caper: roundly condemned but technically fascinating, and sufficiently lurid to grab and hold headlines.

Perhaps because these stories are dramatic, voter fraud makes a popular scapegoat. In the aftermath of a close election, losing candidates are often quick to blame voter fraud for the results. Legislators cite voter fraud as justification for various new restrictions on the exercise of the franchise. And pundits trot out the same few anecdotes time and again as proof that a wave of fraud is imminent.

Allegations of widespread voter fraud, however, often prove greatly exaggerated. It is easy to grab headlines with a lurid claim ("Tens of thousands may be voting illegally!"); the follow-up — when any exists — is not usually deemed newsworthy. Yet on closer examination, many of the claims of voter fraud amount to a great deal of smoke without much fire. The allegations simply do not pan out.

These inflated claims are not harmless. Crying "wolf" when the allegations are unsubstantiated distracts attention from real problems that need real solutions. If we can move beyond the fixation on voter fraud, we will be able to focus on the real changes our elections need, from universal registration all the way down to sufficient parking at the poll site.

Moreover, these claims of voter fraud are frequently used to justify policies that do not solve the alleged wrongs, but that could well disenfranchise legitimate voters. Overly restrictive identification requirements for voters at the polls — which address a sort of voter fraud more rare than death by lightning — is only the most prominent example.

The Brennan Center for Justice at NYU School of Law carefully examines allegations of fraud to get at the truth behind the claims. The Brennan Center has analyzed purported fraud cited by state and federal courts; multipartisan and bipartisan federal commissions; political party entities; state and local election officials; and authors, journalists, and bloggers. Usually, only a tiny portion of the claimed illegality is substantiated — and most of the remainder is either nothing more than speculation or has been conclusively debunked.

This paper seeks to distill our findings: the truth about voter fraud. It first offers a straightforward definition to avoid the common trap of discussing election irregularities that involve neither voters nor fraud as if they showed voter fraud. It then discusses different alternative reasons more credible than voter fraud to explain many of the recurring allegations. The paper then analyzes, scenario by scenario, some of the more common types of alleged voter fraud and their more likely causes and policy solutions. Finally, the paper presents individual case studies of notorious instances of alleged voter fraud, and finds those allegations to be grossly inflated. For more information, analysis, and opinion about voter fraud, by the Brennan Center and others, please see www.truthaboutfraud.org.

II. What Is Voter Fraud?

"Voter fraud" is fraud by voters.

More precisely, "voter fraud" occurs when individuals cast ballots despite knowing that they are ineligible to vote, in an attempt to defraud the election system.[1]

This sounds straightforward. And yet, voter fraud is often conflated, intentionally or unintentionally, with other forms of election misconduct or irregularities.

There are many such problems that are improperly lumped under the umbrella of "voter fraud." Some result from technological glitches, whether sinister or benign: for example, voting machines may record inaccurate tallies due to fraud, user error, or technical malfunction.[2] Some result from honest mistakes by election officials or voters: for example, a person with a conviction may honestly believe herself eligible to vote when the conviction renders her temporarily ineligible,[3] or an election official may believe that certain identification documents are required to vote when no such requirement exists.[4] And some irregularities involve fraud or intentional misconduct perpetrated by actors other than individual voters: for example, flyers may spread misinformation about the proper locations or procedures for voting; thugs may be dispatched to intimidate voters at the polls; missing ballot boxes may mysteriously reappear. These are all problems with the election administration system ... but they are not "voter fraud."

IT IS MORE LIKELY THAT AN INDIVIDUAL WILL BE STRUCK BY LIGHTNING THAN THAT HE WILL IMPERSONATE ANOTHER VOTER AT THE POLLS.

Conflating these concerns is not merely a semantic issue. First, the rhetorical sloppiness fosters the misperception that fraud by voters is prevalent. That is, when every problem with an election is attributed to "voter fraud," it appears that fraud by voters is much more common than is actually the case.

This, in turn, promotes inappropriate policy. By inflating the perceived prevalence of fraud by voters, policymakers find it easier to justify restrictions on those voters that are not warranted by the real facts.

Moreover, mislabeling problems as "voter fraud" distracts attention from the real election issues that need to be resolved. It draws attention away from problems best addressed, for example, by resource allocation or poll worker education or implementation of longstanding statutory mandates, and instead improperly focuses on the voter as the source of the problem.

III. The Research Landscape

It is easy to find opinion pieces and legislative statements claiming that voter fraud is a substantial concern. But aside from a trickle of news stories of low-grade fraud in a few isolated elections, there are surprisingly few sources recounting specific incidents of alleged voter fraud.

The most notorious such sources are documents prepared by the American Center for Voting Rights ("ACVR"), a controversial organization established in early 2005 and apparently defunct just over two years later.[5] The ACVR produced two reports — one compiling allegations of fraud in Ohio in 2004, and another compiling allegations of fraud in 2004 nationwide.[6] The ACVR has also repeated these and other allegations in *amicus* briefs filed in litigation related to voter identification provisions.[7]

Former *Wall Street Journal* editorial board member and weekly columnist John Fund has also recounted several specific allegations of voter fraud in his 2004 book *Stealing Elections*;[8] two other books by academics, *Dirty Little Secrets* and *Deliver the Vote*, address allegations of fraud from a historical perspective.[9] Hans von Spakovsky, a commissioner on the Federal Election Commission and a former Counsel to the Assistant Attorney General for Civil Rights in the Department of Justice, has similarly recounted allegations of voter fraud in several policy papers and presentations.[10]

Finally, there are a few newspaper articles that seem repeatedly cited in discussions of voter fraud — for example, a 2000 article in the *Atlanta Journal-Constitution* and a 2004 article in the *New York Daily News*.[11] These articles review attempts to match voter rolls to other large lists in an effort to find allegedly ineligible voters; the limitations of such studies are discussed later in this paper.

Similarly, there are surprisingly few sources of information specifically analyzing the allegations of alleged voter fraud to determine the extent to which they show reliable evidence of fraud. In two studies, both focusing more heavily on the political and legal context of voter fraud allegations, Professor Lorraine Minnite has reviewed several incidents.[12] Professor Spencer Overton, a former commissioner on the 2005 Commission on Federal Election Reform, has also reviewed several incidents of alleged fraud in his book *Stealing Democracy*.[13] After careful analysis, both authors find the claims largely overblown.

Among its other work on the subject,[14] the Brennan Center for Justice has developed a methodology for reviewing allegations of voter fraud,[15] and continues to collect analyses of noted allegations at www.truthaboutfraud.org. This paper distills the results of that work, compiling for the first time the recurring methodological flaws that continue to spawn allegations of widespread voter fraud where it does not exist.

IV. Voter Fraud And The Press For Photo ID

The most common example of the harm wrought by imprecise and inflated claims of "voter fraud" is the call for in-person photo identification requirements. Such photo ID laws are effective *only* in preventing individuals from impersonating other voters at the polls — an occurrence more rare than getting struck by lightning.[16]

By throwing all sorts of election anomalies under the "voter fraud" umbrella, however, advocates for such laws artificially inflate the apparent need for these restrictions and undermine the urgency of other reforms.

Moreover, as with all restrictions on voters, photo identification requirements have a predictable detrimental impact on eligible citizens. Such laws are only potentially worthwhile if they clearly prevent more problems than they create. If policymakers distinguished real voter fraud from the more common election irregularities erroneously labeled as voter fraud, it would become apparent that the limited benefits of laws like photo ID requirements are simply not worth the cost.

THE VOTER FRAUD PHANTOM DRIVES POLICY THAT DISENFRANCHISES ACTUAL LEGITIMATE VOTERS, WITHOUT A CORRESPONDING ACTUAL BENEFIT.

Royal Masset, the former political director for the Republican Party of Texas, concisely tied all of these strands together in a 2007 *Houston Chronicle* article concerning a highly controversial battle over photo identification legislation in Texas. Masset connected the inflated furor over voter fraud to photo identification laws and their expected impact on legitimate voters:

> Among Republicans it is an "article of religious faith that voter fraud is causing us to lose elections," Masset said. He doesn't agree with that, but does believe that requiring photo IDs could cause enough of a dropoff in legitimate Democratic voting to add 3 percent to the Republican vote.[17]

This remarkably candid observation underscores why it is so critical to get the facts straight on voter fraud. The voter fraud phantom drives policy that disenfranchises actual *legitimate* voters, without a corresponding actual benefit. Virtuous public policy should stand on more reliable supports.

V. THE TRUTH ABOUT VOTER FRAUD

There have been a handful of substantiated cases of individual ineligible voters attempting to defraud the election system. But by any measure, voter fraud is extraordinarily rare.

In part, this is because fraud by individual voters is a singularly foolish and ineffective way to attempt to win an election. Each act of voter fraud in connection with a federal election risks five years in prison and a $10,000 fine, in addition to any state penalties.[18] In return, it yields at most one incremental vote. That single extra vote is simply not worth the price.

Instead, much evidence that purports to reveal voter fraud can be traced to causes far more logical than fraud by voters. Below, this paper reviews the more common ways in which more benign errors or inconsistencies may be mistaken for voter fraud.

CLERICAL OR TYPOGRAPHICAL ERRORS

In the course of millions of recorded votes and voters, it is virtually certain that there will be clerical errors. Often, what appears to be voter fraud—a person attempting to vote under a false name, for example — can be traced back to a typo.

Errors in the poll books. In a jurisdiction of any significant size, it is unfortunately easy to make an entry in the poll book next to the wrong voter's name. For example, despite having died in 1997, Alan J. Mandel was alleged to have voted in 1998; upon further investigation, Alan J. Mandell (two "l"s), who was very much alive and voting at the time, explained that local election workers simply checked the wrong name off of the list.[19] The same problem may occur when information from a poll book is entered incorrectly into a county's computer system, as in Milwaukee in 2004.[20] Or voters — legitimate voters — may make a mistake: a 1994 investigation of fraud allegations in California, for example, revealed that voters accidentally signed the poll books on the wrong lines, next to the names of deceased voters.[21]

Errors in registration records. Simple typos may also infect voter records, changing a name or an identifying number or an address in a way that interferes with attempts to validate the voter's information against some other source. For example, in Washington State in 2006, Marina Petrienko tried to register to vote for the first time, but a county official mis-typed the year of her birth, entering "1976" into the database, instead of the year on her form: "1975."[22] First-time Illinois voters Mike and Sung Kim "had been mistakenly registered with Kim as their first names" in 2004.[23] And in Milwaukee, Victor Moy was listed on the rolls as living at 8183 W. Thurston Avenue, but actually resides at number 8153.[24] Because such typos may prevent registrations from being externally validated by information in other sources, officials and observers may believe that registrations are fraudulent when they are, in reality, entirely legitimate.

BAD "MATCHING"

The most common source of superficial claims of voter fraud, and the most common source of error, probably involves matching voter rolls against each other or against some other source to find alleged double voters, dead voters, or otherwise ineligible voters.

Errors in the underlying data. Some such matches fail to account for errors or default entries in the underlying data. In New Jersey in 2005, for example, examiners alleged fraud by individuals on the voter rolls in two different places whose first and last names and birthdates matched, including a woman named Mary Johnson.[25] Closer examination, however, showed that some of the matching birthdates in question were January 1, 1880, which was simply a system default for missing information.[26] In reality, the examiners had found only two different women named "Mary Johnson," with no relevant birthdate information at all.

Partial matches. Other matches neglect middle names or suffixes: in the same New Jersey procedure described above, for example, James A. Smith and James G. Smith were presumed to be the same person, as were J. T. Kearns and J. T. Kearns, Jr.[27] Similarly, in New Hampshire, 22 pairs of people who shared the same first and last names were flagged for possible double-voting; in fact, all of the flagged voters had different middle names.[28] And in one of the more infamous examples of inappropriate matching, a vendor preparing a set of voters to be purged in Florida in 2000 found "matches" in the first name if the first four letters were the same on two different lists, and "matches" in the last name if 80% of the letters were the same.[29] The final set of voters to be purged, of course, contained the names of many individuals whose records had been falsely matched.[30]

The "birthdate" problem. Even given an exact match, however, two entries with the same name and birthdate may not represent the same individual. Statistics students are often surprised to discover that in a group of 23 people, it is more likely than not that two will share the same month and day of birth; in a group of 180, two will probably share the same birthdate. In any group of significant size, statistics teaches that there will be many with the same first and last names — and it is likely that at least two such voters will be born on the same day.[31] It should not therefore be surprising, for example, that "Kathleen Sullivan" was most likely listed twice on the rolls of 2004 New Jersey voters not because one woman drove the length of the state to cast a second ballot, but because two women named Kathleen Sullivan happen to share the same birthdate.[32]

Jumping to Conclusions

Those searching for fraud — politicians, pundits, and even occasionally prosecutors — sometimes jump to unwarranted conclusions with a limited amount of information. The "birthdate problem" above — mistaking two different people with the same name and birthdate — is one example. But there are many other circumstances in which observers draw illicit conclusions from data that in fact have a benign explanation.

Dual registration. Registering twice — or mistakenly leaving an old registration on the rolls — is not meaningful evidence of an intent to commit fraud by voting twice. There is no requirement that citizens inform their local election officials before they move, and with approximately 14% of Americans moving each year,[33] it is not surprising to find that many voters are registered under multiple addresses — but vote only once. In New Hampshire in 2004, for example, local officials found 67 individuals on the rolls in both Dover and Durham; each of the 67 had moved from one town to the other, and each voted only once.[34]

FRAUD BY INDIVIDUAL VOTERS IS A SINGULARLY FOOLISH WAY TO ATTEMPT TO WIN AN ELECTION.

It may seem significantly more suspicious to register twice on the same day — but even then, two registrations do not necessarily yield two votes. In 2004, for example, federal prosecutors charged Wisconsinite Cynthia Alicea with double-voting. Wisconsin allows residents to register on Election Day, which Alicea did. Poll workers found an error on the form, and asked Alicea to fill out another, which she also did — but the first form was never discarded. Although Alicea completed two registration forms, following poll worker instructions, she voted only once. Her innocence was eventually proven, but not before prosecutors forced the 23-year-old through an unwarranted trial.[35]

Death records. Voting from the grave offers salacious headlines, and investigators often attempt to match death records to voter rolls in an attempt to produce purported evidence of fraud. Yet in addition to the problems with inaccurate matching identified above, a simple match of death records to voter rolls may conceal citizens who voted before dying, in quite ordinary fashion. In Maryland in 1995, for example, an exhaustive investigation revealed that of 89 alleged deceased voters, none were actually dead at the time the ballot was cast. The federal agent in charge of the investigation said that the nearest they came was when they "found one person who had voted then died a week after the election."[36] Similarly, in New Hampshire, postcards were sent to the addresses of citizens who voted in the 2004 general election; one card was returned as undeliverable because the voter died after Election Day, but before the postcard arrived at her home.[37]

Criminal records. Reports of votes by persons with convictions have often fed claims of voter fraud. Yet without more information, such reports may be deceptive. Many, if not most, convictions are misdemeanors, which in most states do not affect the defendant's voting rights. Wallace McDonald, for example, was purged from the Florida voter rolls in 2000 because of a conviction. Yet Mr. McDonald's crime was not a felony, for which many Floridians forfeit voting rights forever — but merely a misdemeanor, which should not affect voting rights at all. Indeed, Mr. McDonald had been convicted only of falling asleep on a bench.[38] Similarly, in Washington's 2004 gubernatorial election, hundreds of citizens were alleged to have voted illegally because of convictions that were actually juvenile dispositions — which do not disqualify voters.[39]

Other claims of fraud rely solely on the fact that someone was convicted but never look to see whether the accused person had his voting rights restored. Even in Florida, where, until 2007, most persons with felony convictions lost their voting rights permanently, not every person convicted of a felony was ineligible to vote. Reverend Willie Dixon, 70, was purged from the Florida voter rolls in 2000 because of a felony conviction — but Reverend Dixon had already been pardoned for his crime and his voting rights had been restored.[40] In most other states, persons with convictions regain the franchise after release from either incarceration, probation, or parole. Allegations of fraud that rely on a past criminal conviction but fail to investigate whether voting rights were restored will likely prove unfounded.

Returned mail. Voter "caging" is a tactic involving a mass mailing to registered voters to sniff out mailings that are returned undelivered; these undelivered mailings are then used to compile a list of voters allegedly enrolled under invalid addresses. But for many reasons, undelivered mail need not be an indication that a person registered at the given address is not entitled to vote there.[41] A voter may be away from home for work, like a Louisiana Congresswoman challenged because she received her mail in Washington;[42] or for military service, like an Ohio servicewoman challenged because she received her mail where she was stationed, in North Carolina;[43] or for an extended vacation, like an Oregon woman rendered inactive because she was out of the country for a few months.[44] A voter may live with others but be unlisted on the mailbox. Or, like Ohio resident Raven Shaffer, he may receive mail at a post office box or other mail service, and not at his registered residence.[45] Moreover, some mail is simply not delivered, through no fault of the voter: in the 1990 census, for example, *The New York Times* reported that "[a]lthough at least 4.8 million [census] forms were found to be undeliverable by the Postal Service, 1.8 million of those were later delivered by hand."[46] And recent reports found that government records used by Chicago postal workers to deliver mail contained more than 84,000 errors.[47]

Mail sent to a listed registration address may also be returned as undeliverable because the voter has moved — even though the citizen remains wholly eligible to vote without re-registration. Each state has different rules determining when a voter who has moved must inform election officials of her new address. At a minimum, however, federal law provides that if a voter has moved within the same area covered by a given polling place — if, for example, a voter moves from one apartment to another within the same apartment complex, as a 2000 Oregon voter did[48] — she may legitimately vote at that polling place even if she has not yet notified a registrar of her move.[49] Similarly, a voter who has moved within the same registrar's jurisdiction and Congressional district may return to vote at her former polling place without re-registering.[50] Especially in urban areas where there is high mobility within a particular neighborhood, undeliverable mail may simply reflect the recent move of a voter who remains fully eligible to vote.

Unusual addresses. In most states, voters must register at a residential address; those looking for fraud may therefore flag addresses zoned for business use as an indication of fraudulent activity. Broad zoning restrictions, however, do not account for many less traditional — but legitimate — residences. Barbara Taylor was among hundreds of Washington voters challenged in 2005 for this reason. While it is true that the address on her registration was the address of a public storage facility, Taylor explained that she is "a manager for the company and has lived in an apartment on the site for 12 years."[51] In other cases, transient or homeless individuals have registered — as they are legally entitled to do — at shelters or government buildings.[52]

Records compiled for a different purpose. In St. Louis in 2000, officials compared the voter rolls to city property records and alleged that some voters fraudulently registered from vacant lots.[53] The property records, however, were originally compiled for a purpose other than individual identification; an address with multiple plots of land was apparently deemed entirely "vacant" if only one of the plots had no building. Further investigation by local reporters revealed that the supposedly vacant lots where voters were registered in fact contained valid residences.[54]

VOTER MISTAKES

Even after accounting for the false conclusions above, investigations reveal that ineligible voters do sometimes cast votes. It is important, however, to distinguish those cases in which voters know they are ineligible but vote anyway — real voter fraud — from cases in which ineligible voters mistakenly believe themselves to be eligible. Both scenarios are unquestionably of concern. But it is likely to be more productive to address mistakes with remedies different from those often proposed for fraud.

Of the relatively small number of ineligible voters who mistakenly cast ballots, most are citizens rendered ineligible by criminal conviction. The laws concerning eligibility vary from state to state and can be confusing: different voters are disenfranchised for different convictions for different lengths of time.[55] Moreover, the process of restoring a citizen's right to vote varies as well, from automatic restoration upon release from prison in states like Pennsylvania, Indiana, Ohio, Illinois, and Michigan,[56] to the excruciatingly burdensome application process in Kentucky — which requires all would-be voters to submit a written application accompanied by three character references, an essay explaining why they should be eligible to vote, and a filing fee.[57]

These rules are not merely difficult for voters to navigate: election officials with special training in the rules and regulations governing eligibility routinely get the law wrong. A 2004 survey, for example, found that 43% of New Jersey's county election offices did not follow state law in restoring citizens' right to vote.[58] In New York, a much-publicized 2003 survey found that more than half of the local election officials did not follow state law; when the survey was repeated just two years later, 38% of the local boards of elections still got the law wrong.[59]

It is difficult to expect disenfranchised voters to navigate the election laws successfully when so many election officials with expertise do not. Indeed, in Milwaukee, one voter asked to present identification at the polls showed his Department of Corrections ID card, with "OFFENDER" printed in bold letters across the face — but he was not informed by any poll worker that he might be ineligible to cast a ballot.[60] Such cases show confusion ... but not voter fraud.

VI. Types Of "Voter Fraud"

Allegations of "voter fraud" seem to fall into one of several recurring categories. Some would represent actual fraud if the allegations proved true, though the allegations are often unsupported. Some would not actually represent fraud even if they were true. This paper reviews some of the more common assertions of "fraud" below, to substitute more careful analysis for overeager and salacious headlines.

Allegations of Double Voting

Allegations of double voting are among the most common assertions of voter fraud. Consider one set of agitated headlines: "More Double Voting Tied to '04 Election,"[61] "Double Voting Being Investigated,"[62] "Double Voting Fear Rises,"[63] "Hundreds Might Have Double-Voted,"[64] "Exposed: Scandal of Double Voters."[65] Most of these reports are hypothetical — hundreds "might" have double voted — and further research shows reason to question the conclusion that widespread double voting occurred. Other reports appear more certain but are actually more incorrect.

There are a handful of known cases in which admissions, poll book entries, absentee ballots, provisional ballot stubs, or other documentation indicate that one individual has actually voted twice.[66] These cases are extremely rare — not because such documentation is hard to come by (many states require that such documents be retained), but because actual double voting is itself extremely rare. Moreover, the scarcity is expected, given the severity of the penalty (criminal prosecution), and the meager nature of the payoff (one incremental vote).

ALICEA VOTED ONLY ONCE, BUT BASED ON TWO REGISTRATION FORMS, PROSECUTORS TOOK HER TO TRIAL. SHE EVENTUALLY WON HER CASE BUT, BECAUSE OF THE ORDEAL, "SHE'S INCLINED NOT TO VOTE EVER AGAIN".

Instead, it is far more common to see allegations of epidemic double voting that are unfounded. Such claims are usually premised on matching lists of voters from one place to another; upon closer inspection, the match process shows error. Sometimes the interpretation is flawed: two list entries under the same name — even the same name and birthdate — indicate different individuals, as with two Kathleen Sullivans confused for each other in New Jersey in 2004.[67] The opportunity for error increases with the size of the attempted match: when allegations of fraud in 2000 were based on a *nationwide* attempt to match names and birthdates, it is not surprising that 3,273 alleged double voters were found — and not surprising that many, like those attributed to Martha Alexander, the chair of the North Carolina legislature's panel on election laws, were based on flawed assumptions that two people with the same name and birthdate were the same individual.[68] Moreover, sometimes the lists themselves are flawed: because of the occasional clerical error by overworked and undertrained election workers, an individual is marked as voting when she did not in fact cast a ballot, as Missouri investigators discovered in 2004.[69]

Sometimes, merely following a poll worker's accurate instructions can land legitimate voters in unwarranted hot water. In 2004, for example, federal prosecutors were especially attuned to claims of voter fraud, and fixed the weight of the federal government on 23-year-old Cynthia Alicea. Alicea, an eligible resident of Wisconsin, registered on Election Day, as permitted under Wisconsin law. Poll workers found an error on the form, and asked Alicea to fill out another, which she also did. The poll workers, however, never discarded the first form. Alicea voted only once, but based on the two registration forms, prosecutors took the young woman to trial. Though she eventually won her case, because of the ordeal, "she's inclined not to vote ever again."[70]

Exaggerated or unfounded allegations of fraud through double voting include the following:

- In Missouri in 2000 and 2002, hundreds of voters were alleged to have voted twice, either within the state or once in Kansas and once in Missouri. The same analysis acknowledged that the "computer files contain many errors that show people voting who did not actually vote."[71] Of 18 Kansas City cases that reporters followed up, 13 were affirmatively shown to result from clerical errors.[72] We are aware of public sources substantiating only four cases (amounting to six votes within the state), yielding an overall documented fraud rate of 0.0003%.[73]

- In New Hampshire in 2004, citizens were alleged to have voted twice. In fact, on further investigation, many of the voters who were allegedly listed multiple times on the rolls actually represented different people with identical names; others were listed with multiple registrations, but voted only once. We are not aware of any public materials substantiating the claims of double voting.[74]

- In New Jersey in 2004, 4,397 voters were alleged to have voted twice within the state, and 6,572 voters were alleged to have voted once in New Jersey and once elsewhere.[75] Many of these alleged double votes were actually flawed matches of names and/or birthdates on voter rolls.[76] Only eight cases were actually documented through signatures on poll books; at least five signatures appear to match.[77] Even if all eight proved to reveal fraud, however, that would amount to an overall double voting rate of 0.0002%.[78]

- In New York in 2002 and 2004, between 400 and 1,000 voters were alleged to have voted once in New York and once in Florida. These allegations were also prompted by a flawed attempt to match names and birthdates.[79] We are aware of public sources substantiating only two cases, yielding an overall documented fraud rate of 0.000009%.[80]

- In Wisconsin in 2004, dozens of voters were alleged to have voted twice. After further investigation, the vast majority were affirmatively cleared, with some attributed to clerical errors and confusion caused by flawed attempts to match names and birthdates. There were 14 alleged reports of voters casting ballots both absentee and in person; at least 12 were caught, and the absentee ballot was not counted. There were no substantiated reports of any intentional double voting of which we are aware.[81]

ALLEGATIONS OF DEAD VOTERS

Allegations of "dead voters" are also popular, not least for the entertaining pop culture references to be found in the headlines: "Among Voters in New Jersey, G.O.P. Sees Dead People,"[82] for example, or "Dead Man Voting."[83] After further investigation, however, these allegedly dead voters often turn up perfectly healthy.

There are a handful of known cases in which documentation shows that votes have been cast in the names of voters who have died before the vote was submitted.[84]

It is far more common, however, to see unfounded allegations of epidemic voting from beyond the grave, with a chuckle and a reference to Gov. Earl Long's quip ("When I die — if I die — I want to be buried in Louisiana, so I can stay active in politics.") or Rep. Charlie Rangel's update (same idea, but takes place in Chicago).[85]

Here, too, flawed matches of lists from one place (death records) to another (voter rolls) are often responsible for misinformation. Sometimes the interpretation is flawed: two list entries under the same name indicate different individuals.[86] Sometimes the lists themselves are flawed: as Hilde Stafford discovered in 2006, individuals who are in fact quite spry are occasionally listed as deceased on the Social Security Administration's master files.[87] And sometimes, because of clerical error by election workers or voters or both, an individual is marked as voting when she did not in fact cast a ballot, or is marked as voting under the wrong person's name. For example, despite having died in 1997, Alan J. Mandel was alleged to have voted in 1998. On further investigation, Alan J. Mandell (two "l"s), who was very much alive and voting at the time, explained that local election workers simply checked the wrong name off of the list.[88] Indeed, a 2007 investigation of about 100 "dead voters" in Missouri revealed that every single purported case was properly attributed either to a matching error, a problem in the underlying data, or a clerical error by elections officials or voters.[89]

In other circumstances, the match is accurate but reveals nothing illegal about the vote: the voter has died, yes, but *after* casting her ballot. In Maryland in 1995, for example, an exhaustive investigation revealed that of 89 alleged deceased voters, none were actually dead at the time the ballot was cast. The federal agent in charge of the investigation said that the nearest they came was when they "found one person who had voted then died a week after the election."[90]

Exaggerated or unfounded allegations of fraud by dead voters include the following:

- In Georgia in 2000, 5,412 votes were alleged to have been cast by deceased voters over the past 20 years.[91] The allegations were premised on a flawed match of voter rolls to death lists. A follow-up report clarified that only one instance had been substantiated, and this single instance was later found to have been an error: the example above, in which Alan J. Mandel was confused with Alan J. Mandell.[92] No other evidence of fraudulent vores was reported.

- In Michigan in 2005, 132 votes were alleged to have been cast by deceased voters.[93] The allegations were premised on a flawed match of voter rolls to death lists. A follow-up investigation by the Secretary of State revealed that these alleged dead voters were actually absentee ballots mailed to voters who died before Election Day; 97 of these ballots were never voted, and 27

were voted before the voter passed away.[94] Even if the remaining eight cases all revealed substantiated fraud, that would amount to a rate of at most 0.0027%.[95]

- In New Jersey in 2004, 4,755 deceased voters were alleged to have cast a ballot. The allegarions were premised on a flawed match of voter rolls to death lists. No follow-up investigation publicly documented any substantiated cases of fraud of which we are aware, and there were no reports that any of these allegedly deceased voters voted in 2005.[96]

- In New York in 2002 and 2004, 2,600 deceased voters were alleged to have cast a ballot, again based on a match of voter rolls to death lists. Journalists following up on seven cases found clerical errors and mistakes but no fraud, and no other evidence of fraud was reported.[97]

ALLEGATIONS OF FRAUDULENT ADDRESSES

Those claiming voter fraud also point to allegations that voters have been registered at fraudulent addresses such as vacant lots, storage units, or government buildings. As with the allegations above, there are a few cases in which charges that votes have been improperly cast from illegitimate addresses have been substantiated.[98]

More often, however, the allegations are either unsupported or further investigation reveals that the allegedly flawed addresses turn out to be legitimate.

These sorts of claims are often based on postcards that are returned undelivered or undeliverable — but the postcards are an unreliable indicator. Typos during the registration process, like the one listing Victor Moy at 8183 W. Thurston Avenue in Milwaukee instead of 8153,[99] may cause mail to be misdirected. Or, like the post office box used by Raven Shaffer in Ohio, individuals may receive mail at an address different from the legal residence they list as their registration address.[100]

Other unsupported claims are based on attempts to screen registration addresses against lists of vacant lots, or against zoning regulations to find locations dedicated to non-residential use. Here, too, typos may cause legitimate addresses to be flagged as suspicious.[101] Or the underlying lists may be flawed: in Missouri in 2000, lots that were supposedly vacant actually held houses.[102] Sometimes the lists are simply overly broad, and capture voters who list less traditional — but entirely legitimate — residences. Barbara Taylor, for example, was among hundreds of Washington voters challenged in 2005 for this reason. While it is true that the address on her registration was the address of a public storage facility, Taylor — a manager for the storage company — "has lived in an apartment on the site for 12 years."[103] Though her address appeared superficially questionable, her address was in fact entirely legitimate.

Finally, a variant of the above claims concern allegations that large numbers of votes are all tied to one address. There is, however, nothing inherently suspect about multiple votes from one address if multiple eligible voters live there, whether the address is a college dormitory or nursing home or any other group housing arrangement. In New Hampshire, for example, a citizen apparently became concerned because 88 individuals had registered with residences on property owned by Daniel Webster College; on further investigation, the 88 registrations were revealed to be from students at the college — and unsurprisingly, entirely legitimate.[104]

Exaggerated or unfounded allegations of fraud by voters with invalid addresses include the following:

- In Missouri in 2000, 79 voters were registered from addresses alleged to be vacant lots, but further investigation found that properties classified as vacant in fact contained legitimate residences, and that at least one of the voters was apparently the victim of a typographical error.[105] We are aware of no public reports substantiating claims that any votes were cast by individuals fraudulently registered at invalid addresses.

- In New Hampshire in 2004, based on undelivered postcards sent after the election, citizens were alleged to have voted from invalid addresses. Many actually lived at the addresses claimed, but received their mail elsewhere. Others moved after the election but before the postcards arrived. We are aware of only two substantiated cases (including one domestic violence victim, who voted from an old address in order to avoid disclosing her current domicile), with two more under investigation. Even if all four revealed fraud, that would amount to an overall rate of 0.0006%.[106]

- In Wisconsin in 2004, after an attempt to match voters' addresses to a postal service list, 1,242 votes in Milwaukee were alleged to be fraudulent; many of these allegations were later traced to data entry errors or to legitimate residences that were presumed to be business addresses.[107] 5,800 additional Election Day registrants were sent undeliverable postcards, but many of these postcards were returned because the voters legitimately moved after the election.[108] We are aware of no substantiated reports of any votes cast by individuals fraudulently registered at invalid addresses.

Allegations of Voter Fraud by Persons with Felony Convictions

Many close elections have also featured allegations that waves of ineligible people with felony convictions have deliberately overtaken the voting system. There are, however, only a handful of known cases in which people rendered ineligible by convictions cast ballots despite knowing that they were not permitted to do so.[109]

More frequently — though still quite rare — individuals who are ineligible because of convictions have reportedly registered or voted *without* realizing that they were ineligible. In Washington in 2004, for example, there were reports of voting by ineligible persons with convictions, in substantial part because of significant confusion about the circumstances under which civil rights were taken away or restored.[110] At the time, citizens convicted of a felony were disenfranchised both while in prison and after they had returned to the community on parole or probation. In order to regain the right to vote, these citizens had to complete their sentence — including repayment of all restitution, fees, and fines.[111] Confusion abounded. Many citizens with convictions thought they could vote again once they were released from probation.[112] Some individuals rendered ineligible by conviction were allegedly told by corrections officers that they could vote; other probationers were apparently mailed ballots they thought they could (indeed, should) cast.[113] At least one county elections office provided mistaken information on its website.[114]

Similar confusion was not confined to Washington. A 2004 survey in New Jersey, for example, found that 43% of election offices got the law wrong; the error rate by election officials in New York was 38%.[115] When more than a third of trained election officials do not know the rules, it is not hard to imagine that persons with convictions are also poorly informed. Moreover, given the ease with which poll book entries can be

double-checked against lists of convictions to find ineligible voters, it seems unlikely that ineligible citizens would take the substantial risk of a return to prison for just one incremental vote. On the rare occasions when citizens rendered ineligible by conviction do vote, it is far more sensible to believe that they do so by mistake than that they do so with intent to deceive.

The few examples above concern actual votes — intentional or unintentional — cast by people who are ineligible because of a conviction. More common are allegations of such activity that prove unfounded. Such reports are often based on comparisons of voter rolls with lists of people who have been convicted. Yet these "matches" are subject to the same errors mentioned repeatedly above: typos, clerical errors, individuals who superficially appear to be the same person but are actually different. The notorious 2000 purge of purported felons in Florida is a good example: a system that found roughly similar names and birthdates on voter rolls and conviction records ended up disqualifying thousands of voters who were perfectly eligible to vote, but who were deemed ineligible by the "match."[116] For example, because of the inaccurate matching protocol, eligible citizen Matt Frost was prevented from voting because state officials incorrectly linked him with a similar alias of ineligible voter Shawn Chadwick.[117]

Even when the matching system is not to blame, allegations of ineligible voting may be inflated. As with at least some names on the 2000 Florida purge list, convictions may be mislabeled as disenfranchising felonies when in fact a voter has been convicted only of a misdemeanor.[118] As in Washington in 2004, citizens may be accused of ineligible voting due to juvenile dispositions — which do not affect their voting rights.[119] Or as with at least seven cases in Waukesha, Wisconsin, in 2004, accusations may fail to account for voters who are convicted *after* casting a legitimate vote.[120]

Moreover, even when the individual in question has actually been convicted of an offense that renders him ineligible, few such voters are ineligible to vote indefinitely. Some, like Reverend Willie Dixon of Florida, have been pardoned, and their voting rights restored.[121] Other convictions may be overturned on appeal. Still others, depending on the state, regain the franchise automatically or upon petition, after release from incarceration, probation, or parole. Allegations of fraud that look to convictions without accounting for the restoration of voting rights often miss the mark.[122]

Exaggerated or unfounded allegations of fraud by persons rendered ineligible by conviction include the following:

- In Florida in 2000, a large-scale purge became justifiably notorious for its inaccurate, even haphazard, discarding of the rights of eligible citizens. Despite recognizing the flawed nature of the purge lists, however, reporters used similar lists to claim that 5,643 ineligible persons with convictions actually voted in 2000. These reports used slightly more rigorous match criteria than were used to create the purge lists, but still acknowledged that the underlying data included eligible citizens with misdemeanors, citizens with convictions *after* their valid vote, and convicted persons with names and birthdates that matched eligible citizen voters. It is true that some votes were cast by ineligible citizens, some of whom were told by election officials that they were eligible. We are not aware of any reports of citizens voting despite knowing that they were ineligible.[123]

- In Wisconsin in 2004, after an attempt to match voters to Department of Corrections records, 376 people with allegedly disenfranchising convictions were said to have voted. A follow-up investigation revealed that several were found to be convicted only *after* they voted;[124] one was convicted of a misdemeanor,[125] and in another case, a woman's vote was improperly recorded in her ineligible husband's place.[126] Still another presented an identification card boldly labeled "OFFENDER," but was not told that he might be ineligible.[127] We are aware of sources documenting seven cases in which the voter knowingly voted while ineligible, yielding a fraud rate of 0.0002%.[128]

- In Washington in 2004, evidence submitted in vigorously prosecuted election contest proceedings showed 1,401 votes by individuals rendered ineligible due to convictions. Some of these voters were apparently misinformed by official county election information or corrections officers; most were apparently sent ballots in the mail by the state. We are not aware of any reports that any of these individuals voted knowing that they were ineligible.[129]

ALLEGATIONS OF VOTER FRAUD BY NONCITIZENS

We are not aware of any documented cases in which individual noncitizens have either intentionally registered to vote or voted while knowing that they were ineligible. Given that the penalty (not only criminal prosecution, but deportation)[130] is so severe, and the payoff (one incremental vote) is so minimal for any individual voter, it makes sense that extremely few noncitizens would attempt to vote, knowing that doing so is illegal.

Although there are a few recorded examples in which noncitizens have apparently registered or voted, investigators have concluded that they were likely not aware that doing so was improper. In one highly publicized case, for example, noncitizens were given voter registration forms by a group helping them through the naturalization process, immediately after successfully completing citizenship interviews with federal officials and receiving letters beginning "Congratulations, your application for citizenship has been approved."[131] Though the actual swearing-in ceremonies were still up to 90 days away, these individuals most likely mistakenly thought it their obligation and privilege to complete the paperwork, and did not intentionally fabricate their citizenship status in front of federal officials who *knew* that they were noncitizens.[132]

Far more common than these incidents of noncitizen voting are allegations of noncitizen voting that prove wholly unfounded. These claims are often premised on matching lists of voters from one place to another, but as with each of the examples above, upon closer inspection, the match process shows error. The interpretation may be flawed, as when two list entries under the same name indicate different individuals. Or the lists themselves may be flawed, with an individual marked due to a clerical error as voting when she did not in fact cast a ballot.

Government citizenship records — as the government itself acknowledges — are also replete with errors or incomplete information. Naturalization documentation may find its way into the government files slowly, or not at all, leaving outdated or inaccurate information for investigators looking for fraud. And this, in turn, leads to flawed accusations that noncitizens have been voting, when the voters in question have in fact become fully naturalized American citizens.

Exaggerated or unfounded allegations of fraud by noncitizens include the following:

- In Washington in 2005, an individual asked county offices to investigate the citizenship status of 1,668 registered voters based on their "foreign-sounding names." There are no reports of which we are aware that any individual on the submitted list was actually a noncitizen.[133]

- In Washington in 2004, documentation appears to show that two votes were cast in King County by noncitizens. There are no reports of which we are aware that either of these noncitizens knowingly voted illegally, although one did ask to rescind his vote shortly after the election. Given these votes, the rate of documented noncitizen votes — without proof of fraud — in King County was 0.0002%.[134]

- In Milwaukee in 2001, journalists analyzed 370,000 voting records from 1992 to 2000, and found four instances in which voters' names matched a list of naturalized city residents, but appeared to have voted before their naturalization dates; there is no indication of which we are aware that any of these four knowingly voted illegally. Even if all four of the matched records accurately represented noncitizen votes, the rate of noncitizen voting among the city records examined would have been 0.001%.[135]

- In Hawaii in 2000, 553 apparent noncitizens were alleged to have registered to vote. On further investigation, 144 documented that they had become citizens. At least 61 individuals affirmatively asked to cancel their registration; the others were stopped at the polls and specifically asked about their citizenship before voting. There are no reports of which we are aware that any noncitizen actually voted. To the extent that noncitizens were actually represented on the rolls, officials attributed the registrations to mistake rather than fraud.[136]

- In Hawaii in 1998, four years after an INS investigation into more than 10,000 names identified fewer than twelve noncitizens whose names matched those on the voter rolls, the INS again investigated claims of extensive noncitizen voting. The agency examined 1,200 noncitizens suspected of voting, but found no evidence that any had voted. A separate proceeding uncovered three noncitizens who had indeed voted in 1998, and three others who were reported to be under further investigation. There are no reports of which we are aware that any noncitizens voted knowing that they were ineligible. But even if all six had voted, the overall noncitizen voting rate would have been 0.001%.[137]

- In California in 1996, 924 noncitizens allegedly voted in Orange and Los Angeles Counties, including 624 allegedly ineligible vorers identified by the Task Force of the U.S. House of Representatives investigating the Dornan/Sanchez election. The allegations were based largely on attempts to match immigration lists to voter rolls, but only 71 voters matched name, date of birth, and signature; other matches were less reliable. Most of the identified voters were processed by one nonprofit group registering individuals proceeding through the naturalization process; many were registered immediately after passing an INS citizenship interview, and after receiving a letter indicating that they had become naturalized. At least 372 of the voters were apparently officially sworn in before Election Day. There are no reports of which we are aware that any noncitizens registered or voted knowing that they were ineligible. Even assuming there were no matching errors, and

leaving aside the critical question of intent, if all 552 remaining individuals were in fact noncitizens when they cast their votes, the overall noncitizen voting rate would have been 0.017%.[138]

ALLEGATIONS OF REGISTRATION FRAUD

There have been several documented and widely publicized instances in which registration forms have been fraudulently completed and submitted. But it is extraordinarily difficult to find reported cases in which individuals have submitted registration forms in someone else's name in order to impersonate them at the polls. Furthermore, most reports of registration fraud do not actually *claim* that the fraud happens so that ineligible people can vote at the polls. Indeed, we are aware of no recent substantiated case in which registration fraud has resulted in fraudulent votes being cast.

Instead, when registration fraud is alleged, the allegations generally fall into one of four categories:

The first type of allegation concerns individuals intentionally submitting forms in the name of someone (or something) ineligible in order to have some fun or — more often — to make a point.[139] Most of the infamous stories of dogs on the rolls fall into this category, including a recent incident in Washington State.[140] Most of the time, these forms are discovered and investigated by local officials before they make it onto the rolls. There are no reports that we have discovered of votes actually cast in the names of such registrants.

The second type of allegation concerns "fraud" that is not actually fraud at all. This includes registration forms submitted by eligible voters, but with errors or omissions.[141] Such mistakes are relatively common, but do not represent fraud. Similarly, there are many jurisdictions in which the registration rolls are inflated with the names of eligible voters who have moved or died or otherwise become ineligible.[142] These lingering entries also do not represent fraud; furthermore, as states build and improve the statewide voter registration databases now required by federal law, it will become easier to remove ineligible voters from the rolls while maintaining safeguards for eligible registrants.

The third type of allegation concerns registration drive workers, who may be paid for their time or on the basis of how many forms they submit,[143] and who intentionally submit fraudulent forms. The allegations may involve forms submitted in the names of fictional voters, as in the case of "Jive Turkey,"[144] or with the names of actual voters but a false address or a forged signature.[145] Most of the cases of registration fraud that are prosecuted fall into this category.[146] If voter registration drives have enough time and are allowed by law to review the forms submitted by their workers, they can often catch these forms and draw them to the attention of local elections officials.[147] These forms actually defraud the voter registration drives, which compensate workers on the expectation that their time will be spent registering new and eligible citizens; the worker herself is interested not in defrauding the government, but in getting credit for work she didn't do.[148] When drives are able to flag these forms for elections officials, the forms are investigated, not processed, and the worker can be investigated and prosecuted. There are no reports that we have discovered of votes actually cast in the names of such registrants.

Finally, the fourth type of allegation involves individuals who change or manipulate the registration of an eligible voter to frustrate her ability to vote.[149] Like the deliberate destruction of forms,[150] these incidents are

rare and most often committed by partisan actors. Most states criminalize the intentional destruction of registration forms or fraudulent submission of forms. Like the allegations of fraud by election officials, these incidents do not concern allegations of fraud by individual voters, and we do not address them in detail here.

Exaggerated or unfounded allegations of voter fraud due to fraudulent registration forms include the following:

- In Florida in 2005, a registration drive was alleged to be submitting thousands of fraudulent registration forms and withholding valid ones, with a box of 179 complete but unsubmitted forms produced as evidence. The charges later proved groundless, and the disgruntled former worker who produced the box was found to have defamed the drive. There are no reports of which we are aware that any votes were cast using any fraudulent registration connected to the drive.[151]

- In Georgia in 2004, 3,000 allegedly fraudulent registration forms — with the same handwriting and with numerous errors — were submitted by a registration drive. Procedures apparently meant to protect the forms from interference seemed to interfere with the group's ability to perform quality control on the forms that were submitted. There are no reports of which we are aware that any votes were improperly cast using the name of any fraudulent registration form.[152]

- In Missouri, in a departure from clear Department of Justice policy, four individuals were federally indicted on the eve of the 2006 election for alleged registration fraud in Kansas City. At least 1,492 other allegedly questionable voter registration forms were submitted to St. Louis, prompting the Board of Elections for the City of St. Louis to send misleading notices to a wide swath of voters who had registered through the same group.[153] Yet the wrongdoers were an isolated few registration workers, and despite the skepticism of some that registration fraud occurs only to let ineligible people vote fraudulently, there are no reports of which we are aware that any votes were cast using any fraudulent registration connected to the drive.[154]

ALLEGATIONS OF VOTER FRAUD BY DOGS

Popular media seem especially drawn to allegations that dogs are voting. These stories have a compelling "news of the bizarre" feel, and offer particular pleasure to punsters: "Prank Lands Voter in the Doghouse,"[155] "Woman Registers Her Dog to Vote; Prosecutors Growl."[156] The fact, however, is that the voter rolls have not been overrun by canines. We are aware of only nine specific reports of dogs found on the voter rolls, including the registration card of "Ritzy Mekler" made infamous by Senator Kit Bond of Missouri.[157]

At least six of the nine canine registrants were placed on the rolls by individuals trying to make a point about the fact that it is possible, if one risks prosecution, to place a dog on the voter rolls.[158] Which is to say, if people no longer registered dogs to show that dogs are on the rolls, dogs would no longer be on the rolls.

We are aware of only two cases — ever — involving ballots actually submitted in the name of a dog: the ballots cast by "Duncan MacDonald" in 2006 and 2007 (but labeled "VOID" and signed with a paw print),[159] and the ballot cast by "Raku Bowman" in 2003 in the Grass Roots Venice Neighborhood Council elections in Venice, California.[160] Only Bowman's vote — in a local election run by volunteers, rather than state or

federal election officials — was counted. Moreover, in order to cast these votes, both owners had to go to significant lengths: swear falsely on a voter registration form, forge a signature there, forge proof of identity, swear falsely again on the absentee ballot request form, forge a signature there, swear falsely again on the absentee ballot envelope itself, and forge a signature there. In an election for federal candidates, that could subject a defendant to up to thirty years in prison on federal charges alone.

ALLEGATIONS OF VOTE-BUYING

We also briefly mention allegations of vote-buying, which are often lumped together with "voter fraud," though they do not usually involve allegations that the voters in question are ineligible. Instead, these incidents involve illegal agreements by *eligible* citizens to buy or sell their votes.

Vote-buying schemes may involve agreements to buy or sell votes for particular candidates, or they may simply involve payments for voting — candidate unspecified — in get-out-the-vote efforts targeted at communities thought more likely to support a particular candidate.[161] Usually, the monetary value of the reward is fairly small: a small amount of cash, for example, or cigarettes, or food. And in virtually every case, a candidate or campaign staff are directly and centrally involved in brokering the illegal deal.

We mention such schemes specifically because they *do* still occur,[162] and are often used to buttress claims that widespread fraud infects the election system.[163] However, for most purposes, it is necessary to distinguish vote-buying from the voter fraud that more typically captures the attention of the public. Because the individuals involved in vote-buying schemes are almost always citizens who are eligible to vote, vote-buying cannot possibly be addressed by most of the remedies proposed to confront voter fraud: photo identification rules, restrictions on registration, and the like. In supporting the need for policies that address alleged fraud by ineligible voters, then, it is misleading to include vote-buying in the list of wrongdoing.

ALLEGATIONS OF FRAUD BY ELECTION OFFICIALS

Similarly, reporters and analysts should be wary of attempts to bootstrap fraud by election officials or other insiders into compendiums of alleged "voter fraud." Election fraud by insiders has been an issue since Senators wore togas. Sadly, there are still occasional reports of wrongdoing by those who are employed to safeguard the process. For example, in 2004, election judge Leander Brooks was convicted of casting at least twenty ballots in others' names in 2002 in East St. Louis, Illinois; his cousin Michael Collins, a former city councilman, had been convicted of registering acquaintances from outside his precinct to vote fraudulently from a neighbor's address in 1995.[164]

Like the allegations of vote-buying above, fraud by election officials should be condemned, and documented acts of such fraud should be prosecuted. But also like the allegations above, such incidents should be clearly distinguished from voter fraud. Most remedies aimed at preventing alleged fraud by ineligible voters depend on honest enforcement of the law by election officials. Conversely, if as above, election officials are willing to pervert the law, policies aimed at policing voters will not be able to stop insiders from corrupting the system.

VII. Appendix

Selected Case Studies

Allegations of widespread fraud by malevolent voters are easy to make, but often prove to be inaccurate. The Brennan Center has analyzed public materials in some of the areas branded as notorious election fraud "hot spots," finding that various election irregularities led to inflated claims of widespread fraud.

In many of these cases, proposals to require restrictive identification documents of voters at the polls were under debate at the time of the election — or were proposed as a result. The cries of "voter fraud" were often used to support the call for restrictive ID.

We examined each of the allegations of fraud by voters to uncover the truth behind the assertions. Further case studies are available at our website devoted to the topic, www.truthaboutfraud.org.

Missouri	In some ways, the recent hunt for voter fraud began in Missouri in the 2000 election, the crucible that proved formative for Attorney General John Ashcroft and Senator Kit Bond, among others. Yet despite all the frenzy, the allegations yielded only six substantiated cases of Missouri votes cast by ineligible voters, knowingly or unknowingly, except for those votes permitted by court order. The six cases were double votes by four voters—two across state lines and two within Missouri—amounting to an overall rate of 0.0003%. None of these problems could have been resolved by requiring photo ID at the polls.
New Jersey	Just before the 2005 election, partisan actors attempted to probe the accuracy of New Jersey's voter rolls by comparing election records for 2004 with death records and with the rolls of other states. The allegations yielded only eight substantiated cases of individuals knowingly casting invalid votes that counted—eight voters who voted twice. Given the number of votes cast in these elections, this amounts to a rate of 0.0004%. None of these problems could have been resolved by requiring photo ID at the polls.
Wisconsin	The 2004 election was hotly contested in Wisconsin, and various irregularities led to inflated claims of widespread fraud. The allegations yielded only seven substantiated cases of individuals knowingly casting invalid votes that counted—all persons with felony convictions. This amounts to a rate of 0.0025% within Milwaukee and 0.0002% within the state as a whole. None of these problems could have been resolved by requiring photo ID at the polls.

MISSOURI

The 2000 election was hotly contested in Missouri, and various irregularities led to inflated claims of widespread fraud. Many of these fraud claims were later used to support the call for restrictive ID requirements. We examined each of the allegations of fraud by individual voters — the only sort that ID could possibly address — to uncover the truth behind the assertions.

THE ALLEGATIONS:

- Invalid addresses: 79 individuals listed as voting in St. Louis City were registered from addresses alleged to be vacant lots. Further investigation found that properties that were wrongly classified by the city assessor's office as vacant in fact contained legitimate residences. Only 14 voters were found to be listed as registered from vacant lots, at least one of whom was apparently victim of a typographical error, and three more of whom moved within St. Louis City and may not have been required to re-register with a new address before voting.[165]

  14 addresses in St. Louis City were allegedly "drop sites" where fraudulent registrations might have been processed.[166] The 14 alleged "drop sites" in St. Louis City were addresses that were determined to be locations other than apartment buildings, nursing homes, or recognizable group homes where more than eight people were registered at each location. Seven of these addresses were actually visited by reporters, and all seven visits revealed that more than eight people properly lived at the address noted.[167]

- Ineligible by conviction: 62 individuals listed as voting in St. Louis City and County matched the name, date of birth, and Social Security number of individuals listed on federal court records of felony conviction, and 52 individuals listed as voting in St. Louis County matched the name and date of birth of individuals listed on county records of felony conviction. It is not clear whether there was any overlap between the list of 62 and the list of 52, nor is it clear whether any of the individuals had had their rights restored before the election. We are not aware of any public reported analysis of poll records to determine whether individuals listed as voting actually voted and were not listed as voting due to a clerical error or mistakenly listed instead of an eligible voter with the same name and birthdate.[168]

- Double voters: 23 individuals listed as voting on the voter rolls maintained by St. Louis City and County matched the name, date of birth, and Social Security number of another individual listed as voting; 45 individuals matched the name and date of birth of another voter. We are not aware of any public reported analysis of these poll records to determine whether individuals listed as voting actually voted twice and were not listed as voting due to a clerical error or mistakenly confused with another eligible voter with the same name and birthdate.[169]

  Based on a computer match of names and dates of birth on voter rolls, 150 individuals from St. Louis — presumably including the individuals above — were listed as voting twice in 2000 or 2002, and 150 other individuals from across the rest of the state were alleged to have either voted twice within the state or once in Kansas and once in Missouri. The same analysis acknowledged that the "computer files contain many errors that show people voting who did not actually vote."[170] Of 18 Kansas City cases that reporters followed up, 13 were shown to result from clerical errors, 2 were uncertain, and 3 appeared to show double voting in Missouri and Kansas — 2 in 2000 and 1 in 2002. (At least two of these were convicted in federal court.) One other case of double voting within Missouri in 2000, and one in 2002, were substantiated using poll records.[171]

- Dead voters: 14 votes in St. Louis City and County were cast in the names of allegedly dead people, based on a computer match of names, dates of birth, and Social Security numbers on the voting rolls against information in Department of Health records.[172] It is not clear whether any of these individuals died after the election. We are not aware of any public reported analysis of poll records to determine whether individuals listed as voting actually voted and were not listed as voting due to a clerical error.[173]

ADDITIONAL ALLEGATIONS OF IRREGULARITIES UNCONNECTED TO INDIVIDUAL VOTER FRAUD:

- "Inactive" purge: In St. Louis, approximately 49,589 eligible voters were removed from the active voter rolls and placed on an "inactive list" after postcards allegedly sent to them were returned as undeliverable. At many polling places, the "inactive lists" were not made available, and these voters were allegedly unlawfully instructed that they could not vote at their regular precinct, but instead had to travel to the central city office to wait on lengthy lines to affirm their registered status, and then return to their original polling places to vote. Some voters were still on line at the central office when the polls closed, and were not able to return to their polling places to vote.[174]

- Polling place time: In St. Louis, the polls were kept open by court order until 7:45pm, 45 minutes past the original closing time. The lead plaintiff requesting this order was allegedly deceased, although later review showed that the plaintiff's name had been typed with an incorrect middle initial; the legal filings also stated that this plaintiff had been unable to vote when he had in fact voted. The effort to keep the polls open was alleged to have been conceived before Election Day. The delayed closing time allowed at least 100 voters to vote who otherwise would have arrived at the polls too late to cast a vote.[175]

- Court order: At least 342 voters in St. Louis City and 891 voters in St. Louis County were allegedly improperly granted a court order allowing them to vote. The effort to seek court orders was also alleged to have been conceived before Election Day. Most of these voters allegedly gave insufficient reasons for obtaining a court order, although the report arriving at this conclusion stated an inaccurately high threshold for obtaining a court order.[176] 143 of these voters allegedly had not been registered by the voter registration deadline; it is not clear if any of the other voters were ineligible to vote.[177]

- Improper election judges: 45 election judges in St. Louis City allegedly not registered to vote were later found to be validly registered; all were thought invalid because of typographical errors.[178]

- Inflated voter rolls: St. Louis City had more names registered on the voting rolls than the voting-age population of the city, and 24,000 names were also listed as registered elsewhere in Missouri.[179]

- Chain of custody: Ballot boxes were allegedly left unattended at 29 precincts.[180]

THE RATE OF SUBSTANTIATED VOTER FRAUD:

- The allegations of fraud related to the 2000 general election, in which 124,752 votes were cast in St. Louis City, 497,577 votes were cast in St. Louis County, and 2,361,586 votes were cast in all of Missouri.[181]

- There were **6** substantiated cases of Missouri votes cast by ineligible voters, knowingly or unknowingly, except for those votes permitted by court order. These six cases were double votes by four voters – two across state lines and two within Missouri. This amounts to a rate of **0.0003%. None** of these problems could have been resolved by requiring photo ID at the polls.

- Even given allegations that were unsubstantiated, the rate of possible fraud remains low. The analysis above lays out the allegations, reasons to question each, and the facts that we now know. But assuming that **all** 278 of the remaining questionable allegations—including 14 voters with allegedly invalid addresses, 114 allegedly ineligible persons with felony convictions, 68 allegedly double voters (at two votes apiece), and 14 votes in the names of allegedly deceased individuals—in fact represent ineligible votes, that would amount to a rate of **0.045%** within St. Louis City and County and **0.012%** within the state as a whole. If all 14 votes in the names of allegedly deceased individuals in fact proved fraudulent and were cast in person, these votes—0.002% within St. Louis City and County and 0.0006% within the state as a whole—might possibly have been resolved by requiring photo ID at the polls.

  Note: this analysis does not include 228 unsubstantiated cases of alleged double voting across the state reported by the *Kansas City Star*, because they did not distinguish between votes cast in 2000 and 2002. In the 2002 general election, 1,877,620 votes were cast in Missouri.[182]

COVERAGE BY EXISTING LAW:

- Proper implementation of the federal Help America Vote Act (HAVA), which was passed after (and to some extent, because of) the 2000 election, would have addressed most of these allegations. HAVA requires states to create statewide electronic voter registration lists with each eligible voter listed uniquely to remove duplicate registrations, and to coordinate those computerized lists with agency records on death and conviction in order to remove ineligible voters. Although the obligation to maintain these cleaned lists predated HAVA, the computerized registration rolls — if implemented with suitable controls for accuracy — offer a new and efficient means to do so statewide. Like most states, Missouri did not have a statewide computerized database up and running in 2000, but now that it does, the database should allow the state to sharply reduce even the small number of alleged invalid votes due to allegedly improper registrations.

NEW JERSEY

Just before the 2005 elections, partisan actors attempted to probe the accuracy of New Jersey's voter rolls by comparing them with death records and with the rolls of other states. The reports led to inflated claims of widespread fraud in the 2004 election, of the sort commonly used to support restrictive identification requirements for voters at the polls. We examined each of the allegations of fraud by individual voters—the only sort that ID could possibly address—to uncover the truth behind the assertions.

THE ALLEGATIONS:

- Dead voters: 4,755 votes were alleged to have been cast in the names of dead voters in 2004, based on an attempt to match the first and last name and date of birth from voting records to death records.[183] No follow-up investigation appears to have been published on the number of votes actually cast in the names of dead voters in 2004, if any. None of the allegedly dead voters actually voted in 2005.[184]

- Double voters: 4,397 individuals allegedly voted twice in New Jersey, and 6,572 individuals allegedly voted both in New Jersey and in either New York, Pennsylvania, Florida, North Carolina, or South Carolina, based on an attempt to match the first and last name and date of birth from one set of voting records to another.[185] Analysis of the list of alleged double voters within New Jersey showed that 2,305 of the entries had different middle names or suffixes, or an error in the date of birth.[186] Data errors in Middlesex county, and the statistical likelihood of finding two different individuals with the same name and birthdate, call into question much of the remainder of the list.[187] Ultimately, the existence of eight double voters was substantiated through original signatures on poll book materials.[188]

THE RATE OF SUBSTANTIATED VOTER FRAUD:

- The allegations of fraud related to the 2004 general election, in which 3,611,691 votes were cast in New Jersey.[189]

- There were eight substantiated cases of individuals knowingly casting invalid votes—eight voters voting twice. This amounts to a rate of **0.0004%**. None of these problems could have been resolved by requiring photo ID at the polls.

- Even given allegations that were unsubstantiated, the rate of possible fraud remains low. The analysis above lays out the allegations, reasons to question each, and the facts that we know. But assuming that **all** 13,419 of the remaining cases in fact involved voter fraud—which is highly unlikely, given the methodological errors revealed in the study of double-voting—that would amount to a rate of 0.61%.

COVERAGE BY EXISTING LAW:

- The federal Help America Vote Act (HAVA) requires states to create statewide electronic voter registration lists, and to coordinate those computerized lists with agency records on death in order to remove ineligible voters. Although the obligation to remove deceased voters from the rolls predated HAVA, the computerized registration rolls — if implemented with suitable controls for accuracy—offer a new and efficient means to do so statewide. Like most states, New Jersey did not have a HAVA-ready statewide database up and running in 2004, but once it does, the database should allow the state both to eliminate duplicate registrations within the state and to cut down on the number of deceased citizens who are still on the rolls.

WISCONSIN

The 2004 election was hotly contested in Wisconsin, and various irregularities led to inflated claims of widespread fraud. At the same time, Wisconsin citizens were debating a proposal to require restrictive identification of each voter at the polls, and the fraud claims were used to support the call for ID. We examined each of the allegations of fraud by individual voters—the only sort that ID could possibly address—to uncover the truth behind the assertions.

THE ALLEGATIONS:

- Invalid addresses: Based on an attempt to match voter roll entries to the U.S. Postal Service's database of street addresses, 37,180 people in Milwaukee were alleged to have registered from invalid addresses. Of these, 31,500 listed accurate street addresses, but had problems with an apartment number. Further review of the remaining allegedly invalid addresses revealed cases in which the list was corrupted; digits were dropped on some entries, making otherwise valid addresses appear fictitious. This review also showed typos turning valid addresses into invalid ones. Though reporters following up on the story could not locate 68 listed addresses, at least 400 addresses were affirmatively proven to be valid. The bipartisan Milwaukee Election Commission ultimately threw out a challenge lodged to 5,619 of the entries, citing insufficient evidence that the registrations were invalid. Still, poll workers were specifically instructed to ask challenged voters for proof of residency, so every voter on the list of 5,619 should have been asked for proof of proper residency.[190]

  1,242 Milwaukee votes were cast from allegedly invalid addresses, based on another computerized match; this match paired voter rolls with U.S. Postal Service and City of Milwaukee property lists, with spot checks of 40 specific addresses.[191] A sample of 300 of the entries showed that about 20% of the invalid addresses were attributed to data entry errors (e.g., "3130 S. 15th Place" became "3130 S. 15th St.," and "S. 68th St." became "S. 63rd St."). At least two other addresses ostensibly deemed business locations were found to be valid residences after an individual spot-check. Furthermore, 75% of these votes were from Election Day registrants, who were required to show proof of residence at the polls.[192]

- Faulty registration cards: In Milwaukee, 10,921 voter registration cards from Election Day voters were allegedly unable to be processed. This allegation turned out to be an error; in fact, 1,305 Election Day registration cards from Milwaukee could not be processed. 548 of these listed no address, and 48 cards listed no name, but voters had to show both proof of name and proof of residence to register on Election Day. 236 cards had missing or incomplete dates of birth, 28 had no signature, 141 listed addresses outside of the city limits, and 23 were deemed illegible. 155 cards were not processed because they had not been given a voter number by the city. It is unclear why the remaining 126 cards could not be processed.[193]
  3,600 address verification cards mailed using information entered from these Election Day registrations were returned as allegedly undeliverable. [194] We are not aware of any further public investigation of these cards. [195]

  2,200 address verification cards from outside of Milwaukee, mailed using information entered from Election Day registrations, were also returned as allegedly undeliverable.[196] 313 of these were from Racine: 207 were returned because the voter moved after the election, and at least 24 addresses were entered incorrectly by election workers.[197] Of the 1,887 returned address verifications of Election Day registrations from elsewhere around the state, 1,198 were returned because the voter moved after the election or was temporarily absent

when the card arrived; 610 showed a valid address but the individual could not be found there; 36 had an incorrect street number; 2 had an incorrect street name; 9 had a missing apartment number; 9 were sent to an address with no mailbox; 2 were sent to vacant addresses; and 21 were returned for some other reason.[198]

- Ineligible by conviction: The organizers of one pre-election jailhouse absentee ballot drive conducted a records check on 400 inmates who had signed up, found 18 ineligible, and alerted election officials; no votes were cast by these ineligible persons.[199]

  376 individuals allegedly rendered ineligible by felony conviction cast ballots, based on an attempt to match voter rolls and information from the Department of Corrections.[200] 96 individuals listed as voting in Milwaukee matched name, address, and birthdate against Department of Correction records, and 182 individuals listed as voting matched only name and address. At least one appears to have been erroneously listed as voting; he is listed as voting but claims that he did not, while his wife is not listed as voting, but did cast a ballot. Another 98 people listed as voting elsewhere around the state matched name, address, and birthdate against Department of Correction records, but at least 7 were convicted after the election, and were eligible at the time they cast their ballot.[201]

  13 voters have been formally charged with fraudulently voting while ineligible; of these, 7 have been convicted, 1 voter was acquitted, 1 case was dismissed upon evidence that the voter was eligible when voting, 2 cases were dismissed for other reasons, and 2 cases were dismissed despite evidence that the voter was ineligible. In one of the latter cases, the voter provided his Department of Corrections identification card at the polls, which had "OFFENDER" printed in bold letters across the face, but was not told that he was ineligible to vote.[202]

  3 others were documented as voting while ineligible but have not been charged. An additional voter documented as ineligible was found in 2006.[203]

- Double voters: A computer glitch in Milwaukee caused at least 314 voters who re-registered before or on Election Day to be listed twice on the rolls, with a notation of voting next to each listing. Each was given only a single ballot.[204]

  83 people allegedly voted twice; 14 allegedly voted both absentee and in person, 9 allegedly voted in Milwaukee and other cities, 59 allegedly voted twice in Milwaukee, and 1 allegedly voted twice in Madison.[205] Of the 59 voters alleged to have voted twice in Milwaukee, most registered twice but voted only once. 51 were cleared by investigators, 1 was acquitted at trial, 1 received no verdict at trial, and 1 was found incompetent to stand trial. Finally, another voter named Gloria Bell believes that she was confused with a woman named Gloria Bell-Piphus.[206]

  Of the 9 voters alleged to have voted both in Milwaukee and in another city, all 9 were cleared of wrongdoing: clerical and scanning errors by poll workers accounted for 6 of the voters, 2 were fathers and sons alleged to be the same person, and 1 had a different middle name and birthdate from his alleged double.

  Of the 14 voters alleged to have voted both absentee and in person, in at least 12 cases, after comparing absentee records to poll records, the absentee ballot was not counted.[207]

- Dead voters: 4 votes were cast in the names of allegedly dead people.[208] These were all absentee ballots, cast by individuals who died within two weeks of the election; it is not clear whether the ballots were cast before the individuals died.[209]

- Impersonation: 1 vote was allegedly cast in the name of an individual who did not vote.[210] Further investigation of the alleged vote cast in the name of another was determined to be a clerical error by a poll worker.[211]

- Fictitious voters: 2 votes were allegedly cast in the name of an individual who could not be verified as an actual individual.[212] These votes were cast in the name of Marquis F. Murff, who could not be verified by a reporter as an actual individual. We are not aware of any further public investigation.[213]

- Underage voter: One ballot was cast by a 17-year-old voter, using his real birthdate.[214]

- Noncitizen: One columnist reported that a ballot was allegedly cast by a Canadian legal permanent resident. We are not aware of any further public investigation.[215]

- Faulty registration: Four individuals allegedly submitted false voter registration applications.[216] 2 Milwaukee residents were convicted for submitting false voter registration applications; 1 person alleged to have supervised two others who turned in false forms was also convicted, but that conviction was overturned. The trial of one other individual accused of submitting false registration applications is still pending. No votes were alleged to have been cast under these registrations.[217]

ADDITIONAL ALLEGATIONS OF IRREGULARITIES UNCONNECTED TO INDIVIDUAL VOTER FRAUD:

- "Extra" ballots: In Milwaukee, there were allegedly 8,300 more ballots cast than individuals processed as voting; the gap was later narrowed to 4,609. The discrepancy was later attributed to administrative error in reconciling poll book logs with ballots, and at least one typographical error in reporting results.[218]

- Election Day interference: In Milwaukee, tires on 20 get-out-the-vote vans were allegedly slashed.[219]

- Uncounted ballots: 238 valid absentee ballots from Milwaukee were counted late.[220]

- Uncounted votes: 600 valid votes were allegedly not counted in Medford due to a computer error.[221]

- Unprocessed registration cards: Eight boxes of valid registration cards were allegedly not processed in order to put voters on the rolls by the time individuals arrived at the polls.[222]

THE RATE OF SUBSTANTIATED VOTER FRAUD:

- The allegations of voter fraud related to the 2004 general elections, in which 277,565 votes were cast in Milwaukee, and 2,997,007 votes were cast in all of Wisconsin.[223]

- There were 7 substantiated cases of individuals knowingly casting invalid votes—all persons with felony convictions. This amounts to a rate of **0.0025%** within Milwaukee and **0.0002%** within the state as a whole. **None** of these problems could have been resolved by requiring photo ID at the polls.

- There were 11 substantiated cases of votes cast by ineligible Milwaukee voters—all persons with felony convictions. There are 8 substantiated cases of votes cast by ineligible voters from other parts of the state — 2 persons with felony convictions, 1 foreign national, 1 17-year-old voter, and 4 absentee ballots cast by deceased voters. That amounts to a rate of **0.004%** within Milwaukee and **0.0006%** in the state as a whole. **None** of these problems could have been resolved by requiring photo ID at the polls.

- Even given allegations that were unsubstantiated, the rate of possible fraud remains low. The analysis above lays out the allegations, reasons to question each, and the facts that we now know. But assuming that **all** 6,877 of the remaining questionable allegations—including 1,150 voter registration cards not processed, 5,356 allegedly flawed addresses, 353 other allegedly ineligible persons with convictions, 8 allegedly double voters (for a total of 16 votes), and 2 votes from the allegedly fictitious individual—in fact represent ineligible votes, that would amount to a rate of **2.2%** within Milwaukee and **0.2%** within the state as a whole. **None** of these votes could have been resolved by requiring photo ID at the polls.

COVERAGE BY EXISTING LAW:

- The vast majority of these allegations would have been addressed by adequate implementation of existing law. Elections officials should have been able to correct incomplete or illegible registration cards on site; the requirement of proof of residence for Election Day registrants should have caught invalid addresses on Election Day. Addresses of voters registering before Election Day could have been carefully investigated before Election Day — by an investigation more thorough than a computer match, and attuned to the possibility of data entry errors. If the investigation revealed questions, as occurred here, the questioned voters could have been validly challenged by election officials, and asked to verify their residence; if an investigation revealed fraud rather than error or a valid change of residence, the case could be referred for prosecutorial follow-through. Similarly, as occurred here, absentee ballots should have been matched against poll records to determine if a duplicate had been cast.

- Proper implementation of the federal Help America Vote Act (HAVA) would have addressed most of the remaining allegations. HAVA requires states to create statewide electronic voter registration lists with each eligible voter listed uniquely to remove duplicate registrations, and to coordinate those computerized lists with agency records on death and conviction in order to remove ineligible voters. Although the obligation to maintain these cleaned lists predated HAVA, the computerized registration rolls — if implemenred with suitable controls for accuracy — offer a new and efficient means to do so statewide. Like most states, Wisconsin did not have a HAVA-ready statewide database up and running in 2004, but once it does, the database should allow the state to sharply reduce even the small number of alleged invalid votes due to allegedly improper registrations.

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Ms. WEISER. The question depends on your definition of the term "voter fraud." Election misconduct is something that exists and there are problems. Vote buying exists. There have been ballot tamperings. There have been documented instances.

But what we have been hearing a lot of noise about over the past couple of years has been a thing called in-person voter fraud, or impersonation fraud. We are referring to when an individual voter shows up at a polling place and pretends to be someone else on the voter rolls in order to vote in their place. And that is something that has been used to justify a range of restrictions on voting and most commonly voter ID, and that is something that we have found almost never occurs.

We have done an extensive study of all of the documented allegations of voter fraud of that sort and found this is something that is extraordinarily rare and it, in fact, does not make sense. The benefit to the putative fraud feasor is very minimal. It is one marginal vote. The risk of getting caught is high, and the penalties are extraordinary, five years in prison and $10,000 in penalties.

So, you know, according to our studies, which are consistent with virtually all other studies that are out there, including the study that was discussed this morning that the EAC Commission has found that this is something that is really not a problem in our elections today.

Mr. SERRANO. And that is an interesting point because it would seem to me that if you are malicious enough to try to commit voter fraud, that one is so easy to get caught at and then the penalty is so severe. So why the complaint by some folks that there's vast voter fraud going on in the country?

VOTER INTIMIDATION

I mean, I think there was a problem in 2000 with counting votes. I have seen examples of voter intimidation. I remember a few years ago in New York City we had an election for mayor, and what happened was that on election morning pasted flyers showed up saying that immigration would be checking citizenship at the polls.

Well, those of us especially in the Hispanic community know that even if you're a citizen, there is still a chilling effect on immigration. The IRS and Immigration seem to upset all Americans, and so the idea that Immigration would be asking, which was not true, we feel and some people claim kept citizens away. It did not keep away the folks that were trying to break the law that day.

And the other point here is that there are people who swear that undocumented aliens want to vote. If you know the behavior of undocumented aliens, the whole idea is to stay in the shadows of society. It is not to come and say, "Here I am. I am going to go on election day and be seen by the police and everybody and you can catch me."

That is not the point. In fact, it is just the opposite. They become citizens. They are registered to vote, and then you have to convince them to vote.

So is voter intimidation an issue that's stronger than voter fraud as we know it?

Ms. WEISER. We would certainly say so. We agree that the phantom of in-person voter fraud has been used to try and justify a

range of restrictions on voting, some of which you mentioned, proof of citizen requirements, ID bills, but also unfair purges of the voter rolls, certain other uses of databases to restrict access to voting, and that is a real problem.

And when there are real other threats to the integrity of our elections, voter intimidation, as Mr. Vargas had testified, is a significant problem that has been documented, especially by election protection hotlines significantly over the past two election cycles, and you know, there is also the threat of the security of our elections from the insecure voting systems that we have and the fact that we do not actually audit any of the audit records that voting systems have in place.

Mr. SERRANO. Mr. Matthews, what do you look for? What are the complaints, when there are complaints, about the issue of voter fraud or voter intimidation or suppressing the vote if you get any of those complaints?

What form do they take?

Mr. MATTHEWS. Well, we did have one case prior to the Ohio voter ID law enactment where a father impersonated his son at the Board of Elections to vote. So it does occur, and in the environment when we are talking about one vote really counts, it may have been one situation, but it did occur.

And I think you are in a position where you do not know the extent of it. I do not get many complaints about that. I do not get many complaints about intimidation.

VOTER REGISTRATION

Mr. SERRANO. What do you get complaints about?

Mr. MATTHEWS. Accessibility, long lines in the suburbs. Those are the kind of complaints that I receive. You know, I think there is some anecdotal information when four or 500 people show up and vote a provisional ballot on a presidential election and they are not even registered to vote. That may be election misconduct. There may be some walking around money out there. You know, you cannot prove that. Those are some things that some people raise as possibilities, but we do not see much.

Mr. SERRANO. Well, let me ask you a question on that. I find traditionally in New York that people will register to vote. I mean, it happens much less now, but they will register, honestly register to vote wherever the voter registration drive is, and then that was not processed. So they go on election day feeling that they were registered, and yet they are not.

Well, they are not lying about it. They honestly think that they are registered. So how up to date in Ohio do you feel are your voters' rolls, as an example of one state? I mean it is unfair. You are the only person representing a state here, but maybe we can get some feeling of what is going on out there.

Mr. MATTHEWS. Well, I think that we are very up to date with our voter rolls, not only new registrations but existing registrations. One of the laws that we have is an election notification. For our March primary we mailed a notification to every registered voter informing them of their poll location.

Mr. SERRANO. Right.

Mr. MATTHEWS. So this serves two purposes, and it actually pleases both sides. We are informing people where to vote. We are also cleaning up our rolls if that notice is bounced back, and then we do a follow-up mailing that is forwardable to tell them to change their address, and that is done in plenty of time before the close of registration so they are not forced to vote a provisional ballot.

Mr. SERRANO. Mr. Regula.

Mr. REGULA. Thank you, Mr. Chairman.

Mr. Matthews, you mentioned Ohio's voter identification law. What are the characteristics of that? What is required?

Mr. MATTHEWS. Well, a photo ID is ideal that contains an address. If it is a driver's license, it is not required to be a current address. However, there is a number of other government documents, including utility bills that suffice for the identification requirement in Ohio.

Mr. REGULA. Has it worked pretty well that you prevent, for lack of a better term, fraud?

Mr. MATTHEWS. I think it has worked well. I think that through education most voters realize that it is required. I am not sure if it prevents fraud. I know that if you are required to show some form of ID then there is a verification process there.

POLL WORKER RECRUITMENT AND TRAINING

Mr. REGULA. What is your experience in getting poll workers? I hear this complaint from many sources.

Mr. MATTHEWS. Well, as has been mentioned, you need proper training of poll workers, and every year we seem either at the state or the federal level to add additional responsibilities and burdens to the poll workers, also not only through state and federal, but through the court system we add additional burdens to poll workers.

And so what we are seeing is a huge turnover in poll workers. They are getting to the point where they do not want the responsibility. You have certain activists that are accusing them of being part of the problem, and so we have a tremendous turnover now. It is not only recruitment. It is retention. So you are constantly in a training mode.

So, for example, they may not—it does not happen in Stark County, of course—but as Mr. Vargas said, you know, there are instances where they are not aware that in a federal election they are required to offer a provisional ballot if someone is not in the book.

So the problem with the poll workers is multi-faceted. It is not just limited to the responsibilities. It is limited to the length of days. It includes the pay, and oddly, we have some people that are doing it for the money, and those are not necessarily the ones you want to be recruiting.

Mr. REGULA. Do you have any experience where companies or firms of any kind will give their employees a day's pay if they serve as a poll worker?

Mr. MATTHEWS. Yes. As a matter of fact, we championed a state law that allowed public employees to do that, and I did that when I was president of the Ohio Association of Election Officials. I made

that one of my goals for the year that I was president, and we were able to pass it.

Of course, the County Commissioners Association and the Municipal League and a few others watered it down a little, like we were going to bankrupt them, I guess, and we have reached out to various corporations.

We also are extensively utilizing high school and college students. In some counties in Ohio, I have been told that ten percent of their poll workers are high school students.

Mr. REGULA. Is there any minimum age required for poll workers?

Mr. MATTHEWS. Ideally you would want an 18-year-old, but the Ohio law does allow a 17-year-old.

Mr. REGULA. Seventeen is the cutoff then?

Mr. MATTHEWS. As long as they are going to be 18 by the November election, yes.

MOBILE VOTER POPULATION

Mr. REGULA. Another problem, I think, is we are a very mobile population. People are constantly moving in their job, and so do you find that difficult? People are moving in to establish their residence so that they are eligible for the next election?

Mr. MATTHEWS. Yes. I was very excited about the pilot project that the Pew Charitable Trusts are in charge of with regard to Ohio, Indiana and Kentucky, I believe, where when they file a change of address with the Postal Service, which not everyone does, you know, when they receive their packet, they will receive voter registration forms.

One thing that I have done locally with realtors is that when they are closing a home, they will hand over a couple voter registration cards also.

Again, that does not touch everyone, and it really does not touch the most mobile of our population. You know, I think in presidential years you have various groups that are out registering people, and it is amazing. Over the summer leading up to a November general election, some people move three times because we receive three registrations at three different addresses, and it is not a case of fraud. It is a fact that they have moved because once someone registers in Ohio, we are required to mail them a notice. And if two bounce back and one is deliverable, then we know that is not a case of fraud and where someone is registering in multiple locations.

Mr. REGULA. You heard Mr. Bonner talk about their problems with military personnel, and of course, our county doesn't have the volume that they would in some locations. Do you have any problem getting the military people an opportunity to vote?

Mr. MATTHEWS. Yes, we have the same frustrations I think that everyone has documented that sometimes even if we have an up to date address by the time we mail the ballot and it is delivered, they have moved on.

For example, this year in a presidential primary election in Ohio, absentee balloting starts 25 days before the election.

Mr. REGULA. Is it closed at a given time?

Mr. MATTHEWS. It closes effectively the day before the election, for absentee. For mail-out purposes, it is the Saturday before the

election. But in a normal election, it is 35 days, but for some reason in a presidential primary it is 25 days, which makes it very difficult. That is our first mailing always, is the military and overseas ballots. They go out the first legal day, and everything that we have to that point.

And the frustrating problem is that it is not getting forwarded, and then it is not being returned in time to be counted. They are given additional days, you know, after the election, but still, if they are not being delivered in the first place, it does not help. Something really needs to be done with that.

Mr. REGULA. Tell us about the Pew program that Mr. Matthews alluded to.

Ms. URAHN. Mr. Regula, it is a program, as was mentioned, where we include voter registration forms in the change of address. It gets included in that packet, which has 100 percent open rate. So even though everyone does not request one and get it mailed, when it does get out, it gets opened. And we are going to test whether that does, indeed, increase the chances that people who move will then update their voter registration forms.

Mr. REGULA. Well, the objective would be to give more people the opportunity to vote even though they are moving around; is that correct?

Ms. URAHN. That is absolutely correct.

ONLINE ELECTION ACTIVITIES

And I might also point out we have another project also in Ohio where we are testing some online poll worker training to try to address some of the issues around poll worker training, and I think that some of the other experiments that ultimately are worth looking at is whether the precinct based approach which does require a very large temporary work force in terms of poll worker training might be supplemented or in some cases replaced by vote centers, where you would have the opportunity to have a smaller and possibly more professional poll worker staff because you would need fewer people.

Mr. REGULA. I am interested. I think someone earlier said you could register online to vote; is that correct?

Ms. URAHN. In some states you can. It is up to the states, indeed.

Mr. REGULA. What is Ohio's position?

Mr. MATTHEWS. Ohio does not allow that currently. They want an actual signature on the document under existing Ohio law.

Mr. REGULA. It would seem to me that that would open itself up a little bit to fraud. When it's online, you are not sure who is inputting at the other end. How do you verify it?

Ms. URAHN. In terms of the voter registration?

Mr. REGULA. Yes.

Ms. URAHN. Well, I think it may be less a problem in terms of technology for voter registration and getting a blank ballot, which I think the big challenge is, particularly for overseas voters than actually the returning of the filled out ballot, which is a significant challenge yet to be met.

Mr. MATTHEWS. You would verify it the same way you would verify a regular registration. You would send a mailing to the address, and if it was a first time registration through mail, well, it

now requires ID anyway, and you would verify the signature that way, the name.

HAVA FUNDING

Mr. REGULA. Have the funds thus far that have been made available to the group that are funded under the Help America Vote been adequate in your judgment? Do any of you want to comment on that?

There has been some effort to give them more money. Do you think they are adequately funded to do their job?

Ms. WEISER. We certainly support greater funding under HAVA to the states to implement the methods and changes that HAVA had required in voting technology both in terms of voting systems and the statewide voter registration databases. There is a lot that is not as effective as it could be.

Mr. REGULA. Well, it would seem like people would make a decision on the state or as to what system they are going to use and then do it and not take the money to change the whole system over to something else.

Ms. WEISER. Well, there are jurisdictions that are not changing their system as well, taking a position on the changing of systems, but even with existing systems, there are additional funds that are needed to make sure that they function properly, to make sure that states can actually appropriately audit them and maintain the systems, and to make sure that the databases have proper functionality.

So there is a range of needs that states have that do not involve changing their systems as well.

Mr. VARGAS. If I could add, sir, we believe one of the areas where additional funding would be helpful would be to educate the public about the mechanics of voting, how to register to vote, and then especially when there are new technologies being introduced at the polling location, how to actually use the polling machines. Many times people are intimidated when they go vote and all of a sudden it is a different system than the one they had been used to.

So there is a need for ongoing public education.

Mr. MATTHEWS. Mr. Chairman, may I comment on that?

Mr. REGULA. Sure.

Mr. MATTHEWS. I cannot speak to the funding for the EAC itself, but I would think that 3.6 billion funding on new equipment was a pretty substantial number. I think that before any funding for new voting equipment, I think that we ought to wait until standards are established so that when we spend the money the next time, you are spending it on equipment that meets the latest standards.

One area where you could have additional funding is for the electronic poll book, and that is instead of someone coming to the polls and checking in manually with a paper-based system, you could have it electronic. You could have your entire county database on that electronic poll book so that if they showed up at the wrong location, you could direct them to the correct location.

Sometimes lines are formed not because of too few machines but the check-in process, because we are dealing with an older crowd that is our poll worker group right now, and they are just not as

quick. That can be helped through equipment like electronic poll books.

So I would not mind seeing funding for that, but I think until we develop standards on new voting equipment, we could change every two years.

Mr. SERRANO. Mr. Matthews, as an interested Democrat, I am tempted to ask you if everything is in place for next Tuesday. You guys are up next Tuesday, right?

Mr. MATTHEWS. Yes, Tuesday is going to be very interesting on many levels in Ohio.

Mr. SERRANO. Yes. I would say, and in Texas, too.

PORTABLE VOTER SYSTEM

You know, I am intrigued by the thought of voting near work rather than having to go back. You know, we lose so many voters, I think, because they have to leave early in the morning. There is a problem checking in, but they are coming back after nine o'clock at night, and even though New York has long hours, from six in the morning to 9:00 p.m., there are still some people who get caught up in that.

And then I am very intrigued by the thought of in the same way that we have a Social Security card, to have a voter card that allows you to vote wherever you are at that point, where you're living in that jurisdiction without having to register everywhere. You go from one building to another and you have to re-register.

But I am reminded by the smart folks back here that states have those rights and they take very seriously the desire to run their own system. So how realistic is it that we can reach a time here when we have some kind of universal, you know, voting ability, if you will, in this country?

Yes.

Ms. URAHN. I think it is entirely realistic that ultimately you could reach the point of having a portable registration system. I think part of the challenge is that the field has been appropriately from the election official's standpoint very focused on the next election, and it is a difficult field that is a resource poor field and it is a difficult field within which to take a long-term look.

It is part of the luxury that we have, is really taking a look beyond the 2008 election, looking out to 2012 and trying to find ways for states to begin to test some of these innovations and really understand what works, what does not, and how it works and how to help the states begin to implement these things.

Mr. SERRANO. Well, we have a database for Social Security card. I am speaking to Mr. Vargas now. Can you believe I am talking about national cards here, you know? That is another issue. [Laughter.]

Mr. SERRANO. We have wherever we go in this country with our Social Security number, it works. How much thought has gone into the possibility of establishing a system where you could go with a voter registration card anywhere in the country and then you kind of have to sign up with that community, right? You just cannot walk in and say, "I am voting in his district today when I was in the Bronx last week."

How does that work? You could only vote in the area where you are residing. Would that be the plan?

Ms. WEISER. The Brennan Center is actually currently studying this exact question as to how to move towards a system of more universal voter registration where the government takes a more affirmative responsibility for making sure that all citizens are registered and can vote. And there are a range of different options that we are considering, that we do not have a final set of recommendations, but some things that make us hopeful that this is really available in the near future or might be available in the near future.

For one thing, the massive technological advances that were brought by the statewide voter registration databases; the experience in many states with election day registration; the work that Pew Charitable Trusts is funding to experiment with portable registration. I think that we are a lot closer to that day when voter registration does not serve as much of a barrier than we were just a few years ago.

And we would be happy to share our work with the Committee as soon as it is complete.

Mr. SERRANO. Please. We would like to see that.

Mr. VARGAS. Mr. Serrano, I think we should be very cautious about trying to replicate a voting system based on the Social Security system. While you may think it works, it does not work for everybody necessarily, and I know of many of your colleagues who continuously get constituent complaints about their names not being accurate on the Social Security Administration rolls and because of some snafu and some bureaucratic snafu.

We would not want somebody's right to vote be denied because of some bureaucratic snafu.

Mr. SERRANO. Right, but we have that problem now. Obviously, any system we put forth we would have to look at what we have in place now and see how it can be adjusted, and certainly Social Security cards are not perfect. In fact, there are other people on Lou Dobbs every night who tell you how they are not perfect in another way.

But my point is, for instance, I have never understood the notion in New York, and I am sure it happens in a lot of states, that if you do not vote in four elections in a row—I believe that is what the law still is—you lose your registration.

Well, no. If voting is that important a right as a citizen, then I should have from the day I turn 18 to the day I die, and I should not lose it because I chose not to vote for four years where I was out of the country and so on. Yet I know the records have to be kept of people.

So my question is: how do we deal with those two issues in that case, for instance, and how do we deal with the possibility of having the ability to register once and then you vote the rest of your life anywhere you go in the country? Is that possible?

Yes.

Mr. MATTHEWS. I am not sure that that is possible, but if I may touch on a couple of points you have raised earlier about voting anywhere, voting near work. Keep in mind that if you are going to have a vote center concept like that, you need to be looking at tech-

nology capabilities versus paper based systems because as long as we are precinct based system, you know, we are voting on those issues and those candidates that are localized to where we reside, and to have a vote center that has every single ballot style available for that jurisdiction, for that county, let's say, is impossible.

That is usually called a Board of Elections, but as far as a vote center concept, this is primarily a case where you can really use the technology of the DRE because you can have every ballot style.

And so I would embrace a vote center concept if it included that component. Otherwise I am not sure how that would work.

Mr. SERRANO. Well, let me tell you a little bit of it. Mr. Regula is part of my mischievous ways. The whole idea of creating havoc on all the pundits who tell you who voted where, can you imagine if all the people from the South Bronx voted at work in the middle of Manhattan and then it would look like Mr. Nadler's district voted the way the South Bronx used to vote all the time?

I mean, those guys would go crazy on TV that night. That would be nice. [Laughter.]

Mr. REGULA. I think it would be difficult for the very reasons that Mr. Matthews points out because you have got to have a local. An anchor is where you live, and if you have a vote center next to your factory, it seems to me it would be hard to keep track of things.

Mr. MATTHEWS. You could do that if you were online and you had the technology to make it happen, but a paper-based system does not work, in my opinion.

Mr. SERRANO. It would just wreck polling. I love that, and the big CNN maps where they say, "How is the other one?" No, they do not know how they voted, and that is good.

Well, listen. This is an ongoing issue. If there is something dramatic about this or sad, it is that the greatest democracy on earth may have committed the sin New York City committed with a subway system. It was running well. It worked well, and no one thought it needed any repairs, and all of a sudden a few years ago they realized that it needed a lot of help.

I think for so long our voting system, our democracy has worked well and people just took it for granted and did not pay attention to it. Now we find that there are many issues and many problems that threaten, in my opinion, the very democracy that we all love and are sworn to protect.

And so I can see no greater issue in terms of protecting our rights and securing our future right now than making sure that we get accurate counts, that we open the system up to everybody who is eligible to vote, and to encourage people to vote.

This year may be the beginning of that if the numbers hold in terms of the young people that have been voting, and there will be a demand on the system like we have never seen before in November, but it will be a healthy demand, young people saying, "Yes, I am not cynical. I want to be part of this society. This is my country, and I want to protect it by casting my vote."

So we all are challenged to make sure that this takes place, and I certainly thank all of you for your input and for your worthy information that we will use as we go along, and we thank you for your involvement today.

And this hearing is now adjourned.

RESPONSES TO QUESTIONS FOR THE RECORD SUBMITTED BY CHAIRMAN JOSÉ E. SERRANO

1. EAC Inspector General's report. The EAC's Inspector General released on February 25, 2008 an "Assessment of the U.S. Election Assistance Commission's Program and Financial Operations."

What is the status of implementing changes to internal policies and procedures in response to the Inspector General's report? Does the EAC have adequate resources – funding or otherwise – to implement the necessary changes?

On February 2, 2008, EAC provided a comprehensive action plan to implement the recommendations of the Office of Inspector General's (OIG) Assessment of the U.S. Election Assistance Commission's Program and Financial Operations. The action plan was included in the response was attached to the OIG's report and is also attached to these questions for the record for your convenience. (Attachment 1) That document included an item by item response to the 29 recommendations contained in the assessment. The document included plans and milestones for implementing policies and procedures in response to these recommendations. The response also included the revised organizational chart adopted by the Commission on January 17, 2008. That new organizational structure recognized the weaknesses pointed out by the Inspector General's report and established new positions to improve EAC's work in those areas. One such position is the Chief Operating Officer. EAC hopes to have the position filled by the end of April 2008.

As indicated in the response, EAC will contract with service providers to assist in developing the procedures and processes needed to remedy the deficiencies noted in the assessment. EAC is developing the statements of work and cost estimates for those contracts, so the costs are uncertain at this time. However, we anticipate that these contracts will be costly, and, there will be substantial expense implementing these procedures. Regardless of the cost, EAC will make this a priority. EAC will keep this committee apprised of the costs and whether EAC's current budget allocation is sufficient to cover anticipated expenses.

Attachment 1

U.S. ELECTION ASSISTANCE COMMISSION RESPONSE TO RECOMMENDATIONS IN THE DRAFT AUDIT REPORT, *ASSESSMENT OF EAC'S PROGRAM AND FINANCIAL OPERATIONS*

DESCRIPTION			
Recommendation (and cross reference to recommendation no. in the draft report, if applicable)	**Other Recs. Settled by Resolving the Rec.**	**Actions**	**Milestones and Responsible Officials**
1. Develop, document and communicate short and long-term strategic plans, performance measurements and goals.	7(a)	Complete strategic plan; major steps are as follows: ✓ Division Directors complete Division plans. ✓ ED prepares draft Election Assistance Commission (EAC) plan and briefs Commissioners on draft plan. ✓ ED solicits views of Congressional and OMB officials. ✓ ED presents draft plan at public meeting for a Commissioners' vote. ✓ ED posts draft plan on website and invites comments. ✓ ED adjusts plan as appropriate on basis of comments and prepares final plan. ✓ Chair submits plan to Speaker of the House, President and President Pro Tempore of the Senate, and the Director of OMB Complete Annual Performance Plan. We will perform these tasks in-house.	September 30, 2008 Executive Director (ED) December 31, 2008 ED
2a. Re-evaluate the current organizational structure and clearly define areas of authority and responsibility, and hierarchy for reporting.	4, 11	Completed January 17, 2008. See Attachment 2.	
2b. Perform a risk assessment to identify internal and external risks and implement appropriate and effective internal control to mitigate or eliminate high risks.	None	Implement the applicable requirements of Office of Management and Budget A-123, *Management's Responsibility for Internal Controls*. As the EAC will not complete development of its policies and procedures (one of its principle internal control technique) until September 30, 2008, we will delay the risk assessment until the following fiscal year. We will hire a contractor to assist us with this process.	September 30, 2009 ED
3. Document its governance and accountability structures and practices in place in formal polices and procedures.	4, 6(a), 7(a), 7(b), 8, 9, 10, 13, 14, 15, 16, 19, 20, 21, 22, 23,	Develop an EAC Manual. An index for the Manual is presented in Attachment 3. Section 2, Organization, will describe the functions, objectives, and structure	September 30, 2008 ED

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U.S. ELECTION ASSISTANCE COMMISSION RESPONSE TO RECOMMENDATIONS IN THE DRAFT AUDIT REPORT, *ASSESSMENT OF EAC'S PROGRAM AND FINANCIAL OPERATIONS*

	and 26	for all EAC units. This Section will also include the operating procedures for each EAC organizational unit except for administrative and personnel functions. Administration and Personnel are covered in separate sections of the Manual. Section 2 will also incorporated by reference guidance/handbooks which organizational units may issue for their program areas. For example, the Division of Voting Systems Certifications will issue handbooks for the Lab Accreditation Program and for the updating of the Voluntary Voting System Guidelines. We will hire a contractor to assist us with this task.	
4. Define areas of authority and responsibility, and hierarchy for reporting to avoid confusion and misunderstanding (including the roles of the Commissioners and the Executive Director).	None	This recommendation is addressed by implementing recommendations 2(a) and 3.	
5. Conduct skills inventory assessment for all EAC program offices. (12)	17	This recommendation will be accomplished in the following manner: ✓ The Office of Personal Management will perform an assessment of competencies for all positions. ✓ The Director of the Office of Human Resources and Division Directors will determine needs for staff training or new staffing requirements to meet required competencies.	May 15, 2008 Director, Division of Human Resources
6a. Develop and implement policies and procedures for modifying the Voluntary Voting System Guidelines to ensure that there is a clear understanding of the process that will be followed and that EAC ultimately has a responsibility for overseeing this process. Moreover, policy related to conflict of interest and ethics should be developed. (2a)	None	This recommendation is addressed by implementing recommendation 3.	
6b. Ensure the *Laboratory Accreditation Program Manual* under development is completed by the end of fiscal year 2007. (2b)	None	Draft *Manual* was submitted for publication in the Federal Register on January 30, 2008. *Manual* to be finalized after consideration of applicable comments.	June 30, 2008 Director, Division of Testing and Certification
7a. Develop a communication strategic plan and goals, and establish written policies and procedures to ensure authorized and consistent implementation of its communication. (3a)	None	This recommendation is addressed by implementing recommendations 1 and 3.	

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U.S. ELECTION ASSISTANCE COMMISSION RESPONSE TO RECOMMENDATIONS IN THE DRAFT AUDIT REPORT, *ASSESSMENT OF EAC'S PROGRAM AND FINANCIAL OPERATIONS*

7b. EAC should also have policies and procedures such as implementation of the Freedom of Information Act, the Privacy Act Regulations, and Records Management. (3b)	None	This recommendation is addressed by implementing recommendations 3.	
8. Develop written policies and procedures to minimize the impact of human capital loss, if any, to its operations of the Communications Division. (4)	None	Hired new employee for the Communications Division on January 28, 2008. Also, this matter we be addressed in policies and procedures prepared under recommendation 3.	
9. Establish policies and procedures related to the research process and the clearinghouse function. This will include developing a formal peer review process for the research methodology and results; and policies and procedures related to the research process from initiation through reporting. (5)	None	This recommendation is addressed by implementing recommendations 3.	
10. Establish a process to ensure that mandated studies are prioritized considering the limited resources that it has. (6)	None	This recommendation is addressed by implementing recommendations 3.	
11. Re-evaluate the current organizational structure and clearly define areas of authority and responsibility, and hierarchy for reporting for the Administrative Division. (7)	None	This recommendation is addressed by recommendations 2(a) and 3.	
12. Resolve with GSA the unobligated balance of requirements payments of $9,072,894 (Fund 803 - Appropriation No. 95X1651). (8)	None	Done.	
13. Review and perform a periodic reconciliation of EAC financial activities with GSA's accounting records. (8)	None	Establish procedure for reconciliations in conjunction with recommendation 3, and implement procedure after the Division of Administration is fully staffed.	September 30, 2008 Director, Division of Administration
14. Implement or strengthen EAC fund control reviews to ensure that funds are used timely and appropriately. (Funds control review should be performed monthly to ensure that funds obligated or de-obligated as needed.) (9)	None	Establish procedure for reconciliations in conjunction with recommendation 3, and implement procedure after the Division of Administration is staffed.	September 30, 2008 Director, Division of Administration
15. Establish written policies and procedures for the Administrative Division to ensure that operations are implemented consistently eliminate or reduce confusion, and mitigate the risk of disruptions to its operations in case of a personnel change or termination. (10)	None	This recommendation is addressed by implementing recommendations 3.	
16. Develop a list of financial laws and regulations that are applicable to the Commission. Some of the laws and regulations to consider are the FMFIA, GPRA, FFMIA, OMB Circular A-136, A-123, A-130, A-127. (11)	None	This recommendation is addressed by implementing recommendations 3.	
17. Identify appropriate knowledge and skills	None	This recommendation is addressed by	

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U.S. ELECTION ASSISTANCE COMMISSION RESPONSE TO RECOMMENDATIONS IN THE DRAFT AUDIT REPORT, *ASSESSMENT OF EAC'S PROGRAM AND FINANCIAL OPERATIONS*

needed for various jobs in the Administrative Division and provide needed training. In doing so, consider hiring staff who will be responsible for the recording, summarization, and reporting of accounting activities in accordance with Federal Government GAAP. Moreover, we believe EAC should conduct skills inventory assessment for all of its program offices. (12)		implementing recommendations 5. We will consider staffing needs after implementing recommendation 5.	
18. Consider hiring staff with federal budgeting experience or provide training to appropriate staff in the Office of Finance, [Budget], and Administration to carry out this function. (1)	None	Issued vacancy announce for new staff which provides for skills in budgeting. See Attachment 5. All senior staff were trained on "Project Cost Management" on January 30, and 31, 2008	February 29, 2008 Director, Division of Administration
19. Establish a systematic and formal process for establishing and approving policies and procedures for EAC payment and grant programs. These policies and procedures should also be centrally maintained and readily available for use by EAC staff. (13)	None	This recommendation is addressed by implementing recommendations 3.	
20. Provide written guidance, in addition to the examples posted in its website, for the preparation of annual financial and narrative reports on the use of HAVA payments. (14)	None	This recommendation is addressed by implementing recommendations 3.	
21. Develop a systematic process for conducting some form of financial management oversight to provide some assurance that costs incurred are reasonable, allowable, and valid based on the purpose of the funding provided under HAVA Sections 101, 102 and 251. (15)	None	This recommendation is addressed by implementing recommendations 3.	
22. Implement policy and procedures to recover unobligated Section 102 funds by the revised deadline for State use of funds. (16)	None	This recommendation is addressed by implementing recommendations 3.	
23. Develop policies and procedures to implement audit follow-up as required in OMB A-133. (17a)	None	This recommendation is addressed by implementing recommendations 3.	
24. Perform a risk-based assessment to evaluate the sufficiency of personnel in the Programs and Services Division to ensure that the Division's day to day operations and oversight do not suffer due to limited resources. (17b)	None	Under new organization structure, the former program and services division was split into two Divisions – HAVA Payments and Grants Division and Election Administration Improvement Programs Division to provide for more effective program administration. In addition, two new staff with experience administering HAVA funds was added to the Payments and Grants Division as of January 14, 2008. Staffing of the Election Administration Improvement Division is on hold	

Attachment 1

U.S. ELECTION ASSISTANCE COMMISSION RESPONSE TO RECOMMENDATIONS IN THE DRAFT AUDIT REPORT, *ASSESSMENT OF EAC'S PROGRAM AND FINANCIAL OPERATIONS*

		pending Commission issuance of regulations pertaining to National Voter Registration Act. In the meantime, personal from the Payments and Grants Division will develop guidance on implementation of HAVA Title III guidance and the Voting System Certifications Division will continue to work on the election management guidelines. Staff of all Commission Divisions based on experience with new organization structure and resolution of NVRA rulemaking.	September 30, 2008 ED
25. Establish policies and procedures on responding, documenting, communicating, and retaining answers to questions raised by the States in the administration of the HAVA payment and grants. (18)	None	This recommendation is addressed by implementing recommendations 3.	
26. Establish policies and procedures to comply with the National Voter Registration Act.	None	This matter is pending a majority vote by the Commissioners on a course of action.	No target.

2. Ballot design. You mention in your statement that "one challenge that continues to confront election officials... is designing ballots that are understandable, intuitive, user-friendly and affordable."

What can be done by the EAC as well as local election officials to ensure that ballots are clear and understandable to all voters? Should the EAC be developing a model or guidelines for effective ballot design, and how would this work for the various voting technologies used by states?

The EAC recognizes the importance of ballot design, and despite the election reform efforts that have taken place since 2000, poorly designed ballots continue to present challenges for voters. That is why the EAC issued the report "Effective Designs for the Administration of Federal Elections" in July 2007, one of the most extensive set of best practices on the topic.

The report was the culmination of an 18-month study on ballot and polling place sign design. EAC contracted with the American Institute of Graphic Art and, its nonprofit entity, Design for Democracy, to research best practices for the design of ballots and polling place signs. The contractors also involved Election officials to ensure that the designs and best practices could be implemented in the real world of elections. The report is extensive, covering voter information materials and ballot design practices for several voting systems, including optical scan, full-face direct recording electronic (DRE) and rolling DRE. The report includes sample images and design specifications.

While the report is extensive, perhaps even more useful to election officials is the accompanying image library, containing thousands of camera-ready images in two formats. The report and the image library were distributed to election officials throughout the nation. The image library provides files that can be customized for a local jurisdiction and then sent to the printer for production – a service that saves election officials money and provides them with voting materials that were created with sound design principals and practices. The image library is not available on the EAC Web site due to security concerns, but the Web site contains instructions for election officials who would like to receive the image library.

As a February 8, 2008 Government Accountability Office (GAO) Report demonstrated, ballot design continues to present a challenge to both voters and election officials. Since the report has been issued, there have been

further instances of voter confusion over ballots during this year's primary season. The EAC will continue to aggressively push The Effective Designs in Federal Elections report to make sure election officials are aware of these resources.

In April 2008, the EAC will hold a ballot design workshop. Participants will include election officials who use different kinds of voting technology so we can discuss design principals for a variety of ballots. We will discuss lessons learned, innovative practices, and how ballot design must be integrated into the election administration management system. During the workshop, the EAC will remind election officials about the assistance we provide to ensure voters can successfully participate on Election Day.

EAC anticipates providing additional training and technical assistance to local election jurisdictions interested in using these designs, throughout the coming election year and beyond.

3. Use of HAVA funds to replace systems purchased with HAVA funds. On February 21, 2008, the Chair of the EAC notified the Committee that she would be proposing a new policy to guide the use of HAVA funds by states wishing to replace HAVA-compliant voting equipment previously purchased with HAVA funds. The Chair also asked for a GAO opinion on the proposed policy prior to the next EAC meeting on March 20, 2008.

Has GAO informed EAC whether it will be able to provide an opinion on the policy by March 20th? Has GAO provided any preliminary oral advice on this issue? Will the EAC still vote on the proposal if GAO has not provided an opinion, and do you have any concerns about adopting the revised policy in the absence of a GAO opinion?

On February 21, 2008, Commissioner Rodriguez requested GAO guidance on whether the EAC new proposal to allow states to use HAVA funds to purchase voting equipment to replace HAVA-compliant equipment bought previously with HAVA funds is reasonable. GAO provided a written opinion on March 19, 2008. The proposed change to the EAC guidance on the use of HAVA funds was considered and adopted at the March 20, 2008 public meeting.

4. Voluntary Voting Systems Guidelines. The EAC has submitted for public comment, in October 2007, draft voluntary voting system guidelines

(VVSG). The VVSG present specifications and requirements that states may use to determine whether voting systems provide necessary functionality, accessibility, and security. The comment period expires on March 5, 2008.

What has been the level of response to the request for public comment? What are the most common or significant issues and concerns with the VVSG that have been raised during the comment period?

The period for receiving public comment on the TGDC recommendations on the VVSG has been extended to May 5, 2008. The EAC has implemented one of the federal government's most transparent, accessible, and user-friendly public comment tools at www.eac.gov. The public is able to submit comments at every level of the document, as well as view all comments that have been submitted. Currently, the EAC has received and posted 657 comments. The breakdown of comments by organizations and entities are as follows:

- *200 comments were submitted by academics;*
- *37 comments were submitted by advocates;*
- *63 comments were submitted by members of the general public;*
- *124 comments were submitted by local election officials;*
- *44 comments were submitted by manufacturers;*
- *4 comments were submitted by a state election official;*
- *164 comments were submitted by a voting system test laboratory;*
- *4 comments were submitted by people who identified themselves as voters;*
- *3 comments were submitted by persons who associated themselves with a federal agency; and*
- *14 comments were submitted by people who did not identify an organization or affiliation.*

The most common topics covered by the comments include the need to create testable standards, supporting or opposing the concept of software independence, and the use of paper ballots and voting machines. The EAC encourages the Committee to visit the public comment tool to see the insightful comments that the public has provided about the next generation of voting systems.

5. Meeting Federal requirements. Six years after enactment of HAVA and 15 years after enactment of the National Voter Registration Act, some state

and local election officials still struggle to meet all Federal election administration requirements.

Which Federal requirements do state and local election officials continue to have difficulty meeting? What steps can the EAC take help election officials comply with Federal requirements?

The Department of Justice (DOJ) is the agency charged with enforcing HAVA and likely has more information about the success or failure of states in meeting the HAVA requirements. However, EAC can offer some observations from the reports submitted by states on the use of funding, the suits that it has observed that DOJ has filed, and general information available to the public regarding election administration.

States must meet five requirements in order to comply with HAVA:

- *Use HAVA compliant voting equipment;*
- *Establish and implement a system of provisional voting;*
- *Provide information to voters at the polling place;*
- *Establish and implement a statewide voter registration list;*
- *Identify voter registration applicants according to the procedures set forth in HAVA and by reference the National Voter Registration Act (NVRA).*

It appears from the information available to EAC that different states struggle with different requirements of HAVA. DOJ has filed suit against states to enforce the all of the requirements including having HAVA compliant voting equipment, having a statewide voter registration list, having a system of provisional balloting, posting polling place information, and implementing voter identification procedures and processes to compare the statewide voter registration list against other available databases.

Last year's reports from states on the spending of HAVA funds showed that they were largely spent on purchasing voting equipment and implementing the statewide voter registration database. While spending data shows us that little funding was dedicated to the implementation of provisional voting, the more interesting data comes in the form of which states have attested that they meet all five of HAVA's requirements. Only eight states[1] have submitted certifications to EAC that they met the requirements of HAVA.

[1] American Samoa, Florida, Kentucky, Maryland, New Jersey, North Carolina, Oregon and South Dakota.

6. Absentee voting. Some jurisdictions have increased or are considering increasing absentee voting as a way to making voting easier and more accessible to its citizens. This raises questions about the security and reliability of absentee ballots.

What factors should jurisdictions weigh when considering whether to encourage increased absentee voting? What are the security issues relating to ensuring that legitimate votes are cast?

The security and reliability of any voting method – paper-based or electronic -- relies on the controls to manage the risks associated with that particular system. Absentee voting, like other forms of voting, involves the integration of people, processes, and technology (GAO-06-450). Election jurisdictions that have experienced an increase in absentee voting or are considering methods for increasing it should review their policies and procedures to ensure they can effectively and securely manage this process. The EAC has developed recommendations for election officials regarding absentee voting in its Quick Start Management Guide on Absentee Voting/Vote by Mail. The Quick Start Management Guide on Absentee Voting/Vote by Mail focuses on practices/procedures that jurisdictions can take to improve the management of the absentee voting process. EAC distributed this publication to state and local election jurisdictions across the country and it is available at www.eac.gov. EAC developed the guide in collaboration with election officials that had significant experience in this particular area.

The guide is broken down into the following topic areas: ballot preparation and mailing, ballot reception, ballot tabulation, storage and security considerations (physical security of absentee ballot documents), and voter education. The guide does not determine whether absentee voting is a secure and reliable form of voting. However, the guide offers recommendations for ensuring the security and integrity of the cast ballots once they're returned to the election office. In addition, other sections contain useful information to consider as well when considering how to manage the absentee process in an effective manner.

Some of the recommendations contained in the guide include:

- *Evaluate the area designated for pulling and stuffing ballots to determine space needs in order to develop an efficient work flow. Implement the policy of working in teams of two to ensure accuracy. Staff assignments should include individuals designated as ballot pullers and ballot stuffers. Be sure to implement "two person" integrity and separation of duties throughout the process.*
- *If using an external mailing/distribution center for ballot mailing, it is recommended that election staff be on-site at all times.*
- *Maintain a daily listing of all individuals who have been mailed a ballot. Follow State law regarding public/candidate access to this information.*
- *Track numbers of ballots issued by quantity and ballot style on a daily basis. Use this information to monitor ballot stock usage and availability.*
- *Consider investing in postal tracking software to track the envelopes through the postal facilities and to confirm the delivery of individual ballot envelopes to the postal carriers. This same tracking software can track the route of the return ballot envelope.*
- *Coordinate with the post office on how you wish to receive the returned ballots. Will you schedule a special delivery from the post office? Will you have staff members pick up the ballots from the post office? Tip: Always work in teams of two when receiving returned ballot envelopes. At no time should any one person be alone with the voted ballot envelopes.*
- *Determine if you will provide off-site collection/drop off receptacles for returned ballot envelopes. Establish procedures for securing and monitoring these locations.*
- *Develop and post general rules for individuals wishing to observe the ballot reception process. For example:*
  - *Ask everyone observing the process to turn off or silence their cell phones.*
  - *Observers must visibly wear identifying name tags/badges at all times.*
- *Develop training manuals and conduct training sessions for all temporary staff assigned to the ballot reception operation. Maintain record of all staff involved in ballot reception by keeping a daily sign in/out sheet. Tip: Require that all ballot reception staff take lunch breaks at the same time, ensuring that the ballot reception area is locked down and secured during that time period.*
- *Date and time stamp each return ballot envelope. Implement daily logs (computerized or by hand) to account for all returned ballot envelopes.*

These logs must be balanced on a daily basis to actual ballot envelopes on hand.

- *Update the voter record to indicate that the ballot envelope has been returned. Confirm the voter's name and address. If required, verify the voter's signature on the envelope. Tip: Provide specialized staff training on signature verification. Consider implementing the "check it three times" policy for questionable signatures: first check is conducted by regular staff; second check is conducted by more experienced staff; and third check is conducted by the county canvass board. When a signature is first questioned, consider sending a letter to the voter notifying them that their signature is being questioned.*
- *Separate and log any ballot envelopes that are challenged. Continue to balance all receiving logs to total ballot envelopes received on a daily basis.*
- *Develop procedures for managing exceptions during the ballot opening process. Examples include: "No ballot in the envelope"; "Too many ballots in the envelope"; or "Ballot from a wrong election in the envelope". Tip: Before storing ballot envelopes, recheck that all envelopes are empty.*
- *Follow State law and uniform administrative guidelines when determining voter intent. Establish procedures for managing physically damaged ballots, ballots that are marked in such a fashion that they will not be read by the scanner, and write-in votes.*
- *Establish written procedures for manual duplication of voted ballots. Assign a number to the original ballot and that same number to the duplicate ballot. Work in teams of two to duplicate each ballot. Maintain a log indicating the assigned number, ballot style, and reason for duplication. Require that the two person duplication team initial the ballot log for auditing purposes.*
- *Count the number of ballots sent to the scanner and balance with the scanner on a regular basis. Consider batching the ballots in bundles and assign batch numbers to each bundle to ensure that all ballots have been read by the scanner.*
- *When tabulation is completed, balance the total number of envelopes received, minus exceptions to the total number of voted ballots scanned.*
- *Install appropriate security in areas where ballots are stored (i.e. alarms, locks, cameras, etc.).*
- *Enforce the two-person rule anytime ballots are handled. Maintain a listing of employees who are authorized to access the ballot area.*

Establish an access log to include access date, employee name(s), and reason for access.

- *Store the empty return envelopes and voted ballots in separate tamper-evident sealed containers.*
- *Utilize brochures, flyers, and your jurisdiction's web site to inform voters how to ensure their ballot is counted. Provide answers to "frequently asked questions" such as:*
  - *May I drop my voted absentee ballot at the polls on Election Day?*
  - *Will my ballot be counted if I mail it ON Election Day?*
  - *I made a mistake while voting my ballot – How do I get a new ballot?*

7. Impact of HAVA.

What has been the net result of HAVA on the U.S. election environment to date?

Overall, HAVA has improved the election environment and increased transparency in and public awareness of the elections process. It has resulted in more attention and resources being devoted to the administration of elections than at any other time in this country's history. The law has empowered voters, especially those with disabilities, by requiring that voters in federal elections be able to cast their vote privately and independently.

Use of HAVA funds by states has resulted in the installation of better voting equipment; use of more reliable and available voter registration information; the implementation of provisional voting; and increased information to voters on voting matters. Voting equipment is easier to use and audit and more reliable than previously employed punch card and lever action voting machines. In addition, new voting equipment has provided access to voters with disabilities and voters with limited English proficiency. Voter registration systems now provide a single, unified computerized list of voters and unique identifier for each legally registered voter; allow the state to verify the identity of registrants against other government databases; and the information is immediately available to any election official in the states. Provisional voting assures that voter eligibility can be judged with all available information and that a voter's choices are preserved until a determination of eligibility can be made. Finally, there has been an increase in the amount of useful information provided to voters about their voting rights, voter registration, and voting options.

In addition, the EAC has adopted new standards and processes to improve the accuracy of voting equipment; new and consolidated information and guidance to assist states in the administration of elections; and an effective oversight of states' use of HAVA funds. EAC issued its first set of voluntary voting system guidelines (VVSG) in 2005 and is now updating the VVSG in anticipation of the next generation of voting systems. The VVSG provide a set of specifications and requirements against which voting systems can be tested to determine whether they provide all the basic functionality, accessibility, and security capabilities required of voting systems. In 2007, the EAC instituted its program to test and certify voting equipment to determine whether equipment meets the VVSG, the first federal certification program of voting equipment in the nation's history. The EAC posts the results of EAC and state and local election officials' research into election administration issues and EAC information (such as best practices for provisional voting and for poll worker recruitment, training, and retention; and a glossary of key election terminology) on its web site to assist voters and state election officials. Lastly, EAC has implemented a system of audits, management reviews, and guidance, to help ensure states use HAVA funds only for authorized purposes.

What aspects of HAVA have not been adequately addressed, and to what extent is this due to limitations in funding and staff?

EAC has not completed the study on voters who register by mail and use of social security information (required by Section 244 of HAVA) because responsive proposals have not been received from two separate requests for proposals that have been issued by EAC. That is, EAC determined that none of the bidders had the capability to perform the study requirements as HAVA intended. EAC is working on a new approach.

The EAC has not issued guidance to states about implementation of HAVA Section 301 voting system requirements or HAVA Section 302 provisional voting. The guidance provided under Section 303 was limited is being updated and expanded.

In 2007, the EAC's employee cap was lifted, and EAC began hiring new staff to assist us in critical program areas such as research and voting system certification. However, the EAC must be prudent in its hiring approach as our budget has not increased significantly. The EAC needs to hire

additional program staff in all divisions and will need time to train new employees before it can noticeably increase response times and work products. The current budget will allow for some additional hiring of new program staff but the level of staffing needed to carry out all of EAC's responsibilities in a timely fashion will require additional funding.

HAVA Sections 271 and 281 were never funded. Therefore, the EAC has not undertaken the testing of new technologies in voting systems or research on voting technology improvements.

What HAVA funds remain unallocated or unspent, and why?

Through fiscal year 2007, EAC had received approximately $2.96 billion for subsequent payment to states under Sections 101 ($350 million), 102 ($300 million) and 251 ($2.31 billion). EAC has allocated and distributed the entire $2.96 billion to the states. Through the most recent reporting periods for 2006, states have reported the expenditure of HAVA funds totaling about $1.78 billion. This leaves a balance of unspent HAVA funds of $1.34 billion.[2] There is no single reason why States have not spent or allocated their entire allocation of funding under HAVA.

As reported in the July 2007 "Report to Congress on State Governments' Expenditures of Help America Vote Act Funds", states have spent 60 percent ($1,781,943,111) of HAVA funds received ($2,968,860,616). In addition, 60 percent of States have expended more than 50 percent of their HAVA funds. In contrast, five States have spent less than 10 percent of their HAVA funds. These five States, however, account for approximately 27 percent ($365,263,991) of the unexpended funds ($1,339,389,395).

States report on the financial status of HAVA funds to EAC on an annual basis, consistent with section 258 of HAVA. Reports are due by March 31 of this year for 2007 expenditures. We plan to submit a report to the Congress by July 31, 2008 (pending timely submission of state reports) on the current status of each state's expenditure of HAVA funds.

For fiscal year 2008, EAC received $115 million for requirements payments to states, $10 million for grants to five states for election data collection,

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[2] *Since states earned interest on the advanced HAVA payments, the balance of funds plus the expenditures ($3.12 billion) is greater than the $2.96 billion disbursed to the states.*

$750,000 for poll worker training grants, and $200,000 for mock election grants. None of the payments or grants has been disbursed to recipients. However, EAC has solicited proposals for the college poll worker and student parent mock election grants. Applications are due April 7, 2008. Solicitation for data collection grant proposals will go out on or before March 30, 2008, and EAC anticipates awarding those grants on or before May 30, 2008.

EAC awaits certifications from states to distribute the $115 million in requirements payments. In anticipation of such certifications, EAC posted each state's allocation of requirements payments, matching cost requirements, and instructions for applying for the payments on its web site in January 2008. The most time consuming aspect of applying for the payments will be the need for states to update their state plans to demonstrate how the payments will be used.

What changes should be made in HAVA and why?

Changes could be made to enable the EAC and other stakeholders to implement the goals of HAVA more effectively and efficiently. EAC would like to explore the following changes, for example:

EAC could be permanently authorized without a sunset provision. This would create a permanent federal entity authorized to deal with election administration issues and provide funding for states for continual improvements to the administration of federal elections.

EAC could be authorized to collect fees from voting equipment manufacturers so that EAC, not the voting machine manufactures, fund testing laboratories for determining whether voting equipment complies with applicable standards. This change will ensure independence in equipment testing and increase public trust and confidence in the process.

Authorization of funding for states under Section 251 of HAVA could be changed from a specific amount to such sums as necessary. This will provide more flexibility to provide funding for states to assist them in making additional improvements to the administration of federal elections.

HAVA could be amended to allow EAC to have broader rulemaking authority (i.e. remove or amend the prohibition on rulemaking in Section

211). Regarding areas such as HAVA Title III, this would enable the EAC to ensure that there are at least minimum uniform requirements in place for implementing provisions of HAVA. This would allow things such as mandating top-down voter registration systems because they are more efficient and accurate or creating regulations that allow provisional ballots to be counted as long as they are cast in the correct state but not necessarily the correct precinct.

The mock election program in section 295 should be permanently changed to a competitive grant program to be administered by the EAC. A competitive grant program will allow for more innovation and reduce overall program costs.

What other ways can Congress support EAC and the nation in improving the U.S. election environment?

Congress can support the EAC and the nation by ensuring that sufficient funds will be appropriated to the EAC to assist it in carrying out its mission as prescribed by HAVA. This includes fully funding the 2009 budget request to reflect the EAC's important responsibilities during and after an election year.

The EAC's rulemaking authority under the National Voter Registration Act (NVRA) could be expanded to include the ability to issue regulations concerning the interpretation and implementation of various aspects of the Act and not just the federal voter registration form.

Congress could consider enacting statutory changes that have a major impact on the administration of elections no more frequently than every five years and any changes should have implementation dates of three federal general elections from the time of passage to allow election administrators sufficient time to make changes and for the EAC to issue guidance or regulations regarding the changes prior to state action.

The EAC should be included in federal government task forces or working groups related to federal disaster response. The issue of holding elections shortly after a disaster has not been appropriately dealt with at the federal level and should be addressed in national emergency preparedness.

8. GAO recommendations.

What progress has the EAC made in implementing prior GAO recommendations? When do you expect these recommendations to be fully implemented? Please provide this committee with a detailed accounting of the EAC's status in implementing these recommendations, including planned efforts and completion dates.

The following details EAC's steps to address recommendations in GAO's 2005 report, Federal Efforts to Improve Security and Reliability of Electronic Voting Systems Are Under Way, but Key Activities Need to Be Completed, GAO-05-956:

Recommendation 1: Collaborate with NIST and the TGDC to define specific tasks, measurable outcomes, milestones, and resource needs required to improve the voting system standards that affect security and reliability of voting systems.

On August 31, 2007 the Technical Guidelines Development Committee (TGDC) of the EAC submitted their draft guidelines for the "Next Iteration" of the Voluntary Voting System Guidelines (VVSG). The submission of these recommendations was the culmination of more than a year's worth of work by the TGDC and the National Institute of Standards and Technology (NIST). The draft recommendations represent a total re-write of the 2005 VVSG that the EAC adopted in 2005. The recommendations contain increased requirements in the areas of security, reliability, usability, and accessibility.

Upon receiving the TGDC's recommendations the EAC began a four-phase process for reviewing and creating the next iteration of the VVSG. This plan is designed to be open and transparent, providing the public with two lengthy public comment periods. EAC will publicly post all public comments received. The plan is detailed below:

- ***Phase I** – EAC has published the TGDC's draft document in the Federal Register which started a 120- day public comment period (this comment period has subsequently been extended to 180 days). A Public Comment feature was created on www.eac.gov. During the public comment period the EAC is holding roundtable discussions with all major stakeholder groups in order to have an open discussion on the proposed standards strengths and weaknesses. Also, in December 2007 the EAC Standards Board and Board of Advisors issued resolutions pertaining to the draft recommendations.*
- ***Phase II** – EAC will collect and review, with the assistance of NIST, all public comments submitted on the TGDC draft. After consideration of all public comments, the EAC will perform an internal review.*
- ***Phase III** – The EAC will develop and publish its draft version in the Federal Register. The public will have another 120 days to comment on the EAC draft version. EAC will conduct public hearings about its draft version.*

- ***Phase IV*** *– EAC will collect and review all comments submitted and make final modifications. The final version of the VVSG will be adopted by vote of the commission at a public meeting and then published in the Federal Register.*

In addition to the creation of the next iteration of the VVSG, the EAC is working closely with NIST in developing a set of test suites to be used by EAC accredited testing laboratories in testing voting systems to the 2005 VVSG. These test suites will create a consistency and thoroughness of review that is necessary in the certification of products.

Recommendation 2: Expeditiously establish documented policies, criteria, and procedures for certifying voting systems that will be in effect until the national laboratory accreditation program for voting systems becomes fully operations; define tasks and time frames for achieving the full operational capability of the national voting system certification program.

The EAC implemented its Testing and Certification program on January 1, 2007. The opening of this program marked the first time that the Federal Government is testing and certifying voting systems. Upon the creation of its program the EAC adopted its Voting System Testing and Certification Program Manual. This manual details all of the program's requirements and procedures. Also, the EAC currently has its Voting System Test Laboratory Accreditation Program Manual out for public comment. This public comment period is scheduled to conclude on April 4, 2008. After the completion of the public comment period, staff will incorporate the comments received and recommend the manual for adoption to the Commissioners. This manual outlines the requirements and procedures for a test laboratory to receive and maintain EAC accreditation.

Recommendation 3: Improve management support to state and local election officials by collaborating with NIST to establish a process for continuously updating the National Software Reference Library for voting system software; take effective action to promote the library to state and local governments; identify and disseminate information on resources to assist state and local governments with using the library; and assess use of the library by states and local jurisdictions for the purpose of improving library services.

VVSG 2005 section 7.4.4 (c)(iv) requires that the software of the voting system submitted for certification shall be stored on unalterable storage media by the testing lab and that "The testing lab shall retain a copy, send a copy to the vendor, and send a copy to the NIST National Software Reference Library (NSRL) and/or to any repository designated by a State." In addition to this requirement, the EAC is currently working with state and local jurisdictions to develop a software program that would allow states to effectively search and use the NSRL. The program will be designed to allow jurisdictions to match the software of their currently fielded voting systems with those that have been certified by the EAC in order to ensure that the fielded system is the same as the certified system.

Recommendation 4: Improve management support to state and local election officials by collaborating with TGDC and NIST to develop a process and associated timeframes for sharing information on the problems and vulnerabilities of voting systems.

Chapter 8 of the EAC's Voting System Testing and Certification Program Manual outlines the EAC's "Quality Monitoring Program". Included in this chapter are sections detailing the EAC's ability to review and test already fielded voting systems, reporting of anomalies with fielded voting systems, and site reviews of the manufacturing facilities of registered manufacturers. Additionally, section 2.3.2.7 of the Voting System Testing and Certification Program Manual requires voting system manufacturers to "Report to the Program Director any known malfunctions of a voting system holding EAC certification." This reporting requirement will allow the EAC to inform election officials of the problems being experienced in the field with already fielded EAC certified systems. It is important to note that all provisions of the manual including the quality monitoring program pertain only to EAC certified systems. All information gained as a result of the EAC's quality monitoring program will be made available on its web site in order to inform other jurisdictions that use the EAC certified system being reported on.

On August 3, 2007, the EAC adopted a policy authorizing staff to post and distribute voting system reports and studies that have been conducted or commissioned by a state or local government. This policy is designed to allow states or localities the ability, if they choose, to report their experiences with voting machines for the benefit of other jurisdictions. Currently the EAC has reports from California and Kentucky regarding

their experiences with voting systems. While the EAC does not have the authority to require jurisdictions to submit reports to its Voting System Clearinghouse it is working hard to encourage jurisdictions to share their experiences with the EAC.

Recommendation 5: Improve management support to state and local election officials by establishing a process and schedule for periodically compiling and disseminating recommended practices related to security and reliability management throughout the system life cycle (including the recommended practices identified in this report) and ensuring that this process uses information on the problems and vulnerabilities of voting systems.

As part of the EAC's Testing and Certification Program, the EAC has created a product entitled Election Management Guidelines (EMG). The long-term goal of the EMG is to provide a comprehensive set of election management guidelines, consolidated into one document, to assist State and local election officials effectively manage and administer elections. As part of the EMG project, the EAC has created a series of Quick Start guides designed to be a quick reference tool for jurisdictions to use regarding a variety of election administration topics. Among the topics covered in the EMG and available via quick start guide are Managing Change in an Election Office, Contingency and Disaster Planning, Acceptance Testing, Voting System Security, Voting System Certification, and Poll Workers. All of these guides make recommendations for practices related to the management of the security and reliability of a voting system throughout its life cycle.

Additionally, the EAC is currently working to develop a Request for Proposals on a comprehensive threat assessment of voting systems. This threat assessment will be designed to be used as a tool by jurisdictions, academics, Congress, and the EAC in determining the level of threats against specific types of voting systems and the best means by which to mitigate those threats. The threat assessment will cover all the various types of voting systems from pure paper systems to Direct Recording Electronic Devices (DRE). In creating this threat assessment it will be the goal of the EAC to create a better understanding of the specific threats against voting systems, the level of effort necessary to carry out those threats, and the ability to mitigate those threats through proper software, hardware, and procedural security.

9. HAVA requirements payments. The FY 2008 appropriations bill included $115 million for grants to assist states further in meeting the requirements of the Help America Vote Act.

What is the status of dispersing these funds to the states?

No states have applied for the requirements payments. However, in January 2008, the EAC notified the states of the availability of the funds, as well as information about how, where, and when to apply. In addition, the EAC has posted more detailed information about the new funds at www.eac.gov, including a set of frequently asked questions based on inquiries the EAC received during the distribution of previous requirement payments.

How many states have taken action to provide the required matching funds?

EAC does not have this information because it has not received any requests for requirements payments from the states. As part of the application for payments, states must provide information on matching funds. So, EAC will begin collecting this information as the process advances.

Will states receive the HAVA funds in time to assist their November general election activities?

It depends principally on the state actions, because states drive the process to obtain the requirements payments. In that regard, HAVA Section 253(b) requires that each State certify to the EAC that it has met the requirements of Section 253(b) by

- *Describing in its state plan how it will use the requirements payments.*
- *Indicating the State has followed the 30-day public notice and comment requirements of section 256.*
- *Filing with the EAC a plan for the implementation of the uniform, non-discriminatory administrative complaint procedures required under section 402 (or has included such a plan in the State plan), and has such procedures in place.*
- *Demonstrating the State is in compliance with each of the federal laws as they apply to the Act*
- *Providing that, to the extent that any portion of the Title II requirements payment is used for activities other than meeting the requirements of Title III, the State's proposed uses of the requirements payment are not inconsistent with the requirements of Title III and the use of the funds under this paragraph is consistent with the requirements of section 251(b); and*
- *Appropriating state funds for carrying out the activities for which the requirements payment is made in an amount equal to 5 percent of the total amount to be spent for such activities (taking into account the requirements payment and the amount spent by the State).*

In January 2008, EAC reminded states of the above requirements. To date, we have not received any requests for these new funds. As a result, it is questionable that states will have these funds in hand in time to make purchases prior to the November 2008 election.

10. Election data collection grants. The 2008 appropriations bill included $10 million for a pilot program to help states improve the collection of election administration information.

What is the status of implementing this program? What is the level of interest among the states in participating in the program? In what ways do you believe that improved collection and assessment of election data would be helpful?

EAC is currently working through the emergency provisions of the Paperwork Reduction Act in order to obtain a required control number so that it can issue its Request for Applications (RFA) for this grant program. EAC posted the proposed RFA on its website for a 10-day comment period on March 7, 2008. At the conclusion of that comment period, EAC will resolve the comments and issue a final RFA.

EAC has received a number of inquiries from states that have expressed an interest in applying for an election data collection grant. EAC plans to formally announce the program at the end of March, at which time States will be asked to submit an Intent to Apply. Consequently, EAC anticipates that it will be able to gauge how many States will be applying to the program by the first week of April.

EAC believes that the work of the selected grantees will result in best practice models for collecting election data. Presently, States are required by HAVA to collect certain data on Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) voters. In addition, the NVRA requires States to track and report to EAC certain voter registration data. Creating a reliable, Federally-administered national clearinghouse of election data, will provide Congress, election officials, and media who track elections, basic information about the conduct of Federal elections along with voter's participation in these elections.

11. Mock election program. The FY 2008 appropriations bill provided $200,000 for a student mock election program, to be administered as a competitive grant program by the EAC.

What is the status of implementing this program?

EAC prepared a request for grant applications and posted it on the EAC web site on March 4, 2008. Proposals in response to this request for applications are due to EAC by April 7, 2008.

When will the competition for the funds occur, and when will the funds be awarded?

EAC anticipates the award of the grants by mid June 2008.

Are the funds sufficient to support a viable student mock election program?

This is the first time that the Congress authorized EAC to award the grants on a competitive basis. The program was previously authorized and funded as a direct grant to a single entity.. So, EAC does not have any prior experience to determine whether the appropriated funding will be sufficient. As this competitive grant program progresses, we will provide the Subcommittee with information on the number of grant applicants and their funding request for this cycle of grants as a gage to the sufficiency of funding.

RESPONSES TO QUESTIONS FOR THE RECORD FROM REPRESENTATIVE REGULA

Between FY 2003 and FY 2005, Congress provided the States with $3.1 billion to replace equipment, create statewide voter registration databases, improve access for people with disabilities, and provide training. In addition, the Committee provided an additional $115 million in fiscal year 2008. What is the EAC doing to ensure that States have effectively used these funds?

To ensure that HAVA funds provided to states to improve the administration of elections for Federal office are effectively used for authorized purposes, EAC requires states to file annual reports on the use of HAVA funds. Those reports are filed according to the funding program, specifically Section 101, 102 or 251. Section 101 and 102 reports are due on February 28 of each year and cover the previous calendar year. Section 251 reports are due on March 30 of each year and cover the previous Federal fiscal year. In addition to these reports, EAC monitors the single audits of each state to determine the audit coverage given its programs and to resolve any findings that are noted in those single audits. Last, EAC's Inspector General conducts audits of state spending under HAVA. In addition, EAC can by vote of the Commission request a special audit of any state's use of HAVA funds.

To help states be good stewards of HAVA funds, EAC has also engaged in the following activities and/or provided the following information:

- ✓ *Posted on* http:///*the EAC website a guide for managing, recordkeeping, reporting and auditing HAVA funds.*
- ✓ *Presented training on accounting for HAVA funds in conjunction with the National Association of Secretaries of State and National Association of State Election Directors meetings.*
- ✓ *Presented training on the negotiation of indirect cost rates.*
- ✓ *Negotiated indirect cost rates with States.*
- ✓ *Responded to questions from State administrators about the appropriate uses and reporting of HAVA funds.*

- ✓ *Posted on the EAC website a list of frequently asked questions on reporting requirements and the proper use of HAVA funds.*

- ✓ *Published formal advisories on www.eac.gov on maintaining effort when using requirements payments, treating income earned on HAVA funds, accounting for interest earned on HAVA funds, calculating the 5-percent matching requirement, and using county funds to match requirements payments.*

- ✓ *Established a comprehensive, uniform process for reviewing annual state financial reports.*

The administration of elections is largely a State and local function. There are calls by some groups for Congress to legislate new election requirements and standards, and to provide additional Federal funding to subsidize the cost of elections. Please describe the role that Congress and this Committee specifically should play in assisting the States.

Congress' authority to regulate elections for Federal office is established by Article I, Section 4 and Article II, Section 1 of the United States Constitution. Those clauses give Congress the ability to regulate the time, place and manner of conduction elections for Federal office. The courts have interpreted this authority to include regulating the voter registration process as Congress did through the National Voter Registration Act and in requiring certain minimum standards for election practices as Congress did through HAVA.

HAVA was delicately crafted to avoid overburdening the balance of power and responsibility for conducting Federal elections shared by the states and Federal government. Any future legislative activity should take into account the balance of power and recognize that new requirements bring about new expenses that states may not be prepared to handle.

There have been many concerns raised regarding the security of electronic voting equipment and these concerns must be taken seriously. Specifically, there were concerns raised to that effect in Florida. However, GAO tested the machines in Florida and concluded that there were no problems with their accuracy. In addition, according to an April 2004 Carnegie Mellon study, "the United States has been using

direct-recording electronic voting equipment for well over 20 years without a single verified incident of successful tampering". Has there ever been a documented case of electronic voting equipment being hacked into during an election and votes being changed?

To our knowledge, there has never been a documented case of an electronic voting system being hacked into during an election and votes being changed.

There has been much discussion on the use of paper trails to eliminate perceived security risks in electronic voting. An April 2004 study by Carnegie Mellon University concludes that paper records do not address those risks. Do you agree with the Carnegie Mellon study? Are there better ways to ensure security?

The use of paper records such as Voter Verified Paper Audit Trails (VVPAT) does not work to fully secure a system. The intent of such a record is to create a record by which the system can be audited. As such, it is serving not as a security protector but as a means to check the machines after a vote has been cast. There is value in such an audit but it is incorrect to perceive such a record, by itself, as increasing the security of the system.

The inherent security risks with paper are numerous and well documented. The best way to ensure that a voting system is secure is to combine the software and hardware securities with the recommended procedural securities. Securing a voting system is a process that cannot focus solely on the machine itself. For example, issues of access control and chain of custody must be addressed in order to secure a voting system. Whether a jurisdiction is using a direct recording electronic (DRE) system, optical scan system, or simple paper ballots, the voting system is only as good as the procedures used to secure it. Corrupting thousands of paper ballots can easily be accomplished with such common, non-technical items as a match, a paper shredder or dumping them into San Francisco Bay (all of which have been done). Securing paper ballots can only be done through proper procedures. The same holds true for DREs. For example, DREs have internal security functions, such as the use of cryptographic modules. In the end, proper procedures working in conjunction with those software and hardware security controls are the only means by which to properly secure a voting system.

The EAC believes examining voting equipment and testing security in a sterile environment is not enough. A thorough assessment of security must include real world scenarios and be conducted in an election environment. We encourage the scientists and academics who conduct hacking tests to partner with election officials to recreate an Election Day situation.

The EAC advises election officials that regardless whether they use paper ballots or touch screens: details matter. It is just as important to make sure the voting equipment is working properly as it is to have procedures and well trained people to control access to and maintain the equipment properly.

That's why the EAC issues Election Management Guidelines, which provides materials to election officials to help them manage the entire process. So far, we have issued information about the following topics:

- *Polling Places and Vote Centers*
- *Managing Change in an Election Office*
- *Media and Public Relations*
- *Absentee Voting and Vote by Mail*
- *Acceptance Testing*
- *Voting System Certification*
- *Voting System Security*
- *Poll Workers*
- *Ballot Preparation*
- *Printing and Pre-Election Testing*
- *New Voting Systems*
- *Contingency and Disaster Planning*

The management materials – we call them "Quick Starts" have been distributed to election officials throughout the nation.

In the very near future, we will issue materials about serving elderly and disabled voters in long-term care facilities; military voters; and how to audit the entire election process.

Some have called for States to quickly implement paper trail voting systems. Is it advisable for a State that does not require a paper trail to immediately change their equipment to ensure a paper trail for the November elections?

In elections, it is never advisable to "quickly implement" anything. Change in election procedures stresses the process, as it requires extensive training and a period of adjustment. (See the EAC's Quick Start Management Guide on Change Management in Elections.)

Experience has taught election officials that a minimum of 6-8 months, and preferably longer, is needed to effectively implement a new voting system and to educate the voting public about how to use the system. Consistency in procedures and process is key in creating a secure, accurate, and effective election. As we have seen in Ohio and several other jurisdictions, the hasty attaching of a printer to some machines has led to paper jams, long lines, and confusion. While jurisdictions may find a VVPAT to be suitable to their needs, hastily requiring such a thing for this years election has the potential to lead to more problems than it could possibly solve. At this point in the election cycle, election officials are better served by sharpening their already existing policies than trying to apply patchwork fixes that could lead to greater problems.

It is also important to take into account the individual needs of each state because one size fits does not fit all when it comes to elections. For instance, the needs of voters in states often drive the selection of voting systems. For instance, in rural areas, vote by mail may be a more convenient option for voters. In areas that have large populations with limited English proficiency, touch screen voting empowers those voters and reduces administrative costs.

The EAC is implementing a Voting System Testing and Certification Program. How will this new certification ensure voting security?

The EAC's Testing and Certification Program tests voting systems to the Voluntary Voting System Guidelines (VVSG). These guidelines, adopted by the Commission in 2005, serve to test voting systems to ensure that they meet established levels of accuracy, security, reliability, and accessibility. In order for a voting machine to receive EAC certification, it must meet or exceed the requirements (including security) stipulated in the VVSG.

Also, the EAC's Testing and Certification Program has a Quality Control process detailed in its Testing and Certification Program Manual. Through this quality control process manufacturers of EAC-certified systems are required to report all anomalies experienced by an EAC-certified system in the field. Also through this quality control process, the EAC with the cooperation of the jurisdiction using the EAC-certified machine has the ability to enter a state and inspect a fielded voting system in order to ensure 1) the system has the same software and hardware as what was certified by the EAC and 2) the system has not been compromised in any way. It is through this quality monitoring process that the EAC can work to hold manufacturers accountable for fielded EAC accredited systems.

I understand that compliance with the Voting System Testing and Certification Program by the States is voluntary. Do you expect most States be able to comply with the EAC standards?

It is correct that HAVA does not require states to participate in the EAC's testing and certification program. Therefore, the process is voluntary. However, States can require that voting system manufacturers produce systems that that comply with the EAC's standards. Thus, States can choose to require testing of voting systems used in the state to the VVSG in full, in part, or not at all.

At this time, most of the manufacturers have submitted upgraded versions of their currently fielded systems to the EAC's program. The EAC has approved one test plan (the road map that the testing laboratories use to evaluate a voting system) and is eagerly awaiting the test report (the report by the test lab detailing if and how a system conforms to the VVSG) for this system. It is premature to predict whether or not this system will meet the standards prescribed by the program. However, EAC is confident that the Voting System Test Laboratories will test each system to the standards in a thorough and complete manner.

The Commission administers a grant program to recruit college students to become poll workers. Has the program been effective?

A new generation of poll workers is needed to help alleviate the poll worker shortages seen across the country, and the College Program has been a positive step in that direction.

The College Program was administered in 2004 and 2006, and the announcement for 2008's program was released on March 4, 2008. In the past two administrations of the College Program, 34 grants were awarded. Efforts to recruit the next generation of poll workers are extremely valuable. The lessons learned and the successes inform the EAC and election officials how to tap into these young people as champions of democracy. Due to the grants, college students have served as poll workers and become educated in election administration.

RESPONSES TO QUESTIONS FOR THE RECORD FROM REPESENTATIVE HINCHEY

First Set of Questions:

I want to commend the Chair's recent proposed clarification of the commission's policy that would allow states to use new and remaining HAVA funds to replace voting equipment that had been purchased with previous HAVA funds.

Is there any reason, that you can think of, that this policy would not pass by a unanimous vote on March 20th?

The proposed policy statement submitted by EAC Chair Rosemary Rodriguez was considered and adopted at the March 20, 2008 EAC public meeting.

Second Set of Questions:

Questions 1:

Are you aware of the large number of studies, papers and state sponsored reviews which have shown that these voting systems are unreliable and vulnerable to tampering?

The EAC is aware of studies conducted about voting equipment. Some of these studies were conducted in sterile laboratories without introducing the elements of an election environment such as poll workers and equipment in polling places. Other studies focused solely on the accuracy of voting systems. These studies have produced mixed results, with wide-ranging conclusions such as electronic voting systems being vulnerable to security breaches to the lower accuracy rates of optical scan systems.

The EAC established a Voting System Reports Clearinghouse to provide a central repository for state and local election officials to submit their reports about voting system usage in their respective jurisdictions. The state of California submitted its top-to-bottom review, and it is a very thorough examination of the state's voting systems. We commend Secretary Debra Bowen for recognizing the importance of not only the mechanics of voting systems, but also how those systems are managed. Ensuring secure and

accurate elections requires a comprehensive approach, including the following elements:

- *Conducting logic and accuracy testing to ensure the voting system will operate correctly in the field*
- *Establishing chain of custody procedures*
- *Training election officials and poll workers*
- *Adopting a contingency plan*
- *Designing ballots that are intuitive and voter friendly*
- *Providing poll workers with an Election Day checklist*

Question 2:

Are you aware that a number of these machines have been decertified because they are so insecure and unreliable?

It is our understanding that these systems were deemed to be insecure due to the lack of management procedures. Any kind of voting system, even a ballot box, is vulnerable without the proper management procedures in place. That is why the EAC issued a series of management materials about managing and securing the entire election process. Focusing solely on the merits of a particular voting system – paper-based or electronic – is not a comprehensive enough approach and ignores known vulnerabilities, such as voting system access, the lack of logic and accuracy testing, and the lack of proper training.

Question 3:

Are you aware that a number of these machines have randomly lost or added votes during elections held in the past four years and have brought the outcome of the election into question?

Often, extra or lost votes are the result of poor pre-election planning. For instance, during logic and accuracy testing, test votes are taken. We are aware of several instances in which election officials forgot to "zero out" after the test, and discovered these extra votes during periodic vote tallies. This has occurred in both electronic and optical-scan systems. We are not aware of any scientific or academic study that determined any voting system independent of human error malfunctioned, resulting in adding or subtracting votes during an election. However, it is important to remember

that HAVA requires an audit trail for all voting systems used in federal elections, which means that all voting systems must be able to produce a record of every single vote cast. The audit trail requirement is for election officials' internal use. As you are aware, some states have gone a step further and required a paper trail that is accessible to voters. Regardless, all voting systems used in federal elections must produce a paper record that can be audited.

Question 4:

Do you think it reasonable for voters to have confidence in election results when the voting machines they are using are so flawed?

The EAC advises election officials to make the voting process transparent – that is the best solution to increase and maintain voter confidence. It would be irresponsible for the EAC to issue a statement proclaiming all voting machines to be flawed. The EAC does not recommend judging voting systems in a vacuum. Even if a voting system has gone through rigorous testing, if the person operating the system is not well trained or has questionable motives, the system can be compromised. This is true for paper-based, optical-scan, and electronic voting systems.

The EAC approach is to encourage voters to empower themselves about the election process through education. We advise election officials to let the public observe the entire process. Let them observe logic and accuracy testing, vote tallies, recounts and audits. Educate them about voting systems and provide demonstrations prior to the election. Increased transparency is the key to greater confidence.

Question 5:

Do you think it is the job of the Election Assistance Commission to help insure voter confidence?

The EAC follows the requirements of HAVA, which are adopting voluntary voting system guidelines, establishing a voluntary voting system certification program, and serving as a clearinghouse of information about election administration. By helping states to successfully achieving the mandates of HAVA, the EAC will contribute to voter confidence.

Third Set of Questions:

Question 1:

In August 2007, "Dan Rather Reports" on HDNet ran a show entitled: "The Trouble with Touch Screens." The show raised serious questions as to whether the Election Systems & Software Company has knowingly marketed defective DRE machines across the United States when it discovered an affidavit of a quality control scientist who called the touch screens "time bombs" and predicted the screens would fail. What, if anything, is the EAC doing to investigate these allegations?

In a letter to ES&S dated August 14, 2007 the EAC issued a notice of noncompliance regarding the use of a manufacturing facility in the Philippines (mentioned in the "Dan Rather Reports" story) that was not part of the manufacturer registration package submitted to the EAC by ES&S. EAC's testing and certification program requires registered manufacturers to disclose all manufacturing sites so that EAC may visit those sites as a part of its quality control process. Because ES&S failed to identify the Pilipino manufacturing site, it was in violation of EAC's testing and certification program. ES&S responded to EAC's notice of noncompliance by updating its information to properly reflect all manufacturing facilities used by the company as required by the EAC's program.

The Help America Vote Act, for the first time, gave the Federal government a role in testing and certifying voting equipment. Prior to HAVA, the federal government did not test or certify any voting systems. Testing and certification of voting systems was conducted by the National Association of State Election Directors (NASED). Upon creating its testing and certification program, EAC decided not to recognize or "grandfather" any of the NASED qualified voting systems. As such, a voting system is only subject to the EAC testing and certification program, when the voting system is submitted for testing under the EAC program. EAC has no authority to enter a jurisdiction and demand to inspect or test any non-EAC certified system. However, voting systems submitted to the EAC and tested under its program must undergo thorough and rigorous assessment before it receives an EAC certification. Furthermore, the voting system manufacturer and its products are subject to a quality control assessment under EAC's testing and certification program.

Question 2:

In recent reviews by the Ohio, Colorado and California Secretaries of State, it has been revealed that many voting systems have received "NASED numbers" indicating that the machines passed qualification of federal voting standards, but these systems in fact, did not meet the qualification standards. The EAC is now responsible for reviewing voting system test results and certifying the machines. However, many of the exact same people responsible for the now questionable NASED testing and certification system, are in key positions for the EAC testing and certification process. How will the EAC increase oversight to ensure that the failures of the NASED process are not repeated?

The current EAC certification program relies on the rigorous initial and ongoing laboratory review process conducted by NVLAP on all accredited labs for assurance that these entities have the technical capability to successfully test voting systems against the requirements of the 2005 VVSG. Further, EAC personnel cannot influence the testing once the systems are submitted to the laboratories. In addition to the NVLAP review, the EAC also conducts an independent review of applicant labs to make sure appropriate processes are in place to prevent conflicts of interest and to assure laboratory independence. Details of the EAC's portion of the laboratory accreditation process are contained in our Lab Manual currently available for public comment and are available on the EAC web site.

In addition to the laboratory accreditation program, the EAC certification program contains a rigorous quality monitoring program for all EAC certified voting systems. This program includes quality inspections of voting system manufacturing facilities, the ability to do field reviews of certified systems, and collection of anomaly reports from election officials and ***required*** *reports from all manufacturers of certified voting systems who experience a system malfunction during an election.*

Fourth Set of Questions:

A 2007 GAO report states that in 2006 the EAC spent "$3.5 million for research and study and to establish the EAC as a national clearinghouse of election administration information." This amount was roughly 25% of the 2006 budget. Yet when testifying before the Committee on Wednesday February 27, it was asserted that the EAC did not have the budget to serve as a clearinghouse. What was accomplished with that $3.5 million dollars?

The purpose of the EAC's clearinghouse is to provide the public and election officials with a wide variety of information about election administration, which includes the voluntary voting system guidelines and other information about improving voting systems. However, EAC's clearinghouse role also includes conducting HAVA-mandated research about the voters, those serving in the military and citizens who reside overseas. HAVA also mandates that the EAC collect information from states about the National Voter Registration Act. Twenty-five percent of the 2006 funding was used to conduct research about poll worker recruitment and retention, college poll worker recruitment and retention, voting fraud and voter intimidation, vote count and recount procedures, provisional voting, and voter identification. Activities also included work to establish a Legal Resources Clearinghouse and costs for issuing related Federal Register notices regarding these activities. The EAC's clearinghouse is a comprehensive resource of information about not only voting systems, but also other data and resources election officials use to improve election administration and better serve voters. Congress has never funded Section 271 of HAVA, which would specifically fund research into the development of voting system improvements and advances.

The many components of the clearinghouse are available on the EAC Web site, which has been redesigned and reorganized to provide clearinghouse materials to a variety of audiences. Visitors can now find information in the Election Official Center, the Voter Information Center, the Voting System Center, and under Research, Resources, and Reports.

At the hearing on February 27, the EAC was urged to take a more aggressive approach regarding gathering, posting, and acting upon information about voting equipment performance, including those systems that were not evaluated by the EAC. HAVA states that participation in

EAC's Voting System Certification program is voluntary and while the law mandated that the EAC set up the federal government's first voting system certification program, it did not give the EAC authority or a regulatory role regarding systems that are not undergoing testing in the EAC program. Expanding the EAC's authority beyond the voluntary role it was assigned by HAVA would require legislative action as well as the resources to monitor, investigate, and report on the tens of thousands of voting systems that are currently in the field that have not been submitted to the EAC's certification program.

RESPONSES TO QUESTIONS FOR THE RECORD SUBMITTED BY REPRESENTATIVE BONNER

Question for individual reply to each EAC witness:
Thank you for your testimony before the Committee on February 27, 2008, and in particular your thoughts on the recently authorized Voting Rights Act. My question to you is simple – If the prescription for suppressing the voting rights of African-Americans and other minorities who were disenfranchised in the South in the 1960s worked – and it did – then why are we not continuing that march for justice and equality for the citizens in Milwaukee and Chicago and Cleveland and other great cities across our country, who in recent elections have protested that their right to vote was compromised and their voice in this great democracy was intimidated? Why are their geographic boundaries on the federal protections afforded by the Voting Rights Act – should not all US citizens be equally protected?

The Department of Justice (DOJ) is the Federal agency charged with enforcing the Voting Rights Act. EAC has no role under the Voting Rights Act. Furthermore, any limitations placed on the application of the Voting Rights Act are legislative and must be changed by legislative action.

THURSDAY, FEBRUARY 28, 2008.

CONSUMER PROTECTION IN FINANCIAL SERVICES: SUBPRIME LENDING AND OTHER FINANCIAL ACTIVITIES

WITNESSES

PANEL 1

DONNA GAMBRELL, DIRECTOR OF THE COMMUNITY DEVELOPMENT FINANCIAL INSTITUTIONS FUND, DEPARTMENT OF THE TREASURY

LYDIA PARNES, DIRECTOR OF THE BUREAU OF CONSUMER PROTECTION, FEDERAL TRADE COMMISSION

PANEL 2

MICHAEL D. CALHOUN, PRESIDENT, CENTER FOR RESPONSIBLE LENDING

JANET MURGUIA, PRESIDENT AND CEO, NATIONAL COUNCIL OF LA RAZA

CHRIS STINEBERT, PRESIDENT AND CEO, AMERICAN FINANCIAL SERVICES ASSOCIATION

GREG LOBO JOST, DEPUTY DIRECTOR, UNIVERSITY NEIGHBORHOOD HOUSING PROGRAM (ALSO REPRESENTING THE NEIGHBORHOOD ECONOMIC DEVELOPMENT ADVOCACY PROJECT)

CHAIRMAN SERRANO'S OPENING STATEMENT

Mr. SERRANO. The Subcommittee will come to order. Good morning to everyone. We waited until exactly 10:00, because as you know these hearings are covered by international television networks. Okay. [Laughter.]

We just started on time. It is covered in New York City, it is covered in Ohio. [Laughter.]

Today we will explore an issue that touches upon several of the agencies under the jurisdiction of this Subcommittee, and that is consumer protection. The consumer protection issue has been in the spotlight in a number of ways in recent months, and this Subcommittee has followed the issue closely. Today we will continue to look at this issue and focus specifically on financial services.

All consumers are at risk of being victimized by financial predators. However, it is often our most vulnerable populations who bear the brunt of these crimes. Each year countless working class parents who are struggling to achieve the American dream tragically have their hopes of upward mobility crushed by the practices of dishonest businesses.

While their plight often goes unrecognized, the enduring housing crisis has opened the eyes of many Americans to their struggles, and made us all aware of the devastating effects such exploitation can have on the strength of our economy.

The impact of subprime mortgages on borrowers continues to receive much attention, and this Subcommittee will examine this topic. Consumer protection concerns are not limited to subprime mortgages, however. There are numerous other financial services being offered that have generated worries over the fair treatment of consumers.

Examples include certain loan products such as refund anticipation loans, or payday loans, accompanied by excessive rates of interest, credit or debit cards with hidden fees, and illegal or abusive debt collection. In many cases, the problems are in the way financial products are marketed, such as the cases of inadequate or misleading disclosure of credit terms, or the advertising of so-called credit repair programs making false promises.

With regard to mortgage lending, alternative mortgages, in many cases, have been a vehicle for bringing the dream of home ownership to many families who would otherwise have not qualified for a mortgage. But as we have seen, many local housing markets have floundered in the past couple of years. The median price of a single-family home fell in 2007 for the first time in at least four decades.

At the same time, hundreds of thousands of subprime loans are resetting to higher interest rates, and many of the holders of these loans are unable to refinance or sell their homes due to the weakening housing market. Foreclosures and late payments rose in January to the highest level on record.

The rise in foreclosures has had implications not just for families losing their homes. Whole neighborhoods have seen declines in property values and tax base as a result of being near foreclosed homes. In New York City, for example, 400,000 homes are experiencing or will experience devaluation as a result of being located near foreclosed homes.

In addition, minority communities have been, and will continue to be, hardest hit by the foreclosure crisis, since these communities received a disproportionate share of subprime loans in recent years. In 2006, 52 percent of the home loans that went to African-American families and 41 percent of the home loans that went to Latino families were subprime loans.

I am deeply concerned that many borrowers in these communities were steered specifically toward subprime loans, even though the borrowers in many cases were fully qualified to receive conventional loans. Minority communities have also been disproportionately affected by other forms of financial fraud or deception. A 2005 Federal Trade Commission survey found that Hispanics and African-Americans experience more fraud. In September 2007, the FTC charged telemarketers who were promoting advance fee credit cards with deceiving more than 30,000 Spanish-speaking consumers.

The Treasury Department has begun to address the issue of foreclosures, most notably in the HOPE NOW Initiative. Under this voluntary initiative, participating mortgage loan companies are agreeing to institute five-year interest rate freezes for certain families faced with the prospect of foreclosure. While many people in the Treasury Department have worked extremely hard on this initiative, I am concerned that: one, the proposal is still a voluntary

initiative; and, two, a great many borrowers who are facing foreclosures are not eligible.

Just how many imminent foreclosures are not addressed by this initiative? Secretary Paulson himself has acknowledged that we have not yet seen the worst of the foreclosure crisis. We must continue to explore what options exist to minimize the numbers of foreclosures that will take place in the future.

Joining us today to discuss these issues are two panels of experts. On the first panel we have Donna Gambrell, the Director of the Community Development Financial Institutions Fund, or CDFI Fund, at the Treasury Department, and we welcome you. Both the Treasury Department as a whole, and the CDFI Fund specifically, have been involved in these issues.

Also on our first panel is Lydia Parnes. Am I pronouncing that correctly?

Ms. PARNES. It is [pronounced] Parness.

Mr. SERRANO. Parness.

Ms. PARNES. Yes, thank you.

Mr. SERRANO. I said it was Parness, and I was still——

[Laughter.]

And English is a second language to me. Director of the Bureau of Consumer Protection at the Federal Trade Commission. The FTC has been very active in the area of consumer protection in financial services. We will be joined later by a second panel of nongovernment witnesses.

Before I recognize the panel, I want to recognize a man whose name I have never misstated, Raphael Regula. [Laughter.]

Mr. Regula.

Mr. REGULA. Well, that is better than Ragula. [Laughter.]

Mr. SERRANO. That happened yesterday, right?

Mr. REGULA. Right. [Laughter.]

MR. REGULA'S OPENING STATEMENT

Thank you, Mr. Chairman, for holding this—what I think is a very important hearing on consumer protection. The subprime lending downfall in the United States over these past few months has resulted in extraordinary market volatility, but also uncertainty and hardship to homeowners and communities across the country.

Mortgage lenders and brokers seem to have resorted to disturbing practices of predatory lending in many cases, yet distinguishing valid subprime lending from predatory does not appear to be clear-cut either, as valid subprime lending has allowed many Americans to own a home that otherwise never would have.

PANEL 1

I hope the witnesses today from the Federal Trade Commission and the Treasury will give light on this distinction and help us understand what went wrong and what needs to be changed in terms of regulation of the financial services industry.

Mr. SERRANO. Thank you, Mr. Regula.

I will remind the witnesses that we will adhere strictly to the five-minute rule. Your full statement will be in the record. The less

you speak to us, the more we can ask you questions. Ms. Gambrell, you will go first.

DIRECTOR GAMBRELL'S TESTIMONY

Ms. GAMBRELL. Thank you. Good morning. Chairman Serrano, Ranking Member Regula, and members of the Subcommittee, my name is Donna Gambrell, and I am the Director of the Department of the Treasury's Community Development Financial Institutions Fund.

I am part of Secretary Paulson's senior leadership team in the Office of Domestic Finance, which is leading the Department's efforts in addressing the housing market issues. I am pleased to be here this morning, along with my colleague from the Federal Trade Commission, to testify on subprime lending and consumer protection.

As you requested, I am going to focus my remarks on the HOPE NOW Alliance, other efforts to address preventable foreclosure, and Treasury's main financial literacy and education initiatives. HOPE NOW was formed on October 10, 2007, as an alliance among nonprofit counselors, servicers, investors, and other mortgage participants, to maximize efforts to reach at-risk homeowners and help them stay in their homes. The American Financial Services Association, which is represented here today on your second panel of witnesses, is one of the many HOPE NOW members.

Let me first briefly highlight the accomplishments of HOPE NOW, since its formation over four and a half months ago. HOPE NOW membership has grown from less than 60 percent of the subprime mortgage servicing market to 94 percent today. Today 26 servicers are represented. The nationwide foreclosure prevention hotline, 888–995–HOPE, has been publicized and expanded. Daily call volume has increased from 625 in the third quarter of 2007 to 4,500 today.

Since last November, HOPE NOW servicers sent one million letters to at-risk homeowners. Early results show a 21 percent response rate, up from just 2 to 3 percent before HOPE NOW existed. Homeowners who had previously avoided contact are now calling for help, and over 200,000 additional letters are being sent every month. Today all HOPE NOW servicers are contacting subprime borrowers 120 days before their interest rate resets.

The American Securitization Forum—a HOPE NOW member—developed a framework called the ASF Framework to streamline refinancing and loan modifications for subprime ARM borrowers whose rates reset between January 1, 2008, and July 31, 2010. It is estimated that up to 1.2 million homeowners could benefit from the ASF Framework.

In the second half of 2007, the industry provided loan modification and repayment assistance to an estimated 869,000 homeowners. Coincident with the formation of HOPE NOW, the assistance rate in the fourth quarter doubled over the rate in the third quarter. Of the 869,000 homeowners assisted, 545,000 were subprime borrowers.

Most recently, the HOPE NOW Alliance announced that its members would participate in outreach efforts called Project Lifeline. Under this initiative, HOPE NOW Alliance members agree to

reach out to the most vulnerable homeowners who are 90 days or more delinquent. Homeowners who respond may qualify for a pause in the foreclosure process while a loan modification is considered.

This initiative is targeted to reach not only subprime borrowers, but all 90-day delinquent homeowners nationwide, with a step-by-step approach to find individual solutions to individual problems. We look forward to seeing the results of HOPE NOW efforts on a monthly basis, in the coming weeks, and we will be monitoring the progress of the initiative very closely.

In addition to the HOPE NOW efforts, solutions in mortgage counseling and financial education are being developed to help homeowners avoid foreclosure. Through the Financial Literacy and Education Commission, known as FLEC, Treasury plays an active role in improving the nation's level of financial literacy and education for people across our nation.

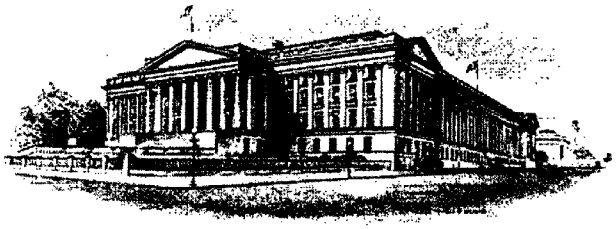
The Commission includes 19 other federal agencies, including the FTC, which is also represented here today. In addition to FLEC, Treasury coordinates the President's new Advisory Council on Financial Literacy. Through these channels, consumers can find information related to home ownership and retention, including how to avoid foreclosures, how to access credit reports, how to build better credit, and how to save for the future.

To boost housing counseling efforts, the Neighborhood Reinvestment Corporation, or NeighborWorks America, is administering a new foreclosure mitigation program. NeighborWorks has just recently awarded $130 million to applicants who plan to provide 89 percent of their services in areas of greatest need.

Due to the CDFI Fund's experience working in distressed communities and with homeowners, I am serving on the NeighborWorks Advisory Committee to assist the organization in implementing this important new program.

Mr. Chairman, thank you for holding this important hearing today and for allowing the Treasury Department to testify. This concludes my formal statement, and I would be pleased to answer any of your questions.

[The information follows:]



U.S. TREASURY DEPARTMENT OFFICE OF PUBLIC AFFAIRS

EMBARGOED UNTIL 10 a.m. (EST), February 28, 2008
CONTACT Jennifer Zuccarelli, (202) 622-8657

OPENING STATEMENT BY CDFI DIRECTOR DONNA GAMBRELL ON SUBPRIME LENDING AND CONSUMER PROTECTION BEFORE THE HOUSE APPROPRIATIONS SUBCOMMITTEE ON FINANCIAL SERVICES

WASHINGTON - Good morning. Chairman Serrano, Ranking Member Regula, and Members of the Subcommittee, my name is Donna Gambrell and I am the Director of the Department of the Treasury's Community Development Financial Institutions (CDFI) Fund. I am part of Secretary Paulson's senior leadership team in the Office of Domestic Finance, which is leading the Department's efforts in addressing the housing market issues. I am pleased to be here this morning along with my colleague from the Federal Trade Commission (FTC) to testify on subprime lending and consumer protection.

As you requested, I am going to focus my remarks on the HOPE NOW Alliance, other efforts to address preventable foreclosure, and Treasury's main financial literacy and education initiatives.

HOPE NOW

HOPE NOW was formed on October 10, 2007, as an alliance among non-profit counselors, servicers, investors, and other mortgage market participants to maximize efforts to reach at-risk homeowners and help them stay in their homes. The American Financial Services Association, which is represented here today on your second panel of witnesses, is one of the many HOPE NOW members.

Let me first briefly highlight the accomplishments of HOPE NOW since its formation over four and a half months ago:

- HOPE NOW membership has grown from less than 60 percent of the subprime mortgage servicing market to 94 percent; today, 26 servicers are represented.

- The nationwide foreclosure prevention hotline (888-995-HOPE) has been publicized and expanded; daily call volume has increased from 625 in the third quarter of 2007 to 4,500 today.

- Servicers and investors are now providing funds for counseling; previously, only government and foundations provided funding.

- Since last November, HOPE NOW servicers sent 1 million letters to at-risk homeowners; early results show a 21 percent response rate, up from just 2-3 percent before HOPE NOW existed. Homeowners who had previously avoided contact are now calling for help, and over 200,000 additional letters are being sent every month.

- Today, all HOPE NOW servicers are contacting subprime borrowers 120 days before their interest rate resets.

- The American Securitization Forum – a HOPE NOW member – developed a Framework (ASF Framework) to streamline refinancing and loan modifications for subprime ARM borrowers whose rates reset between January 1, 2008 and July 31, 2010. It is estimated that up to 1.2 million homeowners could benefit from the ASF Framework.

- In the second half of 2007, the industry provided loan modification and repayment assistance to an estimated 869,000 homeowners. Coincident with the formation of HOPE NOW, the assistance rate in the fourth quarter doubled over the rate in the third quarter. Of the 869,000 homeowners assisted, 545,000 were subprime borrowers

Most recently, the HOPE NOW Alliance announced that its members would participate in outreach efforts called "Project Lifeline." Under this initiative, HOPE NOW Alliance members agreed to reach out to the most vulnerable homeowners who are 90-days or more delinquent. Homeowners who respond may qualify for a "pause" in the foreclosure process while a loan modification is considered. This initiative is targeted to reach not only subprime borrowers, but all 90-day delinquent homeowners nationwide with a step-by-step approach to find individual solutions to individual problems.

But homeowners must take responsibility and respond to this outreach. Owning a home is a responsibility, and struggling homeowners must actively engage with their lenders and demonstrate they want to keep their homes in order for our initiatives to be effective.

It is important to note that 93 percent of American homeowners pay their mortgages on time. That is 51 million households – many on tight budgets, sacrificing other things in

order to pay their mortgage. But even in a year when the economy and the housing market are both strong, we see about 600,000-700,000 foreclosure starts as we have over the last ten years.

The goal of HOPE NOW is to assist troubled borrowers and help them with solutions to stay in their homes. We look forward to seeing the results of HOPE NOW efforts on a monthly basis in the coming weeks, and we will be monitoring the progress of the initiative very closely.

Other Foreclosure Prevention Efforts

In addition to the HOPE NOW efforts, new mortgage solutions are being developed to help homeowners avoid foreclosure.

- On August 31, 2007, the Administration announced "FHASecure" to offer homeowners foreclosure alternatives; since then, over 96,000 Federal Housing Administration (FHA) insured loans have been closed under FHASecure, putting over $13 billion to work. In addition, it is estimated that about 100,000 more applications are in the pipeline.

- Last December, Congress passed a temporary mortgage debt tax relief act that will provide homeowners relief from taxes that would have otherwise been due from principal forgiveness.

- The Administration has advocated temporarily raising the cap on tax-exempt bonds for state housing authorities to help borrowers refinance.

- On December 18, 2007, the Federal Reserve proposed changes to Regulation Z ("Truth in Lending Act"/"Home Ownership and Equity Protection Act") to protect consumers from unfair or deceptive home mortgage lending and advertising practices.

- The Administration has proposed FHA Modernization to create new financing options for home-buyers and homeowners.

- The Department of Housing and Urban Development is proposing to reform the Real Estate Settlement and Procedures Act regulations to bring much needed transparency to the home-buying process.

To boost housing counseling efforts, the Neighborhood Reinvestment Corporation or "NeighborWorks® America" was designated by Congress to develop and implement a new program to minimize the impact on homeowners who face or are at-risk of foreclosure. Created by your Transportation-HUD Appropriations Subcommittee colleagues, NeighborWorks is administering a new foreclosure mitigation program, with an appropriation of $180 million provided in the FY 2008 Omnibus Appropriations Act.

NeighborWorks has just recently awarded $130 million to applicants who plan to provide 89 percent of their services in areas of greatest need.

Due to the CDFI Fund's experience working in distressed communities and with homeowners, I am serving on the NeighborWorks's advisory committee to assist the organization in implementing this important new program.

Financial Literacy and Education

Treasury plays an active role in improving the nation's level of financial literacy and education for people across our Nation. Whether it is buying a home or making an investment, understanding the basics behind assets and liabilities, managing your credit, saving for the future, or avoiding fraud, I think we can all agree that financial education can help consumers make better choices.

One of Treasury's main efforts in improving the nation's level of financial literacy and education is through the Financial Literacy and Education Commission (known as "FLEC"), which was created by the Fair and Accurate Credit Transactions Act of 2003. Under this Act, the Secretary of the Treasury was named the head of the Commission. FLEC includes 19 other federal agencies, including the FTC which is also represented here today. FLEC published the first-ever national strategy on financial education, and provides useful financial information for consumers on its website at www.mymoney.gov and through its toll-free number at 1-888-MYMONEY, both of which are available in English and Spanish. Through these channels, consumers can find information related to home ownership and retention (including avoiding foreclosure), how to access your credit report and build better credit, and retirement planning.

In addition to FLEC, Treasury coordinates the President's new Advisory Council on Financial Literacy, which recently held its inaugural meeting. The Council advises the President and Secretary of the Treasury on ways to encourage financial literacy. In pursuit of this objective, the Council will evaluate financial literacy in the United States, including the use of a survey to identify what Americans know and need to know about money. With this information, the Council will encourage private sector entities to increase financial literacy efforts, particularly in areas of greatest concern.

Conclusion

Mr. Chairman, thank you for holding this important hearing and for allowing the Treasury Department to testify. Before closing, I also want to thank you and this subcommittee for your support of the CDFI Fund and for your strong support of Treasury's financial literacy and education programs.

This concludes my formal statement and I would be pleased to answer any of your questions.

-30-

Mr. SERRANO. Thank you.

DIRECTOR PARNES' TESTIMONY

Ms. PARNES. Chairman Serrano, Ranking Member Regula, and members of the Subcommittee, I, too, appreciate the opportunity to speak with you today about the Federal Trade Commission's efforts to combat unfair, deceptive, and other illegal practices in the consumer financial services industry.

First and foremost, the Commission is a law enforcement agency with wide-ranging responsibilities, including consumer financial issues. We enforce Section 5 of the FTC Act, which prohibits unfair or deceptive acts or practices, as well as over half a dozen consumer credit-related statutes. The Commission's authority, however, does not extend to banks, thrifts, and federal credit unions, which Congress has exempted from the Commission's jurisdiction.

The FTC does have jurisdiction over non-bank federal entities. The Commission investigates and prosecutes those who violate the law. We do not audit or supervise these financial institutions.

Mortgage lending has long been a Commission priority. In the past decade, the agency has brought 21 actions focused on the mortgage lending industry, alleging that mortgage brokers, lenders, and servicers have engaged in unfair or deceptive acts and practices. These cases have collectively returned more than $320 million to consumers.

Today the Commission is announcing new actions to protect consumers from foreclosure rescue scams. This week we filed a case alleging that a company called Safe Harbor contacts homeowners guaranteeing to save their homes from foreclosure. Instead, the company allegedly entices consumers into a second mortgage or home equity line of credit, on unfavorable terms, without fully disclosing the costs, risks, and consequences of doing so. We filed two other cases under seal this week alleging similar unfair and deceptive practices.

In conjunction with these cases, we are rolling out a related consumer education effort—a fact sheet on how to avoid foreclosure rescue scams, a series of radio PSAs in English and Spanish, and warnings about these schemes which we will place in the classified ad sections of English and Spanish language community newspapers.

Our cases and consumer outreach are part of a larger partnership to combat mortgage foreclosure rescue scams. Commission staff are leading or participating in seven task forces around the country to tackle the problems of increasing foreclosures and related fraud. Let me mention two other recent initiatives in the mortgage lending area.

First, the FTC last fall warned over 200 mortgage brokers and lenders, and the media that carried their ads, that their advertising claims may violate federal law. The Commission is investigating a number of these mortgage advertisers and will continue to monitor these claims.

Second, the Commission has been active in a new interagency subprime lending project. As part of this project, the FTC, the Federal Reserve Board, the Office of Thrift Supervision, and state regulators are jointly conducting compliance reviews and investiga-

tions of certain financial entities with significant subprime operations.

The Commission, likewise, has been active in its efforts to protect consumers of non-mortgage financial services. Yesterday, the FTC announced consent agreements with three internet payday lenders who advertised the costs of their loans without disclosing their annual percentage rate, in violation of the Truth in Lending Act. This violation makes it far more difficult for consumers to comparison shop between payday loans as well as between payday loans and other short-term forms of credit.

Consumer education also is a key to protecting consumers in the financial services marketplace. The FTC has more than 50 credit-related educational brochures, and we use innovative methods to get our messages out. For example, we created—and I have here—an English and Spanish language guide to help organizations working with Hispanic communities to educate consumers about their rights.

We have partnered with local agencies to give financial education presentations at senior centers and other community-based organizations, and just this month the U.S. Postal Service distributed our identity theft brochure to the 121 million U.S. households.

Protecting consumers from unfair and deceptive acts and practices in the financial services market is, and will continue to be, a top priority for the FTC. The Commission appreciates your consideration of its views, and I look forward to your questions.

Thank you.

[The information follows:]

PREPARED STATEMENT OF

THE FEDERAL TRADE COMMISSION

on

CONSUMER PROTECTION IN FINANCIAL SERVICES: SUBPRIME LENDING AND OTHER FINANCIAL ACTIVITIES

Before the

HOUSE COMMITTEE ON APPROPRIATIONS

SUBCOMMITTEE ON FINANCIAL SERVICES
AND GENERAL GOVERNMENT

Washington, D.C.
February 28, 2008

I. INTRODUCTION

Chairman Serrano, Ranking Member Regula, and Members of the Committee, I am Lydia B. Parnes, Director of the Bureau of Consumer Protection at the Federal Trade Commission ("FTC" or "Commission").[1] I appreciate the opportunity to appear before you today to discuss the Commission's wide range of activities to protect consumers of financial services, particularly in the subprime market.

The FTC deals with issues that touch the economic life of nearly every American. It is the only federal agency with both consumer protection and competition jurisdiction in broad sectors of the economy. In consumer protection, the Commission's mandate is to protect consumers from unfair and deceptive practices. That broad mandate brings the Commission's work into areas as varied as children's online privacy, false claims for foods, drugs, and dietary supplements, weight-loss advertising, scholarship scams, pyramid schemes, and identity theft, to name just a few. The Commission's actions to protect consumers of financial services are a very important part of its consumer protection work.

The Commission protects consumers at every stage of the consumer credit life cycle, from the advertising and marketing of financial products to debt collection and debt relief. The Commission assists consumers in obtaining the information they need to make better informed financial decisions and protects them from unlawful acts and practices that are likely to cause them harm.

During today's testimony, the FTC would like to emphasize the following points:

- The FTC's recent law enforcement actions in the financial services marketplace have targeted deception and illegal practices in: (1) subprime and prime mortgage lending and

[1]The views expressed in this statement represent the views of the Commission. My oral presentation and responses to any questions are my own, however, and do not necessarily reflect the views of the Commission or any individual Commissioner.

servicing; (2) payday lending and other forms of unsecured consumer credit; (3) payment cards; (4) gift cards; (5) payment processing; (6) debt collection; and (7) debt negotiation and credit repair.

- In the past decade, the Commission has brought 21 actions focused on the mortgage lending industry, with particular attention to entities in the subprime market, alleging that mortgage lenders and servicers engaged in unfair or deceptive acts and practices. These cases have collectively returned more than $320 million to consumers.

- Most recently, the FTC warned over 200 mortgage brokers and lenders, and media outlets that carry their advertisements for home mortgages, that their advertising claims may violate federal law. The Commission has ongoing investigations of mortgage advertisers and is continuing to monitor mortgage advertising claims.

- With the recent rapid increase in mortgage delinquencies and foreclosures, the FTC also has intensified its focus on protecting consumers from mortgage foreclosure rescue scams. The Commission will shortly file three law enforcement actions against defendants allegedly engaged in mortgage foreclosure fraud, and has additional matters under investigation.

- To empower consumers to better protect themselves from potentially harmful conduct, the FTC also engages in extensive consumer education related to mortgage lending. New educational materials in English and Spanish provide information about deceptive mortgage advertisements, mortgage foreclosure rescue scams, buying a home, and steps borrowers can take to avoid foreclosure.

- In the area of unsecured consumer credit, such as payday loans, the FTC takes legal action when lenders deceive consumers about their credit terms or otherwise fail to provide disclosures or other information that the law requires. The FTC also focuses on consumer education, alerting consumers to the importance of comparison shopping among short-term credit alternatives, and to information they should consider in evaluating credit offers.

- In the area of payment cards, the FTC brings legal actions against nonbank entities under its jurisdiction that use deceptive or unfair means to market debit and credit cards, such as by charging consumers advance fees to obtain credit, or by failing to adequately disclose the existence of fees associated with a payment card.

- In the area of gift cards, the FTC has brought cases against Kmart Corp. and Darden Restaurants, Inc. for failure to adequately disclose gift card fees and expiration dates. Evidence suggests that large gift card retailers nationwide recently have changed their practices.

- The FTC also brings law enforcement actions against non-bank payment processors, alleging unfair practices or violations of the FTC's telemarketing rules. In an ongoing action, the FTC has charged a payment processor with debiting, or attempting to debit, over $200 million from consumers' bank accounts on behalf of fraudulent merchants.

- The FTC also protects consumers in financial distress. For example, in the past decade, the FTC has brought 21 lawsuits for illegal debt collection practices, and has obtained both tough permanent injunctive relief and substantial monetary judgments.

- The FTC also acts aggressively against "credit repair" scams, in which marketers promise to cleanse individual credit reports of negative information, and debt reduction services that charge hidden fees and make false promises to lower consumers' debts.

- The FTC budget request for FY2009 contains additional funding to support this work as well as the other important work of the agency. To accomplish the agency's consumer protection and competition missions in FY 2009, the FTC requests $256,200,000 and 1,102 Full Time Equivalents (FTEs). Of the requested amount, Hart-Scott-Rodino pre-merger filing fees and Do Not Call fees will provide the Commission with an estimated $189,800,000 in FY 2009. Thus, the FTC anticipates that the remaining funds needed for its operations will come from a direct appropriation of $66,400,000 from the General Fund in the United States Treasury.

This testimony will discuss: (1) the Commission's authority and mission related to financial services; (2) the FTC's efforts to protect mortgage borrowers, especially subprime mortgage borrowers; (3) the agency's activities to protect consumers of non-mortgage financial services, such as payday loans and payment cards; and (4) the Commission's efforts to help consumers in financial distress.

II. THE FTC'S ROLE IN FINANCIAL SERVICES

The Commission has responsibilities regarding many financial services affecting consumers. The Commission enforces Section 5 of the Federal Trade Commission Act ("FTC Act"), which broadly prohibits unfair or deceptive acts or practices in or affecting commerce.[2] The Commission also enforces statutes that address specific aspects of lending practices, including the Truth in Lending Act ("TILA"),[3] and the Home Ownership and Equity Protection

[2] 15 U.S.C. § 45(a).

[3] 15 U.S.C. §§ 1601-1666j (requiring disclosures and establishing other requirements in connection with consumer credit transactions).

Act ("HOEPA").[4] In addition, the Commission enforces a number of other consumer protection statutes that govern financial service providers, including the Consumer Leasing Act,[5] the Fair Debt Collection Practices Act ("FDCPA"),[6] the Fair Credit Reporting Act ("FCRA"),[7] the Equal Credit Opportunity Act ("ECOA"),[8] the Credit Repair Organizations Act ("CROA"), and the privacy provisions of the Gramm-Leach-Bliley Act ("GLB").[9]

The Commission's legal authority does not extend to all entities that provide financial services to consumers. The FTC Act and the credit statutes that the FTC enforces specifically exempt banks, thrifts, and federal credit unions, among other types of entities, from the Commission's jurisdiction.[10] The FTC, however, has jurisdiction over nonbank financial companies, including nonbank mortgage companies, mortgage brokers, and finance companies. The agency also coordinates regularly on financial practices matters with federal banking agencies, the Department of Justice ("DOJ") and the Department of Housing and Urban Development ("HUD"). The FTC also engages in cooperative efforts with many state attorneys

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[4]15 U.S.C. § 1639 (providing additional protections for consumers who enter into certain high-cost refinance mortgage loans). HOEPA is a part of TILA.

[5]15 U.S.C. §§ 1667-1667f (requiring disclosures, limiting balloon payments, and regulating advertising in connection with consumer lease transactions).

[6]15 U.S.C. §§ 1692-1692p (prohibiting abusive, deceptive, and unfair debt collection practices by third-party debt collectors).

[7]15 U.S.C. §§ 1681-1681x (imposing standards for consumer reporting agencies and information furnishers in connection with the credit reporting system and placing restrictions on the use of credit reporting information).

[8]15 U.S.C. §§ 1691-1691f (prohibiting creditor practices that discriminate on the basis of race, religion, national origin, sex, marital status, age, receipt of public assistance, and the exercise of certain legal rights).

[9]15 U.S.C. §§ 6801-6809 (imposing requirements on financial institutions with respect to annual privacy notices, procedures for providing customers an opt-out from having certain information shared with nonaffiliated third parties, and safeguarding customers' personally identifiable information).

[10]*See, e.g.,* 15 U.S.C. §45(a)(2).

general and state banking departments to protect consumers.

The Commission employs a multi-faceted approach to protect consumers of financial services. The Commission brings enforcement actions against entities that violate the law, educates consumers and businesses as to their rights and responsibilities under the law, and engages in research to adapt its policies to protect consumers more effectively. The testimony below discusses how the FTC is using its multi-faceted approach to protect consumers of mortgage and non-mortgage financial services in the marketplace.

III. PROTECTING SUBPRIME AND PRIME MORTGAGE BORROWERS

The Commission is committed to using all means at its disposal to protect mortgage borrowers against those who would prey on their financial turmoil, and to provide information to help them confront the challenges they face.

A. Law Enforcement

In the past decade, the Commission has brought 21 actions focused on the mortgage lending industry, with particular attention to entities in the subprime market, alleging that mortgage lenders and servicers engaged in unfair or deceptive acts and practices.[11] Several of these landmark cases have resulted in large monetary judgments, collectively returning more than $320 million to consumers.

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[11] *FTC v. Mortgages Para Hispanos.Com Corp.*, No. 06-00019 (E.D. Tex. 2006); *FTC v. Ranney*, No. 04-1065 (D. Colo. 2004); *FTC v. Chase Fin. Funding*, No. 04-549 (C.D. Cal. 2004); *United States v. Fairbanks Capital Corp.*, No. 03-12219 (D. Mass. 2003); *FTC v. Diamond*, No. 02-5078 (N.D. Ill. 2002); *United States v. Mercantile Mortgage Co.*, No. 02-5079 (N.D. Ill. 2002); *FTC v. Associates First Capital Corp.*, No. 01-00606 (N.D. Ga. 2001); *FTC v. First Alliance Mortgage Co.*, No. 00-964 (C.D. Cal. 2000); *United States v. Action Loan Co.*, No. 00-511 (W.D. Ky. 2000); *FTC v. NuWest, Inc.*, No. 00-1197 (W.D. Wash. 2000); *United States v. Delta Funding Corp.*, No. 00-1872 (E.D.N.Y. 2000); *FTC v. Barry Cooper Prop.*, No. 99-07782 (C.D. Cal. 1999); *FTC v. Capitol Mortgage Corp.*, No. 99-580 (D. Utah 1999); *FTC v. CLS Fin. Serv., Inc.*, No. 99-1215 (W.D. Wash. 1999); *FTC v. Granite Mortgage, LLC*, No. 99-289 (E.D. Ky. 1999); *FTC v. Interstate Res. Corp.*, No. 99-5988 (S.D.N.Y. 1999); *FTC v. LAP Fin. Serv., Inc.*, No. 99-496 (W.D. Ky. 1999); *FTC v. Wasatch Credit Corp.*, No. 99-579 (D. Utah 1999); *In re First Plus Fin. Group, Inc.*, FTC Docket No. C-3984 (2000); *In re Fleet Fin., Inc.*, FTC Docket No. C-3899 (1999); *FTC v. Capital City Mortgage Corp.*, No. 98-00237 (D.D.C. 1998).

Most of the Commission's enforcement actions have challenged the deceptive advertising or marketing of subprime loans. For example, the FTC's complaint against Associates First Capital Corp. and Associates Corporation of North America ("the Associates") alleged that the defendants marketed subprime mortgage loans through false and misleading statements about loan costs.[12] The Associates represented that consumers would save money when consolidating their existing debts, but these "savings claims" did not take into account the loan fees and closing costs the company typically added to consumers' loan amounts. Further, the claims did not disclose that, for certain Associates loans, consumers would pay only interest and still would owe the entire principal amount in a "balloon" payment at the end of the loan term. The complaint also alleged that the Associates deceptively sold single-premium credit insurance with its mortgage loans. The defendants paid a record $215 million in consumer redress to settle the FTC's complaint allegations.[13]

Mortgage brokers also have been the subject of substantial FTC law enforcement activity in recent years. The FTC has brought enforcement actions against brokers for allegedly deceiving consumers about key loan terms, such as the existence of a prepayment penalty[14] or a large balloon payment due at the end of the loan.[15] In some of these cases, the Commission also has charged brokers with falsely promising consumers low fixed payments and rates on their

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[12]*FTC v. Associates First Capital Corp.*, No. 01-00606 (N.D. Ga. 2001).

[13]*FTC v. Associates First Capital Corp.*, No. 01-00606 (N.D. Ga. Jan. 26, 2002) (Order Preliminarily Approving Stipulated Final Judgment and Order).

[14]*FTC v. Chase Fin. Funding*, No. 04-549 (C.D. Cal. 2004); *FTC v. Diamond*, No. 02-5078 (N.D. Ill. 2002).

[15]*FTC v. Diamond*, No. 02-5078 (N.D. Ill. 2002).

mortgage loans.[16]

In a recent case, the Commission alleged that a mortgage broker misrepresented numerous key loan terms to Hispanic consumers who sought to refinance their homes.[17] The complaint alleged that the broker conducted business with his clients almost entirely in Spanish, then provided at closing English-language documents with less favorable terms. The settlement of the case provided for, among other things, a $240,000 suspended judgment against the broker, required that an independent settlement agent conduct the closing for each mortgage the defendant brokered, and imposed a permanent injunction prohibiting the broker from misrepresenting loan terms.[18]

In the Commission's most recent law enforcement initiative attacking potentially deceptive marketing by mortgage lenders, the FTC last fall warned over 200 mortgage brokers and lenders, and media outlets that carry their advertisements for home mortgages, that their advertising claims may violate federal law.[19] The ads, including some in Spanish, were identified during a nationwide review focused on claims for very low monthly payment amounts or interest rates that were not accompanied by an adequate disclosure of other important loan terms. The Commission currently is conducting several investigations of mortgage advertisers and will continue to monitor the claims made in mortgage advertising.

In addition to law enforcement related to mortgage advertising, the FTC plays an

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[16]*FTC v. Chase Fin. Funding*, No. 04-549 (C.D. Cal. 2004); *FTC v. Ranney*, No. 04-1065 (D. Colo. 2004); *FTC v. Diamond,* No. 02-5078 (N.D. Ill. 2002).

[17]*FTC v. Mortgages Para Hispanos.Com Corp.*, No. 06-00019 (E.D. Tex. 2006).

[18]*FTC v. Mortgages Para Hispanos.Com Corp.*, No. 06-00019 (E.D. Tex. Sept. 25, 2006) (Stipulated Final Judgment and Order of Permanent Injunction) (entering suspended judgment of $240,000 and ordering payment of $10,000 based on documented inability to pay full judgment amount).

[19]*See* Press Release, FTC, FTC Warns Mortgage Advertisers and Media That Ads May Be Deceptive (Sept. 11, 2007), *available at* www.ftc.gov/opa/2007/09/mortsurf.shtm.

important role in preventing unlawful mortgage discrimination.[20] Since the ECOA was enacted, the Commission has brought over three dozen cases against large subprime lenders, major non-mortgage creditors, and smaller finance companies alleging ECOA violations. About two dozen of these cases have alleged substantive discrimination on the basis of race, marital status, sex, age, and the receipt of public assistance.[21]

The FTC closely coordinates its fair lending investigations with those of other federal law enforcement agencies.[22] A major component of the Commission's investigations is a statistical analysis of the data that companies within the FTC's jurisdiction have produced

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[20]The Commission's July 25, 2007 testimony before the Subcommittee on Oversight and Investigations of the House Committee on Financial Services detailed the Commission's fair lending program. The testimony is available at www.ftc.gov/os/testimony/P064806hdma.pdf.

[21]*See, e.g., United States v. Delta Funding Corp.,* No. CV 00 1872 (E.D.N.Y. 2000) (sex, race); *United States v. Ford Motor Credit Co.,* No. 99-75887 (E.D. Mich. 1999) (marital status); *United States v. Franklin Acceptance Corp.,* No 99-CV-2435 (E.D. Pa. 1999) (sex, marital status); *United States v. Money Tree, Inc.,* No. 6-97-CV-7 (M.D. Ga. 1997) (age, receipt of public assistance); *FTC v. CIT,* No. 94-4092 (D. N.J. 1994) (marital status); *United States v. Shawmut Mortgage Co.,* No. 93CC-2453 (D. Conn. 1993) (race, national origin); *United States v. Academic Int'l,* No. 1:91-CV-2738 (N.D. Ga. 1991) (race); *United States v. Barclays Am.,* No. C-C-91-14 (W.D.N.C. 1991) (sex, marital status); *United States v. Blake,* No. 90-1064 (W.D. Okla. 1990) (sex, marital status); *United States v. Chesterfield,* No. 90 C 0347 (N.D. Ala. 1990) (age, sex, marital status); *United States v. City Fin.,* No.1:90-cv-246 (N.D. Ga. 1990) (age, sex, marital status); *United States v. Tower Loan of Mississippi,* No. J90-0447 (S.D. Miss. 1990) (age); *United States v. GECC,* No. N89-483 (D. Conn. 1989) (age, sex, marital status); *United States v. Wanamakers,* No. 89-1466 (E.D. Pa. 1989) (sex, marital status); *United States v. William Lee Moore III,* No. N89-2531 (N.D. Tex. 1989) (age, sex, marital status); *United States v. ITT CFC,* 816 F. 2d 487 (9th Cir. 1987) (sex, marital status); *FTC v. Green Tree Acceptance,* No. CA 4 86 468 (N.D. Tex. 1986) (age); *United States v. Allied Fin.,* No. CA3-85-1933F (N.D. Tex. 1985) (age, sex, marital status); *United States v. Fid. Acceptance,* No. 3-85-1588 (D. Minn. 1985) (age); *United States v. Landmark Fin.,* No. N-84-5310 (D. Md. 1984) (age); *United States v. Aristar,* No. 83-0719 (S.D. Fla. 1983) (age); *United States v. Sec. Pac.,* No. 832 647 N (CM) (S.D. Ca. 1983) (sex, marital status); *United States v. Georgia Telco,* No. 80-1217A (N.D. Ga. 1982) (sex); *United States v. Amoco Oil Co.,* No. 80-1071 (D. D.C. 1980) (race, national origin, sex, marital status, receipt of public assistance); *United States v. Federated Dep't Stores,* No. C-1-78-730 (E.D. Va. 1979) (sex, marital status, age, receipt of public assistance); *In the Matter of Westinghouse Credit Corp.,* 94 FTC 1280 (1979) (marital status); *In the Matter of Alden's, Inc.,* 92 FTC 901 (1978) (sex, marital status).

[22]For more than a decade, the FTC has been a member of the Interagency Task Force on Fair Lending, a joint undertaking with the Department of Justice, the Department of Housing and Urban Development, and the federal banking regulatory agencies. Task Force members meet often to share information on lending discrimination, predatory lending enforcement, and policy issues.

pursuant to the Home Mortgage Disclosure Act ("HMDA").[23] At this time, the Commission is conducting several non-public investigations of mortgage originators for possible violations of fair lending laws.

The FTC also fights unfair and deceptive practices in the mortgage servicing area. For example, in 2003, along with the HUD, the Commission charged Fairbanks Capital Corp. (now called Select Portfolio Servicing, Inc.) with violating federal law in connection with mortgage servicing.[24] The Commission alleged that Fairbanks, then one of the country's largest third-party subprime loan servicers, failed to post consumers' payments upon receipt, charged unauthorized fees, used dishonest or abusive tactics to collect debts, and reported consumer payment information that it knew to be inaccurate to credit bureaus. The settlement agreement included a $40 million redress fund for consumers, as well as strong injunctive provisions, including specific safeguards to prevent the company from foreclosing on consumers without cause.[25] Last year, based on a compliance review of the company, the Commission negotiated modifications of the 2003 consent order that provided substantial benefits to consumers beyond those in the original order, including additional refunds of fees paid in certain circumstances.[26]

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[23]12 U.S.C. § 2801. HMDA requires certain mortgage lenders located in metropolitan areas to collect and report to the government data about their housing-related loans and applications for such loans. The data include pricing data for higher-priced loans made in 2004 or later. Of the 8,886 institutions that reported HMDA data in 2006, 2,004 institutions are nondepository institutions subject to FTC jurisdiction. Robert B. Avery, Kenneth P. Brevoort, and Glenn B. Canner, *The 2006 HMDA Data*, 93 FEDERAL RESERVE BULLETIN (Dec. 2007) at A73, *available at* www.federalreserve.gov/pubs/bulletin/2007/pdf/hmda06final.pdf. The remaining 6,882 institutions reporting data are depository institutions subject to federal banking agency jurisdiction.

[24]*United States v. Fairbanks Capital Corp.*, No. 03-12219 (D. Mass. 2003).

[25]*United States v. Fairbanks Capital Corp.*, No. 03-12219 (D. Mass. Nov. 21, 2003) (Order Preliminarily Approving Stipulated Final Judgment and Order as to Fairbanks Capital Corp. and Fairbanks Capital Holding Corp.).

[26]*United States v. Fairbanks Capital Corp.*, No. 03-12219 (D. Mass. Sept. 4, 2007) (Modified Stipulated Final Judgment and Order).

Finally, with the recent rapid increase in mortgage delinquencies and foreclosures, the FTC has intensified its focus on protecting consumers from mortgage foreclosure rescue scams.[27] There are many varieties of mortgage foreclosure rescue fraud but, in each case, the perpetrator makes misleading promises that a consumer's home will be saved from the pending foreclosure permanently.[28] Many consumers, however, ultimately lose their homes and lose the money they paid to scammers.

The Commission will shortly file three law enforcement actions against defendants allegedly engaged in mortgage foreclosure fraud. Although these cases and the additional cases currently under investigation are not yet public, speaking generally, it can be said that they share at least two common characteristics. First, the fraudulent schemes target consumers who face imminent foreclosure and who thus have limited time and resources to save their homes. Second, these schemes falsely promise consumers that their homes can be saved from foreclosure.

In two of these cases, the Commission alleges that the defendants promise to stop foreclosure in exchange for a consumer's up-front payment of $500 to $1,200. After a consumer makes the payment, the defendants do little or nothing to stop the foreclosure. This fraud deprives consumers not only of much-needed funds but also of the opportunity to explore realistic options. In the third case, the Commission alleges that the defendants entice consumers into a second mortgage or home equity line of credit on very unfavorable terms without fully

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[27]In testimony on February 13, 2008 before the Senate Special Committee on Aging on foreclosure rescue fraud, the Commission set forth a more complete description of the FTC's efforts to address such fraud. The FTC's testimony is available at ftc.gov/os/testimony/P064814foreclosure.pdf.

[28]*See* Prentiss Cox, *Foreclosure Equity Stripping: Legal Theories and Strategies to Attack a Growing Problem,* CLEARINGHOUSE REV. J. OF POVERTY LAW AND POL'Y, Mar.-Apr. 2006 at 607, 608.

disclosing the costs, risks, and consequences of doing so.

In addition to its own law enforcement, the Commission is working with state and local partners in law enforcement and consumer outreach. More specifically, the FTC staff is leading or participating in seven federal-state-local task forces across the country. Task force members share information about mortgage foreclosure scams and coordinate their prosecutions.

As described above, the Commission has a vigorous law enforcement program to protect consumers in connection with many aspects of their mortgage loans. The FTC continues to explore ways to enhance the effectiveness of its law enforcement activities related to mortgage financing. For example, through the Interagency Pilot Project to Review Subprime Lender Conduct, the FTC, the Federal Reserve Board ("FRB"), the Office of Thrift Supervision ("OTS"), and two associations of state regulators have combined forces in undertaking an innovative law enforcement project. The agencies are jointly conducting consumer protection compliance reviews and investigations of certain nonbank subsidiaries of bank holding companies with significant subprime mortgage operations.[29]

B. Consumer Education

Law enforcement is the primary means that the Commission uses to combat mortgage lending acts and practices that harm consumers. Although law enforcement is vital, consumers are, of course, better off if they are not injured in the first place. To empower consumers to better protect themselves from potentially harmful conduct, the FTC engages in extensive consumer education related to mortgage lending.

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[29] *See* Press Release, FTC, Federal and State Agencies Announce Pilot Project to Improve Supervision of Subprime Mortgage Lenders (July 17, 2007), *available at* www.ftc.gov/opa/2007/07/subprime.shtm.

In 2007, the Commission released several new mortgage-related consumer brochures, including brochures on deceptive mortgage advertisements, buying a home, how to manage a mortgage if the mortgage lender goes out of business or files for bankruptcy, and high-rate, high-fee mortgages.[30] To help consumers facing possible foreclosure, the Commission also released an alert offering guidance on steps borrowers can take to avoid foreclosure. In conjunction with its impending law enforcement actions alleging foreclosure rescue schemes, the Commission also is planning a stepped-up consumer outreach initiative on foreclosure rescue fraud. Among other things, the FTC will submit a series of radio public service announcements, in English and Spanish, to stations in cities hardest hit by mortgage foreclosures, as well as publish classified advertisements in English- and Spanish-language community newspapers.[31] All of the Commission's consumer protection materials, including many released in Spanish as part of the Commission's Hispanic Outreach Program, are available to the public on the FTC's website or by calling the FTC's Consumer Response Center toll-free at 1-877-FTC-HELP.[32]

The Commission also regularly partners with other agencies to educate consumers. Partnering with other agencies has proven to be an effective technique because it taps the respective expertise and distribution channels of the agencies involved. The FTC has jointly

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[30]The Commission's consumer education materials are available from the FTC's website, www.ftc.gov. The FTC publishes many of its materials in both English and Spanish. Educational materials on mortgage and real estate issues are directly accessible from the FTC's webpage, Credit and Loans: Mortgages/Real Estate, www.ftc.gov/bcp/menus/consumer/credit/mortgage.shtm. In Spanish, the materials are available from the FTC's webpage, Crédito y Préstamos: Hipotecas/Propiedades, www.ftc.gov/bcp/menus/consumer/credit/mortgage_es.shtm.

[31]The Commission also will send information to community libraries, unions, and other organizations warning consumers about foreclosure rescue scams.

[32]The Commission's Spanish-language publications are available from its webpages, Información de la FTC para Consumidores, *available at* www.ftc.gov/bcp/consumer_es.shtm, and ¡OHO! Mantente alerta contra el fraude: Infórmate con la FTC, *available at* www.ftc.gov/ojo.

published with the banking regulators, the DOJ, and HUD brochures addressing key lending issues.[33] The FTC continues to participate in the governmental Financial Literacy and Education Commission, contributing its expertise to subcommittees that produced *MyMoney.gov* and *Taking Ownership of the Future: The National Strategy for Financial Literacy.*[34]

C. Research and Policy Development

The mortgage marketplace in the United States is dynamic. The Commission therefore engages in public workshops and other research efforts so that it may better understand particular consumer protection issues in the changing marketplace, and advocate for policies that promote protections for consumers, such as policies that foster informed mortgage borrowing.

For example, in June 2007, the FTC staff released an empirical study assessing the effectiveness of mortgage disclosure documents that mortgage originators are required to provide to consumers under the Real Estate Settlement Procedures Act ("RESPA") and TILA.[35] The study found that these disclosures were not very effective in helping consumers of subprime and prime mortgages understand the terms of mortgages and their implications. The study also

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[33]*See, e.g., Looking for the Best Mortgage? Shop, Compare, and Negotiate, available at* www.ftc.gov/bcp/edu/pubs/consumer/homes/rea09.shtm.

[34]*See* www.mymoney.gov. In addition, each April, the FTC participates in Financial Literacy Month. Activities include presentations to students on the importance of responsible credit card use and safeguarding personal information, and exhibits at Financial Literacy Day on Capitol Hill, where agency representatives distribute free consumer education materials.

[35]JAMES M. LACKO & JANIS K. PAPPALARDO, FEDERAL TRADE COMM'N, BUREAU OF ECONOMICS STAFF REPORT, IMPROVING CONSUMER MORTGAGE DISCLOSURES: AN EMPIRICAL ASSESSMENT OF CURRENT AND PROTOTYPE DISCLOSURE FORMS (2007), *available at* www.ftc.gov/os/2007/06/P025505mortgagedisclosurereport.pdf. FTC staff previously conducted empirical studies of mortgage disclosures. *See* JAMES M. LACKO & JANIS K. PAPPALARDO, FEDERAL TRADE COMM'N, BUREAU OF ECONOMICS STAFF REPORT, THE EFFECT OF MORTGAGE BROKER COMPENSATION DISCLOSURES ON CONSUMERS AND COMPETITION: A CONTROLLED EXPERIMENT (2004), *available at* www.ftc.gov/os/2004/01/030123mortgagefullrpt.pdf.

demonstrated that consumers could benefit from changes in current disclosure requirements. Significantly, the study suggested that, in actual market transactions, subprime borrowers may face even greater difficulties understanding the terms of their mortgages than they did in the study and, therefore, these borrowers may benefit the most from improved disclosures.

Based in part on its mortgage disclosure study, the FTC staff in November 2007 submitted comments to the federal banking agencies in response to their request for comments on proposed illustrations to disclose information to consumers about subprime mortgages.[36] The comments stated that consumers likely would benefit from one clear disclosure document that alerts them to the major costs and features of a mortgage. Such a document would significantly reduce the cost of obtaining accurate information about the value of different mortgage options, be noticeable and easy to read and understand, feature up-front summaries of key loan features, and make clear what a consumer is getting before signing legal documents. The comments also noted the importance of consumer research and expressed the FTC staff's readiness to participate with the FRB and HUD in a more comprehensive effort to improve mortgage disclosures.[37]

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[36]*See* FEDERAL TRADE COMM'N, STAFF COMMENTS TO JENNIFER J. JOHNSON, SECRETARY, BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM (October 2007), *available at* www.ftc.gov/be/v080000.pdf.

[37]Similarly, in a comment filed with the FRB, the Commission stated that, as consumers shop for a mortgage, it is important that they receive timely and understandable information about the loan terms and costs of the particular products they are trying to analyze and compare. Moreover, for many mortgage products with payment schedules that likely will increase substantially in future years, it is important that consumers receive information about their future payments at a time when they can readily use the information in selecting their preferred loan and terms. *See* FEDERAL TRADE COMM'N, COMMENT BEFORE THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, DOCKET NO. OP-1253: UNFAIR AND DECEPTIVE PRACTICES IN THE MORTGAGE LENDING MARKET, ALTERNATIVE MORTGAGE PRODUCTS, AND INFORMED CONSUMER CHOICE IN THE MORTGAGE MARKETPLACE (September 2006), *available at* www.ftc.gov/os/2006/09/docketop-1253commentfedreserve homeeqlenditextv.pdf. The comment was based, in part, on information learned at a May 2006 workshop the Commission sponsored on consumer protection issues associated with nontraditional mortgage products. *See* Protecting Consumers in the New Mortgage Marketplace, 71 Fed. Reg. 15,417 (Mar. 28, 2006); *see also*

In other mortgage-related policy work, the FTC staff late last year shared with the OTS the Commission's experience in challenging unfair or deceptive acts and practices in the financial services context. The FTC staff filed a public comment with the OTS in response to a request for information about whether the OTS should issue regulations to expand its prohibitions against thrifts engaging in unfair or deceptive acts and practices in mortgage and non-mortgage lending.[38] The FTC staff comment set forth the general principles of unfairness and deception under the FTC Act, and described how the Commission has applied these principles over the course of many decades to protect consumers of financial services. The comment recommended that the OTS consider the FTC's experience in determining whether to use its authority to issue new rules that prohibit or restrict thrifts from engaging in unfair or deceptive practices related to mortgages and other types of lending.

IV. PROTECTING CONSUMERS OF NON-MORTGAGE FINANCIAL SERVICES

The Commission's actions to protect consumers of financial services extend beyond mortgage lending to a wide range of non-mortgage financial services. As in mortgage financing, the Commission uses all tools at its disposal – law enforcement, consumer education, and research and policy development – to prevent consumers from being deceived as well as to assist them in obtaining the information they need to make better informed decisions about financial services.

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www.ftc.gov/bcp/workshops/mortgage/index.html.

[38]FEDERAL TRADE COMM'N, STAFF COMMENT TO JOHN E. BOWMAN, CHIEF COUNSEL, REGULATION COMMENTS, OFFICE OF THRIFT SUPERVISION, REGARDING SECTION 5 POLICY ISSUE FOR FINANCIAL PRACTICES (December 2007), *available at* www.ftc.gov/os/2007/12/P084800anpr.pdf.

A. Unsecured Consumer Credit

Nonbank entities extend credit to consumers, sometimes in the form of cash loans, and sometimes in the form of merchandise or services that consumers receive and then pay for over time. The FTC provides consumers with information to help them make better informed choices about unsecured consumer credit, including enhancing their ability to comparison shop among the credit alternatives available to them. The Commission also takes legal action when lenders deceive consumers about their credit terms or otherwise fail to provide the disclosures or other information that the law requires.[39]

Payday loans are small, high-cost, short-term loans, usually based on a deferred presentment of a borrower's check or electronic access to his or her bank account. Payment is due on the borrower's next payday, which is usually in two weeks. Typical finance charges on payday loans range from $15 to $30 per $100 borrowed,[40] which results in annual percentage

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[39] *See, e.g., FTC v. Stewart Finance Company Holdings, Inc.*, No. 03-2648 (N.D. Ga. Jan. 10, 2006) (Stipulated Final Judgment and Order, imposing $10.5 million judgment against subprime lender that the FTC alleged deceptively marketed small personal loans).

[40] *See* JEAN ANN FOX & PATRICK WOODALL, CONSUMER FEDERATION OF AMERICA , CASHED OUT: CONSUMERS PAY STEEP PREMIUM TO "BANK" AT CHECK CASHING OUTLETS 2 (November 2006), *available at* www.consumerfed.org/pdfs/CFA_2006_Check_Cashing_Study111506.pdf.

rates ("APR") ranging from 390 to 780 percent.[41] Payday lending has expanded rapidly over the past decade. Today, the industry's loan volume is estimated to be $28 billion a year.[42]

TILA, and its implementing Regulation Z, mandate that creditors who state an interest rate or other triggering term in an advertisement for a loan also must disclose the loan's APR.[43] The purpose of requiring that an APR be disclosed is to promote comparison shopping. Consumers may use APRs to compare the cost of a loan from one payday lender to the cost of a loan from another payday lender. Consumers also may use APRs to compare the cost of a loan from a payday lender to the cost of a loan from a cash advance on a credit card or from some other short-term credit source.

To promote compliance with the law and facilitate comparison shopping for short-term credit, the Commission is investigating several Internet payday lenders for failing to disclose their APRs in their advertisements. Enforcement actions in those cases are directed at requiring

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[41]Congress has taken action on payday loans made to members of the military. In the John Warner National Defense Authorization Act of Fiscal Year 2007, § 670, "Limitations on Terms of Consumer Credit Extended to Service Members and Dependents," Congress restricted the annual percentage rate on "consumer credit" to military personnel to a maximum of 36 percent. The Department of Defense ("DOD") issued a final rule to implement this law, defining "consumer credit" to include payday loans, title loans, and refund anticipation loans. *See* Limitations on Terms of Consumer Credit Extended to Service Members and Dependents, 72 Fed. Reg. 50,580 (Aug. 31, 2007) (to be codified at 32 C.F.R. Part 232). In June of this year, the FTC filed a comment supporting the DOD's decision to focus its regulation on these three types of loans. FEDERAL TRADE COMM'N, BEFORE THE DEPARTMENT OF DEFENSE, IN THE MATTER OF REQUEST FOR COMMENT ON PROPOSED REGULATION IMPLEMENTING LIMITATIONS ON TERMS OF CONSUMER CREDIT EXTENDED TO SERVICE MEMBERS AND DEPENDENTS, DOCKET NO. DOD-2006-OS-0216 (June 2007), *available at* www.ftc.gov/os/2007/06/070614dodcomm.pdf.

[42]*See* KING URIAH, LESLIE PARRISH AND OZLEM TANIK, CENTER FOR RESPONSIBLE LENDING, FINANCIAL QUICKSAND: PAYDAY LENDING SINKS BORROWERS IN DEBT WITH 4.2 BILLION IN PREDATORY FEES EVERY YEAR 1, 3 (2006), *available at* www.responsiblelending.org/pdfs/rr012-Financial_Quicksand-1106.pdf.

[43]TILA, 15 U.S.C. § 1664; Regulation Z, 12 C.F.R. § 226.24(c).

the respondents to disclose their APRs in their future advertisements, as well as comply with all of the requirements of TILA and Regulation Z.[44]

The Commission also has focused its educational efforts on alerting consumers to the importance of comparison shopping and what information they should consider in evaluating short term credit alternatives. Specifically, the FTC's consumer education bulletin relating to payday loans emphasizes possible short-term credit alternatives to payday loans. It also stresses the importance of considering the APR in choosing between payday loans and other forms of credit.[45]

Other personal loans of concern to the Commission include refund anticipation loans ("RAL"), which are high-interest, short-term loans, generally issued by banks and generally offered to consumers in connection with tax preparation services. The Department of the Treasury and the Internal Revenue Service recently announced a new initiative under which they are considering issuing rules to limit the ability of tax preparers to market RALs to consumers.[46] In appropriate circumstances, the FTC also may take law enforcement action against refund anticipation lenders who engage in unfair or deceptive acts and practices in violation of the FTC

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[44]The Commission also has brought law enforcement actions against payday lenders for engaging in deceptive or unfair acts and practices. *See, e.g., FTC v. Consumer Money Markets, Inc., and FTC v. Continental Direct Services, Inc.,* No. CVS001071 (D. Nev. Sept. 5, 2000) (consent judgments requiring, among other things, defendants to disgorge over $350,000 and forgive over $1.6 million in consumer debts).

[45]*See Payday Loans – Costly Cash, available at* www.ftc.gov/bcp/conline/pubs/alerts/pdayalrt.shtm (English), and www.ftc.gov/bcp/conline/spanish/alerts/s-pdayalrt.shtm (Spanish).

[46]*See* INTERNAL REVENUE BULL. NO. 2008-5, ANNOUNCEMENT 2008-7: GUIDANCE REGARDING MARKETING OF REFUND ANTICIPATION LOANS (RALS) AND CERTAIN OTHER PRODUCTS IN CONNECTION WITH THE PREPARATION OF A TAX RETURN 379 (FEB. 4, 2008), *available at* www.irs.gov/pub/irs-irbs/irb08-05.pdf.

Act or who violate other laws the Commission enforces. The FTC is monitoring the progress of the Treasury Department's promising initiative as it considers how it can be most effective in using its law enforcement and other activities to prevent harm to consumers of refund anticipation loans.

The Commission also acts against merchants that violate the law in connection with offering unsecured credit to consumers. This week, the Commission announced a settlement with BlueHippo Funding, LLC, and BlueHippo Capital, LLC ("BlueHippo"), which advertised high-end electronics to consumers with poor credit.[47] Consumers paid for these items by making a down payment and agreeing to allow BlueHippo to deduct installment payments directly from their bank accounts. The FTC alleged that BlueHippo failed to deliver merchandise as promised, causing many consumers to cancel their contracts. The FTC also alleged that Blue Hippo often failed to inform consumers that it would not refund installment payments, even if consumers never received their merchandise, resulting in thousands of consumers losing between $99 and several hundred dollars each when they cancelled their contracts before they received the promised goods. The Commission's settlement agreement with BlueHippo requires the company to pay between $3.5 million and $5 million for consumer redress, prohibits the company from misrepresenting its finance terms when offering any consumer electronic product for sale, or offering any product for sale on an installment payment basis, and requires the company to affirmatively disclose any policy of not refunding installment payments to consumers who cancel their contracts before receiving merchandise.

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[47] *FTC v. BlueHippo Funding, LLC,* No. 08-cv-1819 (S.D.N.Y. 2008) (alleging violations of the FTC Act, TILA, the Electronic Fund Transfer Act, 15 U.S.C. §§ 1693-1693r, and the Mail and Telephone Order Rule, 16 C.F.R. Part 435).

B. Payment Cards – Debit and Credit Cards

More and more, consumers are relying on debit and credit cards in their daily financial transactions. A recent Federal Reserve study found that in 2006, consumers used debit cards to make 25.3 billion payments, 10 billion more payments than in 2003.[48] The same study found that in 2006, consumers used credit cards to make 21.7 billion payments, almost 3 billion more payments than in 2003.[49] Although the Commission does not have jurisdiction over the banks and other financial institutions that generally issue payment cards,[50] the FTC can and does bring legal actions against nonbank entities that use deceptive or unfair means to market debit and credit cards.[51]

For example, the FTC alleged in a recent case that the online marketers of pre-paid debit cards that were issued by banks charged a $159.95 "application and processing" fee to consumers' bank accounts without authorization.[52] The FTC also alleged that the defendants failed to disclose adequately the existence of the fee, and that consumers' personal financial information would be used to impose the fee. A settlement required the defendants to pay more than $2.2 million for consumer redress. It also mandated that the defendants clearly and

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[48] *See* Press Release, Fed. Reserve Bd., Federal Reserve Study Shows That More Than Two-Thirds of Noncash Payments Are Now Electronic (Dec. 10, 2007), *available at* www.federalreserve.gov/newsevents/press/other/20071210a.htm.

[49] *Id.*

[50] *See* 15 U.S.C. §45(a)(2).

[51] For example, the FTC has sued fraudulent marketers of advance-fee credit cards in over 60 cases since 1998, alleging that they charged advance fees but did not provide consumers with credit as promised. The Commission's June 13, 2007 testimony before the House Committee on Financial Services described the FTC's recent advance-fee credit card cases. The Commission's statement is available at www.ftc.gov/os/2007/06/070613statement.pdf.

[52] *FTC v. Edebit Pay, L.L.C.*, No. 07-04880 (C.D. Cal. 2007).

conspicuously disclose key information to consumers when marketing any prepaid card, or debit or credit card, disclose that they will use consumers' personal information to impose costs, and disclose that such information will be sold or transferred to third parties for marketing purposes.

The FTC supplements its payment card law enforcement activities with consumer education. The Commission's materials explain in plain language the meaning of loan terms such as "annual percentage rate," describe methods by which payment card issuers compute interest, explain fees that can be added to a payment card bill, alert consumers to other important credit terms, and warn consumers about advance-fee loan schemes and other possible fraudulent activities.[53]

C. Other Payment Cards – Gift Cards

The past few years have brought tremendous growth in the sale of gift cards. By one estimate, gift cards generated $26.3 billion in sales in the 2007 holiday season, compared to $24.8 billion in 2006.[54] Some gift cards, however, have imposed conditions upon their use and either an expiration date or a potential fee, known as a dormancy fee, for not using the card within a certain time period. Consumers are entitled to know when conditions and fees exist.

The Commission brought cases against gift card retailers Kmart Corp. and Darden Restaurants, Inc., owner of the restaurant chains Olive Garden, Red Lobster, Smokey Bones, and

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[53]The Commission's consumer education materials on non-mortgage consumer credit are directly accessible from the FTC's webpage, Credit and Loans: Credit Cards and Consumer Loans, *available at* www.ftc.gov/bcp/menus/consumer/credit/loans.shtm. In Spanish, the materials are accessible from the FTC's webpage, Crédito y Préstamos: Tarjetas de Crédito y Préstamos, *available at* www.ftc.gov/bcp/menus/consumer/credit/loans_es.shtm.

[54]Press Release, Nat'l Retail Fed'n, Gift Cards More Popular Than Ever, According to NRF (Nov. 13, 2007), *available at* www.nrf.com/modules.php?name=News&op=viewlive&sp_id=410; *see also* MONTGOMERY COUNTY, MARYLAND, DIVISION OF CONSUMER AFFAIRS, GIFT CARDS 2007: BEST AND WORST RETAIN CARDS; A DEEPER VIEW OF BANK CARDS DOESN'T IMPROVE THEIR LOOK, *available at* www.montgomerycountymd.gov/content/ocp/giftcards2007final.pdf.

Bahama Breeze.[55] The cases alleged that Kmart and Darden failed to adequately disclose fees and expiration dates associated with their gift cards. Settlements reached last year prohibited the companies from marketing cards without clearly and prominently disclosing the existence of any fees and expiration dates on the front of the gift cards. The settlements also required the companies to disclose other material gift card terms to consumers before the consumers purchased the gift cards, and mandated that each company implement a program to reimburse eligible consumers whose cards previously were charged fees. Evidence suggests that large gift card retailers nationwide recently have changed their practices.[56]

In conjunction with the Kmart and Darden cases, the Commission also released consumer education materials with tips for consumers who purchase or receive gift cards.[57] The materials encourage consumers to ask whether a card they intend to buy has any expiration date or fees, and provide information for consumers who have had a problem with a gift card.

D. Unauthorized Debits From Bank Accounts

Consumers are injured when money is taken from their bank, credit card, or debit card accounts without their authorization. The Commission has a long history of bringing successful legal actions against fraudulent merchants and other actors who use deception to obtain

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[55] *In re Kmart Corp.*, FTC Docket No. 0623088 (Aug. 14, 2007); *In re Darden Restaurants, Inc.*, FTC Docket No. C-4189 (Apr. 3, 2007).

[56] *See* MONTGOMERY COUNTY, MARYLAND, DIVISION OF CONSUMER AFFAIRS, GIFT CARDS 2007: BEST AND WORST RETAIL CARDS; A DEEPER VIEW OF BANK CARDS DOESN'T IMPROVE THEIR LOOK, at 7, *available at* www.montgomerycountymd.gov/content/ocp/giftcards2007final.pdf.

[57] *See Buying, Using, and Giving Gift Cards, available at* http://ftc.gov/bcp/edu/pubs/consumer/alerts/alt010.shtm (English), and http://ftc.gov/bcp/edu/pubs/consumer/alerts/salt010.shtm (Spanish).

consumers' account numbers.[58] These scam artists, however, generally need help to secure the proceeds of their fraud. Payment processors serve as intermediaries between merchants and banks, and their role is to submit merchants' demands for payments to banks. Merchant demands for payment may be made either in the form of Automated Clearinghouse ("ACH") system debits or through the use of unsigned, remotely created checks that payment processors submit to banks.[59] While payment processors generally perform an important function and make the payment system more efficient, they also can assist scam artists in defrauding consumers if they submit unauthorized charges to banks for these fraudulent actors.

In recent years, the Commission has filed seven enforcement actions against non-bank payment processors, alleging that they have committed unfair practices or violated the FTC's telemarketing rules when processing payments for fraudulent merchants.[60] Most recently, the Commission joined forces with seven state attorneys general in an action charging payment processor Your Money Access, LLC, and related entities and individuals with debiting, or attempting to debit, consumers' bank accounts on behalf of numerous fraudulent telemarketers

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[58]Since 1991, the Commission has brought more than 350 telemarketing cases, the vast majority of which involved alleged fraud in the marketing of investment schemes, business opportunities, sweepstakes pitches, and the sales of various goods and services.

[59]A recent Federal Reserve study found that 14.6 billion ACH payments were made in 2006, an increase of almost 6 billion payments from 2003. *See* Press Release, Fed. Reserve Bd., Federal Reserve Study Shows That More Than Two-Thirds of Noncash Payments Are Now Electronic (Dec. 10, 2007), *available at* www.federalreserve.gov/newsevents/press/other/20071210a.htm.

[60]*FTC v. Your Money Access,* No. 07-5147 (D. Pa. 2007) (accounts debited through remotely created checks and ACH debits); *FTC v. Interbill Ltd. et al.,* No. 2:06-CV-01644 (D. Nev. 2007) (remotely created checks); *FTC v. Global Mktg. Group, Inc., et al.,* No. 8:06-CV-02272 (M.D. Fla. 2006) (ACH debits); *FTC v. Universal Processing, Inc.*, No. CV-05-6054 (C.D. Cal. 2005) (ACH debits); *FTC v. First Am. Payment Processing, Inc., et al.,* No. CV-04-0074 (D. Ariz. 2004) (ACH debits); *FTC v. Elec. Fin. Group, et al.,* No. W-03-CA-211 (W.D. Tex. 2003) (ACH debits); *FTC v. Windward Mktg., Ltd., et al.,* No. 1:06-CV-615 (N.D. Ga. 1997) (remotely created checks).

and Internet-based merchants.[61] The FTC's complaint alleged that the merchants used deception to obtain consumers' account information, then transmitted the information to the defendants, who processed debits to the consumers' bank accounts. The complaint alleged that from June 2004 to March 2006, the defendants processed more than $200 million in debits and attempted debits to consumers' bank accounts, even though they had notice that they were processing payments for which consumers had not given their consent.

In addition to taking law enforcement action, the Commission works with trade associations and bank regulators to protect consumers from payment processing abuses. For example, in April 2007, the FTC staff submitted a comment to NACHA – The Electronic Payments Association ("NACHA"), the organization that develops and maintains operating rules for certain electronic payments, expressing its support for NACHA's proposed rule changes to adopt stronger self-regulatory measures to prevent payment processing fraud.[62] The FTC staff comment noted that NACHA's proposals would help stop the processing of unauthorized debits from consumers' bank accounts.

The Commission also moves proactively to protect consumers from payment processing abuses by staying abreast of new payment mechanisms that evolving technologies are making available. For example, in November 2006, the FTC held hearings to learn about changing technology, including new payment methods, and develop policy responses to them.[63] Panelists

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[61] *FTC v. Your Money Access,* No. 07-5147 (D. Pa. 2007).

[62] FEDERAL TRADE COMM'N, COMMENTS OF THE FEDERAL TRADE COMMISSION BUREAU OF CONSUMER PROTECTION TO NACHA - THE ELECTRONIC PAYMENTS ASSOCIATION, CONCERNING NACHA'S NETWORK ENFORCEMENT RULE PROPOSAL (April 2007), *available at* www.ftc.gov/os/opinions/070423staffcommenttonacha.pdf.

[63] *See* Protecting Consumers in the Next Tech-Ade, *available at* www.ftc.gov/bcp/workshops/techade/who.html. Additional information about the hearings is available at

focused on several new payment technologies, such as new features for automated teller machines, contact-less payment cards, and mobile telephone payments. Panelists expressed concern that consumer rights in disputing charges or debits vary among the different payment types, and that the new payment methods raise certain privacy and security concerns.[64] The Commission has published consumer education materials about consumers' rights when using various payment methods,[65] and continues to be vigilant in working to protect consumers' privacy and security when using all types of payment methods.

V. PROTECTING CONSUMERS IN FINANCIAL DISTRESS

Among the most vulnerable consumers are those who find themselves overwhelmed by debt. A consumer's financial crisis may be caused by personal or family illness, the loss of a job, or overspending. Regardless of the cause, the Commission is committed to using the law enforcement, consumer education, and policy development tools at its disposal to protect consumers from those who may seek to profit unlawfully from their financial distress, and to provide consumers with information they can use to gain control of their finances.

A. Debt Collection

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www.ftc.gov/bcp/workshops/techade/index.html.

[64]Transcript, November 8, 2006, at 14, 16, 49-50, *available at* www.ftc.gov/bcp/workshops/techade/transcripts.html.

[65]*See, e.g., Check 21: Substitute Checks, Electronic Processing, and What It Means to You, Electronic Check Conversion,* and *Credit, ATM, and Debit Cards: What to Do If They're Lost or Stolen,* These and other educational materials are directly accessible from the FTC's webpage, Credit and Loans: Credit Cards & Consumer Loans, www.ftc.gov/bcp/menus/consumer/credit/loans.shtm. Information in Spanish is available from the FTC's webpage, Crédito y Préstamos: Tarjetas de Crédito y Préstamos, *available at* http://www.ftc.gov/bcp/menus/consumer/credit/loans_es.shtm. The FTC also publishes *Automatic Debit Scams, available at* www.ftc.gov/bcp/conline/pubs/tmarkg/debit.shtm.

Protecting consumers from debt collection abuses is a critical part of the Commission's mission. The agency receives more complaints about third-party debt collectors than any other single industry, with nearly 70,000 complaints in 2006. Although not all consumers who complain to the Commission about collection problems have experienced law violations, many complain of conduct that, if accurately described, clearly violates the FDCPA.[66] Since 1998, the FTC has brought 21 lawsuits for illegal debt collection practices.[67] In these cases, the Commission has obtained tough permanent injunctive and equitable relief, including substantial monetary judgments and, for some defendants, bans on collecting debts.[68]

In a pending case, the Commission obtained a preliminary injunction halting the operations and freezing the assets of defendants that targeted Spanish-speaking consumers who had purchased, or inquired about, English-language training courses. The complaint alleged that

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[66]The Commission does not verify the consumer complaints it receives, but uses them for various purposes, such as determining whether a collector's alleged improper conduct warrants further investigation and possible enforcement action.

[67]*FTC v. Tono Records,* No. 07-3786 (C.D. Cal. 2007); *FTC v. Rawlins & Rivera, Inc.,* No. 07-146 (M.D. Fla. 2007); *United States v. LTD Financial Services, L.P.,* No. 07-3741 (S.D. Tex. 2007); *United States v. Whitewing Fin.,* No. 06-2102 (S.D. Tex. 2006); *FTC v. Check Investors, Inc.,*2005 U.S. Dist. LEXIS 37199 (D.N.J. July 18, 2005), *aff'd,* 503 F.3d 159 (3d Cir. 2007), *petition for reh'g denied,* Nos. 05-3558, 05-3957 (3d Cir. Feb. 6, 2008); *United States v. Capital Acquisitions and Mgmt. Corp.,* No. 04-50147 (N.D. Ill. 2004); *FTC v. Capital Acquisitions and Mgmt. Corp.,* No. 04-7781 (N.D. Ill. 2004); *In re Applied Card Sys., Inc.,* FTC Docket No. C-4125 (Oct. 8, 2004); *United States v. Fairbanks Capital Corp.,* No. 03-12219 (D. Mass. 2003); *FTC v. Associates First Capital Corp.,* No. 01-00606 (N.D. Ga. 2002); *United States v. DC Credit Servs., Inc.,* No. 02-5115 (C.D. Cal. 2002); *United States v. United Recovery Sys., Inc.,* No. 02-1410 (S.D. Tex. 2002); *United States v. North American Capital Corp.,* No. 00-0600 (W.D.N.Y. 2000); *United States v. National Fin. Sys., Inc.,* No. 99-7874 (E.D.N.Y. 1999); *Perimeter Credit, L.L.C.,* No. 99-0454 (N.D. Ga. 1999); *In re Federated Dep't Stores, Inc.,* FTC Docket No. C-3893 (Aug. 27, 1999); *FTC v. Capital City Mortgage Co.,* No. 98-00237 (D.D.C. 1998); *United States v. Nationwide Credit, Inc.,* No. 98-2920 (N.D. Ga. 1998); *United States v. Lundgren & Assocs., P.C.,* No. 98-1274 (E.D. Cal. 1998); *In re May Dep't Stores Co.,* FTC Docket No. C-3848 (Nov. 2, 1998); *In re General Elec. Capital Corp.,* FTC Docket No. C-3839 (Dec. 23, 1998).

[68]*See, e.g., FTC v. Check Investors, Inc.,* 2005 U.S. Dist. LEXIS 37199 (D.N.J. July 18, 2005) (ban on debt collection and $10.2 million judgment), *aff'd,* 503 F.3d 159 (3d Cir. 2007), *petition for reh'g denied,* Nos. 05-3558, 05-3957 (3d Cir. Feb. 6, 2008).

company agents, often posing as third-party debt collectors, called consumers repeatedly and misrepresented that the consumers owed large amounts relating to the training courses.[69] The complaint also alleged that the defendants, sometimes posing as attorneys, threatened consumers with lawsuits, seizure of their property, and even arrest. The FTC is seeking permanent injunctive relief and consumer redress in the case.

The Commission also recently announced settlements in two other debt collection cases, including one in which a large Texas debt collector agreed to pay more than $1.3 million in civil penalties,[70] and another that imposed a $3.4 million judgment on the defendants, who were required to sell personal property to satisfy the award.[71] In a third case, the Third Circuit Court of Appeals upheld a lower court decision that permanently banned a debt collection firm, its principal, and its attorney from engaging in debt collection activities, and imposed a $10.2 million judgment. This month, the appeals court denied the defendants' petition for a rehearing.[72]

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[69] *FTC v. Tono Records,* No. 07-3786 (C.D. Cal. 2007).

[70] *United States v. LTD Financial Services, L.P.,* No. 07-3741 (S.D. Tex. Nov. 13, 2007). The complaint alleged that the defendants misled, threatened, and harassed consumers by falsely threatening them with lawsuits, criminal action, wage garnishment, and property seizure, and by disclosing their debts to third parties. The civil penalty award was the highest ever in an FTC debt collection case. The settlement also imposed strong injunctive relief, including a bar prohibiting the individual owners and top company managers from future law violations.

[71] *FTC v. Rawlins & Rivera, Inc.*, No. 07-146 (M.D. Fla. Jan. 14, 2008). The complaint alleged the defendants falsely threatened consumers nationwide with lawsuits, seizure of property, and arrest. The $3.4 million judgment represented the total amount the defendants collected during the period that the Commission's complaint addressed.

[72] *FTC v. Check Investors, Inc.*, 503 F.3d 159 (3d Cir. 2007), *petition for reh'g denied,* Nos. 05-3558, 05-3957 (3d Cir. Feb. 6, 2008).

The Commission's consumer outreach activities are an essential element of its consumer protection program in debt collection. The FTC advises consumers about their rights and responsibilities under the FDCPA by means including written materials and public addresses to consumer groups. The Commission's written materials explain the FDCPA in easily understandable language, provide information regarding debts so old that creditors and debt collectors may no longer sue to collect them, and offer consumers strategies for regaining control of their finances.[73]

The Commission also pursues research and policy initiatives focused on emerging issues in the $16 billion debt collection industry.[74] Last fall, the FTC staff hosted a two-day workshop that examined technological, economic, and legal developments in debt collection and their impact on consumers and businesses. The workshop featured panel discussions on a range of topics such as the emergence of the debt buying industry, the impact of new communications and data storage technologies on debt collection methods, globalization of the industry, and the use of court processes and of the credit reporting system in furtherance of debt collection. The Commission expects to issue a report detailing the workshop discussions.[75]

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[73]Consumer education materials on debt collection and related issues are directly accessible from the FTC's webpage, Credit and Loans: In Debt?, *available at* www.ftc.gov/bcp/menus/consumer/credit/debt.shtm. In Spanish, the materials are available from the FTC's webpage, Crédito y Préstamos: ¿Endeudado?, *available at* www.ftc.gov/bcp/menus/consumer/credit/debt_es.shtm.

[74]*See* KAULKIN REPORT, THE FUTURE OF RECEIVABLES MANAGEMENT 10 (7th ed. Sept. 2007).

[75]Also in the fall of 2007, the FTC issued an advisory opinion concluding that, after a consumer notifies a debt collector in writing that the consumer disputes a debt, the debt collector may, without violating the law, contact the consumer to tell him that the collector is halting its collection efforts. The Commission issued the opinion in response to ACA International, a debt collection trade association, that asked the FTC for clarification of the law. The FDCPA provides that if a debt collector contacts a consumer to collect a debt, and the consumer then disputes that debt in writing, the collector must stop collection efforts until it has sent the consumer written verification of the debt. The FTC's advisory

B. Debt Negotiation and Credit Repair

The Commission has prosecuted about a dozen companies that it alleged falsely promised lifelines to consumers drowning in debt or falsely promised to clear consumers' credit reports of negative but accurate and timely information.[76] In its largest case, the FTC sued AmeriDebt, Inc., a purported credit counseling organization.[77] The Commission alleged that AmeriDebt deceived consumers with claims that it was a non-profit organization that provided bona fide debt counseling services. In fact, the FTC alleged, AmeriDebt funneled profits to affiliated for-profit entities and individuals. The Commission also alleged that AmeriDebt deceived customers by claiming that it did not charge an up-front fee when, in fact, AmeriDebt kept its clients' first payments as a fee, rather than disbursing the money to their creditors as promised. On the eve of trial, AmeriDebt's founder agreed to a $35 million settlement.[78]

The Commission similarly has acted aggressively against "credit repair" scams, in which marketers promise to cleanse individual credit reports of negative information. The FTC has

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opinion concluded that it would benefit consumers to receive notice that a debt collector has halted its collection efforts, and that such a notice would not violate the FDCPA.

[76] *FTC v. Debt-Set*, No. 07-558 (D. Colo. 2007); *FTC v. Select Personnel Mgmt., Inc.*, No. 07-0529 (N.D. Ill. 2007); *FTC v. Dennis Connelly*, No. 06-701 (C.D. Cal. 2006); *FTC v. Express Consolidation*, No. 06-61851 (S.D. Fla. 2006); *US v. Credit Found. of Am.*, No. 06-3654 (C.D. Cal. 2006); *FTC v. Debt Solutions, Inc.*, No. 06-0298 (W.D. Wash. 2006); *FTC v. Debt Mgmt. Found. Servs., Inc.*, No. 04-1674 (M.D. Fla. 2004); *FTC v. Integrated Credit Solutions, Inc.*, No. 06-00806 (M.D. Fla. 2006); *FTC v. National Consumer Council, Inc.*, No. 04-0474 (C.D. Cal. 2004); *FTC v. Better Budget Fin. Servs., Inc.*, No. 04-12326 (D. Mass. 2004); *FTC v. Innovative Sys. Tech., Inc., d/b/a Briggs & Baker*, No. 04-0728 (C.D. Cal. 2004); *FTC v. Jubilee Fin. Servs., Inc.*, No. 02-6468 (C.D. Cal 2002).

[77] *FTC v. AmeriDebt, Inc.*, No. 03-3317 (D. Md. 2003).

[78] *See FTC v. AmeriDebt, Inc.*, No. 03-3317 (D. Md. Jan. 9, 2006) (Stipulated Final Judgment and Permanent Injunction as to DebtWorks, Inc. and Andris Pukke). Subsequently, the court-appointed receiver determined that primary defendant Andris Pukke had hidden assets from the FTC, and the court entered a judgment requiring him to turn over tens of millions of dollars' worth of additional assets. Because he resisted turning over his assets even after the court found him in contempt of court, the Court ordered his incarceration pending full cooperation, lasting almost a month.

brought more than 50 cases since 1998 against defendants that the Commission alleged misrepresented the credit-related services they said they would provide.[79] For example, in February 2006, the Commission, along with federal and state law enforcement partners, announced a crackdown on 20 credit repair organizations.[80] As part of this effort, the FTC charged Bad Credit B Gone, LLC, with violating the FTC Act and the CROA by claiming it could improve most consumers' credit reports by removing negative information that was accurate and not obsolete.[81] The court ruled that the defendants violated the law and ordered them to pay more than $322,000 in equitable monetary relief.

The Commission also has taken enforcement actions against debt reduction services that charge hidden fees and make false promises to lower consumers' debts. For example, in an ongoing action, the FTC has charged Express Consolidation, Inc., a nationwide debt consolidation business, with operating as a phony non-profit, misrepresenting the fees involved in its debt management programs, and violating the Do Not Call provisions of the Telemarketing Sales Rule.[82] The Commission's complaint also alleged that the company misrepresented that enrolling in its program would improve consumers' credit ratings. The FTC is seeking remedies, including consumer redress, in the case.

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[79]*See, e.g., FTC v. Sunshine Credit Repair, Inc.*, No. 05-20228 (S.D. Fla. 2005); *FTC v. Service Brokers Assoc., Inc.*, No. 05-60129 (S.D. Fla. 2005); *FTC v. ICR Services, Inc.*, No. 03-5532 (N.D. Ill. 2003); *FTC v. Cliff Cross, individually and d/b/a Build-It-Fast*, No. 99-018 (W.D. Tex. 2001); *FTC v. Patrick R. P.R.K. Enters.*, No. 99-562 (E.D.N.Y. 1999); *United States v. Cornerstone Wealth Corp.*, No. 98-0601 (N.D. Tex. 1998); *United States v. Jack Schrold*, No. 98-6212 (S.D. Fla. 1998); *FTC v. Midwest Mgmt. Assocs., Inc.*, No. 98-1218 (N.D. Ill. 1998).

[80]Press Release, FTC, "Project Credit Despair" Snares 20 "Credit Repair" Scammers (Feb. 2, 2006), *available at* www.ftc.gov/opa/2006/02/badcreditbgone.shtm.

[81]*FTC v. Bad Credit B Gone, LLC*, No. 06-0254 (N.D. Ill. 2006).

[82]*FTC v. Express Consolidation, Inc.*, No. 06-61851 (S.D. Fla. 2007).

The Commission's consumer education effort in this area focuses on providing consumers with information to help them avoid becoming victims of deceptive operators. The Commission's written materials list questions for consumers to ask when considering working with a credit counselor, provide advice on what to do if a credit counselor goes out of business, and warn consumers to be wary of companies advertising debt relief.[83]

VI. CONCLUSION

The Commission is committed to protecting consumers of financial services, including subprime borrowers. The FTC's law enforcement, consumer education, and policy research initiatives in financial services are part of the FTC's broad, vigorous, and continuing program to protect consumers from deceptive, unfair, and otherwise illegal practices.

The Commission appreciates the opportunity to appear before you today to discuss the FTC's work relating to financial services. The budget request recently submitted by the President for FY2009 contains additional funding to support this work, as well as the other important work of the agency. To accomplish the agency's consumer protection and competition missions in FY 2009, the FTC requests $256,200,000 and 1,102 Full Time Equivalents (FTEs). Of the $256,200,000 requested amount, Hart-Scott-Rodino pre-merger filing fees and Do Not Call fees will provide the Commission with an estimated $189,800,000 in FY 2009. Thus, the FTC anticipates that the remaining funds needed for its operations will come from a direct appropriation of $66,400,000 from the General Fund in the United States Treasury.

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[83]Consumer education materials on debt negotiation, credit repair, and related issues are directly accessible from the FTC's webpage, Credit and Loans: In Debt?, *available at* www.ftc.gov/bcp/menus/consumer/credit/debt.shtm. In Spanish, the materials are available from the FTC's webpage, Crédito y Préstamos: ¿Endeudado?, *available at* www.ftc.gov/bcp/menus/consumer/credit/debt_es.shtm.

The FTC's 2009 request is an increase of $12,336,000 and 18 FTEs compared to FY 2008. It includes $7,989,000 in mandatory salary and contract expenses; $2,847,000 for the 18 additional FTEs;[84] and $1,500,000 for non-FTE programs.[85] The agency needs this level of resources to continue to build on its past record of accomplishments in enhancing consumer protection and protecting competition.

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[84]The 18 FTE include: (a) 10 FTE for Consumer Protection to, among other things, protect consumers from unfair and deceptive practices in the financial services marketplace; protect consumers' privacy; improve compliance with FTC orders; pursue foreign-located evidence of fraud perpetrated against U.S. consumers; and provide support for the effective operation of this program; and (b) 8 FTE for Maintaining Competition to meet the increased workload required to challenge anticompetitive mergers and assure that the marketplace is free from anti-competitive business practices in the health care, pharmaceutical, energy, and technology sectors; promote convergence in competition policy of foreign enforcement practices; and provide support for the effective operation of this program.

[85]The $1,500,000 for non-FTE programs includes (a) $1,100,000 for Consumer Protection, consisting of $500,000 for "Green" marketing research, education campaign, and enforcement; $250,000 for high-tech tools to stop fraudsters; $250,000 for activities related to the marketing and advertising of food to children; and $100,000 for privacy and identity theft and deceptive and unfair practices in mobile marketing; and (b) $400,000 for Maintaining Competition to meet the challenges of an increased enforcement agenda and associated litigation and outreach efforts.

Mr. SERRANO. Thank you so much. Thank you both for your testimony.

TREASURY'S OFFICE OF FINANCIAL EDUCATION

Ms. Gambrell, could you please talk about Treasury's Office of Financial Education? And, specifically, please discuss the issue of foreclosure prevention scams that are sweeping the country in which homeowners are offered the opportunity to "fix" their loan in some way. What is Treasury doing in terms of financial education to combat these scams?

Also, could you please talk more widely about what Treasury's Office of Financial Education is doing in the area of subprime mortgages, both for families facing foreclosures as well as helping future borrowers to avoid the same problems?

Ms. GAMBRELL. Thank you for your question, Mr. Chairman, and that is a very important question. The Treasury Department has been dedicated for a very long time to looking at issues related to financial education, and specifically how to reach out to those populations that are most in need of that education.

As you know, the Office of Financial Education is comprised of 20 federal agencies, including the Treasury Department. It was formed specifically not only to develop a national strategy that is addressing financial education needs, but then to take that strategy and really put it into action. There are about 32 calls of action that are part of the Financial Education Office's national strategy.

Twenty-two of those come under the leadership of the Federal Government to spearhead, and those include working with community organizations on the ground to conduct the financial education workshops, to ensure that consumers are very well aware of predatory lending tactics, which as you know can be devastating to both communities and to individuals, and a number of other actions specifically addressed to consumers.

The office just recently received $400,000 in appropriations to look at two areas specifically in the area of financial education, one targeted to elementary and high school students, because, again, certainly getting that education at an early age is perhaps one of the most effective ways to ensure that people understand not only the cost of credit but how to plan their financial future. The other $200,000 is going to be dedicated to predatory lending initiatives.

That particular initiative is still in a conceptual discussion and framework right now. Dan Iannicola, who is the Director of the Office of Financial Education, however, would be happy to provide additional details to the Committee about specific efforts going forward.

I can tell you that, certainly, on this FLEC Committee there are member agencies that again have long been dedicated to the financial education effort, either individually or as part of the Financial Literacy Education Commission, and will continue to do so.

Mr. SERRANO. I am sure you meant that $200,000 is dedicated against predatory lending.

Ms. GAMBRELL. Yes. Did I say "for"? I hope I did not say "for."

Mr. SERRANO. You said "for."

Ms. GAMBRELL. For fighting against——

Mr. SERRANO. I hang on every word. [Laughter.]

Ms. GAMBRELL. Thank you for the correction.

PREDICTING THE HOUSING CRISIS

Mr. SERRANO. You know, a general question, which some people would think is better asked of some folks on Wall Street. In fact, maybe they are the ones who have to answer it, but I want to ask everybody today. How come we did not see this coming? Or did we see it coming and not pay attention to it? I mean, it seems to have hit the country like—you know, like a lead balloon. It threatens our economy. It is, you know, creating havoc on American families everywhere.

It is, in so many neighborhoods, as you know, as we all know, hurting people who just got into accomplishing the American dream of owning a piece of the pie, if you will. Did we see it coming at all? Could we have stopped it?

Ms. GAMBRELL. Well, I think that is a complicated question. Certainly, I think when you look at the statements that Secretary Paulson has made he first mentioned the housing crisis back in December of 2006. I think, of course, in hindsight it is always easier to wish that you were on this issue much earlier, but we feel encouraged by the early progress, the efforts that are being put into play now. And I think we need to look at all of the strategies, all of the approaches, as tools, if you will, that can be resourced, be considered resource, and use——

Mr. SERRANO. So we did not see it coming?

Ms. GAMBRELL. Well, I cannot answer specifically to that, but I think that, again, there were—we were certainly looking at this issue and had been studying the issue for a while.

Mr. SERRANO. Right. To you the same question: was there any sign of this coming, or that we all missed, and Congress, and at the local level, and everywhere else?

Ms. PARNES. I think I share my colleague's view that that is a really—it is a hard issue. I would say from the perspective of the Commission, you know, as a law enforcement agency, we saw kind of specific issues with specific companies. We did not see a prevalent practice across the industry that would flag this for us.

And I think it is probably just because of the way the market was—prices were going up, interest rates were down, consumers when they, you know, kind of hit the higher interest rate time in their mortgages they were able to get other mortgages, they were able to refinance. I just do not think that we were able to kind of guess what would happen. I think it was really hard to crystal ball that.

Mr. SERRANO. You mentioned materials and work that you do in languages other than English.

Ms. PARNES. Yes.

Mr. SERRANO. How many other languages do you deal with?

Ms. PARNES. We translate our material into Spanish pretty regularly. I mentioned this is one of our guides that is in Spanish and in English, and it is, you know, all in the same brochure.

In terms of getting our materials into other languages, what we do is we get it out to community-based organizations who are then able to translate it into the appropriate language for their community.

Mr. SERRANO. Let me ask you a question. When you advertise, you give advice on TV, for instance, or on radio, do you pay for that? Does the Commission pay for that, or does that go on the public advertising, you know, that these stations do as——

Ms. PARNES. Yes, they——

Mr. SERRANO [continuing]. Their part?

Ms. PARNES. Exactly. We use public service announcements. Frankly, it is much harder to get PSAs on television. We are pretty successful in radio PSAs, and we use that very regularly.

Mr. SERRANO. Yes. I do not want to take too long on this. Mr. Regula, I remember years ago you saw a regular number of PSAs on different issues all the time on TV. And now you have to be up at 4:30 in the morning, which I did as I was reading all of this stuff, to watch them. And I know it is all business, but you wonder, you know. Maybe that is a question we should ask the FCC when they come before us, you know, why this time it is not being done.

Mr. Regula.

DEFINITION OF SUBPRIME MORTGAGES

Mr. REGULA. Ms. Gambrell, what percentage of subprime—well, first of all, define a subprime loan for me.

Ms. GAMBRELL. Well, I think there are probably a number of definitions that are in the lexicon right now. Certainly, when we look at subprime lending we look at whether—the characteristics of subprime lending. It can be a high-cost loan. It can be one that we would look at the terms and rates of that loan. It may carry certain amortization features.

There is not—there are a lot of characteristics. I——

Mr. REGULA. Is this a recent phenomenon, or have there been subprime loans for the last several years?

Ms. GAMBRELL. Well, there have been—the subprime loans have been within the communities for a number of years, yes.

Mr. REGULA. Why all the excitement now? Is it because the real estate market got depressed, and a lot of these were predicated on an increasing value of property?

Ms. GAMBRELL. Some of the concern, a large part of the concern, quite honestly, is that in many of the subprime loans people were signing on the dotted line and not fully understanding the nature, the rates and terms of those loans. They may not have been either clearly explained in the disclosure, which is why the Treasury Department is very happy to see the Federal Reserve Board tackling this issue through the proposed amendments that they are making to Regulation Z, which covers the HOEPA Act, as well as Truth in Lending.

Basically, what that proposal says is that—it is asking whether or not there needs to be credit lending standards for mortgage products, especially for high priced loans, to make sure that the advertising is very clear, and to make sure that the disclosure requirements are very clear to the borrower, which can be a win-win in the end I think for not only the lending, the financial services industry, but certainly for the consumer as well.

Mr. REGULA. Do most of these loans have a reset provision?

Ms. GAMBRELL. I believe they do, but I do not know the extent of, in terms of numbers, what that might be.

IMPACT OF SUBPRIME ON CREDIT MARKETS

Mr. REGULA. Is the subprime crisis spilling over into the credit card field?

Ms. GAMBRELL. Well, you know, what we are seeing, of course—and we are monitoring that very closely—we would—in fact, we want to be sure that as we look at not only the housing market, that we are looking at all sectors of the industry.

And even in that housing market we are focused not only just on the subprime sector but also on all at-risk homeowners, which is why in the HOPE NOW Alliance we have expanded the efforts to target not only those subprime borrowers but at-risk homeowners within that population, regardless of whether they are 60 days delinquent on their payments, 90 days, and, in particular, making sure that everyone is receiving some sort of notification to reach out to their services and to counselors 120 days before those mortgages are reset.

Mr. REGULA. I can see it spilling over. I go by the used car lots, and they have big signs out, "No credit, bankrupt, fighting with your wife, come in and see us." [Laughter.]

"We will give you a loan." They make it so attractive, I am sure people are getting taken in.

Question: If the housing market were actually to continue to go up—the values, prices, and such—would we still have a subprime crisis?

Ms. GAMBRELL. That is a great question. And I would have to rely, quite honestly, on the economists who work with me to answer that question. I do not know if I could answer that question in a comprehensive way that would satisfy your question.

Mr. SERRANO. Forgive me for—would not the folks who run into the second problem, which is the problem where your first set of payments were a certain amount, and then it breaks out to an amount that you did not expect, that problem would still be in place, even if the market was different, right?

Ms. GAMBRELL. Well, again, I think with the HOPE NOW Alliance one of the things that they are looking at is a fast-track process, and I think we have to look at all of the loan products that are part of this subprime market. Part of that fast-track process is to actually refinance to put people in fixed rate, 30-year mortgages, or to modify those loans so that the starter rate is extended for another five years. So the reset, in fact, could change, depending on the workouts that are actually completed through the work that the servicers are doing with the consumers.

Mr. REGULA. It seems to me these ought to have a big sign that alerts people to the fact that there is a reset provision.

Ms. GAMBRELL. And that is why the——

Mr. REGULA. There is a period when this is the rate than this is what you have the for rest of the mortgage.

Ms. GAMBRELL. Yes.

Mr. REGULA. Now people do not look carefully, and the credit card industry in particular will tell you, "No card, come on in, we will give you one"—your first payment will be 6 percent, and then it jumps to 18 or 24 or whatever.

And payday loans are a recent phenomenon, too. I never saw those before.

Ms. GAMBRELL. Well, the payday loans are a recent phenomenon perhaps to many on the American landscape. You have seen various forms of payday loans in communities for many years. Some of them are called shark loans, if you are familiar with that, certainly. So, again, with payday lending, we want to make sure that the consumer really does understand that there are alternatives, that there is a traditional financial services component that they can use, that they can go to.

And I think, as you said, Congressman Regula, that the disclosure requirement and understanding what people are signing and what they are actually committing to is extraordinarily important. It is really at the top of the list in terms of what the Federal Reserve is looking at, but certainly Treasury very much supports amendments that would in fact make it clear, make those disclosure requirements clear to the public.

CONSUMER EDUCATION

Mr. REGULA. I might ask, do you think more education of consumers starting early in the public school—elementary as well as secondary—would be helpful?

Ms. PARNES. Absolutely. I think that giving consumers information to protect themselves is certainly a better proposition than having the FTC or any other government agency come in after there has already been a problem. And, you know, it is one of the things that we have been working on with the Treasury Department, with other partners in government, and with folks on the state level.

We have gone into some states and offered material to community colleges. We have gone in, we have done training classes in high schools. We prepare consumer education material that is geared to high school and college age students. So absolutely——

Mr. REGULA. Are education institutions receptive?

Ms. PARNES. Yes, they are. They are very responsive, particularly, you know, colleges have been very responsive. First-year college students are bombarded with credit card offers, and colleges have been very responsive in terms of putting our consumer education material into the—in their bookstores when, you know, kids are out there buying the first week of school, and they get our brochure.

Mr. REGULA. Have you tried getting this material to the unions and let them distribute this to their members?

Ms. PARNES. That would be a terrific source. I do not know if we have actually reached out to unions, but that would be an excellent——

Mr. REGULA. That is where part of the problem is.

Ms. PARNES [continuing]. Excellent way to go.

Mr. REGULA. Other than conventional agencies, maybe people that get loans ought to get a brochure warning them, because when you go in to get a loan they have got a mountain of paperwork, and most people are not going to ever take time to read it and be alert to it, read the fine print if you will.

Mr. SERRANO. Thank you, Mr. Regula.

You know, Mr. Regula had asked a question—my next question, which was exactly what we discussed. You know, we know—some of us know—that in certain communities, especially poorer communities, there have been very innovative ways of moving money around, legally, but, you know, lending money, and so on.

But the subprime thing, it almost looks as if someone invented a new way of lending money, and no one checked to see if that was okay. It appears that way. It might be that subprime mortgages may have been around for a while, but if you ask the average American, you say "subprime," they will say, "Oh, that is a new way of lending money."

They do not see it as something that just happened to create a problem, which would lead us to ask the question eventually, "So when somebody comes up with a new way of lending money, who checks to make sure that it is a proper way, so that it does not create the problems we have now?"

Ms. Kilpatrick.

THE CDFI FUND AND SUBPRIME MORTGAGES

Ms. KILPATRICK. Thank you, Mr. Chairman. And forgive my tardiness. We have three meetings I am trying to cover at the same time. I certainly want to be here to discuss this crisis with you guys, and thank you very much for your service and for representing and taking care of many of the people that we represent. We thank you very much.

Last year when we got our budget for '08, and President Bush was asking $54 million, give or take, and our Committee—I want you to know, and I know you probably do, we upped that to some $92 million, and hopefully you were able to take care of many more people, and your program is more efficient, and all of that.

So I wanted to acknowledge our Chairman and Ranking Member and this whole Committee, as well as the full House.

Ms. GAMBRELL. Thank you.

Ms. KILPATRICK. They were able to sustain that, almost doubling what was asked for.

This year, the '09 appropriation, unfortunately it is much lower than $54 million—almost half of that I understand. And hopefully we will do better by that, because I think that the Community Development Financial Institutions——

Ms. GAMBRELL. Right.

Ms. KILPATRICK [continuing]. Bad timing. You have a poor record—you have a good record of taking care of America, and I want to make sure you can do that.

Part of your portfolio is the subprime. Some of your portfolio—what percent of it is that subprime? And you do—you know, subprime has not always been a bad word, just in the last two, three, four, maybe five years. What percent of your portfolio is that?

Ms. GAMBRELL. When you say "my portfolio," Congresswoman, I am sorry.

Ms. KILPATRICK. As you work with subprime—do not you work with subprime customers?

Ms. GAMBRELL. Actually, what the CDFI Fund does is its mission is really to expand the capacity of financial institutions that are

specifically serving low-income communities. Some of those CDFIs, in fact, are involved in conducting foreclosure counseling for subprime borrowers and others, quite honestly. It could be home ownership counseling. It could be credit counseling. It really runs the gamut.

So our mission is a little broader in terms of the constituents that—the stakeholders that we serve.

Ms. KILPATRICK. Do you serve communities all across America?

Ms. GAMBRELL. All across America.

Ms. KILPATRICK. In all 50 states?

Ms. GAMBRELL. In all 50 states.

REASONS FOR FORECLOSURES

Ms. KILPATRICK. I see. Okay. Then, when we talk about the problem that we have—and I heard some of my colleagues—the Chair and the Ranking—bring it up, why foreclosures? What are the reason for foreclosures? You know, obviously, prime and predatory lending. This Congress tried to tackle that pretty effectively I think over the last decade. Loss of jobs? I mean, other kinds of things, or is it the one single reason for the foreclosures, I mean, is——

Ms. GAMBRELL. I think you see a variety of reasons. And certainly one of those could be a loss of employment. It could be long-term illnesses. Sometimes, as unfortunate as it is, people end up buying more house than they can afford, but may not realize it at the time, and sometimes are not necessarily anticipating changes in life that may happen and have not always been able to secure enough of a cushion to prepare for that.

So there are a variety of reasons of why people go into foreclosure. The interesting I think, though, is that when you look at the foreclosure starts versus those that are actually sold, the foreclosure sales, that that number is very different. Less than 50 percent of the people who actually go to the foreclosure sales, there is a less than 50 percent rate of those sales.

So through that process, people are constantly trying to work out that foreclosure issue. They are working with counselors. They are working with community organizations. They are working with their church organizations and others. And now I think what Treasury has really encouraged through this HOPE NOW Alliance is that the servicers, the financial institutions, and others who can speak directly to those consumers be part of this alliance to work directly with them as well, to do workouts, refinancings, loan modifications, and other plans that may present alternative solutions for that homeowner.

Ms. KILPATRICK. Which is going to take—it is going to take all of us, 400, 535 of us, being more actively involved in it.

Ms. GAMBRELL. Absolutely.

Ms. KILPATRICK. I think we offer ourselves for that, at least this Committee, as we try to educate, you know, getting other resources. No doubt at it. Once you get the resources, there has got to be an education portfolio that—

Ms. GAMBRELL. Yes.

Ms. KILPATRICK [continuing]. Development financial institutions have.

EDUCATING AT-RISK HOMEOWNERS

Ms. GAMBRELL. And, Congresswoman, if I may, I think part of that education also is really encouraging that at-risk homeowner to pick up the phone to reach out. It is devastating to know that you may be in the position of losing your home. It is very difficult to do that kind of outreach and say, "I need assistance."

But, again, one of the things that we have been encouraging is for homeowners to pick up that phone and to call that 800 number, which again is 888–995–HOPE, to make sure that they are connected to foreclosure counselors who, again, can assist them with some options or put them directly in contact with servicers. So it also becomes the homeowner's responsibility, too. We want to make sure that the homeowners understand that they play an important part in this role.

Ms. KILPATRICK. They pay "the" part, as a matter of fact, who get the ball rolling in the entire process.

And in consumer protection, what kind of education programs do you see? I know you see a lot of problems. You also had some resolve for some of that?

Ms. PARNES. We do consumer education across the board in the financial sector. And as I mentioned, we also—the FTC is really primarily a law enforcement agency, and that is our focus. And so one of the things that we have seen with the recent increase in foreclosures are scam artists trying to take advantage of consumers who are facing foreclosure. So there has been an increase in what we refer to as foreclosure rescue scams.

And we announced a case today that we filed against a foreclosure rescue scam. We have other cases that we filed under seal this week, and that we will be releasing soon, and yet additional investigations that we have.

Ms. KILPATRICK. That is very good, and I would like you to have some PR on that to let America know that we catch you from time to time. [Laughter.]

Prohibit those who want to become scam artists, because that is a very bad situation for everyone to be in. And I think the more we hear that we catch them, hopefully the more unlikely we will be hearing—

Ms. PARNES. Absolutely. And if I can also mention, we have done—in these regional task forces that we have been participating in throughout the country on foreclosure rescue scams, there have been outreach conferences that we have held in a number of states, and we have really reached thousands of consumers who have come to these essentially town hall meetings to ask questions and tell us about issues that they are facing. And that has been a very effective way of getting the word out as well.

Ms. KILPATRICK. Do you have a way of communicating with us all of those—I mean, are we on your websites? Do we have to go to yours? Is there some automatic legislative assistance between the two that can keep us connected?

Ms. PARNES. We do. In fact, I know that many of you have links to the FTC on your own websites. And we can make sure that you do, and if you do not we will get in touch with your office.

Ms. KILPATRICK. Okay. So nobody calls to say, "It is coming, let us do this, let us mobilize this."

Ms. PARNES. Oh, we do. We absolutely do. We had—what I am remembering is we had a forum about a year ago in New York, and we had—members of Chairman Serrano's staff attended. And whenever we do these forums, we reach out to the Congressional offices.

Ms. KILPATRICK. Thank you. We would like to be a part of it. Thank you both. We appreciate it so much.

Mr. SERRANO. Thank you, Ms. Kilpatrick.

The Chair would like to note that this is Mr. Bonner's second day on the Subcommittee. He has been bright and early to both. He is on his way to getting the gold pen at the end of his term. [Laughter.]

Mr. Bonner.

SCOPE OF THE PROBLEM

Mr. BONNER. Thank you, Mr. Chairman.

And thank you, ladies. Ms. Kilpatrick just asked a question referring to the housing crisis. The question I am going to ask you in just a minute refers to the housing crisis, and yet sometimes we are all guilty of throwing terms around like "crisis" and not necessarily knowing the damage that we may be doing to the confidence of those who are not in crisis.

So I guess my first question is: could you kind of help me at least understand what we are talking about in terms of the number of people in this country—you know, a few months ago it seemed, certainly a couple of years ago, we were bragging about the fact that there was record home ownership, and in certain demographics in America there was even higher than ever expected home ownership. My home State of Alabama, for instance, we were proud to be one of the highest home ownership among African-Americans in the 50 states.

So can you kind of put it in perspective for me. I am not saying there is not a crisis. But what is the status of the people who are in foreclosure? And how does it compare with any recent chapters in American history? Not the Great Depression, but any recent years or decades, if you could.

Ms. GAMBRELL. Are you directing it to me?

Mr. BONNER. To either one or both.

Ms. GAMBRELL. Well, I think to try to put this into context, what we are looking at, what the Treasury Department is looking at, of course, is—and, again, this is why the Treasury has tried to be very active in this area. There are 1.8 million subprime ARM resets that will be occurring in 2008/2009.

The HOPE NOW Alliance servicers have estimated that about 600,000 of that number people may not be able to afford that reset rate of their mortgage. And so we, again, I think are looking at efforts that can get ahead of the problem and really try to address those issues. How do you help those consumers who may in fact be facing those resets? How can you put them in different plans, different workout plans, etcetera, etcetera?

Of the numbers that we have—the HOPE NOW Alliance servicers have also looked at, they have also identified about 1.2

million homeowners who may in fact be able to reapply for the fast-track process that would allow for refinancing, loan modifications, and other types of strategies to assist those homeowners.

So, again, I think the real question here is not so much how big is the crisis, but what can we do to address those thousands of owners in fact who may be at risk, who with some flexibility may be able to stay in their home with assistance from the financial services industry, from the servicers, and others, who are involved in this effort.

Mr. BONNER. And I think that begs the followup, and that is, is there a recent paradigm in the last 20 or 30 years where we had a similar crisis? And, if so, what was the prescription to get us out of that situation then that we might look to to get us out of the situation we find ourselves in today?

Ms. GAMBRELL. Well, in many ways, I think what we are doing now is perhaps even more aggressive in some ways, again, because we are really trying to reach out directly to the at-risk homeowner. We are, of course, still monitoring the progress and looking at the early progress of those efforts, but also are open to any ideas and strategies and approaches that others have as well, because, again, I think the issue is: how quickly can we get on top of this problem? And how quickly can we address it and make sure, again, that those homeowners are paying reasonable mortgage payments and are able to stay in their homes?

Mr. BONNER. And just an opinion based on the conversations already taking place, I think education is one of the key ways of doing that. The Chairman, the Ranking Member, the Vice Chairwoman have all talked about—and you all have responded to—in terms of trying to get the public service announcements to be our ally in this.

But not a day passes, I do not think, that any of us do not get inundated with offers of free money. Of course, there is no such thing.

Ms. GAMBRELL. Right.

BANKRUPTCY LEGISLATION

Mr. BONNER. Let me get this question in, if I might. Obviously, there are many groups that we are looking to to assist us through this housing crisis that we, as a nation, are facing. But we also must consider what effects and what result will come from our actions to help some that might have a negative impact on others.

Again, in my home State of Alabama, and I am sure throughout all 50 states, many families and homeowners, especially in rural areas, rely on their community banks in their own hometowns, and yet most community bankers have not made the subprime loans that other financial institutions have. And I for one, and I am sure I am not alone, would be concerned that our actions in the Congress, such as the bankruptcy legislation that is now being considered in the Senate, could put community bankers in jeopardy, and perhaps some out of business.

If bankruptcy judges are allowed to modify the terms of all first mortgages in Chapter 13 proceedings, then the increased risk borne by community bankers would make home ownership out of reach for many people, and much more expensive for others.

So my question is: if you look into your crystal balls that none of us have, how, in you view, would the Senate legislation undermine the community banker? And, secondly, how would such legislation undermine the effectiveness of Congress and the administration's efforts to work on programs such as the HOPE NOW Alliance?

Ms. GAMBRELL. Congressman, Treasury is studying this issue, and, of course, as you know, most of our efforts recently have been focused on HOPE NOW. This is an area that falls within the jurisdiction of the Department of Justice. Unfortunately, I am not able to give you an official position today, because we still are studying the impact.

It is a billeted balance—again, as you have talked about, and I think one of the things that Secretary Paulson has stated is that we need to be very careful in looking at both sides of the issues. On the one hand, consumer protection is one thing that we are all advocating for, and we want to be sure is in place. On the other hand, we want to make sure that there is not a constraint in terms of access to credit and some of the unintended consequences that can happen with any steps that go forward.

So all I can, unfortunately, offer you today is that we certainly are studying that, and we will continue to study the legislation and other legislation that is being put forward.

Mr. BONNER. Mr. Chairman, I look forward to my gold star. I will try to earn it by the end of the year. Thank you.

Mr. SERRANO. You went over your five minutes. We kind of took it away for——

[Laughter.]

You know, in watching last night's late sports news, I found out that the Orioles are having a very good three days in spring training. That is the reason for Mr. Ruppersberger's glow that you see. [Laughter.]

With that glow in front of me, I recognize the gentleman.

Mr. RUPPERSBERGER. You know, he is a good man, but he is a Yankee fan, and I am Orioles fan. And we have been down, and you are bullying me right now. [Laughter.]

Mr. SERRANO. I am telling you that I root—it is the Red Sox I never——

Mr. RUPPERSBERGER. We are rebuilding.

Mr. SERRANO. I should not say that. I get this room from a guy from Massachusetts, so I——

[Laughter.]

Mr. RUPPERSBERGER. I am sorry I am late. I commute from Baltimore, and the traffic was terrible as it is. Sometimes it is, sometimes it is not. Do you have any jurisdiction in traffic engineering? [Laughter.]

And I see also, Ms. Gambrell, that you went to Towson University.

Ms. GAMBRELL. That is correct, sir.

Mr. RUPPERSBERGER. So you know the route that——

Ms. GAMBRELL. I absolutely do know it.

Mr. RUPPERSBERGER. The first thing I—and just a couple of quick questions, and I think Ms. Gambrell first—and, by the way, can we

call Mr. Bonner "rookie"? Would that be appropriate? No? We cannot call him a rookie? Okay.

Mr. SERRANO. No, he has been around a while.

Mr. RUPPERSBERGER. No, I mean on the Committee.

Mr. SERRANO. Oh, on the Committee.

Mr. RUPPERSBERGER. He came in with me. [Laughter.]

COUNSELING AND OUTREACH

As far as the issue with respect to your program of CDFI Fund, part of—a lot of us who represent districts that are lower income—and Baltimore City, to give you an example, eastern part of Baltimore County—and a lot of times that we see that a lot of people that need help are not getting access to banks, because banks and the credit unions just are not there.

And I am wondering, you know, do you have any plan how we can improve that education and reaching out? I used to be—I was in local government for about 17 years, and one of the major issues was reaching out, helping people with home ownership, trying to counsel. Do we have any plan there?

The other thing I want to ask you, another question, there is always a battle at budget time, but with the cuts that are taking place—and there is a lot of the issues, and we have to have priorities, the war, and those type of things—what areas do you feel that you will have to cut, or are you getting signals from the administration that you think you will have to cut? And what impact would those cuts have, and how are you going to deal with them?

Ms. GAMBRELL. Thank you, Congressman. Let me answer the first question for you. I think certainly when you look at the type of outreach that needs to take place in communities we have to—I always say we have to kind of think outside that box and go outside the lines, the parameters of those traditional ways in which we have done outreach.

The public-private partnerships are extraordinarily important. That means banks working with local governments, agencies working with city government as well, can be a very effective way to reach those, for example, who are in the lower income categories, and who may be using those city services or those local services, but also presents a great opportunity for people to really understand that they do not have to resort to high-cost providers, that there are other ways in which they can get that access to credit, that there are traditional ways in which the financial——

Mr. RUPPERSBERGER. One of the things—I know Harbor Bank, you work very closely with them. They are doing a good job.

Ms. GAMBRELL. Yes, Harbor Bank is excellent.

Mr. RUPPERSBERGER. There are a lot of people that we are not getting to.

Ms. GAMBRELL. Right.

Mr. RUPPERSBERGER. Now, do you think it is more of the responsibility of the local government to reach out using——

Ms. GAMBRELL. You know what? I think in this environment it is everybody's responsibility. And, again, we have seen local government participate, but we have also seen a large—certainly, with Harbor Bank, has been a great advocate and working with church organizations, faith-based organizations, non-profits, schools. I

think everybody has a responsibility and everybody has a role to make sure that consumers certainly understand that there are a number of options that are available to them to make good financial choices.

Mr. RUPPERSBERGER. Okay. Are you getting any pushback from the industry at all, the industry players about what you are doing, your program?

Ms. GAMBRELL. No, not at all. In fact, they have been extraordinarily supportive. And, again, because we—our stakeholders are primarily community development financial institutions, these are folks, including community banks, that are working in the community, including rural areas, but primarily low-income areas to create affordable housing programs, jobs programs, small—encourage small business development, and others. They have been extraordinarily supportive.

LAW ENFORCEMENT

Mr. RUPPERSBERGER. Okay. From the FTC point of view, we have had a lot of issues. And if this question has been asked, just tell me, and I will not go any further. But we know that there has been a lot of issues, and it seems that a lot of times the mortgage brokers or whatever have been targeted. And when you really look at the whole picture, it goes from A to Z. I mean, in the beginning it looked like they were caught, and it seems a lot of state legislation is focusing on dealing with the brokers.

And sometimes if you do that, and you take away a broker's incentives, then they will not go sell, and then you have just a monopoly with the banks. And I think it is good to have those checks and balances between the credit unions, the banks, and also the brokers.

From your perspective, have any actions or have any other areas as it relates to lending institutions—have you focused in that regard on where we need to go with this type of a crisis that we are in right now?

Ms. PARNES. Well, the Commission, as I had mentioned, our jurisdiction, as you know, is somewhat limited in this area. Congress excluded banks, thrifts, credit unions. And we are looking at it from a law enforcement perspective. We are primarily——

Mr. RUPPERSBERGER. Oh, you are looking at it from——

Ms. PARNES. Absolutely.

Mr. RUPPERSBERGER. Okay. Tell me about it.

Ms. PARNES. We are a law enforcement agency, and we have a history of cases that we have brought against mortgage brokers, against servicers, against—you know, we go through the entire financial transaction. We have brought cases against debt collectors, if consumers are in financial trouble, and owe, and their debt is, you know, referred over to a debt collector.

So we do law enforcement in, you know, kind of the whole——

Mr. RUPPERSBERGER. What is your jurisdiction? Do you have the ability to indict or to arrest?

Ms. PARNES. No, we only have civil—civil law enforcement authority. But——

Mr. RUPPERSBERGER. And where do you bring those? Administrative courts or——

Ms. PARNES. We can bring them administratively before the Commission, but most of our cases we bring in Federal District Court.

Mr. RUPPERSBERGER. What do you think we need to do to help in this situation? I mean, that is a very broad question, but I have only five minutes, so——

MORTGAGE DISCLOSURE REFORM

Ms. PARNES. Right. It is a broad question. I mean, I think that from our perspective we will continue our law enforcement. We will continue to work with other federal agencies. One area that I would focus on—our Bureau of Economics did a study about maybe a year ago on mortgage disclosures and found that the disclosures were confusing to consumers in the prime market.

They do not understand exactly what they are signing when they go to closing. And it is more confusing for people who are in the subprime market. So one of the things that I—that we thing that—that the agencies in this area should focus on, and possibly Congress, is mortgage disclosure reform.

Part of the issue I think is—that we are facing now is that consumers did not really understand that their loans would be reset, that they might get big balloon payments. And I think they did not understand it because there is a lot of paper that you are looking at when you are going to close on a mortgage.

Mr. RUPPERSBERGER. Let me just stop here because my time is up. One comment that I am going to make—and you do not have to answer—I am very concerned that sometimes we, as legislators, federal, state, and local, overreact to situations. And I am concerned about too much overregulation, if it affects those people that need help the most.

In other words, when sometimes we come in to regulate, then they will not lend in subprime areas. They just will not do it. So eventually the people that are trying to help that need help do not get help because the banks will not do it, or the mortgage brokers will not do it, because they feel so overregulated.

So I think it is—I hope you are looking at that to make sure you advise financial services committees, and things like that, on what really the end game should be to help those individuals.

Mr. SERRANO. Thank you.

The Chair would recognize the distinctive, charming, debonair, bilingual, Mr. Kirk.

Mr. KIRK. Muchas gracias, Señor.

SCOPE OF THE PROBLEM

Just to get a perspective, I have been looking at this a lot, studying it a lot, and, ironically, as a Republican came to the same conclusion as Chairman Dodd on this issue over on the Senate. My understanding—we are trying to get a scope of the problem.

My understanding of the rough numbers are these. The value of homes in America, $20 trillion. Value of home mortgages in America, $10 trillion. Values of ARM subprime mortgages, $1 trillion. Value of subprime mortgages, 90 days late or more, $300 billion.

You talked about how we had roughly 600,000 borrowers in deep distress, and I understand the average loan size for them is

$150,000, so that would mean you have an urgent $90 billion problem, 1.8 million homes in jeopardy.

So looking at the overall situation, the good news is 97 percent of mortgages are okay, and 3 percent are not. And my understanding is the situation we faced in 1934 was 52 percent of mortgages were 90 days' arrear or more. So this problem is 15 times better than the Great Depression, but still a $90 billion urgent problem and a $300 billion six-month problem. You can see why it is destabilizing the market.

For HOPE NOW, I just had my staff call the number to do a reality check, and got a two-minute answer. So that is good, and I understand you are up to 4,000 a day in calls. But according to The Wall Street Journal, we have had only about 10,000 people actually helped by HOPE NOW in December and January. And if we take the 1.8 million mortgage holders who are resetting in the next six months, and you have 130 working days, that means your call volume, if they were to be helped by HOPE NOW, would go from 4,000 a day to 14,000 a day, to handle the problem.

I understand we have got about 2,200 foreclosures per day happening right now. I am worried, though, that we are not getting the full scope of the problem, because the Journal also reports FDIC is bringing back retired employees, because we are facing 100 bank failures in the next six months. And Fannie Mae just reported a $3.6 billion loss for the fourth quarter of last year. And if you look at the balance sheet, it is income insufficiency on their loans for Fannie Mae right now.

So my question is this: it would appear that more aggressive action is necessary, because you have made a start, but at 4,000 a day you are running at around 25 percent the rate you should be running to handle this problem. And given the size of the capital problems, etcetera, we have an urgent $90 billion problem, and a long-term $300 billion problem.

HOME OWNERS' LOAN CORPORATION

When I look back, you know, you were asked, you know, what other times have we taken federal action to really correct this problem? And I see two key examples, which is the RTC and the Homeowners Loan Corporation.

And Alex Pollack, who is the former President of Federal Home Loan Bank Board for Chicago, and then Alan Blinder, a great economist, both say that we ought to restart the Homeowner's Loan Corporation. And I particularly favor that, because I think it was a brilliant federal intervention in buying distressed mortgage securities for 1934, 1935, and 1936 only, and then managing the portfolio.

My understanding is we have about 600,000 foreclosures a year anyway in a good economy, so you managed the portfolio, and then they repaid President Eisenhower the full capital, plus a $14 million profit, in 1953, and closed the institution. And so it was a key short-term federal instrument. We did not make the Federal Government the number one mortgage purchaser in the country permanently. And we effectively eliminated the panic-pain premium of what was happening to the housing market in the mid-1930s, which is where so much damage is caused.

So can you describe, what is your thinking on where I and especially Chairman Dodd are going? What is your thinking on where Alex Pollack and Alan Blinder are going? And it dramatically affects this Committee, because what we are calling for is a $10 billion appropriation from this Subcommittee in this year to get this rolling.

And I do say, while rebate checks are politically popular, the market is destabilizing on the mortgage issue alone, and so a reassurance of this size and this nature, it would appear to me, would be the wise course. But give me your thoughts.

Ms. GAMBRELL. Congressman, thank you for your question. The Treasury Department is studying the proposal on the loan corporation that is being, of course, studied throughout the country right now. And we are looking forward to learning more about the proposal.

I think you also know that we are open to new ideas, new perspectives. The administration has—and the President has said that it opposes a federal bailout, and so I think Treasury needs to look very closely at the proposal, be able to comment, give its suggestions and recommendations on what it believes will actually help address some of these issues.

Of course, when we look at the solutions, we want to make sure, again, that we are targeting the at-risk homeowners. And even the plans that we have in place now are not targeted to investors or speculators. So I think it is going to be very important for us, as we go forward, in the Department and certainly throughout this country as we look at these different proposals, to make sure that whatever proposals are adopted are in fact ones that are addressing those at-risk homeowners.

Mr. KIRK. I would just say, Mr. Chairman, that with the term "bailout" politically charged, and in the case of the HLC intervening in the Depression Era mortgage market, which was 15 times worse than this, is the U.S. taxpayer was repaid capital with a profit. So there was no bailout. It was the panic premium that we eliminated. And when a lender forecloses and takes an illiquid asset and no functioning market, you go to zero on the value of the asset.

The HLC entered in—my read on what Alex Pollack has told us is that generally the lender took a 20 percent hit, not a 100 percent hit. The restructured security benefitted the family who remained in the home. And by the way, the local school district and the town kept the taxpayer in the home. And the neighbor did not have a boarded up piece of property depressing their property value, and it turned out not to be a bailout at all. It eliminated a panic, a penalty, that the market was creating.

SERVICEMEMBER LOANS

Let me just—one last thing. I am worried about our active duty military as well on the scam side. We understand that the VA-backed loans for military have gone from around $250,000 loans to less than $120,000, a real drop. And that is rated because the VA limit is still set at $417,000, which it provided now an opportunity for scammers to come in to offer military families these adjustable rate and unstable marketing provisions for active duty military.

Has the FTC looked into this? We looked particularly at the surrounding and military base market, and protecting military families.

Ms. PARNES. We actually do have a program geared to the military. We work very closely with both the JAG and their financial counselors on almost all military bases, and we work with them. It is actually one of the reasons that we initially got into payday lending, because we heard that there were all of these payday lending outfits that were setting up right outside the military bases. So we are very focused on that.

I do not know if we have heard specifically of this issue, but I will check on that.

Mr. KIRK. Thank you. Just it looks like the VA loan limits are out of date, which is——

Ms. PARNES. Okay.

Mr. KIRK [continuing]. Giving an opportunity for the scammers, and so forth.

Ms. PARNES. Okay.

Mr. KIRK. Thank you, Mr. Chairman.

Mr. SERRANO. Thank you. Thank you.

Something either wonderful or scary is happening today on this panel, and that is the Republicans are asking exact or similar questions as the ones I have in mind. [Laughter.]

I do not know what that means. But, you know, you bring up an issue when you say "bailout" that I brought up, and amongst the four or five things that could cause me trouble in my own Congressional district, this is one of them. And that is when Mrs. Rivera or Mr. Smith have asked for $60 in food stamps, maybe people have said, "She needs food stamps because of her lack of personal responsibility, and it got her to that point." Unfair as it is, that is the statement.

But when the same person or someone else bought a house that they maybe could not afford, the country is now asked to bail them out or to do something else. Now, I know that the difference is that one is a question of a human being having more to eat, which is dramatic enough. The other one has repercussions throughout the economy, and a lot of people were duped and are totally innocent.

But it is just interesting how some of these issues play against each other and they are seen differently, because, yes, there were people who were duped, but it was also in a way—I am now going to get into real trouble—part of this "me" generation where you have to have a bigger place than the person next to you in some cases, you know, and that also got people into messes.

Of course, that—I do not know how you regulate that. What we have to do is make sure that the ones who honestly went out there to be part of the American dream that we keep talking about do not get hurt, which brings me, Ms. Gambrell, to the HOPE Program.

LIMITATIONS OF HOPE NOW INITIATIVE

You say there are 1.8 million people who are in danger right now, we see as being in danger.

Ms. GAMBRELL. 1.8 million reset——

Mr. SERRANO. Reset.

Ms. GAMBRELL [continuing]. Resetting of the loans.

Mr. SERRANO. Now, the HOPE Program will cover certain folks, but it does not cover other folks whose mortgages reset before 2008, and so on.

Ms. GAMBRELL. Correct.

Mr. SERRANO. So what will we do to deal with their issue? And I want to be—notwithstanding my other sarcastic comments. I want everybody covered and protected. How do we deal with those?

Ms. GAMBRELL. I think, again, you have to look at all of the different approaches that are being used and all of the different tools that are being used, the organizations that are being involved—that are involved as well in trying to address this issue. As I had mentioned earlier, NeighborWorks America was just recently awarded $130 million to housing and foreclosure counseling agencies across this country to help those agencies as well deal with the problems on a local level.

The Treasury Department is focused, looking ahead at the current situation, but also looking ahead at what potentially may arise as well, Chairman Serrano. But I do think, again, we have to look at all of the remedies that may be available, if it is not from Treasury, then through other means and organizations as well.

Mr. SERRANO. Thank you.

FTC V. MORTGAGES PARA HISPAÑOS

The FTC recently had a case that included—that was the FTC v. Mortgages Para Hispaños—that is Mortgages for Hispanics——

[Laughter.]

Dot com, that is dot com. [Laughter.]

And I often wonder, what happens if a person was named Dorothy Com? Could we call her Dot Com? [Laughter.]

But what was that case about? I understand that was the case of a mortgage broker who allegedly promised one set of loan terms verbally in Spanish, but had customers sign English-only closing documents with different, less favorable terms. Of course, that goes into the whole area of cheating the consumer, but it is specific to this issue also. What happened there?

Ms. PARNES. Right. Well, that is exactly right. The outfit was pitching its services to——

Mr. SERRANO. And that was their actual name?

Ms. PARNES. Yes. Yes.

Mr. SERRANO. They did not even have an English language alternative name?

Ms. PARNES. That was their name. That was their—that was their name. And they were obviously pitching their service, their product, to Hispanics. They did business in Spanish. They would sit down with consumers and explain the entire transaction in Spanish, and the actual loan documents had different, less favorable terms, and those documents were all in English.

Certainly, I mean, that is——

Mr. SERRANO. It was blatant.

Ms. PARNES. Yes, a very blatant scam.

Mr. SERRANO. What is going to happen to them now? Will you refer them to the——

Ms. PARNES. Well, no, we have actually taken action against that company, and that case has been resolved. Unfortunately, as in many—as in at least some of the cases we bring, most of the money was gone. We were able to get a judgment for $250,000, which was, you know, the extent of consumer injury, but the individual only had $10,000.

We have accountants who look very carefully at the ability of our defendants to pay up, and that is all we could get, so we got $10,000 from this individual.

Mr. SERRANO. Did they go to jail?

Ms. PARNES. We do not have criminal authority.

Mr. SERRANO. Well, I know you cannot send them to jail, but can you refer it to someone——

Ms. PARNES. Right.

Mr. SERRANO [continuing]. Who would?

Ms. PARNES. We do. We do refer these cases. We have actually a Criminal Liaison Unit, CLU, that works very closely with U.S. Attorneys Offices. And when there is conduct—we talk to AUSAs throughout the country and try and get them interested in cases. And sometimes it is harder, because some of these cases are—just fall below the threshold that a U.S. Attorneys Office needs to be able to get an indictment and get a conviction.

Mr. SERRANO. Mr. Regula.

SPECULATORS

Mr. REGULA. In your judgment, what percent of the subprimes are speculative versus people who really want to get that first home? I am talking about the second home people, people who are in the subprime on the basis of growing value of real estate. It seems we have got two groups here. We have got people who want honest to God help and then we have got those who were playing the market, and yet probably expect us to "bail them out." What is your evaluation of subprimes?

Ms. GAMBRELL. Congressman, I do not have those specific numbers, but I can certainly get those for you. And you are right; there is a tier certainly of speculators and investors that are involved in this entire discussion. Unfortunately, I just do not have the figures with me today.

Mr. REGULA. Well, I do not think it is our job to get them out of a bad judgment anymore than if you buy a stock and it goes down.

Ms. GAMBRELL. And Treasury supports that as well.

Mr. REGULA. But you do not offhand have any——

Ms. GAMBRELL. I do not have them with me today, but we can certainly get them to you.

[The information follows:]

SUBPRIME DATA ON INVESTORS AND SECOND HOMES

Some estimates suggest that about 8 to 9 percent of subprime loans were made to investors or those who bought a second home. Based on readily available data, of the estimated 1.8 million active subprime adjustable rate mortgages resetting in 2008 and 2009, roughly 160,000 are investor/2nd homes. However, this data may underreport the true number of homes bought as an investment, since some homeowners claimed second or investment homes as primary residences to obtain easier financing.

Mr. SERRANO. We do not know how to single them out as such, do we? Because I fall where he falls. A person who was duped into buying a house, especially their first home, I know families in the Bronx—for instance, I was telling Mr. Regula—where the brother and the sister, you know, are both married and everything, bought together, you know, they moved into this two-family house because they could afford the $3,000 a month that they split, and that was tough.

And then, when the first reset came in, they cannot afford it. They lost it. That person I want to do whatever we need to do to help, and to get at the people who did that to them. But if a person already had a house and was buying one for the weekend, you know, I am not—I do not think I should be worried. Well, if there are criminal acts involved, of course I have to be worried. But I think you know what I am saying. We are here to protect those who were hurt, not those who were playing the market and took a chance.

We have votes going on now. You have been a wonderful panel. We have a second panel coming. So we will submit the other questions for the record, and we will excuse this panel and thank you——

Ms. GAMBRELL. Thank you.

Mr. SERRANO. And congratulate you on the work you do. We know this is difficult. We will be staying in touch with you to see how together we can help folks who need help, and I thank you also for your work with Spanish-speaking folks throughout this country.

Ms. PARNES. Thank you, Chairman.

Mr. SERRANO. Thank you so much.

We have three votes, a 15-minute, a 5, and a 5, and then after that we will come back. So it is roughly 20 minutes.

[Recess.]

Mr. SERRANO. We will reconvene.

We may not be joined by a lot of members because the House decided to call it quits before the big storm comes. Political storm. [Laughter.]

Mr. SERRANO. There are a couple of bills on the floor that are, you know, causing some drama.

PANEL 2

We will now proceed to our second panel of witnesses, and we apologize for the delay. We had three votes over there. We lowered taxes, right?

Mr. REGULA. Did we? I thought we increased it. [Laughter.]

Mr. SERRANO. Wow, there is a change here.

Michael Calhoun is president of the Center for Responsible Lending, a nonprofit research and policy organization which works to protect home ownership and to eliminate abusive financial practices. Janet Murguia, an old friend, not old in age.

Ms. MURGUIA. Thank you. [Laughter.]

Ms. MURGUIA. Will you get that on the record, please? [Laughter.]

Mr. SERRANO. Old in service.

Is the president and CEO of the National Council of La Raza, the largest national Hispanic civil rights and advocacy organization in the United States. Among many other efforts La Raza has also worked to increase home ownership and to eliminate predatory lending.

Chris Stinebert is president and CEO of the American Financial Services Association, the national trade association for the consumer credit industry. The association has nearly 350 active members ranging from large national financial services to small, independently owned consumer finance companies.

And last but not least—yesterday you had someone from Ohio, right? I have someone from the Bronx.

Mr. REGULA. Where's that?

Mr. SERRANO. Last but not—the Bronx?

Mr. REGULA. Yeah.

Mr. SERRANO. It is where we buy all of the stuff you grow on your farm. [Laughter.]

Mr. SERRANO. I told him when I first met him I thought everything just came from the supermarkets. I did not know it came from the farm.

Mr. REGULA. We are working on him. [Laughter.]

Mr. SERRANO. Last but not least, Greg Lobo Jost is deputy director of the University Neighborhood Housing Program and a member of the Board of Directors of the Neighborhood Economic Development Advocacy Project in the Bronx, New York, USA.

Mr. Lobo Jost is active in creating, financing, and preserving affordable housing for the residents of the northwest Bronx and the 16th Congressional District represented by that charming and debonair Congressman Serrano.

Thank you all, and we are very much appreciative of your time with us. We really do appreciate it. We again apologize for the delay, and we will start with Mr. Calhoun.

MICHAEL CALHOUN'S TESTIMONY

Mr. CALHOUN. Thank you, Mr. Chairman and Ranking Member Regula and members of the Committee.

Mr. SERRANO. And for a moment we will remind everybody that all of your testimony will go into the record. That is our nice way of saying please keep your statement down to five minutes.

Thank you.

Mr. CALHOUN. Thank you for your invitation today. As you mentioned, the Center for Responsible Lending is an affiliate of Self-Help, which is a subprime mortgage lender. We are also a CDFI. We have been making first-time home loans to borrowers who did not qualify for conforming loans for more than 25 years.

Over the last five years we have made $4 billion of financing available for first time home buyers in 48 states across the country. We actively participate in the secondary markets, and prior to my current position as president for Center for Responsible Lending, I headed up those programs for Self-Help. So I have personally been involved in those lending endeavors.

I am going to address three things very quickly here and try to respond to questions that have come up from the previous panel,

and those are, first, what is the scope and depth of the current mortgage crisis or situation.

Second, what were the causes that got us here? What were the types of loans? Why are so many of them going bad?

And then third, very quickly, what are some of the remedies?

On the scope, to be clear, many industry experts in our own projections are that over the next two years more than two million families will lose their homes to foreclosure, not enter foreclosure, but actually lose their homes. That works out to more than 20,000 per week, and that is an accurate reflection of what is happening right now in the market.

Depending on how long this hearing lasts, probably several thousand additional families will lose their homes as we speak here today, and when we get into the questions, I can talk about some of the specifics. Some of the numbers you heard before were about small segments of the families at risk, not the overall picture, and those numbers, for example, are from Moodysresearch.com. They are a leading housing economist. Our numbers, core logics, they are pretty close to consensus numbers in the market.

That is obviously causing great disruption not just in the housing market, but in the whole economy as recent GDP figures certainly confirm today.

Let me tell you about the typical loan that got us into this. The typical subprime loan which you have heard is this so-called subprime hybrid ARM where you had a fixed rate for two or three years, usually two, and then the rate went up. It had some notable features.

One, the rate could not go down. So those borrowers, while their rates may not go up as much with the current Fed rate going down, their start rate would not go down.

The start rates were referred to as teaser rates, but that is a little bit of a misnomer. The average initial rate on these mortgages was about eight and a half percent, not a bargain rate of some of the one or two percents that you heard in some of the crazy ads.

There were other factors that made these loans so risky, which were that they were underwritten so that the initial payment could be up to 55 percent of the borrower's gross income, not even take home pay, but gross income. They did not look at whether the borrower could even afford the increased rates.

Half of the loans had no documentation of the borrower's income, and one of the most critical factors and one of the real gimmicks that we're paying the price for now is that three-fourths of these loans had no escrow for taxes or insurance. It was a way to make the monthly payment look lower to the borrower, but then it creates this crisis when your taxes come due, and that actually is triggering a lot of the foreclosures.

To be clear, Ms. Gambrell was talking a lot about the rate resets. Over half of these foreclosures are happening before the reset because what had previously happened was borrowers were able to refinance even before the reset, for example, when they got their tax bill. But now with decreasing housing prices, that refinance escape option is no longer there.

Let me talk about the remedies. First, we have supported and participated in the HOPE NOW programs, the various AFSA Pro-

grams. We support all of those, and they are critical, and they will make a difference.

In our view, they will not be enough, not for lack of will and not for lack of good intention, but because of structural obstacles that are built into the market today. This isn't like when your local savings and loan made your loan. If you had problems, there was somebody you could go down the street and talk to.

Today not only are these loans sold into the secondary market. No one owns the whole loan. They are sold into different slices of the rights to cash flow for these mortgages. For example, they even sell separate securities that are funded just by the prepayment penalties on the loan. That's the only thing that funds that class of securities.

So it is a little bit like sending cattle to the slaughterhouse and then deciding after the fact you want to put it back together and move the cow to a new pasture. It is very, very hard to do.

There are a couple of other structural obstacles that we have not been able to overcome. Over 40 percent of these mortgages have second mortgages in addition to the primary mortgage. To modify, you have got to satisfy both of those liens in some way, which is extraordinarily difficult to do. Just the logistics of it, the first mortgage holder is saying, "Why should I take a discount to benefit the second mortgage holder?" and the second mortgage holder saying, "Why should I get out of the way to benefit the first mortgage holder?"

You have a couple other structural obstacles. Servicers generally are not paid to do modifications. Industry figures are it costs about $750 to $1,000 for the work to carry out a modification. Foreclosures are sent to third parties who carry them out, and those costs are reimbursed.

And finally, not surprisingly, the threats of lawsuits where security holders have told servicers that if you modify these mortgages, you may hurt the value of my securities. Not all classes will be affected equally, and those classes have threatened to sue servicers if they do too many modifications.

Recent numbers are if you look at, for the subprime hybrid ARMs, which have been the worst performing loans, that for the fourth quarter there were about ten foreclosures for every loan modification, and that is not, again, due to lack of will, lack of effort. It is these structural obstacles.

So what do we support? One that has been mentioned here today, and I want to be clear about the details of it, is a modification to the bankruptcy code to allow a court ordered modification if, and only if, the lender and servicer do not offer their own modification. That is an eligibility threshold that you have to get past.

I would note we did the exact same thing in the mid-'80s when we had a very similar crisis in the farm world where farm prices appreciated rapidly and then deflated and the farmers could not refinance their loans. This exact same approach was used. It did not raise the cost of credit. It saved a lot of family farms.

I want to thank you again for holding this important hearing, and I would be happy to answer any questions that you have.

[The information follows:]

Testimony of Michael D. Calhoun
Center for Responsible Lending

Before the Financial Services and General Government Subcommittee of the U.S. House Appropriations Committee
"Consumer Protection in Financial Services: Subprime Lending"

February 28, 2008

Chairman Serrano, Ranking Member Regula, and members of the Financial Services and General Government Subcommittee, thank you for holding this hearing and inviting us to testify before you today. My remarks will focus on issues in the subprime mortgage market, where improved legislation and oversight would strengthen consumer protections long-term and, more immediately, reduce the economic damage caused by the massive subprime foreclosures plaguing our economy today.

I serve as the President of the Center for Responsible Lending (CRL) (www.responsiblelending.org), a not-for-profit, non-partisan research and policy organization dedicated to protecting homeownership and family wealth by working to eliminate abusive financial practices. CRL is affiliated with Self Help (www.self-help.org), which comprises a certified community development financial institution and subprime lender that makes loans to people with less-than-perfect credit.

Since 1985, Self-Help has provided over $5 billion of financing to 55,000 low-wealth families, small businesses and nonprofit organizations in North Carolina and across the country, with an annual loan loss rate of less than one percent. Over the years, this Committee has provided valuable support for our lending through appropriations to the Community Development Financial Institution Fund, a grant program administered by the Treasury Department. Chairman Serrano, we are grateful for that support and particularly for your leadership last year in advocating for an increased appropriation for the CDFI Fund. It is a sound investment of public monies. We are proud to report that Self-Help has leveraged federal grants to increase homeownership, expand opportunities for small businesses, and strengthen communities in a variety of ways. (See "Self Help Impact," attached as an appendix.)

Self-Help and similar CDFIs are lenders who are in the business of making constructive loans to people who would not qualify for mainstream financing. However, there is a big difference between responsible community development lending and the typical type of subprime activity that developed in recent years. CDFIs provide loans that are designed to be sustainable; the majority of subprime lenders in recent years placed a low priority on sustainability. The proof is in the massive foreclosures we are seeing in the subprime industry today—the worst rate of home losses since the Great Depression.

A year ago this month, our organization appeared before the Senate Banking Committee to sound an alarm about the subprime market. At that time, we had just released new research predicting that due to predatory and unsustainable lending practices, 2.2 million

families had lost or were likely to lose their homes to foreclosure. Our analysis showed that those lending practices would cause a crisis in the housing market, and that projection has become all too real.

What we did not anticipate is how extensive a spillover effect the housing crisis would have on the global economy, nor did we anticipate the effects on the prime mortgage market. Irresponsible lending, fueled by Wall Street demand for highly risky loans, has pushed our nation to the brink of recession. Part of the reason for the spillover is that the impact of foreclosure is not confined to the families who lose their homes. In addition, 40 million Americans who pay their mortgage on time also are poised to experience drastic drops in their property value as a direct result of subprime foreclosures.[1] The consequent pullback in spending by homeowners whose properties have lost value is further fueling a downward economic spiral.

In the context of this hearing, I believe it is important to outline why subprime lending, overall, has produced such disastrous results—not only for the families who received these loans, but for our economy as a whole. The following facts are some key factors in understanding the crisis we are facing today:

- Magnitude. The massive foreclosures the nation is experiencing today go well beyond any level seen in the modern mortgage market. Even with a strong policy response, many communities will be recovering from the economic devastation for years to come.

- No net gain in ownership. The majority of subprime loans have been refinances—not loans used for purchasing homes. Subprime mortgages made between 1998 and 2006 have not produced any net increase in the rate of homeownership.[2]

- Reckless underwriting. Lenders and brokers compromised basic, common sense underwriting principles in order to boost their loan volume. Loan originators made their money up front, and they had incentives to market loans that would attract higher prices on Wall Street. The riskier the loan, the higher the value in the secondary market. Unsustainable mortgages became standard in the subprime market not because of consumer demand, but because lenders were responding to Wall Street demand for high-risk products that produced a higher return for investors.

- Dangerous loan products. At the same time the industry lowered its standards for qualifying borrowers, it also aggressively marketed riskier types of adjustable-rate mortgages (ARMs). The most well known of these products is the hybrid ARM, often known as a "2/28" or "2/27." Another risky product is the payment option adjustable-rate mortgage (POARM), which allows people to make monthly payments that do not cover principal and interest. With a POARM, the homeowner can actually end up owing *more* on the home over time instead of less. Subprime lenders and brokers billed themselves as professionals who could

offer the American dream, but too often they put Wall Street demand for high-risk investments ahead of the best interest of homeowners.

- Passive federal regulators. Federal financial regulators have been slow to respond. Even when there were clear warning signs that subprime lending was out of control, banking regulators (with some exceptions), and the Federal Reserve, which had authority over the entire market, remained largely passive, and missed an opportunity to take a leadership role in curbing subprime abuses. As the problem grew out of hand, federal regulators were equally passive about the contributory role that the secondary mortgage market played

  Some federal regulators have tried to justify the lack of response by arguing that the problem was largely confined to non-federal, non-depository lenders. It is the case that many of the most egregious lending abuses in the subprime market were perpetrated by non-bank financial institutions, which are subject to state regulation, and to enforcement by state attorneys general and the Federal Trade Commission (FTC). Though more could have been done on that front as well, the states and the FTC did bring major enforcement actions against top market players, despite limited resources to deal with a rapidly growing industry.[3] And, in some instances, states' efforts were hampered by increasingly aggressive assertions of federal preemption.[4] At the end of the day, the national regulatory response was largely missing, both for the origination side of these deals, and for the buying side of these deals.

The sad truth is that consumers have had very little protection against abusive subprime lending, particularly on the federal level.[5] Because most subprime lenders do not keep their mortgages, but sell them to Wall Street investors, lenders did not need to care about the quality of their loans. And because federal law did not keep up with the abuses, subprime lenders essentially had a free pass to flood the market with reckless loans.

Market incentives have been stacked against homeowners, but from personal experience we know that it is possible to serve the subprime mortgage market responsibly, affordably and ethically. Today the House is considering reasonable policies that would not only help struggling homeowners, but would also help mitigate economic damage and strengthen the economy as a whole. These solutions, discussed in more detail below, are to (1) permit judges to fix distressed home loans (H.R. 3609); (2) establish common-sense, enforceable lending standards that would restore discipline to both originators and Wall Street to prevent the subprime crisis from happening again; and (3) increase the resources available for FTC's enforcement actions against abusive lending practices by market players under its jurisdiction.

Magnitude of Problem

Fifteen months ago, CRL estimated that 2.2 million families who secured subprime loans made from 1998 through 2006 have lost their home or will lose it in the future. Nothing in the past year has diminished this concern, and our most recent analysis shows that 2.26 million homes will be lost, primarily this year and next, if nothing is done.[6] Indeed, a

recent Fitch report projects that 47% of the outstanding subprime loans originated in 2006 will be foreclosed, along with more than 40% of outstanding subprime loans originated in the first half of 2007.[7]

Foreclosures have risen drastically in every region in the country, hitting areas with a high concentration of subprime lending particularly hard. Chairman Serrano and Ranking Member Regula, I am sure you are aware that your own districts are at risk of suffering significant damage from foreclosures. In the 16th District of Ohio, 28% of all mortgages originated during 2005 and 2006 were subprime loans, and we project that one in six subprime loans in the district will ultimately end in the loss of a home from foreclosure. In the 16th District of New York, the risk is even more severe given that subprime lending rose to 42% of all mortgages made in '05 and '06. The result will be a high level of home losses, with more than one in five subprime loans in the district ultimately ending in foreclosure.

The subprime problem is not confined to the people who lose their homes, but it also spills over to their neighbors. When a home goes into foreclosure, the negative economic and social effects extend to surrounding neighbors and the wider community. The "spillover effects" are startling. In CRL's report on this "spillover effect,"[8] we have projected that, nationally, foreclosures on,subprime home loans originated in 2005 and 2006 will have the following impact on the neighborhoods and communities in which they occur:

- 40.6 million neighboring homes will experience devaluation because of subprime foreclosures that take place nearby.
- The total decline in house values and tax base from nearby foreclosures will be $202 billion.
- Homeowners living near foreclosed properties will see their property values decrease $5,000 on average.

This is a dramatic reduction in the tax base of local and regional economies – a loss that exceeds the gains offered by the recent $145 billion economic stimulus package by nearly 40%. California, New York, Florida and Illinois, respectively, rank the highest in property devaluations with Maryland (6th), Virginia (9th), Michigan (16th), Ohio (18th), and Wisconsin (22nd) all ranking among the top 24 states facing declines.

While some argue that "the market is correcting itself," the signs are more ambiguous. The volume of subprime originations has slowed considerably, but there is strong evidence that abusive lending continued long after the subprime crisis had become apparent. Among subprime loans that were originated and sold on the secondary market in 2007, there was still a significantly high portion with dicey terms that increase risk of foreclosure: 69% had adjustable interest rates; 40% had not required proof of income; and 67% had prepayment penalties.[9] Although these types of loans are now less widely available for financially vulnerable borrowers, the subprime mortgage market as

currently structured doesn't have adequate incentives to change its practices. As long as the subprime market continues running without adequate rules, brokers and lenders will continue to make any type of loan that Wall Street will buy. The market may tighten up temporarily, but with so much money at stake, future abuses are inevitable.

A Net Loss in Ownership

One might be able to justify the enormous losses stemming from subprime lending if those loans had produced overall gains in homeownership. Unfortunately, that is not the case. Over the past nine years, the subprime market has produced more than $3 trillion in home loans, but contrary to industry assertions, these loans have not resulted in a net gain in homeownership. Between 1998 and 2006, only about 1.4 million first-time home buyers purchased a home with a subprime loan. However, during the same period, over 2.2 million borrowers who obtained subprime loans will lose or have already lost their home to foreclosure.[10]

The result is that since 1998, subprime lending has led to a net loss of homeownership for over three-quarters of a million families. In fact, subprime lending has led to a net loss of homeownership in every year of the past nine. (For more details, see the full report at www.responsiblelending.org/pdfs/Net-Drain-in-Home-Ownership.pdf.)

Reckless Underwriting

It is widely recognized today, even within the mortgage industry, that lenders became far too lax in qualifying applicants for subprime loans.[11] They underwrote ARMs only to the initial rate, which means they did not even consider how homeowners would be able to pay their loans once the payment adjusted upward. Even worse, many lenders qualified borrowers without any verification of income at all through so-called "stated-income" or "no-doc" loans. Fitch has noted that "loans underwritten using less than full documentation standards comprise more than 50 percent of the subprime sector."[12] These "stated doc" loans added to the cost for borrowers. Even borrowers who could—and were quite willing to—document their income were steered into these loans by the originators because of the price premium attached to stated-doc loans. Some lenders even offered a product called "Stated-Income W-2s" – meaning a higher-cost loan product was sold to wage earners who could perfectly easily verify their salaries.[13] Stated-income products also made it easier for originators to qualify borrowers for loans without underwriting for ability to repay the loan.

Dangerous Loan Products

Subprime lenders flooded the market with dangerous loan products, making them appealing to borrowers by marketing low monthly payments based on low introductory teaser rates. The most well known of these products is the hybrid adjustable-rate mortgage (ARM), often known as a 2/28 or 3/27. This type of loan begins with a fixed interest rate for either two or three years, then converts to a higher interest rate pegged to an index such as LIBOR. The loan then continues to adjust every six months, which, if the index rises, can be as much as 50% more than the original rate. Another complex product that has put many low-income families at risk is the POARM, mentioned above. POARMs allow people to pay a minimum payment that does not cover principal and

interest, which can make their loan balance grow larger during the period when the minimum payment is being made (i.e., the loan "negatively amortizes"). Unfortunately, lenders like Countrywide offered these loans to borrowers for whom they were not well suited, structured the products so that the payments substantially increase in five years or less when they hit their negative amortization cap, used excessive teaser interest rates to lure borrowers to the product, and failed to document income. Unlike 2/28s, the POARMs that were poorly underwritten are largely Alt-A mortgages (considered by investors to have slightly higher risk than prime loans) as opposed to subprime.

Passive Regulators

With some notable exceptions, key federal regulators were slow to act in response to the rapid growth of an increasingly reckless—and, as we now see—destabilizing portion of the mortgage market. (The subprime share of the mortgage market grew from 12% of the mortgage market [$160 billion] in 1999 to more than 21% [$600 billion] in 2006.[14])

The most recent federal law aimed at curbing excesses in the subprime market was enacted over a dozen years ago in 1994 (the Homeownership Equity Protection Act, or "HOEPA"). While it was largely successful in curbing targeted problems, the law was aimed at a narrow range of abuses that were prevalent at that time. HOEPA includes flexibility to deal with inevitable subsequent predatory practices that would develop by giving the Federal Reserve Board the authority to issue rules aimed at addressing unfair and deceptive practices in the mortgage market.[15] Yet the FRB's proposed rules to tackle today's abuses – making loans without attention to the borrower's ability to pay the loan, the perverse incentives to steer homeowners into higher-priced loans, the prepayment penalties that lock borrowers into higher priced loans – were just published in January of 2008.

While the Board's proposed rules offer stronger protections on some abusive practices, we fear they would not be adequate to curb some of the most fundamental causes of today's crisis. For example, the proposal falls short in addressing the perverse market incentive (called "yield-spread premiums) that encourages brokers to place borrowers into higher-priced loans, and also fails to sufficiently address abusive prepayment penalties that both increase costs and the risk of foreclosure for borrowers.[16] The Board's proposed rules are also far too late for many homeowners, and they are unlikely to become to become effective until sometime in the second half of 2008. Another action that occurred late in the subprime crisis came only last July, when the federal financial regulators collectively issued a "guidance" that addressed several key components of reckless underwriting.[17]

The lack of protections against abusive lending have been particularly damaging in a market that offers strong incentives to take advantage of borrowers. Subprime mortgage brokers, lenders, securitizers, and investors are operating in a market that rewards business practices that directly undermine homeowners and sustainable homeownership. Some of the federal regulators have been more aggressive than others in seeking to act, although arguably the focus on origination practices rather than the "market-making" practices of financial institutions who supported poor lending practices by buying

questionable loans may have had the unintended consequence of magnifying the spillover impact into the larger economy, as major federally chartered institutions have found it necessary to write down billions of dollars in losses.[18]

Markets function effectively when transactions are likely to benefit all parties involved, but we don't have that situation in subprime lending. For years the mortgage industry has lobbied against subprime lending regulation and legislation, arguing that credit markets would shrink as a result of such regulation. Ironically, we have seen the credit markets become more restrictive in response to the lack of adequate regulation and the reckless lending that followed; in fact, it has largely shut down. If subprime lenders had been subject to the same kind of rules that responsible mortgage lenders have always followed, the nation would not be bearing the costs of this crisis today.

Solutions

We urge Congress to stand up for homeowners by seeking meaningful solutions to the subprime crisis that will help our national economy recover and prevent this kind of fiasco in the future. Any effective solution will involve reducing foreclosures on existing loans, and also addressing perverse market incentives that could cause a recurrence of this situation in the future. It has become abundantly clear that to let the foreclosure crisis play out in a continued downward spiral is not acceptable. The consequences to neighbors, communities, and the economy as a whole are too great to do nothing. The problem has metastasized too much for any one solution, but we believe that key proposals discussed below are within Congress' reach this session.

Permit judges to fix distressed home loans. The best solution to the current mortgage crisis is a small change to the bankruptcy code that would allow courts to make limited modifications to a mortgage loan when the borrower is facing foreclosure, ensuring that the borrower stays in their home and the lender continues to receive a payment stream. This change, H.R. 3609, has passed the House Judiciary Committee in a bipartisan compromise struck by Chairman Conyers and Representative Chabot. Because the compromise legislation is limited to loans already in existence, it will have no detrimental impact on the cost or availability of credit going forward.

The proposal to allow court-supervised modifications for borrowers facing foreclosure does not implicate the 2005 Bankruptcy Code changes, but rather relates to an older provision of the law. Right now, wealthy investors and speculators may receive loan modifications in bankruptcy proceedings for the debt they owe on their yachts, vacation homes and investor properties. Yet current law bars middle-class homeowners from receiving a loan modification to save the roof over their heads. Permitting bankruptcy judges to modify loans on primary residences could prevent as many as 600,000 foreclosures. (In reality, this remedy will accomplish its objective even without requiring most of these families to actually file for bankruptcy. Changing the Code will provide a template for modification and will give servicers the precedent and protection they need from lawsuits by tranches of investors who might otherwise object.)

Making this small fix to the bankruptcy code will be a win-win for homeowners, lenders, neighbors, taxpayers and the economy as a whole. Homeowners can stay in their homes. Lenders will be guaranteed the fair market value of their house, which is more than they would receive at foreclosure sale, and without the lengthy delays and expenses associated with foreclosure. Finally, and crucially, loans can be modified quickly and effectively.

Establish common-sense standards for sustainable mortgage origination. Any solution to the foreclosure crisis also requires that we prevent such abuses from happening again, especially since so many people will need to refinance their current mortgages. In the fall, the House passed H.R. 3915 to do just that. While that legislation is a good start, it did not adequately hold Wall Street accountable for its role in this mess. To restore the world's confidence in our markets and recover a reasonable expectation of integrity to our mortgage financing system, we need policy action to realign the interests of people who buy homes, institutions that provide the loans, and the entities that invest in those mortgages.

Increase the resources available for FTC's enforcement actions against abusive lending practices by market players under its jurisdiction: Key federal regulators are not funded by Congressional appropriations, but rather by assessments on the banks they regulate.[19] Consequently, other Committees have more direct oversight over their responses. The Federal Trade Commission, however, is funded largely by appropriations. Although it does not have market-wide authority to enforce the federal law against unfair and deceptive acts and practices (UDAP) in the marketplace, it does have a significant number of actors within its jurisdiction. We see now that reckless lending and misleading sales practices in the subprime and nontraditional marketplace have consequences far beyond the homeowner and the loan originator. It would be an investment in our economy to increase the resources available to the FTC to enhance its enforcement capacity.

Conclusion

The subprime lending system has failed millions of middle-class families. These are people who were trying to do everything right: they worked hard at their jobs, they took care of their children, and they were seeking a more secure future. Now these families are on the verge of losing any semblance of security, and we all will be worse off as a result.

While many homes can no longer be saved, policymakers have a number of tools at their disposal to mitigate the harm caused by the current situation, and prevent it from happening again in the future. We greatly appreciate your interest in these issues, and we look forward to working with you to protect homeowners and promote sustainable homeownership.

ATTACHMENT
Appendix: "Self Help Impact"

END NOTES

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[1] "Subprime Spillover: Foreclosures Cost Neighbors $202 Billion; 40.6 Million Homes Lose $5,000 on Average," Center for Responsible Lending issue brief (rev. January 18, 2008).

[2] "Subprime Lending: A Net Drain on Homeownership," CRL Issue Paper No. 14 (March 27, 2007), available at http://www.responsiblelending.org/pdfs/Net-Drain-in-Home-Ownership.pdf.

[3] States or the Federal Trade Commission (or both in cooperation) brought enforcement actions against First Alliance Mortgage Company, Associates (acquired by Citigroup), Household (acquired by HSBC), and Ameriquest. In doing so, the states and the FTC took on the top market-share subprime originators in all years between 1997 and 2005 save one.

[4] The Office of the Comptroller of the Currency, for example, preempted Georgia's anti-predatory lending law for national banks and their operating subsidiaries, at the request of National City Bank of Indiana and its operating subsidiary First Franklin Financial, 68 Fed. Reg. 46264 (Aug. 5, 2003). (First Franklin Financial alone originated 4.4% of the subprime originations in 2005, over $29 billion of loans—see *Inside Mortgage Finance*, THE 2006 MORTGAGE MARKET STATISTICAL ANNUAL 187 (2006). (In December, 2006, National City Bank sold First Franklin Financial to Merrill Lynch.) The OCC has indicated that other state anti-predatory lending laws would likewise be preempted. And, invoking a 2004 regulation that it issued expanding the scope of its exclusive "visitation" authority over national banks and their operating subsidiaries, the OCC joined forces with banks to stop the New York Attorney General's efforts to investigate compliance with fair lending laws. *See* Clearing House Ass'n, L.L.C. v. Spitzer, 394 F. Supp. 2d 620, 622 (S.D.N.Y. 2005) & OCC v. Spitzer, 396 F. Supp. 2d 383, 387-88 (S.D.N.Y. 2005), *aff'd in part, vacated in part sub nom.* Clearing House Ass'n, L.L.C. v. Cuomo, 510 F.3d 105 (2d Cir. 2007).

[5] Legislative and regulatory responses to changes in the nature of the problems in the subprime market at the federal level have been slow to non-existent, while states have shown more nimbleness. Several states have enacted so-called "mini-HOEPAs" since 1999 to close the loopholes in the 1994 federal law (the "Homeownership and Equity Protection Act"). As the industry's underwriting got more reckless, and the products sold shifted to the riskier adjustable-rate mortgages, states again moved more rapidly to address the new model of abusive lending and reckless lending as Ohio, Minnesota, North Carolina, Maine, Illinois, and Colorado have enacted laws taking aim at these practices since May, 2006.

[6] Center for Responsible Lending: The Impact of Court-Supervised Modifications on Subprime Foreclosures: United States (February 25, 2008).

[7] Calculated by CRL from figures provided in *Update on U.S. RMBS: Performance, Expectations, Criteria*, by Glenn Costello, p. 18, Fitch Ratings (undated, est. Feb. 2008).

[8] See note 1.

[9] "Subprime Guidance Did Little to Diminish ARM Share," *Inside B&C Lending* (February 15, 2008).

[10] Our numbers are conservative for several reasons. First, we use data from a proprietary database, and the share of loans used to purchase homes (versus refinances) among these investment mortgages was higher than in the market as a whole. Second, our analysis compares subprime first-lien, owner-

occupied loans made to first-time homebuyers with CRL's foreclosure projections in a research report issued in December 2006, *Losing Ground: Foreclosures in the Subprime Market and Their Cost to Homeowner (issued by the Center for Responsible Lending.* The foreclosure projections in *Losing Ground* are based on conservative assumptions. In fact, since we issued the report, other analyses suggest that foreclosures in the subprime market could actually be higher than indicated by our analysis. See, e.g., Lehman Brothers report that projects 30% losses over time for subprime loans originated in 2006. See *Mortgage Finance Industry Overview* (December 22, 2006), p. 1.

[11] *See*, e.g., Vikas Bajaj and Christine Haughney, "Tremors at the Door – More People with Weak Credit are Defaulting on Mortgages," *The New York Times*, citing *Inside Mortgage Finance* (January 26, 2007). A recent Fitch publication found that low-doc subprime loans made in 2006 were 50% more likely to be sixty or more days delinquent 15 months after origination than their low-doc subprime counterparts from 2000 (delinquency rates were roughly 18% and 12% respectively). Adding concern, the 2006 group of loans actually carried credit scores that were about 20 points higher than the 2000 cohort. See Glenn Costello, *Update On U.S. RMBS: Performance, Expectations, Criteria*, p. 13, Fitch Ratings (undated, est. Feb. 2008).

[12] See *Structured Finance: U.S. Subprime RMBS in Structured Finance CDOs*, Fitch Ratings Credit Policy (August 21, 2006), p. 4.

[13] For example, an October, 2006 rate sheet from New Century had a "stated wage earner" product that added 30 basis points (.3%) to the interest rate over the price of a fully documented loan. (Rate sheet on file with CRL.)

[14] Calculated from data at Inside Mortgage Finance: 2007 Mortgage Market Statistical Annual, p. 3, 209, 219 (rounded).

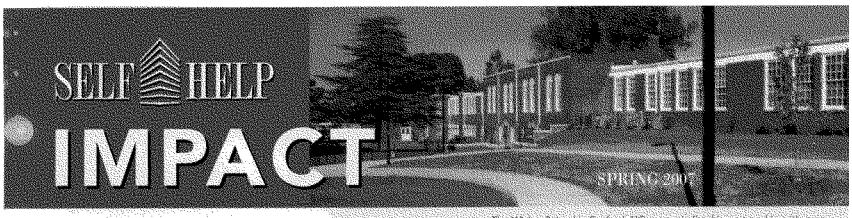
[15] 15 USC § 1639*l*. The Federal Trade Commission also has authority to promulgate regulations prohibiting unfair and deceptive acts and practices, but there are two structural hurdles impeding its capacity to do so with respect to mortgage lending. First, its rules apply only to non-depository lenders, so, unlike the FRB's authority under HOEPA, its rules would not cover the entire mortgage market. Second, the statutory procedure which the FTC must follow to promulgate rules regarding unfair and deceptive acts and practices is significantly more cumbersome, lengthy, and resource-intensive than the normal Administrative Procedures Act notice-and comment rule-making. *See* 15 USC § 57a. Indeed, the FTC's credit practices rule took nearly a decade, from 1975 to 1985, to wend its way through its special UDAP rule-making process.

[16] 73 Fed. Reg. 1672 (January 9, 2008).

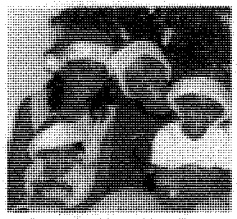
[17] Interagency Statement on Subprime Mortgage Lending, 72 Fed. Reg. 37569 (July 10, 2007), effective July 10, 2007. (Office of the Comptroller of the Currency, Federal Reserve System, Federal Deposit Insurance Corporation, Office of Thrift Supervision, and National Credit Union Administration.) These were issued as "guidances," not as rules. There were earlier interagency guidances addressing subprime lending, but they failed to address the core problems. Interagency Guidance on Subprime Lending (March 1, 1999), and Expanded Guidance for Subprime Lending Programs (2001).

[18] *E.g.* Citigroup's write-down could be as much as $24 billion, Charlie Gasparino, "Citigroup's Layoffs Could Reach 24,000 this year," CNBC (January 14, 2008), *available at* http://www.cnbc.com/id/22639976 (visited February 26, 2008); Washington Mutual, the largest federal thrift, wrote down $1.6 billion in the fourth quarter of 2007, and "predicted that its provision for bad loans in the first quarter of next year will be $1.8 billion to $2 billion," Elizabeth Hester, "Washington Mutual to Take Writedown, Slash Dividends," Bloomberg.com (December 10, 2007), *available at* http://www.bloomberg.com/apps/news?pid=20601103&sid=aNUz6NmbYZCQ&refer=us.

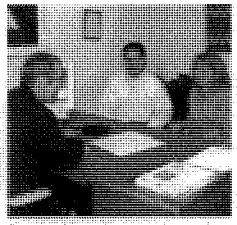
[19] *See, e.g.* Office of the Comptroller of the Currency, *Annual Report: 2007* at p. 70 *available at http://www.occ.treas.gov/annrpt/2007AnnualReport.pdf* (OCC receives no congressional appropriations; funded primarily by assessments on national banks under its jurisdiction. In FY 2007, $666 million of its $695.4 total revenue came from assessments, with the bulk of the difference from investment income.)



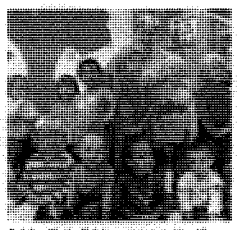
The Wicker School in Sanford, NC was revitalized in partnership with Brick Capital Community Development Corporation



Lisa Davis and her children celebrate Christmas in their home financed by a loan from Self-Help.



Prospective first time homeowners learning about the "Zero Down Homeowner Bound" program offered by the Bank of Oklahoma and made possible, in part, by Self-Help's Secondary Market Mortgage Program.



Building Blocks Oklahoma was started up by Jill Parsley and Mary Plummer with the help of the Small Business Administration and a loan from Self-Help.

TOTAL FINANCING $5 billion 55,000 borrowers

The nonprofit Center for Community Self-Help and its financing affiliates Self-Help Credit Union and Self-Help Ventures Fund provide financing, technical support, and advocacy for those left out of the economic mainstream. Since its founding in 1980, Self-Help has reached out to female, rural, and minority borrowers across North Carolina, in Washington, D.C., California, and many other states.

- We help borrowers nationwide to build wealth through ownership of a home or business.
- We strengthen underserved communities by financing nonprofits, childcare centers, community health facilities, public charter schools, and residential and commercial real estate projects.
- We operate a secondary market program that enables private lenders to make more loans in low-wealth communities.

Over time we have learned, and demonstrated, that low-income borrowers pose no greater credit risk than others. Our borrowers have proven their determination to repay their loans, build their businesses, improve their communities, and build wealth through home equity.

CUMULATIVE IMPACT SINCE 1980

HOME LENDING

$228 million, 3,290 loans
- female-headed households – 31%
- minority-headed households – 79%
- households in rural areas – 36%

REAL ESTATE DEVELOPMENT

$71.9 million invested in 16 neighborhoods & downtowns
- 124 properties acquired, renovated or built
- 74 homes sold
- 583,000 square feet of completed commercial renovation

COMMUNITY FACILITIES LENDING

$140 million, 699 loans
- 25,578 child care spaces
- 17,785 charter school spaces
- 716 supportive housing spaces
- 7,495 jobs created or maintained
- female-led organizations – 70%
- minority-led organizations – 58%
- organizations in rural areas – 48%

SECONDARY MARKET FINANCING

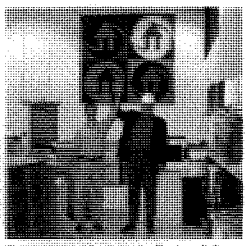
$4.3 billion, 48,390 loans
- female-headed households – 42%
- minority-headed households – 40%
- households in rural areas – 16%

SMALL BUSINESS LENDING

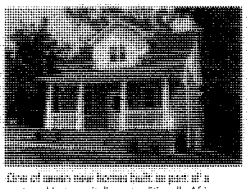
$302 million, 2,648 loans
- 20,334 jobs created or maintained
- female-owned businesses – 43%
- minority-owned businesses – 46%
- businesses in rural areas – 45%

POLICY & ADVOCACY

- Helped enact the first federal usury law in 25 years, protecting military personnel from abusive loans
- Lead effort to expose the dangers of subprime "exploding" Adjustable Rate Mortgages to congress & regulators
- Authored widely cited reports on subprime mortgage foreclosures, overdraft loans, and payday lending



The new Habitat for Humanity Charlotte Building, offices and cafe opened with almost $3 million in Self-Help loans utilizing the North Carolina Recycling Loan Fund and the federal New Market Tax Credit program.



One of many new homes built as part of a partnership to revitalize a traditionally African-American neighborhood in Fuquay-Varina, NC.

Patricia and Michael Mapp launched Jahi Products, a Greensboro, NC-based hair-care product distribution company, with an SBA 504 loan from Self-Help and Bank of North Carolina.

OUR MISSION:
Creating and protecting ownership and economic opportunity for people of color, women, rural residents, and low wealth families and communities.

SELF HELP

HOME LENDING

Since two-thirds of low-income and minority family wealth is in home equity, Self-Help believes homeownership is the best path to success for low and moderate-income families. Moreover, homeownership is perhaps the single best strategy for stabilizing distressed rural and urban communities.

SMALL BUSINESS LENDING

Small business is our economy's best job generator and an effective method for creating wealth for entrepreneurs underserved by conventional lending. Self-Help seeks borrowers whose businesses will contribute to their community's vitality, create jobs and/or provide critical community services. Self-Help offers a broad array of loan programs for new and growing businesses.

COMMUNITY FACILITIES LENDING

Low-income communities need strong community infrastructure and services in order to thrive. Childcare is one example: loans to childcare providers create jobs, provide a critical service to working families, and help the providers build wealth in their own families. Similarly, Self-Help's lending to public charter schools provides modern facilities for high-achieving schools that are on the cutting edge of providing quality educational opportunities for at-risk children both in and outside North Carolina.

SECONDARY MARKET FINANCING

This program extends access to credit far beyond what Self-Help can do on its own. Partner lenders across the country work with Self-Help and Fannie Mae, in a program supported by the Ford Foundation, to provide mortgage loans to borrowers of modest means. The new homeowners are offered free credit counseling to prevent foreclosure. Though borrowers in this program are primarily low and moderate-income, the rate of foreclosure is below the national average.

REAL ESTATE DEVELOPMENT

Self-Help and its partners are redeveloping homes in several distressed neighborhoods across North Carolina to provide affordable housing. Self-Help also restores abandoned downtown commercial properties, providing modern office space for nonprofits and small businesses in North Carolina and Washington, D.C.

POLICY & ADVOCACY

Self-Help uses its experience in lending and community development to inform its positions on public policy issues, and is a strong advocate in the national community development and credit union fields. Since the late 1990s, Self-Help has fought predatory lending practices that strip wealth from low-income families. The affiliated Center for Responsible Lending uses Self-Help's lending experience to recommend practical solutions to predatory lending abuses in legislative and regulatory arenas.

For More Information on How You Can
Support Self-Help's Work, Call Us or Visit Our Website
1-800-476-7428 • www.self-help.org

Self-Help • 301 West Main Street • Durham, NC 27701

Self-Help's Regional Offices: Charlotte NC, Central NC (Headquarters), Sandhills NC, Triad NC, Southeastern NC, Western NC, Northeastern NC, Oakland, CA and Washington D.C.

03/07

Mr. SERRANO. Thank you.

Before we go to Ms. Murguia, I want to thank you because I think you quickly put in place how these things worked, and we have been trying to find that out all day, and you made it clear how it was that people were invited to participate, if you will.

I also for the record want to state that we had finished the last panel dealing with the issue of people who had the American dream, you know, destroyed for them or are in danger of having it and those who bought a second home or a situation where, you know, maybe we should be concerned, but we should not necessarily be involved in what is bailing them out versus the ones who were hurt. And it was made clear to us by a person from Treasury on my way out the door that the HOPE Program takes that into account. It deals with primary residents as an issue rather than people just speculating on what was a great market at that time.

JANET MURGUIA'S TESTIMONY

Ms. MURGUIA. Good morning. Thank you.

My name is Janet Murguia. I am president and CEO of the National Council of La Raza. AT NCLR, we have been committed to improving the life opportunities of the nation's 40 million Latinos for the last four decades. In fact, this year we are celebrating our 40th anniversary as a very American institution in this country.

I would like to thank Mr. Chairman Serrano for inviting me and all of us to participate this morning. We do appreciate your very diligent work on behalf of Latino families, and I thank you for being a champion on funding for CDFIs and for opposing many damaging anti-immigrant amendments, and thank you for bringing attention to this issue today.

NCLR is deeply concerned that a generation of Latino wealth is under attack, and the status of the Latino middle class is in danger. NCLR has been working hard to plug gaps where mortgage lenders fall short.

Through our housing counseling network we serve more than 30,000 borrowers every year. Later this year NCLR plans to launch a campaign to prevent foreclosure among low income families. We understand what it takes to build wealth in Latino and immigrant communities.

Today's hearing is very timely. Household debt, foreclosures and report of fraud are on the rise. We must protect consumers in addition to improving the quality and quantity of credit available to all families.

This morning I will briefly discuss the major barriers that open our community to abuse, areas where consumer protection fall short, and recommendations for congressional action.

Let me begin by saying that all Americans rely on financial products to help them reach the middle class. Safe and affordable credit is necessary to buy a car or home. Unequal access to credit has perpetuated the wealth gap between minority and white households. Latino borrowers are unique. For example, 22 percent of Latinos do not have enough information in their credit file to produce a FICO score. This is compared to only four percent of whites.

About 35 percent of Hispanic families do not have basic checking or savings accounts. Many Latinos rely on abusive payday loans and check cashiers to pay their bills and make ends meet.

Most creditors do not look favorably on such characteristics. In fact, many Latino families are steered to more expensive credit cards, car loans, and home loans even when they have good credit.

Allow me to give three examples. Credit card issuers look at credit scores, the number of credit cards a family has, and their combined card balances when pricing credit. Many Latinos do not even have credit cards. This means that regardless of whether they pay all of their bills on time, when they do get a card, it is more likely to be an expensive one.

In fact, Latinos are twice as likely to have a credit card interest rate higher than 20 percent as white borrowers. Similarly, discrimination in auto financing costs Hispanic borrowers hard-earned money. One report showed that 57 percent of Hispanic borrowers were charged inflated interest rates compared to 40 percent of white borrowers.

And it is the same story with mortgages. Our families are more than twice as likely as whites to receive certain high-priced, high-risk loans that are now going into foreclosure at record rates. This pattern of abuse is troubling considering the rate at which Latinos are entering financial markets. Hispanic credit card use is increasing. Latino home ownership hit an all time high in 2006.

This is a good sign for our community. However, we are concerned that their gains are being eroded by financial predators. Despite the evidence, consumer protections have not kept pace with demand. I would like to share with you three areas where consumer protections fall short.

Shopping is nearly impossible. Most credit transactions are not transparent. Consumers do not have the tools or the information to determine what they are really paying for credit. Borrowers get expensive loans even when they have good credit. Taking into account a borrower's history of timely rent and utility payments is seen as a burden. So instead, lenders push Latino and minority borrowers into pricey loans.

Third, borrowers are trapped into cycles of debt. There are few options for borrowers desperately seeking relief from high interest rates and abusive fees. Many turn to balance transfers or mortgage refinances, but for most families this does not bring relief; just more debt and fees.

Compounding the impact of these gaps in protections, reports of fraud are on the rise. The FTC found that Hispanics are more than twice as likely to be victims of fraud as whites. The current mortgage crisis shows the impact of predatory lending expands far beyond targeted communities.

Congress must act, and I am going to offer just briefly four recommendations as I close. The Federal Reserve and other regulatory agencies must issue stronger rules against predatory and unfair practices. Congress should investigate abusive auto loans through oversight hearings and studies.

Federal agencies, credit card issuers, and local consumer protection agencies should partner with local community organizations to raise awareness of financial scams.

And finally, Congress should create a financial counseling program to provide financial advice to low income families. We believe it is important for Congress to act. We appreciate you all looking at this issue now because there is no question that, while some of the regulators earlier today talked about looking backward and saying that it was hard to look in hindsight at this, we know, for instance, that Latino foreclosure rates are going to peak in '09 and 2010. There is no excuse for us to not take action now knowing that this is going to be on the horizon.

So we appreciate your looking at this and welcome the chance to talk to you later about it.

Thank you.

[The information follows:]

NCLR
NATIONAL COUNCIL OF LA RAZA

Eroding a Generation of Wealth
Abusive Lending Practices Targeting Latino Communities

Presented at:

Consumer Protection in Financial Services: Subprime Lending and Other Financial Activities

Before:

Subcommittee on Financial Services and General Government
U.S. House of Representatives Appropriations Committee

February 27, 2008

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Good morning. My name is Janet Murguía. I am the President and CEO of the National Council of La Raza (NCLR) – the largest national Hispanic[1] civil rights and advocacy organization in the United States. For the last four decades, NCLR has been committed to improving opportunities for the nation's 40 million Latinos. To this end, NCLR conducts research, policy analysis, and advocacy on a variety of financial services issues that impact the ability of Latinos to build and maintain assets and wealth. I would like to thank Chairman Serrano for inviting me to participate in this timely and important panel, and for your diligent work on behalf of Latino families. Specifically, we would like to thank you for being a champion on funding for Community Development Finance Institutions and for opposing damaging anti-immigrant amendments that have been attached to financial services legislation.

NCLR is deeply concerned that a generation of Latino wealth is under attack. Historically, Latinos have been marginalized from mainstream financial services, such as basic banking and checking accounts. Despite the many barriers, Latinos are entering the financial services market in record numbers. Unfortunately, these same barriers leave Hispanic borrowers vulnerable to abuse. As a leading voice for Latino consumers, NCLR has been warning corporations and governments for years that the financial markets do not serve Latino consumers well. The crisis in the mortgage market has exposed the cracks in the system. NCLR and its Affiliates have been doing our part to ensure that potential Latino homeowners do not fall through these cracks. As a housing counseling intermediary, NCLR serves more than 30,000 homebuyers and homeowners every year. The NCLR Homeownership Network (NHN) is expanding its work in this area to launch a campaign to prevent foreclosure in low-income communities. We understand what it takes to build sustainable wealth in Latino and immigrant communities and have executed a successful strategy to do so.

All Americans rely on financial products to help them buy homes and otherwise build wealth and financial security. Access to safe and affordable credit is a critical means to this end for Latinos as they more fully integrate into the mainstream financial system and work to gain access to the American middle class. Yet, there are clear disparities between the quantity and quality of financial products made available to low-income and minority consumers. These disparities perpetuate the wealth gap between minority and White households. Household debt, foreclosures, and reports of fraud are on the rise. Congress must take this opportunity to improve the quality and quantity of credit available to marginalized communities while also protecting consumers.

We have yet to see the robust response from Congress and federal agencies necessary to overcome the financial crisis facing all communities. Today we will discuss the major structural barriers in the market that have left low-income and minority borrowers vulnerable to abuse, the areas where the consumer protections have fallen short, and recommendations for congressional action.

Structural Barriers

[1] The terms "Hispanic" and "Latino" are used interchangeably by the U.S. Census Bureau and throughout this document to identify persons of Mexican, Puerto Rican, Cuban, Central and South American, Dominican, and Spanish descent; they may be of any race.

Latino borrowers are unique. For example, 22% of Latinos have a "thin" credit file, or no credit history, which usually results in a "0" credit score, compared to only 4% of Whites.[2] Approximately 35% of Latino families do not have basic checking or savings accounts.[3] Many Latino consumers rely on fringe financial products, such as payday loans, car title loans, and check cashiers to pay their bills and otherwise make ends meet. Creditors do not look favorably on characteristics outside the traditional borrower profile when qualifying consumers for the best-priced products. As a result, many Latino families are channeled to more expensive credit cards, car loans, and home loans, regardless of their actual risk or creditworthiness. For example, credit card issuers analyze consumers' credit scores, the number of credit cards they currently hold, their combined credit card balances and credit limits on their cards, and any record of past delinquencies, among other factors, when determining the terms of a contract. The automated underwriting systems employed by mortgage lenders often do not take into consideration nontraditional credit histories such as rent, utility, and other bill payments. These structural barriers are inherent in the financial systems and contribute to the abuse of Latino consumers. This is even more troubling considering the rate at which Latinos are entering financial markets. In the sections below, we briefly outline the structural barriers in credit card, auto loan, and mortgage markets.[4]

Credit Cards

While the vast majority of American households use credit cards, a large share of Latino consumers do not. Data from the *2004 Survey of Consumer Finances* show that 80% of all surveyed respondents said that they use credit cards, compared to only 56% of Hispanic households.[5] Still, more Latinos are using credit cards today than ever before. Between 1992 and 2001, the share of Hispanic families who held credit cards grew from 43% to 53%.[6] Increased quantity, however, has not necessarily come with increased quality. A recent study by Demos shows that Latino and African American consumers are more likely than White consumers to pay interest rates higher than 20%. More specifically, 13% of Latino, 15% of African American, and 7% of White cardholders pay interest rates greater than 20%.[7]

Although wise credit card use is a good method for building a credit history, unethical credit card practices trap consumers in less-than-favorable terms. Not only do families spend hard-earned income on unnecessary fees and extra interest, predatory practices hamper their ability to save

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[2] Michael Stegman et al., "Automated Underwriting: Getting to 'Yes' for More Low-Income Applicants," Presented before the 2001 Conference on Housing Opportunity Research Institute for Housing America Center for Community Capitalism (Chapel Hill: University of North Carolina, April 2001).

[3] *2002 National Survey of Latinos* (Washington, DC: Pew Hispanic Center/Kaiser Family Foundation, 2002).

[4] NCLR has published several reports, public statements, and testimony on each of these issues. These are available at www.nclr.org. Key reports include: Beatriz Ibarra and Eric Rodriguez, *Latino Credit Card Use: Debt Trap or Ticket to Prosperity?* (Washington, DC: National Council of La Raza, 2007); *Saving Homes, Saving Communities: Hispanic Brokers Speak Out on Hispanic Homeownership* (Washington, DC: National Council of La Raza and National Association of Hispanic Real Estate Professionals, 2007); and Janis Bowdler, *Jeopardizing Hispanic Homeownership: Predatory Practices in the Mortgage Market* (Washington, DC: National Council of La Raza, 2005).

[5] NCLR calculation based on unpublished tables from the *2004 Survey of Consumer Finances*.

[6] Javier Silva and Rebecca Epstein, *Costly Credit: African American and Latinos in Debt* (New York: Demos, May 2005).

[7] Jennifer Wheary and Tamara Draut, *Who Pays? The Winners and Losers of Credit Card Deregulation* (New York: Demos, August, 2007).

for big-ticket items, such as a reliable vehicle, a home, or an education. The average credit card debt among Hispanics increased by nearly 20% between 1992 and 2001, from $3,082 to $3,691.[8] Recent data show that Latinos are having difficulty managing their credit card debt. Approximately 19.3% of Hispanics in one survey described their situation as "burdensome and not enough money to pay down [the balance]," and 11.4% of Hispanics reported they were "maxed out and can't use [their cards]." This is in comparison to only 12.7% and only 7.3%, respectively, of all non-Hispanic respondents in the same survey who characterized their debt situation in the same way.

Auto Lending

Auto financing is another area where Latino consumers are particularly vulnerable. In 2002, slightly more than one-quarter (25.4%) of Latino households did not own any assets other than a vehicle or unsecured liabilities, compared to 6.3% of White households. Reports show that Latinos and African Americans are often the victims of discrimination in auto financing. Economist Mark Cohen of Vanderbilt University conducted a series of studies chronicling the impact of a pricing component known as a "markup" on Latino and African American consumers. Dr. Cohen found that minority car buyers were more likely than their peers, regardless of creditworthiness, to have a marked up auto loan. For example, in a statistical analysis of more than 1.5 million race-coded sale files, Dr. Cohen found a staggering disparity between the amount of the markup paid by minorities and that paid by White customers. This racial disparity exists in every state analyzed and in all credit tiers. As a result, Hispanic and African American consumers with the same creditworthiness as White customers nevertheless pay more for credit. In a second report, Dr. Cohen examined 219,278 financing records of a major auto company from 2001 to 2004. He found that 57% of Hispanic customers who financed their car through the company were charged an unwarranted markup, compared to 40.2% of White customers. The average markup for Hispanic customers was $715, compared to $464 for White customers.[9]

While some companies have imposed a cap on the markup charge, recent data show that the lower markup cap only reduces the disparity between African American and White consumers but does not eliminate it. One study showed that even after the markup cap was put in place in one company, the average markup for African Americans was $498, compared to $343 for Whites. These reports clearly indicate that lawmakers need to take a closer look at the auto financing industry and expose practices that undermine the ability of Latinos and minorities to get fair and equal access to credit.

Mortgages

As the largest and most significant asset most families own, homes create wealth that allows families to send their children to college and save for retirement. Latino homeownership reached an all-time high of 49.5% in 2005, up from 42% in 1995. However, much like the auto and credit card markets, this increased access came at a price. Latinos and other minorities often find themselves channeled toward the products most profitable to the lender, but which may be

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[8] Ibid.

[9] Mark A. Cohen, "Imperfect Competition in Auto Lending: Subjective Markup, Racial Disparity, and Class Action Litigation" Vanderbilt Law and Economics Research Paper (Nashville: Vanderbilt University, December 14, 2006), No. 07-01.

expensive and risky for borrowers, regardless of their creditworthiness. Research shows that Latinos are 30% more likely than Whites to receive a high-cost loan when purchasing their home. Other research shows that nontraditional mortgage products such as Option Adjustable-Rate Mortgages (Option ARMs)[10] and interest-only mortgages are disproportionately concentrated among minority borrowers; Latinos are more than twice as likely as Whites to receive an Option ARM. Some lenders sold Latino families stated-income loans rather than take the time to verify their cash income and savings. Nontraditional products were easier to originate and more profitable than taking the time to manually qualify borrowers for products designed to accommodate attributes common among first-time Latino homebuyers. Though it has not been well studied, NCLR is concerned that disparate advertising also plays a role. A brief review of Spanish-language press shows that they are dominated by advertisements for subprime loans. Compare this to English-language press, which often feature neat tables that display rate information for the area's top lenders.

The expansion of the subprime market has helped some families with poor credit history access home loans. However, subprime loans are typically more expensive, riskier, and oftentimes easier to abuse. A study by the Center for Responsible Lending estimates that of the loans made to Latinos in 2005 and 2006, one in 12 will end in foreclosure. While forecasters are predicting 1.8 million foreclosures in 2008 alone, NCLR is concerned that the height of the crisis for Latinos will not come until 2009-2010, when Option ARMs and interest-only loans are scheduled to reset.

Consumer Protections

Overwhelming evidence shows that minority borrowers pay more to access credit than similarly situated White borrowers. As the current mortgage crisis is demonstrating, this pattern of overpayment, abuse, and discrimination disrupts the financial stability of low-income, minority, and immigrant communities, and prohibits their movement toward the middle class. It can also rise to the level of threatening the safety and soundness of entire financial markets. With record foreclosure rates and increasing defaults on credit cards, it is clear that the consumer protection system has not kept pace with a dynamic and evolving marketplace. The credit markets have grown considerably in scope and complexity in recent years. Too many creditors have adopted policies and practices that focus on making a profit, rather than on sound underwriting that would ensure borrowers are matched to credit products that meet their needs and are appropriate for their credit risk. Congress and regulators must address issues that have created gaps in protections, including the following:

- **Shopping for credit is nearly impossible.** Many credit offers are not transparent. Credit card, auto, and mortgage borrowers are often unaware of the hidden costs included in their loans. Few shopping tools exist that can help borrowers create true apples-to-apples cost comparisons. As a result, many borrowers forego shopping all together.

[10] Option ARMs are nontraditional home loan products where a borrower is able to choose the payment they wish to make month to month. Typically, borrowers are offered four payment options – a minimum payment, an interest-only payment, a payment that if made consistently would pay off the home in the traditional 30-year time (known as "fully amortizing"), and a payment that if made consistently would pay off the home in 15 years. Some originators abused this product by only qualifying families for the lowest payment. In this scenario, families are unknowingly adding a balance to their mortgage each month, since their payments do not even cover the interest expense. When the mortgage reaches 115% of value, the monthly payment is adjusted to reflect the higher debt.

According to one survey, only 7% of Hispanic consumers who carry a balance report "substantial" shopping for credit, compared to 12% for similar White consumers. Research also shows that Latinos are not shopping and applying for credit cards for fear of rejection. Approximately 25% of Hispanic consumers who use credit cards and were denied a loan did not reapply for fear of rejection.[11] In the case of mortgage and auto loans, mortgage brokers and auto dealers serve as an intermediary between the borrower and the lender. While many borrowers believe these agents are shopping for the best deal on their behalf, they are under no legal or ethical responsibility to do so. While most consumers do not proactively shop for credit, credit issuers shop aggressively for borrowers. Roughly 5.2 billion credit card solicitations were sent to U.S. households in 2004.[12] Through the collection of consumer financial information, issuers essentially prescreen and select their customers. Individuals with robust credit histories receive multiple offers from which to choose. Subprime and low-income borrowers who are not operating in the mainstream financial system are less likely to receive multiple offers. These borrowers will have to spend a significant amount of time and resources searching for a credit card that meets their needs.

- **Borrowers are steered toward expensive products regardless of creditworthiness.** As previously described, many low-income, immigrant, and minority borrowers have unique borrower profiles. Rather than take the time to match these consumers with existing products that accurately measure their true risk, lenders err on the side of higher risk and steer borrowers toward products that are easier to originate and highly profitable. The consumer bears the majority of risk in such a transaction. While lenders use credit enhancements – hidden fees in the case of credit cards, markups in auto lending, and pre-payment penalties in mortgages – to protect themselves from losses, borrowers have no such tools. Evidence of steering is all to clear. Low-income and minority borrowers are more likely than similarly situated White borrowers to receive high-cost mortgage loans, even after controlling for income, coapplicant, and credit. The scenario is the same for credit cards and auto loans – Hispanic and African American borrowers are more likely to get higher markups or pay higher interest rates than their White peers. In fact, in auto and mortgage lending, brokers and dealers are paid kickbacks (known as Yield Spread Premiums in mortgage loans) for putting consumers in loans with higher interest rates than their credit warrants.

- **Creditors trap borrowers in cycles of debt.** For some subprime borrowers, excessive fees, high interest rates, and mounting debt effectively trap them in the subprime market. For example, many credit card customers find relief from high interest rate cards by transferring their balance to a credit card with a lower interest rate. Transferring balances from one card to another is not an option for consumers who carry high interest rates and who are often rejected for credit. Approximately 34% of Hispanic households who carry a balance reported being rejected for a loan, and 23% cited "credit" as a reason for the

[11] Unpublished data from the *2004 Survey of Consumer Finances* tabulated by the Federal Reserve on behalf of NCLR.
[12] *Credit Cards: Increased Complexity in Rates and Fees Heightens Need for More Effective Disclosures to Consumers*, (Washington, DC: Government Accountability Office, September 2006).

> rejection."[13] In the case of home loans, the pervasive use of loose underwriting criteria led to the origination of loans that homeowners could never afford to repay. The mortgage industry bet that the value of home prices would continue to climb and clients would refinance if their mortgage product became too expensive. This practice led many families into a downward spiral of wealth-draining refinances that has contributed heavily to the current mortgage crisis.

Compounding the impact of predatory lending and the gaps in consumer protections is the rise of fraud and scams targeting victims of burdensome debt and foreclosure. Research conducted by the Federal Trade Commission (FTC) shows that 14.3% of Hispanics are victims of fraud, compared to 6.4% of non-Hispanic Whites.[14] One type of scam is the existence and distribution of affinity and fake credit cards. Affinity credit card scams involve individuals who sell credit cards to Hispanic consumers, claiming that they are custom-tailored to meet their needs. Similar to fake credit card scams, these affinity credit cards are worthless and cannot be used to purchase goods or services. Scams targeting victims of predatory lending and those facing foreclosure are also on the rise. Predators commit to refinances or temporary transfer of deeds where the family believes they will rent for a short period of time and earn their way back to ownership; others completely misrepresent the documents the client signs. Others pose as disinterested parties offering to negotiate with the lender/servicer on behalf of the borrower. In most cases, the contract is written with terms so onerous it is unlikely the family will ever be able to recover their home or benefit from the sale of the property.

Recommendations

In a time when Latino and other marginalized consumers were clearly not equitably served by credit markets, our government regulatory agencies have failed to act in a manner sufficient to ward off the worst abuses. Yet, access to credit remains critical to putting families on the path to the middle class. Without fairly priced credit, families are forced to waste hard-earned money on unnecessarily fees and high interest rates, or to rely on predatory, fringe financial providers. Regulators and government agencies must view consumer protection as an important element of their safety and soundness duties.

We would like to applaud the work of Sheila Bair at the Federal Deposit Insurance Corporation (FDIC). She has been a leader in promoting policies that represent a balance between consumer protections and responsible lending practices. We urge other regulators to follow her lead. That said, we also recognize that the ability of regulatory bodies to act is limited by authority given them by Congress. NCLR has provided a number of recommendations to Congress on the various issues we have raised in this testimony.[15] In this statement, we have focused our recommendations on this subcommittee's oversight authority over government agencies. We urge the committee to ensure that the federal regulatory and government agencies are furthering policies and regulations that protect the interest of the market's most vulnerable consumers. This will require substantive rulemaking; increased or improved disclosure statements will not curb abuses. Specifically, we make the following four recommendations:

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[13] Ibid.

[14] "Consumer Fraud in the United States: An FTC Survey," Federal Trade Commission Staff Report (Washington, DC: Federal Trade Commission, August 2004).

[15] See www.nclr.org.

- **Stop the scams.** Federal agencies, credit card issuers, and local consumer protection agencies should partner with community-based organizations (CBOs) to raise awareness of financial scams that strip wealth from the Latino community. CBOs serve as the "eyes and ears" of the Latino community and understand its needs. Regarding foreclosure rescue scams, the Federal Reserve can clarify that these products qualify as extensions of credit under the Truth in Lending Act (TILA) and the Home Ownership and Equity Protection Act (HOEPA). In addition, federal regulators should market their consumer complaint centers and highlight any toll-free consumer complaint phone number on all materials sent by credit card issuers to consumers. Furthermore, this information should be provided in languages and formats that consumers understand. Finally, federal regulators should collect consumer complaint information by race and ethnicity to more effectively detect trends within segments of the population, help to shape efforts to eradicate scams, and develop strong cases against predators.

- **Strengthen enforcement and consumer remedies.** Last year the Federal Reserve and other regulatory agencies issued joint guidance on nontraditional mortgages. While this guidance promoted many of the responsible lending practices that are important to connecting borrowers with safe home loans, it falls short in that it is only guidance, which is not as strong or binding as law. The Federal Reserve has also recently issued a new rulemaking aimed at curbing abusive practices in the mortgage market using HOEPA. NCLR intends to submit official comments on this rule. However, the rule falls short of even codifying current best practices, much less advancing consumer protections. The Federal Reserve should set a high standard for compliance by holding unethical lenders accountable and ensuring that victims have access to meaningful remedies. HOEPA should be amended to address home purchase abuses such as targeted and push marketing, steering to high-cost products and lenders, and the use of teaser interest rates.

- **Investigate auto lending.** Mounting evidence of discrimination in auto financing demands congressional attention. Congress and the regulatory agencies should investigate "markups" under Unfair or Deceptive Acts and Practices (UDAP) laws and the Equal Credit Opportunity Act through public oversight hearings. Independent reports and investigations should be commissioned to study the impact of selected industry practices on Latinos and minority consumers. Business leaders exhibiting best practices and offering their Latino and minority customers fair deals should be rewarded and enlisted to help push out those preying on vulnerable consumers.

- **Create a community-based financial counseling network.** One-on-one financial counseling has proven to be an effective method for building wealth in the Latino community. Congress should create a community-based financial counseling infrastructure similar to the Housing Counseling Program that the Department of Housing and Urban Development currently oversees. The primary purpose of the program would be to help consumers manage their personal finances, learn how to avoid unmanageable debt, and spot credit card-related and other scams in the community. Resources would be

used to hire and train community-based financial counselors and to develop software to track client progress.

Conclusion

Rising foreclosures, abusive lending practices, and mounting household debt are aggressively eroding the financial security of the American middle class. Unfortunately, the collective response from the regulatory agencies has not risen to the same level. Congress, the Administration, and the federal agencies must present a united, comprehensive plan to curb abuse and protect wealth.

Mr. SERRANO. Thank you.
Mr. Stinebert.

CHRIS STINEBERT'S TESTIMONY

Mr. STINEBERT. Good morning. My name is Chris Stinebert, and I am the president and CEO of the American Financial Services Association.

AFSA's 350 member companies include auto finance companies, credit card issuers, mortgage lenders, industrial banks, and other financial services firms that lend to consumers and to small businesses. We do not represent or try to represent the payday lenders in our association.

Let me state from the outset that we share Congress' concern about the growing number of homeowners who are having difficulty making their mortgage payments. Not only do foreclosures affect individual borrowers and their communities, they also affect mortgage lenders who lose, and I think Mike Script says $40,000. Mike and I were talking that the average could be up to 65 or $70,000 on every single foreclosure that a lender makes today.

So today I am going to limit my remarks to four major issues. First, in today's tight credit market, liquidity remains the key to providing credit. To maintain liquidity, policy makers should avoid imposing new mandates and policies and regulations for mortgage lending that create uncertainty for investors, especially if applied retroactively.

Second, I would like to emphasize the importance of the voluntary nature of the partnership efforts between lenders and consumers who face financial difficulty.

Third, I will focus on the growing importance of consumer understanding of lending products in general and mortgage products specifically through personal finance education programs.

And, fourth, the possible use of federal resources to encourage at-risk borrowers to contact their lenders to learn what assistance is available to them.

Let's start with certain market liquidity, which is the key to lenders' ability to provide affordable credit to consumers. Many borrowers with less than perfect credit have found it extremely difficult to get a mortgage or to refinance their home. The Federal Reserve's recent rate cuts have improved liquidity and made credit more affordable, but maintaining liquidity remains a primary concern for investors, both foreign and domestic.

Investors rely upon certainty and stability. Proposals that impose new terms and conditions on existing mortgage contracts would make investors even more resistant to reenter the credit market. And legislation that would allow bankruptcy judges to rewrite mortgage contracts on primary residences would do just that.

A better course of action is to provide an open and voluntary pathway for borrowers and lenders to work together. Mandating workouts, on the other hand, would only serve to restrict credit.

AFSA believes the right way to provide relief is through the current outreach campaigns that are now underway. As Treasury talked about this morning, AFSA is a founding member of HOPE NOW Alliance. Fourteen HOPE NOW servicers responsible for more than 33 million home loans, or about 94 percent of prime and

subprime mortgages, reported that in the last half of the year 545,000 subprime mortgage holders were helped in the second half of the year. So far 324,000 prime borrowers have been helped as well, for a total of 869,000 prime and subprime homeowners.

All too often distressed homeowners do not contact their lender. They will not open letters. They do not answer phone calls. If they only understood that the sooner contact is established between the homeowner and the mortgage servicer, the sooner a workable solution can be found.

As this Committee considers how to best appropriate funds, we strongly encourage you to augment the private sector's efforts to convey this important message. A major part of any solution must include financial literacy. We learn things in school that we never ever use, and yet very few students ever receive any formalized instruction or personal education on personal finance, lessons that would be used every single day of their lives.

It is time to prepare the next generation of financial services customers with a clear understanding of the lending process and the savings process, just everything involved with consumer education and begin at a very early age.

One example is AFSA's Education Foundation's personal finance curriculum, MoneySKILL. More than 80,000 high school students have enrolled in this Internet-based course, which is available free of charge for anyone.

And finally, it is worth noting that this hearing comes at a time when Congress is considering proposals to stimulate the housing sector. One way Congress can directly help at-risk borrowers is by creating a temporary home ownership tax credit. Not so long ago Congress offered this type of tax credit to homeowners in the District of Columbia, and it was extremely successful.

A national tax credit would encourage home buying activity, stop the slide of home prices, reduce the current existing inventory of homes, and get America out of its housing slump faster than imposing any new regulations that might affect the next time we are down the road.

Thank you for this opportunity to participate today, and I look forward to answering any questions you might have.

[The information follows:]

HOUSE COMMITTEE ON APPROPRIATIONS
SUBCOMMITTEE ON FINANCIAL SERVICES
AND GENERAL GOVERNMENT

HEARING ON

CONSUMER PROTECTION IN FINANCIAL SERVICES: SUBPRIME LENDING AND OTHER FINANCIAL ACTIVITIES

Thursday, February 28, 2008

WRITTEN TESTIMONY OF CHRIS STINEBERT
PRESIDENT AND CHIEF EXECUTIVE OFFICER
THE AMERICAN FINANCIAL SERVICES ASSOCIATION

HOUSE COMMITTEE ON APPROPRIATIONS
SUBCOMMITTEE ON FINANCIAL SERVICES AND GENERAL GOVERNMENT
Consumer Protection in Financial Services: Subprime Lending and Other Financial Activities
Thursday, February 28, 2008

WRITTEN TESTIMONY OF CHRIS STINEBERT

My name is Chris Stinebert, and I am the Chief Executive Officer and President of the American Financial Services Association ("AFSA"). AFSA is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. The association encourages and maintains ethical business practices and supports financial education for consumers of all ages. AFSA has provided services to its members for over 90 years. AFSA's 350 member companies include consumer and commercial finance companies, "captive" auto finance companies, credit card issuers, mortgage lenders, industrial banks, and other financial service firms that lend to consumers and small businesses.

AFSA appreciates the opportunity to provide testimony to the Members of the Subcommittee on the state of the mortgage market, efforts by industry to partner with government agencies and consumer counselors to provide mortgage security to at-risk borrowers, and our members' perspective on policy recommendations currently before Congress. As the Members of the Subcommittee know, the scope of mortgage-related issues in the current environment is immense. Today, however, I will focus my testimony on how Members can utilize the appropriations process to effectively help the regulatory agencies, industry and consumers. I also have a suggestion on how to utilize the economic stimulus packages now before Congress to reduce funds needed to deal with existing mortgage challenges.

Let me state at the outset that AFSA members share Congress' concern about the growing number of homeowners who are having difficulty making their mortgage payments. Not only do foreclosures affect individual borrowers and their communities, they also affect mortgage lenders, which lose approximately $40,000 per foreclosure.

AFSA asks the Subcommittee to consider several key points. First, in today's tightened credit market, liquidity is key. To maintain liquidity, it is imperative that policymakers avoid imposing new mandates and policies for mortgage lending that would be applied retroactively and create uncertainty for investors.

Also, I would like to emphasize the importance of the voluntary nature of the partnership efforts between lenders and consumers who face financial difficulty but want to stay in their homes.

In addition, enhancing consumer understanding of mortgage products through personal finance education programs is crucial.

Finally, AFSA believes that limited federal resources should be used to encourage at-risk borrowers to contact their lenders to learn what assistance is available to them.

Market Liquidity

Market liquidity is the key to lenders' ability to provide affordable credit to consumers. When credit is tight, the interest rates that lenders can offer consumers rise. After the credit crisis last August, many borrowers with less-than-perfect credit found getting a mortgage loan extremely difficult. However, the Federal Reserve Board's recent rate cuts have improved liquidity and made credit more affordable.

Part and parcel of maintaining liquidity is providing certainty to investors about the nature of the products to which they are committing their capital. Proposals to address the current economic conditions in the mortgage market that would impose new terms and conditions on existing mortgage contracts would make investors more reticent to reenter the credit market. Legislation such as H.R. 3609, The Emergency Homeownership and Mortgage Equity Protection Act, which would allow bankruptcy judges to rewrite mortgage contracts on primary residences, would do just that. Some presidential candidates have suggested that the best course of action is to impose a moratorium on foreclosures.

Retroactively prohibiting investors from being able to exercise their rights under a contract would also limit liquidity. Additionally, Larry Litton, of Litton Servicing Corporation, testified before Congress last year that such action would eliminate an important incentive for borrowers to remain current in their mortgage.

Voluntary Foreclosure Prevention Programs

AFSA believes that a better course of action is to provide an open, and voluntary, pathway for borrowers and lenders to work together to keep people in their homes. The voluntary nature of these programs would ensure that efforts to restore liquidity will not be undermined. Mandating workouts has the same effect as bankruptcy judges rewriting mortgage contracts or prohibiting foreclosures.

While relief for borrowers whose adjustable rate mortgages are about to reset cannot come fast enough, AFSA believes the right way to provide this relief is through the outreach campaigns that are currently underway. A paper that describes ongoing foreclosure mitigation efforts is attached to this testimony.

AFSA is a founding partner of the HOPE NOW Alliance that was launched last October at the behest of Treasury Secretary Paulson and HUD Secretary Jackson as a coordinated outreach program utilizing the resources of the lending industry and the credit counseling community. The HOPE NOW plan is designed to help subprime borrowers who can at least afford the current, starter rate on a subprime loan, but will not be able to make the higher payments once the interest rate goes up. HOPE NOW members have agreed on a set of new industry-wide standards to provide systematic relief to these borrowers in one of three ways: (1) refinancing an existing loan into a new private mortgage; (2) moving them into an FHASecure loan; or (3) freezing their current interest rates for five years.

Fourteen HOPE NOW servicers responsible for more than 33.3 millions home loans, or about 62 percent of both prime and subprime loans outstanding nationwide, reported that

approximately 545,000 subprime mortgage holders were helped in the second half of 2007. So were 324,000 prime borrowers, for a total of 869,000 prime and subprime homeowners helped. These numbers include 652,000 repayment plans initiated and 217,000 loan modifications.

In addition to HOPE NOW, six major lenders announced the launch of Project Lifeline earlier this month. These servicers will begin the program by providing a letter to seriously delinquent homeowners nationwide. The letter gives homeowners a simple step-by-step approach that, if followed, may enable them to "pause" their foreclosure for 30 days while a potential loan modification is evaluated. The ultimate goal of this step-by-step approach is to find a solution which meets the individual's needs. This is different than the streamlined approach to loan modification announced previously. Subprime, Alt-A, and prime loans may qualify for this program, including second liens and home equity loans.

Furthermore, I call your attention to the activity by the federal financial regulators to provide greater consumer protection in the mortgage arena. The regulators have provided guidance to strongly encourage lenders to limit the use of balloon terms and prepayment penalties on adjustable-rate mortgage products, and called for the increased use of escrows in relation to these products. Finally, the regulators have asked for clearer disclosure of consumer obligations associated with adjustable rate mortgages.

Personal Finance Education Programs

Part of the solution must also include consumer education programs that equip potential homeowners with a clear understanding of the mortgage lending process and the tools that are available to them in choosing the mortgage product that best meets their financial needs. AFSA's Education Foundation (AFSAEF) has produced a world-class personal finance curriculum, MoneySKILL®, which aims to help high school students meet the financial challenges that lay ahead. MoneySKILL is a highly interactive, reality-based Internet curriculum. The course consists of 34 "how to" modules on income, money management, spending and credit, and saving and investing. MoneySKILL is used by educators in all 50 states and several other countries. More than 80,000 students are currently enrolled in the program. AFSAEF also plans

to translate MoneySKILL into Spanish and undertake a campaign to encourage the Latino community to use this curriculum.

In addition, AFSAEF has developed an educational mortgage brochure, available in both English and Spanish, in conjunction with AFSA and the American Association of Residential Mortgage Regulators. The brochure contains worksheets to help consumers shop for the best mortgage deal and determine an affordable monthly mortgage payment. A glossary defines basic, but important, loan terms, such as Annual Percentage Rate, finance charge, balloon payment and arbitration clause.

Borrower Contact with Lenders

As you can see, lenders are working successfully with credit counselors to help at-risk borrowers stay in their homes. Where we need help is reaching as many homeowners as possible about the importance of contacting their lenders if they are having difficulty making their mortgage payment. Far too many homeowners have not taken this step, often because of ignorance, fear, or a combination of the two. Yet the sooner these borrowers contact their lenders, the better their chances of finding a workable solution.

As this committee considers how to best appropriate funds, we encourage you to augment the private sector's efforts to convey this important message. In particular, the U.S. Treasury Department's Office of Financial Education and/or the newly created President's Advisory Council on Financial Literacy may be ideal places to conduct these kinds of campaigns.

Proposed Addition to Economic Stimulus Package

Finally, it's worth noting that this hearing comes at a time when Congress is considering various proposals to stimulate the economy. This is relevant to today's discussion, as an economic stimulus package that helps the mortgage market would reduce the funds that must be appropriated for this purpose.

We believe that one way Congress can help at-risk borrowers is by creating a temporary homeownership tax credit. This will encourage buying activity, which will reduce the existing housing supply and improve home values for many homeowners who otherwise would owe more than the value in their home. Not long ago, Congress offered this type of tax credit to homebuyers in the District of Columbia and it was met with unquestioned success.

Based on IRS data, 21,821 claims (in the amount of $76.7 million) were filed for the D.C. tax credit between 1997 and 2001. On average, the program participants accounted for about 77 percent of all home purchasers in the District each year. A March 2005 article in *The Washington Post* reported on a study that described this tax credit as "a significant force in jump-starting the city's real estate market and helping low and moderate income people buy their first homes."

Again, AFSA appreciates the opportunity to provide testimony to the Members of the Subcommittee on the state of the mortgage market.

FORECLOSURE PREVENTION: STEPS TAKEN BY INDUSTRY[1]

Foreclosing on a property is an expensive and protracted process for lenders[2] and borrowers alike. Generally, mortgage lenders lose money in foreclosure situations. For this reason, many lenders are taking actions to help identify borrowers in need and prevent foreclosure. What follows is a summary of practices that lenders are using to help troubled borrowers keep their homes. These practices include engaging in early-stage loss mitigation, training and hiring new staff, modifying loan terms, refinancing, and partnering with nonprofit organizations.

ENGAGING IN EARLY-STAGE LOSS MITIGATION CONTACT AND CLOSELY MONITORING ACCOUNTS

Early and proactive contact with a borrower has always been a mortgage lender's top priority. Now lenders are starting to outreach to certain borrowers even when they have never been delinquent. This outreach takes place through personal contact or through an agency months before an interest rate adjustment occurs.[3] In the case of hybrid Adjustable-Rate Mortgages (ARMs), early contact helps the borrower assess whether he or she will be able to afford the loan once the rate adjusts, and whether a strategy to avoid foreclosure would be a feasible option for the borrower.[4]

Lenders continuously categorize the risk profiles of borrowers based on borrower characteristics, loan types, and possible delinquencies to help them decide who to contact early. When no solution seems feasible, lenders typically conduct a final review of all delinquent loans to be sure that every possible option was considered in an effort to prevent foreclosure.[5]

Through early contact with the borrower, companies are also attempting to curb challenges sometimes associated with an increase in monthly payments. Some lenders notify all ARM borrowers up to six months in advance regarding a scheduled payment change date, actively reminding borrowers to assess their financial situation before their new payment rates go into effect.[6] Other lenders contact their customers at least 45 days in advance to be informed of a payment increase. The sooner lenders work with the customer, the higher the probability of identifying a problem and finding a solution.

When communicating with a borrower, agents can retrieve their account history and inform them of their current financial status with the company. If a payment is late, companies are proactively helping borrowers before becoming seriously delinquent, a measure that can also help protect their credit.[7]

[1] This report is based on numerous industry sources. Standard & Poor's Ratings Services recently issued a report pertaining to steps the subprime industry and special mortgage loan lenders are taking to deal with the raise in delinquencies, and other early payment defaults on loans. This foreclosure mitigation report is largely based on the S&P findings, other resources as noted, and direct information acquired from several member companies. Member companies surveyed in the preparation of this report include (alphabetically) ACC Capital Holdings / Ameriquest, AIG, CIT, CitiGroup, Countrywide, GE, GMAC, HSBC, Option One, and Wells Fargo.
[2] This paper refers to both lenders and lenders of loans. "Servicing is the collection of mortgage payments from borrowers and related responsibilities of a loan lender. A loan lender is an organization that collects principal and interest payments from borrowers and manages borrowers' escrow accounts. The lender often services mortgages that have been purchased by an investor in the secondary mortgage market." Glossary, www.fanniemae.com, *last visited June 8, 2007.*
[3] Standard & Poor's, *Subprime Loan Lenders Step up Loss Mitigation Efforts to Avoid Foreclosures* (Mar. 14, 2007), *at* http://www2.standardandpoors.com/portal/site/sp/en/us/page.article/3,1,1,0,1148442756243.html
[4] Jonathan D. Epstein, *Lenders Offer First Line of Help to Fight off Foreclosure* (May 7, 2007), *at* http://www.buffalonews.com/258/story/69621.html?imw=Y
[5] Standard & Poor's, *Subprime Loan Lenders Step up Loss Mitigation Efforts to Avoid Foreclosures*, *supra* note 3.
[6] *Id.*
[7] *Id.*

Some companies are implementing default administration areas integrated with specialized units, such as government and subprime. In each unit, counselors oversee delinquent loans on a daily basis through calls to borrowers with the objective of curing defaults. These companies are working with borrowers to offer workout options based on agency, business, or investor partner guidelines.

Many lenders now consider all distressed loans to be eligible for loss mitigation, even those with first payment defaults. They have established contact centers with extended hours so borrowers have an opportunity to discuss their accounts at times convenient to them. Considering that borrowers may prefer to resolve their issues in person and not over the phone, companies are expanding satellite offices in high foreclosure rate areas.[8] Sometimes this involves sending teams of counselors into cities experiencing unusually high delinquency and default rates to work with borrowers face-to-face. One company is even distributing pre-paid cell phones to facilitate contact with delinquent borrowers classified as "no contact" accounts.

ONGOING TRAINING AND HIRING NEW STAFF

Lenders are training corporate customer service and early collections staff to listen for triggers in borrower phone calls that might suggest a need to refer the call to a loss mitigation specialist.[9] For most companies, early contact with customers requires highly trained staff to assist the needs of borrowers. Some companies require employees to complete120 hours or more of training before answering calls from borrowers; and thereafter require as much as 40 hours per year of specialized training.

Hiring additional personnel is another measure taken by lenders to better assist the needs of customers.[10]Lenders are actively increasing the number of employees to avoid having to refer customers to external companies. Lenders are further enhancing default management and home retention programs by ensuring proper staffing levels that allow agents to devote more time to borrowers, and restrict loss mitigation calls to only seasoned employees.[11] RBC Capital Markets predicts that lenders outside of the subprime market will also move toward hiring extra "loss mitigation" personnel.[12]

MODIFYING LOAN TERMS OR REFINANCING

Some companies are helping borrowers find manageable payments through loan modification.[13] For example, some lenders are allowing repayment plans where unpaid balances are gradually reduced through small, affordable increments to borrowers' monthly payments.[14] Repayment plans, with escrow shortages past the traditional 12-month period, are another option being offered by lenders.[15]
Though lenders are actively attempting to work with borrowers to minimize losses, the successful modification of a loan may not be an easy task due to securitized mortgages combined with legal and accounting restrictions. For example once a loan is securitized, the Pooling and Servicing Agreement

[8] Standard & Poor's, *Subprime Loan Lenders Step up Loss Mitigation Efforts to Avoid Foreclosures, supra* note 3.
[9] *Id.*
[10] *Id.*
[11] Standard & Poor's, *Subprime Loan Lenders Step up Loss Mitigation Efforts to Avoid Foreclosures, supra* note 3.
[12] *Id*; The Center for Statistical Research Inc., *U.S. Mortgage Borrowing: Providing Americans with Opportunity, or Imposing Excessive Risk?* (May 2007) ("Although foreclosure start rates are rising in subprime fixed and adjustable rate loans, they are also rising in prime and FHA fixed and adjustable rate loans, suggesting that broad economic conditions are driving the current upturn") *at* http://www.afsaonline.org/sitepages/sga_resources.cfm.
[13] Standard & Poor's, *Subprime Loan Lenders Step up Loss Mitigation Efforts to Avoid Foreclosures, supra* note 3.
[14] Kenneth Harney, *Lenders working to keep people out of foreclosure* (Apr. 15, 2007) , San Francisco Chronicle, *at* http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2007/04/15/REG4LP8FQ01.DTL
[15] Standard & Poor's, *Subprime Loan Lenders Step up Loss Mitigation Efforts to Avoid Foreclosures, supra* note 3.

(PSA) may place a limit on the number of accounts that can be modified.[16] Also, lenders may not be willing to work out an agreement with the servicer due to accounting principles that might bring back substantially modified pools to the originator's balance sheet. According to the Federal Reserve Chairman Ben Bernanke, "[m]odifications that reallocate expected cash flows across different securities associated with the pool could trigger a review of those securities by the ratings agencies. At the same time, if workouts are economically viable, then an incentive exists for third parties to purchase distressed pools at a discount and to undertake the workout process."[17] This type of purchase taking place in the market place might contribute to an increase in successful workouts.[18]

In some circumstances, companies are allowing borrowers to repay loans and avoid foreclosure through temporary or permanent relief of their loans. Such programs focus on borrowers who find it difficult to repay their loan due to a temporary change in their circumstances, such as loss of employment and/or reduction in wages. In some situations, the relief might be permanent since the customer's circumstances may be more disastrous, such as a permanent disability or death.[19]

Temporary forbearance is another solution that is being utilized wherever possible. Forbearance is an informal agreement that allows the temporary relief of the loan by spreading out repayment of past due balances over an extended period of time (usually 3 to 12 months).

Companies are also staffing up with seasoned loan modification experts who work with borrowers who cannot meet their mortgage obligations at the current rate and term. The staff's objective is to modify the loan requirements in such a way that it allows borrowers to pay their loan and avoid foreclosure. These measures focus on reaching out proactively to individual borrowers rather than waiting for borrowers to contact them.[20]

Lenders are also negotiating longer-term repayment plans with delinquent borrowers where possible. These plans provide borrowers with a set time period, such as 18 months, to catch up on their payments.[21]

In situations where home values may have declined below the loan balance, the industry is evaluating programs with the Federal Housing Administration (FHA) and Government-Sponsored Enterprises (such as Fannie Mae and Freddie Mac) that would allow a streamlined refinance in which the difference between the amount of the new loan and the balances owed on the previous loan are placed into a second mortgage loan carrying minimal or no interest rate and no monthly payments that would be due depending on the borrower's ability to repay it and/or upon the sale of the more. Credit risk on the second mortgage would be shared by the lender, Wall Street bond investors, the federal government and/or other mortgage market investors.[22] The latter innovation may provide an answer for borrowers facing unaffordable payment increases and simply got in over their heads and mistimed the end of the boom."[23]

As a last resort when a loan modification or forbearance is not a feasible option for the borrower, some lenders will allow a short-sale or a deed in lieu of foreclosure. Through a short-sale, the borrower in default avoids foreclosure by selling his or her house for less than the value of the loan. The lender then

[16] Wall Street Journal, *Text of Chairman Bernanke's Speech at the 43rd annual Conference on Bank Structure and Competition hosted by the Federal Reserve Bank of Chicago* (May 17, 2007).
[17] *Id.*
[18] *Id.*
[19] Senate Committee On Banking, Housing, And Urban Affairs, *Hearings On "Mortgage Market Turmoil: Causes And Consequences"* (Mar. 22, 2007) , *at* http://banking.senate.gov/_files/mcdonagh.pdf
[20] Kenneth Harney, *Lenders Working to Keep People out of Foreclosure, supra* note 18.
[21] Real Estate News, *Workouts Could Soften Impact of Subprime Lending Woes* (Apr. 9, 2007) *at* http://www.toprealtynews.com/realestatenews/id_34911
[22] *Id.*
[23] *Id.*

collects the proceeds from the sale, and in most cases forgives the remaining part of the debt.[24] A deed in lieu of foreclosure allows the borrower to deed back the property to the lender. In turn, the lender forgives the debt, releasing the borrower from all obligations under the mortgage.[25] Both options have less harmful effects on the borrower's credit than foreclosure.

PARTNERING WITH NONPROFIT ORGANIZATIONS

Major lenders are partnering with and contributing money to organizations that counsel borrowers about refinancing mortgages and coming up with options to help them keep their homes. Among the participating organizations are Save Our Homes Task Force,[26] the Neighborhood Assistance Corporation,[27] NeighborWorks America,[28] and the National Training and Information Center.[29]

More than 20 leading companies support the Homeownership Preservation Foundation, an independent non-profit organization dedicated to preserving homeownership.[30] The foundation provides 24/7 access to trained foreclosure prevention counselors who will work with the borrower to help him or her develop a budget and explore loan work-out options with their lender. Borrowers can reach the organization through their toll-free number 1-888-995-HOPE hotline.

Some companies have taken interacting with these counseling agencies to a whole new level. When a delinquent borrower, or a borrower who indicates they will have trouble making future payments, expresses their financial concern, highly skilled loan agents perform a "warm transfer" to a selected counseling agency. The company phones the counseling agency with the borrower on the line and introduces the borrower to a loan counselor. The company then transfers the call to the counseling agency for the borrower to discuss their situation in private.

AFSA and its members are strong supporters of programs that educate borrowers on the financial responsibilities that come with owning a home. The AFSA Education Foundation (AFSAEF) produces educational materials which warn consumers of the risks of foreclosure. Other AFSAEF materials and AFSAEF's MoneySKILL program train consumers and future consumers about responsible money management.

[24] Arthur Chapman, *Workouts Could Soften Impact of Subprime Lending Woes, supra* note 6; Carol Lloyd *Short Sale can Help Homeowner facing Foreclosure* (May 6, 2007), *at* http://www.sfgate.com/cgiin/article.cgi?f=/c/a/2007/05/06/BUGHTPL0E41.DTL&feed=rss.business
[25] http://www.hud.gov/offices/hsg/sfh/nsc/faqdil.cfm
[26] Standard & Poor's, *Subprime Loan Lenders Step up Loss Mitigation Efforts to Avoid Foreclosures, supra* note 3.
[27] Kathleen Pender, *Why we Shouldn't be Bailing out Subprime Lenders or Borrowers* (Apr. 22, 2007), San Francisco Chronicle, *at* http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2007/04/22/BUGU9PB34E1.DTL
[28] Standard & Poor's, *Subprime Loan Lenders Step up Loss Mitigation Efforts to Avoid Foreclosures, supra* note 3
[29] News Max, *Lenders on Rescue Mission to Limit Foreclosure* (Apr. 26, 2007) , *at* http://www.newsmax.com/archives/articles/2007/4/25/214317.shtml?s=lh , Kathleen Pender, *Why We Shouldn't Be Bailing Out Subprime Lenders or Borrowers* (Apr. 22, 2007), San Francisco Chronicle, *at* http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2007/04/22/BUGU9PB34E1.DTL
[30] HPF partners include: American General Financial Services, a member of AIG, Inc., Citigroup, Countrywide Home Loans, GE, Homecomings Financial – a GMAC company, HSBC – North America, JP Morgan Chase, Option One Mortgage and Wells Fargo Home Mortgage. *Information provided by the Housing Policy Council.*

Mr. SERRANO. Thank you.
Mr. Jost.

GREG LOBO JOST'S TESTIMONY

Mr. LOBO JOST. First I would like to thank Chairman Serrano, Ranking Member Regula, and the other members for inviting me here today to testify.

I am speaking today on behalf of the University Neighborhood Housing Program. We are a 25-year-old nonprofit housing group in the Bronx working to create, approve, and finance affordable housing throughout the Bronx, and I am also on the board of directors of the Neighborhood Economic Development Advocacy Project, and both of our groups, we put together different maps to help kind of illustrate different things that are in the written testimony that I submitted if you wanted to follow along and look at any of those.

Without a doubt there is a need for stronger consumer protections in financial services, especially in low and moderate income communities of color that in the past were victims of redlining. The Bronx is entirely too familiar with redlining, as this practice led to the borough's notorious incendiary reputation.

While the Community Reinvestment Act has helped immensely to turn around the fortunes of places like the Bronx, the residual effects of redlining have led to abusive lending practices often referred to as reverse redlining.

Traditional banks continue to have a relatively small branch presence in our neighborhoods, opening up the door to fringe financial institutions. For instance, it is three times as hard to find a bank branch in the Bronx as it is nationally, and in fact, our borough's many Puerto Rican born residents are much more likely to find a bank branch back on the island than they are in the Bronx. And within the borough they are obviously concentrated in higher income areas.

One way in which the Subcommittee could address this shortage of financial institutions is by funding the CDFI Fund to promote the growth and expansion of community development credit unions. We have two such credit unions in the Bronx, and they serve their communities well, but they obviously are not reaching a lot of neighborhoods. And it is these same neighborhoods that are specifically targeted by subprime and predatory lenders.

At UNHP, we have performed outreach, intake and referrals to many struggling Bronx homeowners over the last decade. More recently, many of those calls have come from new homeowners who never could have afforded their home, and others, many of whom are senior citizens, have owned their homes for a long time and can no longer afford them because of an unsavory refinance.

Our own research has shown that in 2007, the majority of Bronx homeowners going into foreclosure were not the victims of 2/28 or 3/27 ARMs resetting. I think it was about 65 percent of the loans going into foreclosure last year were less than two years old.

This exemplifies the extent of atrocious underwriting in recent years, where huge numbers of loans were made without regard to the borrower's ability to repay. The proliferation of the securitized secondary market has made this all possible through its blatant lack of accountability. This lack of accountability needs to be cor-

rected, and in order to truly protect consumers, currently Senator Dodd's bill, S. 2452, stands out as the best bill to help fix our broken mortgage system.

The House equivalent H.R. 3915 contains certain strong protections for consumers, but falls short of the Dodd bill on the critical issue of assignee liability, something which gives distressed borrowers recourse against the current holder of their loan so they can effectively fight foreclosure.

On the funding side, our neighborhoods need more counselors and legal services. Sadly, we have had to scale back our outreach efforts for homeowners because there are no counselors who have the time to see them in the Bronx. There are only two in the entire borough right now, and this is a borough of over 1.3 million residents, and these two individuals and their two respective agencies have no chance of keeping up with the growing tidal wave of foreclosure that is coming their way.

We also need consumer protection against the exorbitant interest rates that come with refund anticipation loans. Once again, it is the same neighborhoods that are targeted, and the financial effects are devastating as tens of millions of dollars meant for low and moderate income families struggling to literally pay the rent are being siphoned off every year just in our area.

Again, it is these same communities where households receive and depend upon the earned income tax credit that these loans are targeted and flourish. And, in fact, the federal government is subsidizing tax preparation companies and their national lender partners by allowing them to take advantage of folks living on the edge who are desperate for cash.

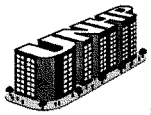
Congress can change all of this by requiring the IRS to band refund anticipation loans on Earned Income Tax Credit dollars. Congress can also act by ending federal preemption of state laws that would, in effect, do away with such predatory loan products. It is no wonder that at least in New York only national banks make these loans. State laws and banking regulations prohibit such high interest rates. So only banks not subject to these rules can offer such predatory products.

Another big problem is bank accounts containing federal benefit income, like Social Security and veterans benefits being improperly frozen by predators. Federal banking regulators should require banks upon receipt of a garnishment notice to make a determination whether an account contains exempt federal benefit funds, and if it does, the bank should refuse to honor the restraining notice.

Currently the fixed income residents who have had their accounts frozen improperly are subject to bounced check fees and even eviction as they are unable to make payments because of these improperly frozen funds.

And that is all I have to say, and thank you again, once again, for having me here.

[The information follows:]



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Testimony of Gregory Lobo Jost, Deputy Director of University Neighborhood Housing Program (UNHP) and Board Member of the Neighborhood Economic Development Advocacy Project (NEDAP)

Financial Services and General Government Subcommittee Hearing on Consumer Protection in Financial Services: Subprime Lending and Other Financial Activities

February 28, 2008

First I would like to thank Congressman Serrano and the other members of the Financial Services and General Government Subcommittee for holding today's hearing and for inviting me to testify. I come before you today both as the Deputy Director of University Neighborhood Housing Program (UNHP), and as a member of the Board of Directors of the Neighborhood Economic Development Advocacy Project (NEDAP). University Neighborhood is a 25 year-old nonprofit Community Development Financial Institution (CDFI) working to create, preserve, improve and finance affordable housing in the Bronx. Over the past decade we have expanded our efforts to help preserve homeownership in the Bronx through research, organizing, outreach and advocacy. NEDAP is a 13 year-old nonprofit resource and advocacy center that works with community groups in New York City and State to promote economic justice and to eliminate discriminatory economic practices that harm communities and perpetuate inequality and poverty.

The Continuing Legacy of Redlining

Without a doubt there is need for stronger consumer protections in financial services, especially in low- and moderate-income communities of color that in the past were victims of redlining. The Bronx is entirely too familiar with redlining, as this practice led to the borough's notorious incendiary reputation. While the Community Reinvestment Act has helped immensely to turn around the fortunes of places like the Bronx, the residual effects of redlining have led to abusive lending practices, often referred to as "reverse-redlining." Traditional banks continue to have a relatively small branch presence in our neighborhoods *(see Attachment 1)*, opening up the door to fringe

financial institutions such as payday lenders and check cashers who often double as mortgage brokers pushing subprime products. For instance, FDIC Summary of Deposits data showed that there were only 136 bank branches in the Bronx last year—just one branch for every 3,443 households. This means it is three times as hard to find a bank branch in the Bronx as it is nationally, where there is one branch for every 1,174 households. And since the distribution of the branches within the Bronx is completely uneven (they tend to cluster around each other), many neighborhoods have no branches for miles around. In fact, our borough's many Puerto Rican-born residents are much more likely to find a bank branch back on the island (where there is one branch for every 2,197 households) than they are in the Bronx.

One way in which the subcommittee could address this shortage of financial institutions is by funding the CDFI Fund to promote the growth and expansion of Community Development Credit Unions like Bethex Federal Credit Union. Currently Bethex is one of only two such credit unions in the Bronx (and the other is located in the east Bronx), and while they fill many gaps in financial services in their respective underserved communities, there are many neighborhoods they are not reaching leaving residents completely un-banked.

In the meantime, this residual effect of redlining has created a vacuum for predatory and irresponsible lending to come into our neighborhoods and make a fortune off the meager incomes of our residents through the guise of rent-to-own stores, tax preparers that offer refund anticipation loans (RALs), and one-stop-shop mortgage agencies pushing their subprime dope. As you can see *(in Attachment 2)*, it is the same low- and moderate-income neighborhoods that underwent redlining—and that continue to be underserved by banks—that have been targeted by subprime lenders.

Fighting to Preserve Homeownership in a Broken System

At UNHP, we have performed outreach, intake and referrals to many struggling Bronx homeowners over the past eight years. In the past two-and-a-half years, many of those calls have come from new homeowners who by no means could afford their homes. Others, many senior citizens, have owned their homes for a long time but can no longer afford their current mortgage thanks to the unsavory terms of a recent refinancing. Our own research has shown *(see Attachment 3)* that the majority of Bronx homeowners going into foreclosure during the first three quarters of 2007 were not the victims of 2/28 or 3/27 ARMs; almost 65% of the loans going into foreclosure during this period were less than two years old! This exemplifies the extent of atrocious underwriting in recent years, where huge numbers of loans were made without regards to the borrower's ability to repay. The proliferation of the securitized secondary market has made this all possible through its blatant lack of accountability.

This lack of accountability that had previously been present in the mortgage market (with the notable exception of certain past abuses of FHA-insured mortgages) needs to be corrected in order to truly protect consumers. Currently, Senator Dodd's (D-CT) bill, *S. 2452*, stands out as the best bill to help fix our broken mortgage system, as it requires that loans are underwritten for affordability for the full term of the loan,

rather than at any initial teaser rate, and prohibits subprime abuses such as loan flipping and prepayment penalties. It is also crucial that the bill places strong prohibitions on steering borrowers to higher cost loans than they qualify for. Most important, *S. 2452* provides for limited assignee liability— which gives distressed borrowers recourse against the current holder of their loan so that they can effectively fight foreclosure. The securitization process has effectively "laundered" predatory mortgages, by helping to strip borrowers of their ability to raise defenses in foreclosure. When borrowers assert defenses in foreclosure, the trusts inevitably assert the "holder in due course" doctrine, claiming that they purchased the loan with no knowledge of the abuses. Borrowers are left defenseless—their only legal recourse is against the originators who no longer hold the loan and have no ability to stop the foreclosure. Many of these originators have gone bankrupt. Depriving borrowers of the right to defend against foreclosure is wrong as a matter of fairness and public policy. The Dodd bill, by providing for limited assignee liability, would help to disincentivize the securitization of predatory loans, and would give borrowers targeted by abusive loans a means to fight for their home.

The House equivalent of the Dodd bill, *HR 3915*, contains certain strong protections for consumers, but falls short of the Dodd bill in certain key areas. *HR 3915* contains far weaker assignee liability provisions than the Dodd bill; has inadequate protections against steering; and exempts far too many loans from compliance with the ability to pay standards in the bill. For this reason, we strongly urge the members of the Subcommittee to work to adopt a preventative bill modeled after *S.2452*.

On the funding side, our neighborhoods need more counselors and legal services! Sadly, UNHP has had to scale back our outreach and referral services to homeowners because there are no counselors in the Bronx who have the time to see them. Up until about six months ago, there was only one counselor for the entire borough of over 1.3 million residents! Even after our City Council helped double the number of counselors to two last fall these two individuals and their respective agencies have no chance of keeping up with the growing tidal wave of foreclosures that are plaguing neighborhoods throughout the Bronx. The result is that things are being turned topsy-turvy in our renter-heavy borough; blocks lined with two- and three-family homes have become destabilized and can even serve as the new hotspots for local drug dealing while large rental properties seem to be providing a level of stability. As property values in the outer-boroughs of New York City begin to stagnate and even drop, the foreclosures will begin to affect more than just the families who lose their homes as communities will begin to deal with the boarded-up homes that have devastated other parts of the country. Funding the critical work that counselors and attorneys perform is real tangible protection for our homeowners and their neighbors that Congress should help provide.

Refund Anticipation Loans Are Draining Already Stretched Residents

Outside of mortgages, one of the main areas that our neighborhoods could use more consumer protection is with tax preparation, specifically with protection against the exorbitant interest rates and fees that come with Refund Anticipation Loans (RALs).

Once again, it is the same neighborhoods *(see Attachment 4)* like the South and West Bronx that are targeted by tax preparation services offering RALS. The financial effects are devastating *(see Attachment 5)* as tens of millions of dollars meant for low- and moderate-income families struggling to literally pay the rent are being siphoned off through RALs.

This year, University Neighborhood is partnering with other nonprofits to provide free tax preparation assistance to local households making less than $75,000 in an effort to combat these types of fees and help folks keep more of their money in their pockets, so they can pay the bills they really need to pay. It is typical in our neighborhoods for a family to spend half of their meager income on housing costs, leaving precious little for other necessary expenses. We could use help from Congress to protect these vulnerable families from becoming victims of the usurious products tax preparation services offer them.

To make matters worse, it is one of our nation's largest anti-poverty programs that is being preyed upon by RALs. It is indeed the very same low-income neighborhoods where households receive and depend upon the Earned Income Tax Credit (EITC) that RALs are targeted and flourish. In effect, the federal government is subsidizing tax preparation companies and their national lender partners by allowing them to take advantage of folks living on the edge who are desperate for cash. Congress can easily change all of this by requiring the IRS to ban RALs on Earned Income Tax Credit dollars.

Congress can also act by ending Federal preemption of state laws that would in effect do away with predatory loan products like RALs. It is no wonder that (at least in New York) only national banks make these loans; State laws and banking regulations prohibit such high interest rates so only banks not subject to these rules can offer such predatory products. This is a loophole that needs to be closed.

Ensuring Exempt Funds Stay Exempt from Creditors

NEDAP's Consumer Law Project provides free legal information, advice, referrals, and representation to low income New Yorkers who have problems concerning debt collection, credit reporting, and lending discrimination. The project provides services through a legal hotline, a *pro se* legal clinic, and direct representation of consumers in state and federal court. More than 2,000 individuals have been served since the project was launched in 2005.

One fifth of the clients call because their exempt funds have been improperly restrained by creditors. Federal banking regulators should require banks, upon receipt of a garnishment notice, to make a determination whether the account contains exempt federal benefit funds, such as Social Security or Veterans Benefits. If the account contains only exempt funds, the bank should refuse to honor the restraining notice. In the case of commingled funds, the bank should refuse to restrain the exempt funds, but allow restraint of the nonexempt funds. Banks can apply commonly accepted rules of accounting, such as FIFO (first in, first out), to decide which funds are exempt.

Here are three real cases handled by the hotline that illustrate how the current system fails federal benefit recipients:

1. Ms. S and her eight year old daughter had to borrow food and money from friends for six weeks when their bank account containing only a few hundred dollars of directly deposited Social Security was restrained. Even though the bank admitted the account contained only exempt money, it refused to lift the restraint, telling Ms. S to deal with the creditor's attorney. By the time Ms. S found a legal services attorney to help, the bank had taken $380 from her $875 Social Security check to pay for bounced check and other fees triggered by the restraint. Worse, Ms. S was sued for missing her rent payment due to the restraint, and had to pay the landlord's lawyer $900 in legal fees to settle the case.

2. Ms. C is elderly and lives with her disabled daughter in public housing. Permanently disabled herself, Ms. C uses a wheelchair due to osteoarthritis and other medical problems. She learned that she had been sued by debt collectors for an old credit card debt only after her bank account—containing her and her daughter's SSI benefits—was frozen. The creditor's attorneys refused to lift the restraint, and Ms. C was unable to pursue her case because she is homebound. She and her daughter had no access to their funds for more than one month. During this time Ms. C could not pay rent or utility bills, causing the public housing authority to send her an eviction notice. Her bank also charged her a $150 "legal processing" fee for freezing her account. Fortunately, Ms. C found an attorney to help her get her account unfrozen, persuade the bank to waive the fees, and ultimately avert eviction for herself and her daughter.

3. Mr. B is a 59-year-old disabled Vietnam War veteran. Although his bank account contained only directly deposited exempt income, Mr. B's bank account was frozen by a debt collection law firm enforcing a default judgment in a case that Mr. B never even knew about. As instructed by the bank, he contacted the law firm, but was unable to convince them to release his exempt income. Mr. B's account was not released until nearly three months later, after he obtained the assistance of a legal services attorney. Mr. B incurred substantial bank fees as a result of the restraint, and developed such a deep mistrust of the banking system that he closed his bank account. He now uses expensive check-cashing facilities and hides his money in his home.

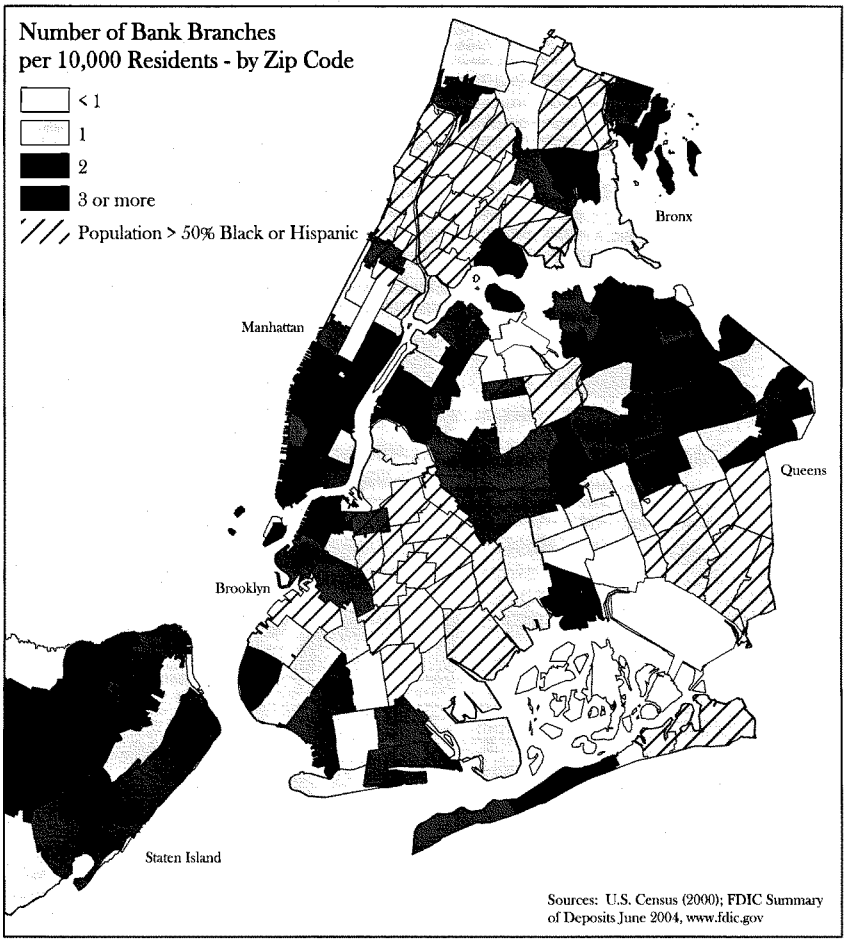
Conclusion

In conclusion, there is much work to be done to protect our neighborhoods from irresponsible and predatory lending. Responsible private investment is crucial; encouraging a stronger bank presence in traditionally underserved communities and funding Community Development Credit Unions to fill in the gaps will make responsible lending accessible where it is needed most. Legislation that will require mortgage suitability standards while creating assignee liability will help prevent future foreclosure crises from occurring.

While ending federal preemption of state usury laws could curtail Refund Anticipation Loans in many states, exempting Earned Income Tax Credit dollars from high interest RALs would keep this federal benefit in the hands of those it was intended for and could limit the predatory nature of the operations that offer the product. Likewise, exempting federal benefits from improper restraints placed by creditors will prevent many future hardships for families and individuals who can least afford them.

Thank you for holding this hearing on this critical topic, and it is our hope that our many recommendations will soon become funding and policy changes enacted by Congress.

ABSENCE OF BANK BRANCHES IN COMMUNITIES OF COLOR NEW YORK CITY (2004)



Prepared by the Neighborhood Economic Development Advocacy Project (NEDAP)
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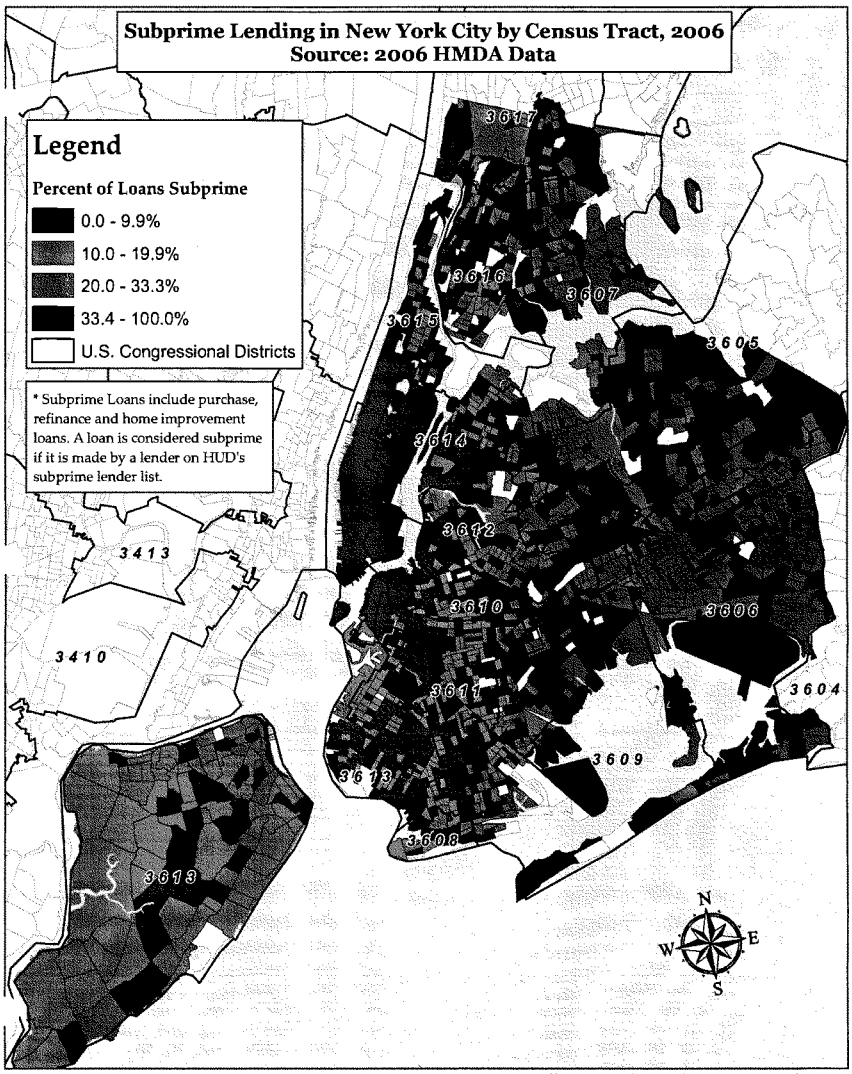
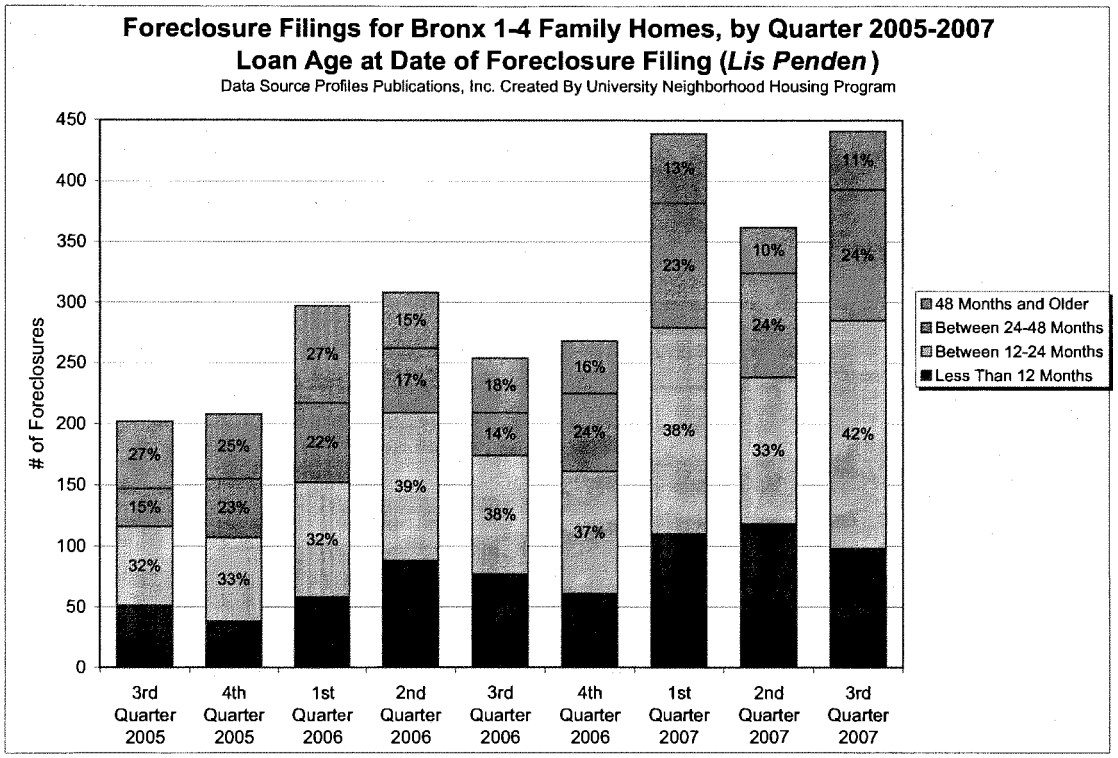
Attachment 1

5/05



Attachment 2

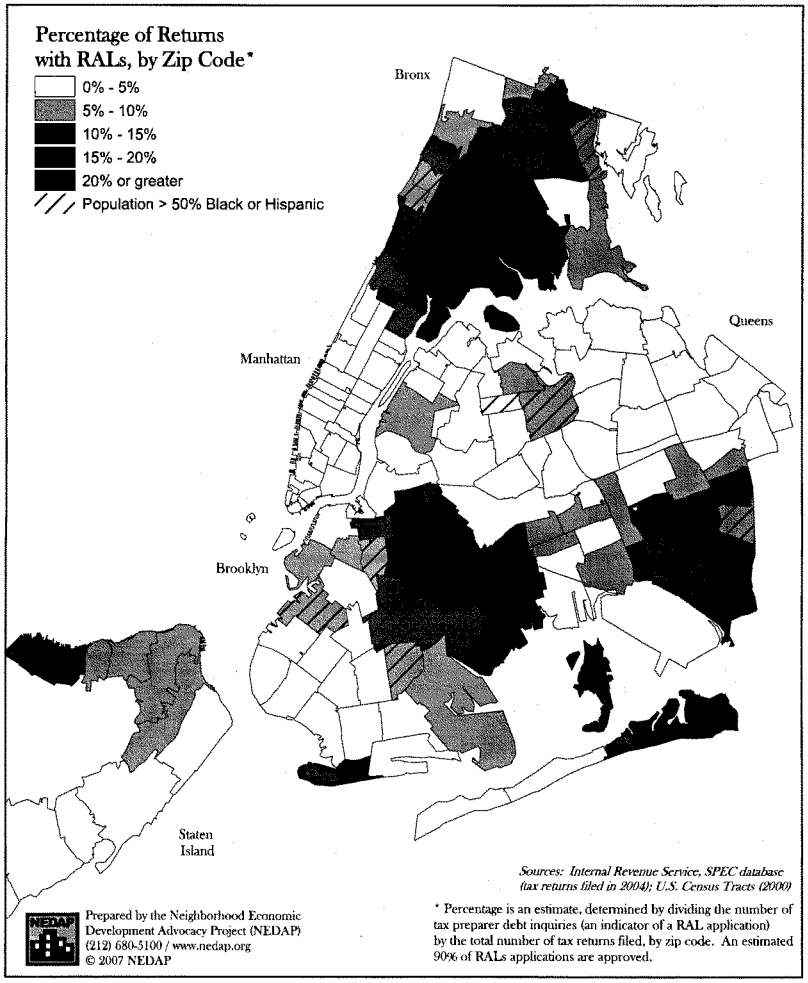
Map Created by University Neighborhood Housing Program, October 2007



Data Source Profiles Publications, Inc.
Created By University Neighborhood Housing Program

Attachment 3

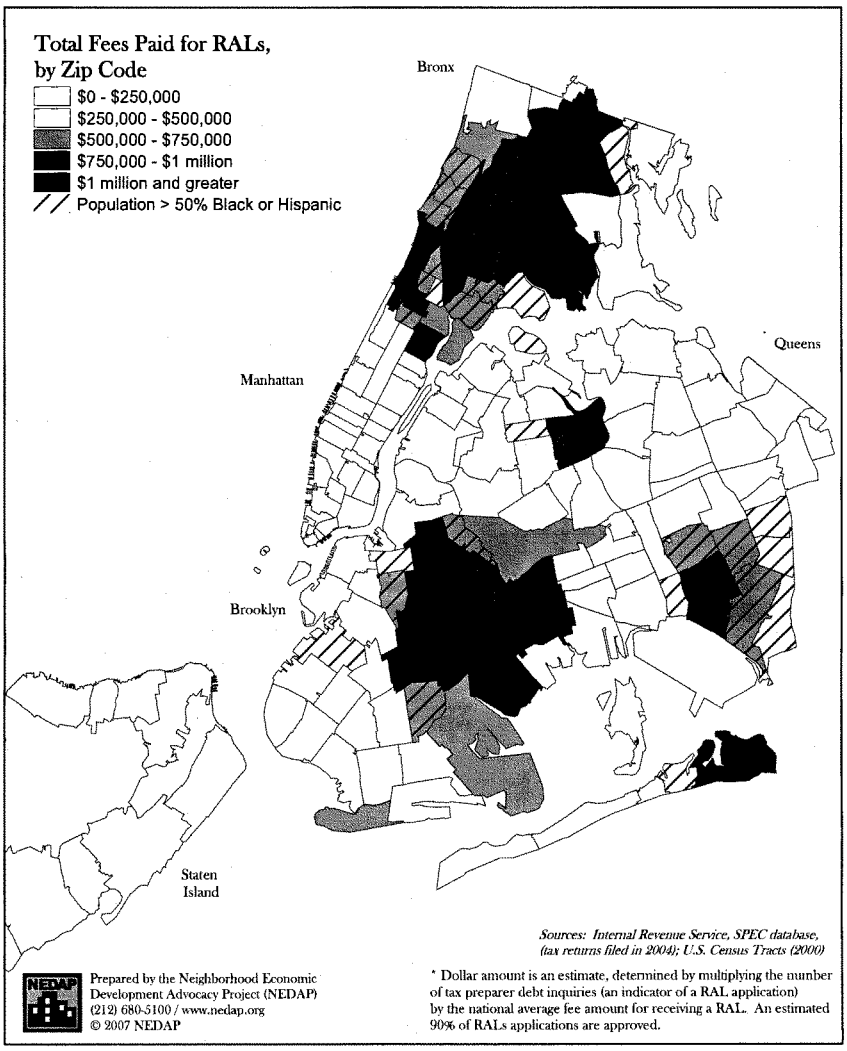
Percentage of Income Tax Returns with Refund Anticipation Loans
New York City (2005)



Attachment 4

1/07

Fees Paid for Refund Anticipation Loans
New York City (2005)



Sources: Internal Revenue Service, SPEC database, (tax returns filed in 2004); U.S. Census Tracts (2000)

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* Dollar amount is an estimate, determined by multiplying the number of tax preparer debt inquiries (an indicator of a RAL application) by the national average fee amount for receiving a RAL. An estimated 90% of RALs applications are approved.

Mr. SERRANO. Thank you.

Before we go into the order of questioning, I just wanted to ask you a question. I always say that we members of Congress assume that we know all of the subjects. That is because no one dares to ask the question that people would laugh at.

So let me ask the question of the day that people will laugh at. When the local tax preparer gives you a refund anticipation loan, is that from their own funds or do they work with somebody else?

Mr. LOBO JOST. Yes, they work with another bank, an outside bank, and I do not know all of the banks that do it, but it is only national banks that do not come under state jurisdiction. HSBC, I think they have some new leadership, and they are deciding that the new leadership does not think that this is a good loan product.

Mr. SERRANO. Getting out of the business.

Mr. LOBO JOST. Yes, they are going to stop offering that.

WALL STREET

Mr. SERRANO. Okay. Mr. Calhoun, in your testimony you state that Wall Street has played a major role in the subprime mess by encouraging subprime lenders to ignore whether their customers could actually afford the loan. What, if anything, do you believe Congress should do to address this issue and what might the Appropriations Committee specifically do, and tell us how Wall Street did that.

Was this high level meetings they had or was it just a behavior pattern that began to grow? How did they encourage people to do this?

Mr. CALHOUN. It was financial incentives. There is a well known quote that was in the financial trade press from the president of a subprime lender, and he put it this way. He said, "Wall Street will pay me more to do a no documentation loan than they will pay me to do a fully documented loan. Which do you think I am going to do?"

Mr. SERRANO. Explain that to us. How does that work?

Mr. CALHOUN. How it works is that it sort of happened from both ends. For example, a broker typically makes higher fees for considerably less work on a no doc. loan, where there is not documentation of the income, and again, most of these loans were to people with just regular salaried jobs. They've got a W–2. You know, these are not self-employed folks who have to dig up extensive tax records, and what most of them did not realize is they paid a heavy premium. Usually in the subprime market if you did not bring in your W–2, you might get your loan a little faster, but they raised the interest rate on the loan a full percentage point.

Well, that extra percentage point went part to the mortgage broker, part to the lender, and part to Wall Street. And so at least in the short run everyone was making more money.

Well, now that these loans are foreclosing, everybody is getting hurt by that practice, but that is an area where I do think our federal regulators are moving the so-called ability to repay, and I think there is consensus within the financial industry that loans should not be made when there is no reasonable ability for the person to repay the loan absent winning the lottery.

Mr. STINEBERT. Not to disagree, but to give a little bit of a not just product specific or reasons, but more of a macro reason for why Wall Street was so amenable to this product is it really goes back to the dot-com buzz and all of this money left dot-coms and was looking for a home. Real estate and dirt has always been the most reliable, stable thing that you could put investments into.

You had a huge amount of investments coming from overseas where savings in China and in India were looking for investments. Where do you invest it? You invest it in the United States, which is the most stable, safest market to invest in, and real estate being the most stable of those markets.

So you had huge amounts of capital that were available. Now, that caused other people to put together programs and to look at buying deeper certainly into the subprime area than they ever had before, but it started with the huge availability of funds that were not there previously.

RATING AGENCIES

Mr. CALHOUN. And we would agree that there was a glut of worldwide capital during this time, and then the other thing that needs mentioning is the guardian of the security of this was supposed to be the rating agencies. They were supposed to look at these loans and evaluate their credit worthiness.

They were also in a difficult position. They are paid by the companies issuing these securities, not by investors, and there was a lot of pressure to grade these as triple A securities. If you had $100 million of loans, you would get $80 million of triple A securities. It is more profitable the more triple A securities you get.

So, for example, at one point they ignored whether a loan had a second mortgage or not. If you had an 80 percent loan with a 20 percent second mortgage, the rating agency treated that the same as an 80 percent loan where the borrower had put 20 percent down.

Well, most lenders think that there is a real difference in those loans.

Mr. STINEBERT. I think we would all agree that everyone was lured by the steady appreciation of homes and had a dependence on that it would continue

Mr. SERRANO. Thank you.

Ms. Murguia, when was the last time I called you Ms. Murguia? [Laughter.]

Mr. SERRANO. Janet.

Ms. MURGUIA. I do not know, Mr. Chairman.

STEERING PRACTICES

Mr. SERRANO. As I told the first panel, I am deeply concerned by the fact that it is minorities who have been overwhelmingly hurt by this mortgage crisis. It appears that in many instances mortgage companies aim their dishonest practices directly at minority communities. I would like to ask you about the practice known as steering, in which mortgage loan officers have a personal financial incentive to steer applicants toward loans that are not necessarily in the best interest of the applicant.

A Wall Street Journal article last December reported that more than half of the people who received subprime loans during 2005 had credit scores that would have qualified them for prime loans.

So could you please comment on the practices of the mortgage loan industry and the financial incentives given to loan officers. What needs to be done to address this issue? What should we be looking at over here?

And you just happen to have a La Raza wire?

Ms. MURGUIA. No. Look. The steering practice is one that we have been very concerned about, and you know, we understand that our research and analysis, there are different factors that we are looking for in predatory lending legislation, but on the anti-steering provision, you know, you should not be able to put families in more expensive and risky loans simply because they walk into the wrong bank branch and maybe only sell subprime loans or have nontraditional credit profiles.

So bankers and brokers should be obligated to sell loans that families can afford to repay, and we think there needs to be more Wall Street accountability, too, because Wall Street played a role in funding some of these poor loans.

But we have to make sure that there are the right protections in place and accountability in place with these financial institutions so that they are not allowed to move people into these bad loans. Obviously we are seeing the result of that here today in terms of where we have seen this foreclosure crisis.

HOPE NOW PROGRAM

You know, I wanted to comment briefly on the HOPE NOW Project because while it is commendable and outreach is great and appropriate, you know, what we have seen is that calling the servicers does not necessarily guarantee assistance either. We know that the Wall Street Journal reported that only nine percent of borrowers who called HOPE NOW got a workout, and that which includes the repayment plans and modifications.

So servicers cannot keep up with the demand, and we need a streamlined approach that would automate how for many of the most vulnerable families.

Anti-steering provisions would help in terms of ahead of time, you know, affirmatively looking at what could be potential problems. You know, we sponsor a home ownership counseling network program that has been in place for ten years. We know that prevention programs like that keep us out of this problem.

But when there is no accountability and all of these measures are voluntary, I would argue that while it is commendable that they are voluntary, that is not good enough knowing what we know now, especially when it comes for us where we are able to document and show research of what the implications are going to be for Latino families.

So even when you talk about educating a future generation of borrowers, that's commendable, too, but, Mr. Chairman, Mr. Regula and Mr. Bonner, Rome is burning. We know that there are problems right now, and for us to not take specific measures, whether it is expanded refinance options or loan modification cri-

teria, that we can take now because we know we are going to be bumping up against this.

You know, people have talked about it as tsunami. We have gotten the warning wave here, and we know that it is coming again, and it is going to hit, in particular, certain families, and we should not just rely on voluntary measures.

We can look at anti-steering and home ownership counseling efforts that prevent that, but we need to take specific measures now that allow these families to have some relief.

Mr. SERRANO. Well, that was my next question for Mr. Stinebert. We know that the HOPE Program is voluntary, an agreement. So how much of a solution is it, and what more needs to be done by us?

Mr. STINEBERT. Well, it is voluntary in nature, and yes, they are not 100 percent participating, but I would say 94 percent of the lenders and servicers involved in the industry in mortgage subprime and mortgage market is pretty good participation for any voluntary program.

And working with the Treasury Department and what they are trying to do is take, as you pointed out earlier, you have taken people that were investors and others that were looking at flipping and second homes and tried to look at those people and not necessarily put together programs that are going to help those people.

There are other people that can certainly go into a reset and we are very knowledgeable about what they had gotten into and certainly have the finances and the income available to make those payments, and then, as was pointed out to us earlier, there are about 600,000 that are going to be coming up for reset in the next year that truly need help, and we are really trying to focus our efforts on those people that not only need help, but that will benefit from help and stay in their homes.

I think when you talk about alignment, and you talk about how we got into some of this mess earlier on, there was not necessarily the alignment that there is today with the lenders and the incentives that they have in order to prevent a foreclosure or keep a homeowner in their home and what you had before.

Right now everybody has parallel alignment. They have all of the same incentives. We also have the same goals to have as few foreclosures as we possibly can because a foreclosure, as we said, costs much more than a workout or an extension or a modification is going to cost to keep that person in their home.

STEERING PRACTICES

And to address a little bit on the steering issue, we should not forget that some steering has certainly benefitted, whether it be Fannie Mae or Freddie Mac or even Congress who wanted to encourage lending in certain areas, wanted banks and others to put some incentives so that people would go into those areas and specifically go into markets that were perhaps under represented and gave incentives specifically for that purpose.

Of course, steering, no one condones steering, of putting a person in a mortgage that is not as good as one they might qualify for, steering away from a prime mortgage product into a subprime product. That is not what we are talking about.

But some steering course has been encouraged by home ownership groups and community groups throughout the country to try and increase participation in certain areas.

Mr. SERRANO. Well, you, Mr. Stinebert, seem to look at the glass as half full, and that is fine. But there has been steering that has hurt people and created major problems. Wouldn't you agree to that?

Mr. STINEBERT. I agree. When steering has occurred and in many cases I think it was mentioned this morning. As much as lenders would like to cite mortgage brokers and all of the things that they have done to possibly steer homeowners or borrowers into certain products and misrepresentation, I think that they were working as representatives of the industry. There are many, many good brokers out there, and there are others that did this.

FINANCIAL LITERACY

Well, we know that there are many cases that we all know of where abuses have occurred. We are certainly not trying to defend those abuses. But one of the primary areas, and I think we can all agree on talking about fixes and solutions or areas that need to be worked on, is the area of financial literacy. It is an abomination, quite honestly, that most people can get through high school and have never had one course or one hour of instruction on financial literacy or personal finance.

Yet they take course after course of things that they will probably never use again in their entire life, but they do not spend five to ten minutes talking about financial literacy. If there is an area that we can all improve upon the——

Mr. SERRANO. I am finally in total agreement with you. I totally agree with that. I agree.

I have a couple more questions, but I am going to ask Mr. Regula to.

JUDICIAL MODIFICATIONS TO MORTGAGE LOANS

Mr. REGULA. Thank you, Mr. Chairman.

The idea that is kicking around the Senate that gives bankruptcy judges the ability to reform mortgage I think would set a very dangerous precedent because if that were the case, where do you stop? The bankruptcy judge would be substituted for a negotiation between the borrower and the lender, and as a matter of principle, I think that to be bad business. What do you think, Mr. Stinebert?

Mr. STINEBERT. I think when people look at it, I think it looks as if it would be helpful to current people who got into a bad situation and might go into bankruptcy.

But I think when you look down the road and you look at the cause and effect of changing the bankruptcy law in this way would actually result in, it would definitely result in more expensive loans at a higher interest rate.

Now, we can sit here and debate on how much higher, whether it be one percent or 100 basis points or 200 basis points as some have indicated, but it is definitely going to be an increase in interest rates. Now, why?

It is pretty simple. If you are going to have to sell these loans to investors and they have no idea what they are buying because

some third party down the road can change the terms and change the contracts, then you are not really buying contracts, are you? You do not know what you are buying.

So therefore, investors would shy away from these products. It would definitely increase the loans. We talk about, and I think Michael mentioned that in the farm and in vacation homes and second homes, that judges are allowed to do this. Well, there is a reason why the interest rates are 100 to 150 basis points higher for each of those loans, too, and part of that is because they can do this.

Now, if you want to strap future home buyers with that penalty to help the current people that might have problems, I think it is very short sighted of Congress to consider it.

Mr. REGULA. Wouldn't it also result——

Mr. CALHOUN. If I may add just quickly, very briefly, that independent folks who have looked at this come to far different conclusions. Moody's has looked at this specifically and concluded, number one, that it would not raise the cost of credit going forward, and number two, that this one measure would save nearly 600,000 families that we are talking about right now from foreclosure.

They regard it as the most important measure that can be taken right now—this is Moody's—that would protect families from foreclosure and stabilize the housing market and the whole economy. Jack Kemp has come out and written editorials endorsing this for the same reasons, that it would help the economy.

Because the key is this is a very targeted provision. It is only available if the borrower can show that the house would otherwise be foreclosed on. And so the choice is not foreclosure. It is not one of these deals where I can go into bankruptcy and say, "I just want a better deal." You have to demonstrate to the court that this house would be foreclosed upon unless I got a modification. The modification is limited. If the lender offers one, then you are not eligible.

And then you have to complete a five-year plan before you get to keep the modification. If you do not complete the plan, the lender gets to foreclose with their full lien. They lose nothing. So we are a lending——

Mr. REGULA. What are the elements involved in your plan?

Mr. CALHOUN. There are IRS guidelines that say this is your living allowance. Every penny above that has to go to pay your creditors. You can not get any additional credit during that five-year period without specific court approval. It is a very onerous plan, and this provision is not changing the 2005 bankruptcy code.

And one of the ironies is here we actually—there was a period from the 1978 enactment of the bankruptcy code through 1993, when we actually had an experiment in this country. But a third of the districts in the country interpreted the 1978 law to say mortgages could be modified.

And it was not until 1993 that the Supreme Court looked at it and said, "No. We believe the law is that you cannot modify the mortgage."

But the key is rates did not go up in 1978 when that was enacted. There was not a difference in rates or availability of credit in the different jurisdictions depending upon whether they have

this narrow modification available and rates did not change after the decision.

Again, borrowers cannot walk in and say, "I want a two percent mortgage." They have to pay at or above the prime rate on the mortgage. There are very tight limits on this.

I agree if you said the judge can come in and rewrite any mortgage for no good reason that would be very adverse to the economy and to the mortgage market, but we are a lender. We have a billion and a half dollars of loans outstanding that would be subject to this provision. So we believe in it both for protecting borrowers in general and as a good provision for us as a lender.

Mr. REGULA. Mr. Stinebert, do you want to comment?

Mr. STINEBERT. Well, I think, Michael, to be honest you have to point out that in Moody's and in his testimony there were four others that testified exactly the opposite to what Moody said. They were the only ones that said that it would not be a substantial increase in interest rates. So there was definitely disagreement there.

Mr. REGULA. Somebody has got to pay, and if the judge is going to modify my mortgage, then the next person that gets the mortgage is going to have to pay a little more to make up that loss.

Mr. STINEBERT. I think you have to ask yourself if you are an investor would you purchase mortgages that you do not know whether you have a contract with.

Mr. REGULA. Well, that is right.

Mr. STINEBERT. Now, I know there have been lots of modifications and somewhat compromises to make this more palatable to people, and as much as that is appreciated, many people certainly in the House and in the Senate remember those ten years of negotiations and sometimes contentious issues that were to have the bankruptcy laws that we have today, and it was, I think, very smart that originally when they excluded mortgages or at least primary residents from being able to allow a cram-down, that it has resulted in lower interest rates for all consumers, and that is across the board.

Even though you look at trying to do this and isolate it as they have to subprime and others, you are bringing uncertainty into the marketplace. It is making it less stable, and it is already not that stable as it is. We do not need to introduce new criteria into it.

Mr. REGULA. Wouldn't every court be a little different depending on the disposition of the judge? Would there be any guidelines as to what Court A in New York could do versus Court B in Texas in terms of modifying this mortgage contract?

Mr. STINEBERT. Congressman, that is one of the major concerns, is that it would be uneven as far as——

Mr. REGULA. I would think so, depending on the judge.

Mr. SERRANO. Mr. Bonner has come back when most Members, Mr. Chairman, went home to take care of their district needs. He came back. He is working on his gold star in attendance.

Mr. Bonner.

Mr. BONNER. Mr. Chairman, I would like to also apologize. The reason I go over my five minutes is because I am from Alabama. It takes us a little bit longer to get our words out. So I apologize to my distinguished, debonair, and what were the other words you used? Handsome, brilliant Chairman. [Laughter.]

Mr. SERRANO. I did not say handsome. You say handsome.

Mr. BONNER. And I mean it, too.

Mr. SERRANO. Yes. Well, try thinking in Spanish and speaking in English.

Mr. BONNER. Yes, sir.

Mr. REGULA. You have got to move up about three chairs.

TAX CREDITS FOR HOMEBUYERS

Mr. BONNER. This is a great panel, and I know that you see more empty seats than you see seats filled, but your advice and your testimony today is very timely and also very insightful to all of us because we are all looking to try to come up with a solution.

Ms. Vernon, there is a tsunami out there. I live on the Gulf Coast. We know more about hurricanes than tsunamis, but the point is it is a serious matter.

Mr. Stinebert has offered one possible solution based on the D.C. model, and I thought in your written testimony you elaborated a little more. If you could give us a little bit more food for thought, and then if we could get the three other panelists to comment on that, if we could get a unanimous agreement just among the four of you, I think that would be helpful.

Mr. STINEBERT. Well, if for a moment you would take your focus off of the foreclosure issue, just as that as a separate issue, we all realize that families are losing their homes, and that is a terrible thing. But what I think everybody can agree upon is that the only way this is ever going to end is when the housing market stabilizes. The housing market stabilizes when people out there which can purchase a home decides that the depreciation or the decline in home prices has bottomed.

And as soon as they know that basically the depreciation has hit its bottom, that is the best time to buy because then prices are going to go up again. So the sooner we can hit that bottom, the sooner that people can start purchasing homes. The sooner that people that are possibly entering foreclosures have an exit plan.

I mean, let's face it. The exit plan that people bought into those homes was not only refinancing, but they could always resell their home in a matter of weeks before. So it was not necessarily difficult for them to sign on the dotted line on a mortgage. Number one, they could refinance tomorrow. If that did not work, they could sell it the next day and possibly make a profit.

So we need to give an exit plan to people that possibly could be entering foreclosures, and the best exit plan I have heard of focuses on the housing industry of giving a tax credit to anybody who purchases a home, not just subprime, but all purchasers of a primary residence.

It worked in Washington, D.C. when they did it, and there is no reason why it cannot work around the rest of the country. It is a stimulus that I think would really work as opposed to some of the other stimuli that are being discussed.

It would put money in people's pockets immediately, something that would encourage people to purchase homes tomorrow, and we could start getting back to where we need to be as far as housing being a good resource, if not the best investment, a good investment for people to make.

Mr. BONNER. Any other panelists have any opinion about that?

Ms. MURGUIA. Well, I think I would have to claim a conflict of interest since I am looking at buying in the District right now. [Laughter.]

STABILIZING THE HOUSING MARKET

But that is officially for the record disclosed in the area of transparency.

But look. I think we all agree that there are important steps that we can take to stabilize the market, and we should be doing that if that is going to help in the long term or midterm. But what you have heard, I think, from a lot of us on this panel is there are immediate priorities and steps that we should be taking, and you know, I would argue that allowing them to be completely voluntary is not going to get us there, and if we are not specific about some of those steps, and we can make them targeted, I think we can show that those would have more immediate impact in dealing with this really.

But you know, tax credits, can they be helpful in stabilizing the market? Of course they can, but I am not sure that is going to provide the immediate relief that we know we need right now.

Mr. CALHOUN. I think we agree on the problem, and that is that you need to stabilize the housing market, and it is good ol' supply and demand. It makes sense to work at it from both sides. The most cost effective way is to reduce the number of houses, additional houses, that you are dumping on the market.

I mean, I think everyone agrees it is a lot, lot more efficient economically to keep someone in the house if that is feasible, and it is not for all of these folks facing foreclosure by any means. It is a lot more efficient to keep someone in the house than to go through foreclosure, have that house be vacant, subject to depreciation and damage, and then try and get a new owner in there. It just takes a lot more money at a time when money is particularly scarce.

HOUSING AFFORDABILITY

Mr. LOBO JOST. One thing that kind of complicates it in the Bronx and throughout New York City where we still have really high housing prices is there is a huge affordability problem and people living in the house even before the whole foreclosure crisis, you had people who, like, it is typical for people to pay half of their income on their mortgage and on renters as well.

So you know, we are not at the point where the prices have really dropped yet, but we are still seeing a lot of foreclosures. So in terms of stabilizing, I guess New York City is as stable as it is, but it is still an issue. I mean, there are still people losing their homes even with prices staying where they are because we do not have the population that has the income to afford the prices at what they were because these homes for a typical Bronx residence were never affordable at the price they were selling at because the prices went up so dramatically, so quickly.

So you know, it is kind of tough for me to say anything more than that other than that the people are not going to be able, at the prices that they are now, people are not really going to be able

to afford them unless we can bring down some of the other costs of owning a home.

That is one of the things that we have been kind of working on, but that is kind of outside of the whole mortgage area.

Mr. BONNER. Thank you, Mr. Chairman.

Mr. SERRANO. Thank you.

And I share your comments and your concern because, you know, I live right there on the grand concourse near Yankee Stadium, and there are a few buildings that are co-ops, and you used to be able to get an apartment for $50,000. The same apartments now are selling for $300,000, and so they are not being bought by any of the folks that are there. New folks are moving in.

That is fine. I do not have a problem with that, but there is something wrong with the fact that the folks who were there who would like to buy the apartment in the building next to them cannot.

I was just telling Mr. Regula. He was amazed. On 164th Street in the middle of the South Bronx with everything that you read about it, although we never see it because we love the place, but you know, an apartment just sold for $525,000, a two bedroom apartment, and that is ridiculous. That is before the new stadium goes up, you know, and values just shoot up.

MORTGAGE SERVICING

One question that I had, I was in a mortgage for the last 15 years where I started paying out to one company and every couple of years somebody would write to me and tell me that I had now somebody else to make the check out to. What is the incentive for these folks selling the mortgage?

You end up over the life of a mortgage, you know, having six different people or organizations, companies that you end up paying to. What is the incentive, anyone on the panel, for selling these mortgages off? Is it just a matter of taking the money up front and they then go collect the mortgage?

Mr. CALHOUN. I think it is a reflection. Servicing is sold, I mean. When it is transferred, the company giving it up is paid something for it, but it is a reflection of two things that are relevant here.

One is just there has been consolidation in the financial services industry. Much more a few large lenders were controlling so much of the business.

And the other that is very relevant here is that servicing is a very high volume, low margin business. You don't get paid a lot to service a loan, and you have to have a huge volume of it to make it profitable. And that, unfortunately, is a challenge here because the servicers are not set up to do these widespread modifications, and asking them to take on that extra work onto a very thinly profitable business is a challenge.

There have been improvements, but, for example, a typical ratio would be you might have one employee per servicer or case worker for every 450 mortgages. Now if a significant percentage of those are in distress now, that is just very difficult to respond even with the best of intentions and the greatest effort, and that is one of our concerns about the voluntary modification.

The system was not set up to handle this, and unfortunately there are a lot of characteristics of the system that make it very difficult for it to respond to this crisis.

Mr. SERRANO. I wanted to make a comment on what Mr. Bonner has said, and Ms. Murguia knows this well. There are folks here who are listening to this testimony or that testimony that goes into decisions that we make on the bill. You should never see empty chairs as a sign that no one is listening. Trust me. Everyone is listening in more ways than we care to think about.

MULTIPLE FAMILY HOMES

Mr. Jost, I am wondering on the number, on the record keeping, if something is missed here. When we say 1.8 million families stand to lose their homes, does that take into account the fact that in some communities, I know for a fact a couple of folks in the Bronx, where two brothers married with children will jointly buy a house, a two-family home. So if they lose that home, it is really two families that lost their home.

I mean, I know this is just numbers, but are we changing the crisis in terms of numbers by not taking into account the fact that some people have doubled up in buying homes?

Mr. LOBO JOST. I mean, I do not know. I cannot speak outside of the Bronx, but definitely there are a lot of cases like that, a lot of immigrant families who buy two and three family homes together and share it amongst themselves, and you know, multiple families living in one home, and we have a lot, as you know, two and three family homes.

So I do not know if there is any data. I do not think there is any data on that, but you could definitely assume that in certain areas where that is common that you are talking about more families that are going to be affected by this.

Then there is also the issue about rent. People who are renting in the apartments as well could be forced out in the case of a foreclosure as well. I think that has become a big issue as well.

Mr. SERRANO. In other words, this would be where I buy a house, a two-family house, and I rent one of the apartments to help me pay the mortgage, and then when I lose it or I am gone, that person also cannot rent there any longer.

Mr. LOBO JOST. Right, depending on what happens. I mean, if they are going to sell ahead of time, then it depends on the new owner, but potentially they could be thrown out. But if it does go into bank-owned REL, then the person has generally been kicked out.

REFUND ANTICIPATION LOANS

Mr. SERRANO. Talk to me about these refund anticipation loans. You know, from day one when I saw that I said, "Is this really, you know, of benefit to the community? Is this something that should not be taking place?"

How do some of these loans work? And how much of a problem is it in areas like the Bronx?

Mr. LOBO JOST. I mean, it is definitely targeted as you can see on some of the maps like in certain neighborhoods, and these are the same kind of low income neighborhoods that get a lot of money

through the Earned Income Tax Credit, and I think that that is partly why they are targeted there, because, you know, low income people really count on that money from their tax return, Earned Income Tax Credit, as part of their income.

People generally speaking are really maxed out, and they are paying their rent or they own a home and that's half of their income right there. And so they have got very little leftover money, and you know, it is right after Christmas time. You are probably spending a little bit extra if you want to have presents and do other things for the holidays, and so then in January you have got to pay these bills, and so you need the extra cash to kind of pay off some of these debts.

And so the idea, obviously it is changing a little bit. I do not know in terms of we are working to get the word out. It used to take longer to get your refund back, but now I think with E-file and everything it is quicker, but still there is the idea like, well, we need to go to these places and get the money as fast as possible.

A lot of people go and file their taxes as soon as they get their W–2s and they want to get the money like in hand right away. And I do not think they understand because it is such a short-term loan like what the interest rate is. I mean, these are often like 600 percent interest rate loans.

Mr. SERRANO. Six hundred?

Mr. LOBO JOST. Yes, if you annualized it. So obviously that is why that would not be allowed under New York State banking and lending regulations, but like I was saying, they are targeting areas where people are getting the Earned Income Tax Credit because they get bigger refunds. So there is more money to be made off those people's tax returns even though they are very low income people. They are going to get a bigger check back because of the credit, and so that is a bigger slice of the pie that they can take out and make more money off it.

Mr. SERRANO. Have you heard of any anticipation loans having to do with the tax rebate that Congress and the President just approved?

Has anybody—oh, did I just give somebody an idea for a scam? [Laughter.]

Mr. REGULA. I am sure they thought of it.

Mr. SERRANO. I cannot believe I thought of that.

Mr. LOBO JOST. Well, last year they were doing these holiday loans, which was pretty much like a refund anticipation loan, except they were offering them in December so that you could do your Christmas shopping based on your tax return from the year before and then maybe some pay stubs, and so they were for a longer term, but this was just another horrible product.

There was some organizing work done against them, and they decided they were not going to offer any more. So I do not know if they are going to try to do something on these.

Ms. MURGUIA. Mr. Chairman, you highlight sort of scams that people can encounter at the front end. I would just point out still that, you know, fraud and these kind of scams are out there now at the back end in the sense that I think one of the testimony we heard earlier today offered an example of a help line that is very similar to the HOPE line that we have, and it is called

www.hopenowusa.com. It sounds a lot like the HOPE Alliance number. It is nothing to do with the HOPE Alliance number, and they have been found to have been, you know, in the zone of these predatory practices and saying, "Oh, okay. We will take your loan," and these folks are vulnerable to that.

So you know, scams are out there on the front end, but we are seeing them still in this sort of zone right now as people are trying to get legitimately. We talked about those families that do take the steps to try to reach out and get help can oftentimes find that there is fraud at the very end.

I just want to make sure, and it is not just because we represent a network of community based organizations, but you really want to focus on those types of outlets for recourse for help in these communities where people are trusted and accredited, you know, community based organizations that are going to be able to reach out and work with those individuals or families that need that help because it is rampant in terms of what we are seeing now because every is seizing on any type of scam idea that is out there, and we are seeing it now in terms of how these sort of help lines are being established.

Mr. SERRANO. Mr. Stinebert.

Mr. STINEBERT. On tax anticipation loans, because we have members that do those, and most of the ones that I have talked with that do them only do them because they do tax preparation work, and they would not get anyone to do their tax preparation work if they did not offer those loans.

We have a current chairman of the board who made the remark, "We would like to get out of the business entirely and just do tax preparation, but if I did that, we would never have anybody come in for tax preparation."

So it is——

Mr. SERRANO. But he had them coming in before.

Mr. STINEBERT. What I meant to say is if there is ever an area, I mean, they are gaining like two to three weeks on their money. It really is crazy that people would demand that type of a loan to gain two or three weeks on their funds, but it is being done by millions of people, and the whole area of education, once again, is just key to stopping refund anticipation.

TAX PREPARATION SERVICES

Mr. SERRANO. Okay, but here is where I am going to disagree. As this map shows, unfortunately, I have hardly any banks in my district, and it saddens me personally because I started out as a banker. I worked 12 years for Manufacturer's Hanover Trust, and when I did, there was a bank on 138th Street near Willis Avenue, for those of you who know the Bronx, and across the street was Bankers Trust, and down the block was Banco Popular, and Ponce de Leon Savings and Loan was somewhere else. And then you had another branch for each one of these on 149th Street and 161st and Yankee Stadium in the Sombi area. I mean banks were all over the place.

In fact, if you misbehaved they would send you to the other branch. You know, that was not as fun as the other branch, you know. Coney Island was big.

But now there are no banks. Yet there are these tax preparers. I remember ten years ago, 15 years ago, they were full of people waiting in line because these folks are not going to go to some accountant downtown. They do not have access to them, nor can they afford them.

So the suggestion that if they stop giving out these loans, people would stop going to them, I do not buy that, not from you, not from them, because where are they going to go? To Park Avenue or Madison Avenue for a big accountant? No, they are going to go to the same place. It is just that they have found a way to get 600 percent interest rates on them.

And I will tell you, I know these things are covered by laws, but if I could just waive this and get rid of something, it would be the ability of these folks to do that. And your point on the Earned Income Tax Credit, you are right. That is hitting the American taxpayer because this is a program, a great program, where some folks who pay taxes assist folks who are hurting, to get some money.

So when you scam them, you are hurting me. This is not money that we printed somewhere. This is money that I pay, that you pay so that someone else could be helped. You know, it is like stealing from Medicaid. It is no different in my opinion, you know.

Mr. CALHOUN. Mr. Chairman, on that concern.

Mr. SERRANO. Sure.

Mr. CALHOUN. We have been involved in this. We have worked in trying to limit and reduce these refund anticipation loans, particularly when they are targeted to Earned Income Tax Credit taxpayers. I think this is what Chris is referring to because we have heard this in our negotiations with them.

For example, a household would say that if they unilaterally stop this, it is not that the families would quit going to tax preparers, but they would go down the street to Jackson Hewitt, for example, if Jackson Hewitt kept offering the refund anticipation loans.

And so it is a situation and there are similarities, parallels here with the mortgage industry where in the absence of almost any regulation, I mean, the mortgage world particularly at the rich nation level is almost the Wild Wild West over the last five years.

In the absence of any regulation, the worst actors drag down the whole market. Not only do they disadvantage borrowers. They have an unfair advantage over those lenders who try to act responsibly.

For example, we had lenders, one of the leading ones, who stated, "Do not pay yield spread premiums to your brokers. It creates a conflict of interest and causes you to pay more than you should for your loan."

Well, the brokers came to originate three-fourths of the subprime loans, and the broker said, "Fine. We will just send our loans down the street to a competitor," and so that lender had to eventually reverse their policy and start paying these big yield premiums to compete with the other lenders who were paying them.

So if you do not set some floor of reasonable consumer protections, education is critical, but as several people have said, it is necessary but it is not sufficient. It is not enough. This is a very complex area. There need to be some substantive ground rules there that protect both borrowers and the responsible lenders.

Mr. SERRANO. I am going to wrap up in a couple of minutes.

SUBPRIME MORTGAGES

Mr. Jost, what specifically does your group do to deal with the subprime issue?

Mr. LOBO JOST. On the mortgage side?

Mr. SERRANO. Yes.

Mr. LOBO JOST. Specifically, we do a lot of outreach and referrals and intake in terms of homeowners that are current homeowners who have already fallen behind. We try to connect them with counselors, although like I said, by now there are too few counselors to connect them with, and also legal services.

And we are also working on a number of ways to bring down other costs of owning a home because the mortgage side is just one part of it. There are all of the other costs associated with owning a home or have gone up. So we are working on like water and sewer issues. We are working on weatherization with the Northwest Bronx Coalition to try to get more people to bring down their energy costs as well.

But specifically with the subprime in our neighborhood, we are doing outreach and speaking with folks and organizing events to bring people together to talk, and we will bring in lenders. We are organizing a homeowner affair coming up next month, and we are bringing in one of the banks that is offering SONYMA products, which is the New York State Mortgage Association, and they are products that help keep people in their homes.

And then through NEDAP and such and some other groups, we do more organizing work, I would say, and advocacy.

Mr. SERRANO. All right. I thank you all. This has been painfully fascinating. Painful because we are not discussing something nice, but it is fascinating. You have given us a lot of good information, and we will all try to work together as Congress moves along to try to deal with this issue, and let's just hope that the picture is not as bleak as we all believe it is and that it can get better as we go along.

So I want to thank you. You have been a great panel. It sounds like a TV show, a great panel, and we thank you for your service.

And for anybody who is here, that adjourns the meeting.

SUBCOMMITTEE ON FINANCIAL SERVICES AND GENERAL GOVERNMENT

HEARING

ON

CONSUMER PROTECTION IN FINANCIAL SERVICES

Questions for the Record

for

The Federal Trade Commission

February 28, 2008

Questions for the Record
Submitted by Chairman José E. Serrano

1. Trigger Lists. Numerous consumer advocacy organizations believe that the FTC should prohibit the credit bureaus from selling "trigger lists" to lenders. They argue that these lists, which contain the personal and financial data of prospective borrowers, make them more susceptible to identity theft and predatory lending schemes.

While I am aware that the FTC believes it does not have the regulatory authority to ban the selling of such lists, has the FTC taken steps to ensure consumers know they have the right to opt out of these lists?

Yes. The Fair and Accurate Credit Transactions Act of 2003 improved consumers' ability to opt out of receiving the types of prescreened solicitations described in your question. The Commission has issued a rule implementing this requirement and is the agency charged with enforcing this rule. Specifically, the rule mandates that all written prescreened offers contain a prominent disclosure on the first page of the solicitation explaining in simple terms what a consumer needs to do to stop receiving these solicitations. The disclosure also refers consumers to a separate location in the solicitation where they can find further explanation, including the statutorily-required opt out language.

The Commission has actively sought to ensure that consumers are aware of their right to opt out of receiving such solicitations. The FTC has a brochure, "Prescreened Offers of Credit or Insurance," that provides consumers with information about their options and how to exercise them.[1] In addition, last year, the Commission issued a consumer alert entitled "Shopping for a Mortgage? Your Application May Trigger Competing Offers."[2] The alert describes the process of how a consumer's mortgage application can trigger competing offers, how consumers can use these offers to their benefit, and how consumers can stop receiving these offers by opting out through a phone call (1-888-5-OPTOUT) or online (www.optoutprescreen.com). It also advises consumers to put their phone number on the National Do Not Call Registry so that they do not receive telephone solicitations. We publicize these materials through the media, speeches, and our partners. For example, last year, I spoke to the National Association of Mortgage Brokers and specifically addressed the consumer alert about mortgage trigger lists.

Has the FTC received complaints from consumers who have opted out but continue to receive solicitations from lenders? If so what action has been taken?

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[1] *See* www.ftc.gov/bcp/conline/pubs/credit/prescreen.pdf.

[2] *See* http://www.ftc.gov/bcp/edu/pubs/consumer/alerts/alt171.pdf.

Since December 2005, the effective date of the regulation requiring prescreen opt-out notices, the Commission has received approximately 100 complaints from consumers asserting that they continued to receive prescreen solicitations after exercising their rights to opt out. These complaints are not limited to mortgages, however, and may include consumers complaining about credit card or other solicitations. FTC staff has conducted investigations of whether companies using mortgage trigger lists are complying with the Fair Credit Reporting Act (FCRA) and the FTC Act, and more generally of businesses' compliance with prescreened solicitation requirements. To date, the staff has not found a basis for recommending formal law enforcement action. FTC staff continues to monitor businesses for compliance with prescreen opt-out requirements.

The Commission also monitors complaints for violations of the Do Not Call provisions of the FTC's Telemarketing Sales Rule, including in the mortgage area. For example, the Commission brought a case against mortgage lender Ameriquest. According to the FTC's complaint, Ameriquest's telemarketers improperly called consumers on the Registry whose numbers had been obtained from third-party lead-generators. The lead generators enticed consumers to provide their contact information, including phone numbers, using Web sites that offered information on financial and other products. The FTC's complaint states that because consumers whose numbers were on the lead lists were not reaching out to Ameriquest in particular, the company had not developed an "established business relationship" with them, making calls to registered numbers illegal. In settling the charges, Ameriquest will pay a $1 million civil penalty and is required to ensure that any lead generators it uses disclose to consumers, before they provide their contact information, that they will receive a phone call, the maximum number of sellers who may contact them, and, if possible, the identity of any seller that might call them as a result of their inquiry. The FTC has also brought other actions alleging violations of Do Not Call against entities marketing mortgage related products and services.[3]

2. Consumer education outreach. One of the FTC's performance objectives is preventing consumer injury through education. The Commission characterizes consumer education as "the first line of defense against fraud, deception, and unfair practices."

The FTC has wonderful consumer education materials available on your website; however, many of my constituents have no Internet access, and even if they do, would not know to look at the FTC's website. What are you doing to disseminate your materials to the consumers who need them?

What other strategies do you have to ensure that the communities most in need of consumer protection information, such as subprime borrowers in lower-income neighborhoods, receive the information?

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[3] *United States v. USA Home Loans, Inc., et al.*, No. 1:06-cv-02850-JFM (D. Md. Oct. 31, 2006); *United States v. Global Mortgage Funding*, No. SACV07-1275 DOC PJWx (C.D. Cal. Oct. 30, 2007).

We disseminate our consumer education materials in several ways to reach consumers who have no Internet access. First, we put our messages out through the media. Virtually all of our press releases announcing cases include consumer education. We send these releases to over 2500 radio, television and newspaper outlets across the country, which use consumer tips with the articles they write or report on. We also do interviews about important consumer protection issues, including financial topics with local and national media. For example, staff has conducted media interviews on credit and mortgage related topics with the local New York City Univision Radio station and with national media like Univision, Telemundo, and CNN Radio en Español. We also develop PSA scripts for radio station personnel to read. In fact, as part of National Consumer Protection Week this month, which focused on the importance of financial education, we developed radio PSA scripts on financial issues that were distributed to radio stations across the country. We also developed radio PSA scripts on mortgage foreclosure rescue scams in English and Spanish in conjunction with the three cases we announced this month on such scams. Further, we provide our education materials to a syndicate that places our information in thousands of daily and weekly newspapers (English and Spanish) across the country.

In addition, we distribute consumer education through federal, state, and local government agencies, industry associations, and non-profits. For example, recently, the U.S. Postal Service printed our identity theft brochure and distributed the piece to 121 million U.S. households.

We also share practical and timely educational information with community-based organizations, which in turn share this information with consumers. Indeed, we have created a guide called "Reach Out! A Guide to Consumer Education and Outreach" to help organizations working within Hispanic communities educate consumers about their rights.

Finally, we give presentations to local groups about financial issues. For example, the FTC's Northeast Regional Office, based in New York, is partnering with the New York City Department of Consumer Affairs and the New York State Department for the Aging to give presentations about financial issues at senior centers throughout the five boroughs, including in lower income neighborhoods. The FTC's Northeast Office also participates in a Credit Smarts outreach project to give presentations about credit to college students on the campuses of the City University of New York. FTC staff has given presentations about data security and avoiding identity theft to organizations such as the South Bronx Board of Trade and a group of housing counselors from the National Council of La Raza (NCLR).

3. Consumer complaints. Sometimes consumers are reluctant to complain or are generally wary of the Federal Government. This is especially true in certain minority populations.

What can the FTC do to make sure you and other agencies receive necessary complaints from consumers who have been harmed? What can Congress do?

We publicize our toll-free consumer hotline and website extensively, including on all of our consumer education materials and during our speeches and presentations to the media, industry, consumer groups, and others. We also ask our partners to promote our complaint form and toll-free number. Our web-based complaint form is available both in English and Spanish, and our toll-free hotline includes Spanish-speaking telephone counselors. We tell consumers who complain to us that any personal information they provide voluntary. In fact, consumers can and do provide completely anonymous complaints.

Members of Congress can and have publicized our complaint form and toll-free numbers, as well as our consumer education materials. During the 110th Congress, FTC staff helped to organize several dozen town halls in Members' districts on consumer protection issues, which featured FTC speakers and provided a venue for distribution of our consumer education materials.

In addition, more than 170 Members of Congress provide links to FTC materials on their Web sites. Several Members have devoted entire pages to consumer assistance, hosting a series of links to FTC mini-sites. We have also supplied bulk shipments of our materials for Congressional staff to distribute to their constituents during routine district visits and for such community events as county fairs or during Members' "open house" type events. We are pleased to work with Members of Congress to continue this outreach.

4. Deceptive Marketing. The FTC recently reached settlements with companies that were being investigated for deceptive marketing practices. For example, a company advertised "free gifts" as incentives for consumers to visit websites when, in fact, consumers had to spend money to receive such "gifts". In another example, a company targeted subprime consumers by promoting "no-fee" pre-paid credit cards and loans; this company then debited funds from consumers' bank accounts without their authorization.

How are subprime borrowers particularly at risk as targets of deceptive advertising and related marketing practices? What recent actions, including monetary settlements, has the FTC taken against such deceptive practices? Are the monetary settlements sufficient to provide an adequate incentive against companies undertaking such practices?

With the recent rapid increase in mortgage delinquencies and foreclosures, subprime borrowers appear particularly vulnerable to mortgage foreclosure rescue scams. In the last month, the Commission has filed three enforcement actions involving such scams.

In two of these actions, the Commission alleged that the defendants promise to stop foreclosure in exchange for a consumer's up-front payment of $500 to $1,200. After a consumer made the payment, the defendants did little or nothing to stop the foreclosure.

These schemes deprived consumers not only of much-needed funds but also of the opportunity to explore realistic options.[4] In both of these cases, the courts temporarily stopped the scams and froze assets to preserve the possibility of returning some money to consumers. In the third case, the Commission alleged that the defendants enticed consumers into high-cost, short-term loans secured by a second mortgage on very unfavorable terms without fully disclosing the costs, risks, and consequences of doing so.[5] The Commission is continuing to investigate more companies making misleading statements in this area and plans to announce new law enforcement actions in the future.

Foreclosure rescue is not the only subprime mortgage area in which the FTC has an active enforcement presence. As discussed in the Commission's February 28 testimony, in the past decade, the agency has brought 21 actions focused on the mortgage lending industry, with particular attention to entities in the subprime market. These cases have alleged that mortgage brokers, lenders, and servicers have engaged in unfair or deceptive acts and practices and have collectively returned more than $320 million to consumers.

In addition, the FTC last fall warned over 200 mortgage brokers and lenders, and the media outlets that carry their ads, that their advertising claims, some of which were in Spanish, may violate federal law. The Commission currently is conducting several investigations of mortgage advertisers and will continue to monitor claims made in mortgage advertising.

We believe that out mortgage-related law enforcement activities, including the $320 million obtained for consumers through these activities during the past decade, deter bad actors from harming consumers. FTC law enforcement alone, however, cannot completely ensure that scam artists will stop taking advantage of vulnerable consumers. The Commission therefore also coordinates and cooperates with other civil law enforcement officials and engages in extensive consumer education.

The FTC's efforts to prevent mortgage foreclosure scams aptly illustrate the value of a comprehensive approach to consumer protection problems. In addition to bringing its own law enforcement actions as described above, the FTC staff is leading or participating in seven federal-state-local task forces across the country on foreclosure rescue issues. Task force members share information about mortgage foreclosure scams and coordinate their prosecutions. Further, the FTC staff have participated in public meetings to provide homeowners with information and resources to help them avoid foreclosure, including

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[4] *FTC v. Mortgage Foreclosure Solutions, Inc. et al.*, (M.D. Fla., filed Feb. 26, 2008) *available at* http://www.ftc.gov/os/caselist/0823021/index.shtm; *FTC v. National Hometeam Solutions, Inc. et al.*, (E.D. Tex., filed Feb. 26, 2008), *available at* http://www.ftc.gov/os/caselist/0823076/index.shtm.

[5] *FTC v. Safe Harbour Foundation,* No. 08 C 1185 (N.D. Ill., filed February 25, 2008), *available at* http://www.ftc.gov/os/caselist/0823028/index.shtm.

advice for contacting loan servicers to learn about available options. The FTC is also submitting a series of radio public service announcements, in English and Spanish, to stations in cities in which mortgage foreclosures are particularly prevalent. Further, the FTC is asking local newspapers to run public service messages about foreclosure rescue schemes in the classified advertisement sections of English-and Spanish-language community newspapers.

5. Teaser websites. The FTC utilizes "teaser" web sites to draw consumers to educational web sites that warn them about potential fraud or "too good to be true" claims. The web sites look similar to fraudulent sites, but they instead direct consumers to information on how to protect themselves from scams. These sites cover weight-loss claims, credit repair, travel fraud, and many other topics. There does not appear to be any teaser site dedicated to mortgage or credit card fraud.

Are "teaser" web sites effective in informing consumers of potential fraud or deception on the Internet? Would similar sites covering subprime mortgages or credit cards be helpful, and is the FTC considering setting up such sites?

Teaser sites are just one tool that the FTC uses to educate and inform consumers about marketplace issues and can be highly effective in particular instances. For example, we publicized our recent weight-loss teaser site, promoting "Fat Foe Eggplant Extract," through press releases, media outreach, speeches, articles, and partnerships. As a result, the site received over 200,000 hits and has been picked up by over 200 blogs, bulletin boards, and fitness sites.

Teaser sites can draw people to the information they need at the so-called "teachable moment" -- that is, when consumers are looking for it. When it comes to consumer education, one size does not fit all. Our consumer education program is built on the premise that people have varying amounts of interest, knowledge and time to spend on any particular subject -- and that people learn in different ways. That is why we present information in a variety of formats, from brochures and bookmarks to checklists and ecards, and from games and quizzes to videos and teaser sites. Each is effective for a subset of the population.

With respect to a potential teaser site for mortgages, our experience has shown that there are a number of different kinds of unfair or deceptive practices that take place in this industry. We are not sure that a teaser site, which covers one issue and sends one comprehensive message to consumers, would be the best consumer education tool. With respect to credit cards, many credit card solicitations are sent through the postal mail; thus, a teaser site might not be the best "teachable" moment.

Questions Submitted by Mr. Regula

Given that the FTC has relied on disclosure as the primary regulatory approach to protect consumers in the financial services industries, how can it be improved, or is the reliance on disclosure inherently a flawed approach?

Consumers need information about the costs and benefits of their mortgage options if they are to make well-informed decisions. Mortgage disclosures are intended to help provide consumers with this type of information. Based on the FTC's empirical research and law enforcement experience, we believe the mortgage disclosures that federal law requires can and should be improved.

In June 2007, the FTC staff released an empirical study assessing the effectiveness of mortgage disclosure documents that HUD requires under RESPA and the Federal Reserve Board requires under the Truth in Lending Act ("TILA"). The study found that these disclosures were not very effective in helping consumers understand the terms of mortgages and their implications. The study also demonstrated that consumers could benefit from changes in current disclosure requirements. The study showed that consumers likely would benefit from one clear disclosure document that alerts them to the major costs and features of a mortgage; will significantly reduce the cost of obtaining information about the true value of different mortgage options; is noticeable, easy to read, and easy to understand; summarizes key loan features upfront to facilitate informed comparison shopping; and makes clear what a consumer is getting into before signing on the dotted line.

Based on these results, the Commission believes that comprehensive mortgage disclosure reform supported by empirical testing is needed. The FTC has been pleased to work with the Federal Reserve Board and HUD in their efforts to improve mortgage disclosures, and looks forward to continuing such cooperative efforts in the future.

Improved mortgage disclosures, however, may not be sufficient to protect consumers from harm. Even if mortgage brokers, lenders, and others provide adequate disclosures, they may still engage in unfair or deceptive conduct in violation of Section 5 of the FTC Act or violate other laws the Commission enforces. Adequate mortgage disclosures therefore do not obviate the need for vigorous FTC law enforcement. Nor do they eliminate the need for Commission efforts to help consumers understand information about mortgages, including the information in federally-required mortgage disclosures. As explained in the February 28 testimony and above, the FTC has been active in mortgage-related law enforcement and consumer education.

Does the Truth in Lending Act need to be updated, or are better enforcement tools needed? Could you describe the agencies with jurisdiction in this area and how their mandate differs from the other? Are disclosure requirements significantly different for mortgage loans versus other forms of credit?

The Federal Reserve Board is responsible for promulgating rules under the Truth-in-Lending Act (TILA), which includes the Home Ownership and Equity Protection Act (HOEPA). The Federal Reserve Board, Office of the Comptroller of the Currency, Federal Deposit Insurance Corporation, Office of Thrift Supervision, National Credit Union Administration, Department of Transportation, Department of Agriculture, Farm Credit Administration, and Federal Trade Commission enforce TILA and its implementing regulations with regard to the entities over which each of them has jurisdiction. In particular, the FTC has enforcement authority with regard to all entities over which federal banking and other agencies lack jurisdiction. These entities are primarily nonbank financial companies, such as nonbank mortgage companies, mortgage brokers, and finance companies.

Using its authority under HOEPA, the Federal Reserve Board recently proposed rules to protect home mortgage borrowers from unfair or deceptive mortgage practices. Among other things, the Federal Reserve Board has proposed to prohibit lenders of subprime loans from engaging in a pattern or practice of making loans without regard to borrowers' ability to pay, and to require these lenders to verify the income and assets that they rely upon in making a loan. The Federal Reserve Board is accepting public comment on its proposed rules, and the Commission is in the process of reviewing the proposed rules to assess their potential impact on entities within the FTC's jurisdiction.

With respect to your question about the nature and extent of disclosure requirements, the requirements for mortgage loans generally are more extensive than for other forms of credit. TILA and RESPA mandate that lenders, brokers, and others must provide consumers with a substantial amount of information to try to assist them in making better informed financial decisions. Given that the purchase of a home is one of the most important and complex financial decisions that consumers make, it is not surprising that the law requires that more information be disclosed in this context than in some other credit contexts.

I am concerned by the common practice by the 3 large credit bureaus of selling individuals' personal financial information. It seems there is no personal control over what is very personal information. First, do you think that the easy sale of personal financial data from the credit bureaus has led to deceptive advertising? Second, do you think consumers should be able to have more control over their personal credit data and at a minimum have an "opt out" option with the credit bureaus?

I am not aware of any evidence that solicitations made as a result of the sale of personal financial data from the credit bureaus are more or less deceptive than other credit solicitations.

As you know, the FCRA generally restricts the purchase or sale of consumer report information except for certain permissible purposes. In general, marketing is not a permissible purpose. However, the FCRA allows, with certain restrictions, the provision

of consumer lists generated based on information in their credit reports for the purpose of making unsolicited mailings or telephone calls. To comply with the FCRA, recipients of these lists must make firm offers of credit (or insurance) to the consumers on the list. Under the FCRA, consumers have the option to opt out of having their information included on prescreened marketing lists. The Commission has issued a rule implementing this requirement and is the agency charged with enforcing this rule.

The Commission has actively sought to ensure that consumers are aware of their right to opt out of receiving such solicitations. The FTC has a brochure, "Prescreened Offers of Credit or Insurance," that provides consumers with information about their options and how to exercise them.[6] In addition, last year, the Commission issued a consumer alert specifically on mortgage trigger lists, which provides information to consumers on the process of how a consumer's mortgage application can trigger competing offers, how consumers can use these offers to their benefit, and how consumers can stop receiving these offers by opting out through a phone call (1-888-5-OPTOUT) or online (www.optoutprescreen.com).[7] It also advises consumers to put their phone number on the National Do Not Call Registry.

There have been reports in the press that one result of the subprime mortgage crisis has been a new reliance by some borrowers on "hard-money" mortgages made by private lenders. It seems that these private mortgage lenders have different lending standards than traditional mortgage brokers but also have higher fees. Could you discuss this phenomenon with us, and is it an area that the FTC oversees for predatory lending practices?

"Hard money"mortgages generally refers to high-rate, high-fee loans based almost entirely on the value of the home, rather than the borrower's ability to pay. The FTC does not have empirical evidence suggesting that consumers are relying more on hard-money mortgages, although it may be that some consumers are finding it more difficult to obtain other types of mortgages as lenders apply higher underwriting standards.

The FTC can take law enforcement action against lenders, including hard money lenders, within its jurisdiction who engage in unfair or deceptive acts and practices in violation of Section 5 of the FTC Act. In addition, HOEPA prohibits lenders of certain high-priced loans from engaging in a pattern or practice of lending without regard to ability to pay. The FTC, for example, has brought several cases alleging that lenders violated HOEPA through engaging in asset-based lending.[8] Depending on type of hard money loan and

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[6] *See* www.ftc.gov/bcp/conline/pubs/credit/prescreen.pdf.

[7] *See* http://www.ftc.gov/bcp/edu/pubs/consumer/alerts/alt171.pdf.

[8] *See, e.g., FTC v. Barry Cooper*, Civ. Act. No. 99-CV-7782 (C.D. Cal. 1999); *FTC v. CLS Financial Serv*, Civ Act. No. No. 99-CV-1215 (W. Wash. 1999); *FTC v.*

the acts and practices involved, the Commission therefore may be able to bring a law enforcement action against a hard money lender for violating Section 5 of the FTC Act or HOEPA.

Granite Mortgage, E.D. Ky. No. 99-CV-289 (E.D. Ky. 1999).

Questions for the Record for the Department of Treasury from Mr. Regula

The HOPE NOW Alliance has worked to provide counseling and assistance to many subprime borrowers. However, we need to improve education to consumers before they run into trouble. The fiscal year 2008 appropriation provided Treasury with $400,000 above the budget request to enhance your financial education activities to improve elementary education and educate adults on predatory lending practices.

- Can you describe how you provide children with financial education?

  The Department of Treasury actively works with financial education providers in a variety of ways to promote their efforts to teach financial education to children:

  Curriculum: *In February 2008, Treasury launched Money Math: Lessons for Life 2, a curriculum for middle school math classes that integrates personal finance concepts into math classes.*

  Training: *Treasury takes part in teacher training sessions.*

  Teaching: *Treasury teaches financial education lessons directly to children in classrooms across the United States. As part of its outreach to provide children with financial education, Treasury has visited 154 schools since 2004.*

  Brokers partnerships: *Within the public and private sectors Treasury brokers partnerships among those offering financial education resources and those needing them.*

  Mobilizing the private sector: *Treasury provides support for the newly formed President's Advisory Council on Financial Literacy, where prominent leading financial education individuals and organizations are undertaking initiatives to improve financial education targeted to youth.*

  Online resources: *The Financial Literacy and Education Commission's website, MyMoney.gov, features an educational area for children entitled MyMoney for Kids*

  Creates incentives: *To encourage more schools and teachers to integrate personal finance concepts in their classrooms, Treasury plans to launch a national recognition program for high school students in 2008. Treasury will use this new, voluntary program to recognize young people's understanding of basic personal finance. The program will also help create an incentive for teachers to incorporate more financial education into their classrooms.*

- Will providing financial education at a young age help children throughout their adult lives?

  Treasury is committed to providing financial education to children at all grade levels so they can one day make better choices as adults.

Experts are still researching the link between providing financial education at a young age and its positive effects later in life. It is important to note that there are few longitudinal studies tracking knowledge retention and behavior influence through adulthood. A frequently cited study is a 1997 report by Stanford University's Douglas Bernheim. Dr. Bernheim found that high school students exposed to formal instruction on household financial decision-making were more likely to save and accumulate wealth as adults. Other researchers have found that many program providers do not test their programs' efficacy. For example, a 2003 Community Reinvestment Report from the Federal Reserve Bank of Cleveland found that just under half (47%) of financial education providers conduct follow-up studies by surveying or meeting with program graduates after program completion.

The Financial Literacy and Education Commission recognized this lack of research data when it published its National Strategy for Financial Literacy in 2006. The National Strategy features "Calls to Action" on various topics. Call to Action 11.1 commits the Commission to hold an academic symposium to help identify the gaps in financial education research. Treasury plans to host this symposium in the fourth quarter of 2008.

- Do you coordinate with the Department of Education?

The Department of Treasury regularly coordinates with the Department of Education on financial education matters. The Department of Education is one of 20 federal agencies on the Financial Literacy and Education Commission, established by Title V of the Fair and Accurate Credit Transaction Act (FACT Act) of 2003. The Commission is led by the Department of the Treasury, and meets three times per year.

In 2006, the Commission published the National Strategy for Financial Literacy. The National Strategy included more than 20 "Calls to Action" on specific topics. Through Call to Action 10.1, the Department of Treasury and the Department of Education committed to co-host a summit focused on the integration of financial education into the core school curriculum. To fulfill this Call to Action, the Department of Treasury and the Department of Education co-hosted a two-day summit in February 2007. In conjunction with this joint event, the Department of Treasury also collected public comments on best practices in financial education through a Federal Register notice. A paper summarizing the findings from the summit and the public comments will be published by Treasury sometime in 2008.

- How do you provide adults with financial education including making people aware of predatory lenders and fraudulent financial schemes?

The MyMoney.gov web site currently provides a clearinghouse of information on several topics such as budgeting and taxes, home ownership, retirement planning, paying for education, and starting a small business. The content is able to be easily navigated and used by target audiences. The site also links to the FDIC's Money Smart program, which provides teaching curricula and other tools developed by the FDIC for partner organizations such as banks, schools, employers, and government agencies to help adults outside the financial mainstream enhance their money skills and create positive banking relationships.

In 2008, the Department of the Treasury will develop messages to educate adults on how to determine actual borrowing needs, how to consider total borrowing costs, and how to comparison shop for the best loan alternative. To create these messages, the Department of the Treasury will consult with other federal agencies, which may include the Federal Trade Commission, the federal banking agencies, the National Credit Union Administration, the Federal Deposit Insurance Corporation, and the Department of Housing and Urban Development. With this information, consumers will be better equipped to avail themselves of financial products offered by mainstream lenders and avoid fraudulent products, practices, and schemes. These messages will be delivered through a number of channels, which may include targeted radio announcements, printed materials, and Internet advertisements. Adults will be directed to educational materials available at MyMoney.gov. These materials will focus on how to avoid predatory loans and fraud, and how to obtain low-cost financial services.

There is a proposal in the Senate that would give bankruptcy judges the authority to alter the terms of mortgages for primary residences allowing a judge to reduce the amount a borrower owes as part of resolving their debt. How will this proposal impact the mortgage industry and the ability of consumers to have affordable access to credit?

Treasury is concerned that the proposed changes to the bankruptcy code could lessen the availability of affordable credit to the homeowner. It would also likely prolong the time it will take the market to recover from the current downturn. This proposal and other similar bankruptcy-related provisions would rewrite long-standing tenets of bankruptcy law in ways that would fundamentally alter the expectations of parties to hundreds of thousands of home purchases after the fact, causing lenders to be less willing to provide credit at low rates.

PUBLIC WITNESS TESTIMONY

STATEMENT

OF THE

COURT SERVICES AND OFFENDER SUPERVISION AGENCY FOR THE DISTRICT OF COLUMBIA

IN SUPPORT OF THE

FY 2009 BUDGET REQUEST

SUBMITTED TO THE

U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON APPROPRIATIONS SUBCOMMITTEE ON FINANCIAL SERVICES AND GENERAL GOVERNMENT

AND THE

U.S. SENATE COMMITTEE ON APPROPRIATIONS SUBCOMMITTEE ON FINANCIAL SERVICES AND GENERAL GOVERNMENT

APRIL 30, 2008

The Court Services and Offender Supervision Agency (CSOSA) supervises approximately 15,000 men and women offenders on probation, parole, or supervised release in the District of Columbia at any given time. CSOSA includes the D.C. Pretrial Services Agency, which supervises another 5,000 defendants at any given time to ensure that they comply with court-imposed release conditions and appear for scheduled court dates. These agencies make a vital contribution to public safety in Washington, D.C.

This statement is provided in support of CSOSA's FY 2009 budget request of $202,490,000 including 1,297 permanent positions and 1,293 FTE. Of this amount, $54,838,000 is requested for the Pretrial Services Agency (PSA) and $147,652,000 is requested for the Community Supervision Program (CSP). The FY 2009 request for CSOSA represents a $12,147,000, or 6 percent, increase over FY 2008 enacted levels.

Background

Since CSOSA was created under the National Capital Revitalization and Self-Government Improvement Act of 1997, we have implemented significant program enhancements, particularly in post-release supervision. Probation and parole caseloads have been lowered dramatically—in many cases by 50 percent—to meet or exceed the recommended national standard of 50 cases per Community Supervision Officer (CSO). Since FY 1999, monthly surveillance drug testing has increased 360 percent; last year, over 8,300 offenders were tested each month. CSOSA operates six field offices to locate CSOs in the neighborhoods were offenders live and work, and over 8,000 joint field visits by CSOs and the Metropolitan Police Department occurred in those neighborhoods last year. Since FY 2004, CSOSA has placed over 2,000 high-risk offenders on Global Positioning System (GPS) monitoring to reinforce compliance and track their location; MPD routinely uses GPS data in crime investigation.

CSOSA has also received resources for contract substance abuse treatment to supplement the District's public treatment system. Last year, we made over 2,400 offender and over 1,600 pretrial defendant placements in our continuum of services, which includes detox, residential, transitional housing, and outpatient services. We also continue to implement the Reentry and Sanctions Center, a residential program that provides intensive assessment and treatment readiness services for high-risk offenders and defendants. Since the facility's opening in 2006, we have placed 1,188 individuals in the program; 88 percent have completed it successfully.

CSOSA recognizes that successful supervision involves both managing risk through close supervision and addressing need through the provision of treatment and support services. We have implemented many enhancements to ensure effective risk management. We work closely with a variety of government, non-profit, and faith-based partners to increase offenders' access to existing services and build additional capacity in the core need areas of housing, education/training, and health care. Through the Criminal Justice Coordinating Council's Reentry Steering Committee, we provide leadership of efforts to address the needs of supervised offenders, particularly those returning to the District from incarceration.

One of our most significant accomplishments of the past year has been the implementation of a new performance management system (SMARTStat) that tracks a core set of supervision practices down to the individual case level. Through this system, we can determine the extent to which cases are being managed effectively. This information is available to supervisors and branch chiefs, who are encouraged to use it as part of their case audits and team meetings. The information forms the basis of regular reviews with the entire CSP executive staff, during which action items are assigned and outcomes regularly tracked so that problems can be solved quickly.

2009 Budget Initiatives

CSOSA's FY 2009 budget contains two initiatives, one for CSP, which provides information technology resources for post-release supervision, and one for PSA, which provides resources for supervision of DC Misdemeanor and Traffic Court (drunk driving) cases

CSP Information Technology Enhancement Initiative

CSP requests $2,583,000 and ten (10) positions to continue building its information technology infrastructure, including enhancements to the Supervision Management Automated Records Tracking (SMART) case management system.

Improving the quality, management, and utility of information has been a CSP priority since CSOSA's founding. CSP inherited outdated, cumbersome legacy systems from its predecessor agencies. In 1997, most probation and parole officers relied on paper case files and lacked access to personal computers. Developing an automated case management system and training staff to use it were essential to successful implementation of the agency's program strategy. CSP launched the initial version of SMART in 2002, following a remarkably efficient requirements gathering and application development process.

SMART is now in its third release. From its initial core supervision tracking functions, the system has expanded to encompass modules that capture treatment placement and expenditures, the development of Alleged Violation Reports, vocational and education assessment, and other critical program functions. We are also developing

an Enterprise Data Warehouse (EDW) as a repository for historical data that can be used for research and performance measurement. The EDW is the source of CSP's new performance management system (SMARTStat), which provides management and staff with complete visibility into offender supervision practices and effectiveness. CSP also developed and maintains the District's Sex Offender Registry (SOR).

CSP's Office of Information Technology (OIT) develops and maintains the CSP infrastructure, including acquisition, support, maintenance, and life-cycle replacement of architecture/design/systems enhancements, the EDW, IT Security services, Disaster Recovery, and operational services, such as customer support (Help Desk), network management, change and configuration management, e-mail and system administration services.

The requested resources will continue the significant progress made by CSP OIT to increase the timeliness and accuracy of data used by agency staff and our partners to make day-to-day law enforcement decisions affecting public safety in the District. These resources will be used to continue SMART and SOR enhancements, transition to a next-generation Service Oriented Architecture platform, continue building the EDW and performance management platform, and continue improving our capacity to integrate data with our partner agencies.

The resources will be allocated as follows:

Infrastructure Enhancements

- $300,000 in contract funding to support EDW software, development and maintenance;
- Five (5) New Positions:
  - Two Systems Engineers (GS-13)
  - One Infrastructure Architect/Project Manager (GS-14)
  - One Customer Support Specialist (GS-8)
  - One EDW Database Administrator (GS-13)

SMART Enhancements

- $1,000,000 in contract funding to support SMART, SOR and Data Sharing development and maintenance;
- Five (5) New Positions:

- One Systems Integration Architect (GS-14)
- One Systems Integration Analyst (GS-13)
- One Configuration Manager (GS-13)
- One Business Intelligence Analyst (GS-13)
- One Technical Writer (GS-13)

CSP OIT currently lacks sufficient staff to sustain operations and to plan and implement migration to an "agile" service-based infrastructure. Current CSP funding does not provide sufficient ongoing resources to maintain the current IT infrastructure and continue the SMART development process. To date, CSP has been able to support the significant SMART and IT infrastructure accomplishments through delayed operational costs at two new field units. One of those field units (Rhode Island Avenue) became operational in FY 2006, and the other is planned for implementation in FY 2009. Without the requested FY 2009 resources, planned SMART, partnership/data sharing and infrastructure improvements will be significantly reduced, affecting the effectiveness and efficiency of CSP and our law enforcement partners.

Lack of additional resources will effectively derail investments made in our information technology (IT) infrastructure over the past two years, most of which were implemented to comply with federal IT mandates for security, disaster recovery and performance management. It is vital that CSOSA have the IT capability to effectively perform its law enforcement and public safety functions for the nation's capital. Compared to its federal counterparts, CSOSA is still very new and very small. We are still in need of funding for critical IT infrastructure and developmental initiatives to implement the full scope of the local public safety functions that CSOSA was created to assume.

PSA Misdemeanor and Traffic Court Supervision Initiative

In our other new budget initiative, PSA requests $3,340,000 and 23 positions for defendant supervision, substance abuse and mental health assessments, and drug testing services for DC Misdemeanor and Traffic Court (drunk driving) cases.

In 2006, the Office of the Attorney General's (OAG) Criminal Section papered over 12,400 D.C. misdemeanor and traffic cases. Based on estimates from the OAG's Public Safety Division and the D.C. Superior Court, over 3,600 of these cases (29 percent) involved defendants in need of mental health and/or substance abuse treatment services. To better address the problems and community safety issues within this population, beginning in FY 2009, the D.C. Superior Court and OAG will lead a court-centered, problem-solving initiative geared to the unique problems and service requirements of mentally ill and substance abusing arrestees. This initiative will identify mental health and substance abuse issues in this population and link defendants to community-based services; ensure the least restrictive diversion and community supervision options needed to address public safety and treatment concerns; ensure comprehensive and individualized treatment and supervision placements; provide a comprehensive team-oriented approach to addressing health and social issues geared to a defendant's criminal behavior; and provide supervision of participants, including court notice for infractions of supervision conditions.

The initiative already has the support of many local criminal justice and community partners. Defendants will be referred to the District of Columbia's Addiction Prevention and Recovery Administration (APRA) and the Department of Mental Health (DMH) for needed treatment services. DMH also will establish a crisis care center within the D.C. Superior Court to temporarily assist defendants with severe mental health issues. The city's Department of Employment Services (DOES) will offer job referral and training geared to the special needs of this population.

The missing elements of the program design are strong defendant supervision and drug testing, as well as assessments for and linkages to needed treatment and social services in the community. Therefore, the D.C. Superior Court and the OAG have requested that PSA provide supervision, substance abuse and mental health assessments, linkage to treatment, and drug testing services. Supervision would include conditions such as weekly drug testing, in-person contact as needed with a case manager, and referrals to treatment and social service agencies. Besides helping the OAG, the Court, and other collaborative partners meet an important strategic goal, this assistance would help PSA meet its statutory obligation under D.C. Code §23-1303(h) to provide

supervision to all defendants released with conditions and to address within this population what potentially may be unacceptable safety risk to the Washington metropolitan community.

To ensure proper management of treatment and other conditions, as well as prompt administrative and judicial responses to infractions, PSA recommends a maximum case manager-to-defendant ratio of 1:75.

The proposed request would fund the following supervision, drug testing, and treatment assessment personnel costs:

- 12 Pretrial Service Officers
- 1 Supervisory Pretrial Service Officer
- 3 Community Treatment Specialists
- 2 Chemists
- 1 Laboratory Technician
- 3 Drug Testing Technicians
- 1 Program Assistant
- $120,000 for drug testing supplies (chemical reagents)

PSA data supports enhanced supervision for defendants charged with serious traffic offenses as well as misdemeanants with serious mental health and substance abuse needs. Drug-involved defendants are three times as likely to be rearrested and more than twice as likely to fail to appear as non-users. Introducing pretrial supervision to the high risk defendants in D.C. Misdemeanor and Traffic Court who have mental health and substance abuse challenges will assist the Court in enhancing public safety and assuring that these defendants keep their court dates.

This initiative will also enhance PSA's collaborations with the D.C. Superior Court, OAG, and other criminal justice and community partners. The proposed initiative is a combined effort to screen, assess, and supervise potentially high-risk defendants who now receive little or no supervision and support. No other partner in this initiative can provide the assessment, supervision, and drug testing of this population; these services are needed to ensure court appearance and protect the public.

Adjustments to Base

CSOSA also requests $6,224,000 in adjustments to base to fund employee cost of living pay raises and general price increases. Of this amount, $4,620,000 is for CSP, and $1,604,000 is for PSA.

Conclusion

CSOSA's budget initiatives reflect the developmental challenges the agency continues to face. While CSP has implemented a wide range of program enhancements, such progress necessitates ongoing maintenance and expansion of IT infrastructure to ensure that our ability to manage cases efficiently, analyze data, and measure performance keeps pace with our operations. PSA continues to face the need to collaborate with and support its partners—most particularly, Superior Court—by participating in initiatives that will enhance defendant compliance and protect the public.

Unless CSOSA responds to these challenges, we are at risk of losing the ground we have gained. These initiatives will enable us to continue building and supporting a model supervision system that achieves the benefits CSOSA was established to bring to the District of Columbia: increased public safety, reduced recidivism, and enhanced systemwide collaboration.

We appreciate the support we have received to date, and we look forward to working with the Committee on this request.

STATEMENT OF JON T. RYMER, INSPECTOR GENERAL
Federal Deposit Insurance Corporation
Fiscal Year 2009 Budget Request

Subcommittee on Financial Services and General Government
Committee on Appropriations
United States House of Representatives

April 30, 2008

Mr. Chairman and Members of the Subcommittee:

Thank you for providing me the opportunity to submit this written statement for the record on behalf of the Office of Inspector General (OIG) at the Federal Deposit Insurance Corporation (FDIC or the Corporation). I am proposing a budget of $27,495,000 to fund FDIC OIG operations for fiscal year (FY) 2009. This budget will support a full-time equivalent (FTE) level of 122, down 5 from FY 2008. Even with the reduction in staffing, the OIG's proposed budget for FY 2009 reflects a 2-percent increase over our budget for FY 2008. The increase in budget funds is required to help absorb inflationary increases in employee salaries and benefits costs and other expenses, as well as projected increases in the following areas:

- Contract funding for information systems audit services; periodic follow-up audits of the FDIC's investment policies for the Deposit Insurance Fund, as agreed upon with the Audit Committee; and technical expertise and assistance in a variety of areas to support OIG audits, evaluations, and attestation engagements on an "as needed" basis;
- Relocations for an expanded Office of Investigations (OI) presence in the FDIC's regional offices;
- Professional development, particularly in the areas of banking and information technology; and
- Travel expenses related to a projected increase in our investigative workload.

Fiscal Year 2009 Summary of Requested Changes (Dollars in thousands)			
Budget category	FTEs	Amount	Percent change
FY 2008 Base	127	$26,848	
Net Effect of Requested Changes	- 5	$627	2.2%
FY 2009 Budget Authority	122	$27,495	

The FDIC's Mission and Current Environment

The FDIC was created by the Congress in 1933 as an independent executive agency to maintain stability and public confidence in the nation's banking system. The federal deposit insurance offered by the FDIC is designed to protect depositors from losses due to failures of insured commercial banks and thrifts. Deposit insurance reform legislation, enacted in February 2006, maintains insurance coverage for individual accounts at $100,000, but provides for inflation indexing every 5 years beginning in 2011.

Also, as of April 1, 2006, coverage for certain retirement accounts increased to $250,000 from $100,000, with similar inflation indexing. Currently, the FDIC insures $4.2 trillion in deposits at the nation's 8,571 banks and savings associations, and it promotes the safety and soundness of these institutions by identifying, monitoring, and addressing risks to which they are exposed.

The end of the historic boom in U.S. housing prices has contributed to credit market disruptions that continue to impact the financial system. Much of the disruption relates to uncertainty about the extent of the credit losses that will result from problem mortgage loans. FDIC management reports that FDIC-insured institutions experienced significant declines in earnings and credit quality during the latter half of 2007. Much of the decline in industry earnings was concentrated among larger institutions, while the vast majority of FDIC-insured institutions were well-capitalized at year-end 2007. As of December 31, 2007, the FDIC had 76 insured institutions with approximately $22 billion in assets on its problem bank list. FDIC defines "problem" institutions as those institutions with financial, operational, or managerial weaknesses that threaten their continued financial viability.

The FDIC OIG Mission and Planning Approach

The FDIC OIG is an independent and objective unit established under the Inspector General Act of 1978, as amended. The OIG's mission is to promote the economy, efficiency, and effectiveness of FDIC programs and operations, and protect against fraud, waste, and abuse to assist and augment the FDIC's contribution to stability and public confidence in the nation's financial system.

The OIG has established a comprehensive and integrated approach to planning audits, evaluations, investigations, and internal activities, resulting in a *Business Plan* that captures the OIG's strategic goals, performance goals, and key efforts. Each year, the OIG reexamines its mission and vision, validates the strategic goals, and develops performance goals—both qualitative and quantitative—and identifies key efforts to support those agreed-upon strategic goals. The OIG then plans, conducts work, and reports results in the context of these strategic goals. The OIG's work is centered on five strategic goals that link directly to the FDIC's mission, principal business lines, and significant challenges: Safety and Soundness, Insurance, Consumer Protection, Receivership Management, and FDIC Resources Management. In addition to these, a sixth strategic goal relates to the OIG's internal resources management in the interest of continuing to build and sustain a high-quality staff, effective operations, OIG independence, and mutually beneficial working relationships. The OIG's *Business Plan Framework,* depicted on page 5, shows how the work of the OIG relates to the broader FDIC mission.

The FDIC OIG's Achievements and Contributions

As in past years, during FY 2007, OIG audits, evaluations, and investigations resulted in a number of major achievements, as follows:

- $116.4 million in actual and potential monetary benefits
- 42 non-monetary recommendations to FDIC management
- 60 referrals to the Department of Justice
- 58 indictments/informations
- 23 audit and evaluation reports issued
- 52 convictions

Within the framework of the five FDIC mission-related goals, the OIG has contributed substantially to improvements in the following areas through audits, evaluations, and investigations:

- Detection and prevention of money laundering, terrorist financing, fraud, and other financial crimes in open and closed financial institutions
- The FDIC's supervision program and corporate programs that identify and manage risks to the deposit insurance funds, including granting insurance to and monitoring industrial loan companies
- Management of the Deposit Insurance Fund
- FDIC programs for protecting consumers, such as those designed to prevent identity theft and predatory lending practices
- FDIC resolution and receivership activities and information systems
- Crimes affecting the FDIC's efforts to recover financial losses
- Information technology, personnel, and physical security
- Business continuity planning and emergency response plans
- Human capital strategic initiatives
- Contracting activities
- Corporate governance

Additional information on our performance results can be found at www.fdicig.gov.

The FDIC OIG's Workload

In line with the strategic goals in the *Business Plan*, the OIG will continue to focus its work now and into FY 2009 on the management and performance challenges facing the FDIC. The OIG has recently identified the challenges shown below.

2008 Management and Performance Challenges	
Identifying and Mitigating Risks to the Deposit Insurance Fund	▪ Addressing risks in large banks ▪ Maintaining strong regulatory capital standards ▪ Implementing new deposit insurance regulations ▪ Serving as a model for deposit insurers and bank supervisors around the world ▪ Granting insurance to and supervising industrial loan companies
Ensuring Institution Safety and Soundness Through Effective Examinations, Enforcement, and Follow-up	▪ Maintaining an effective examination and supervision program ▪ Identifying and addressing risks related to consumer debt
Contributing to Public Confidence in Insured Depository Institutions	▪ Guarding against financial crimes in insured institutions
Protecting and Educating Consumers and Ensuring Compliance Through Effective Examinations, Enforcement, and Follow-up	▪ Safeguarding the privacy of consumer information ▪ Promoting fairness and inclusion in the delivery of information, products, and services to consumers and communities ▪ Ensuring compliance with consumer protection laws and regulations and follow-up on violations

Being Ready for Potential Insured Institution Failures	▪ Resolving failed banks and effectively managing receiverships
Promoting Sound Governance and Managing and Protecting Human, Financial, Information Technology, Physical, and Procurement Resources	▪ Corporate governance and enterprise risk management ▪ Human capital management; financial management; information technology management; IT and physical security; and procurement management

The OIG anticipates handling an investigative workload in 2009 exceeding that of 2008. For example, the OIG's OI has undertaken a growing number of mortgage fraud cases, and that trend will likely continue. Additionally, with OI's expanded presence in the FDIC's regions, there will likely be an upward trend in investigative referrals emanating from the Corporation and other law enforcement officials in those areas. If there are upswings in FDIC-insured financial institution failures due to fraud, more of the OIG's investigators will be involved in closings, and the workload for OI's computer forensic agents will also increase.

With respect to audit workload, any increase in the number of bank failures of FDIC-supervised institutions could require that the OIG conduct material loss reviews, depending on the magnitude of the loss to the Deposit Insurance Fund. Such reviews could require a substantial investment of the OIG's audit resources. As for evaluation work going forward, the OIG anticipates a growing number of management-requested assignments, based on recent experience and the benefits that have been derived from such work. The OIG will also continue to be actively involved in the activities of the Inspector General community through participation in the President's Council on Integrity and Efficiency and will also sustain solid working partnerships with the U.S. Government Accountability Office; the Department of Justice, including the FBI and U.S. Attorneys' Offices; and other federal, state, and local law enforcement officials throughout the country.

To remain responsive, the OIG will keep close track of its planned work and make adjustments, as needed, to maximize value added. Further, the OIG will vigilantly monitor the banking environment and the FDIC's workload. In that regard, the OIG is maintaining an on-board staffing level slightly below its authorized FTEs to ensure the office has the capability to promptly hire sufficient and appropriate staff that can address any increased resolution activity or other emerging risks to the Corporation.

Concluding Remarks

I appreciate the support and resources the OIG has received from this Subcommittee, the Congress, and the FDIC. As a result, the OIG has continued to pursue successful investigations and to make a difference in FDIC operations in terms of financial benefits and improvements and strengthened internal operations and efficiency. I believe our FY 2009 budget strikes an appropriate balance between the mandate of the Inspector General Act, other legislative requirements, judgments of OIG workload needs, and the challenges and changing conditions in the banking industry. The OIG continues to seek your support to be able to effectively and efficiently conduct work on behalf of the Congress, the FDIC, and the American public.

FDIC Office of Inspector General
Business Plan Framework
(2008 – 2013)

Vision

The Office of Inspector General is a quality-focused FDIC team that promotes excellence and trust in service to the Corporation and the public interest.

Mission

The Office of Inspector General promotes the economy, efficiency, and effectiveness of FDIC programs and operations, and protects against fraud, waste, and abuse, to assist and augment the FDIC's contribution to stability and public confidence in the nation's financial system.

Strategic Goals

Safety & Soundness	Insurance	Consumer Protection	Receivership Management	FDIC Resources Management	OIG Resources Management
Assist the FDIC to ensure the nation's banks operate safely and soundly	Help the FDIC maintain the viability of the insurance fund	Assist the FDIC to protect consumer rights and ensure customer data security and privacy	Help ensure that the FDIC is ready to resolve failed banks and effectively manages receiverships	Promote sound governance and effective stewardship and security of human, financial, IT, and physical resources	Build and sustain a high-quality staff, effective operations, OIG independence, and mutually beneficial working relationships

FY 2008 Performance Goals

Safety & Soundness	Insurance	Consumer Protection	Receivership Management	FDIC Resources Management	OIG Resources Management
▪ Help ensure the effectiveness and efficiency of the FDIC's supervision program ▪ Investigate and assist in prosecuting bank secrecy act violations, money laundering, terrorist financing, fraud, and other financial crimes in FDIC-insured institutions	▪ Evaluate corporate programs to identify and manage risks that can cause losses to the fund ▪ Evaluate selected aspects of implementation of deposit insurance reform	▪ Contribute to the effectiveness of the Corporation's efforts to ensure compliance with consumer protections at FDIC-supervised institutions ▪ Conduct investigations of fraudulent representations of FDIC affiliation or insurance that negatively impact public confidence in the banking system	▪ Evaluate the FDIC's plans and systems for managing bank resolutions ▪ Investigate crimes involved in or contributing to the failure of financial institutions or that lessen or otherwise affect recoveries by the Deposit Insurance Fund involving restitution or otherwise	▪ Evaluate corporate efforts to manage human resources and operations efficiently, effectively, and economically ▪ Promote integrity in FDIC internal operations ▪ Promote alignment of IT with the FDIC's business goals and objectives ▪ Promote IT security measures that ensure the confidentiality, integrity, and availability of corporate information ▪ Promote personnel and physical security ▪ Promote sound corporate governance and effective risk management and internal control efforts	▪ Effectively and efficiently manage OIG human, financial, IT, and physical resources ▪ Ensure quality and efficiency of OIG audits, evaluations, investigations and other projects and operations ▪ Encourage individual growth and strengthen human capital management and leadership through professional development and training ▪ Foster good client, stakeholder, & staff relationships ▪ Enhance OIG risk management activities

IRS Oversight Board

STATEMENT OF
IRS OVERSIGHT BOARD
CHAIRMAN PAUL CHERECWICH, JR.
BEFORE THE
HOUSE COMMITTEE ON APPROPRIATIONS
SUBCOMMITTEE ON FINANCIAL SERVICES AND GENERAL GOVERNMENT
APRIL 15, 2008

The IRS Oversight Board thanks Chairman Serrano and Ranking Member Regula for the opportunity to present the Oversight Board's views on the Administration's FY2009 IRS budget request. Created as part of the IRS Restructuring and Reform Act of 1998 (RRA 98), the Oversight Board's responsibilities include overseeing the IRS in its administration, management, conduct, direction and supervision of the execution and application of the internal revenue laws. The Board is also responsible for ensuring that the IRS' organization and operations allow the agency to carry out its mission. To this end, the Board was given specific responsibilities for reviewing and approving annual budgets and strategic plans.

In fulfilling its responsibilities, the Board must ensure that the IRS' budget and the related performance expectations contained in the performance budget support the annual and long range plans of the IRS, support the IRS mission, are consistent with the IRS goals, objectives and strategies and ensure the proper alignment of IRS strategies and plans. In addition to my statement today, the Board developed a formal report in which it explains why it has recommended this budget for the IRS. I request that my statement and the report be entered into the committee record.

FY2009 IRS Budget Recommendations

One of the IRS Oversight Board's most important statutory responsibilities is to ensure that the IRS' budget request supports the agency's annual and long-term strategic plans. A budget request is more than a mechanism for appropriating funding; it's also a plan and a commitment. Not only does a proposed budget request funding, it also describes the activities the IRS will perform, how those activities align with the long-range strategic plan, and identifies measures to evaluate the expected results. A performance budget, properly used, enhances the ability of the IRS to meet its short-term performance targets and three strategic plan goals: (1) improve customer service; (2) enhance enforcement of the tax law; and (3) modernize the IRS through its people, processes and technology.

Achieving these three strategic goals will enable the IRS to address the most serious problem facing tax administration today—reducing the tax gap, the difference between what taxpayers should be paying and what they actually pay in a timely manner. The size of the tax gap is significant, with the IRS' most recent estimates placing it at approximately $290 billion (net) annually, based on 2001 tax returns. The imperative for closing the tax gap has never been greater. An annual net tax gap of $290 billion averages to about $2,200 per individual tax return, an enormous burden for the average taxpayer, and one that should not be tolerated by honest taxpayers. It is far too large to be dismissed lightly—it imposes a large burden on all taxpayers and undermines respect for tax administration.

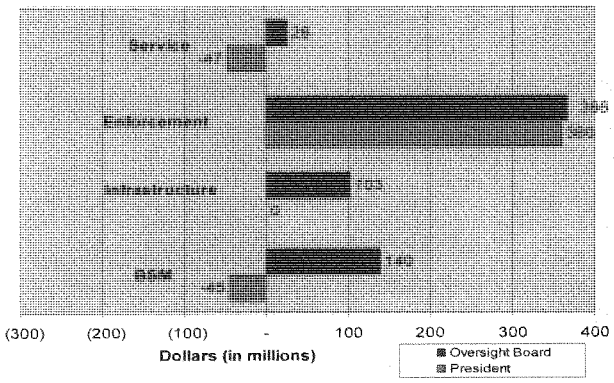
The IRS Oversight Board recommends an IRS FY2009 budget of $11.737 billion, an increase of $845 million over the enacted FY2008 amount of $10.892 billion, as summarized in Tables A-1 and A-2 in Appendix A.

The recommended budget takes a long-term view of IRS needs. Despite the severity of the tax gap, the Board believes such a view is both warranted and needed. In submitting its FY2009 budget recommendations to the Treasury Department in June 2007, the Board identified increased funding for Business Systems Modernization (BSM), security, infrastructure, and research as high priorities. These initiatives offer the best opportunity to reduce the tax gap in the long term.

By following this approach, the Board's recommended budget maintains balance at its core: enforcement, taxpayer service, business systems modernization, and employee development must be adequately funded for the IRS to succeed in all parts of its mission and to ensure the long- term health of our tax administration system.

The Board's recommended IRS budget compares to the President's request of $11.361 billion, an increase of $469 million over the FY2008 enacted appropriation. Although the two budgets are within 3.3 percent, they take different approaches to funding priority program initiatives at the margin. The Board recommends a total of $644 million in program initiatives, spread among four areas: enforcement, taxpayer service, infrastructure and IT, and BSM. The President's budget requests a nearly identical amount of funding for enforcement initiatives as the Board, but cuts taxpayer service and BSM funds, and includes no program initiatives for infrastructure and IT. Figure 1 shows the differences in graphic form.

Figure 1. Program Initiative Funding



Although both budgets have as a core objective the reduction of the tax gap, the Board recommends funding initiatives across the full range of IRS functions and taxpayer segments. In contrast, the President's budget has as its central focus a short-term effort to build up IRS revenue-producing enforcement staffing at a time when the IRS is hard-pressed to replace the high number of experienced employees who are retiring. Increased staffing is important, but the Oversight Board believes the IRS cannot "audit its way out of the tax gap," and should avoid the temptation to close the tax gap with large staffing increases in revenue-producing functions that cannot be absorbed effectively. The Board believes its recommended budget avoids this problem by focusing on ways to make the IRS more efficient in the long term, and putting more resources into technology, infrastructure, and service as well as enforcement.

Because reducing the tax gap is of critical importance, the Board has identified a subset of its recommended initiatives as having the highest priority. These initiatives are generally infrastructure and research intensive and will have the greatest effect on reducing the tax gap in the long term, and are identified in Table 1.

Table 1. IRS Oversight Board Highest Priority Initiatives

IRS Oversight Board Budget Highest Priority Initiatives	Dollars (in millions)
Technology/Infrastructure	
Fund Business Systems Modernization in Line with Current Strategy	$141.0
Enhance IT Security	$16.7
Enhance Contingency Planning and Disaster Recovery	$8.7
Implement Security Auditing	$6.8
Preserve quality IT workforce in applications development	$36.8
Build alternate power supply for computing center	$11.0
Technology/Infrastructure Subtotal	$221.2
Enforcement	
Improve tax gap estimates, measurement, and detection of non-compliance	$11.1
Taxpayer Service	
Research Taxpayer Burden, Complexity, and Compliance	$10.0
Total Highest Priority Initiatives	$242.3

None of these initiatives, except the enforcement initiative for improving tax gap estimates, are funded in the President's budget. Moreover, as shown in Figure 1, the BSM program and taxpayer service programs undergo reductions of $45 million and $47 million, respectively. The Board recommends that the appropriated IRS FY2009 budget closely follow the priorities and balance reflected in this statement.

The following sections discuss the Board's budget recommendations in the context of each of the IRS' strategic goals.

Strategic Goal 1 – Improve Taxpayer Service

IRS customer service has made consistent gains since FY2002. For example, Toll-Free Tax Law Accuracy and Accounts Accuracy are at 91 percent and 93 percent respectively in FY2007, as compared to 84.4 percent and 90 percent five years ago. Of particular note, overall customer satisfaction with IRS Toll-Free Service has held steady at 94 percent for four consecutive years. Such stability is most welcome and a good indicator that best practices have taken root.

As a result, a more pressing challenge is to deliver more extensive electronic self-assistance tools and to perform research that identifies innovative ways to expand taxpayer education and outreach to all taxpayer segments, especially those who are now under served.

To a large degree, many of the IRS' customer service activities are designed to respond to taxpayer inquiries. Examples include toll-free telephone service and Taxpayer Assistance Centers. Overall, the IRS has done a good job fielding and answering questions, whether via toll-free telephone, the Internet, or in person at Taxpayer Assistance Centers.

The IRS expends considerably fewer resources on education and outreach services. A broader approach to customer service would entail giving taxpayers access to self-service applications so they could "pull" specific information on accounts or tax law, and "pushing" answers, information and updates to taxpayers, practitioners and other affected parties as the need for such information became apparent. Lastly, the IRS must seize opportunities to provide innovative outreach, education and community partnerships. For example, given limited resources and elimination of programs such as TeleFile, the IRS must also work to broaden and strengthen partnerships, such as Volunteers in Tax Assistance (VITA).

To take service to the next level, the IRS must better understand the taxpayers they serve. The IRS must conduct more insightful research, and develop services better tailored to the specific needs of particular taxpayer segments. By better understanding taxpayers, the IRS can focus both its service and enforcement efforts to increase compliance through targeted pre-filing, filing, and post-filing efforts. The IRS must find out what kind of information and assistance taxpayers need and the most effective ways of delivering that information to them.

In the last two years, the IRS has put considerable effort into developing the Taxpayer Assistance Blueprint (TAB), which establishes a five-year plan for delivering service to taxpayers. This vision entails a much broader use of electronic interactions between taxpayers, practitioners and the IRS, such as

account management and the ability to resolve taxpayer issues securely over the Internet. The TAB describes an IRS that is an "interactive and fully integrated, online tax administration Agency" with the capability "for any exchange or transaction that occurs face-to-face, over the phone, or in writing to be completed electronically." These types of services are much along the lines of what customers of large financial institutions already experience today but are still for the most part unavailable to taxpayers.

The Oversight Board disagrees with the President's program reductions for taxpayer service and recommends that the following three initiatives be funded for a total of $26.3 million:

- Maintain Processing of Critical Pension Plan Returns ($6.3 million)
- Research Taxpayer Burden, Complexity, and Compliance ($10 million)
- Expand Volunteer Income Tax Assistance and Low Income Tax Clinics ($10 million)

The first initiative supports customer service by providing funds to maintain processing of essential pension plan return information while transitioning to a new mandated electronic filing system "EFAST2" in 2010. It also enables processing of residual returns that are IRS-only forms and not part of the mandated EFAST2 system (Form 5500EZ and Schedule SSA filings).

The second initiative provides funding to enhance understanding of the interaction between taxpayer burden, tax law complexity, and taxpayer compliance. This research will help improve understanding of these inter-relationships, in keeping with strategies put forth in the Taxpayer Assistance Blueprint (TAB) and the Department of the Treasury report, *A Comprehensive Strategy for Reducing the Tax Gap.*

The third initiative provides funding to improve service to two taxpayer segments with special needs: the growing number of elderly and the ethnically diverse. These taxpayer segments face unique challenges in meeting their tax obligations because of limited access to or inability to use all of the channels offered for service delivery. Additional resources will enhance the IRS's volunteer return preparation and other services provided by the Volunteer Income Tax Assistance (VITA) and the Low Income Tax Clinic programs with emphasis on both targeted taxpayer segments. Such services help created a more fair and just tax system.

Strategic Goal 2 – Enhance Enforcement of the Tax Law

Increases in IRS enforcement activity intended to produce gains in direct revenue collection must be balanced with a broad view of the tax gap. The Board recognizes that increased enforcement activity over the past five years has produced noticeable results—enforcement revenue has increased from $34.1 billion in FY2002 to $59.2 billion in FY2007, a gain of nearly 74 percent. The IRS estimates that it can produce more than a four-to-one return on every dollar invested in additional enforcement resources, a fact that the Board believes warrants the appropriation of additional enforcement funding.

However, while the Board applauds the increases in enforcement activity and revenue, it also recognizes that the IRS cannot "audit its way out" of the tax gap. There is wide belief, as evidenced by the Board's recommendations for reducing the tax gap and the Treasury Department's tax gap strategy, *A Comprehensive Strategy for Reducing the Tax Gap*, that an integrated set of comprehensive actions is needed. Even a large infusion of resources for more enforcement personnel—something highly unlikely—would not eliminate the tax gap. There are many reasons for taxpayer non-compliance. Only a balanced program that promotes voluntary compliance across a broad continuum of taxpayers, from education and service for those who want to comply, to enforcement and even criminal prosecutions for those who refuse to comply, can be effective.

Table 2 compares the Board's and President's enforcement initiatives. Although very close in dollars, the President's initiatives place more emphasis on enforcement resources that can be shown to produce revenue in the short term. The Board takes a broader view of enforcement, and recommends program increases in such areas as expanded collection of proper taxes from recipients of federal payments, investigation of tax-related criminal activity, Bank Secrecy Act compliance, tax exempt organization examination, more published guidance for Tax Exempt taxpayers, additional litigation staff, and tax preparer monitoring.

Additional enforcement resources produce a positive return on investment and result in short-term benefits, so the benefits of increased enforcement are apparent. However, increases in enforcement resources must also be balanced with more systemic long-range actions that improve voluntary compliance, and priorities must be considered as budget resources are limited. The Oversight Board

considers technology modernization and research a higher priority than additional enforcement resources, in recognition of the long-term impact that technology modernization and research have on the IRS' ability to work more efficiently to reduce the tax gap and to be better able to focus both its service and enforcement resources optimally.

Table 2. Comparison of Enforcement Initiatives for Board's and President's Budgets

Oversight Board's Budget Enforcement Initiatives	Dollars (M)	President's Budget Enforcement Initiatives	Dollars (M)
Reduce the Tax Gap for Small Business/Self-Employed	$120.7	Reduce the Tax Gap for Small Business/Self-Employed	$168.50
Increase Reporting Compliance of Domestic Taxpayers with Offshore Activity	$16.4	Improve Reporting Compliance of US Taxpayers with Offshore Activity	$13.70
Reduce the Tax Gap for Large Businesses	$52.0	Reduce the Tax Gap for Large Business	$69.49
Expand Federal Payment Levy Program	$17.3		
Reduce Tax Fraud	$72.2		
Enhance Financial Investigations of Narcotics Trafficking Organizations	$24.0		
Enhance BSA Compliance Program	$3.4		
Address Complexity through Up-Front Guidance, Education, and Correction	$8.9		
Expand Examination of Tax Exempt Organizations	$28.6		
Increase Tax Court Litigation	$5.8		
Implement New Procedural Tax Court Requirements	$3.4		
Improve Tax Gap Estimates, Measurement, and Detection of Non-Compliance	$11.1	Improve Tax Gap Estimates, Measurement, and Detection of Non-Compliance	$51.06
Increase Monitoring of Preparers	$2.5		
		Expand Document Matching	$35.06
		Implement Legislative Proposals to Improve Compliance	$23.05
Total Enforcement	$366.3		$360.85

Another factor that must be considered is the degree to which additional staffing can be absorbed into various IRS organizational units. Figure 2 depicts the distribution of new hires in major IRS organizations under the President's and Board's budgets. The Board believes its budget strikes a more balanced posture across all IRS organizational units and expands enforcement resources for a range of activities that are important elements of IRS enforcement, although they do not generate revenue directly, such as examination of tax exempt organization reporting, regulation of pension plans, and criminal investigation of tax fraud and abusive tax shelters. These activities are all part of a balanced, enforcement program that has as a goal the promotion of voluntary compliance among all taxpayer segments.

To better understand the impact of both budgets on the Small Business/Self-Employed (SB/SE) and Large and Mid-Sized Business (LMSB) organizations, the Board examined hiring requirements during FY2009 for both divisions. Table 3 shows the number of Mission Critical Occupation (MCO) employees projected to be on-rolls as of September 30, 2008, as well as the hiring requirements contained in both budgets. The Board has used a rule of thumb that 15 percent new hires is a reasonable limit on the amount of new employees that can be effectively accommodated into an organization in a year. It had concerns with the hiring implications of its own budget on SB/SE, but thought this risk could be mitigated. The President's budget would increase the percentage of new hires in SB/SE to over 23 percent of its employees in FY2009, and over 16 percent for LMSB.

Figure 2. New Hires by Organization; Board's vs. President's Budget

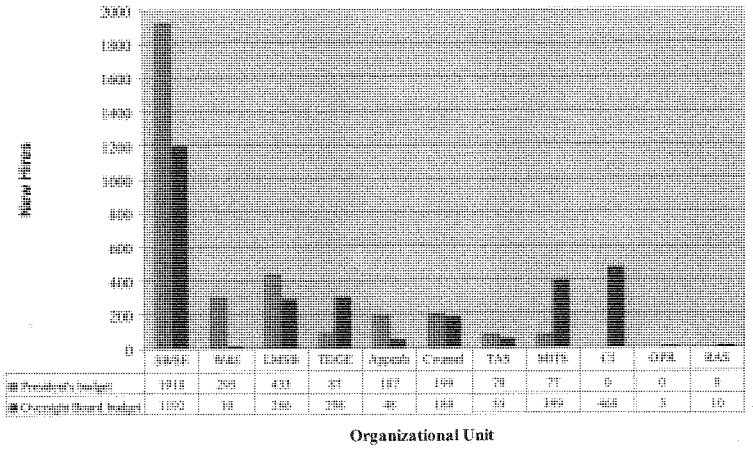


Table 3. SB/SE and LMSB Hiring Requirements in the Board's and President's FY2009 Budgets

Operating Unit Mission Critical Occupations	Projected on rolls as of 9/30/2008	Projected Attrition Hires in FY2009	Projected New Hires in FY2009 to Meet Budget Request	Total Attrition Hires and New Hires	Percent of Hires to total MCO population
Oversight Board Budget					
SB/SE	19,394	2,612	1,177	3,789	19.5%
LMSB	5,126	403	273	676	13.2%
President's Budget					
SB/SE	19,394	2,612	1,918	4530	23.4%
LMSB	5,126	403	433	836	16.3%

As in FY2006 through FY2008, the Administration proposes to include its requested enforcement increases as a Budget Enforcement Act program integrity cap adjustment. The Oversight Board's recommended enforcement initiatives would also qualify for such treatment, should Congress decide to make such an adjustment.

Strategic Goal 3 – Modernize the IRS Through its People, Processes and Technology

The most effective strategy for reducing the tax gap in the long term is to provide the IRS with modern technology that enables it to operate at a high performance level. The Board has no doubts that a high performing organization with high service, quality, and satisfaction levels also minimizes taxpayer burden. Under such conditions, service and enforcement activities are prompt, efficient, and correct.

The Board has identified program initiatives for IT and infrastructure activities that are funded under the BSM and Operations Support accounts. These initiatives will further modernize the IRS core IT systems used for tax administration, upgrade its infrastructure, and improve its security posture.

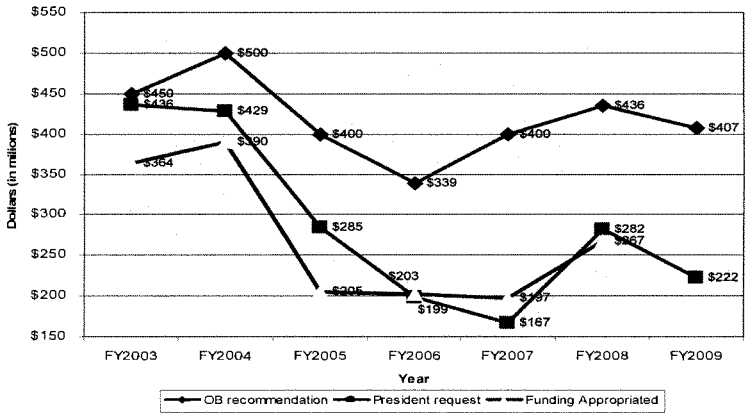
Business Systems Modernization Program Initiative

Tax administration is a knowledge-intensive activity and the IRS depends heavily on information technology (IT) to leverage the knowledge and perform its mission. The IRS has made slow but steady progress in replacing its antiquated IT systems. The most noticeable improvements to taxpayers have been increased use of electronic products and services to interact with the IRS. However, the IRS' performance is still hampered by archaic IT systems used for central record-keeping that update taxpayer account information on a weekly instead of a daily basis.

The Board has long advocated that the BSM program be funded at a higher level so progress could be made more quickly. Admittedly the program experienced a series of cost and schedule overruns during its first several years, and the result has been to slow down the funding stream to levels that dictate only modest progress can be made in modernizing the core IRS master files and account management systems. Because of its long-term effect on reducing the tax gap, the Board considers increasing BSM funding so that the pace of IT modernization can be increased as having the highest priority.

Figure 3 compares the BSM budget recommended by the Oversight Board, the amount requested by the President, and the BSM funding appropriated by Congress for fiscal years 2003 to 2008. BSM funding needs to be restored to the levels realized in FY2003 and FY2004 to make progress faster.

Figure 3. BSM Funding FY2003 to FY2008



Note: FY2008 and FY2009 amounts contain $45.2 and $56.9 million of labor costs not contained in prior years.

Table 4 shows the Board's and President's budgets for the BSM program in FY2009. Had the Board's funding recommendations been followed, the IRS would be closer to the day when it could update its central records on a daily basis.

Table 4. Application of FY2009 BSM Funding to Projects in the IRS Oversight Board's and President's Budgets

	Dollars (M)				
		Oversight Board		President	
Project Activities	FY2008	FY2009	Increase over FY2008	FY2009	Increase over FY2008
Customer Account Data Engine	$58.5	$80.0	$21.5	$58.8	$0.3
Accounts Management Services	$29.0	$47.4	$18.4	$26.2	($2.8)

Modernized e-File	$55.8	$36.1	($19.7)	$25.0	($30.8)
Common Services Project	$0.0	$16.0	$16.0	$0.0	$0.0
Integrated Financial System	$0.0	$73.0	$73.0	$0.0	$0.0
Core Infrastructure; Architecture Integration & Management; and Management Reserve	$78.6	$98.1	$19.5	$69.3	($9.3)
Subtotal Capital Investments	$221.8	$350.6	$128.8	$179.3	($42.6)
BSM Labor	$45.2	$56.7	$11.5	$43.4	($1.8)
BSM Program Total	$267.1	407.3	$140.2	$222.7	($44.4)

Note: BSM program excludes $1.2 M of corporate costs in Operations Support.

The Board believes that when implemented, modernized IT systems will literally save taxpayers billions of dollars in burden reduction and make the IRS much more efficient. For example, replacement of the Individual Master File by the Customer Account Data Engine (CADE) will allow the IRS to update the tax accounts for individuals on a daily basis, instead of its current weekly update process. The Oversight Board expects that a rapid refund from the IRS of three to five days will reduce the number of Refund Anticipation Loans (RALs). The National Consumer Law Center and Consumer Federation of American estimate that approximately 12 million American taxpayers spent an unnecessary $1.6 billion on RALs in 2004 (the latest year for which data is available) to obtain their refund monies faster by two weeks. Moreover, daily updating of account records will give IRS employees and taxpayers access to the most current taxpayer account data, eliminating the problems associated with having various data bases with less than current status. The Oversight Board expects that daily posting of account information will improve the IRS' analysis capability and greatly reduce the burdens associated with the account resolution process.

The Modernized e-File system not only makes it easier for taxpayers to file tax returns with the IRS, it reduces the human resources needed to receive and process tax returns and eliminates the error-prone transcription process. For corporate filers, it helps the LMSB division improve currency and cycle time in working large corporate tax cases. When implemented for individual tax returns, it will make the electronic filing process even simpler than it is today with the current legacy electronic filing system.

The Integrated Financial System (IFS) will provide necessary improvements to the system the IRS uses to manage its financial resources, clearly a must for any agency, especially one that is responsible for managing taxpayers' accounts as well as its own appropriated resources. The IFS upgrade is needed to ensure that the IRS remains in compliance with federal accounting and other financial management requirements. The additional funding for the IFS initiative will enable the IRS to add procurement and asset management modules to the existing IFS application and integrate related business processes with core accounting and financial management operations. The funding will also provide for the subsequent transfer of IFS to a Shared Service Center and thereby maintain its longer term viability.

The Board believes that funding for the BSM program should be accelerated, not slowed down. Failure to fund the IRS BSM program at higher levels, in the view of the Board, is a case of being penny-wise and pound foolish.

Information Technology/Infrastructure Program Initiatives

The IRS must be held to the highest standards for security and data integrity while increasing its engagement in the electronic world in which most taxpayers already live. Meeting this dual challenge of high security and a high degree of electronic interaction with taxpayers demands that the IRS have a modern information systems and infrastructure.

The Board recommends six program initiatives for a total of $103 million that will improve the IRS' operations by allowing it to make critical improvements to its technology and personnel infrastructure. By comparison, the President's budget contains no initiatives for IRS infrastructure.

Three of the initiatives, totaling $32.2 million, enhance the IRS' security posture as the way the IRS does business continues to evolve and security threats seem to increase on a daily basis. Data security has taken on an expanded meaning in a post 9/11 world. Terrorists from around the globe are actively working to exploit weaknesses in government IT security systems with the intent of producing both great

physical and economic harm. Disrupting IRS returns processing and stealing sensitive information could wreak havoc on the economy and financial markets. The IRS cannot be complacent with respect to security, and the Board recommends the following security initiatives:

- Enhance IT Security ($16.7 million)
- Enhance Contingency Planning and Disaster Recovery ($8.7 million)
- Implement Security Auditing ($6.8 million)

The first initiative enables the IRS to further implement key IT security and privacy safeguards to assure the integrity of sensitive taxpayer and employee data and supporting infrastructure processes. Protecting taxpayer data is paramount. The second initiative is to enhance the IRS enterprise-wide contingency planning and disaster recovery capabilities to support critical business systems. Any unavailability of critical IRS business systems poses an unacceptably high risk to the nation's security. The third initiative, Security Auditing, will allow the IRS to more effectively monitor key networks and systems to identify any unauthorized activities.

The remaining three initiatives, for a total of $71.3 million, allow the IRS to improve other elements of its infrastructure. They are:

- Redesign Form 990 for Tax Exempt Organizations ($23.5 million)
- Preserve Quality IT Workforce in Applications Development ($36.8 million)
- Build Alternate Power Supply for the Computing Centers ($11.0 million)

The first initiative, the only one that is not considered high priority, is recommended because it brings new efficiencies to tax filing for a segment of taxpayers who are frequently ignored because their tax returns do not produce revenue—tax exempt organizations. The Form 990 tax return is difficult to complete for tax exempt organizations to complete and for reviewers to comprehend. Worse, it fails to provide the IRS with sufficient information to detect and analyze compliance trends in the sector and target enforcement actions as needed.

The second initiative will give the IRS better tools to retain its IT workforce by mitigating intellectual and experiential loss through a series of supporting strategies such as workforce re-tooling, succession planning, and retention. The third initiative provides alternate power supply for three of the IRS's computing centers. Currently there is but a single power supply facility at each of the computing centers. An alternate power supply capability at each of the three computing centers would ensure the continuous operation of, and continuous access to, tax processing systems at the computing centers during unplanned emergencies and planned power supply tests, and avoid the revenue loss and overtime expense associated with the current process that requires total shut down periods.

Investing in IRS is a Good Business Decision Supported by the Public

In spite of recommendations made by the IRS Oversight Board, the IRS has not been funded at the most effective levels to achieve its strategic objectives. Figure 4 illustrates funding recommendations made by the Board since its inception, the President's budget request during this same time frame, and the funding appropriated by Congress. One of the principal reasons for this so-called "resource gap" is the budget process which treats the IRS the same as it does all other discretionary spending requests. It does not credit the IRS with bringing in 95 percent of all the revenue to fund the federal government, nor does it recognize the previously discussed four-to-one return on every dollar invested in tax enforcement.

The Oversight Board has urged previously Congress to view funding of the IRS as an investment. [1] Other members of the tax administration community, such as the National Taxpayer Advocate and the National Treasury Employees Union, have made similar recommendations. [2]

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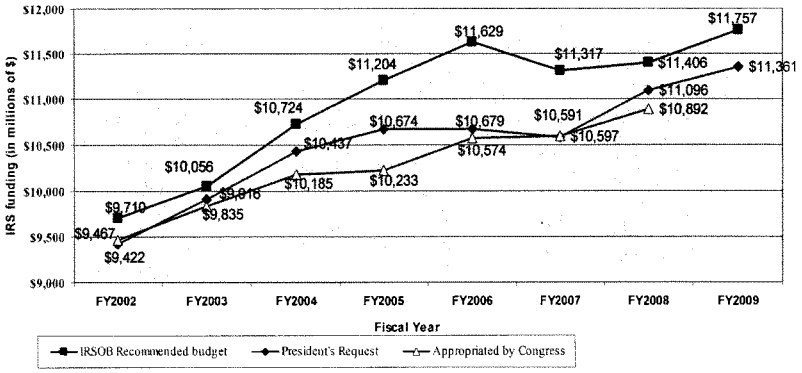
[1] IRS Oversight Board reports, *FY2006 IRS Budget Recommendations/Special Report, FY2007 IRS Budget Recommendations/Special Report, and FY2008 IRS Budget Recommendations/Special Report.*

[2] NTA, *2006 Report to Congress*, Section 2, p. 445, and Statement of Colleen M. Kelley, President, National Treasury Employees Union, Testimony Before the House Committee on Ways and Means, May 23, 2007.

Figure 4. IRS Funding History FY2002-2009



There are a number of approaches that Congress could take to achieve this result, such as funding the IRS outside of budget caps, and the Board believes that the implementation of such a change is best left for Congress to decide. The Board would be remiss, however, if it didn't point out providing additional funds to the IRS has been consistently supported by nearly two out of three members of the public. In its annual Taxpayer Attitude Survey, the Board has asked taxpayers whether they support additional funding for the IRS. The results for 2005 through 2007 are shown in Table 5.

Table 5. Results of Taxpayer Attitude Survey on IRS Funding

Survey Question 11	Percent Completely Agree			Percent Mostly Agree		
	2007	2006	2005	2007	2006	2005
The IRS should receive extra funding to enforce tax laws and ensure taxpayers pay what they owe	24	24	20	40	39	43
The IRS should receive extra funding so it can assist more taxpayers over the phone and in person	21	24	22	42	42	44

The Board believes such strong support indicates the public understands the need for effective tax administration and realizes that, ultimately, it pays for itself.

Conclusion

Approving a budget is not just about money; it's also about choices. The Board believes its budget recommendations, if implemented, will put the IRS on an effective long-term path to achieving the IRS strategic goals, improving voluntary compliance, and reducing the tax gap.

Although the Board's recommended budget is $375 million more than the President's request, there are some important decisions that must be made with respect to priorities and balance. The Congress must not only decide the amounts to be appropriated, but must also choose whether it wants to pursue short-term growth in enforcement activity over a more balanced path that stresses the benefits of long-term investments in technology, infrastructure, service, and research.

Appendix A

IRS Oversight Board Recommended IRS FY2009 Budget

Table A-1: IRS Oversight Board's Recommended FY2009 IRS Budget by Program Initiative
(all dollars in millions)

FY2008 Enacted Appropriation	$10,892.38
Base Adjustments	$262.62
Savings/Reinvestments	($61.65)
FY2008 Base Budget	$11,093.35
Initiatives	
Enforcement	
Reduce the Tax Gap for Small Business/Self-Employed	$120.7
Increase Reporting Compliance of Domestic Taxpayers with Offshore Activity	$16.4
Reduce the Tax Gap for Large Businesses	$52.0
Expand Federal Payment Levy Program	$17.3
Reduce Tax Fraud	$72.2
Enhance Financial Investigations of Narcotics Trafficking Organizations	$24.0
Enhance BSA Compliance Program	$3.4
Address Complexity through Up-Front Guidance, Education, and Correction Opportunities	$8.9
Expand Examination of Tax Exempt Organizations	$28.6
Increase Tax Court Litigation	$5.8
Implement New Procedural Tax Court Requirements	$3.4
Improve Tax Gap Estimates, Measurement, and Detection of Non-Compliance	$11.1
Increase Monitoring of Preparers	$2.5
Total Enforcement	$366.3
Taxpayer Services	Dollars (M)
Maintain Processing of Critical Pension Plan Returns	$6.3
Research Taxpayer Burden, Complexity, and Compliance	$10.0
Expand Volunteer Income Tax Assistance and Low Income Tax Clinics	$10.0
Total Service	$26.3
Infrastructure/IT	Dollars (M)
Enhance IT Security	$16.7
Enhance Contingency Planning and Disaster Recovery	$8.7
Implement Security Auditing	$6.8
Redesign Form 990 for Tax Exempt Organizations	$23.5
Preserve Quality IT Workforce in Applications Development	$36.8
Build Alternate Power Supply for the Computing Centers	$11.0
Infrastructure/IT Initiatives Subtotal	$103.5
Business Systems Modernization (BSM)	$142.4
HITCA	$5.50
Total Initiatives	$644.00
FY2009 Budget Request	$11,737.35
FY2009 Request Increase over FY2008 Base	$844.97
FY2009 President's Request for IRS	$11,361.51
Increase Over President's Budget Request	$375.8

Table A-2: IRS Oversight Board's Recommended FY2009 IRS Budget by Appropriation Account
(Dollars in Millions)

	Taxpayer Services	Enforce-ment	Ops Support	BSM	HITCA	**Total**
FY 2008 Enacted Appropriation	$2,150.0	$4,780.0	$3,680.1	$267.1	$15.2	**$10,892.4**
Base Adjustments	$54.7	$125.0	$81.2	$1.4	$0.3	**$262.6**
Savings/Reinvestments	($10.5)	($48.8)	($2.2)	$0.0	($0.2)	**($61.6)**
FY 2009 Base Budget	$2,194.2	$4,856.2	$3,759.0	$268.4	$15.4	**$11,093.4**
Initiatives						
Enforcement						
Reduce the Tax Gap for Small Business/Self-Employed	$2.9	$94.0	$23.8			**$120.7**
Increase Reporting Compliance of Domestic Taxpayers with Offshore Activity		$13.8	$2.6			**$16.4**
Reduce the Tax Gap for Large Businesses		$44.0	$8.0			**$52.0**
Expand Federal Payment Levy Program	$0.4	$16.5	$0.4			**$17.3**
Reduce Tax Fraud		$55.8	$16.4			**$72.2**
Enhance Financial Investigations of Narcotics Trafficking Organizations		$21.0	$3.0			**$24.0**
Enhance BSA Compliance Program		$2.8	$0.6			**$3.5**
Address Complexity through Up-Front Guidance, Education, and Correction Opportunities	$1.1	$6.5	$1.3			**$8.9**
Expand Examination of Tax Exempt Organizations	$0.2	$23.3	$5.1			**$28.6**
Increase Tax Court Litigation		$5.0	$0.8			**$5.8**
Implement New Procedural Tax Court Requirements		$2.8	$0.5			**$3.4**
Improve Tax Gap Estimates, Measurement, and Detection of Non-Compliance		$7.6	$3.5			**$11.1**
Increase Monitoring of Preparers		$2.2	$0.4			**$2.5**
Total Enforcement	**$4.7**	**$295.2**	**$66.5**			**$366.3**
Taxpayer Services						
Maintain Processing of Critical Pension Plan Returns	$6.0		$0.2			**$6.3**
Research Taxpayer Burden, Complexity, and Compliance			$10.0			**$10.0**
Expand VITA and Low Income Tax Clinics	$9.8		$0.2			**$10.0**
Total Service	**$15.8**		**$10.5**			**$26.3**
Infrastructure/IT						
Enhance IT Security			$16.7			**$16.7**
Enhance Contingency Planning and Disaster Recovery			$8.7			**$8.7**
Implement Security Auditing			$6.9			**$6.9**
Redesign Form 990 for Tax Exempt Organizations			$23.5			**$23.5**
Preserve Quality IT Workforce			$36.8			**$36.8**
Build Alternate Power Supply for the Comp Centers			$11.0			**$11.0**
Infrastructure/IT Initiatives Subtotal			**$103.5**			**$103.5**
Business Systems Modernization (BSM)			$1.2	$141.2		**$142.4**
HITCA					$5.5	**$5.5**
Total Initiatives	$20.5	$295.2	$181.6	$141.2	$5.5	**$644.0**
FY 2009 Budget Recommendation	**$2,214.7**	**$5,151.4**	**$3,940.6**	**$409.7**	**$20.9**	**$11,737.4**
FY 2009 Recommendation over FY 2008 Enacted	$64.7	$371.4	$260.6	$142.6	$5.7	**$845.0**
FY 2009 President's Request for IRS	**$2,150.0**	**$5,117.3**	**$3,856.2**	**$222.7**	**$15.4**	**$11,361.5**
Increase Over President's Budget Request	$64.7	$34.2	$84.5	$187.0	$5.5	**$375.9**

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Statement of the Honorable William A. Chatfield
Director, Selective Service System

House Appropriations Subcommittee on
Financial Services and General Government
April 10, 2008

Forward:

Chairman Serrano and members of this subcommittee, I am honored as Selective Service Director to present the President's FY 2009 Appropriations Request of $22,000,000 for the Agency. The Congress and Administrations under both parties have acknowledged the wisdom of maintaining Selective Service as a hedge against unforeseen threats and as a low-cost insurance policy against underestimating any threat our Armed Forces might face in a still-dangerous world.

This Agency is as determined as ever to make the necessary adjustments to budget realities and the requirements of combating terrorism, defending the homeland, and maintaining other priorities listed in the President's January 28, 2008, State of the Union Address. Personnel reductions at Selective Service have resulted from planned attrition and will not involve a reduction-in-force. Meanwhile, the Agency continues its phased reductions in operational readiness while preserving as much customer service as possible. For example, we are reducing the number of part-time Reserve Component officers from a total of 250 to 200 by the end of FY 2008 and to 150 by the end of 2009. Automated registrations are making it possible to accomplish our missions without the need for as much face-to-face contact at the local level. These innovations have required painful choices, but satisfying our goals will assure a Selective Service that is beyond reproach, while meeting the needs of its primary customer, the Department of Defense. I welcome the challenge and appreciate the opportunity to share my vision for Selective Service with you today.

What We Do Today:

Selective Service is in business to perform two unique functions. Should the Congress and the President authorize a return to military conscription, the Agency can conduct a draft that is efficient, fair, and accepted by the public. It is also ready to administer a program of alternative community service for men who are classified as conscientiously opposed to military service.

Additionally, each and every day Selective Service continues its close partnership with the Department of Defense by providing direct support to Armed Forces recruiting. Specifically, Selective Service provides names of registrants to the Secretary of Defense for recruiting purposes, in accordance with the Military Selective Service Act. Information about Armed Forces opportunities for Active Duty, National Guard, and Reserves, along with a business reply card, is enclosed routinely with our registration acknowledgment that Selective Service sends to each new registrant. For FY 2007, these contacts totaled nearly 2.2 million young men. Consequently, the Defense Department benefits by "piggy-backing" on our routine mailings which generate actual recruiting leads. And it reimburses us for the additional costs in accordance with the Economy Act.

Beyond its compliance with the Military Selective Service Act and providing these tangible services, the Agency also promotes an intangible national benefit. For present and future generations of America's young men, Selective Service is a very critical link between society-at-large and today's volunteer military. It is a reminder that, as Americans, every young man is personally responsible to "provide for the common defence" in the time-honored tradition of preceding generations.

Areas of Emphasis:

a. Air Shows. I look forward once again in 2008 and continuing in 2009 what I regard as this Agency's most creative innovation in meeting its traditional mission in a climate of budget austerity. I refer to our success in harnessing the venue, excitement, and patriotism of air shows.

My vision has been to present the Agency in huge, open community venues across the nation, highlighting authentic American heroes and promoting public service and patriotic themes appealing to multiple generations. The value of this effort presented itself after my assessment of the Agency's capabilities, priorities, and missions. Air shows are the second most attended spectator events in America, attracting a high concentration of registration-age men. I remain convinced that funding this initiative results in a substantial increase in registration compliance and represents a positive impact on the influencers of young men. We are conducting this effort by absorbing the $118,000 expense out of our FY 2008 budget and will do so again in FY 2009. No new money is involved.

b. Registration Compliance. As exciting as the air show initiative has been, it will not be the only effort to satisfy our statutory missions. Our operational readiness to perform our traditional missions has been reduced because of world risk assessments. Selective Service has always believed only when all eligible young men are in the manpower pool and accounted for as equally vulnerable would any future draft be considered completely fair and equitable by the public.

Our latest full year of data collection (CY 2007) indicates 91 percent of legally eligible men (ages 18 to 25) are registered; this is a two percentage point drop from the previous year. The compliance rate for men who are draft eligible (ages 20 to 25) is 95 percent, a one percentage point decrease from CY 2006. Keeping the rates high is very important because a declining compliance rate contributes to a lack of public confidence in our ability to administer a fair and equitable draft

Naturally, this Agency is as determined as ever to make congressional priorities truly our own. We appreciate the subcommittee's support for ensuring that our work continues. To the extent that our traditional mission survives, I will use every resource to continue to maintain high registration compliance. For example, the Agency will:

1. Carry on routine updating of the interactive Selective Service pages on the World Wide Web (www.sss.gov) where online registration, registration verification, the ability to file changes of information, and a wealth of other Agency information are available to anyone with access to the Internet. For FY 2007, 83 percent of registrations reached Selective Service through electronic means, the same percentage as 2006. Electronic registrations are encouraged because they are quicker, more cost-effective than processing paper registrations, and provide better customer service. We are also placing links to our site with other federal, state, and local agencies, schools, and assorted organizations to enhance public education and facilitate customer responsiveness.

2. Profit from an increasing number of states that link obtaining a driver's license or state identification card to the Selective Service registration requirement. These state and territorial laws currently provide Selective Service with an average of 71,000 registrations per month. As of this month, 36 states, three territories, and the District of Columbia have enacted laws. These jurisdictions represent 70.1 percent of the national 18-year-old male registrant population. We continue to offer technical expertise to the other states where such legislation is pending. Data electronic exchanges are the most cost-effective, timely, and user-friendly registrations available. Selective Service is committed to aid the remaining 14 states in implementing this easy method to protect their young men's eligibility for state and federal benefits and programs. This program has been a valuable tool to reach all eligible registrants and is more customer-friendly.

3. Remain sensitive to the fact that not every household in your district has a computer, so technological innovations will not compensate for all resource restraints. The only way for young men in those households to register is the old-fashioned, pre-Internet way. That means going to the nearest post office. And that is why we must devote sufficient resources to printing forms and keeping post offices well stocked.

c. Alternative Service Program. Half of the Agency's mission during any return to conscription is to provide for a supervised term of alternative civilian service for all

men it classifies as conscientious objectors. A key component of this program, therefore, is reaching out to employers capable of providing work of "national importance" by becoming members of the Alternative Service Employer Network, or ASEN. We continue to reach out to historic peace church constituencies, non-profit organizations, and government entities. These have, in past wars, provided the bulk of the assignments we will need to provide our alternative service workers with employment that benefits the national health, safety, and welfare.

We have had negotiations with Christian Aid Ministries, Mennonite Voluntary Services, and others who hope to join the ASEN. We also continue to have our State Directors visit the projects run by these organizations to determine their suitability to become ASEN members. In addition to visiting model project sites, our State Directors have begun to reach out to our historic conscientious objector constituencies across America. These contacts and outreach efforts were previously confined to our headquarters staff. In addition to making it easier and less expensive for the public to stay in touch with us, this field effort facilitates the building of the relationships we will need to successfully meet our goals for this program during any return to conscription.

Finally, we continue to work toward obtaining employer agreements with the Public Health Service and the Corporation for Community and National Service. These two Federal entities will, we hope, play a key role in providing suitable employment to conscientious objectors in any future conscription.

d. Information Technology Modernization. The Agency's Reclassify, Compliance, and Verification project is intended to allow SSS to leave the Department of Defense's Military Entrance Processing Command mainframe and move to a Microsoft Windows system. However, it is behind schedule. Selective Service hopes to complete the analysis, scope, and requirements definition during FY 2008, and we plan to design, code, and test in FY 2009. Notwithstanding resources expended so far, if our revised schedule is not met, then the entire project will be shelved pending future resources and commitment.

National in Scope, Local in Service:

While rumors of a future draft will continue to circulate among the public, private groups, the media, and academia, Selective Service remains focused on missions mandated by Congress. It manages its volunteer board members; prepares to administer a program of alternative community-based service for men classified as conscientious objectors; and, to the extent possible, updates its conscription plans and registration procedures. All these efforts are aimed at being ready to conduct a fair and equitable classification procedure to determine who should serve when not all can serve during an emergency. To ensure fairness and equity, each Selective Service board is a gathering of civic-minded men and women reflecting the racial, cultural and ethnic diversity of the young men in your districts. Through these volunteers, a unique

bond has been formed at the grass roots with young American men, society-at-large, and the U.S. Armed Forces. Through the Selective Service structure, local American communities play a positive role in providing for the common defense.

Closing:

Mr. Chairman, Selective Service stands prepared to perform its time-tested responsibilities when directed. The FY 2009 appropriation request of $22,000,000 will be invested prudently in one of the nation's important security assets in an increasingly dangerous and ambiguous world. Maintaining this adequate funding level would: (1) provide a compact, cost-efficient civilian structure capable of expansion in a crisis; (2) provide manpower to the U.S. Armed Forces as required; and (3) do it fairly, equitably, and within the necessary timeframes. These outcomes will advance our statutory mandate and restore the high registration compliance rates so painstakingly achieved over the last decade. Selective Service remains an active partner in the national preparedness community, ever watchful for opportunities to improve.

Thank you, Mr. Chairman. I would be pleased to answer your questions.

Written Testimony from Missouri Secretary of State Robin Carnahan to the Financial Services and General Government Subcommittee of the United States House of Representatives

Hearing on Election Administration Issues
February 27th, 2008

Ensuring fair, accurate and inclusive elections through sound election administration policies is a goal that I share with Congress. Since taking office, I have worked hard to keep an open dialog with Congress and with the Missouri state legislature to highlight and improve elections issues and to enhance voter confidence in the election process.

This year as states across the country, including Missouri, anticipate record turnout and increased voter participation, it is more important than ever that election administrators have the resources they need to guarantee smooth Election Day activity. And, as this will be the first presidential election cycle using new voting systems required by the Help America Vote Act (HAVA), I believe there are sensible measures Congress can take to help ensure that even in a record turnout year, elections will remain fair, free and accurate nationwide.

Any Congressional action should focus on the goals of ensuring that (1) every eligible voter is able to cast a ballot; (2) all voters can be confident that their vote is counted; and (3) election results are fair and accurate.

After publishing Missouri's first comprehensive post-election report entitled Voters First: An Examination of the 2006 Midterm Election in Missouri[1], my office identified several real obstacles to achieving the above mentioned goals. We found that long lines, an insufficient number of well-trained poll workers, paper ballot shortages, and identification requirement confusion presented the biggest challenges to smooth Election Day activities.

Below, I have identified specific issues in election administration which would significantly enhance voter confidence and maintain the integrity of elections in Missouri. From conversations with other Secretaries of State, I know many of these challenges are prevalent throughout the country and believe that Congress should consider similar commonsense solutions to the real challenges faced by election administrators.

1. **Congress should consider legislation to guarantee every voter the choice of voting on a paper ballot or accessible machine.** Since the implementation of HAVA, local election authorities, poll workers and voters have had to adapt to a variety of new technologies and modes of casting their ballot. While I applaud the efforts of Congress to ensure that every voter, regardless of a physical disability is able to cast their vote in private, there is no need to risk voter confidence in the election process as a trade off for providing accessible and second chance machines. That is why I support the "Voter Confidence Act[2]" in Missouri. This piece of legislation will ensure that every voter is given the choice

[1]To read more about Voters First please visit www.sos.mo.gov/elections/VotersFirst

[2]To view The Voter Confidence Act please visit http://www.house.mo.gov/billtracking/bills081/biltxt/commit/HB2114C.HTM

to vote on a paper ballot or an accessible voting machine. This bill will also provide funding to local election authorities to pay for the costs of printing paper ballots. In the 2006 elections several jurisdictions in Missouri ran out of paper ballots because of unanticipated turnout. This is inexcusable. I urge the Congress to consider legislation which will allow every voter the choice of voting on a paper ballot and to provide funding to offset the costs of providing paper ballots to voters nationwide.

2. **Congress should consider funding and training mechanisms that will increase the number of poll workers and improve the quality and uniformity of their training.** In 2006, Missouri launched the *It's Your Turn: Be a Poll Worker* recruitment program which has helped local election authorities locate more than 2,200 potential poll workers. Congress should consider programs to help states recruit more poll workers and also consider how to help fund more comprehensive, uniform training for poll workers nationwide.

   Issues with new voting technology can be improved with additional and better-trained poll workers. Congress should work with the EAC to create funding and training mechanisms that will increase the number of poll workers and improve the quality of their training. Poll workers are at the front lines of the election process. Having better trained poll workers will help ensure that voting equipment functions properly, that voters won't be misinformed about the process and that casting a ballot can be done with ease.

3. **Congress should consider ways to increase the portability of voter registration.** This February, the National Association of Secretaries of State (NASS) unanimously passed a resolution urging the United States Postal Service (USPS) to include state-specific voter registration cards in change of address programs packages.[3] Elections administrators nationwide urge the Congress and the EAC to help fund this initiative and encourage the USPS to initiate this program soon.

   Congress also should consider practical approaches to increasing the accuracy of centralized state voter registration databases while reducing the burden placed on voters to independently update their contact information with their local election authority.

4. **Congress should consider nationwide early voting legislation.** Congress should consider nationwide early voting legislation which would allow voting on the weekend and for two weeks prior to Election Day. Thirty-five states already have early or no excuse absentee voting. The remaining 30% of states, including Missouri, should be able to offer voters the same opportunity to vote on the days leading up to Election Day. If Congress passed nationwide early voting, states like Missouri could work toward shorter lines at polling places and smoother Election Day activities.

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[3]To view the NASS resolution visit http://nass.org/index.php?option=com_frontpage&Itemid=1

Congress can help ensure that elections are free, fair and accurate by addressing the abovementioned areas. Ensuring that states get the funding they need to maintain paper-based voting systems and pay for adequate numbers of poll workers and poll worker training materials are all priorities Congress should address in the coming months. Secretaries of State across the nation are engaged with the actions of Congress and in Missouri, we will continue to keep the dialog open with regard to election reform and funding.

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April 14, 2008

The Honorable José E. Serrano
Chair, Subcommittee on Financial Services and
General Government
House Committee on Appropriations
2227 Rayburn House Office Building
Washington, D.C. 20515-3216

Dear Chairman Serrano:

The American Association of Law Libraries (AALL) commends you and members of the Subcommittee on Financial Services and General Government for raising a number of substantive issues during the recent hearing on the FY 2009 funding request for the National Archives and Records Administration (NARA). AALL is concerned with many of the issues addressed at the hearing, including the lack of funding for the National Historical Publications and Records Commission (NHPRC) and the White House's attempt to violate the OPEN Government Act (P.L. 110-175) by moving the Office of Government Information Services from NARA to the Department of Justice. In addition, we are very concerned with the recent announcement that NARA will no longer harvest Executive Branch web sites.

The American Association of Law Libraries is a nonprofit educational organization with over 5000 members nationwide. Our members serve the legal information needs of legislators, judges, and other public officials at all levels of government, corporations and small businesses, law professors and students, attorneys, and members of the general public. AALL's mission is to promote and enhance the value of law libraries, to foster law librarianship and to provide leadership and advocacy in the field of legal information and information policy.

AALL has long supported the important work of the NHPRC, which began in 1934 as the grant-making arm of NARA. It is the only federal agency charged with the task of promoting the preservation and use of America's documentary heritage which is essential

to understanding our democracy, history and culture. Over the past 42 years, the Commission has awarded more than $160 million to over 4,000 institutions, including many libraries, to preserve and publish important historical records that document American history. NHPRC grants provide essential funding for electronic records management projects which develop solutions and "best practices" for implementation at all levels of government.

AALL supports H.R. 5582, a bill introduced by Representative Wm. Lacy Clay to reauthorize NHPRC at an annual level of $20 million for fiscal years 2010–2014. The current authorization funds the NHPRC at an annual level of $10 million per year. The NHPRC has been an essential leader in preserving our nation's history and making it more accessible to the American public. We believe that the additional money is needed to allow the NHPRC to continue its work and expand its efforts to fund electronic records management projects in the 21st century.

In addition, we urge the Subcommittee to appropriate necessary funds to establish the new Office of Government Information Services (OGIS) at NARA, as mandated by the OPEN Government Act. Unfortunately, the President's FY 2009 budget funds the creation of the new office within the Department of Justice (DOJ). The OPEN Government Act purposely established the OGIS at NARA as a result of Congressional findings that the DOJ is not meeting the interests promoted by the Freedom of Information Act (FOIA), for which DOJ has been the lead agency for the past 30 years. OGIS is tasked with reviewing agency compliance with FOIA and offering mediation services to requestors. Therefore allowing the DOJ to oversee the office in charge of FOIA mediation services creates a major conflict of interest and contradicts both the spirit and the letter of the Act. AALL urges the Subcommittee to fund the creation of the OGIS at NARA, thus fulfilling Congressional intent to make the Freedom of Information Act more responsive to requesters.

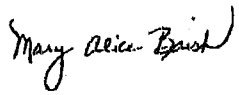
Last but not least, we have recently learned that NARA has announced its decision not to harvest Executive Branch web sites at the end of President Bush's administration. Since government information has moved online, NARA has regularly conducted web harvests of agency public web sites. Halting the harvesting of Executive Branch web sites is, we believe, in conflict with the mission of NARA to "serve American democracy by safeguarding and preserving the records of our Government." As today more and more government records and publications are available *only* online through the Internet, we believe it essential that NARA capture and preserve these digital files. We hope that the Subcommittee will work to ensure that NARA continues to capture Executive Branch web sites as a vital part of its mission.

Mr. Chairman, we have raised three important issues of great concern to our association and its members. We strongly urge you to appropriately fund the NHPRC for FY 2009; to provide the necessary funding to establish the new Office of Government Information Services at NARA, rather that at the DOJ; and to investigate NARA's recent decision not to capture Executive agency web sites at the end of the Bush Administration. If this decision is based on a lack of available funds, we urge you to appropriate the necessary

monies so that NARA can fulfill its mission. We believe it is crucial that NARA harvest important online government information from agency web sites to document the activities of this administration to ensure transparency and accountability.

Thank you very much for your consideration of our concerns. I ask that you please include this letter as part of the Subcommittee's record for the April 1, 2008, hearing on NARA's FY 2009 budget request.

Sincerely,



Mary Alice Baish
Acting Washington Affairs Representative
American Association of Law Libraries

CC: Members of the Subcommittee

Subcommittee on Financial Services and General Government Chairman:
Josa' E. Serrano
B-300 Rayburn House Office Building Washington DC 20515

From: Felecia Ledbetter Coalition to Save Our Schools .org (member)

I submit this testimony in all sincerity as a full-time parent of four children and three of them being school-aged students at John Burroughs ES. I am highly offended and insulted by the representation of our Mayor Fenty's School Reform Proposal present by the Mayor's appointed Chancellor Rhee. They announced this proposal in November 07 and now it is almost the beginning of May and they still have attempted to present an Academic Program for the schools to be closed, consolidated, and /or be reconstructed. And Now the Chancellor Rhee WTU President has sent a Memorandum of Agreement to have the teachers in closing or receiving schools will have to reapply for their school position. Please do not allow the torment of the Mayor's Educational Reform to be allowed to continue and longer. With that in mind the fact of the matter remains that this proposal did not include the input of the Parents, teachers, students community and other Educational administrators EVERYONE IT EFFECTS FOUND ON THE NEWS. This will be detrimental to security of a productive academic program. Effected by unorganized chaos, I am a member of John Burroughs PTA and Local Reconstruction Team as well as the Coalition to Save Our Schools , out of all 27 school being proposed to close, my children school was taking of the list and so were three other school that where supposed to be closed. However because of the four that where taking off, Feb. 27th 2008 Chancellor Rhee held a public meeting, announced at short notice, that four more school would be added to the list of school closings .I along with three other Coalition Members Testified at the hearing against it and all of the other because of the lack parental input. About our own childrens' educational welfare. We received no response and not one phone call .I ask for a full investigation of this inaccurate financial-based proposal. Thank you.

STATEMENT OF THE

INVESTMENT COMPANY INSTITUTE

ON THE
U.S. SECURITIES AND EXCHANGE COMMISSION'S
APPROPRIATIONS
FOR FISCAL YEAR 2009

SUBMITTED TO THE SUBCOMMITTEE ON FINANCIAL SERVICES
AND GENERAL GOVERNMENT
COMMITTEE ON APPROPRIATIONS

U.S. HOUSE OF REPRESENTATIVES

APRIL 30, 2008

Investment Company Institute
1401 H Street, N.W.
Washington, DC 20005

The Investment Company Institute[1] appreciates this opportunity to submit testimony to the Subcommittee in support of the Administration's FY 2009 Appropriations request for the Securities and Exchange Commission (SEC). We commend the Subcommittee for its consistent past efforts to assure adequate resources for the SEC.

Registered investment companies are an integral part of the U.S. economy and continue to be one of America's primary savings and investment vehicles for middle-income Americans. Since 1990, the percentage of U.S. retirement assets held in mutual funds and other registered investment companies has more than quadrupled. Today, almost 90 million investors in more than 50 million U.S. households own shares of registered investment companies; the median household income of these investors is $73,400. These millions of ordinary Americans continue to recognize that mutual funds are the best means of achieving their long-term financial goals. They deserve and benefit from continued vigilant regulatory oversight of mutual funds and other registered investment companies.

In addition to their role as the investment vehicle of choice for millions of Americans, mutual funds are major investors in securities and participants in the marketplace. As such, they have a strong interest in assuring the SEC's continued ability to soundly and effectively regulate securities offerings, other market participants, and the markets themselves.

[1] The Investment Company Institute is the national association of U.S. investment companies, including mutual funds, closed-end funds, exchange-traded funds (ETFs), and unit investment trusts (UITs). ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. Members of ICI manage total assets of $12.34 trillion and serve almost 90 million shareholders.

For all of these reasons, sufficient funding of the SEC is critically important to the Institute and its members.

The Administration's FY 2009 budget proposes SEC funding at a level that represents a slight increase over the past three years, in which the SEC's budget has remained largely flat. SEC Chairman Christopher Cox explained in his testimony that this would permit the SEC to keep staffing on par with FY 2007 levels. The SEC believes that this level of funding is necessary to fulfill its regulatory mandate and to continue protecting the nation's investors. We agree, and we urge Congress to provide appropriations at this funding level.

We are particularly pleased that the top strategic priority for the SEC's Division of Investment Management will be to implement new rules under consideration by the Commission that would provide mutual fund investors with more reader-friendly disclosure.[2] To its great credit, the SEC has reconceived its approach to mutual fund disclosure, putting forth a proposal that seizes upon the potential of the Internet and permits funds to use a "summary" prospectus – a short, concise, plain-English document consisting of key information about the fund, including investment objectives and strategies, risks, costs, and performance. Investors who prefer the long statutory prospectus would be able to get it (and other information about the fund) online, or have a hard copy promptly sent to them for free. Our own extensive research and the SEC's – along with the overwhelming majority of the public comments the SEC has received about the proposal – strongly suggest that this is the right approach. Accordingly, we strongly support funding for the SEC to complete this important initiative.

[2] *See* FY 2009 Budget Appendix at p. 1229.

While providing adequate funding is vitally important, it is equally important that the SEC deploy available resources in ways designed to assure the *effectiveness* of its regulatory and law enforcement efforts. We therefore strongly support the continued focus on internal reforms that will improve the performance of the SEC. This includes, for example, developing closer integration of the activities of different SEC divisions and branch offices, providing regulatory guidance that better anticipates issues, and conducting empirical research that informs major rulemakings. Indeed, the importance of these kinds of reforms has been underscored in a series of reports on the competitiveness of the U.S. financial markets. We support appropriate funding of the SEC to facilitate these and other initiatives to enhance the effectiveness of the SEC.

In conclusion, the SEC and the fund industry share a common objective of assuring that mutual funds remain a vibrant, competitive and cost effective way for average Americans to access the securities markets and realize their long-term financial goals. Future regulatory and oversight actions by the SEC will play a key part in this process. It is therefore critically important that the SEC have sufficient resources to enable it to be an effective and efficient regulator and fulfill its mission of protecting the nation's investors, including the almost 90 million Americans who own mutual funds. Accordingly, we support providing the SEC with the requested level of funding.

We appreciate your consideration of our views.

* * * * *

STATEMENT FOR THE RECORD ON THE PROPOSED FY 2009 BUDGETS FOR THE NATIONAL ARCHIVES & RECORDS ADMINISTRATION (NARA) AND THE NATIONAL HISTORICAL PUBLICATIONS & RECORDS COMMISSION (NHPRC)

Lee White
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(202) 544-2422 Ext # 116

April 30, 2008

The Honorable José E. Serrano
Chairman
Subcommittee Financial Services
& General Government
Committee on Appropriations
U.S. House of Representatives
B-300 Rayburn House Office Building
Washington, D.C. 20515

Dear Mr. Chairman:

The National Coalition for History (NCH) is a consortium of over 60 organizations that advocates on federal legislative and regulatory issues affecting historians, archivists, teachers, researchers, and other stakeholders. As researchers and conservators of American history and culture we care deeply about the programs and activities of the National Archives and Records Administration (NARA). Thank you for the opportunity to submit our views on NARA's proposed fiscal year (FY) 2009 budget.

First, we want to thank you Mr. Chairman, Ranking Member Regula and all of the members of the subcommittee for their strong support of NARA's budget in FY 2008. We especially want to acknowledge the extra funding you included to restore the research room hours that had been cut by NARA in 2006 and for the money that was provided to hire additional archival staff. And we were pleased that despite the tight budget parameters last year, you were able to provide NARA with increased funding.

We understand that Congress continues to face enormous fiscal challenges in crafting the federal budget for fiscal year 2009. While we are encouraged that NARA would again receive increased funding under the President's proposed FY 2009, we feel the budget is inadequate in some areas with regard to specific priorities that need to be addressed at NARA. Without adequate funding to address these needs, NARA may once again find itself forced to cut research hours or public

programs. We hope that this Subcommittee will provide adequate funding to ensure that NARA does not have to perform triage on its own programs.

Below are the National Coalition for History's specific concerns with the proposed FY 2009 budget for the National Archives and Records Administration:

1. **National Historical Publications and Records Commission (NHPRC):** For the fourth consecutive year, the President has proposed zero funding for the NHPRC. We strongly oppose this irresponsible recommendation and request the Subcommittee provide FY 2009 funding at the fully authorized level – $10 million for the NHPRC national grants program and an additional $2 million for staffing and related program administration.

   We appreciate the Subcommittee's strong support for the NHPRC in last year's budget. You not only saved the NHPRC from elimination, but also provided $7.5 million for grants, a $2 million increase from the previous fiscal year. However, the NHPRC has not received its fully authorized amount of $10 million since FY 2004. In the following three fiscal years the NHPRC only received only half that amount, or approximately $5 million per-fiscal year.

   The NHPRC leverages every federal dollar with private sector contributions at a level approaching 50%. As a consequence, the Commission has been able to fund a wide variety of programs by combining private sector funds with a small federal investment. However, the annual uncertainty over the survival of the NHPRC and an unpredictable funding level makes it difficult to attract private capital. NHPRC grants are the linchpins for the funding structure of most projects. Loss of the NHPRC's funding will have a domino effect causing funding from other sources to be withdrawn or reduced.

   Without critical NHPRC funding, award-winning biographies of American presidents and the founding fathers from such noted historians as David McCullough, James Patterson, Joseph Ellis, and others might never have been written.

   At a recent hearing in the Senate, David McCullough called for a doubling of funding for the Founding Fathers projects that receive NHPRC support. Mr. McCullough said "you can tell a lot about a society by how it spends its money. Here is our chance, and it's long overdue, to show what we care about, what we value, and what we're proud to pay for."

   In order to ensure that the important work of the NHPRC continues, we urge the Subcommittee to support a FY 2009 funding level of no less than $10 million for the NHPRC grants program, and an additional $2 million for staffing and related program administration.

2. **Presidential Transition and Missing White House E-mails:** As you know, there has been on-going controversy, and litigation, over millions of White House e-mails that are either missing or have been destroyed. In addition, evidence has emerged that numerous White House employees used the Republican National Committee's e-mail system to

conduct official government business outside of the White House computer system, thus circumventing the Presidential Records Act.

At three recent hearings before various House committees, Archivist Allen Weinstein and other senior staff of the National Archives and Records Administration have failed to give a definitive answer as to how both these issues will be resolved prior to the end of President Bush's term in January 2009.

In a hearing before the House Oversight and Government Reform Committee on February 26, 2008, we learned that the White House had not responded to multiple requests from NARA requesting information about the missing e-mails. At that hearing Archivist Weinstein said the White House had been "sensitized" and that progress was now being made, but no details were provided as to where the situation stood.

At the April 1, 2008, hearing before this Subcommittee, Archivist Weinstein once again declined to provide details on the status of the situation saying that some progress had been made, but that there still had not been a complete accounting of the missing e-mails. Dr. Weinstein said that further details about a recovery plan would be forthcoming after an upcoming meeting with the White House. To our knowledge, to date the results of those negotiations have still not been made public.

As recently as April 23, 2008, at a hearing before the Subcommittee on Information Policy, Census and National Archives, NARA General Counsel Gary M. Stern said that there had been greater cooperation by the White House in working on the presidential transition, but again no details were provided as to the status of the missing e-mails or recovery costs.

On February 26, 2008, the House Oversight and Government Reform Committee held a hearing on the missing White House e-mails. At that hearing, Ms. Theresa Payton, the Chief Information Officer (CIO) of the Office of Administration (OA) in the Executive Office of the President (EOP) was asked the following question by the Committee's Ranking Republican Member Thomas M. Davis about the cost of recovering the missing e-mails from the disaster backup tapes of the White House servers.

> Mr. DAVIS OF VIRGINIA. Well, can you give me a ballpark number if we had to go to the backup (tapes)? Assume for a minute we can't recover the originals of this. To get what the Committee wanted to, if we had to go to backup, can you give me a ballpark?
>
> MS. PAYTON. And I believe--and I am working off of memory here--but I believe we had said if we restored every single day from the original analysis, it was going to be somewhere in the ballpark of $15 million or more.

The end of President Bush's term is now less than nine months away, but we have yet to see a firm recovery plan emerge from these meetings between the White House and

NARA. If these hundreds of days of e-mails are truly missing, and not destroyed, the question becomes where is the $15 million or more estimated by Ms. Payton to recover these White House records going to come from?

Our concern here is obvious. The fear is that NARA will be forced to find the funds from elsewhere in its budget to recover the e-mails, leading to cuts in other vital programs and/or public services. Our other fear is that after President Bush leaves office in January, the urgency to spend this large amount of money to recover these vital historical records may wane and they may never be recovered.

When a similar situation concerning missing e-mails occurred at the end of the Clinton administration, the White House's Office of Administration was forced by Congress to absorb the cost of recovery. Since this Subcommittee has jurisdiction over the budget of the White House's Office of Administration, we strongly urge you to follow the Clinton administration precedent and mandate that whatever funds are necessary to recover the missing e-mails come out of the OA's budget and not that of NARA.

We also urge you to include report language mandating that a recovery plan, including specific deadlines and costs, be provided to the Appropriation Committees as soon as possible after an appropriations bill or continuing resolution is enacted later this year. Congress must ensure that the White House is held accountable for this situation before January 20, 2009, the day the responsibility for these records, as they may exist on backup tapes, devolves on NARA. Under no circumstances should the National Archives be forced to bear the financial burden for the mismanagement of the Bush administration in failing to carry out its legal responsibilities to preserve these vital presidential records.

3. **Funding for Hiring Additional Archival Staff.** We were pleased to see that the President's request includes an additional $1.6 million to add 15 archivist positions to the Presidential Library system. The recent controversy over the release of Senator Hillary Rodham Clinton's papers from her time as First Lady brought to public attention the need for additional archival staff to address the enormous backlog of materials that need to be processed not only at the presidential libraries but also throughout NARA. If appropriated, these additional funds, along with the $800,000 in funding this Subcommittee added last fiscal year to hire additional archivists, will begin to address the problem of under-staffing at NARA.

Unfortunately, the reality is that NARA's archival staffing level has remained stagnant for many years while the number of records that need to be processed has continued to grow exponentially as the use of electronic records has proliferated. While it is unrealistic to think that the staff shortage will be solved in a single fiscal year, we are encouraged by the fact that that the problem has been recognized and is being incrementally addressed. We hope that additional funding will be provided over the next few years to continue to remedy NARA's archival staff shortage.

4. **Repairs & Restoration:** We are disappointed to see the dramatic $20 million cut in NARA's FY 2009 proposed budget for Repairs and Restoration down to a level of $9.2 million. Report language to the FY 2008 appropriation for NARA states:

   > NARA is directed to update its comprehensive capital needs assessment for its entire infrastructure of presidential libraries and records facilities. The fiscal year 2008 President's Budget provided funding for ongoing repairs only to records facilities, leaving presidential libraries-some of which are in major disrepair-sorely in need of support and at risk for flooding and other potential dangers. The Appropriations Committees urge that the fiscal year 2009 President's Budget include funding for both records facilities and presidential libraries.

   Despite this clear mandate from the House and Senate Appropriations Committees, the Administration has chosen to cut funding for the restoration of facilities already in the Presidential Library system while at the same time expending funds elsewhere in NARA's budget to prepare for the George W. Bush Presidential Library.

   A perfect example of the maintenance needs faced by some presidential libraries is the Franklin D. Roosevelt Presidential Library and Museum in Hyde Park, New York. The FDR presidential library was the first, and is the oldest, in the presidential library system. Much of the library's infrastructure such as heating and air conditioning, as well as fire safety and security systems are dangerously out-moded and violate industry standards for the preservation of archival materials. The electrical wiring dates back to the library's opening in 1941, the basement often floods due to an ancient septic system and the roof and flashing leak.

   We urge this Subcommittee to disregard these proposed cuts in NARA's Repairs and Restoration budget and to provide adequate funding to restore the presidential libraries that are already in NARA's system.

5. **Office of Government Information Services (OGIS):** Late last year, President Bush signed into law the "Open Government Act of 2007" (Public Law 110-175). The law requires the establishment of an Office of Government Information Services within the National Archives and Records Administration. Within that office a Freedom of Information Act (FOIA) ombudsman is to be appointed to review agency policies and procedures, audit agency performance, recommend policy changes, and mediate disputes between FOIA requestors and agencies.

   Unfortunately, when President Bush sent his proposed FY '09 budget to Congress, no funding was included for the establishment of the OGIS at NARA. Instead, the President proposed language to move OGIS to the Department of Justice, and to repeal the language in the Open the Government Act placing OGIS at the National Archives.

   Congress's intent on this was clear when it passed the law and the White House should not be allowed to capriciously remove this statutory responsibility from NARA. There is

an inherent conflict of interest in placing the OGIS at the Department of Justice. We urge you to provide the funding necessary to establish the OGIS at NARA

6. **"Snapshot" of Federal Agency Websites:** In the weeks since the Subcommittee's NARA's appropriations hearing on April 1st, a situation has arisen that we feel merits your attention. NARA recently announced a decision to not capture and preserve a "snapshot" of government web pages at the end of the current Administration as it previously did in 2001 and 2005. Federal websites are federal records and, therefore, must be treated as such and preserved appropriately. NARA also captured House and Senate public web sites as they existed prior to December 11, 2006, at the end of the109th Congress (2006). A precedent, thus, has been clearly established for this important method of preserving a moment in our country's history.

   In recent weeks, NARA has issued two memorandums stating the reasons for this decision:
   - Lack of resources;
   - There is no requirement that agencies perform a snapshot if NARA does not do so;
   - Existing, private entities such as the Internet Archive (www.archive.org) already record federal web pages; and
   - NARA does not consider such a project to possess enough historical value to warrant conducting and preserving a government-wide web snapshot.

   The work of organizations like the Internet Archive, while valuable, does not supplant the responsibility of our national government to protect and document its own history. Depending on private, non-profit organizations to preserve our Nation's digital history poses serious future risks. A NARA snapshot of federal agency web sites at the end of an Administration is as critically important as the snapshots of the White House and Congressional web sites, both of which NARA has said it will perform at the end of this year.

   A snapshot of federal web pages is, indeed, of great historical value. They provide the public with an image and understanding of the government at a particular point in time that can be then compared and contrasted with other such images over Administrations. As Congress and Federal agencies continue to perform more of their work online, proactive and detailed digital archiving is essential for public awareness and government accountability.

   While NARA claimed a lack of resources as part of the rationale for not performing this snapshot, the agency did not provide a cost estimate. As a result, we cannot request a specific figure for you to fund for this effort. Nonetheless, we urge you to require NARA to continue its web-harvesting program by archiving a snapshot of all federal web pages at the end of the current presidential term. Not capturing federal web sites now may mean losing millions of pages created during the Bush administration. Allowing such a loss is contrary to the core mission of the National Archives and Records Administration.

7. **Electronic Records Archive (ERA):** We feel that the Electronic Records Archive program merits the increased funding proposed by the President in his FY 2009 budget. However, we share the concerns that members of this Subcommittee have expressed about the ERA program remaining on schedule and budget. This program is vital not just to NARA but also to the entire federal government and the historical and archival communities. We were encouraged by the testimony provided by Dr. Weinstein and his senior staff that payment is now being tied to the contractor meeting specific performance milestones. We are confident that this Subcommittee will continue its vigorous oversight of the ERA program and ensure that it comes on-line later this year.

Again, thank you for the opportunity to provide this testimony regarding NARA's budget for FY 2009, and for your past strong support for its mission of preserving our Nation's history.

Sincerely,

Lee White
Executive Director
National Coalition for History

TESTIMONY SUBMITTED FOR THE RECORD TO THE SUBCOMMITTEE ON FINANCIAL SERVICES & GENERAL GOVERNMENT APPROPRIATIONS, U.S. HOUSE OF REPRESENTATIVES

BY JESSICA JONES IRONS – EXECUTIVE DIRECTOR, NATIONAL HUMANITIES ALLIANCE

REGARDING FISCAL YEAR 2009 FUNDING FOR THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION AND THE NATIONAL HISTORICAL PUBLICATIONS AND RECORDS COMMISSION

APRIL 30, 2008

Chairman Serrano and Members of the Subcommittee:

This testimony is submitted on behalf of the National Humanities Alliance (NHA) in support of increased funding for the National Archives and Records Administration (NARA) for fiscal year 2009. We support the Administration's proposed increase in FY 2009 of $12.78 million for NARA's operating expenses and $8.98 for the Electronic Records Archives (ERA). We urge Congress to fully fund the President's request for these accounts. However, we strongly oppose the President's proposed elimination of the National Historical Publication and Records Commission, NARA's grant-making arm. We urge Congress to restore funding for this program at a level of at least $10 million for national grants, and $2 million for staffing.

NARA Operating Expenses

The President has requested $404 million for NARA's FY 2009 budget, including $327.78 million for operating expenses. This represents an increase of $12.78 million for operations over the previous fiscal year, including $6.86 million for inflationary costs. The remaining increase will enable NARA to supplement staff needed to process and declassify Presidential records, prepare for the George W. Bush Presidential library, and improve security. We see this as the ***minimum*** increase necessary for the National Archives to carry out its mission of "ready access" to essential records that document the rights of citizens, the actions of government, and our nation's history.

Over the last decade, the volume of material generated by the Federal government, particularly electronic records, has increased dramatically. We are concerned that without additional resources–and despite the best efforts of the National Archives to cut costs and increase efficiencies–NARA will continue to fall behind in its ability to process and provide access to government records.

In recent years, NARA's Presidential Library system has been unable to keep up with overall demand for records, processing of Freedom of Information Act (FOIA) requests, or review of records for declassification. The Reagan and Bush Presidential libraries, for example, estimate that the backlogs of requests now average five years for classified records and four years for unclassified records. In 2006, the first year that the Clinton administration's records became subject to the FOIA, the Clinton Library received 336 requests involving 9.6 million pages of textual records. The Archives is now preparing for the largest transfer of electronic records in

its history from the George W. Bush administration in January, 2009. We support the administration's request, at a minimum, for an additional 15 FTE's for Presidential records processing and declassification, and 24 FTE's to staff and operate the Bush Presidential Materials Project. NARA is experiencing a significant backlog of unprocessed records from *all* branches of government, not just Presidential records. The Archives has stated unambiguously that without a significant increase in staff resources to process and declassify materials, the volume of records unavailable to the public will continue to grow.

The humanities community has strongly supported the mission of the National Archives since it was established by Congress in 1934. Policymakers, scholars, journalists, filmmakers and others use the records maintained by NARA to enhance public understanding and evaluation of our civic institutions, the decisions of our leaders, and the experience of our citizens. As a nation, we rely on the research and analysis made possible by NARA to hold government accountable to the people, and to make better decisions for the future. There is great demand for NARA materials. During FY 2007 alone, the National Archives responded to 1.2 million written requests, and served over 135,000 researchers in Washington, DC, and around the country. We deeply appreciate the increase provided by Congress in FY 2008 to restore research hours in NARA facilities that had been cut in 2006, and are pleased that the funding proposed by the Administration for FY 2009 will allow current research hours to be maintained.

National Historical Publications and Records Commission

For the fourth year in a row, the National Historical Publications and Records Commission (NHPRC) has been zeroed out in the President's budget request. We strongly urge Congress to restore funding for NHPRC in FY 2009 at a level of $12 million, including $10 million for grants and $2 million for administration of the program (an increase of $2.5 in grant funds over FY 2008). This amount would bring funding for NHPRC grants to the fully authorized level of $10 million, last reached in FY 2004. We deeply appreciate Congress' restoration of funding for NHPRC in FY 2008 and recent years.

The NHPRC is the grant-making arm of NARA established in 1964 to promote preservation and access to America's documentary heritage. While it is a relatively small program, the NHPRC is a vital component of the National Archives. Over the last forty years, NHPRC has made grants to more than 4,200 state and local archives, colleges and universities, libraries and historical societies, and other non-profit organizations. This funding has:

- supported online and text publication of historical records
- preserved thousands of historical collections
- increased public access and use of archives and records
- trained scores of archivists and documentary editors

Produced under modern, rigorous documentary editing standards, NHPRC-supported publication projects make important materials, including papers and other documents from all periods of American history, more accessible to an ever-widening audience. Since its founding, the Commission has sponsored 296 publications projects, which have produced nearly 900 volumes and over 9,000 reels of microfilm. These projects have provided the backbone of research further utilized by scholars, students, teachers, documentary filmmakers, museum curators,

genealogists, and the general public. Books such as Stephen Ambrose's *Undaunted Courage* (based on the journals of the Lewis and Clark expedition) and David McCullough's biography of *John Adams* would not have been possible without the annotated editions that result from NHPRC grants.

NHPRC awards, which require significant cost-sharing on the part of grantees, enable institutions to leverage federal dollars with significant, non-federal contributions (almost 50%, on average). The NHPRC grant helps to ensure funders that projects are of genuine significance, capably staffed, and well-organized. Loss of NHPRC funding will have a domino effect on grantees, causing funding from other sources to be withdrawn or reduced, making it impossible for work on many publication projects to continue.

We feel strongly that the NHPRC should be able to continue its important work in preserving and providing access to historical records, promoting regional coordination in matters related to archives (including disaster preparedness and handling of electronic media), and supporting professional development for archivists, records managers, and historical editors.

Electronic Records Archive

The President's FY 2009 Budget requests $67.01 million in funding for NARA's Electronic Records Archives (ERA), an increase of $8.98 million over the previous year. We strongly support the requested increase for ERA. Currently under development, the Electronic Records Archives will provide a rigorous system to capture the growing volume of electronic information and records generated by all branches of government, regardless of original format. Increased funding will enable the National Archives to process more electronic records, enroll more federal agencies in electronic records scheduling, and enhance public access to search and indexing features. The humanities community is especially interested in the benefits and implications of this new system for educators and researchers. We are encouraged that NARA reports that the new system will be prepared to handle the transfer of the Bush administration records in 2009.

Office of Government Information Services

In 2007, Congress passed the Open Government Act (P.L. 110-175), which established an Office of Government Information Services within the National Archives and Records Administration to oversee and improve compliance with the Freedom of Information Act. We are disappointed that the administration has not provided funding for this office in the Archives' FY 2009 budget. We urge Congress to provide additional funding to NARA for FY 2009 to ensure that the duties of the OGIS are carried out as called for in the Open Government Act of 2007.

Public Outreach and Education

The National Archives is perhaps best known to many Americans, through visits to Washington and popular culture, for its role protecting and displaying the Declaration of Independence, the Constitution, and the Bill of Rights. The National Archives expands its reach to Americans through a variety of public and educational programs that promote civic literacy and engagement.

The National Archives Experience in Washington, DC seeks to "open the stacks" of the Archives and enable millions of visitors to interact personally with the original records of our democracy through exhibits and learning experiences at the Archives on the National Mall. NARA is working to expand its reach beyond Washington through traveling exhibitions, programmatic partnerships with the Presidential Libraries and Archives Regional Facilities, technology initiatives, and expanded educational activities at partner sites across the country. For example, the National Archives is currently working with teachers and students around the country–through learning centers at many Presidential Libraries and a new center at the National Archives in Washington–to help them use primary documents to make the study of history and civics more engaging.

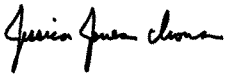
In FY 2007, the National Archives attracted nearly 220,000 participants to public programs, and hosted 2.9 million visitors at museum exhibits in Washington, DC and the Presidential libraries. The NARA website received 35 million visits.

Summary

The National Archives and Records Administration serves an extensive community, including: genealogists, family historians, veterans, academics, business and occupational researchers, publication and broadcast journalists, Congress, the Courts, the White House, public officials, Federal agencies, state and local government personnel, professional organizations, students, and teachers. The public and scholars benefit from the use of historical documents and records for a myriad of purposes including evaluation of government performance, academic study, the publication of books, production of documentary films, and museum exhibits. We praise NARA for its efforts to meet the growing and ever-changing challenges associated with securing, storing, and maintaining the records and facilities under its care.

Thank you for consideration of our request for increased funding for the National Archives in FY 2009. We appreciate the Subcommittee's support for our nation's documentary heritage through the National Archives and Records Administration.

Sincerely,



Jessica Jones Irons
Executive Director, National Humanities Alliance

The National Humanities Alliance *is a coalition of more than ninety leading nonprofit organizations and institutions dedicated to the advancement of education, research, preservation, and public programs in national and federal humanities policy. Its members include: scholarly and professional associations; higher education associations; organizations of museums, libraries, historical societies and state humanities councils; university-based and independent humanities research centers.*

April 30, 2008

Mr. Joseph Eaves
Government Affairs Representative
National Telecommunications Cooperative Association

Written Public Testimony for House Committee on Appropriations Subcommittee on Financial Services and General Government for Fiscal Year 2009

FY 2009 FEDERAL COMMUNICATIONS COMMISSION APPROPRIATIONS

The ubiquitous deployment of state of the art infrastructure that is capable of ensuring all Americans have access to the array of communications services that are essential to our national, economic, and personal security remains a critical national priority. The cornerstone of this policy is the federal Universal Service Fund (USF) which is the support mechanism that ensures cost recovery availability to those making the commitment to serve even the most remote, rural, and high-cost areas of our vast nation.

There are approximately 1,100 independent rural carriers throughout the United States. These providers rely on universal service funds to help recover the extremely high costs of connecting rural and geographically isolated areas of the country. USF support helps these independent carriers build and maintain the broadband-capable network infrastructure necessary to deliver advanced communications services.

Consequently, NTCA strongly urges policymakers to adopt the following specific Fiscal Year (FY) 2009 funding recommendation that are associated with the USF, as well as the FCC generally.

NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION
4121 Wilson Boulevard • Tenth Floor • Arlington, Virginia 22203
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Universal Service:

1. Support the retention of language that has been included in the annual FCC appropriations package for the past several years prohibiting the FCC from subjecting the USF to the Anti-Deficiency Act, which if not enacted could leave the program subjected to internal agency policies that would result in inefficiencies ultimately resulting in higher costs for consumers.

2. Support the retention of language that has been included in the annual FCC appropriations package for the past several years prohibiting the FCC from restricting the distribution of universal service support based upon a single primary line per premise. The program should continue on an inclusive basis that recognizes the need to deploy and maintain overall infrastructure instead of a piecemeal approach that may or may not deliver ubiquitous coverage.

3. Reject the President's budget proposal that envisions distributing universal service support on the basis of a reverse auction concept where the lowest bidder would receive support. The untested reverse auction concept leaves many questions unanswered. How to prevent bidders lacking a genuine commitment to the market from submitting unrealistically low bids to ultimately win the support even if the bid is inadequate to serve the market? What happens if the incumbent looses the auction? Will the incumbent be allowed to exit the market? Will they be able to recoup the cost of their stranded investment? NTCA fails to see how reverse auctions will help ensure such support is well-targeted, demonstrate results, and minimize burdens on ratepayers. Quite the contrary, just the opposite would likely occur if reverse auctions were implemented, leading to the potential for the sort of waste, fraud, and abuse that some mistakenly think exists under the current USF mechanism.

4. NTCA agrees that high standards and fiduciary responsibilities should accompany the privilege of participating in the universal service program. However, the association is concerned by the unwarranted and distrustful cloud certain policymakers have attempted to cast over this uniquely successful program. NTCA and its members recognize that audits and other safeguards are a necessary part of participating in a program of this nature, yet the overzealous nature of the dual audit process that has emerged over the past two years is ultimately damaging the ability of carriers to properly serve their consumers. It is also costing consumers and taxpayers alike unduly high amounts for what so far have been virtually a handful of minuscule administrative errors.

   In the President's FY09 budget proposal, the administration is requesting $25,480,000—or $4 million more than was appropriated in FY08—to continue an all out audit assault on the universal service programs. These funds are not derived from the general fund of the Treasury, but come right out of the pockets of telecommunications consumers that ultimately support the USF. In addition, these funds are over and above other regularly appropriated administrative funds for the FCC's Office of Inspector General, which are derived from the general fund of the Treasury.

We have heard reports from those involved in the audit oversight that often more than $150,000 is spent per audit, yet in the limited cases where there have been any underpayments or overpayments the amounts have been minuscule in comparison. The concentration of audits has grown rapidly during the past year from approximately 65 to a planned 400. The overriding majority of these audits have focused on incumbent carriers which already do substantial reporting and internal auditing, unlike the competitive sector of the industry, which is the source of the rapid growth in the program.

NTCA strongly urges the committee to carefully consider the levels of consumer and taxpayer dollars that are being devoted to this process which is completely out of sync with any ultimate findings that are emerging from the auditing process. We also strongly urge the committee to provide guidance to the FCC, its Office of Inspector General, and the Universal Service Administrative Company to review and revise their procedures that guide the conduct of these audits. Universal service recipients by their very nature are typically very small businesses and are forced to ignore their consumers in order to meet the unrealistic demands of the auditors, which typically mandate a very short turn around time for document production and scheduling. Conversely, the auditors often fail to subsequently keep in touch with the audited companies regarding the progress and ultimately conclusion of the audits.

The bottom line is that the auditing process must be a two-way street and should be based on identification of problems and subsequent remediation rather than on a preconceived, unfounded premise that there is waste fraud and abuse rampant throughout the program. This simply does not appear to be the case.

5. NTCA also remains very concerned with the preoccupation of the administration and the FCC with its current spectrum auction authority and its ongoing failure to adequately abide by the sections of the law that mandate unique consideration of small telephone company needs and interests in the acquisition of spectrum. NTCA is opposed to the administration's proposal to extend indefinitely the authority of the FCC to auction spectrum and believes the Congress should hold hearings on this issue to further investigate how the agency has repeatedly failed to meet its small business and rural telephone company consideration responsibilities under section 309(j) of the Communications Act of 1934.

Statement of Colleen M. Kelley

National President

National Treasury Employees Union

On

"Internal Revenue Service Budget for FY 2009"

Submitted to

House Appropriations Subcommittee on Financial Services and General Government

April 15, 2008

1750 H Street, N.W. • Washington, D.C. 20006 • (202) 572-5500

Chairman Serrano, Ranking Member Regula, and distinguished members of the Subcommittee, I would like to thank you for allowing me to provide comments on the Administration's FY '09 budget request for the Internal Revenue Service (IRS). As President of the National Treasury Employees Union (NTEU), I have the honor of representing over 150,000 federal workers in 31 agencies, including the men and women at the IRS.

IRS FY '09 Budget Request

Mr. Chairman, as you know, the IRS budget forms the foundation for what the IRS can provide to taxpayers in terms of customer service and how the agency can best fulfill its tax enforcement mission. Without an adequate budget, the IRS cannot expect to continue providing taxpayers with top quality service and will be hampered in its effort to enhance taxpayer compliance and close the tax gap.

While acknowledging that IRS employees continue to provide world class customer service and are more efficient than ever in collecting taxes and enforcing tax law, the Administration continues to put forth insufficient and unrealistic budget requests that fail to allow the service to meet its customer service and enforcement challenges.

Staffing levels are dramatically below 1995 levels.

The decline in IRS personnel, particularly enforcement staff, can be attributed to unrealistic budget requests, which since 2003, have contemplated internally generated savings or "efficiency savings" to help fund proposed increased staffing for enforcement. For FY '09, the budget request identifies "efficiency savings" of more than $94 million at the cost of almost 976 FTEs. If, as sometimes has been the case in previous years, IRS fails to realize all expected savings then the funds available for new enforcement personnel would be further reduced.

And although it's widely recognized that additional funding for enforcement provides a great return on the investment, the IRS has repeatedly told Congress that the IRS does not need any additional funding above the President' budget request.

Employee productivity is not the issue. Despite the significant decline in enforcement staff over the past ten years, enforcement revenue has increased significantly, reaching $59.2 billion in 2007, up from $48.7 billion in 2006 and an increase of $46 billion since 2000. The $59.2 billion in collections in 2007 represents a 5.6 to 1 return on investment for all IRS activities. In addition, earlier this year the IRS Data Book for 2007 was released which demonstrated that the IRS is one of the most efficient tax collection systems in the world, spending only 40 cents to collect $100.

Yet, between 1995 and 2007, the total number of employees has shrunk from 114,064 to 86,638. Even more alarming is that during that period, revenue officers and revenue agents – two groups critical to reducing the tax gap – have shrunk by 33 and 20 percent respectively. Revenue officers went from 8,139 to 5,468 and revenue agents fell from 16,078 to 13,026. These drastic cuts have come at a time when the IRS workload has increased dramatically. According to IRS's own annual reports and data, taxpayers filed 114.6 million returns in 1995. After a steady annual climb, eleven years later, the Service saw 134.4 million returns filed. In

addition, between 1997 and 2007, the number of individual tax returns with $100,000 in reported income, which are generally more complex returns, increased by 103 percent.

Unfortunately, instead of recognizing that the dramatic cuts to the IRS workforce are straining the ability of IRS employees to handle the increasing workload, the IRS has continued to reduce its workforce. Further exacerbating the dire staffing situation at the Service is the aging of the IRS workforce. Approximately 4,000 of its employees are retiring annually presenting the Service with the difficult challenge of replacing a large portion of its workforce each year and the institutional knowledge they take with them. These retirements of some of the Services' most experienced personnel will only further stress the current IRS workforce already straining under a rising workload.

Amazingly, IRS efforts to reduce the overall workforce have targeted some of the Service's most productive employees. These include the recent re-organization of the Estate and Gift Tax Program which sought the elimination of 157 of the agency's 345 estate and gift tax attorneys – almost half of the agency's estate tax lawyers—who audit some of the wealthiest Americans. The Service pursued this drastic course of action despite internal data showing that estate and gift attorneys are among the most productive enforcement personnel at the IRS, collecting $2,200 in taxes for each hour of work. It is difficult to understand why the IRS sought the elimination of key workforce positions in an area that could produce significant revenue to the general treasury.

In addition, the Service continues to move forward with its plan to close five of its ten paper tax return submission facilities by 2011. The IRS originally sought the closings of the five paper return submission centers due to the rise in the use of electronic filing (e-filing) and in order to comply with the IRS Restructuring and Reform Act of 1998 (RRA 98) which established a goal for the IRS to have 80 percent of Federal tax and information returns filed electronically by 2007. But the IRS recently reported that in 2007 just 57 percent of Federal tax returns were filed electronically and has previously acknowledged that it is getting harder to convert additional taxpayers to e-filing as those that might convert most readily have already done so.

The continued slow migration of taxpayers to e-filing recently caused the IRS Oversight Board to call on Congress to extend the 80 percent deadline to 2012 in its recent report to Congress on e-filing.

In addition, while the IRS has stated that it will achieve millions of dollars in cost savings as a result of the paper submission consolidation effort, an August 2007 report by the Treasury Inspector General for Tax Administration (TIGTA) found that the agency's business decision to consolidate sites did not even include a cost-benefit analysis *(TIGTA Report Number: 2007-40-165)*. Furthermore, the report found that the IRS had not adequately updated or monitored financial information on the personnel costs of consolidations and had included savings not attributable to site consolidation in some of its analyses. What is most disturbing is that while the IRS acknowledged some of the assumptions used to determine the consolidation plan may have changed, they refused to complete a cost-benefit analysis to determine if the existing plan is optimal or if alternatives need to be considered.

Mr. Chairman, while overall use of e-filing may be on the rise, it is clear that the number of taxpayers opting to use this type of return is not increasing as rapidly as the IRS had originally projected. Combined with the fact that the IRS consolidation strategy rests on an incomplete business plan which did not include any type of cost-benefit analysis, NTEU believes that the IRS should immediately postpone further site consolidations until a comprehensive cost-benefit analysis can be completed to ensure that the existing plan is optimal in terms of cost savings and benefits.

It is clear that drastic reductions in some of the agency's most productive tax law enforcement employees directly contradict the Service's stated enforcement priority to discourage and deter non-compliance. In addition, we believe these staffing cuts have greatly undermined agency efforts to close the tax gap which the IRS recently estimated at $345 billion. As Nina Olson, the National Taxpayer Advocate noted, this amounts to a per-taxpayer "surtax" of some $2,000 per year to subsidize noncompliance. And while the agency has made small inroads and the overall compliance rate through the voluntary compliance system remains high, much more can and should be done. NTEU believes that in order to close the tax gap and handle a rising workload, the IRS needs additional employees on the frontlines of tax compliance and customer service. In addition, we believe Congress should establish a dedicated funding stream to provide adequate resources for those employees.

NTEU Staffing Proposal

In order to address the staffing shortage at the IRS, NTEU believes the workforce should be gradually increased to its pre-1996 levels. Specifically, we support a 3 percent annual net increase in staffing (roughly 2,600 positions per year) over a five-year period to gradually rebuild the depleted IRS workforce to its pre-1996 levels from its current level of 86,638. Because it takes time and careful management to hire, train, and deploy qualified professional staff, consistent but modest annual increases are necessary. A similar idea was proposed by former IRS Commissioner Charles Rossotti in a 2002 report to the IRS Oversight Board. In the report, Rossotti quantified the workload gap in non-compliance, that is, the number of cases that should have been, but could not be acted upon because of resource limitations. Rossotti pointed out that in the area of known tax debts, assigning additional employees to collection work could bring in roughly $30 for every $1 spent. The Rossotti report recognized the importance of increased IRS staffing noting that due to the continued growth in IRS' workload (averaging about 1.5 to 2.0 percent per year) and the large accumulated increase in work that should be done but could not be, even aggressive productivity growth could not possibly close the compliance gap. Rossotti also recognized that for this approach to work, the budget must provide for a net increase in staffing on a sustained yearly basis and not take a "one time approach."

Adding staff to handle an increasing workload at the IRS is not a new concept. In its 2001 budget request, IRS asked for funding for the Staffing Tax Administration for Balance and Equity program (STABLE), an initiative aimed at restoring IRS staffing to mid-1990s levels and strengthening the Service's tax compliance and customer service functions. The STABLE initiative envisioned hiring nearly 4,000 new employees to help increase compliance and improve customer service. The proposal sought to boost staff in Field Offices, where IRS employees provide direct, in-person service to taxpayers, and Service Center/Call Sites, where service is typically provided via telephone and correspondence. Hiring requirements for the Field

Offices was to be determined based on projected workload in the office's geographic area, and existing staff capabilities. Conversely, Service Center/Call Site workload would be planned on a nationwide basis due to the nature of the work, and staffing allocations based upon physical space and local labor market conditions around the center in question.

Although such a staffing initiative would require a substantial financial commitment, the potential for increasing revenues, enhancing compliance and shrinking the tax gap makes it very sound budget policy. One option for funding a new staffing initiative would be to allow the IRS to hire personnel off-budget, or outside of the ordinary budget process. This is not unprecedented. In fact, Congress took exactly the same approach to funding in 1994 when Congress provided funding for the Administration's IRS Tax Compliance Initiative which sought the addition of 5,000 compliance positions for the IRS. The initiative was expected to generate in excess of $9 billion in new revenue over five years while spending only about $2 billion during the same period. Because of the initiative's potential to dramatically increase federal revenue, spending for the positions was not considered in calculating appropriations that must come within annual caps.

A second option for providing funding to hire additional IRS personnel outside the ordinary budget process could be to allow IRS to retain a small portion of the revenue it collects. The statute that gives the IRS the authority to use private collection companies to collect taxes allows 25 percent of collected revenue to be returned to the companies as payment, thereby circumventing the appropriations process altogether. Clearly, there is nothing magical about revenues collected by private collection companies. If those revenues can be dedicated directly to contract payments, there is no reason some small portion of other revenues collected by the IRS could not be dedicated to funding additional staff positions to strengthen enforcement.

While NTEU agrees with IRS' stated goal of enhancing tax compliance and enforcement, we don't agree with the approach of sacrificing taxpayer service in order to pay for additional compliance efforts. That is why we were disappointed to see that the President's proposed budget calls for a $31 million cut in funding for Taxpayer Assistance Center (TACs) at a cost of 262 FTEs. NTEU believes providing quality services to taxpayers is an important part of any overall strategy to improve compliance and that reducing the number of employees dedicated to assisting taxpayers meet their obligations will only hurt those efforts. It is clear that IRS employees are continuing to provide quality customer service to American taxpayers. 2007 year end data from the IRS shows that IRS' customer assistance centers met the 82 percent level of service goal, with an accuracy rate of 91 percent for tax law questions. And while these numbers show that employees providing taxpayer services are helping taxpayers understand and meet their tax responsibilities, more can and should be done.

Mr. Chairman, in order to continue to make improvements in taxpayer services while handling a growing workload and increasing collections, it is imperative to reverse the severe cuts in IRS staffing levels and begin providing adequate resources to meet these challenges. With the future workload only expected to continue to rise, the IRS will be under a great deal of pressure to improve customer service standards while simultaneously enforcing the nation's tax laws. NTEU strongly believes that providing additional staffing resources would permit IRS to meet the rising workload level, stabilize and strengthen tax compliance and customer service programs and allow the Service to address the tax gap in a serious and meaningful way.

Private Tax Collection

Mr. Chairman, as stated previously, if provided the necessary resources, IRS employees have the expertise and knowledge to ensure taxpayers are complying with their tax obligations. That is why NTEU continues to strongly oppose the Administration's private tax collection program. NTEU believes this misguided proposal is a waste of taxpayer's dollars, invites overly aggressive collection techniques, jeopardizes the financial privacy of American taxpayers and may ultimately serve to undermine efforts to close the tax gap.

NTEU strongly believes the collection of taxes is an inherently governmental function that should be restricted to properly trained and proficient IRS personnel. When supported with the tools and resources they need to do their jobs, there is no one who is more reliable and who can do the work of the IRS better than IRS employees.

As you know, in September 2006, the IRS began turning over delinquent taxpayer accounts to private collection agencies (PCAs) who are permitted to keep up to 24 percent of the money they collect. NTEU strongly believes the collection of taxes is an inherently governmental function that should be restricted to properly trained and proficient IRS personnel. NTEU believes this misguided proposal is a waste of taxpayer's dollars, invites overly aggressive collection techniques, jeopardizes the financial privacy of American taxpayers and may ultimately serve to undermine efforts to close the tax gap.

According to the IRS, in FY '07, the PCAs brought in just $32 million in gross revenue, far below original projections of up to $65 million. After deducting commission payments to the PCAs, the true net revenue from PCA (non-IRS) collection activity was just $20 million. Therefore, after spending $71 million in start up and ongoing maintenance costs through the end of FY '07, the IRS private tax collection program lost more than $50 million.

According to Nina Olson the National Taxpayer Advocate, the dismal performance of the private collectors is forcing the IRS to downwardly revise its original ten-year projections for the program. For FY '08, the IRS is now projecting gross revenues of just $23 million, despite projections as recently as last May indicating the program would bring in up to $127 million. In addition, despite assurances that the program would recover all start-up and maintenance costs by April of this year, the IRS is now projecting the program will not break even until late FY 2010.

NTEU also believes that sky high commission payments to the private contractors for work on the easiest to collect cases is unjustified and unnecessary. Under current contracts, private collection firms are eligible to retain 21% to 24% of what they collect. The legislation authorizing the program actually allows PCAs to retain up to 25% of amounts collected. These commission rates were never put up for competition. Before the initial bid solicitations went out, the IRS set commission rates at 21 to 24 percent of the revenue collected by contractors, denying bidders an opportunity to make offers on terms that would have resulted in the IRS getting a greater share of the collected revenue. Consequently, one of the companies that lost its bid for a contract filed a protest with GAO and noted in its bid protest that "offerors were given no credit for proposing lower fees than the 'target' percentages recommended by the IRS."

The problem of excessive commission rates was recently addressed by Congress in legislation overhauling the Department of Education's student loan program, which the IRS has consistently held up as a model for the IRS private collection program. Amid charges that student aid lenders have engaged in abusive and potentially illegal collection tactics including charging excessively high collection fees, coercing consumers into payment plans they could not afford and misrepresenting themselves as Department of Education employees, the House and Senate approved H.R. 2669, the "Higher Education Access Act of 2007," which lowers from 23 percent to 16 percent the amount of recovered money that private guaranty agencies contracted by the government can retain on defaulted loans.

Mr. Chairman, in addition to being fiscally unsound, the idea of allowing PCAs to collect tax debt on a commission basis also flies in the face of the tenets of the IRS Restructuring and Reform Act of 1998 (RRA 98) which specifically prevents employees or supervisors at the IRS from being evaluated on the amount of collections they bring in. But now, the IRS has agreed to pay PCAs out of their tax collection proceeds, which will clearly encourage overly aggressive tax collection techniques, the exact dynamic the 1998 law sought to avoid.

The fear that allowing PCAs to collect tax debt on a commission basis would lead to contractor abuse was realized when the IRS recently confirmed that that the agency had received more than five dozen taxpayer complaints against the PCAs, including violations of the taxpayer privacy laws under Code section 6103. At least one of those complaints was confirmed by an IRS Complaint Panel to be a serious violation of law. In addition, penalties totaling $10,000 have been imposed by the IRS on the PCAs for taxpayer violations. In one instance, private collectors made 150 calls to the elderly parents of a taxpayer after the collection agency was notified he was no longer at that address. And one of the three private contractors was dropped by the IRS for dubious practices despite the Service's previous assurance that its oversight would prevent abuse.

Mr. Chairman, NTEU is not alone in our opposition to the private tax collection program. Opposition to the IRS tax debt collection program has also been voiced by a growing number of major public interest groups, tax experts, two former IRS Commissioners as well as the National Taxpayer Advocacy Panel, whose members are appointed by the Internal Revenue Service (IRS) and the Treasury Department. In addition, the National Taxpayer Advocate, an independent official within the IRS previously identified the IRS private tax collection initiative as one of the most serious problems facing taxpayers and recently renewed her prior call for Congress to immediately repeal the IRS' authority to outsource tax collection work to private debt collectors.

Opposition to the program has also been growing within Congress. Since granting IRS the authority to use PCAs in the American Jobs Creation Act of 2004, the House of Representatives, with bi-partisan support, has twice passed language prohibiting the IRS from moving forward with its private collection initiative. In addition, last session, the House overwhelmingly approved two separate tax bills (H.R. 3056, the "Tax Collection Responsibility Act of 2007" & H.R. 3996, the "Temporary Tax Relief Act of 2007") that contain language that would repeal IRS' authority to use private debt collectors to pursue tax debts.

In the Senate, stand alone legislation (S. 335) introduced by Senator Byron Dorgan (D-ND) that would force the IRS to immediately and permanently suspend its plan to outsource part

of its tax debt collection responsibilities to PCAs and prohibit the use of any IRS funds for that purpose has 24 co-sponsors.

Mr. Chairman, instead of rushing to privatize tax collection functions which jeopardizes taxpayer information, reduces potential revenue for the federal government and undermines efforts to close the tax gap, NTEU believes the IRS should increase compliance staffing levels at the agency to ensure that the collection of taxes is restricted to properly trained and proficient IRS personnel.

The IRS already has a significant collection infrastructure with thousands of trained employees, including fourteen Automated Collection System (ACS) sites which allow the IRS to contact taxpayers by telephone and collect delinquent taxes. The ACS function is a critical Collection operation, collecting nearly $1.49 million per employee per year. The IRS itself has analogized the use of private collectors to the ACS, where IRS collection representatives interact with taxpayers on the telephone. But unlike the private collectors, ACS personnel are able to analyze financial statement information, research assets, enter into installment agreements, make currently not collectible determinations, and can take lien and/or levy enforcement actions. ACS employees also receive training that is far more comprehensive and rigorous than that of the private collectors. In addition, these employees undergo mandatory annual training on topics such as confidentiality and privacy of taxpayer information, ethics awareness, taxpayer rights and computer security.

Unfortunately, inadequate staffing at ACS sites has prevented the IRS from using its current systems to proactively contact taxpayers by telephone to resolve delinquent accounts. The need for the IRS to expand ACS' use of outbound calls has been recognized by IRS management and at least two recent internal IRS study groups have recommended making more outbound calls as a way to make the ACS operation more effective and efficient.

Mr. Chairman, according to the IRS they will spend $7.65 million to run the private collection program in FY '08. NTEU believes that instead of continuing to expend valuable IRS resources on this failed program, this $7.65 million should instead be used to fund roughly 102 additional ACS employees that could return more than $151 million to the Treasury annually. By comparison, the IRS is now projecting the PCAs to bring in just $23 million in gross revenue in FY '08, far less than its original estimate of up to $127 million.

NTEU believes that increasing the number of ACS personnel would allow the IRS to maximize its ability to proactively resolve delinquent accounts by contacting taxpayers directly. This would also help ensure that the high level of customer service to those taxpayers who call the ACS seeking account resolution is preserved. The IRS has acknowledged that ACS employees are already performing admirably noting that in 2006, ACS customer service and quality ranged between 89.5 to 99.5 percent *(pg. 54 - IRS response to Olson '06 Report to Congress)*. These exceptional ratings are all the more impressive when you consider ACS employees generally work on much more complex and often contentious cases than those being worked by the private collectors and that the total number of cases worked by ACS employees dwarfs those worked by the private collectors.

Mr. Chairman, NTEU understands and commends efforts to ensure that all taxpayers pay their fair share of taxes. Without a doubt, rank and file IRS employees are committed to achieving this goal in the most cost-effective manner while providing a high level of customer service to American taxpayers. But the facts make clear that the use of private tax collection companies is not in the best interest of American taxpayers, could potentially undermine future efforts to close the tax gap, and should be terminated immediately.

A number of other issues important to NTEU members are often addressed in the FSGG Appropriations bill and I would like to address some of them here.

Pay Raise

The Federal Employees Pay Comparability Act (FEPCA), enacted in 1990 to close the gap between federal and private sector pay, has never been fully implemented. As a result, there is now a 23% disparity between federal employees and their private sector counterparts. Under the President's plan, federal employees will fall even further behind the private sector.

The Administration's budget proposed a 2.9 percent pay raise for federal workers next year. This not only fails to recognize the important role of our Nation's workforce, it is below the 3.4 percent pay raise the President recommended for the military. The Administration's recommendation ignores the essential role of federal employees in protecting our nation at the borders, in the domestic and international movement of money, in public health, in nuclear security, and in the collection of revenue among others. Further, it ignores the longstanding principle of pay parity, the recognition that federal civil servants and their brothers and sisters in the military, work side by side and should receive an equal level of pay increase. Importantly, pay parity was just reaffirmed on March 13, 2008, in House of Representatives when it passed H. Con Res. 312, the FY 2009 budget resolution. I urge the subcommittee to report its bill in keeping with this pay parity principle.

For most of the last twenty years, government employees in civil service and military personnel have received the same level of pay increase. Last year, both the military and federal civil servants received a 3.5 percent pay raise in the final FY 2008 bills. That amounted to the annual raise in the Employment Cost Index (ECI) plus one-half percent, the standard pay figure received in every year of the current Administration with the exception of 2007. For 2009, the current raise in the ECI as calculated by the Department of Labor is 3.4 percent, and an extra one-half percent equals 3.9 percent. NTEU urges the subcommittee to follow the precedent of ECI plus one-half percent and report legislation for FY 2009 providing a 3.9 percent raise to federal employees. We will be working with the appropriate committees to enact a military raise of the same level.

SEC Pay

NTEU represents the employees of the Securities and Exchange Commission (SEC). We believe that the SEC must be provided with adequate resources to ensure that its performance based pay system can be a viable tool for employee retention and recruitment. While there have been numerous problems with this pay system, adequate funding is essential. From FY2002 to FY2005, the SEC budget included a 3% increase over current compensation levels to fund the

performance pay system. However, for the past two years, the SEC's budget has included only a 2% increase. This year, the President has only requested a 1.5% increase. The continuing performance pay funding crisis has hamstrung SEC managers' ability to provide meaningful and appropriate performance based salary increases to their employees. As budget shortfalls have shifted the system from being fundamentally performance based, some senior managers at the SEC have sent notices to their employees stating that they are being given lower ratings not for performance reasons but because of budgetary limitations. This state of affairs is having severe and negative impacts on employee morale and retention at SEC, contrary to the stated purpose of the performance pay system. NTEU would ask for an additional $5 million in funding for the SEC for this purpose.

OPM Prescription Drug Subsidy

Mr. Chairman and members of the subcommittee, it is NTEU's position that OPM should apply for the drug subsidy to which it is entitled under the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (P.L. 108-173). Under this law, which created the Medicare Part D prescription drug program, the government, as an employer, is eligible to receive a subsidy payment made available to all employers that provide prescription drug benefits as generous as the Medicare program. The "Medicare employer payment" was designed to encourage employers to retain such benefits.

According to GAO, if OPM had applied for the subsidy, it would have lowered the average 2006 FEHBP premium by 2.6 percent. Some of the individual health plans that serve a high number of retirees could have realized a slowdown in premium growth by as much as 3.5 to 4 percent. These savings could have been passed on to keep the enrollee portion of the premium down. Unfortunately, estimates are that OPM has have left more than $1 billion on the table by forgoing the subsidy. NTEU would support legislative language require OPM to apply for the subsidy, which would help keep FEHBP costs down for millions of federal employees and their families who are enrolled.

Contracting Out

Another issue pertinent to the Subcommittee's jurisdiction is the contracting out of government positions and responsibilities. I want to commend and thank the subcommittee for incorporating important privatization language in its portion of the FY '08 Omnibus Appropriations bill to help level the playing field for federal employees.

Unfortunately, the Administration's FY '09 budget request has called for the repeal of these important provisions. We strongly urge congress to oppose any efforts to repeal these important provisions that allow federal employees the ability to fairly compete with the private sector.

In addition, NTEU strongly supports making government wide a number of additional contracting out reforms included in the FY '08 Defense Authorization Bill which currently only apply to the Department of Defense. These include provisions that would encourage "insourcing" by providing employees government wide the opportunity to compete for new work or work currently performed by contractors, allow government employees to acquire new work

by allowing agencies to bring work in-house without going through the A-76 process, eliminate the automatic recompetition requirement which previously only applied to federal employees and not contractor employees, and establishment of a contractor inventory in every government agency to track the cost and performance of every service contract to help identify contract work that could be converted to performance by federal employees.

By making these important contracting out reforms applicable to the entire federal workforce, congress can help bring fairness and accountability to the entire competitive sourcing process. NTEU firmly believes that federal employees are the best value for taxpayers' dollars and they deserve a fair and level playing field on which to demonstrate their effectiveness and efficiency to the White House, Congress and the American public.

Conclusion

Mr. Chairman, while federal workers, and in particular IRS employees, continue to get mixed signals regarding their value to this Administration, they remain committed to serving the American public to the best of their abilities. With the expected surge in federal retirements in the coming years, it is imperative that the federal government do all it can to retain the hundreds of thousands of talented public servants who have the knowledge and expertise to continue contributing to the federal workforce while at the same time preparing to compete for the best and brightest of the young new workers.

Therefore, NTEU believes it is imperative that the Administration reverse many of its policies that have devalued the role of federal employees and the work that they do including the failure to pay competitive salaries and the constant focus on downsizing and outsourcing. These misguided policies have reduced morale of federal employees government-wide and have put the federal government at a disadvantage when it comes to attracting, developing and retaining qualified employees.

Tuesday, April 15, 2008

OMB Watch would like to submit the report, "Bridging the Tax Gap: The Case for Increasing the IRS Budget," into the record for the Committee on Appropriations Subcommittee on Financial Services and General Government hearing on IRS FY 2009 budget on April 15, 2008.

OMB Watch supports efforts by the IRS to close the so-called "tax gap," and believes increased funding of the IRS budget is a necessary condition to achieving this goal. The $4.6 billion appropriated to the IRS's enforcement budget in FY 2008 is less than the 1995 IRS enforcement budget (in inflation-adjusted terms). As the enforcement budget was cut, the IRS saw the number of tax returns filed increase 11 percent from 205 million in 1995 to 228 million in 2006 (the last year for which such data are available).

In addition to the amount of resources available to the IRS, also of concern are the means by which the IRS enforces tax laws. The use of private tax collectors not only exposes taxpayer data to private firms, but when compared to federal tax collectors, private collectors are extremely inefficient. Use of federal employees for tax collection results in a 13:1 return-on-investment (ROI) ratio ($13 dollars collected for each dollar spent), while private tax collectors achieve an ROI of 4.5:1. That the IRS would continue this program represents an egregious mismanagement of tax collection resources.

OMB Watch also believes better targeting of audits and the types of audits performed would enhance the IRS's ability to close the tax gap. Although the overall audit rate has seen a slight increase in recent years (a positive development, to be sure), that increase has been largely constituted of increases in correspondence audits. Compared to face-to-face audits, correspondence audits result in lower revenue yields. Whereas correspondence audits of individuals earning over $100,000 per year result in about a $32,000 increase in identified tax liability, face-to-face audits yield, on average, about $55,000.

Additionally, the IRS has been spending too much time auditing low-income Americans. Forty percent of all audits performed in 2006 were of taxpayers claiming the EITC, resulting in a 2.25 percent audit rate for EITC claimants – more than double the 1.0 percent rate for all taxpayers. With an average yield of $2,895, EITC-return audits have the lowest rate of return of any audit conducted by the IRS. That so many IRS resources are devoted to these low-yield audits underscore the depth of inefficient enforcement practices.

Instead of employing this punitive approach to closing the tax gap through EITC compliance, the IRS should increase resources devoted Taxpayer Assistance Centers (TAC) to increase EITC return accuracy. TAC-prepared EITC returns reduce overpayments by $640-$1,300. However, the number of TAC-prepared returns have been declining as TACs experience staffing shortages. By increasing resources devoted to TACs, the IRS would not only reduce the tax gap, but would expand much-needed services to low-income taxpayers.

Celebrating 20 years: Promoting Government Accountability and Citizen Participation - 1983 - 2003.

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These important tax enforcement issues, and others, are explored in greater detail the report we are submitting. We hope this will help raise awareness of the importance of addressing enforcement issues at the IRS and that the committee will use the findings of this report in formulating IRS legislation.

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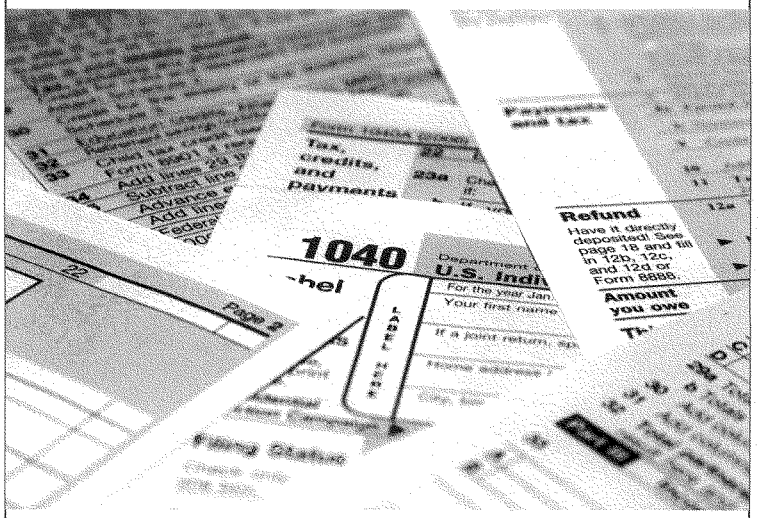
January 2008

Bridging the Tax Gap

The Case for Increasing the IRS Budget



OMB WATCH

Acknowledgements

Matt Lewis, a Federal Fiscal Policy Analyst, conducted the primary research and writing of this report, with assistance from Adam Hughes, Director of Federal Fiscal Policy. Other OMB Watch staff provided advice and research support. Brian Gumm, Communications Coordinator, provided editorial support and designed the report.

OMB Watch is a nonprofit research and advocacy organization whose core mission is increasing government accountability and improving citizen participation. Responsible, fair, and equitable budget and tax policy has been an important part of our work for more than 20 years, and we have practical experience in promoting and informing the public on budget and tax legislation and regulations.

This report is available electronically at:
http://www.ombwatch.org/budget/irstaxgap2008.pdf

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Introduction

A significant and pernicious problem facing the nation is the tax gap, the difference between what is owed in taxes and what is paid. Estimated to be over $300 billion annually, the tax gap represents an enormous revenue loss for the government. This lack of revenue often causes unnecessary increases in annual deficits and the national debt, increasing national interest payments and adding pressure to cut vital government services. Unfortunately, much of the gap must be made up eventually by honest taxpayers through higher taxes and by beneficiaries of federal investments through service cuts.

The Internal Revenue Service (IRS) is responsible for enforcing tax laws and collecting taxes, and therefore, it has the greatest capacity and responsibility to reduce the tax gap. The extent to which the IRS can influence the tax gap is mostly a product of the resources and powers lawmakers in Congress provide the agency and how well IRS administers those resources and powers.[1]

Congress has given considerable lip service to doing something about the tax gap for years but has done little to actually give the IRS the tools to make significant progress in closing it. Despite this fact, Congress has demanded the IRS close the tax gap without making more resources available for the agency to do so. Thus, the IRS has been forced to make difficult choices as to how to use the limited resources it has been allocated. As a result, at the very least, the tax gap remains a large problem, and most experts believe it has probably increased in size as the IRS has largely scaled back tax law enforcement over the last ten years.

The IRS can reduce the size of the tax gap – progress that would yield billions in additional revenue each year. In order to accomplish this, Congress and the IRS will need to invest more in three areas of the IRS budget: audits, collections, and tax preparation services for low-income taxpayers eligible for the Earned Income Tax Credit. With sufficient resources, the IRS should be able to implement effective and efficient tax enforcement policies and programs that will have a real impact on reducing the tax gap.

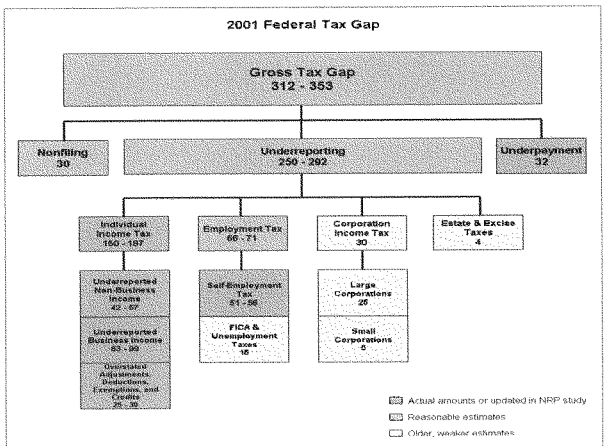
[1] Significant changes to tax laws have reduced the IRS's influence over tax enforcement, and many proposals have been made to increase tax compliance with authorizing legislation. For one in-depth overview, see Max Sawicky's *Bridging the Tax Gap: Addressing the Crisis in Federal Tax Administration* (Washington, DC: Economic Policy Institute, 2005).

The $300 Billion Problem: The Tax Gap

IRS defines the tax gap in two ways. The *gross* tax gap is the total amount of taxes that were not paid when tax returns were first filed, while the *net* tax gap consists of taxes that are not paid after the IRS takes steps to enforce tax laws. The most recent data on the gross tax gap comes from the IRS National Research Project, which evaluated tax returns from FY 2000. It put the gross tax gap at between $312 billion and $353 billion annually, or about 16 percent of all taxes owed. Although the precentage of the economy the tax gap represents has not changed significantly, the absolute size of the gross tax gap has in all likelihood grown in step with the economy.[2] Most of the tax gap results from taxpayers underreporting their income.

It is unclear, however, how much the tax gap has increased as a percentage of the total amount of taxes owed. In the last two decades, IRS has only measured the tax gap three times. Each time, it found the tax gap represented between 16 and 20 percent of total revenues owed.[3] On the other hand, anecdotal evidence, particularly the work of Pulitzer Prize-winning journalist David Cay Johnston, suggests the tax gap has grown as wealthier taxpayers have responded to and requested reductions in the IRS enforcement presence.

In any case, the IRS can influence both the net and the gross tax gap by encouraging and requiring tax compliance. The IRS recovered $48.7 billion of the tax gap in FY 2006, which, coupled with late payments, brought the net tax gap to between $257 billion and $298 billion.[4] Enforcement efforts also have a strong impact on the gross tax gap, because voluntary compliance tends to increase when enforcement programs are more active. More enforcement increases the fear of being audited and perhaps heightens the public sense of civic responsibility, both of which are thought to promote voluntary compliance. But the exact extent of the impact is subject to debate. Some studies have found the increase in voluntary compliance is many times greater than the money the IRS directly recovers through enforcement programs.[5]



Source: Internal Revenue Service, New IRS Study Provides Preliminary Tax Gap Estimate

[2] Internal Revenue Service, "New IRS Study Provides Preliminary Tax Gap Estimate," http://www.irs.gov/newsroom/article/0,,id=137247,00.html (accessed October 10, 2007).

[3] Eric Toder, "Reducing the Tax Gap: The Illusion of Pain-Free Deficit Reduction," Urban-Brookings Tax Policy Center, http://www.taxpolicycenter.org/UploadedPDF/411496_reducing_tax_gap.pdf (accessed October 10, 2007).

[4] Internal Revenue Service, "IRS Enforcement Activities Continue To Recover," http://www.irs.gov/pub/newsroom/11-06_stat_charts.pdf (accessed October 10, 2007).

[5] Eric Toder, "Reducing the Tax Gap: The Illusion of Pain-Free Deficit Reduction," Urban-Brookings Tax Policy Center, http://www.taxpolicycenter.org/UploadedPDF/411496_reducing_tax_gap.pdf (accessed October 10, 2007).

Impact of the Tax Gap

The tax gap affects the public in two ways. Mainly, it reduces what compliant taxpayers *already* have. Because this revenue is intended to be collected and used by the government, not collecting it makes implementing government services and investments more difficult. The existence of the tax gap is kind of like a recuring and permanent tax cut, in the sense it generally must be paid for by either shifting the tax burden to others (in this case, compliant taxpayers), curtailing government services, or increasing debt. The IRS National Taxpayer Advocate (NTA), for example, has testified before Congress that unpaid taxes shift the tax burden onto compliant taxpayers. If all compliant taxpayers were to assume an equal portion of the tax gap, it would add $2,200 to their annual tax bills.[6] Looked at another way, if the IRS eliminated the tax gap, Americans could receive the same level of services and programs while paying significantly less in taxes. The actual impact of the tax gap on the taxes paid by each individual most likely depends on personal circumstances and future policy decisions.

But unlike a tax cut, the tax gap creates a patently perverse set of winners and losers – taxpayers who do not follow the law benefit and taxpayers who do lose out. Larger burdens also tend to fall on lower- and middle-income taxpayers, whose compliance rates are higher than other income levels. Higher-income taxpayers, small business owners, and corporations are the main beneficiaries, as their compliance rates are lower. Because of this, on the whole, the tax gap makes the tax code less progressive than the statutory structure indicates, though by exactly how much has not been quantified.[7]

Secondly, and perhaps more importantly, the tax gap reduces what the public *could* have. The tax gap deprives the government of more revenue to finance the expansion of government services and investments, a reduction in the annual deficit, or payments to reduce the national debt. If the tax gap were reduced or eliminated, the additional revenue brought into the government would, in most circumstances, make the tax code much more progressive. There are surely many different proposals about how to invest the revenue owed, but regardless of how the $300 billion would be used, the federal government is never afforded the opportunity to decide.

On a less practical, but equally important level, the tax gap also represents the eroding integrity of the tax system and could reduce public support for the federal government. Such a large amount of unpaid taxes makes the tax system appear ineffective and unfair, since the tax gap regressively favors wealthier people and businesses who have the means to avoid and evade tax law. These perceptions of unfairness in the tax system may have large-scale effects on public policy, undermining public confidence in government as a fiscal manager.[8] Compliant taxpayers may also object to tax increases on the grounds they would be paid arbitrarily and regressively, and, as a corollary, new government services or investments financed by tax increases may receive less support. Taxpayers may also view ineffective tax enforcement as indicative of government incompetence generally and, therefore, oppose expansion of the government's role. Too many citizens may see no option but to favor tax cuts as a way to restore the integrity of revenue collection and protect themselves from bearing unjust burdens as compliant taxpayers.

[6] National Taxpayer Advocate, "National Taxpayer Advocate's 2006 Annual Report To Congress," Internal Revenue Service, http://www.irs.gov/advocate/article/0,,id=165806,00.html (accessed October 10, 2007).

[7] Jason Furman, Lawrence H. Summers, and Jason Bordoff, "Achieving Progressive Tax Reform in an Increasingly Global Economy," Brookings Institution, http://www3.brookings.edu/views/papers/furman/200706bordoff_summers.pdf (accessed October 10, 2007).

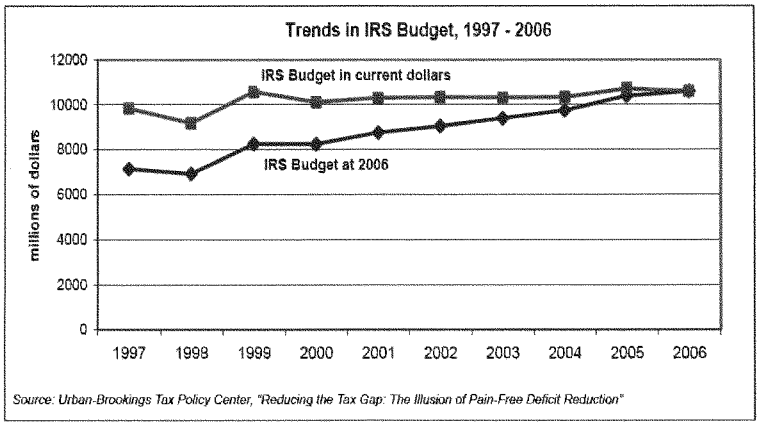
[8] Alison Kladec and Will Friedman, "Understanding Public Attitudes about the Federal Budget: A Report on Focus Groups," Public Agenda, http://www.publicagenda.org/research/pdfs/understanding_public_attitudes_about_the_federal_budget.pdf (accessed October 10, 2007).

A Primary Cause: Lack of Resources at the IRS

While it is widely established that increased resources at the IRS could help to reduce the tax gap, IRS funding levels have not kept up with growing demands on its budget. The total IRS budget has remained static after adjusting for inflation since the mid-1990s. The funding decline has been most pronounced in the enforcement account of the IRS budget, which includes funding for tax return examinations, tax collections, and document matching services that compare financial records with tax returns. In FY 1995, IRS had $4.43 billion in its enforcement account. By FY 2006, this budget had only risen to $4.65 billion – less than a five percent increase. During the same period:

- Inflation had eroded the value of this funding by 36 percent;[9]
- The size of the economy grew 42 percent;[10]
- The number of tax returns the IRS processed increased 11 percent, from 205 million to 228 million;[11] and
- Hundreds of changes to the IRS's authority and tax laws gave the agency more work.[12]

Experts inside and outside government have recognized the resource problem at IRS. IRS National Taxpayer Advocate Nina Olson, who operates independent of the IRS, believes funding shortages have become so problematic, she has called for the creation of special rules for IRS budget bills. Charles Rossotti, former commissioner of the IRS, told the IRS Oversight Board in 2002 that much of the tax gap is a result of the failure of Congress to provide enough resources for tax law administration:



Source: Urban-Brookings Tax Policy Center, "Reducing the Tax Gap: The Illusion of Pain-Free Deficit Reduction"

The source of this problem are two conflicting, long term trends: one, ever increasing demands on the tax administration system due to rapid growth in the size and complexity of the economy; and two, a steady decline in IRS resources due to budget constraints. The cu-

[9] Bureau of Labor Statistics. "Inflation Calculator," U.S. Department of Labor, http://www.bls.gov/cpi/ (accessed October 10, 2007).

[10] Bureau of Economic Analysis, "National Economic Accounts" U.S. Department of Commerce, http://www.bea.gov/national/index.htm#gdp (accessed October 10, 2007).

[11] Internal Revenue Service, "SOI Tax Stats -- IRS Data Books," http://www.irs.gov/taxstats/article/0,,id=102174,00.html (accessed October 10, 2007).

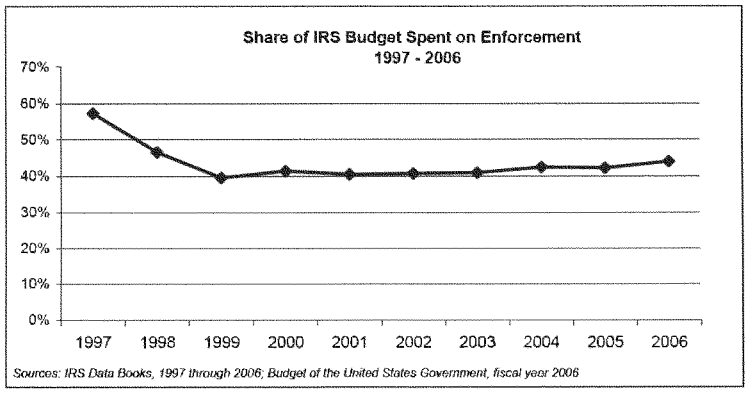
[12] Charles O. Rossotti, "Report to the IRS Oversight Board: Assessment of the IRS and Tax System," http://nteuirswatch.org/documents/numbers/Rossotti%2002%20report%20to%20oversight%20board.pdf (accessed October 10, 2007).

mulative effect of these conflicting trends over a 10-year period has been to create a huge gap between the number of taxpayers who are not filing, not reporting or not paying what they owe, and the IRS' capacity to require them to comply.

The resources crunch can be seen more apparently in staffing levels: the number of IRS employees is down sharply from ten years ago. Between 1995 and 2006, the total number of IRS employees shrunk 18 percent – falling from 114,000 to less than 92,000. The number of revenue agents and officers – IRS employees who perform audits – has decreased even faster, by 40 and 30 percent, respectively.[13] Those categories of employees have decreased from 8,139 to 5,665 for revenue agents and 16,078 and 12,859 for revenue officers.[14] Fewer staff at the IRS has a direct impact on the auditing function at the agency.

There have been many experts who have called for increased funding for the IRS, including the Treasury Inspector General for Tax Administration,[15] the Government Accountability Office,[16] the IRS Oversight Board, Max Sawicky, then of the Economic Policy Institute,[17] Robert McIntyre of Citizens for Tax Justice,[18] Eric Toder of the Urban-Brookings Tax Policy Center,[19] and former IRS Commissioner Donald C. Alexander.[20]

IRS needs additional funding to fulfill its mission as the guarantor of tax compliance. Where funding is needed most is in the IRS enforcement budget, particularly for audits of high-income taxpayers and corporations, the collection function, and services for low-income taxpayers who receive the Earned Income Tax Credit (EITC).



[13] Internal Revenue Service, "SOI Tax Stats -- IRS Data Books."

[14] Ibid.

[15] Treasury Inspector General for Tax Administration. "Trends In Compliance Activities Through Fiscal Year 2006," U.S. Department of the Treasury, http://www.treas.gov/tigta/auditreports/2007reports/200730056fr.html (accessed October 10, 2007).

[16] Michael Brostek, "Tax Compliance: Multiple Approaches Are Needed To Reduce The Tax Gap," Government Accountability Office, http://www.gao.gov/new.items/d07488t.pdf (accessed October 10, 2007).

[17] Max Sawicky, "Do-it-yourself tax cuts: The crisis in U.S. tax enforcement" in *Bridging the Tax Gap: Addressing the Crisis in Federal Tax Administration* (Washington, DC: Economic Policy Institute, 2005).

[18] Robert McIntyre, "Statement of Robert S. McIntyre Before the Senate Budget Committee, January 23, 2007," Senate Budget Committee, http://budget.senate.gov/democratic/testimony/2007/McIntyre_TaxGap012307.pdf (accessed October 10, 2007).

[19] Eric Toder, "Reducing the Tax Gap: The Illusion of Pain-Free Deficit Reduction," Urban-Brookings Tax Policy Center, http://www.taxpolicycenter.org/UploadedPDF/411496_reducing_tax_gap.pdf (accessed October 10, 2007).

[20] Max Sawicky, "Interview: Former IRS Commissioner Donald C. Alexander" in *Bridging the Tax Gap: Addressing the Crisis in Federal Tax Administration* (Washington, DC: Economic Policy Institute, 2005) 52.

Increase Resources For Audits

One of the most disturbing trends in enforcement policy over the last ten years has been a sharp decline in audits, which are an essential tool in the fight against unpaid taxes. Most of the gross tax gap – between $250 and $260 billion – results from individuals and businesses underreporting their income. The IRS determines who inaccurately reported their income and how much they owe in taxes through a variety of means. Examinations, or audits, are one way the IRS makes this determination. In FY 2006, IRS audits showed that an additional $43.95 billion was owed on all tax returns that were audited.[21] The IRS performed 1.4 million audits, resulting in an audit coverage rate of 0.8 audits per 100 tax returns, or less than one percent.[22]

In the last decade, there has been a general decline in most types of audits. In FY 1996, the audit rate for all individual income tax returns was 1.67 percent.[23] In FY 2006, the rate had dropped to 1.0 percent of all individuals, after reaching a low of 0.5 percent in 2000.[24] The recent upswing in audits is encouraging, but the rate is still far below earlier levels and even farther below historic and adequate levels, according to tax administration experts.[25]

Making things worse, the general decrease in audits has been unequally distributed by taxpayer income – with audits of higher-income earners falling faster than the overall decrease. The decline in audits has been the steepest among taxpayers reporting an income over $100,000. Audits of these filers have dropped from 2.85 percent in FY 1996 to 1.3 percent in FY 2006. Decreases in these audits before 1996 were even more drastic: in FY 1992, higher-income filers were audited 5.28 percent of the time.

Furthermore, business income has been insufficiently audited. Business income, which is reported on individual income tax returns, has been audited at a relatively steady rate since FY 1995. Nevertheless, more audits are needed, as the IRS National Research Project identified the underreporting of income by small businesses as the category that contributed the most to the tax gap, accounting for more than $109 billion in unpaid taxes annually. $68 billion of these unpaid taxes are owed by self-proprietorships, known more commonly as the self-employed, and another $22 billion came from partnerships, S corporations, estates, and trusts. In order to close the tax gap, the IRS will need the necessary resources to *expand* its investigation and enforcement of tax laws related to these returns, not hold them steady.

Decline in Quality and Quantity of Corporate Audits

Individual taxpayers are not alone in experiencing a decrease in the likelihood of being audited. Audits related to the corporate income tax for all sizes of corporations have declined significantly. The overall corporate audit rate has been cut in half, dropping from 2.4 percent in 1996 to 1.2 percent in 2006.[26] What's more, new data from the last five years obtained by the Transactional Records Access Clearinghouse (TRAC) show that the quality of those audits has also suffered.

Disturbingly, the decline has been most pronounced among the largest corporations. Audits of corporations with assets between $5 and $10 million dropped from 14 percent in FY 1995 to 3.4 percent in FY 2006 – a 70 percent drop.[27] Slightly

[21] Internal Revenue Service, "SOI Tax Stats -- IRS Data Books."

[22] Ibid.

[23] Government Accountability Office, "Tax Administration: Audit Trends and Results for Individual Taxpayers," http://www.gao.gov/archive/1996/gg96091.pdf (accessed October 16, 2007).

[24] Internal Revenue Service, "SOI Tax Stats -- IRS Data Books."

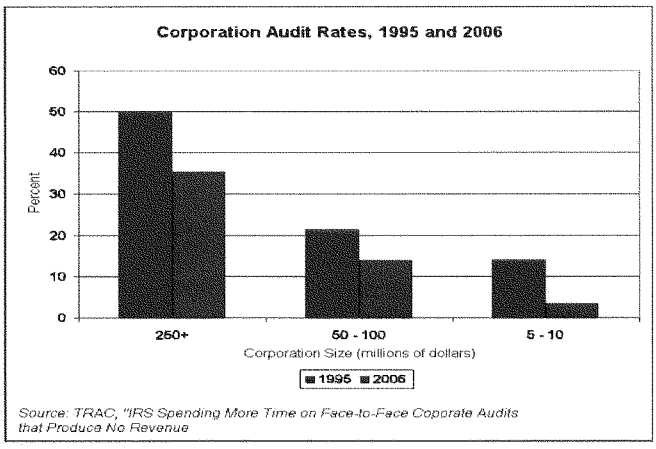
[25] Sawicky, "Interview: Former IRS Commissioner Sheldon S. Cohen," 25.

[26] Transactional Records Access Clearinghouse, "IRS Spending More Time on Face-to-Face Corporate Audits that Produce No Revenue," Syracuse University, http://trac.syr.edu/tracirs/newfindings/current/ (accessed October 16, 2007).

[27] Internal Revenue Service, "SOI Tax Stats -- IRS Data Books."

larger corporations – with assets of $50 million to $100 million – were audited at a rate of 13.8 percent in FY 2006, down from 21.3 percent in FY 1996 – a 35 percent decline. Audits of the largest corporations, those with assets of $250 million or more, have declined by almost a third, from 50 percent in FY 1995 to 35.2 percent in FY 2006.[28] While companies with over $250 million in assets are small in number – they filed only 0.2 percent of corporate tax returns in 2002 – they accounted for a staggering 90 percent of all corporate assets and 87 percent of all corporate income during that year.[29] The decrease in audits among these corporate tax filers must be reversed.

Audits of the largest corporations inexplicably vary by sector, which seems to be an inefficient method of tax enforcement. In FY 2006, only 15 percent of financial services corporations were audited, compared to 100 percent of all large manufacturing and transportation corporations.[30] Yet companies in the financial sector make up a large part of the economy. The largest corporations in the financial sector account for 25 percent of total receipts of large corporations and over 62 percent of total net income – more than 2.5 times the next highest sector.[31]



What's more unfortunate, however, is that the audits that have been done for corporate filers have been increasingly unproductive, particularly among face-to-face corporate audits – the most thorough and intense audits the IRS conducts. The number of nonproductive auditing hours, which is defined by the IRS as face-to-face examination hours that produce a "no change" result in the amount of tax owed, has increased for every corporate asset class over the last five years.[32] The average increase in unproductive hours across all corporate asset classes between FY 2001 and FY 2006 was 40 percent. If the IRS audited a high percentage of corporations, a rise in unproductive hours could be interpreted as a good thing, with companies increasingly paying the taxes they owe. However, because the IRS audits too few corporations and because the tax gap points to large amounts of taxes not being collected, a rise in unproductive hours shows the IRS

[28] Transactional Records Access Clearinghouse, "IRS Spending More Time on Face-to-Face Corporate Audits that Produce No Revenue."

[29] Transactional Records Access Clearinghouse, "Relatively Few Corporations Have Most Income and Assets," Syracuse University, http://trac.syr.edu/tracirs/trends/v10/corpassets.html (accessed October 17, 2007).

[30] Transactional Records Access Clearinghouse, "Corporate Audit Rates -- Wide Disparities Found for Different Industries," Syracuse University, http://trac.syr.edu/tracirs/latest/127/. (accessed October 16, 2007).

[31] Transactional Records Access Clearinghouse, "Net Income of Largest Corporations," Syracuse University, http://trac.syr.edu/tracirs/trends/v10/netincsecG.html (accessed October 16, 2007).

[32] Transactional Records Access Clearinghouse, "Net Income of Largest Corporations."

is being inefficient in selecting which corporations it chooses to audit – a waste of valuable enforcement resources and a missed opportunity to collect more tax revenues.

The rise in unproductive auditing hours increased at faster rates as the size of the corporation increased, especially for large corporations (those with assets over $10 million). While all four asset classes over $10 million saw increases in unproductive hours well above the average of 40 percent, as the asset class grows larger, the increases are even more pronounced. At the low end, audits of corporations between $10 million and $50 million saw a 61 percent increase in unproductive hours, while audits of corporations above $250 million in assets saw the largest increases, at 109 percent – more than double the rate from five years earlier.[33]

Another alarming trend is the decrease in the number of hours spent per corporate audit. In the last five years, every corporate asset class except one ($10-$50 million) has seen double-digit decreases in the average length of audits, with the average corporate audit lasting 21 fewer hours.[34] This represents almost a ten percent drop in the length of corporate audits.

IRS data on corporate audits, combined with the new data obtained by TRAC on audit length, depict disturbing trends in both the quality and quantity of corporate audits – particularly those of the largest corporations. Not only is the IRS performing fewer corporate audits overall than it did ten years ago, the ones they do perform are done too quickly and are poorly targeted. Due to the size and complexity of the business transactions of large corporations, those returns are likely to produce more reporting errors, and therefore, the IRS should be auditing more of those companies (not less) and spending more time (not less) on each audit.

There have been a few reports that some of the changes within the corporate auditing section (the Large and Mid-Sized Business Division) have been forced on IRS auditors by senior level managers at the IRS. These changes put a strong focus on completing more audits by pre-set deadlines in order to drive up total audit numbers regardless of the quality of the audit or of auditors' opinions about possible serious tax violations they had not had time to investigate during audits. David Cay Johnston reported in *The New York Times* on March 20, 2007, that almost two dozen revenue agents had been pressured by their managers to close open audits too soon – actions the auditors said could cost the government billions of dollars in unpaid taxes.[35]

Two dozen revenue agents had been pressured by their managers to close open audits too soon, which could cost the government billions of dollars in unpaid taxes.

This phenomenon was recognized by Colleen Kelley, President of the National Treasury Employees Union, in testimony before the House Appropriations Committee on Financial Services and General Government. Kelley testified the pressure put on IRS auditors was not a recent occurrence but had been happening since 2002. Kelley believes it was the result of a new IRS policy called Limited Focused Examination (LIFE) and said the union had heard directly from its members that the policy was undermining both efforts to make sure companies were paying all the taxes they owed and employee morale at the IRS.[36]

[33] Transactional Records Access Clearinghouse, "IRS Corporate Audit Hours Spent on Nonproductive Examinations Increasing," Syracuse University, http://trac.syr.edu/tracirs/trends/v12/audittimechange.html (accessed October 16, 2007).

[34] Transactional Records Access Clearinghouse, "Change in Average Audit Length FY 2001 vs FY 2006," Syracuse University, http://trac.syr.edu/tracirs/trends/v12/auditlengthchange.html (accessed October 16, 2007).

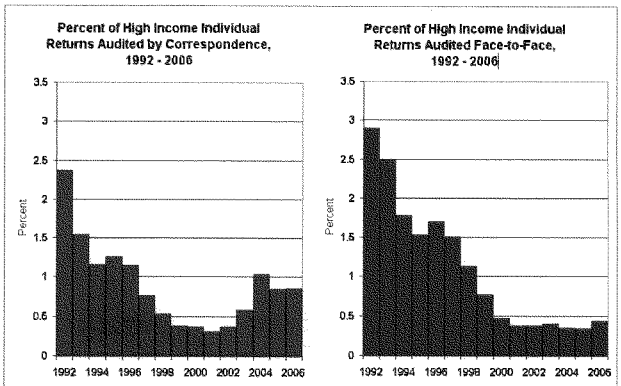
[35] David Cay Johnston, "IRS Agents Feel Pressed To End Cases." *New York Times*, March 20, 2007. http://www.nytimes.com/2007/03/20/business/20tax.html.

[36] Colleen Kelley, "Statement of Colleen Kelley, National President, National Treasury Employees Union on 'Internal Revenue Service Budget FY2008," National Treasury Employees Union, http://nteuirswatch.org/documents/numbers/CMK%20Testimony%20to%20House%20FServices%20sub%203-29-07.pdf (accessed October 18, 2007).

The combination of a decrease in overall corporate audit rates, and reports that those audits being done are closed too soon, will encourage tax evasion behavior among corporations, which may have more cause to believe they will not be audited, and that audits themselves are not to be feared.

Wrong Strategy: Relying on Correspondence Audits

As far as reducing the tax gap is concerned, the *type of audit* being administered is equally, if not more important than *who* is being audited. There are two types of audits: a traditional face-to-face audit, which can happen inside an IRS office or at a taxpayer's home or business, and a correspondence audit. Traditional face-to-face audits involve comprehensive reviews of assets and records, requiring more time and effort for both the taxpayer and the IRS. Correspondence audits consist of the IRS sending a letter to a non-compliant taxpayer in which he or she is asked a few questions about his or her tax return. Striking the right balance between these two types of audits is essential to effective tax enforcement.



Source: Transactional Records Access Clearinghouse, "Percent of High Income Individual Returns Audited"

Face-to-face audits typically generate far more revenue than correspondence audits, and ones on high-income earners in particular produce the highest yields. In FY 2006, face-to-face audits of high-income earners generated an average of $54,934.[37] Face-to-face audits on individuals earning between $50,000 and $100,000, in contrast, only averaged a $3,877 yield, yet these taxpayers were audited almost as much (0.23 percent) as their higher-income counterparts (0.44 percent).[38] Even face-to-face audits on returns with business income over $100,000 yielded less than half as much ($25,787) as audits of high-income filers.[39] The high yields on face-to-face audits of high-income filers show both that they are a good investment and also that there are significantly more taxes due among those filers.

Despite the high yields of these audits, the IRS is performing them too rarely. IRS administered face-to-face audits for 0.44 percent of all high-income filers in FY 2006, compared to 2.9 percent in FY 1992 and 1.7 percent in FY 1996.[40] Yet the IRS claims, and rightly so, that overall audit rates have been gradually increasing in the last few years. These additional audits have increased the yield on tax enforcement, from a ten-year low of $32.9 billion in FY 1999 to $48.7 billion in FY 2006.

Unfortunately, the details behind the IRS data on increased audits tell a different story. Much of the

[37] Internal Revenue Service, "SOI Tax Stats -- IRS Data Books."

[38] Ibid.

[39] Ibid.

[40] Transactional Records Access Clearinghouse, "IRS 'Face-to-Face' Audits of Federal Income Tax Returns Filed by Individuals," Syracuse University, http://trac.syr.edu/tracirs/highlights/current/audpctcompare_ind.html (accessed October 16, 2007).

increase cited by the IRS has been due to an emphasis on ***correspondence audits***, not the more effective ***face-to-face audits***. Overall, in FY 2006, 77 percent of all audits – more than three out of four – were by correspondence.[41] What's more, correspondence audits – not face-to-face audits – have accounted for 74 percent of the recent increase in audits among high-income individuals.[42] Face-to-face audit levels have increased only modestly over that time.

This trend is problematic because correspondence audits are less effective than face-to-face audits, partly because this type of audit can only spot problems that are evident from information submitted by the taxpayer or from information reported by third parties (employers, banks, and other sources). For comparison, in FY 2006, face-to-face audits on individual income tax returns for earners over $100,000 yielded an average of $54,934, while correspondence audits brought in $31,912.[43] For other types of tax returns, such as large corporations, the difference was even more dramatic. The average yield of a face-to-face audit for large corporations in FY 2006 was $2.6 million, but correspondence audits of similarly sized companies averaged a meager return of $285,000.[44]

The IRS seems to have chosen to use correspondence audits so much mainly because administering them requires less staff time and resources. In FY 2006, correspondence audits took an average of only 1.4 auditor hours each, drastically lower than the hundreds of hours face-to-face audits can take.[45] Indeed, IRS data shows even as overall audit rates have increased in the last few years, few additional staff have been added.

The IRS has decided, perhaps because of limited resources, to shift to less efficient and effective processes for auditing. If Congress and othes in government are serious about creating a robust tax enforcement system and closing the tax gap, additional resouces are crucial. Increased funds could be used to raise staffing levels enough that IRS may gradually perform more high-yield face-to-face audits, which would have a greater impact on reducing the tax gap.

[41] Transactional Records Access Clearinghouse, "Targeting of Correspondence Audit Improves," Syracuse University, http://trac.syr.edu/tracirs/newfindings/current (accessed October 16, 2007).

[42] Treasury Inspector General For Tax Administration, "Trends in Compliance Activities Through Fiscal Year 2006," U.S. Treasury Department, http://www.treas.gov/tigta/auditreports/2007reports/200730056fr.html (accessed October 16th, 2007).

[43] Internal Revenue Service, "SOI Tax Stats -- IRS Data Books."

[44] Ibid.

[45] Transactional Records Access Clearinghouse, "Targeting of Correspondence Audit Improves," Syracuse University, http://trac.syr.edu/tracirs/newfindings/current (accessed October 17, 2007).

Expand Internal Tax Collection

Tax law enforcement does not end once an audit has been completed. The IRS will have to actively pursue unpaid taxes it identifies if they are not paid voluntarily. IRS collection officers may make an agreement with the taxpayer to pay the taxes, or issue levies, liens, or property seizures. Agents are also charged with identifying taxpayers who do not file a tax return and collecting the taxes owed. To do these things, significant staffing and resources are required.

Billions are lost annually because Congress does not sufficiently finance the IRS collection department. In 2002, former IRS Commissioner Charles Rossotti reported to the IRS Oversight Board that an annual investment of under $400 million in IRS collections could generate over $11 billion each year.[46] This additional funding could be used to hire more full-time employees to pursue cases the IRS has not taken action on due to insufficient personnel. Even without additional resources, NTA Nina Olson has recently stated the IRS can tackle many of those additional cases by implementing improvements to its current collection regimes.

Former IRS Commissioner Charles Rossotti reported in 2002 that an annual investment of under $400 million in IRS collections could generate over $11 billion each year.

Since Rossotti issued the 2002 report, activity in the collection function has increased modestly. Some key measurements have been on a steady upward trajectory, including the quantity of liens and levies issued by IRS collection staff.[47] However, the level of liens and levies is still down sharply from FY 1996 levels, even excluding growth in the economy and tax returns. Some measures – such as the quantity of seizures – have not increased at all. Indeed, a 2007 Treasury Inspector General for Tax Administration (TIGTA) report found a robust collection function continues to be hampered by inadequate resources, as staffing for collection activities remains 30 percent below FY 1997 levels.[48]

Wrong Strategy: Private Debt Collection

In 2004, Congress enacted – and in September 2006, the IRS implemented – a program to outsource the responsibility of collecting small tax debts to private debt collection firms. The principle rationale for creating the program was that its funding would not show up in the IRS budget. Although the government still spends resources, using private collectors does not require additional annual appropriations. Under the program, private collectors get to keep a portion of the taxes they collect as payment. Therefore, given limited budgets, the IRS would be afforded an opportunity to collect taxes it otherwise could not.

However, the private tax collection program is wasteful and dangerous. Private collection agencies (PCAs) yield a return-on-investment (ROI) of 4:1, whereas – as former IRS Commissioner Mark Everson has acknowledged – federal employees at the IRS produce a 13:1 ROI. Even more efficient, the IRS' Automated Collection System currently collects about $20 for every $1 spent on staffing, according to the NTA.[49]

Furthermore, despite claims the program has no costs, as of May 23, 2007, the IRS had spent $71 million in appropriated funding to set it up. If that money had instead been spent on those high-yield automated functions, an additional $1.4 billion in

[46] Charles O. Rossotti, "Report to the IRS Oversight Board: Assessment of the IRS and Tax System."

[47] Transactional Records Access Clearinghouse, "IRS Collection Enforcement Trends," Syracuse University, http://trac.syr.edu/tracirs/highlights/current/collenfG.html (accessed October 16, 2007).

[48] Treasury Inspector General for Tax Administration, "Trends In Compliance Activities Through Fiscal Year 2006."

[49] National Taxpayer Advocate Service, "National Taxpayer Advocate's 2007 Annual Report to Congress," Internal Revenue Service, http://wwwrs.gov/advocate/article/0,,id=177301,00.html (accessed January 9, 2008).

***If money spent on the private collection program had been used for other IRS functions, an additional $1.4 billion in revenues could have been collected in just one year. The private collection program is expected to yield only around $1.1 billion over the* next ten years.**

revenues could have been collected in just one year. Yet for all those missed opportunities, the private collection program is expected to yield only around $1.1 billion altogether over the *next ten years*.

Initial data on the program are now available for the first year of operation, and the *Washington Post* has reported the PCAs averaged a 4.5:1 ROI, collecting $29 million, from which they were paid $6.34 million – far below both the IRS' ROI levels and initial revenue projections for the program.[50]

Regardless of the program's cost, many experts continue to worry PCAs might violate taxpayer rights. Olson has expressed a great deal of concern that profit-motivated companies could abuse taxpayers. According to Olson, PCAs have the opportunity to use "trickery, device, and belated Fair Debt Collection Practices Act warnings to take advantage of taxpayers," and yet they are not obligated to disclose their "operational plans" regarding practices, letters, or scripts they will use.[51]

Indeed, anecdotal reports on the program's operations have borne out many of the concerns Olson voiced regarding abusive practices. At a May 23, 2007, hearing of the House Ways and Means Committee, Rep. John Lewis (D-GA) presented tapes of conversations between PCA employees and taxpayers.[52] Due to IRS privacy protections, PCA employees did not identify themselves, the nature of their business, or the purpose of their calls, and haggled with taxpayers to obtain their Social Security numbers. The taxpayers in the conversations refused to reveal their Social Security numbers and responded angrily when PCA employees asked repeatedly for the numbers but did not disclose the purpose of the conversations.

Olson reiterated her concerns about the ability of the program to operate efficiently and effectively in the recently released 2007 NTA report, stating tax collection is an inherently governmental function that should be handled only by government employees trained to protect taxpayer rights. Olson argues the IRS could currently collect the outstanding debts given to the PCAs by improving its collection strategy and use of currently available resources, enabling the IRS to reach "most, if not all, of these cases [given to PCAs] at less cost to taxpayers and less risk to taxpayer rights."[53]

The sum of the evidence supports the need to shut down this program immediately. In 2007, Ways and Means Chairman Charles Rangel (D-NY) requested the IRS not issue any new contracts for the program, and the House passed a bill in October 2007 to end it entirely. This would be a wise change in IRS policy. Unfortunately, the IRS is moving forward with soliciting bids from additional PCAs for the second part of the program – full implementation. While Olson has pushed the IRS to include more transparency and taxpayer safeguards in the solicitation of new contracts, she continues to voice strong concerns and recommends Congress end the program.

Congress needs to act immediately to end this program and instead should make more resources available to the IRS to expand existing internal collection efforts.

[50] Business Section "Collectors Get $29 Million for IRS," *Washington Post*, January 9, 2008, http://www.washingtonpost.com/wp-dyn/content/article/2008/01/08/AR2008010804439.html.

[51] National Taxpayer Advocate Service, "National Taxpayer Advocate's 2006 Annual Report to Congress," Internal Revenue Service, http://www.irs.gov/advocate/article/0,,id=165806,00.html (accessed October 16, 2007).

[52] For a transcript of the tapes, see http://waysandmeans.house.gov/media/pdf/110/07%2005%2023%20Debt%20Collector%20call%20transcript.pdf.

[53] National Taxpayer Advocate Service, "National Taxpayer Advocate's 2007 Annual Report to Congress," Internal Revenue Service, http://www.irs.gov/advocate/article/0,,id=177301,00.html (accessed January 9, 2008).

Increase Services for EITC Taxpayers

Re-establishing a robust auditing regime at the IRS is crucial to closing the tax gap. But focusing on enforcement at every turn, particularly having that focus land disproportionally on low-income taxpayers, is not the best solution. The IRS has taken an approach to overseeing and enforcing the Earned Income Tax Credit (EITC) that relies far too much on audits and not enough on services. This is unfair to those taxpayers who claim the EITC, who are held to a higher standard by the IRS than any other taxpayer group, and it fails to address EITC over-claims caused by errors, not malfeasance.

The EITC is a refundable tax credit for low-income workers. In tax year 2005, the EITC provided more than $41 billion to over 21 million families and individuals.[54] It lifts more working families out of poverty than any other work support; in 2003, the EITC helped raise 4.4 million people, including 2.4 million children, above the poverty line.[55]

Since it is a tax credit, the IRS administers the EITC and is responsible for maintaining its integrity. In 1999, the IRS estimated the EITC noncompliance rate at between 27 and 32 percent, resulting in between $8.5 to $9.9 billion annually in overpayments, or about three percent of the tax gap (though the NTA believes that rate is overstated).[56]

Wrong Strategy: Punishing EITC Taxpayers

Mostly by congressional mandate, the IRS has taken a punitive approach to EITC error reduction. Congress designates a portion of the annual IRS budget specifically for EITC compliance. In FY 2006, Congress allocated $167 million for EITC compliance, which the IRS used on several initiatives that focus disproportionate enforcement efforts on EITC taxpayers.

With this funding, Congress has instructed the IRS to heavily audit EITC taxpayers. Under the EITC compliance initiative in FY 2006, almost 517,617 audits were performed on tax returns where the EITC was claimed. These audits constituted about 40 percent of all audits performed on individual tax returns in FY 2006.[57] The examination rate for EITC recipients was 2.25 percent, compared to 1.0 percent for all individual income tax returns, and 1.3 percent of all individuals making over $100,000.[58] Yet EITC audits yield only a fraction of the total revenues recovered by IRS examinations. EITC audits identified nearly $1.5 billion in excess payments, resulting in a yield of only $2,895 per audit – the lowest rate of return for any type of audit performed by the IRS.[59]

[EITC] audits constituted about 40 percent of all audits performed on individual tax returns in FY 2006, even though EITC errors account for only three percent of the tax gap.

Aside from a disproportionately large number of audits, EITC taxpayers are subject to a set of additional enforcement programs. First, the IRS applies a unique type of examination – called "recertification" – only to EITC taxpayers. The recertification program requires taxpayers to "recertify" if they had the EITC denied during an examination. This denial places recertification indicators on a taxpayer's account until the taxpayer proves he or she is eligible to receive the credit again. Once the taxpayer has provided sufficient evidence, he or she is deemed "recertified," and the taxpayer is once again eligible for the EITC. The number of taxpayers subject to this recertification tripled from

[54] Center on Budget and Policy Priorities, "EIC Participation for Tax Year 2005, by State," http://www.cbpp.org/eic2008/docs/EIC%20participation%20prelim%20ty%202005.pdf (accessed October 17, 2007).

[55] Robert Greenstein, "The Earned Income Tax Credit: Boosting Employment, Aiding the Working Poor," Center on Budget and Policy Priorities, http://www.cbpp.org/7-19-05eic.htm (accessed October 17, 2007).

[56] Ibid.

[57] Internal Revenue Service, "SOI Tax Stats -- IRS Data Books."

[58] Ibid.

[59] Ibid.

326,000 in September 1999 to almost 1 million by December 2003.[60] No other tax credit, deduction, or exemption requires such a high burden of proof.

The IRS has also put holds on millions of refunds to crack down on EITC errors. Beginning in 2005, the Criminal Investigations Division of the IRS began a program that postponed sending EITC refunds to people suspected of fraud. The NTA's 2005 Report to Congress revealed that of the 1.6 million taxpayers who had their refunds frozen, 75 percent were EITC recipients.[61] In 80 percent of the frozen refund cases brought to the NTA last year, the IRS ended up paying full or partial refunds, indicating a very large percentage of innocent filers had to face hardships resulting from delayed refunds.

Moreover, anecdotal evidence indicates the fear of punitive action by the IRS discourages workers from claiming the EITC. Currently, one in five workers who is eligible for the EITC does not claim it. Much of the energy and funding the IRS devotes to EITC compliance programs could be better spent by offering the helping hand of taxpayer services rather than punitive enforcement.

Expanded Assistance Would Reduce Error Rates

The EITC error rate could be significantly reduced by increasing the capacity of nonprofit or government tax preparation services to assist EITC-eligible taxpayers.[62] EITC error rates do not distinguish taxpayers who intentionally cheated on their returns from those who simply made mistakes. EITC filings are complicated, requiring a 50-page instruction manual,[63] and therefore, many EITC over-claims are the result of mistakes that could be prevented. In fact, as much as 50 percent of all tax returns with errors are thought to be unintentional and have been linked to the complexity of EITC eligibility requirements.[64] These errors could be addressed principally by simplifying tax laws and, when necessary, giving taxpayers help in preparing what may unavoidably be a complicated application process.

Through its nationwide network of Taxpayer Assistance Centers (TACs), the IRS makes tax return preparation services available for low-income tax filers on a walk-in basis. Studies have found IRS-prepared returns from these centers are substantially more accurate than both self-prepared and commercially prepared returns.[65] Audits show that TAC-prepared EITC returns resulted in between $640-1,300 less in erroneous payments than unprepared returns.[66]

Yet the IRS has decided to reduce the quantity and quality of services available at TACs. The number of tax returns TACs prepared declined from 665,868 in FY 2003 to a projected 406,612 in FY 2006.[67] A 2006 report by TIGTA also found more than ten percent of TACs (47 of 400) were critically understaffed.[68] As the sheer volume of returns processed

[60] Treasury Inspector General for Tax Administration, "The Earned Income Credit Recertification Program Continues to Experience Problems," U.S. Department of Treasury, http://www.treas.gov/tigta/auditreports/2005reports/200540039fr.html (accessed October 17, 2007).

[61] National Taxpayer Advocate Service, "National Taxpayer Advocate's 2005 Annual Report to Congress," Internal Revenue Service, http://www.irs.gov/advocate/article/0,,id=152735,00.html (accessed October 17, 2007).

[62] Another effective approach is to simplify the credit. See Max Sawicky, "Where the Money Isn't," Economic Policy Institute, http://www.epinet.org/content.cfm/issuebriefs_ib183.

[63] See the IRS web site for the manual: http://www.irs.gov/pub/irs-pdf/p596.pdf.

[64] Max Sawicky, "Where the Money Isn't," Economic Policy Institute, http://www.epinet.org/content.cfm/issuebriefs_ib183 (accessed October 17, 2007).

[65] Nina Olson, "The IRS and the Tax Gap," Testimony before the Committee on the Budget, U.S. House of Representatives, http://www.house.gov/budget_democrats/hearings/2007/08Olsontestimony.pdf (accessed October 16, 2007).

[66] Ibid.

[67] Nina Olson, "Hearing on Internal Revenue Service FY2008 Budget Request" Written Statement before the Subcommittee on Financial Services and General Government Committee on Appropriations, U.S. Senate, April 9, 2007.

[68] Treasury Inspector General for Tax Administration, "The Field Assistance Office Has Taken Appropriate Actions to Plan for the 2006 Filing Season But Challenges Remain for the Taxpayer Assistance Program." U.S. Department of Treasury, http://www.treas.gov/tigta/auditreports/2006reports/200640067fr.pdf (accessed October 16, 2007).

by TACs has decreased, the range of services they provide has also been narrowed.[69] For example, in North Dakota, where farming is a major industry, the TACs have been instructed not to answer questions related to reporting farm income on tax returns.[70] As more evidence of the detrimental combination of limited resources and unwise decisions at the IRS, employees at TACs have also been reassigned to jobs unrelated to taxpayer assistance, including being instructed to perform collection activities. This change diverts additional resources away from services offered at TACs.[71]

Even more worrisome, the IRS has also been attempting to close TACs. In 2005, the IRS announced plans to shut down 68 of the 400 TACs nationwide. Before the IRS could carry out these plans, Congress passed a bill prohibiting the IRS from closing the TACs until TIGTA could evaluate the potential impact the closures would have on taxpayers. In March 2006, TIGTA completed the report, which concluded the data concerning TAC usage, on which the IRS based its plans for TAC closures, was unreliable. IRS has so far delayed the closures.[72]

Dedicating additional resources to low-income services would have the benefit of reducing EITC error rates, closing the tax gap, and expanding needed services to more low-income taxpayers. At a minimum, the IRS and Congress should dedicate sufficient resources to maintain existing TACs. Even more funding would make the TAC network more responsive to taxpayer needs, both by opening more centers around the country and expanding the scope of services offered to taxpayers.

[69] National Taxpayer Advocate Service, "National Taxpayer Advocate's 2005 Annual Report to Congress," Internal Revenue Service. http://www.irs.gov/advocate/article/0,,id=152735,00.html

[70] Nina Olson, "Hearing on Internal Revenue Service FY2008 Budget Request."

[71] National Taxpayer Advocate Service, "National Taxpayer Advocate's 2005 Annual Report to Congress," Internal Revenue Service. http://www.irs.gov/advocate/article/0,,id=152735,00.html

[72] Treasury Inspector General for Tax Administration, "The Taxpayer Assistance Center Closure Plan Was Based on Inaccurate Data." U.S. Department of Treasury, http://www.treas.gov/tigta/auditreports/2006reports/200640061fr.pdf (accessed October 16, 2006).

Tax Enforcement Has to be a Priority

The tax gap is an eminently solvable problem. If Congress were to prioritize funding for IRS examination, collection, and tax preparation services, it would drastically reduce the tax gap. The practical effect of expanding these activities at the IRS would be to make the tax code more equitable, and it would bring in additional revenue that could responsibly finance new programs and services. If implemented in the right way, closing the tax gap could also help to increase public confidence in the tax system and the federal government.

Congress needs to enact sustained increases in the IRS budget immediately and should make a commitment to continue to provide the IRS with the extra resources that are so crucial to effective tax enforcement.

This report has only highlighted a few sections of the IRS budget that merit additional funding and reforms. However, it refrains from specifying the dollar amounts needed to address these concerns and recommends a thorough congressional review of the entire IRS budget. We believe Congress, IRS administrators, and outside experts, upon whose research and expertise this report mainly relies, should come together to find common ground on what an appropriate funding increase would look like, how quickly it should be implemented, and how it could be sustained in coming years. Most experts, both inside the IRS and out, prefer gradual increases in funding, as opposed to a sudden increase. A sudden increase would likely overwhelm the IRS and be implemented inefficiently and with too little oversight. Despite this recommendation, we believe the IRS funding shortage is an urgent matter and should be addressed as quickly as possible.

Ultimately, as with most fiscal issues, the root of the problem is political. The case must be made that fears of an IRS run amok are, in a way, a self-fulfilling prophecy. Attempting to curtail the powers of the IRS through inadequate funding levels has had unintended consequences – it has forced the IRS to institute policies and enforcement practices detrimental to tax collection, taxpayers' rights, and the progressivity of the tax code. So long as the IRS is underfunded, it will be forced to enforce the tax code unfairly and punitively. However, if the IRS is properly funded and administered correctly, the federal government will have the opportunity to make substantial progress in reducing the tax gap and to ensure the tax system is as progressive in practice as it is in law.

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Testimony to the Subcommittee on Financial Services and General Government
Chairman José E. Serrano
Department of the Treasury FY 2009 Budget Request

April 30, 2008

OMB Watch submits this testimony as an organization dedicated to government accountability, transparency and a strong civil society. We wish to express our concerns about the Department of the Treasury's policies and procedures regarding charitable organizations and funds. It provides background information on general problems these policies and procedures have created for U.S. organizations, and focuses in detail on the dilemma presented by frozen charitable funds. We ask the committee to request information from Treasury regarding these funds and require the department to develop a means for their eventual release for legitimate charitable purposes.

I. Background

The U.S. charitable sector strongly opposes terrorism, and supports effective and reasonable measures to protect charitable programs from diversion of resources for violent ends. Federal law[1] makes it illegal for any person or entity, including charities, to provide material support for terrorism or to engage in transactions with Specially Designated Global Terrorists. Treasury has the authority to effectively shut down charities and freeze their assets indefinitely through its authority to designate supporters of terrorism. Treasury's implementation of these laws leave accused charities with no effective means of recourse, since the designation process, designed for economic embargoes, does not provide basic due process or independent review. Courts are limited to reviewing Treasury's administrative record, which can contain secret evidence the charity never sees.

[1] [1] Anti-Terrorism and Effective Death Penalty Act of 1996, 104 Public Law 13. See material support provision at 18 U.S.C. § 2339A(b)(1) and Exec. Order No. 13,224, 66 FED. REG. 49079 (Sept. 23, 2001). 1 Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified as amended at various sections of 8, 15, 18, 22, 31, 42, 49, and 50 U.S.C. (2006)) at Section 106 (adding the words "block during the pendency of an investigation" after the word "investigate" in IEEPA, 50 U.S.C. 1702(a)(1)(B)(2000)). Executive Order 12947 (1995) Executive Order 13224. Sept. 23, 2001

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However, the most troubling aspect of Treasury's policies on charities is the indefinite blocking of charitable funds and its persistent refusal to allow transfer of these funds to legitimate charities that can use them to provide badly needed programs. The recent news coverage of the world hunger crisis is an example of the dire need for all available charitable dollars to be put to work.[2]

II. Frozen Funds in General

Last year's committee report to accompany HR 2829, the House Financial Services and General Government Appropriations Act, stated;

> "the Committee has concerns with regard to the freezing of assets associated with charities suspected of having links to terrorist activity. Support for terrorist activity is unacceptable, and the Department should continue to exercise its authorities to disrupt the financing and other support for terrorist activity. At the same time, the Committee is concerned about the status of funds given to charities by individual donors who believed that the funds would be used in good faith and who were unaware of any suspected links to terrorism. The Committee encourages the Department to work on ways to ensure that the funds of these particular donors can be returned to the donors, in the event of freeze actions taken against the charities."

OMB Watch greatly appreciated this language. But rather than return the funds to the donors, we would like to see creation of a process that permits frozen charitable dollars to be transferred to legitimate, third-party aid agencies (with the consent of the frozen charity). Such a process would honor the charitable purpose of the funds and protect the intentions of innocent donors. Most importantly, it would put the money to work helping those in need.

Unfortunately, very little is known about frozen charitable funds. The only available public data comes from the annual *Terrorist Assets Report* given to Congress. The last report indicated over $16 million in frozen assets for Foreign Terrorist Organizations (FTO) and does not indicate how much of those assets can be attributed to charities, how much belongs to U.S. charities, or the long term intent regarding them.

Some of these funds have sat in frozen accounts for more than six years. According to the designated charities, they represent gifts from relatively small donors who intended to provide humanitarian aid, particularly in areas affected by natural disasters and war.

III. Nonprofit Sector Proposal for Release/Transfer of Frozen Funds

In November 2006 a coalition of 20 charitable organizations wrote Treasury Secretary Henry M. Paulson, Jr. requesting a meeting to discuss the status of frozen charitable funds. (A copy of the letter is attached to this testimony as Appendix A.) After 14 months of delay a meeting was held on Jan. 14, 2008 to initiate a conversation on the frozen funds' procedural fate. Specifically, we sought a process whereby frozen charitable funds could be released to reputable organizations

[2] *Washington Post* series: Global Food Crisis at http://www.washingtonpost.com/wp-srv/world/globalfoodcrisis/

with similar charitable missions. (Our proposed process, submitted to Treasury that day, is attached to this testimony as Appendix B.)

At the meeting there was agreement that Treasury's specific license procedure for transactions with the Palestinian Authority provides a useful framework for any applicant seeking to unblock funds for charitable purposes. Nonetheless, we have learned of three designated organizations that have sought release of their funds, only to be told it is inconsistent with national interests or incompatible with Congressional intent underlying the Terrorism Risk Insurance Act (TRIA).

Treasury gave us three reasons for holding the funds indefinitely:

i. They claimed no designated organization has asked for such a transfer,
ii. Release would be inconsistent with national security, and
iii. Congress intended the Terrorism Risk Insurance Act to place a hold on the funds, even when no related suits have been filed or judgments rendered.

Unfortunately, these reasons conflict with available facts and yield more questions than answers. For example, OMB Watch has collected correspondence from attorneys representing three of the eight U.S. charities designated Treasury that document requests for transfer of frozen funds.

One noteworthy request came from the Islamic American Relief Agency which asked for a portion of its frozen funds to be transferred to Hurricane Katrina victims. The Department of the Treasury responded with the following statement,

> It is a basic tenet of OFAC sanctions policy that blocked funds are not licensed for release except under limited and compelling circumstances consistent with the national security, economic and foreign policy of the United States. OFAC's current policy to deny requests to release blocked funds is consistent with the congressional intent underlying section 201(a) of the Terrorism Risk Insurance Act of 2002, Public Law 107-297. Therefore, your request to fund relief efforts in Zaire, Niger or in the wake of Hurricane Katrina from blocked assets is denied.
> *OFAC Letter to Shereef Akeel, Attorney for IARA, June 29, 2006*

We believe Treasury's reasoning is fueled by policy rather than legal requirements, and can and should be reversed. We are appalled that an agency of the U.S. government believes assisting people affected by natural disasters, including Hurricane Katrina, is somehow inconsistent with national security. In addition, Treasury's evocation of TRIA puts extra-judicial restraints on funds when no judgment or attachment has been issued.
Finally, during the meeting, Treasury explained that the economic sanctions program is designed to be active until the root emergency subsides. The logical outcome of this position is that frozen charitable funds will be held indefinitely, since it is unlikely to war on terror will have a clear or conclusive ending. As author Lewis Latham noted, this is "war on an unknown enemy and an abstract noun."[3]

[3] Gag Rule, Lewis H. Latham, p. 17 The Penguin Press 2004

During the meeting with Treasury officials, we submitted a list of questions that we believe need to be answered. A response to our questions is pending. (A copy of these questions is attached as Appendix C.)

IV. Questions for the Department of the Treasury

OMB Watch requests the committee submit the following questions to Secretary Paulson in order to better inform its appropriations decision:

a. Despite claims to the contrary, organizations have requested the release of frozen funds to other charitable organizations. What are Treasury's plans for developing standards and procedures for the release of frozen charitable funds?

b. Within Treasury's response to KindHearts's request for the transfer of funds for earthquake relief in Pakistan, OFAC stated,

> "[i]t is a basic tenet of OFAC sanctions policy that blocked funds are not licensed for release except under limited and compelling circumstances consistent with the national security, economic and foreign policy of the United States. Therefore, your request to fund relief efforts in Pakistan from blocked funds is denied."[4]

How is charitable aid and disaster relief inconsistent with the national security, economic, and foreign policy interests of the United States?

c. What authority demonstrates that Congress intended for all frozen charitable funds to be held indefinitely regardless of whether a TRIA claim has been made?

Question about U.S. Charities:

a. Despite repeated accusations by Treasury that charities are a significant source of terrorist financing and the freezing of millions of dollars in charitable assets, no U.S. charity has been convicted for material support of terrorism. How does the Treasury Department explain this discrepancy?

V. Suggested Follow up Requirements for the Department of the Treasury

In addition to providing the committee with the information requested in the above questions, we request the committee submit our information request to Treasury on its own behalf.

We also request the following language be included in this year's appropriations report:

> *While the Committee is supportive of the work of the Office of Terrorism and Financial Intelligence, the Committee has concerns with regard to the freezing of assets associated*

[4] March 23, 2006 letter to KindHearts' attorney

with charities suspected of having links to terrorist activity. Support for terrorist activity is unacceptable, and the Department should continue to exercise its authorities to disrupt the financing and other support for terrorist activity. At the same time, the Committee is concerned about the status of funds given to charities by individual donors who believed that the funds would be used in good faith and who were unaware of any suspected links to terrorism. The Committee encourages the Department to work with the charitable sector on ways to ensure that the funds of these particular donors are used for their intended charitable purposes. Treasury regulations provide ample flexibility for a process that will allow such programs.

Conclusion

Thank you for your attention to our concerns. We would be happy to meet with members of the committee and your staff to provide additional information. I can be reached directly at 202 683 4879.

APPENDIX A

November 6, 2006

The Honorable Henry Paulson
Secretary
Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, D.C. 20220

Dear Mr. Secretary:

The undersigned charitable organizations, advisors and legal experts are writing to urge the Department of Treasury to release frozen funds of charitable organizations designated as supporters of terrorism to trustworthy aid agencies that can ensure the funds are used for their intended charitable purposes such as providing humanitarian aid and protecting human rights throughout the world. This release of funds should occur as quickly as possible, with the consent of the governing bodies of these charities, and be fully disclosed to the public.

Our request takes no position on whether these designations were appropriate. Instead, our concern is with ensuring that charitable funds are put to good use. It is critical to act swiftly. With the close of Ramadan, many Muslim donors will have donated to faith-based Muslim charities, and wish to ensure their contributions are not seized and held indefinitely, rather than reaching those in need.

Since 9/11 the Treasury Department has frozen more than $13.7 million from over 40 charities designated as supporters of terrorism. Five of these are U.S.-based organizations with substantial combined assets. Most of these funds come from relatively small donors who intended to provide food, medical care, shelter, education and other basic needs to refugees, people displaced by war or famine and others in need. Many of these donors are Muslims whose giving fulfills a religious obligation.

The need for humanitarian assistance is not frozen and has continued to grow since 2001. Meanwhile the frozen funds sit in bank accounts helping no one while critical needs go unmet.

We believe the Treasury Department has the legal authority and ability to do something about this situation. (See 31 CFR 501 and 597.) Where the governing boards of designated organizations have already requested release of funds for charitable use there is no reason for delay. For other designated organizations, we ask the Treasury Department to contact their governing bodies to request authority to release funds for charitable use (the funds should only be released with their consent). Where the governing board is no longer active, we ask that a process be developed to identify the legal owner of the funds and ultimately allow these funds to fulfill their charitable purposes.

Given the length of time these funds have remained frozen, we believe it is time for the Treasury Department to update its policy regarding holding them. In the past few years the Department has rejected two requests from closed U.S.-based charities to release funds for their intended purposes. In 2002, Benevolence International Foundation (BIF) applied for a license to release funds raised from charitable contributions to a children's hospital in Tajikistan and the Charity Women's Hospital in Dagestan. The application included safeguards to ensure the money arrived at the proper destination, but the Treasury Department denied the request. Similarly, in April 2004 the Holy Land Foundation asked for permission to transfer $50,000 to the Palestine Children's Relief Fund. That was also denied.

In addition, KindHearts for Charitable Humanitarian Development, which was shut down in February, has called on the Treasury Department to release its funds "to be spent under the auspices and administration of the USAID Program (of which KindHearts is a member) or any other NGO (United Nations, Red Crescent, etc.) on KindHearts programs, or any other humanitarian program that it deems justified." They only ask that "special consideration be given to the refugees in the earthquake ravaged areas of Pakistan since the overwhelming majority of frozen funds were earmarked for projects therein."

We support the idea behind the request from BIF and KindHearts for Charitable Humanitarian Development. The Treasury Department has acknowledged the importance of charitable work in its introduction to guidelines for charitable organizations, noting that, "Charities provide essential services, comfort, and hope to those in need around the world." We call on the Treasury Department to demonstrate its good faith in its dealing with charities and the people we serve by moving promptly to ensure that charitable funds reach their intended beneficiaries.

We request a meeting to discuss this proposal and provide further information demonstrating the dire need for charitable funds to be spent for charitable purposes. Our contact person is:
Kay Guinane, OMB Watch 202/234-8494
1742 Connecticut Ave NW
Washington, D.C. 20009

Yours truly,

Betsy Buchalter Adler, *Silk, Adler & Colvin
Barnett Baron, *Asia Foundation
Center for Global Justice and Reconciliation, Rev. Canon John L. Peterson, Director
Council on Foundations, Janne Gallagher, General Counsel
The Friends of Charities Association (FOCA), Wendell Belew
Fund for Nonviolence, Monica Larenas, Board Member and Program Officer
General Service Foundation, Lani Shaw, Executive Director
Global Fund for Women, Dale Needles, Vice President of Finance & Administration
Grantmakers Without Borders, John Harvey, Executive Director
Grassroots International, Daniel Moss, Director of Development
Iara Lee & George Gund Foundation

Independent Sector
KinderUSA, Laila Al-Marayati, M.D.
Life for Relief and Development, Dr. Khalil Jassemm, CEO
Moriah Fund, Mary Ann Stein, President
Muslim Advocates, Farhana Khera, Executive Director
Muslim American Society Freedom Foundation, Mahdi Bray, Executive Director
Muslim Public Affairs Council, Salam Al-Marayati, Executive Director
OMB Watch, Gary Bass, Executive Director
San Francisco Court Appointed Special Advocate Program, Michael Scott Associate Director of Development
Third Sector New England, Jonathan Spack, Executive Director
Urgent Action Fund for Women's Human Rights, Julie Shaw, Executive Director/CEO

*For Identification Purposes Only

APPENDIX B

Principles and Procedures for Release of Frozen Funds for Charitable Purposes
Proposed to Dept. of the Treasury Jan. 15, 2008
Council on Foundations, Grantmakers Without Borders, Muslim Advocates, Muslim Public Affairs Council, OMB Watch

Principles

- The specific license process already in place in Treasury regulations is the best procedural starting point. A specific license applicant seeking to get funds released should provide a list of more than one organization that can deliver the program in their place.
- Standard for release of funds: to be consistent with the intent of the donors, determined by reviewing fundraising materials in a two year period before the designation, or by using publicly available information.
- Funds should not be released without the consent of the designated group unless the group has become defunct and no contact persons can be located.
- The process should be simple.

Procedures:

Two types of procedure are needed:

1. Existing board of directors submits a specific license application
2. Process where board cannot be found and/or the organization is defunct

1. Existing Board

- Designated organization files a specific license application under existing Treasury regulations
- License application should identify existing providers that have services to match the intent of donors, in terms of type of service, target populations, locations, etc.
    - The standard for Treasury decision should be based on their specific standards for charitable works in the Palestinian Authority. The guidelines are online at http://www.treas.gov/offices/enforcement/ofac/programs/terror/ns/pal_guide.pdf, and are as follows:

1. *Assistance projects for critical food, health, or welfare aid that is distributed from Palestinian Authority-run facilities such as schools, hospitals and clinics.*
2. *In-kind donation of medicines, medical supplies and medical devices to hospitals, clinics or other health care facilities owned or operated by the Ministry of Health.*
3. *Donated medical services in the West Bank and Gaza involving the Ministry of Health.*
4. *Goods and services related to disease eradication.*
5. *Dealings with universities and other educational institutions in the West Bank and Gaza.*
6. *Goods and services relating to education, including teaching, in the West Bank and Gaza.*

7. *Provision to and receipt from the Palestinian Authority of informational materials.*
8. *Small-scale water projects in the West Bank and Gaza, for the benefit of municipalities not controlled by a Hamas mayor and/or a Hamas majority in the municipal council.*

Treasury indicates that favorable treatment is more likely if the application meets these conditions:

1. *a compelling case exists that there is no practical means to achieve the desired humanitarian goal outside of the proposed transactions with the Palestinian Authority;*
2. *the activities are designed to benefit directly persons in the West Bank and Gaza under circumstances in which, notwithstanding the practical need to involve the Palestinian Authority, the activities will not be subject to the control of the Palestinian Authority other than for routine administrative approvals;*
3. *the activities will not provide any significant material benefit, including technical advisory assistance, to the Palestinian Authority.*

The U.S. Government also will look favorably on those projects and activities that provide humanitarian goods or services, and activities that will stimulate private-sector commerce.

2. Defunct Board/Group

- Treasury issues regulations incorporating the cy press doctrine, with limitations requiring funds be used for a purpose consistent with intent of donors
- After time for all appeals has run, or appeals have been lost Treasury attempts to contact a representative of the designated organization (i.e. 60-90 days).
- The nonprofit sector can assist in attempts to locate contacts, for both charities based in the U.S. and those based abroad.
- If no contact can be found, a notice is published in the geographic area of the organization's last known address announcing that action will be taken to distribute funds according to the intent of the donors. In the case of a foreign charity, efforts to find a contact could be made through the applicable government, and/or published in a newspaper in that country.
- If there is no response Treasury would proceed according to the new cy press regulations.

General Issues

- OFAC should include information on the status of frozen charitable funds in its annual report to Congress, including the success or failure of its efforts to release funds to charitable programs.
- The administrative costs of these efforts should be born by OFAC.

APPENDIX C

Information request regarding frozen charitable funds

Jan. 15, 2008

Council on Foundations, Friends of Charity Association, Grantmakers Without Borders, Muslim Advocates, Muslim Public Affairs Council, OMB Watch

- What is the total amount of charitable funds currently subject to OFAC blocking orders?
- How much can be attributed to each frozen charitable organization (U.S. and non-U.S.)?
- How much was originally frozen and how much is currently in the account?
- What kind of return on investment is the money getting?
- Who is in charge of investment decisions?
- How many specific license applications been made?
- Have any licenses for withdrawal of funds been granted? If so, what was the purpose and how much was spent? What was the process used?
- What is the nature of the tangible property being held? How is it secured?
- How much real estate is being held? Who is in charge of maintenance?
- What is the status of corporate books and records? How are they secured?
- Where licenses have been denied we have seen two reasons given:
    - Release of funds for charitable programs is not consistent with national interests [insert Katrina quote]
    - Congress intended for all frozen funds to be held and made available to satisfy judgments pursuant to the Terrorism Risk Insurance Act
      Please cite your specific authority for each of these positions, and indicate if OFAC views this as a legal requirement or a policy choice within its discretion.
- What is OFAC's long term intent regarding frozen charitable funds?
- Where information is not made public, what is the specific legal authority?

SHAPE UP AMERICA!

April 24, 2008

Chairman José E. Serrano
Ranking Minority Member Ralph Regula
Subcommittee on Financial Services and General Government
House Committee on Appropriations
B-300 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Serrano and Ranking Minority Member Regula:

As part of the oversight responsibilities held by the Appropriations Subcommittee on Financial Services, we believe it is important you are aware of efforts to secure needed and overdue improvements in the Department of the Treasury's Alcohol and Tobacco Tax and Trade Bureau's (TTB) proposal for the labeling and advertising of wine, distilled spirits, and malt beverages (Docket ID: TTB-2007-0062). Specifically, Shape Up America! supports mandating a standardized "Serving Facts" panel on beer, wine and distilled spirit products that includes listing the alcohol content, expressed in grams per serving.

Because having access to complete labeling information will improve the ability of consumers to make responsible drinking decisions, we request that the Subcommittee include this letter as part of the Public Testimony for fiscal 2009. We are also attaching supporting documentation for the Subcommittee's consideration and inclusion in the record at your discretion.

Shape Up America! is a non-profit organization whose mission is to encourage a better diet and more active lifestyle in all individuals and healthy weight loss in overweight individuals that can be sustained over time. In 2005, Shape Up America! joined with the National Consumers League and a host of other consumer, nutrition and public health organizations in submitting comments urging TTB to require information about the alcohol content and number of calories in all beverage alcohol products.

A number of consumer surveys, including several commissioned by Shape Up America!, demonstrate that the public wants this specific information. This includes the results of a 2008 survey we have summarized below. Finally, our views are shared by many other eminent individuals and organizations. We provide an overview of their comments in this matter below as well.

www.shapeup.org
506 Brackett Creek Road * PO Box 149 * Clyde Park, MT 59018
*406-686-4844 Phone * 406-686-4424 Fax

Background:

Last summer, TTB took an important step forward in publishing a proposed rule requiring a "Serving Facts" panel on the labels of beer, wine and distilled spirits. While we commend TTB for this action, we are very concerned that the agency's proposal leaves out the essential information consumers need when consuming an alcoholic beverage – information about alcohol content per serving.
As an organization working to address the unprecedented epidemic of obesity in the U.S., Shape Up America! applauds TTB's decision to require information about the calorie content of alcoholic beverages. TTB also proposes including information about the amount of fat, carbohydrates, and protein. Alcohol is metabolized quite differently from these other macronutrients, and provides 7 calories per gram, which means alcohol's calorie contribution is almost as large as fat. These distinctive characteristics of alcohol justify the inclusion of alcohol content, expressed in grams per serving, on the "Serving Facts" panel on beer, wine and distilled spirits products.

As the TTB states in the preamble to its proposed rule, alcohol content is "very basic information" that consumers use "to measure and moderate their drinking." Yet, the agency has not taken the steps to require this "basic information" in a standardized format. Therefore, consumers will not have the facts they need to guide their consumption decisions. This "half a loaf" strategy is hardly a victory for public health.

Specific Rule Request:

To address this serious omission, Shape Up America! has gone on record as urging TTB to require the critical information consumers need to follow the *Dietary Guidelines'* advice on moderate drinking, which is phrased in terms of number of drinks per day – specifically no more than two for men, one for women.
[http://www.health.gov/dietaryguidelines/dga2005/document/html/chapter9.htm]
We have urged TTB to require the following information, and for manufacturers to provide it in a standardized format:

- The serving size, *i.e.* 12 fluid ounces (fl oz) for beer, 5 fl oz for wine, and 1.5 fl oz for distilled spirits;
- The amount of alcohol (expressed in grams) per serving;
- The definition of a "standard drink" expressed in grams of alcohol per serving;
- The number of standard drinks per container; and
- A summary of the recommendations contained in *The Dietary Guidelines for Americans 2005,* which defines moderate drinking as no more than 2 drinks per day for men and one drink per day for women.

Just as the Food and Drug Administration (FDA) designed the Nutrition Facts panel on food labels as a tool for consumers to follow advice in the *Dietary Guidelines*, TTB should do the same with its "Serving Facts" panel. If this labeling does not provide consumers with the information they need to adhere to the *Dietary Guidelines*, it will fail to support the definition of moderate drinking and fail as a public health tool that will be

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useful both to combat the obesity epidemic and to reduce alcohol-related mortality which is the third leading cause of preventable deaths in the U.S.

In combination with information about the calorie content of alcoholic beverages, access to meaningful information about the alcohol content of beer, wine and distilled spirits is long overdue and will significantly advance important public health goals.

Consumers' Views on Labeling

On January 22, 2008, Shape Up America! submitted to TTB the results of a consumer survey on the proposed "Serving Facts" panel. In short, the survey found strong support among consumers for a mandatory "Serving Facts" panel on labels of all alcohol beverages. At the same time, the poll provided compelling evidence that consumers want a "Serving Facts" panel that provides alcohol content information, including the amount of alcohol per serving, the definition of a "standard drink", and the *Dietary Guidelines'* advice on moderate drinking.

Commissioned by Shape Up America! to find out what kind of alcohol labeling information consumers find most helpful, an online survey of 503 adult Americans aged 18 and over was conducted by Penn, Schoen & Berland Associates, Inc.'s Internet Survey Group (ISG) in December 2007. Respondents drawn from a Census-balanced sample completed an online survey of 10 specific questions addressing the advice about moderate drinking contained in the *Dietary Guidelines for Americans* and the information that would be most helpful for the respondents who choose to consume alcohol beverage products. Those participating in the poll were also asked to review three alternative versions of the "Serving Facts" panel randomly rotated to avoid selection bias and to give feedback on the information that would help consumers make responsible drinking decisions.

As documented in the survey report (a copy of which is being submitted with this statement), the overwhelming majority of respondents to our survey (90%) agreed with TTB that the "Serving Facts" panel should be mandatory. However, the survey shows that most consumers do not agree with TTB's statement that the percent alcohol by volume (ABV) provides sufficient information about a beverage's alcohol content. Rather, respondents clearly expressed a desire for more alcohol content information as follows:

- When presented with three different versions of the "Serving Facts" panel, 76% of consumers favored a format containing alcohol content information – the amount of alcohol per serving, percent alcohol by volume, and the definition of a "standard drink".
- When asked what information they would like to see on the label, consumers ranked the amount of alcohol per serving first (92%), followed by calories (84%) and the *Dietary Guidelines* advice on moderate drinking (77%).

The full survey is submitted as Attachment 1.

www.shapeup.org
506 Brackett Creek Road * PO Box 149 * Clyde Park, MT 59018
*406-686-4844 Phone * 406-686-4424 Fax

Others Strongly Support Our Views

Several eminent individuals and organizations also submitted comments similar to ours. We provide the following summary for your consideration, and full copies of the referenced comments for the Subcommittee's records.

- *C. Everett Koop, MD, ScD* – Dr. Koop is a former Surgeon General of the United States, a Senior Scholar at the C. Everett Koop Institute at Dartmouth College, and the Founder of Shape Up America!. Dr. Koop wrote: *"...having complete information about the alcohol and caloric content of beer, wine and distilled spirits is long overdue. ... Not only is alcohol a significant source of calories but excessive alcohol consumption makes it difficult to ingest sufficient nutrients with an individual's daily caloric allotment and to maintain a healthy weight. ...Potential benefits (of such labeling) include reduced alcohol abuse, reduced drunk driving, and a reduction in many diseases attributable to excessive alcohol intake."* (Attachment 2)

- *Mary H. Hager, PhD, RD,* Director *of Regulatory Affairs, The American Dietetic Association* -- The American Dietetic Association (ADA) is the nation's largest organization of food and nutrition professionals, with more than 67,000 members. On behalf of the ADA, Dr. Hager wrote: *"...nutrition labeling of alcohol beverage products will provide Americans an additional informational tool for monitoring their dietary intake. ...While the (proposed) labeling may be accurate for nutrient and calorie content information, it is not representative of the recommendations of the 2005 Dietary Guidelines for Americans as to what the serving size is that constitutes a single drink. ... While consumer consumption of alcohol beverage products can vary due to different product container sizes, by using the Dietary Guidelines as a standard reference for the "Serving Facts" panel the serving size of alcohol beverage products will provide consistency for the consumer and alleviate confusion about serving sizes. ... ADA supports labeling that is clear and understandable to the consumer and that avoids confusing information that varies from well accepted standards. ADA believes that the following elements must be included on the "Serving Facts" panel:...On a per serving basis: 1. Alcohol in U.S. fluid ounces..."* (Attachment 3)

- *Charles A. Hurley, Chief Executive Officer, Mothers Against Drunk Driving* -- Mothers Against Drunk Driving was incorporated on September 5, 1980. Its mission is to stop drunk driving, support the victims of this violent crime and prevent underage drinking. According to MADD, in 2005, there were 43,433 total traffic fatalities and of these, 12,945 involved a driver with an illegal BAC (.08 or greater). In a 2005 study conducted by MADD, sixty percent of those surveyed said they had operated a car or truck under the influence of alcohol or close to being under the influence of alcohol, up from 57 percent in 2000. Mr. Hurley wrote: *"Having alcohol content measured and declared on the label in a way that is clearly understandable to consumers is of paramount importance to MADD. ...With both the amount of alcohol per serving and the definition of a "standard drink" on the label, it would be possible for consumers to know how*

many drinks they are consuming. We believe your current proposal undermines the essential need for clarity in this area." (Attachment 4)

- *Chris Waldrop, Director, Food Policy Institute, Consumer Federation of America* – Consumer Federation of America is a nonprofit association of 300 local, state and national consumer interest groups representing more than 50 million Americans. Mr. Waldrop wrote: *"CFA believes that the "Serving Facts" panel should also include the following information: * The definition of a standard drink; * The number of standard drinks per serving; * The Dietary Guidelines advice on moderate drinking; * The percentage alcohol by volume; and * The amount of alcohol (in fl oz) per serving. This additional information is essential, because consumers need to be able to determine from the label how much alcohol they are consuming, both the amount of alcohol and the number of standard drinks."* (Attachment 5)

- *George A. Hacker, Director, Alcohol Policies Project, Center for Science in the Public Interest* – The Center for Science in the Public Interest (CSPI) is a nonprofit health-advocacy group that focuses on nutrition, food safety, and pro-health alcohol policies. CSPI is supported by the 800,000 U.S. subscribers to its *Nutrition Action Healthletter* and by foundation grants. Mr. Hacker wrote: "*CSPI has a longstanding interest in the labeling of alcoholic-beverages that dates to 1972, when we first petitioned TTB's predecessor agency, the Bureau of Alcohol, Tobacco, and Firearms, to require the listing of ingredients on alcohol labels. ...We find it astonishing that TTB would propose a "Serving Facts" label panel without requiring that it include information on alcohol content. TTB provides no serious rationale for permitting alcohol producers to bury such core information anywhere on the container. Similarly, we question whether TTB's analysis of the issues has been sufficiently thorough to assure that consumers will have product labels that are visible, uniform, comprehensive, and useful in measuring and moderating their alcohol consumption. ...One must question why an agency entrusted with the authority over the labeling of alcoholic beverages could propose a "Serving Facts" label that would list irrelevant nutrition facts about fat and protein (which rarely occurs in alcoholic beverages), but not include alcohol content."* (Attachment 6)

- *Sally Greenberg, Executive Director, National Consumers League* – The National Consumers League (NCL) was the lead organization in requesting a mandatory Alcohol Facts panel on labels of all alcoholic beverages. The NCL letter is a joint effort of the National Consumers League; the American Public Health Association; Center for Communications, Health & the Environment; Consumer Action; Judy Sandeen, Director of Campus Health Services at Hastings College; Maryland Consumer Rights Coalition; National Association of Local Boards of Health; National Association of Nurse Practitioners in Women's Health; National Partnership for Women & Families; National Research Center for Women & Families; The Black Women's Health Imperative; and the Virginia Citizens Consumer Council. On behalf of these organizations, Ms. Greenberg wrote: *"We*

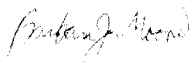
are disappointed ...that the proposed rule would not mandate any new information about alcohol content on product labels. Under the proposed rule, the "Serving Facts" panel for a beer, wine, or distilled spirit product could, at the option of the bottler, contain no information about alcohol whatsoever. By so limiting the amount of label information about alcohol content, TTB would be missing a historic opportunity to de-mystify the composition of alcoholic beverages and educate consumers about healthy and responsible drinking. The "Serving Facts" panel should include the alcohol content information that consumers need to make responsible and healthful drinking decisions. This includes...the amount of alcohol per serving." (Attachment 7)

- *Michael D. Maves, MD, MBA, Executive Vice President, CEO, American Medical Association* – The American Medical Association was established in 1847. Its mission is to promote the art and science of medicine and the betterment of public health. Dr. Mayes included the following recommendations in the AMA's letter to TTB: *"* "Serving facts" labels and ads should cite the percent of alcohol content based on the grams of ethanol present, not on the fluid volume of the drink (which may include non-alcoholic fluids) and cease to cite any "proof" designation. * Labels and ads should use consistent alcohol content and drink size information using the terminology, a "standard drink," which contains about 14 grams (about 0.6 fluid ounces) of pure alcohol."* (Attachment 8)

These are just a few of the many comments filed by leading consumer organizations and public health experts in support of a labeling rule that provides clear and concise information about the alcohol content per serving and the definition of a standard drink expressed in grams of alcohol per serving as part of a standardized "Serving Facts" label. This overwhelming support within the nutrition and public health community should demonstrate to the Subcommittee that TTB will not be meeting its mandate of public service if it does not revise the proposed rule to reflect the concerns stated by this array of concerned individuals and organizations. Given the obesity epidemic and the approximately 100,000 alcohol-related deaths each year, it is imperative that the TTB take action in response to the science-based positions of the public health community.

We appreciate your attention to this issue, and look forward to working with the Subcommittee in the months ahead.

Sincerely,



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Attachment 1

1110 Vermont Ave.
Suite 1200
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Phone: 202-842-0500
Fax: 202-289-0916

Shape Up America! Alcohol Labeling Poll
Final Results

Today, the American public is regularly exposed to standardized labels containing information about the contents of food, non-alcoholic beverages, dietary supplements, and over-the-counter drugs. According to empirical research, this labeling has assisted consumers in making better informed choices among competing products and, in the case of non-prescription medicines, increased understanding of how to take these drugs correctly.

But when it comes to beer, wine and distilled spirits, even the most basic information is not required on the labels of most alcohol beverage products. Although the Alcohol and Tobacco Tax and Trade Bureau (TTB) has long required certain labeling, the agency does not require the same ingredient and nutrition information that now appears on the labels of all other consumable products. This includes information about the serving size, calories per serving, alcohol content per serving, and what represents a "standard drink."

To address this problem, in 2003, the National Consumers League joined with the Center for Science in the Public Interest and 75 other public health and consumer organizations in submitting a formal petition to TTB to require an "Alcohol Facts" panel on the labels of all alcohol beverage products. This resulted in TTB issuing an advance notice of proposed rulemaking in April 2005, whereby the agency called for public comment on "appropriate ways to use beverage alcohol labels to inform the public about the identity and quality of the products."

After receiving extensive comments from nutrition, public health and consumer advocacy organizations, in July 2007, TTB published proposed rules to require a "Serving Facts" on the labels of beer, wine and distilled sprits. While the proposed rules would require manufacturers to list the amount of calories, carbohydrates, fat and protein in a standardized manner, TTB's proposal specifically leaves out any information about the alcohol content on these products.

TTB has again asked for public comment, which is why Shape Up America!, the non-profit organization founded by former Surgeon General C. Everett Koop, commissioned Penn, Schoen and Berland's (PSB) Internet Surveys Group (ISG) to determine what kind of labeling information consumers would find most helpful. Conducted in December 2007, this online survey of 503 adult Americans aged 18 and over finds Americans want detailed and complete labeling information on alcoholic beverages, including the percentage of alcohol by volume, the serving size, the amount of alcohol per serving,

the definition of a "standard drink," and the number of standard drinks per container.

Methodology

The *Shape Up America! Alcohol Labeling Poll* was conducted among 503 respondents who were drawn from a Census-balanced sample of American adults 18 years of age and older. These consumers were asked to complete an online survey of 10 specific questions addressing the advice about moderate drinking contained in the *Dietary Guidelines for Americans* and the information that would be most helpful when using beverage alcohol products. Respondents were also asked to review three alternative label formats that were rotated randonly to control order selection bias-- one using only the information proposed in TTB's rulemaking and the others including additional information about the alcohol content of the product -- and give feedback on the information that would help them make responsible drinking decisions.

To ensure a reliable and accurate representation of the total national adult population, PSB's ISG used a series of screener questions up front to control for important demographic factors including age, geography, gender, race/ethnicity, income, and education. ISG has access to over a hundred million consumer emails, which it uses to construct representative "pools" of respondents for studies. These measures control for any biases associated with online polls as compared to telephone polls. The margin of error is +/- 4.4% at the 95th confidence interval level.

Major Findings

Major findings include the following:

1. Americans of all types believe that the advice about moderate drinking contained in the *Dietary Guidelines for Americans* (up to two drinks a day for men and one drink a day for women) will help them make responsible drinking decisions. That's why the vast majority of consumers want alcohol labels to require specific information about the alcohol and the number of standard drinks per container so they will be able to heed the *Dietary Guidelines'* advice.
2. Americans of all backgrounds want complete information about what is in beer, wine and distilled spirits. In fact, respondents overwhelmingly agree with the statement: "There is no point in having labeling on the containers of alcohol beverages unless labels include all nutrition and ingredient information, including the amount of alcohol in each drink."
3. When read a list of types of information that could be included on an alcoholic beverage label, the largest percentage of Americans said "the amount of alcohol in each drink" would be important to include.

Summary of Major Findings

1. **Consumers believe the advice about moderate drinking contained in the *Dietary Guidelines for Americans* (up to two drinks a day for men and one drink a day for women) will help them make responsible drinking decisions. That's why the vast majority wants alcohol labels to require specific information so they will be able to heed the Dietary Guidelines' advice.**

   - When asked if they were familiar with the *Dietary Guidelines for Americans*, 60 percent of respondents replied affirmatively.

   - Moreover, when informed about the specific advice regarding moderate drinking, nearly 4 in 5 Americans (79%) say it would be useful to know the *Guidelines* defines "moderate consumption" of alcoholic beverages as up to two drinks per day for men and up to one drink per day for women.

   - Although the definition of a standard drink is recognized throughout the federal government and public health community, this definition is not well known by most consumers. Accordingly, more than 4 in 5 surveyed (81%) say it would be helpful to know that government defines a standard drink as containing 0.6 fluid ounces of pure alcohol that translates into 12 fluid ounces of regular beer, 5 fluid ounces of wine, or 1.5 fluid ounces of 80-proof distilled spirits.

2. **The American public supports requiring the manufacturers of alcoholic beverages to provide nutrition and ingredient labeling on the containers of alcoholic beverages. Nearly all consumers say "the amount of alcohol in each drink" is the single most important fact to include.**

   - When informed that TTB is considering requiring mandatory labeling on all beer, wine and distilled spirits products, nine in ten (90%) support this action and the level of support transcends demographics, political affiliation and alcohol usage.

   - Of those surveyed, 44% agreed strongly that mandatory labeling is needed. Only 4% strongly oppose government action.

Level of Support for Labeling			
Profile	**Support (NET) (%)**	**Strongly Support (%)**	**Somewhat Support (%)**
All	***90***	***44***	***46***
Men	87	39	48
Women	92	49	43
Ages 18-34	93	42	51
Ages 35-49	91	42	49
Ages 50+	87	48	39
Income less than $60,000	91	46	45
Income greater than $60,000	88	42	46
Children under 18 at home	91	45	46
No children at home	89	44	45
No college degree	90	44	46
College degree	87	50	37
Democrat	94	50	44
Republican	84	45	39
Independent	91	39	52
Drink alcohol	89	42	47
Not drink alcohol	92	54	38

- When asked specifically about the information that should be listed on the label, the public wants complete information, including the amount of calories, specific nutrients (carbohydrates, fat and protein), and the alcohol content.

- When read a list of types of information that could be included on an alcoholic beverage label, consumers ranked "the amount of alcohol in each drink" first (92%) followed by calories (84%) and information about what the Dietary Guidelines recommend (77%).

- Although consumers view specific nutrient information as helpful, the importance of information about carbohydrates, fat and protein did not rank as valuable in the minds of the public.

How Important is it to you to have each of the following types of information on an alcoholic beverage label? 1st # - % very important 2nd # - % important (very + somewhat)	All (%)	Male (%)	Female (%)
The amount of alcohol in each drink	**65**/92	**59**/91	**70**/93
The number of calories in each drink	**49**/84	**42**/83	**54**/81
The amount of carbohydrates in each drink	**34**/75	**29**/74	**39**/76
The amount of protein in each drink	**26**/66	**22**/65	**30**/68
The amount of fat in each drink	**39**/71	**35**/70	**44**/72
Information about what the Dietary Guidelines recommend	**34**/77	**29**/79	**30**/76

- While the public wants alcohol labels to be complete, they also know that not including specific facts about the alcohol content defeats the point of alcohol labeling. In fact, nearly 8 in 10 respondents (79%) agree – 34% strongly –with the statement: "There is no point in having labeling on the containers of alcohol beverages unless labels include all nutrition and ingredient information, including the amount of alcohol in each drink."

3. **Americans want detailed and complete labeling information on alcoholic beverages, including the amount of alcohol in standard drink.**

Survey respondents were informed that they would be "asked questions about some alternatives labels that could be placed on alcohol beverages containers." They were then presented with the following three options (order rotated for each respondent to control bias):

Serving facts	
Serving Size	12 fl oz (355 ml)
Servings Per Container	1
	Amount Per Serving
Calories	153
Fat	0g
Carbohydrate	13g
Protein	1g

Serving facts	
Serving Size	12 fl oz (355 ml)
Servings Per Container	1
	Amount Per Serving
Calories	153
Fat	0g
Carbohydrate	13g
Protein	1g
Alcohol by volume	5%
Fl oz of alcohol	0.6

Serving facts	
Serving Size	12 fl oz (355 ml)
Servings Per Container	1
	Amount Per Serving
Calories	153
Fat	0g
Carbohydrate	13g
Protein	1g
Alcohol by volume	5%
Fl oz of alcohol	0.6
* A standard drink contains 0.6 fluid ounces of alcohol	

Respondents were asked the following question after reviewing each of the three options: Which one of the following three labels provide you with the information you need to follow the *Dietary Guidelines* recommendation?[1]

Labeling That Contains Alcohol Content Strongly Preferred

When presented with the three alternative labels (featured above) that could be placed on alcohol beverage containers, more then 3 in 4 Americans (76%) chose the "Standard Drink" label that included the notation "a standard drink contains 0.6 fluid ounces of alcohol." Preference was consistent across all demographic groups.

Responses to the question *What type of information do you get from reading this label* (asked of each of the three labels) indicates that American want labeling information that includes alcohol content and what constitutes a standard drink.

- When presented with the "No Alcohol" label, 18% responded that the label was missing information about alcoholic content. This was the top response.
- When presented with the "Standard Drink" label, 14% responded that the label provided alcohol information. This was the second most often response, after useful and informative.

*****

Taken together, these survey findings show that Americans public wants complete and clear information about what is in alcoholic beverages, starting with the amount of alcohol. Moreover, consumers believe that alcohol labeling can play an important role in helping them heed the advice about moderate drinking contained in the *Dietary Guidelines for Americans*. Put very simply, consumers question what is the point of labels that don't give them all the facts.

[1] The following analysis will refer to each of these three labels as follows: (1) No Alcohol; (2) Alcohol, and (3) Standard Drink. Respondents were not told the name of these three labels; we use these definitions as convenience only.

1110 Vermont Ave.
Suite 1200
Washington, D.C. 20005
Phone: 202-842-0500
Fax: 202-289-0916

Survey Questionaire

1. The "Dietary Guidelines for Americans," published every 5 years by the Department of Health and Human Services and Department of Agriculture, offers advice to promote health and on how to maintain a healthy lifestyle. Are you familiar with the "Dietary Guidelines for Americans"?
   a) Yes
   b) No/Don't know

2. According to the "Dietary Guidelines," adults who choose to drink alcoholic beverages should do so sensibly and in moderation. How useful is it to you to know that the Dietary Guidelines defines "moderate consumption" of alcoholic beverages (distilled spirits, beer or wine) as up to two drinks per day for men and up to one drink per day for women?
   a) Very useful
   b) Somewhat useful
   c) Not very useful
   d) Not sure

3. The government defines a standard drink as containing 0.6 fluid ounces of pure alcohol. Would it help to know that the Dietary Guidelines has translated this into 12 fluid ounces of regular beer, 5 fluid ounces of wine, or 1.5 fluid ounces of 80-proof distilled spirits?
   a) Yes
   b) No/Don't know

4. Currently, the manufacturers of alcoholic beverages are not required to provide nutrition and ingredient labeling on the containers of alcoholic beverages. But, the government is now considering requiring information about what is in alcoholic beverages.

   Do you support or oppose requiring the manufactures of alcoholic beverages to provide nutrition and ingredient labeling on the containers of alcohol beverages?
   a) Strongly support
   b) Somewhat support
   c) Somewhat oppose
   d) Strongly oppose
   e) Not sure

5. How Important is it to you to have each of the following types of information on an alcoholic beverage label?

Very Important	Somewhat Important	Not Very Important	Not At All Important	Don't Know
`O	O	O	O	O

a) The amount of alcohol in each drink
b) The number of calories in each drink
c) The amount of carbohydrates in each drink
c) The amount of protein in each drink?
d) The amount of fat in each drink?
e) Information about what the Dietary Guidelines recommend?

6. Do you agree or disagree with the following statement: There is no point in having labeling on the containers of alcohol beverages unless labels include all nutrition and ingredient information, including the amount of alcohol in each drink.
   a) Strongly agree
   b) Somewhat agree
   c) Somewhat disagree
   d) Strongly disagree
   e) Not sure

7. Below are a few questions about some alternatives labels that could be placed on alcohol beverages containers.

This is the first label.

Serving facts	
Serving Size	12 fl oz (355 ml)
Servings Per Container	1
	Amount Per Serving
Calories	**153**
Fat	**0g**
Carbohydrate	**13g**
Protein	**1g**

What type of information do you get from reading this label? OPEN END

8. Another possible label that the government is considering is this label:

Serving facts	
Serving Size	12 fl oz (355 ml)
Servings Per Container	1
	Amount Per Serving
Calories	**153**
Fat	**0g**
Carbohydrate	**13g**
Protein	**1g**
Alcohol by volume	**5%**
Fl oz of alcohol	**0.6**

What type of information do you get from reading this label? OPEN END

9. A third option under consideration is this label:

Serving facts	
Serving Size	12 fl oz (355 ml)
Servings Per Container	1
	Amount Per Serving
Calories	**153**
Fat	**0g**
Carbohydrate	**13g**
Protein	**1g**
Alcohol by volume	**5%**
Fl oz of alcohol	***0.6**
* A standard drink contains 0.6 fluid ounces of alcohol	

What type of information do you get from reading this label? OPEN END

10. Which one of the following labels provides you with the information you need to follow the Dietary Guidelines recommendation?

SHOW THREE LABELS ON ONE SCREEN

And now just a few last questions for classification purposes only.

11. Do you drink alcoholic beverages?
    1) Yes
    2) No

12. Are you . . .?
    1) Male
    2) Female

13. Which one of the following categories best describes your age?
    1) 18-24
    2) 25-29
    3) 30-34
    4) 35-39
    5) 40-44
    6) 45-49
    7) 50-54
    8) 55-59
    9) 60-64
    10)64 or older
    11)Refused

14. What is the last grade in school that that you completed?
    1) Grade school
    2) Some high school
    3) High school graduate
    4) Some college
    5) College graduate
    6) Graduate school
    7) Technical school
    8) Refused

15. What is your current marital status?
    1) Married
    2) Single
    3) Widowed
    4) Divorced
    5) Refused

16. Do you have children living at home?
    1) Yes
    2) No
    3) Refused

17. For statistical purposes only, we need to know your total family income for 2006. Will you please tell me which of the following categories best represents you total family income?
    1) Less than $20,000
    2) $20,000-$34,999
    3) $35,000-$59,999
    4) $60,000-$99,999
    5) $100,000+
    6) Refused

18. Do you live in a city, suburb just outside a city, or a less developed or rural area not near a city?
    1) City
    2) Suburb
    3) More rural, less developed
    4) Refused

19. Which one of the following best describes your employment status?
    1) Full-time
    2) Part-time
    3) Not employed

Attachment 2

SHAPE UP AMERICA!

January 7, 2008

Chief, Regulations and Procedures Division
Alcohol and Tobacco Tax and Trade Bureau
Attn: Notice No. 73
P.O. Box 14412
Washington, DC 20044-4412

Re: Notice No. 73; Docket ID: TTB-2007-0062; Labeling and Advertising of Wine, Distilled Spirits and Malt Beverages; Proposed Rule

To Whom It May Concern:

In 2005, I joined many colleagues in the public health community by urging the Alcohol and Tobacco Tax and Trade Bureau (TTB) to require a mandatory "Alcohol Facts" panel on the labels of all alcoholic beverages, regardless of product category. As a former U.S. Surgeon General and a physician concerned about improving the public's health, I took this action because having complete information about the alcohol and caloric content of beer, wine and distilled spirits products is long overdue.

Two years later, I am pleased to note that TTB has issued a proposed rule addressing the urgent need to inform consumers about the caloric content of alcoholic beverages, as well as certain macronutrients. However, this is only part of the equation. Therefore, in my capacity as the founder of Shape Up America!, I am now writing to urge TTB to provide complete information to consumers by also mandating standardized information about the alcohol content as part of the "Serving Facts" panel. Not only is alcohol a significant source of calories but excessive alcohol consumption makes it difficult to ingest sufficient nutrients within an individual's daily caloric allotment and to maintain a healthy weight.

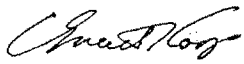
At the same time, excessive consumption of alcohol increases the risk of liver cirrhosis, hypertension, cancers of the upper gastrointestinal tract and serious injury caused by cognitive impairment. To reduce these health risks requires helpful and easily accessible information about the alcohol content of all beverage alcohol products, so that consumers can make responsible drinking decisions. Having improved labeling information about the alcohol content will also make it easier for consumers to follow the Dietary Guidelines' advice on moderate drinking. Potential benefits include reduced alcohol

abuse, reduced drunk driving, and a reduction in the many diseases attributable to excessive alcohol intake.

TTB has taken important steps forward in helping American adults make more informed decisions about alcohol consumption. That is why I urge TTB to get it right by requiring clear, easy-to-read information about the amount of alcohol in beer, wine and distilled spirits, including the percentage of alcohol by volume, the serving size (*i.e.*, 12 fluid ounces (fl oz) for beer, 5 fl oz for wine, and 1.5 fl oz for distilled spirits), the amount of alcohol per serving (fluid ounces or grams), the definition of a "standard drink," and the number of standard drinks per container.

Thank you for your consideration.

Sincerely,



C. Everett Koop, MD, ScD
Founder
Shape Up America!

Senior Scholar
C. Everett Koop Institute at Dartmouth College
7025 Parker House
Hanover, NH 03755506

U.S. Surgeon General 1981-1989

Attachment 3

American Dietetic Association
www.eatright.org | *Your link to nutrition and health™*

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120 South Riverside Plaza, Suite 2000
Chicago, Illinois 60606-6995
312/899-0040 800/877-1600

Washington, D.C. Office
1120 Connecticut Avenue N.W., Suite 480
Washington, DC 20036-3989
202/775-8277 800/877-0877

January 24, 2008

Francis W. Foote
Director, Regulations and Rulings Division
Alcohol and Tobacco Tax and Trade Bureau
P.O. Box 14412
Washington, DC 20044-4412

Labeling and Advertising of Wines, Distilled Spirits and Malt Beverages

The American Dietetic Association appreciates this opportunity to respond to the Alcohol and Tobacco Tax and Trade Bureau (TTB) Notice No. 75: Labeling and Advertising of Wines, Distilled Spirits and malt Beverages; Request for Public Comment first published in the July 31, 2007 Federal register (Vol. 72, No. 146, pp. 41860-41884) and the Comment Period Extension published September 20, 2007 Federal Register (Vol. 72, No. 182, pp. 53742-53743.) The ADA supports the TTB decision to consider amending the required statement of alcohol content, expressed as a percentage of alcohol by volume, on all alcohol beverage products. In addition, ADA supports the proposal to require a Serving Facts panel on all alcohol beverage labels, which would include a statement regarding the amount of calories, carbohydrate, fat, and protein per serving.

With more than 67,000 members, the American Dietetic Association is the nation's largest organization of food and nutrition professionals. ADA serves the public by promoting optimal nutrition, health, and well-being. The Association has identified among its priority issues the need to increase nutrition education for all and to support continuous efforts such as the Dietary Guidelines for Americans to advance better nutrition among diverse populations. ADA actively promotes food labeling that is truthful and non-misleading.

In the United States, leading determinants of morbidity and mortality are rooted in behavioral choices related to eating habits, exercise, tobacco, alcohol consumption, and stress reduction. ADA believes that health promotion and disease prevention are the best population strategies for reducing the current burden of chronic disease (1). In working with clients and consumers, dietitians address alcohol consumption and promote guidance consistent with the Dietary Guidelines.

These issues are also important in the context of body weight management. Successful weight management to improve overall health for adults requires a lifelong commitment to healthful lifestyle behaviors emphasizing sustainable and enjoyable eating practices and daily physical activity (2). While the scientific evidence for a specific role of alcohol in overweight conditions or obesity remains uncertain, alcoholic beverages do contribute to caloric intake. The 2005 Dietary Guidelines for Americans (3) recognizes that excessive alcohol consumption makes it difficult to ingest sufficient nutrients within an individual's daily calorie allotment as well as maintain a healthy weight. Consequently, nutrition labeling of alcohol beverage products will provide Americans an additional informational tool for monitoring their dietary intake.

ADA supports amending the required statement of alcohol content, expressed as a percentage of alcohol by volume, on all alcoholic beverage products. ADA also supports the requirement to include calories, carbohydrate, fat, and protein per serving on the Serving Facts panel on alcohol beverage products. These are addressed in greater detail under items A through C below.

A. PROPOSED SERVING SIZE REFERENCE AMOUNTS FOR WINES, DISTILLED SPIRITS, AND MALT BEVERAGES

While ADA supports language including serving size as part of the Serving Facts panel on alcoholic beverage products, the TTB's proposed serving sizes are not consistent with language familiar to the public in reference to what is defined as one drink. The TTB is proposing the following:

> "....the "serving" or "serving size" as the amount of alcohol beverage customarily consumed as a single serving, expressed in both U.S. fluid ounces and, in parentheses, in milliliters for wines, distilled spirits, and malt beverages...This proposal is for nutrient and calorie consumption and not for recommended consumption amounts."

While the labeling may be accurate for nutrient and calorie content information, it is not representative of the recommendations the 2005 Dietary Guidelines for Americans (3) as to what the serving size is that constitutes a single drink. The Dietary Guidelines state that the standard reference for one drink is defined as 12 fluid ounces of regular beer, 5 fluid ounces of wine or 1.5 fluid ounces of 80-proof distilled spirits (each containing 0.6 fluid ounces of pure or ethyl alcohol.) While consumer consumption of alcohol beverage products can vary due to different product container sizes, by using the Dietary Guidelines as a standard reference for the Serving Facts panel the serving size of alcohol beverage products will provide consistency for the consumer and alleviate confusion about serving sizes. In addition, use of the definition of one drink as stated above would allow consumers to follow the recommended guidance for drinking in moderation—no more than two drinks daily for men and no more than one drink daily for women (9). ADA supports labeling that is clear and understandable to the consumer and that avoids confusing information that varies from well accepted standards.

Thus, ADA does not support the proposed new reference "serving" or "serving sizes" stated in 4.111(b), 5.81(b) and 7.91(b). The ADA does support using the serving sizes set forth in TTB Ruling 2004-1 (1.5 fl. oz. for distilled spirits, 5 fl. oz. for wines and 12 fl. oz. for malt beverages, each containing 0.6 fl. oz. of pure or ethyl alcohol.) as they are consistent with the 2005 Dietary

Guidelines for Americans. The guidelines in the 2005 Dietary Guidelines for Americans concerning a standard reference drink size are used by many governmental and non-governmental agencies for educational purposes. By continuing to use those included in the Dietary Guidelines, which match the TTB Ruling 2004-1, "serving" or "serving size" will be recognizable by the public. Ideally, it will reduce confusion when consumers compare different alcohol beverage products for calories, alcohol percentage, and alcohol in U.S. fl. oz., and grams of carbohydrate, fat, and protein per serving.

B. PROPOSED ELEMENTS OF THE SERVING FACTS PANEL

The ADA supports the proposed elements on the Serving Facts panel, including listing alcohol content as a percentage as well as in fluid ounces per serving.

ADA believes that the following elements must be included on the Serving Facts panel:

A. Serving size
B. Servings per container
C. Percentage of alcohol by volume
D. On a per serving basis:
    1. Alcohol in U.S. fluid ounces
    2. Calories
    3. Carbohydrate
    4. Fat
    5. Protein
E. Reference to "a standard drink contains 0.6 fl. oz. of alcohol"

ADA supports a Serving Facts panel for alcohol beverage products that is consistent with the layout and content of food labels to facilitate consumers using the panel's information. Therefore all serving and nutrient information elements listed above should be included on the Serving Facts panel for all categories of alcohol beverage products, and where possible, use the same units of measure (e.g., g, mg. etc.).

The point of labels is to inform the consumer. By maintaining consistency with the serving sizes---1.5 fl. oz. for distilled spirits, 5 fl. oz. for wines, and 12 fl. oz. for malt beverages, as specified by the Dietary Guidelines (3)---and including all elements on the Serving Fact panel, the consumer will be able to make informed choices when choosing alcohol beverage products. The information should not be used as a replacement for other educational programs already in place, but instead complement existing educational tools.

C. SUMMARY

Results of a consumer survey conducted by the American Dietetic Association in 2002 (4) tell us that consumers were increasingly aware of the connection between diet and health, with particular concern for obesity. They not only sought information on nutrition and healthful eating, but also selected foods and beverages in order to achieve balanced nutrition and a healthy diet. The survey results also indicate that consumers could not consistently identify serving sizes of some foods. Nutrition labels on foods and beverages can and should provide

consumers with the type of information they need to make informed food and beverage choices based on accurate and consistent energy and nutrient data.

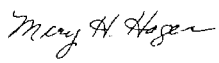
Therefore, ADA supports:

1. Labeling that is consistent with well-recognized standards to identify serving size equivalents for one drink to reduce consumer confusion;
2. Listing of all Serving Facts elements as above in B, including fat and protein, even when the amount is "0"; and
3. Including percentage of alcohol and alcohol in U.S. fluid ounces on the Serving Fact label.

Dietetic professionals play critical roles in helping consumers interpret food labels, integrate them with other tools and information, and apply them in their lives. ADA's members stand ready to assist TTB in its outreach and educational efforts as nutrition information, while of importance, can not replace the need for nutrition education.

For further information or clarification of the above comments, please contact me at 202-775-8277, ext. 6007, or mhager@eatright.org.

Sincerely,



Mary H. Hager, PhD, RD
ADA Director, Regulatory Affairs

References:

(1) American Dietetic Association. Position of the American Dietetic Association: The Roles of Registered Dietitians and Dietetic Technicians, Registered in health promotion and disease prevention. *J Am Diet Assoc.* 2006;106:1875-1884.

(2) American Dietetic Association. Position of the American Dietetic Association: Weight management. *J Am Diet Assoc.* 2002;102:1145-1155.

(3) US Department of Health and Human Services and US Department of Agriculture. *Dietary Guidelines for Americans 2005.* Available at: http://www.health.gov/dietaryguidelines/dga2005/document. Accessed January 15, 2008.

(4) American Dietetic Association. *Nutrition and You: Trends 2002.* Final Report, 2002. Available at: http://www.eatright.org/images/pr/trends02findings.pdf. Accessed January 15, 2008.

Attachment 4

Mothers Against Drunk Driving
NATIONAL OFFICE
511 E. John Carpenter Fwy., Suite 700
Irving, TX 75062-8187
Phone (214)744-MADD
Fax (972)869-2206/2207
www.madd.org

January 23, 2008

Director, Regulations and Rulings Division
Alcohol and Tobacco Tax and Trade Bureau
P.O. Box 14412
Washington, DC 20044-4412

Re: Notice No. 73

Mothers Against Drunk Driving (MADD) appreciates the opportunity to submit comments in response to the Alcohol and Tobacco Tax and Trade Bureau's (TTB) proposed Rule on Serving Facts. We are writing today in support of the National Consumers League (NCL) comments, specifically their comments regarding the ABV labeling requirement and the mandatory serving facts panel, on the Notice. We too are both heartened that the TTB is working toward mandatory labeling, but very disappointed in the direction of the current proposal.

Having alcohol content measured and declared on the label in a way that is clearly understandable to consumers is of paramount importance to MADD. As an organization, we strenuously oppose drunk driving but have no objections to the responsible use of alcohol by adults. In line with this, we support efforts to educate the consumer about what responsible use of alcohol is. Research has shown that quite often this knowledge is not in place, causing consumers to misunderstand the legal and personal responsibility consequences of engaging in complex tasks like driving after consuming alcohol, with often tragic results. Thousands of Americans die each year as the result of someone misjudging (or ignoring) rules of responsible consumption.

To better educate consumers, the serving sizes for alcohol beverages should be based on the standard servings of 12 fl oz for malt beverages, 5 fl oz for wine, and 1.5 fl oz for distilled spirits – these all contain about .6 oz alcohol for average levels of alcohol per drink. These are the standard drink sizes used by the USDA and adopted by NIAAA, NHTSA, FDA, NIH, and all other government agencies that play a role in alcohol policy, as well as numerous NGOs. The responsible drinking messages used by all of these agencies and organizations are phrased in terms of "standard drinks." With both the amount of alcohol per serving and the definition of a "standard drink" on the label, it would be possible for consumers to know how many drinks they are consuming. We believe your current proposal undermines the essential need for clarity in this key area.

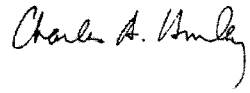
We do agree with the TTB's effort to approximate a serving size based on common serving patterns; however, the levels currently set seem to add to confusion rather than reduce it. MADD believes that there should be equivalence among the beverage types and that the key

determining factor should be the amount of alcohol in the beverage. While the serving size is important information, it alone is not sufficient. Because alcohol levels vary widely among product categories, as recognized by the TTB, there must be alcohol amount per serving as a separate category. Thus, as the NCL proposes, having a declaration of not only what a standard drink is, but also the amount of alcohol in each serving size.

TTB should require that the Serving Facts panel include the Dietary Guidelines advice on moderate drinking; this could be stated, as mentioned in the NCL comments, as: "If you choose to drink, the Dietary Guidelines for Americans recommends no more than two drinks for men, one drink per day for women. Certain individuals should not consume alcohol at all."

In summary, we would recommend that (1) serving sizes are 1.5 fl. oz. for spirits, 12 fl. oz. for beer, 5 fl. oz. for wine; (2) the amount of alcohol per serving is required in the "Serving Facts" panel; and (3) the text in the panel state "a standard drink contains 0.6 fl. oz. of alcohol." By providing standard drink information and the amount of alcohol per serving, Americans would be better able to make responsible choices about the amount of alcohol they choose to consume, just as they do for calories or carbohydrates. It would therefore help achieve MADD's goal of the elimination of drunk driving in the United States.

Sincerely,



Charles A. Hurley
Chief Executive Officer
Mothers Against Drunk Driving

Attachment 5

Consumer Federation of America

December 18, 2007

Director
Regulations and Rulings Division
Alcohol and Tobacco Tax and Trade Bureau
PO Box 14412
Washington, DC 20044-4412

Re: Notice No. 73

The Consumer Federation of America appreciates the opportunity to comment regarding the Alcohol and Tobacco Tax and Trade Bureau's (TTB) proposed rule on labeling and advertising of wines, distilled spirits and malt beverages (Docket No. TTB-2007-0062).

Consumer Federation of America (CFA) is a nonprofit association of 300 local, state and national consumer interest groups representing more than 50 million Americans. CFA was established in 1968 to advance the consumer interest through research, education and advocacy. CFA joined in the December 16, 2003 petition submitted by the National Consumers League and the Center for Science in the Public Interest calling for a mandatory "Alcohol Facts" panel on labels of alcohol beverages.

CFA supports the proposed rule, but we were shocked that the proposed Serving Facts panel would not include any information about alcohol. In the July 2007 Federal Register notice announcing its proposal, TTB plainly states "the alcohol content of a beverage is one of the most important pieces of information about that product." We agree and think that the main purpose of the Serving Facts panel should be to provide consumers with useful information about alcohol content. This should include all of the information that consumers need to follow government recommendations about alcohol consumption, including the *Dietary Guidelines* advice on moderate drinking.

Serving Facts Panel Information
CFA supports the TTB's proposal to require a mandatory "Serving Facts" panel on all alcohol beverages. CFA strongly supports making this information mandatory to ensure that consumers are provided with consistent and standardized information about the alcohol beverages they may consume. A voluntary system would allow some manufacturers to avoid providing this information, which would not effectively serve this interest. Instead, all alcohol beverages should be required to carry this information.

As detailed in the 2003 petition and emphasized in the proposed rule, the Serving Facts panel should include:

- The serving size in fluid ounces (*e.g.*, 12 fl oz for beer, 5 fl oz for wine, and 1.5 fl oz for distilled spirits);
- The number of servings per container;
- The number of calories per serving; and
- The number, in grams per serving, of carbohydrates, fat and protein.

These elements are basic to providing consumers with important and relevant information about the alcohol beverages they may consume. However, this information alone is insufficient. CFA believes that the Serving Facts panel should also include the following information:

- The definition of a "standard drink";
- The number of standard drinks per serving;
- The *Dietary Guidelines'* advice on moderate drinking (*i.e.*, U.S. *Dietary Guidelines* advise moderate drinking: no more than 2 drink per day for men, 1 drink per day for women);[1]
- The percentage alcohol by volume; and
- The amount of alcohol (in fl oz) per serving.

This additional information is essential, because consumers need to be able to determine from the label how much alcohol they are consuming, both the amount of alcohol and the number of standard drinks. The definition of a "standard drink" is recognized throughout the federal government and public health community and should not be controversial.[2] This is also how most consumers talk about alcohol consumption in everyday speech – in terms of number of "drinks." In the preamble to its proposed rule, TTB appears to be unfamiliar with the concept of a "standard drink." This is incredible. The *Dietary Guidelines*, issued by the Departments of Agriculture and Health and Human Services, has for many years used standard drinks to convey advice on moderate drinking. The Food and Drug Administration uses standard drinks when it warns consumers who have 3 or more drinks every day to consult a physician before taking aspirin, acetaminophen, and other over-the-counter painkillers.[3] Thus, keeping standard drink information off of alcohol beverage labels undermines important public health messages.

The *Dietary Guidelines'* advice on moderate drinking is phrased in terms of number of drinks per day (*i.e.*, no more than two for men, one for women). The inclusion of this advice on the beverage container itself can provide a health and safety context within

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[1] U.S. Department of Agriculture (USDA) and Department of Health and Human Services (HHS), *Dietary Guidelines for Americans* 2005, 6th edition, p. 44.

[2] The *Dietary Guidelines* published by USDA and HHS state: "Twelve fluid ounces of regular beer, 5 fluid ounces of wine, or 1.5 fluid ounces of 80-proof distilled spirits count as one drink...." *Id.* The Centers for Disease Control and Prevention (CDC) uses the same definition. *See* CDC, Questions and Answers on Alcohol Consumption, available at http://www.cdc.gov/alcohol/faqs/htm.

[3] 21 C.F.R. 201.322(a)(1). *See also* 63 Fed. Reg. 58769, 56796 (Oct. 23, 1998).

which consumers can monitor their alcohol consumption. However, this advice is of little value if consumers have no idea what a "drink" is or cannot relate the definition to the beverage they are consuming. Therefore, it is important that labels of alcohol beverages provide sufficient information for consumers to count the number of standard drinks they are consuming.

The percent alcohol by volume is already required for distilled spirits, but not for many wines or malt beverages. This information should be provided for all alcohol beverages so that consumers are able to compare the alcohol concentration of different products across and within beverage categories. For consumers who prefer to measure alcohol in fluid ounces, this information should also be provided.

Altogether, this information would enable the consumer to determine the number of drinks per serving and per container, as well as the absolute amount of alcohol per serving and per container. This information should be included in the Serving Facts label so that all the information consumers would use is in one place. Spreading information out in several places on the label decreases the likelihood that consumers will notice or read it; thereby also decreasing the effectiveness of the Serving Facts label for consumers.

Given the many public health problems caused by excessive consumption of alcohol, providing consumers better label information about alcohol content is critical. Comprehensive information can help consumers make responsible drinking decisions and would help them follow the *Dietary Guidelines'* advice on moderate alcohol consumption. Potential benefits include reduced alcohol abuse, reduced drunk driving, and a reduction in the many diseases attributable to excessive alcohol intake.

Placement of Serving Facts Panel

In order for the Serving Facts panel to be effective, its placement on alcohol beverage containers is important. Consumers have become accustomed to using the Nutrition Facts panel that FDA requires for food products. A similar panel for alcohol beverages should provide instant recognition and ease of use for consumers.

CFA supports the presentation of the Serving Facts panel in a horizontal or vertical format for all products. For containers that are 50 milliliters or smaller on which panel placement would be illegible, listing Serving Facts information in a linear fashion is acceptable. However, this liner display should not be permitted on containers that are larger than 50 milliliters. When information is presented in a liner fashion, it is more difficult for consumers to read and utilize. Providing this information in an organized graphic like a Serving Facts panel is the ideal method and should be utilized for all containers larger than 50 milliliters.

In conclusion, CFA urges TTB to reconsider the information to be required in the Serving Facts panel. We believe there are persuasive public health reasons why the Serving Facts label must include the alcohol information discussed in these comments.

Chris Waldrop
Director, Food Policy Institute

Attachment 6

January 22, 2008

Director
Regulations and Rulings Division
Alcohol and Tobacco Tax and Trade Bureau
P. O. Box 14412
Washington, DC 20044-4412

Re: Labeling and Advertising of Wines, Distilled Spirits, and Malt Beverages
Notice No. 73
Comments of the Center for Science in the Public Interest

Dear Director:

The Center for Science in the Public Interest (CSPI) is a nonprofit health-advocacy group based in Washington, DC, that focuses on nutrition, food safety, and pro-health alcohol policies. CSPI is supported by the 800,000 U.S. subscribers to its ***Nutrition Action Healthletter*** and by foundation grants. CSPI appreciates the opportunity to comment on proposed rules for the labeling of alcoholic beverages and applauds the Alcohol and Tobacco Tax and Trade Bureau (TTB) for initiating rulemaking to improve consumer information on those products.

CSPI has a longstanding interest in the labeling of alcoholic-beverages that dates to 1972, when we first petitioned TTB's predecessor agency, the Bureau of Alcohol, Tobacco, and Firearms, to require the listing of ingredients on alcohol labels. In the 35 years since, we've renewed that and related petitions, pursued litigation, successfully advocated for health and sulfite warnings on product containers, and promoted legislation that would have mandated ingredient and other labeling of alcoholic beverages.

Unlike food labels that, by law, provide consumers with substantial useful nutrition information about the foods they eat, alcoholic-beverage labels offer few uniform disclosures that assist consumers in assessing the key elements of the products they drink and comparing those libations with others. Information as basic as alcohol content appears inconsistently in the marketplace, and almost never on malt beverage products, the beverages that contribute most to the alcohol consumed in America. Label information (other than the "average analysis" disclosures on light beer) rarely provides prominent calorie information, despite alcohol's significant contribution to calories in many diets. Despite a well-established governmental standard of "moderate" or "low-risk" drinking, alcoholic-beverage containers still lack that useful information. Consumers deserve better.

Executive Office • [illegible] • [illegible] Street, Suite 211 • Dallas, TX [illegible] • Tel 214 [illegible] • Fax 214 [illegible] • www.cspinet.org

Consumers deserve basic, uniform information about alcoholic beverages, and, in particular, deserve label information that can help them measure, monitor, and moderate their drinking; regulate their caloric intake, and compare products on the basis of their quality. That information takes on even greater importance given the enormous impact of alcohol consumption on society, in terms of health, safety, social, and economic harms. America's most popular, legal drug causes tens of thousands of deaths each year and nearly $200 billion in economic damage, as well as significant morbidity, mayhem, and criminal activity. Additionally, alcoholic beverages pack significant calories that could contribute to America's costly and sickness-inducing obesity epidemic. That backdrop serves as the lens through which we have evaluated TTB's proposed rule.

TTB's proposal includes several necessary and useful informational elements: alcohol content, serving size, servings per container, and calories. Regrettably, however, the proposed rule fails to provide for coherent, uniform, and comprehensive labeling of alcoholic beverages that would significantly enhance consumer, health, and safety choices. In our comments below, we note its strengths and weaknesses and suggest improvements. More broadly, we are concerned about the absence of adequate consumer research on many important questions related to the content and design of the proposed "Serving Facts" label. We question TTB's rejection of label-information proposals that would directly assist consumers in measuring and moderating their drinking and evaluating the quality (ingredients) of the products.

We note that TTB's proposal completely ignores more than 35 years of requests for information on the ingredients in alcoholic beverages, but would require the disclosure of fats and proteins, nutrients that only rarely occur in significant amounts in alcoholic beverages. We urge TTB to require full disclosure of the ingredients in alcoholic beverages. That information would enable consumers to understand the composition of the beverages they consume and compare products on the basis of their quality.

We find it astonishing that TTB would propose a "Serving Facts" label panel without requiring that it include information on alcohol content. TTB provides no serious rationale for permitting alcohol producers to bury such core information anywhere on the container. Similarly, we question whether TTB's analysis of the issues has been sufficiently thorough to assure that consumers will have product labels that are visible, uniform, comprehensive, and useful in measuring and moderating their alcohol consumption. Although we support some elements of the current proposal, we strongly urge TTB to conduct consumer research, both to test its unsubstantiated assumptions about proposed label components and to assist in the design of an informational panel for alcoholic beverages that will truly assist consumers in measuring – and moderating – their alcohol and calorie consumption.

I. Disclosure of Alcohol Content

CSPI supports TTB's proposed mandate that all alcoholic beverages disclose their alcohol content on product containers. This represents an improvement from current rules that allow most malt beverages and some wines to omit that important label

information. However, we strongly oppose TTB's decision to allow alcohol content to be disclosed almost anywhere on the container, at producers' discretion, rather than require it on the central informational ("Serving Facts") panel. TTB's proposal to allow the disclosure virtually anywhere on the container would obscure information that is of vital importance to consumers of alcoholic beverages. What could be more relevant to consumers than the alcohol content of the product? Consumers should not have to hunt for alcohol-content information that might appear in different locations on different brands and different sizes of thousands of products in the marketplace.

TTB's position on the location of alcohol content information contradicts its own express rationale for the labeling mandate. In responding to comments on alcohol-content issues in the Advance Notice of Proposed Rulemaking, the agency wrote (Federal Register, Vol. 72, No. 146, July 31, 2007, P. 41865): "TTB believes that the alcohol content of a beverage is one of the most important pieces of information about the product. We agree with those commenters who stated that labels should provide the (sic) consumers with this very basic information. We also believe that consumers use information about alcohol content to measure and moderate their drinking."

TTB provides no rationale for not requiring alcohol-content information on the "Serving Facts" label, nor does it provide any research, testing, or human factors analyses to determine the effects on consumers of burying critical alcohol-content information anywhere on product containers. Rather, TTB cites the need to conform to an international trade agreement among wine-producing countries. Notably, that agreement merely requires mandatory label information to be "in a single field of vision" with other key label elements. Conforming to that agreement does not require such permissiveness toward producers. In fact, TTB concedes (in its discussion of the proposed rule) that "listing alcohol content on a Serving Facts panel ... would satisfy the labeling requirement of that agreement."

This crucial aspect of TTB's proposal thwarts consumers' interests in making informed choices about the alcoholic beverages they consume. One must question why an agency entrusted with authority over the labeling of alcoholic beverages could propose a "Serving Facts" label that would list irrelevant nutrition facts about fat and protein (which rarely occur in alcoholic beverages), but not include alcohol content.

We note that TTB has also proposed an alternative, voluntary "Serving Facts" label that would give producers the option to disclose alcohol content in terms of "fluid ounces per serving" (but only in addition to an expression of alcohol content as a percentage of volume). Allowing an alternative informational panel could further confuse consumers, especially when alcohol-content information could be completely absent from most "Serving Facts" panels. For consistency and uniformity, all informational panels should contain the same disclosures about alcohol content, and TTB should conduct consumer tests to determine the most useful and comprehensible form of alcohol disclosure. We strongly recommend against allowing two different informational panels.

2. Mandatory "Serving Facts" Panel

CSPI supports the concept of a mandatory, standardized, consistent, and easily noticed informational panel, although we believe that the panel (stripped of extraneous nutrient data) should more appropriately be titled "Alcohol Facts" and should provide better consumer information about alcohol content, including a means for consumers easily to measure and then moderate their drinking. As stated below, more research is necessary to test the design and content of the panel and consumer awareness and understanding of its contents.

We are not aware of any research conducted by TTB or others that would support the current design or content of the proposed "Serving Facts" labels.[1] That omission is in stark contrast to the substantial amount of FDA study that went into the development of nutrition labels.[2]

Several aspects of the proposed "Serving Facts" labels deserve considerably more scrutiny before finalization of a rule. CSPI has raised some of these issues in earlier comments, but will catalogue them here, with a strong recommendation that TTB engage appropriate contractors to conduct needed research prior to finalizing a rule.

a. Serving Size and Servings per Container

Consumers deserve information that will assist them to measure, monitor, and moderate their alcohol consumption. For the most part, TTB's specification of "reference amounts" for serving sizes of beer, wine, and distilled spirits both mirrors real-world consumption of those beverages and tracks the definitions of a serving of alcohol found in the U.S. Dietary Guidelines and in CDC publications. Those serving sizes conform to customary portions of most beer, wine and spirits that provide approximately 0.5 to 0.6 fluid ounces of pure alcohol.

Subject to consumer research and testing, alcoholic-beverage labels should reflect the alcohol content and number of alcohol portions in each serving to allow consumers to compare their intake with that recommended in the Dietary Guidelines. Therefore, oversized single-serve containers (perhaps a malt beverage with as many as 24 ounces), though considered as one serving, would contain information disclosing total alcohol content (not only alcohol concentration) and indicate an approximate number (to the

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[1] In particular, no information is available to test the effectiveness of a linear declaration of the serving facts information, as proposed for containers smaller than 50 milliliters and offered as a potential alternative for all containers.

[2] In developing "Nutrition Facts" panels for food labels, the Food and Drug Administration conducted and analyzed numerous studies of consumer reaction and understanding. It conducted four public hearings on food labeling, the last of which focused on the nutrition label format, and published – for comment – a report on research on alternative nutrition label formats. Subsequently, FDA announced a cooperative plan with industry to test alternative nutrition label formats, which led to further studies. During the process, "FDA staff provided materials, information, support, and consultation on technical aspects of label design and label format to researchers." (see generally, Federal Register, Vol. 58, No. 3, January 6, 1993, P. 2115 et. seq.

closest one-quarter drink) of Dietary Guidelines' drinks that each serving provides per container.

We believe that TTB's "reference amount" for beer, which would classify a 10% ABV (alcohol by volume) beer as a single serving, must also reflect that it contains twice as much alcohol as a standard beer. TTB has proposed smaller serving sizes for wine and liquor products that have higher concentrations of alcohol than standard products in those categories. Rather than create smaller serving sizes for single serving containers of beer, TTB must assure that consumers understand the true alcohol content of the total amount of beverage consumed.

Thus, a 16-ounce can of malt liquor with 8% ABV would disclose that it contains 1.25 fluid ounces of alcohol. Consumers could refer to the disclosure of alcohol per serving and to the statement of number of "drinks" to determine the alcohol content per drink. Consumers could also easily compare the number of drinks with the definition of moderate drinking and determine that one serving exceeded the daily recommended amount for men (2 drinks per day). Many commenters have suggested disclosure of "standard drinks" per container. TTB should test various label approaches and language to assure that consumers are not confused by the nomenclature of "servings" and "drinks."

The following "Alcohol Facts" labels offer examples of an information-panel format that can be consumer tested by TTB. They contain essentially the same information that was in the label proposed in CSPI's 2003 petition to TTB. Conceivably, as with nutrition labels for some non-conforming single-serve soft drink containers, information panels for larger single-serve containers could also include dual panels to provide alcohol (and, if present, nutrient) disclosures for the whole container and for a "standard" ("reference amount") serving.. That option should also be tested.

Hypothetical Informational Panels

Alcohol Facts

5 Drinks/Servings per Bottle
Serving size: 5 fl. oz.

Calories per Serving: 98

Alcohol by Volume:	13%
Alcohol per Serving:	0.5 oz

U.S. Dietary Guidelines advice on moderate drinking: No more than two drinks (1 oz/alcohol) per day for men, one drink (0.5 oz/alcohol) for women.

Ingredients: Grapes,yeast, **sulfiting agents**, and sorbates.

750 mL Bottle of Wine

Alcohol Facts

17 Drinks/Servings per Bottle
Serving size: 1.5 fl. oz.

Calories per Serving: 105

Alcohol by Volume:	40%
Alcohol per Serving:	0.5 oz

U.S. Dietary Guidelines advice on moderate drinking: No more than two drinks (1 oz/alcohol) per day for men, one drink (0.5 oz/alcohol) for women.

Ingredients: Barley, water, caramel coloring.

750 mL Bottle Distilled Spirit

Alcohol Facts

1 Drink/Serving per Can
Serving size: 12 fl. oz.

Calories per Serving: 130

Alcohol by Volume: 5%
Alcohol per Serving: 0.5 oz

U.S. Dietary Guidelines advice on moderate drinking: No more than two drinks (1 oz/alcohol) per day for men, one drink (0.5 oz/alcohol) for women.

Ingredients: Water, malt, barley, yeast and hops.

12 oz. Beer Can

Alcohol Facts

2 Drinks per Container
Serving size: 16 fl. oz.
Servings Per Container: 1

Calories per Serving: 230

Alcohol by Volume: 8%
Alcohol per Serving: 1.25 oz

U.S. Dietary Guidelines advice on moderate drinking: No more than two drinks (1 oz/alcohol) per day for men, one drink (0.5 oz/alcohol) for women.

Ingredients: Water, malt, yeast, hops, and barley.

16 oz. 8% Can Malt Liquor

Among the many issues requiring further inquiry, TTB should determine how best to express alcohol content to assure that consumers will use and understand the information provided on the voluntary, alternate label proposed by TTB, if such a format is implemented. For example, most food labels and the nutrient disclosures TTB suggests for alcoholic beverages pursuant to this rule express those nutrients in grams per serving. Expressing alcohol in fluid ounces per serving might confuse consumers in several ways. First, they may be confused between ounces of fluid per serving and ounces of alcohol per serving. In addition, they may have trouble comparing other components – carbohydrates, fats, and proteins, which are expressed in grams – with fluid ounces of alcohol per serving. Also, listing alcohol content in two ways, one of which is little understood by consumers (alcohol content in fluid ounces), may also cause some head scratching. More research is necessary to examine these questions and to construct a label that will best meet consumer needs.

b. Advice on Moderate Drinking

CSPI and co-petitioners, as well as many commenters on this rule have recommended that the informational panel on alcoholic beverages contain an abbreviated statement of moderate or low-risk drinking from the Dietary Guidelines for Americans. TTB rejected that recommendation, and we believe the agency should re-consider.

In order to assist consumers in measuring and moderating their drinking, information about serving size and number of servings per container should be complemented on the informational panel by a definition of moderate or low-risk drinking: no more than 2 alcoholic drinks per day for men and 1 per day for women. Subject to further consumer testing, that message should also include a reference to the amount of alcohol (in fluid ounces) contained in the recommended daily maximum consumption limit. For example, the two drink healthy limit for men should be identified as approximately1 fluid ounce of pure alcohol, and the daily limit for women, as 0.5 (or 0.6) ounce. Such information would allow consumers to compare those amounts with the

disclosure of fluid ounces of alcohol per serving that, subject to consumer testing, would appear on every informational panel.

We recommend that TTB conduct consumer research that would advise how best to convey that information, particularly inquiring about the necessity for the identification of "standard drink" information on alcoholic-beverage labels. Potential statements include: "Healthy men should drink no more than 2 drinks (1 ounce of alcohol) per day and women no more than 1 drink (0.5 ounce of alcohol) per day." Or, for a 12-ounce serving of beverage that contains 0.5 or 0.6 fluid ounces of alcohol, "Each 12-ounce serving contains the daily healthy alcohol limit for women and half the daily alcohol limit for men." That statement could be adjusted, depending on the serving size and the concentration of alcohol. Or, "Each serving contains 100% of the daily healthy alcohol intake for women and half the healthy intake for men." TTB should conduct consumer research, including focus groups, to determine the most easily understood messages.

Omitting important information about moderate drinking on the label would squander an opportunity to help educate millions of drinkers about safe and healthy levels of alcohol consumption and assist in reducing some excessive drinking. TTB's assertion that such a statement would encourage alcohol consumption among those who should not be drinking is totally without evidentiary basis and defies common sense. Again, research would be useful to determine whether the inclusion of the information would have positive or negative effects.

Alcohol containers currently provide a warning to drivers, pregnant women, and people concerned about other alcohol-related health problems. People in those categories, many of whom know from other sources or experience why they should abstain, could not possibly interpret a measure of moderate drinking as an exhortation to drink, especially if a word like "limit" were used in the definition of moderate drinking.

Ironically, many consumers who believe they drink "responsibly" often exceed the U.S. Dietary Guidelines standards for moderate drinking. Those consumers, who may have exaggerated concepts of "moderation" (such as "a bottle of wine" or two 6-ounce vodka martinis), would benefit enormously from objective information that could assist them in moderating their drinking. Reductions in excessive alcohol consumption would lead to fewer alcohol-related problems and costs. Clearly, TTB should study this issue more carefully before excluding a definition of moderate drinking from the "Serving Facts" label.

Bottom line: Serving sizes should be used generally as a reference for alcohol content (as well as for calorie information) and, together with a label statement of servings per container, should be complemented by a U.S. Government definition of moderate drinking. Subject to additional consumer research, TTB should augment its reference amounts (particularly for single-serve containers) by requiring that all informational panels contain disclosures of alcohol content expressed in fluid ounces (or grams) per serving, which could then be compared to moderate drinking guidelines that included maximum recommended amounts of alcohol – expressed in fluid ounces or grams – per day for men and women.

3. Alcohol Content Disclosure should be Uniform and Comprehensive

The discussion above addresses, in part, the location of alcohol content disclosure and advice about moderate drinking. That disclosure should appear in the informational panel and optionally on the front label as well. TTB should withdraw its proposal for an alternative panel permitting redundant alcohol disclosures at the discretion of the producer. Informational panels should be consistent in design and content across product lines. Once again, more consumer research is necessary to determine the optimal form of informational panel. We call on TTB to conduct such research, as FDA did with regard to proposed nutrition labels.

4. Calories, Carbohydrates, Fat, Protein

CSPI strongly supports disclosure of calories per serving, but there are several good reasons – subject to consumer research – why that disclosure should be highlighted on the informational panel and not listed serially with carbohydrates, fat, and protein. Calories relate directly to obesity and overweight issues, a huge concern for individuals and society. Unlike protein and fat, which rarely occur in alcoholic beverages, calorie information should be highlighted to account for known consumer interest in such information and its relative importance. Given the likelihood that consumers will not read all the information on the label, it makes sense to display the important components as prominently as possible. Informational panels should highlight disclosures of calorie, as well as alcohol content.

Listing of fat and protein should be permitted only if present in a meaningful, threshold amount. FDA defines a low nutrient value as anything less than or equal to 5% of the Daily Value. TTB might use that standard as a threshold for allowing or requiring disclosures of fat and protein content. TTB should conduct research to determine consumer perceptions of the inclusion of such information on alcoholic-beverage labels. In particular, TTB should assess whether, and to what degree, alcohol consumers may perceive alcoholic beverages as legitimate sources of those nutrients as part of a healthy diet.

Based on extensive industry marketing efforts to cash in on the low-carb craze, we are dubious that carbohydrate disclosure will do more good than harm. TTB should conduct consumer research to determine whether listing the carbohydrate, fat, and protein content of alcoholic beverages may mislead some consumers to perceive those products as healthy sources of those nutrients.

We note that at least one producer has already used a "Serving Facts" panel similar to the optional label proposed by TTB to promote the nutritional benefits of its products. For example, Diageo's advertisement for Seagram's 7 Crown whiskey in *USA Today*, April 20, 2005, boasted that a serving of the product contained "no fat, zero carbs and 97 calories." (See Appendix 1 for other examples as well.) Such exploitation of nutrition information to hawk alcoholic beverages as diet or health drinks concerns us greatly.

5. Linear configuration of "serving facts" should be allowed only on containers smaller than 50 ml.

TTB solicited comments about whether it should allow alcohol containers of any size to display the "serving facts" information in linear (rather than panel) form. We strongly oppose this suggestion, because it will significantly increase the difficulty in finding and reading the information. Except for small containers (smaller than 50 ml), all alcohol containers should have a standard, uniformly positioned, clearly visible and legible informational panel that contains complete information about the product. Consumer testing would help shed light on the need for uniform, clear, and visible informational panels.

6. Three years for compliance is long enough.

TTB has proposed a compliance deadline of three years following approval of new labeling requirements. We believe this is the maximum time necessary for industry members to plan for new labels and to absorb the additional costs that might be incurred to comply with the new rules. For most products, compliance should come long before the end of the three-year compliance period. Those producers who develop new labels prior to that time should comply when they submit those labels.

7. Ingredient Labeling is Still Needed

We note that the subject proposed rule addresses only some of the information that was requested in a consumer petition filed with TTB in December 2003.[3] In particular, it does not address the disclosure of ingredients found in alcoholic beverages. We strongly urge TTB to address that issue in rulemaking as soon as possible. Ingredient information would assist consumers to assess the quality of the alcoholic beverages they consume and make informed product comparisons. For instance, some consumers would perceive that beers made with artificial colorings, preservatives, and foam enhancers are inferior in quality, but currently consumers do not (and would not) have access to that information regarding alcoholic beverages, as they do with foods.

Summary

We support, with qualifications, several aspects of the TTB proposal, such as mandatory alcohol-content labeling, disclosure of calories, serving size, servings per container, and the concept of a standardized informational panel.

However, there are numerous deficiencies that still need to be addressed, including a regulatory process that has failed to conduct essential consumer research that would inform the important decisions made by TTB in its labeling proposal.

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[3] Petition to Improve Mandatory Label Information on Alcoholic Beverages ("Alcohol Facts"), December 16, 2003, National Consumers League, Center for Science in the Public Interest and 67 others. (see attached Appendix 2).

In particular, TTB should:

1. Conduct consumer research on numerous issues relating to the design, title, and content of the proposed informational panels (including the following);

2. Require alcohol-content disclosure on the informational panel, rather than anywhere on the label;

3. Include a definition, citing the number of drinks (and possibly number of ounces of alcohol) of moderate or low-risk drinking, on the informational panel;

4. Improve the proposed "reference amounts" for product servings and provide a "drink count" statement in the informational panel to assist consumers in measuring and moderating their alcohol consumption; and

5. Highlight alcohol and calorie content information on Alcohol Facts panels and exclude information about fats and proteins when only minor amounts are present.

Thank you for your consideration of our comments.

Sincerely,

George A. Hacker
Director
Alcohol Policies Project

Appendix 1.

Serving Facts

Serving Size 1.5 fl oz.
Servings Per Container 17

Amount Per Serving	
Calories	97
Alcohol	0.6 fl oz
Fat	0g
Carbohydrates	0g
Protein	0g

You can always count on 7.™

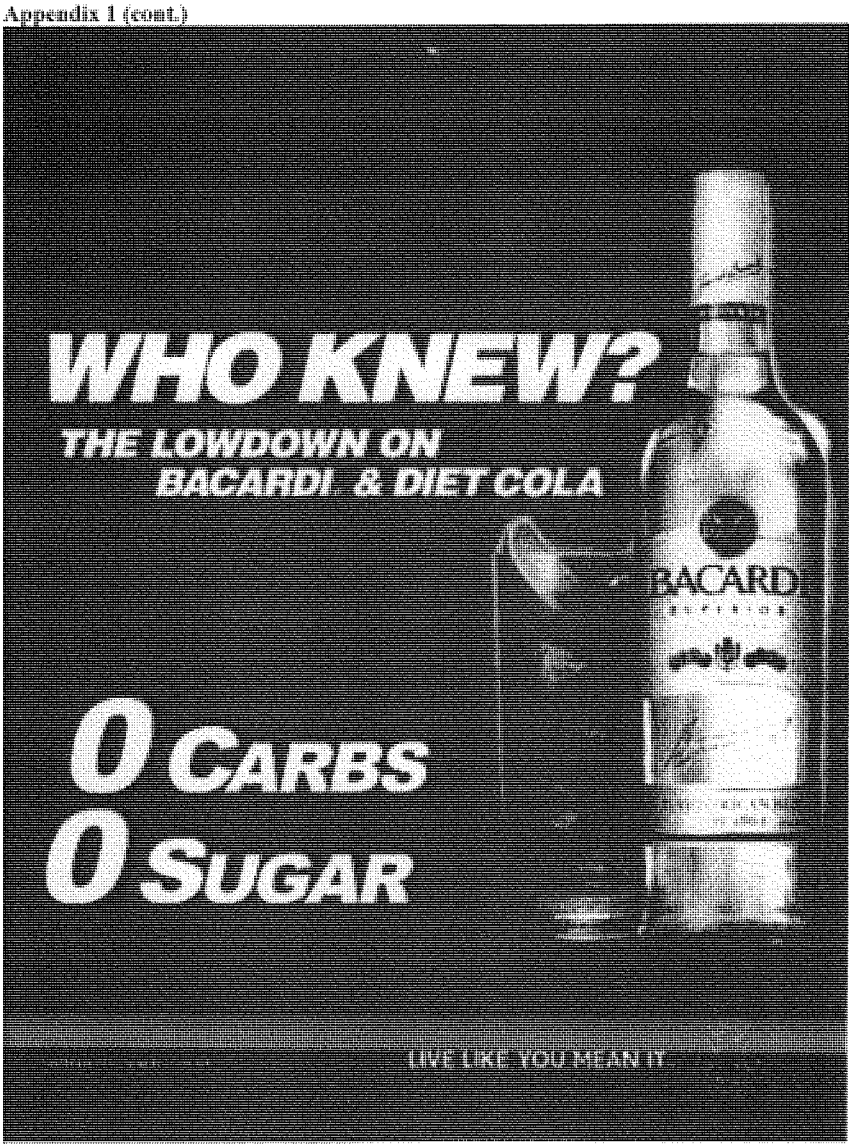
No fat, zero carbs and 97 calories per 1.5 ounce serving.

Please enjoy our quality responsibly

DIAGEO 1.877.276.8570

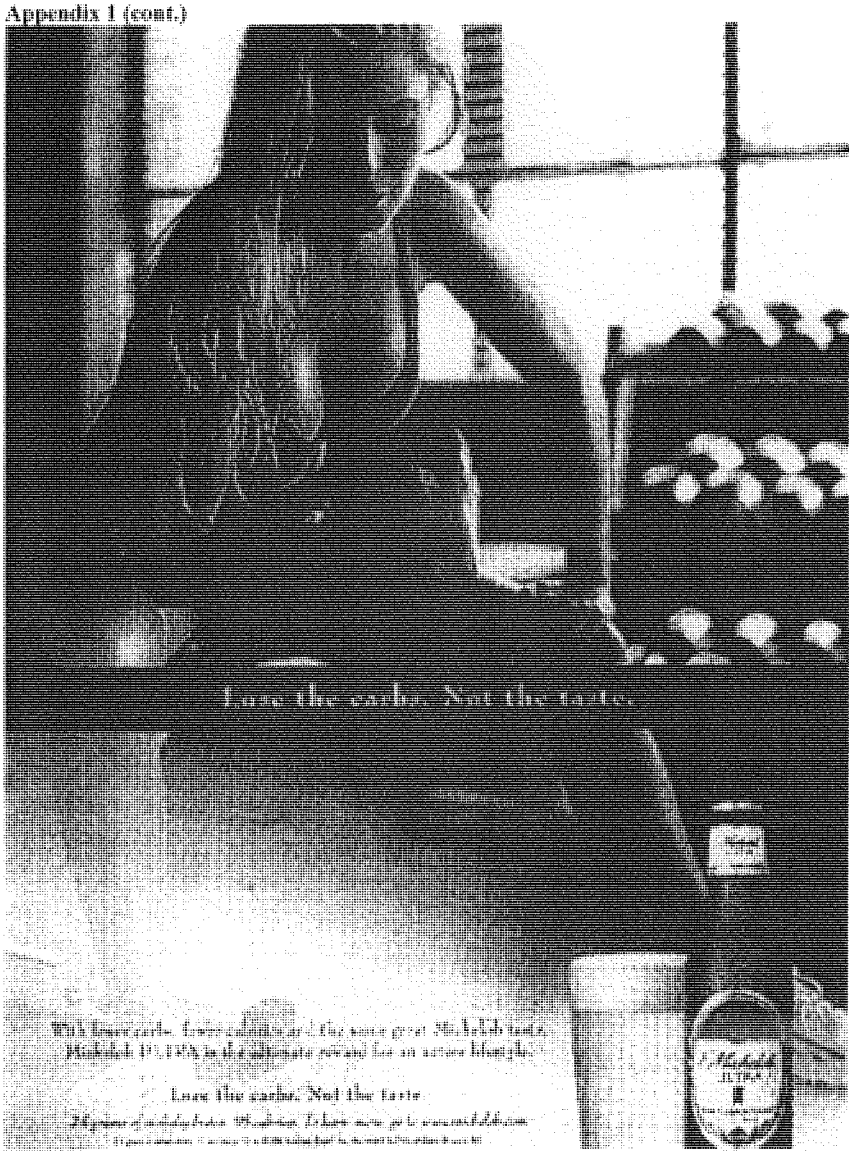
USA Today, April 20, 2005

Appendix 1 (cont.)



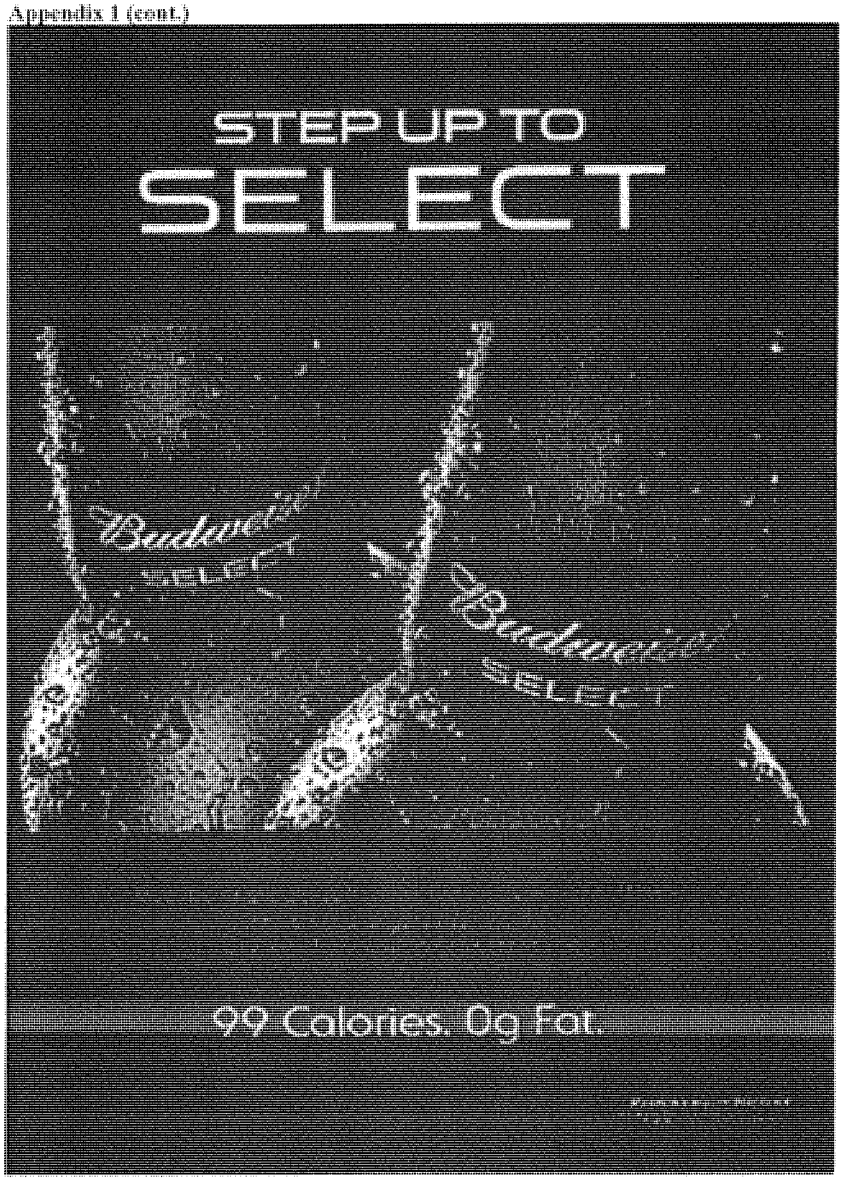
Rolling Stone, Jan 26, 2006.

Appendix 1 (cont.)



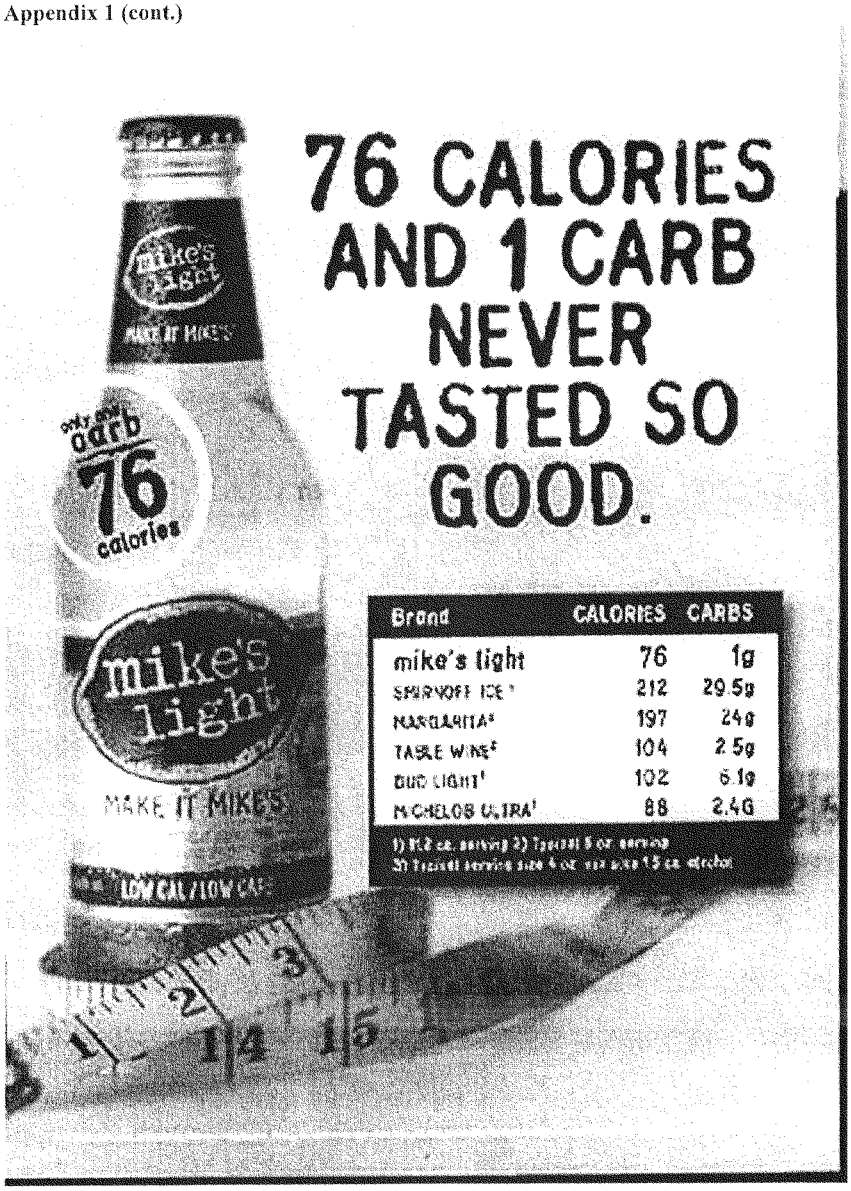
Maxim, May 2003.

Appendix 1 (cont.)



Maxim, November 2007.

Appendix 1 (cont.)



Cosmopolitan, July 2005.

Attachment 7

January 16, 2008

Director, Regulations and Rulings Division
Alcohol and Tobacco Tax and Trade Bureau
P.O. Box 14412
Washington, DC 20044-4412

Re: Notice No. 73

The **National Consumers League (NCL)** along with the **American Public Health Association; Center for Communications, Health & the Environment; Consumer Action; Judy Sandeen, Director of Campus Health Services at Hastings College; Maryland Consumer Rights Coalition; National Association of Local Boards of Health; National Association of Nurse Practitioners in Women's Health; National Partnership for Women & Families; National Research Center for Women & Families; The Black Women's Health Imperative; and the Virginia Citizens Consumer Council** appreciates the opportunity to submit comments in response to the Alcohol and Tobacco Tax and Trade Bureau's (TTB) proposed rule on Serving Facts.

Our organizations represent patients, consumers and families in the marketplace and in the workplace. We have long been interested in labeling, including alcohol beverage labeling, and advertising issues. NCL was the lead organization on the 2003 petition requesting a mandatory Alcohol Facts panel on labels of all alcoholic beverages.

We appreciate TTB proposing a mandatory Serving Facts panel, despite intense opposition from those who would like to keep consumers in the dark about essential characteristics of their products. We are disappointed, however, that the proposed rule would not mandate any new information about alcohol content on product labels. Under the proposed rule, the Serving Facts panel for a beer, wine, or distilled spirit product could, at the option of the bottler, contain no information about alcohol whatsoever.

By so limiting the amount of label information about alcohol content, TTB would be missing a historic opportunity to de-mystify the composition of alcoholic beverages and educate consumers about healthy and responsible drinking. We urge TTB to require a mandatory Serving Facts panel that contains meaningful information about alcohol content, the information consumers who choose to drink need to drink responsibly and follow federal dietary recommendations.

The Serving Facts panel should include the alcohol content information that consumers need to make responsible and healthful drinking decisions. This includes the following information:

- the serving size
- the amount of alcohol per serving

- the definition of a "standard drink"
- the number of standard drinks per container
- the percent alcohol by volume, and
- the *Dietary Guidelines* advice on moderate drinking.

1. We support the proposed expansion of the ABV labeling requirement.

We commend TTB for proposing to extend the requirement to declare percent alcohol by volume (ABV) to all alcoholic beverage products. This would close an existing loophole in the law, which does not require ABV information on the labels of malt beverages (except for flavored malt beverages) or wines containing 7 to 14 percent alcohol by volume.

While we strongly support this aspect of the proposed rule, we are concerned that consumers will have trouble finding ABV information on product labels under TTB's proposal. The proposed rule would remove the current requirement that ABV appear on the brand label and would instead allow it to appear virtually anywhere on the label with no prescribed minimum type size or background contrast. This is an invitation for bottlers to "bury" this information.

Consumers deserve to know where ABV can be found. For this reason, we urge TTB to require that ABV appear in the Serving Facts panel, and allow it to be repeated elsewhere on the label at the option of the bottler.

2. We strongly support a mandatory Serving Facts panel, but one that contains far more information about alcohol content.

We also commend TTB for proposing a mandatory Serving Facts panel on labels of all alcohol beverage products. If finalized, this would be a significant breakthrough in the labeling of beverage alcohol. At long last, alcohol beverage labels would provide consumers with much of the information they need to make responsible and healthful drinking decisions.

Unfortunately, the Serving Facts panel proposed by TTB would not be required to include any alcohol information. A bottler would be allowed to voluntarily provide ABV and the amount of alcohol per serving in the Serving Facts panel, but this would not be required. Any additional alcohol information, such as the definition of a "standard drink" or the number of standard drinks per serving or per container, would apparently be prohibited.[1]

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[1] A "standard drink" is the amount of an alcohol beverage that contains roughly 0.6 fluid ounces (fl oz), or 14 grams (g), of pure alcohol (i.e., 12 fl oz of 5% alcohol beer, 5 fl oz of wine, and 1.5 fl oz of 80 proof distilled spirits). See, e.g., Centers for Disease Control and Prevention (CDC), Questions and Answers on Alcohol Consumption, available at http://www.cdc.gov/alcohol/faqs/htm ("What is a Standard Drink? A standard drink is one 12 ounce beer, one 5 ounce glass of wine, or one 1.5 ounce shot of distilled spirits."); National Institute of Alcohol Abuse and Alcoholism, "The Cool Spot" website, available at http://www.thecoolspot.gov/facts_game.asp ("Check out these standard drinks.... 12 ounces of regular beer (5% alcohol) equals 5 ounces of table wine (12% alcohol) equals 1.5 ounces of hard liquor (40%

We find it inconceivable that the Serving Facts panel for alcohol beverages would not be required to include *any* information about alcohol content. The Serving Facts panel is intended to provide consumers with a concise summary of the information about the labeled product that is likely to be of interest and use to the average consumer. Since alcohol is the characterizing ingredient in alcohol beverages, a Serving Facts panel with no mandatory alcohol content information does not make sense. The main purpose of modernizing alcohol beverage labels is to provide consumers with more useful and actionable information about alcohol content. Yet, except for the expansion of the ABV labeling requirement noted above, the proposed rule fails to do this.

With regard to alcohol content information, the proposed rule represents a sharp retreat from earlier TTB proposals for the Serving Facts panel. Originally, in proposed specifications issued by TTB in July 2004, the Serving Facts panel would have been required to include the following information: the amount of alcohol per serving, the definition of a "standard drink," and the number of standard drinks per serving. A graphic depiction of the standard drink definition would have been optional.[2] In revised proposed specifications issued by TTB in September 2004, the standard drink information had been dropped and only the amount of alcohol per serving was required; other non-misleading information about alcohol content would have been permitted to appear elsewhere on the label.[3] Now, TTB is proposing that no alcohol information at all be required in the Serving Facts panel and that only ABV and amount of alcohol per serving be permitted.[4] Yet, TTB has provided no persuasive explanation for this about-face.

a. The Serving Facts panel must give consumers sufficient information to enable them to follow the *Dietary Guidelines* advice on moderate drinking.

To decide what information belongs in the Serving Facts panel, it is essential to first be clear as to the purpose of the Serving Facts panel. The main purpose of the Serving Facts panel is to give consumers of alcohol beverages the information they deserve so they can follow the *Dietary Guidelines*. This includes the *Dietary Guidelines* recommendation on alcohol consumption:

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alcohol).... Why is it important to know what counts as a drink? You'll understand alcohol news stories better and information such as.... It takes the adult body about 2 hours to break down a single drink.").

[2] TTB, Serving Facts Information on Alcohol Beverages (July 2004).

[3] TTB, Nutrient Content Claims in the Labeling of Wine, Distilled Spirits, and Malt Beverages: 'Serving Facts' Panel (Sept. 2004).

[4] In its advance notice of proposed rulemaking in April 2005, TTB requested comments on whether the Serving Facts panel should include a wide range of information, including the amount of alcohol per serving, the definition of a "standard drink," standard drink graphic, and the *Dietary Guidelines* advice on moderate drinking.

> If you choose to drink, the *Dietary Guidelines for Americans* recommends no more than two drinks per day for men, one drink per day for women. The *Dietary Guidelines* recommends that certain individuals should not consume alcohol at all.[5]

This is not some abstract goal, but a practical imperative for individuals making important health decisions. As the Harvard School of Public Health explains on its website, gauging alcohol consumption with a reasonable degree of accuracy is important to consumers for health reasons:

> It's safe to say that alcohol is both a tonic and a poison. The difference lies mostly in the dose. Moderate drinking seems to be good for the heart and circulatory system, and probably protects against type 2 diabetes and gallstones. Heavy drinking is a major cause of preventable death in most countries.... Moderate drinking sits at the point at which the health benefits of alcohol clearly outweigh the risks.[6]

With the Serving Facts panel proposed by TTB, consumers will not be able to comply with the *Dietary Guidelines* or accurately gauge their alcohol consumption.

b. The Serving Facts panel should put complete alcohol content information at consumers' fingertips.

The Serving Facts panel should include the alcohol content information that consumers expect so that they can make responsible and healthful drinking decisions. This includes the following information: the serving size, the amount of alcohol per serving, the definition of a "standard drink," the number of standard drinks per container, ABV, and the *Dietary Guidelines* advice on moderate drinking.

c. The serving sizes for alcohol beverages should be those with which consumers are already familiar.

The serving sizes for alcohol beverages should be based on the standard servings of 12 fl oz for malt beverages, 5 fl oz for wine, and 1.5 fl oz for distilled spirits. These serving sizes have been established by long common usage, as reflected in the size of the average beer bottle or can, wine glass, and shot glass or jigger. USDA has been using these serving sizes in its data collections on the nutrient composition of foods and beverages for many years.[7] TTB itself uses these serving sizes in the statement of

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[5] U.S. Department of Agriculture (USDA) and U.S. Department of Health and Human Services (HHS), *Nutrition and Your Health: Dietary Guidelines for Americans*, Sixth Edition, 2005 (Bulletin No. 232).

[6] Harvard School of Public Health website at http://www.hsph.harvard.edu/nutritionsource/alcohol.hmtl.

[7] *See* USDA Handbook No. 8-14, Composition of Foods: Beverages – Raw, Processed Prepared.

average analysis required on products that make calorie or carb claims.[8] These serving sizes fit the vast majority and volume of alcohol beverage products on the market.

We agree with TTB's proposal to base serving sizes on these commonly used serving sizes, with adjustments for products with unusually high or low ABV. However, we think the cutoffs proposed by TTB in the proposed rule need to be revised. Under the proposed rule, some products would contain up to two "standard drinks" per serving. For example, a malt beverage with 24% ABV would have a serving size of 5 fl oz that contains 1.2 fl oz of pure alcohol. We believe this would be undesirable. Although the serving size is not a recommended amount for consumption, we are concerned that some women might be misled by the serving size to consume two standard drinks, which is twice the maximum amount of alcohol women are supposed to consume per day according to the *Dietary Guidelines*.

We recommend that the proposed rule be revised so that the serving size will always approximate the amount of product that contains one "standard drink." While it may not be possible for the serving size to always equal one "standard drink" exactly, it should come close. For example, for malt beverages, the serving sizes might be 12 fl oz for products with ABV of 5% or less, 8 fl oz for products with ABV of 6% to 10%, 5 fl oz for products with ABV of 11% to 15%, and 2.5 fl oz for products with ABV of 16% or more. Then the serving size would always approximate the amount of product that contains 0.6 fl oz of pure alcohol. While this may sound complicated, most alcohol beverages will have serving sizes of 12 fl oz (beer), 5 fl oz (wine), or 1.5 fl oz (spirits). TTB should establish a citizen petition process so makers of non-traditional products could petition to allow exceptions from established serving sizes when warranted.

d. TTB should require a declaration of the amount of alcohol per serving, in fluid ounces or grams.

In the preamble to the proposed rule, TTB states that a declaration of the amount of alcohol per serving would not be inherently misleading to consumers. However, TTB declines to require it. TTB concedes that a declaration of the amount of alcohol per serving might be useful to consumers by allowing them "to compare the quantity of alcohol contained in single servings of different commodities without doing mathematical calculations."[9]

It is essential that the Serving Facts panel include the amount of alcohol per serving in fluid ounces or grams.[10] Consumers may be unfamiliar with this information,

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[8] TTB Ruling 2004-1.

[9] 72 Fed. Reg. at 41866.

[10] The gram is the internationally accepted unit of measure, because it is the same worldwide. The United States and Canada use different fluid ounces. In addition, since carbohydrate, fat, and protein would be declared in grams in the proposed Serving Facts panel, use of grams for alcohol would make for a more consistent label.

because it has never been provided to them. The fact that most consumers may not currently think of alcohol beverages in terms of fluid ounces or grams of pure alcohol does not mean they would not benefit from having this information. By reading this information on product labels, consumers would over time begin to measure their alcohol consumption in fluid ounces or grams, and learn how much pure alcohol they can safely consume.

ABV information is useful in making strength comparisons between different products, but it does not tell consumers how much alcohol they are drinking or assist them in following dietary recommendations, except in the unlikely event consumers do mathematical calculations.[11] Many consumers are better able to understand absolute amounts than concentrations. Moreover, to understand ABV information requires an existing base of knowledge that many consumers do not have. For example, if a consumer does not know that regular beer is 5% alcohol by volume, he or she will not realize that a malt beverage with a 10% ABV contains twice the amount of alcohol.

We do not agree with TTB's assumption that consumers might be confused by this information if it is provided without some context to explain its significance. The definition of a "standard drink" would provide the context in which consumers can understand the significance of the amount of alcohol per serving. However, even if "standard drink" information is not provided, many consumers would still benefit from knowing the amount of alcohol per serving in the products they purchase. On food labels, FDA and USDA require declaration of the amount of some nutrients (e.g., sugars) even though there is no Daily Value for that nutrient and therefore no Percent Daily Value declaration. Nevertheless, many consumers are conscious of the amount of sugars they consume and understand what level of sugars is desirable in terms of their own personal needs and desires.

e. TTB should require "standard drink" information in the Serving Facts panel.

It is equally important that the Serving Facts panel be required to include "standard drink" information: a statement defining standard drink and the number of standard drinks per serving or per container.

A standard drink is the amount of an alcohol beverage that contains roughly 0.6 fl oz of pure alcohol. This is equivalent to one regular 12 fl oz can or bottle of 5 % ABV beer, a typical serving of 5 fl oz of wine, and one 1.5 fl oz shot of 80 proof distilled spirits. This definition of a "standard drink" is almost universally accepted and used throughout the federal government and the public health community.

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[11] While it is possible to calculate the amount of alcohol based on the ABV and the serving size or container size, we suspect very few consumers do such calculations. For example, a consumer who drinks two 12 fl oz cans of 5% alcohol beer must do the following calculation to determine the amount of alcohol consumed: 0.05 x 12 x 2 = 1.2 fl oz of alcohol.

Most importantly, the *Dietary Guidelines for Americans* advice on alcohol consumption is couched in terms of "standard drinks":

> Those who choose to drink alcoholic beverages should do so sensibly and in moderation – defined as the consumption of up to one drink per day for women and up to two drinks per day for men.... Twelve fluid ounces of regular beer, 5 fluid ounces of wine, or 1.5 fluid ounces of 80-proof distilled spirits count as one drink for purposes of explaining moderation.[12]

Consumers need "standard drink" information on the label if they are to follow the *Dietary Guidelines* advice on moderate drinking. Federal recommendations on alcohol intake are of little value if product labels do not provide the information consumers need to follow that advice.

The alcohol warning that FDA requires on labels of over-the-counter (OTC) painkillers and fever reducing drug products (e.g., aspirin, acetaminophen, ibuprofen, naproxen sodium) also uses the "standard drink." The required warning for acetaminophen, for example, reads:

> **Alcohol Warning**: If you consume 3 or more alcoholic drinks every day, ask your health professional whether you should take acetaminophen or other pain relievers/fever reducers. Acetaminophen may cause liver damage.[13]

In the preamble to its final rule, FDA made clear that the "alcoholic drinks" referred to in the warning is "standard drinks."[14] This is a warning that appears on a great many OTC drug products on the market.[15] Consumers need and deserve "standard drink" information on labels of beverage alcohol products if they are to follow this FDA warning.

A partial listing of the many other federal government agencies and public health organizations that use the "standard drink" concept would include the following:

- HHS
- CDC

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[12] *Dietary Guidelines for Americans*, 2005, p. 44.

[13] 21 C.F.R. 201.322(a)(1).

[14] See 63 Fed. Reg. 56789, 56796 (Oct. 23, 1998) ("..... the agency based its analysis of alcohol consumption on the Dietary Guidelines for Americans, which defines 'drink.'")

[15] See, e.g., Vicks NyQuil Cold/Flu Relief (http://www.vicks.com/nyquil-cold-flu.php?printer_friendly=true).

- National Institutes of Health/National Institute on Alcohol Abuse and Alcoholism
- National Highway Traffic Safety Administration
- U.S. Surgeon General
- U.S. Department of Education
- American Medical Association
- American Heart Association
- American Dietetic Association
- Mothers Against Drunk Driving
- National Council on Alcoholism and Drug Dependence

Across the country, state driver's manuals universally use the "standard drink" concept.[16]

TTB's own thinking about the "standard drink" concept is unclear. In 2004, TTB proposed to require the definition of "standard drink" as part of the Serving Facts panel on labels of all alcohol beverages.[17] In the current proposed rule, however, TTB seems to disown the concept. TTB seems to have two reservations. First, TTB states that "alcohol beverages are not commonly packaged, poured, served, or consumed in standard drinks with exactly 0.6 fluid ounces of pure alcohol." NCL questions the accuracy of this statement. The overwhelming majority of beers consumed in the U.S. are products with roughly 5% ABV sold in 12 fl oz cans or bottles. This is the "beer standard" on which the concept of a "standard drink" is based. Whether or not this statement is 100% true, we think it is irrelevant.[18] The "standard drink" is an excellent tool or metric with which to measure alcohol consumption. Since federal recommendations and warnings about alcohol are stated in terms of number of "standard drinks," it is a measure that every consumer should know.[19]

Second, TTB expresses concern that consumers may be confused about the difference between "standard drink" and "serving size" if both appear on the label, but provides no evidence of such confusion. We believe that consumers are capable of

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[16] The following are examples: "An alcohol drink is a 1-1/2 oz of 80-proof liquor (one shot glass) straight or with a mixer, 12 oz of beer (a regular size can, bottle, mug, or glass) or a 5-oz glass of wine" (New Mexico); "A 12-ounce glass of beer, a five-ounce glass of wine, and shot of liquor have the same amount of alcohol" (Virginia); "A sobering fact about alcohol: It's not what you drink. It's how much. A 12-ounce can of beer, a 5-ounce glass of wine, and a cocktail with 1.5 ounces of 80 proof distilled spirits all contain the same amount of alcohol" (Indiana).

[17] TTB, Serving Facts Information on Alcohol Beverages (July 2004) (draft specifications). As noted above, TTB Ruling 2004-1 also uses the standard serving sizes of 12 fl oz, 5 fl oz, and 1.5 fl oz for beer, wine, and distilled spirits.

[18] This is like saying that the concept of a "cup" should be abandoned, because foods and beverages are not always packaged or served in cups. The *Dietary Guidelines* recommend that consumers eat at least 2 cups of fruit and 2-1/2 cups of vegetables per day.

[19] TTB's apparent rejection of the "standard drink" concept not only undermines the goal of government uniformity, it also means that government advice and warnings about alcohol consumption, which are stated in terms of number of standard drinks, will not be understood by consumers because the definition of a "standard drink" will remain hidden.

understanding both concepts. It just may take a little time. The concept of a "drink" is hardly new to consumers. A "standard drink," as the name implies, is just a uniform definition for a very old and familiar concept. We believe the concept of a "standard drink" is easily grasped by consumers, and we do not think consumers would be confused if a given product's serving size differs from a standard drink.[20]

The Serving Facts panel should provide consumers with all of the information they need to follow the *Dietary Guidelines*. To do this, it must include "standard drink" information: the definition of a "standard drink" and the number of standard drinks per serving or per container. Because icons are more readily noticed and more easily read by consumers, it should also include a graphic showing that 1.5 fl oz of distilled spirits, 5 fl oz of wine, and 12 fl oz of beer all contain 0.6 fl oz of pure alcohol. Without this information, consumers who wish to adhere to the *Dietary Guidelines* advice on alcohol consumption and the FDA warning about use of alcohol and OTC painkillers will not have the information they need.

f. TTB should require ABV in the Serving Facts panel.

All basic product information, including all alcohol content information, should be presented in a single location on the label. Consolidation is especially important for alcohol beverages, which are often consumed in circumstances that are less than ideal for label reading. Consumers need to know where this information can be found, and the most logical place is the Serving Facts panel. Therefore, the declaration of percent alcohol by volume should be required to appear in the Serving Facts panel. ABV information should be allowed to be repeated elsewhere on the label at the option of the bottler.

g. TTB should require the Serving Facts panel to include the *Dietary Guidelines* advice on moderate drinking.

An abbreviated version of the *Dietary Guidelines* recommendation on alcohol consumption should be required in the Serving Facts panel. This information would serve the same function as the "Percent Daily Value" footnote in the Nutrition Facts panel on food labels.[21]

TTB believes that labeling alcohol beverages with the *Dietary Guidelines* definition of moderate drinking could be misleading, because it might be seen as condoning or encouraging alcohol consumption by individuals who should not consume any alcohol. It is difficult to see how the *Dietary Guidelines* advice on alcohol could be interpreted as an endorsement of alcohol consumption when it advises "no more than"

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[20] If, as we recommend, the required serving sizes approximate a standard drink, the difference between serving size and standard drink would not be large.

[21] That footnote includes a table that advises consumers to limit their daily intake of certain nutrients (e.g., to eat "less than" 2,400 milligrams (mg) of sodium per day).

two drinks per day for men, one drink per day for women. In fact, HHS and USDA wrestled with this question when drafting the *Dietary Guidelines* and concluded that the advice on moderate drinking does not endorse alcohol consumption.[22]

Any potential for misunderstanding could be easily addressed with appropriate wording of the advice or by adding a disclaimer. For example, the advice on moderate drinking could be stated as follows: "If you choose to drink, the *Dietary Guidelines for Americans* recommends no more than two drinks per day for men, one drink per day for women. Certain individuals should not consume alcohol at all."

h. TTB should adopt format and type size requirements based on those used by FDA for the Nutrition Facts, Supplement Facts, and Drug Facts panels.

In the preamble to the proposed rule, TTB acknowledges that the statement of average analysis is not being read by most consumers. We believe this is due to the format and type size in which this information is presented. The Serving Facts panel likely will also be ignored by consumers if its design and presentation are not appropriately conspicuous and readable.

There is an existing design used for other consumable products that is known to be conspicuous and readable, and that can easily be adapted to the Serving Facts panel. It is the design used by FDA and USDA for the Nutrition Facts panel on food labels, and by FDA for the Supplement Facts and Drug Facts panels on dietary supplements and over-the-counter drugs. It won the Presidential Design Achievement Award in 1997; consumer research has consistently shown that the majority of consumers use it.[23] Given the proven track record of this design, we believe it would be foolish for TTB to adopt a different design.

FDA and USDA regulations permit the use of a linear display (of the Nutrition Facts, Supplement Facts, and Drug Facts panels) only for small packages. They restrict use of the linear display option because of its diminished readability. For the Nutrition Facts panel, FDA allows use of the linear display option only on food packages that have 40 square inches or less of surface area available to bear labeling and that have insufficient space to accommodate a vertical or tabular display.[24] In the case of decorative packages, FDA permits the Nutrition Facts panel to be presented on a "hang tag" to preserve its readability. TTB should take the same approach, allowing use of the linear display option only for small containers of beverage alcohol. All other containers should be required to present Serving Facts using a vertical or horizontal display.

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22 **[Add citation]**

23 *See, e.g.*, 2002 FDA Health and Diet Survey: Topline Frequency Report (Nov. 2007).

24 21 C.F.R. 101.9(j)(13)(ii)(A).

3. TTB should require an ingredients declaration on alcohol beverage labels.

Consumers have the right to know all the ingredients in any product that is to be ingested. We are aware that TTB has separately published a proposed rule to require that "major food allergens," as defined in the Food Allergen Labeling and Consumer Protection Act of 2004, in alcohol beverages be declared using a "Contains [allergen]" statement.[25] At the same time, TTB published an interim rule allowing such allergen labeling on a voluntary basis pending issuance of a final rule.[26] Nevertheless, a particular consumer may be allergic or sensitive to an ingredient that is not a major food allergen. Consumers may also wish to avoid particular ingredients for religious, ethical, or other reasons. To assist such consumers, a list of ingredients should be required to appear after or adjacent to the Serving Facts panel.

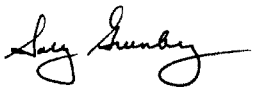
4. **TTB should publish a final rule and an interim rule simultaneously.**

We understand that TTB intends to give industry three years after issuance of a final rule to comply. This means that the Serving Facts panel would not be required on alcohol beverage labels for another four or five years. Consumers should not have to wait that long for improved alcohol beverage labeling.

We urge TTB to publish both a final rule and an interim rule simultaneously. The interim rule should allow bottlers to provide the Serving Facts panel on a voluntary basis and should be effective immediately upon publication. The TTB proposed rule and interim rule on allergen labeling, discussed above, serve as a precedent for this.

The National Consumers League (NCL) along with the American Public Health Association; Center for Communications, Health & the Environment; Consumer Action; Judy Sandeen, Director of Campus Health Services at Hastings College; Maryland Consumer Rights Coalition; National Association of Local Boards of Health; National Association of Nurse Practitioners in Women's Health; National Partnership for Women & Families; The Black Women's Health Imperative; and the Virginia Citizens Consumer Council appreciates TTB's consideration of these comments.

Respectfully submitted,



Sally Greenberg
Executive Director

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[25] 72 Fed. Reg. 42329 (July 26, 2007).

[26] 72 Fed. Reg. 42260 (July 26, 2007).

Attachment 8

Michael D. Maves, MD, MBA, Executive Vice President, CEO

January 28, 2008

Francis W. Foote
Director
Regulations and Procedures Division
Alcohol and Tobacco Tax and Trade Bureau
Attn: Notice No. 73
P.O. Box 14412
Washington, DC 20044-4412

RE: Notice 73: Labeling and Advertising of Wines, Distilled Spirits and Malt Beverages

Dear Mr. Foote:

The American Medical Association (AMA) is pleased to offer the following comments in response to the Alcohol and Tobacco Tax and Trade Bureau's (ATTTB) request for comments on labeling and advertising of alcohol products.

The public's health is best served when consumers have accurate, science-based information about the products it consumes. Accurate and standardized labels would allow the members of the public to make decisions on their health free from any confusion which may derive from inconsistent regulations of similar products or alcohol producer marketing practices. In addition, based on health, safety, religious and other concerns, the public desires and deserves accurate information on ingredients and potential allergens in alcoholic beverages.

Currently, alcohol product labels and ads give mixed and misleading messages about the alleged health benefits of alcohol. There is also consumer confusion about the classification of a wide range of newer alcohol beverage products such as wines, wine coolers, other beverages which contain wine but appear to be fruit drinks, high malt content beer products with names and packaging deceptively similar to those of same-brand distilled spirits, and

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so-called "alcopops." Specifically, consumers are confused about the type and amount of alcohol they contain. Further confusion stems from: the percent of alcohol content versus the "proof" designation; how wines, beers and distilled spirits are similar or different in their alcohol content; inconsistent and ill-defined terms such as "lite," "reduced calorie," and "low-carb"; inconsistent labeling with respect to serving size and the number of servings per container; and concerns about caloric content. Labels and advertising need to be clear and provide accurate information that answers most, if not all, of these points of confusion.

The AMA has long been concerned about the impacts of alcohol use, underage and high risk drinking, and alcohol use by persons addicted to alcohol. We live in a nation in which roughly half of all alcoholic beverages sold are consumed by persons with alcohol use disorders including the disease of alcoholism. To address these issues, the AMA has adopted broad, progressive policies and developed innovative and effective programs to address alcohol use, labeling, promotion, regulation, and health consequences of use. We are pleased to note that the mandatory changes you propose include:

- Disclosing alcohol content, including a mandate that this also apply to malt beverages and some wines.
- A requirement that all alcoholic-beverage containers would bear a "serving facts" panel that includes serving size, number of servings per container, and per serving amounts of calories, carbohydrate, fat and protein.

However, consistent with our policies on labeling advertising, and promotion of alcoholic beverages; caffeine labeling; and increasing taxes on alcoholic beverages, the AMA again makes the following recommendations to the ATTTB.

1. There should be consistent mandatory "serving facts" labels consistently placed on all beverage containers (including kegs), and advertising (including point of sale ads).

2. Labels and ads should have universally accurate and appropriate disclosure of all ingredients, including caffeine, preservatives and additives still present after production if there is a known health risk as determined by the TTB and FDA.

3. There should be no claims of alleged health benefits of beverage alcohol products and no implied assumptions or impressions that consuming the product is part of a healthy lifestyle or part of a weight reduction or weight management plan.

4. Labels or advertisements should contain no impression or assumption that drinking more of the product conveys health benefits because of their lower caloric or lower carbohydrate content, irrespective of whether such impressions are made in a humorous vein.

5. Health education messaging should appear on labels and ads that address: a) the general health hazards of alcohol consumption (e.g., alcohol is a carcinogen and may

cause cancer; alcohol is an addicting drug); b) hazards specific to particular populations or activities including: pregnant women, youth, drivers and operators of machinery, and c) the dangers of harmful use to all sectors of the population.

6. Labels and advertising should contain the 2005 Dietary Guidelines for Americans advice on moderate drinking on any single day (i.e., up to, but no more than, two drinks for a man, and one drink for women). In addition, it should be generally communicated that no one should begin drinking or drink more frequently to improve their health and that in general; men are at risk for developing alcohol-related problems consuming more than a 14 drink weekly average or a daily maximum of more than 4 drinks while women are at risk with a weekly average of more than 7 drinks or a daily maximum is more than 3 drinks according to NIAAA's "Helping Patient with Alcohol Problems" (Publication No. 04-3769 Revised, February, 2004).

7. "Serving facts" labels and ads should cite the percent of alcohol content based on the grams of ethanol present, not on the fluid volume of the drink (which may include non-alcoholic fluids) and cease to cite any "proof " designation.

8. Labels and ads should use consistent alcohol content and drink size information using the terminology, a "standard drink," which contains about 14 grams (about 0.6 fluid ounces) of pure alcohol.

9. Labels and ads should include the number of servings (i.e., standard drinks) per container in fluid ounces of pure alcohol.

10. A consistent graphic symbol indicating how many standard drinks in ounces and grams of pure alcohol should be placed on all labels and ads. This would attract attention and help convey the information. This could be supported through public information materials which illustrate standard drink equivalents such as are contained in the NIAAA's "Helping Patient with Alcohol Problems," Publication No. 04-3769 Revised, February 2004).

11. Fats and protein should be listed only if they reach a significant threshold. If zero, do not list.

12. There should be a standard for terms such as low calorie, light, or low carbohydrate (e.g., 7 grams of carbohydrates or less) in order not to confuse consumers with different language from other food products.

13. There should be no confusing or misleading terms such as "effective carbohydrates" or "net carbohydrates."

14. There should be a consistent, standardized format for labeling design to include the following information: number of standard drinks contained, serving size, dietary

consumption guidelines, calories per serving, alcohol by volume (per serving 0.6 fluid oz), and ingredients.

15. Efforts should be taken to encourage other nations to adopt similar "best practices" ("upward global harmonization") so that regulatory requirements regarding alcohol beverage labeling are in harmony around the globe.

In conclusion, the AMA encourages the agency to apply a scientific basis in any decision that may affect the health and well being of individual consumers of alcohol and the public. We urge that research be conducted on the proposed design and how consumers are likely to interpret the information provided.

The AMA is thankful for the opportunity to comment publicly on the issue of alcohol beverage labeling and advertising. If you have further questions regarding this matter, please feel free to contact Margaret Garikes, Director of the Division of Federal Affairs, in our Washington office at 202-789-7409.

Sincerely,

Michael D. Maves, MD, MBA

John Gideon & Ellen Theisen
Co-Directors
www.VotersUnite.org

February 25, 2008

Chairman Serrano, Ranking Member Regula, and members of the Subcommittee on Financial Services and General Government:

The Help America Vote Act of 2002 requires the Election Assistance Commission to:

- Generate technical guidance on the administration of Federal elections.
- Research and report on matters that affect the administration of Federal elections.
- Provide information and guidance with respect to laws, procedures, and technologies affecting the administration of Federal elections.

Specifically the law states in Section 202:

> "The Commission shall serve as a national clearinghouse and resource for the compilation of information and review of procedures with respect to the administration of Federal elections by carrying out the duties described in part 3 (relating to the adoption of voluntary voting system guidelines), including the maintenance of a clearinghouse of information on the experiences of State and local governments in implementing the guidelines and in operating voting systems in general."

On October 21, 2005 the Government Accounting Office released its report, "Elections: Federal Efforts to Improve Security and Reliability of Electronic Voting Systems Are Under Way, but Key Activities Need to be Completed (GAO-05-956)". In this report the GAO stressed the need for a "clearinghouse for information on problems and leading practices".

The GAO has also stated: "The continued absence of a national clearinghouse for voting system problems means that segments of the election community may continue to acquire and operate their systems without benefit of critical information learned by others regarding the security and reliability of those systems."

Contrary to HAVA and GAO recommendations, the EAC has constantly ignored and denied their responsibility to keep local and state election officials apprised of problems with regards to their voting systems.

In March 2007 computer scientists reviewing voting machines used in the Sarasota County, Florida 2006 election found a serious security vulnerability with the counties ES&S iVotronic DRE voting machines. Notification of this vulnerability was sent to the EAC, by myself, with a request that they pass on the information to other states and counties who may have the same voting machines so they would know of the vulnerability and of the suggested mitigations. The response from the EAC's spokeswoman, Jeannie Layson, clearly stated that the EAC had no responsibility regarding systems they had not certified. She said:

> "EAC's voting system certification program was implemented in January of this year. Until that time, voting systems were evaluated by NASED, which is not a federal

> agency. When the Commission adopted its certification program, it decided not to grandfather or transfer any voting systems that had been qualified by NASED. The Commission felt it was important to conduct its own evaluation of voting systems that had been qualified by NASED. That's why any NASED-qualified voting system, including the one you referenced, that wants an EAC certification must be submitted for end-to-end testing. The system you referenced has not been through EAC's certification program. If and when it does, it will be our responsibility to make sure the manufacturer adheres to the terms of our program. Also, when a system comes to us for certification, relevant substantiated reports or reviews of the voting system may be taken into account. And if an instance such as this were to arise regarding an EAC-certified system, we would certainly investigate."

The concern was never whether the voting system was NASED qualified or EAC certified but that it was seriously flawed and warning of that flaw needed to be passed on to users of that system. The EAC refused to take any action.

I responded by asking Ms. Layson, "What responsibility does the EAC have with regard to warning states about what may be security vulnerabilities in specific voting systems?" She answered, "The EAC certification program will collect anomaly reports which we will then investigate and share with election officials and the public". She ignored the fact that the EAC's mandate to be a clearinghouse of information for voting system problems is not specifically tied to its certification duties.

The recent re-certification testing of voting systems in Colorado found that Hart InterCivic eScan optical scan voting machines picked-up stray marks and, in some cases, ignored correctly marked votes and read those stray marks. Hart InterCivic agreed to provide the state of Colorado with software updates that they felt may solve the problem. What about the rest of the states who use those machines? The EAC ignored emails that pointed out that no one would warn other states.

My request to the EAC commissioners:

> "What about the rest of Hart's customers around the country?? Unsuspecting counties and states will allow their voters to vote and have their ballots tabulated by machines proven to have significant error rates. And, the company agrees with that fact because they are going to provide Colorado with software which MAY fix the problem.
>
> "Whose job is it to ensure that every county in the US that uses these machines is warned that there is a problem and that Hart acknowledges the problem? Colorado? Hart InterCivic? NASED? The states have never passed on information like that to other states. The vendors will cover it up and hope no one notices. NASED has either taken no action in the past or drug their feet until it was too late. How about the EAC?"

The EAC refused to take any action.

Just last week 6 counties in New Jersey reported that some Sequoia Advantage Direct Recording Electronic (DRE) machines had what may be a serious software problem that incorrectly reports the party totals. The voting machine's internal memory does not agree

with the internal paper record. This is, again, an issue that should be reported to other states that are using the same voting machines. Some Pennsylvania counties will use this same system in their primary. Who will warn the Pennsylvania counties? The EAC has refused to take any action.

As serious voting systems problems have been reported, the EAC has stayed quiet. The fact that a problem is found on a system in Florida or Colorado or New Jersey does not mean that the problem is isolated in those states. It is likely to be a problem in every other state that uses the same system and possibly in ever other state that uses other systems from the same vendor. We should not expect that the vendors will take action. They should take action but there is no requirement that they do. We should not expect that an affected county take action. It is not their job to warn the rest of the country. Only the EAC has the duty, as mandated by federal law, to act as a clearinghouse for voting systems problems.

The EAC needs to be asked about this failure to meet their legislated mandate, and they should be held responsible for failing in their duty to local and state elections officials and the voters of the United States. The EAC needs to be the conduit for the flow of information about voting systems. If a system used in Maine has a problem, then election officials in Arizona should know what the problem is and how to mitigate the problem, if possible.

This is the responsibility of the EAC, per HAVA, and they refuse to fulfill it.

Sincerely,

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